South Carolina Law Review

Volume 43 | Issue 3 Article 3

Spring 1992

Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech

Ruth Gavison
The Hebrew University of Jerusalem

SOUTH CAROLINA
LAW REVIEW

VOLUME 43 SPRING 1992 NUMBER 3

TOO EARLY FOR A REQUIEM: WARREN AND BRANDEIS WERE RIGHT ON PRIVACY VS. FREE SPEECH

RUTH GAVISON*

* Haim H. Cohn Professor of Human Rights, Faculty of Law, Hebrew University in Jerusalem; Visiting Ben-Gurion Professor of Law, University of Southern California Law Center. LL.B. 1969, Hebrew University; B.A. 1971, Hebrew University; LL.M. 1971, Hebrew University; D.Phil. 1975, Oxford University. Professor Gavison delivered this paper on April 4, 1991, to members of the South Carolina bar, law faculty, and student body at the University of South Carolina School of Law's Thirteenth Annual Benjamin Adger Hagood Distinguished Lecture.

The author wishes to thank Jeffrey Markel for his research assistance for this paper and is grateful to Erwin Chemerinsky, Dick Craswell, Barbara Herman, Ed McCaffery, Judi Resnik, and Michael Shapiro for comments on a previous draft. The author has pursued some of the themes of this paper in Ruth Gavison, *The Prohibition of Privacy-Invading Publications: The Right to Privacy and the Right of the Public to Know, in* CIVIL RIGHTS IN ISRAEL: ESSAYS IN HONOUR OF H.H. COHN 177 (Ruth Gavison ed., 1982) (Heb.).

I. INTRODUCTION

One hundred years ago Warren and Brandeis published their classic article, which advocated that the common law could and should grant a remedy for violations of privacy.[1] They identified two paradigmatic types of invasions of privacy: The exposure of the privacies of life through the then swiftly growing mass media, and the use of individuals' names and pictures in promotional activities.

The article is frequently described in two partly inconsistent ways. On the one hand, the article is supposed to be the most influential law review article ever written, an essay that single-handedly created a tort and an awareness of the need for legal remedies for invasions of privacy. It is a classic, a pearl of common-law reasoning, and proof of the ability of the law to meet new and challenging conceptions of value. On the other hand, especially since the development of the constitutional aspects of speech tort law, many question the validity and the desirability of the tort, particularly when it clashes directly with the freedom to publish. In the last decade doubts have led some state courts to explicitly reject any right of individuals to obtain a legal remedy for publication of true private facts about them against their will. The Supreme Court has decided four such privacy cases, denying a remedy in all of them. Commentators have suggested that the law in fact has not responded favorably to Warren and Brandeis's particular concerns —the protection of some areas of life and activity from truthful depiction and publication—and that this is a correct response. One commentator declared that it was time for a requiem.[2] Naturally, the three trends, state court rejection of the tort, Supreme Court denial of a remedy, and academic criticism, reinforce each other.

I shall argue that Warren and Brandeis's analysis of privacy and

---

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983). For another recent criticism emphasizing a historical study of the work, see James H. Barron, *Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875 (1979). Zimmerman's analysis was anticipated by the impressive critique of Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966). The detailed documentation of this development, fascinating as it is, goes beyond the scope of this paper. For some of the main highlights of this development, see *infra* part III.

its conflict with free speech is still more valid, clear, and adequate than many of the decisions and literature that have come in its wake. The article has stood the test of time better than many other contributions to the question of privacy and its legal protection. Furthermore, I shall argue that the strength of their analysis is on two levels. First, their recommendation for the proper solution to the conflict between privacy and free speech is wiser and more sensitive to the values of individuals and societies than the almost absolute priority of speech advocated by many courts and scholars. Moreover, their solution is still the one advocated by many scholars whose commitment to free speech cannot be doubted. Second, they reached these better conclusions because their approach to the conflict was clearer and sounder than other approaches.

In Part II, I shall sketch Warren and Brandeis's analysis. In Part III, I shall describe the ways in which the current law of privacy reflects either acceptance of or departure from their analysis. This description will provide the background for my critical Part IV. I shall suggest a general approach in Part IV to the privacy and free speech conflict that is different and sounder than the one adopted by many courts and commentators. I also will show how Warren and Brandeis were closer to this approach than many of the decisions and much of the literature that reflect the present state of the law. Warren and Brandeis's analysis still provides us with a good starting point for this important discussion because one hundred years later their analysis is alive and well. By rearguing with Warren and Brandeis within their framework, we might be led to modify some of their emphases, but many more might agree that they had the better argument than their critics.

II. The Warren and Brandeis Analysis

The Warren and Brandeis article is an advocate's brief for a judge-made tort of invasion of privacy. As in many such briefs, it identifies when the advocates expect to meet resistance and what they may see as evident and unproblematic. The article focuses on the resistance and treats the latter summarily and sketchily.

Warren and Brandeis obviously took some of the premises essential to their argument to be self-evident: that press behavior and new technologies of acquisition and dissemination of information present a new threat to privacy, that privacy is very important to the lives of individuals and to the well-being of society, that invasions of privacy could occasionally cause harm and injury as great as those caused by physical or financial loss, that in some cases invasions of privacy by publication serve no legitimate public interest, and that the law should be enlisted to deter this kind of behavior in the same way that it is

used to prevent other types of harms.

Many commentators may find these premises questionable. For some the magnitude or the seriousness of the loss of privacy is not sufficiently established. Others believe that a legitimate public interest always exists in what is published. A third group doubts whether the law should limit publication of true information about individuals. If the premises are true, however, they create a plausible skeleton of an argument for making invasions of privacy, including unjustified invasions of privacy by publication, actionable in general.

Unfortunately, Warren and Brandeis did not provide us with an elaborate defense of these premises. Rather than argue for them, they merely stated them. They assumed that their audience agreed with these premises and directed their rhetorical effort elsewhere. They devoted more than two-thirds of the article to the arguments that a basic common-law principle is that the individual should have "full protection in person and in property,"[3] that the harms to individuals generated by threats to privacy are inconsistent with this "full protection," and that a legal remedy for invasions of privacy, although superficially similar to protection of reputation, is in fact the principle already recognized in the law concerning the right of people to prevent publication in other contexts. Warren and Brandeis simply argued to extend the right into a more general right to an inviolate personality.

This part of the argument was required mainly because Warren and Brandeis addressed their plea to the courts. They therefore had to show a basis in existing common-law principles that would permit, and maybe even require, judicial development of the law to protect privacy.[4] To assess their argument today, however, it is more important to focus both on what they said to show that the law should protect privacy and on the way in which they approached the conflict between privacy and free speech. Because Warren and Brandeis concentrated their energies on a different purpose, their arguments on these subjects were rather sketchy. What they said, however, creates the skeleton of a plausible argument that can and should be filled in.

I confess that some of my admiration for the piece rests on the intuitions that I share with them. Like Warren and Brandeis, I find their premises self-evident and compelling. Unlike them, I have had the benefit of exposure to many others who do not share these intu-

---

3. Warren & Brandeis, *supra* note 1, at 193.

4. For a critical survey of this part of their argument, see Walter F. Pratt, *The Warren and Brandeis Argument for a Right to Privacy*, 1975 PUB. L. 161. The states that have recognized a judicial right to privacy have not always embraced Warren and Brandeis's reasoning. Occasionally, the states derived such a right directly from common-law protection of property. *See* Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991).

itions. I was led to accept that it is not enough to state the premises. One must elaborate on and argue for these premises in some detail. In the last analysis, however, much still depends on intuition, and Warren and Brandeis's skeleton of an argument is simple, elegant, and valid.

I doubt that many will seriously question Warren and Brandeis's premise that changing technologies and developing human enterprises create new threats to privacy. Mass media is among those human enterprises that threaten privacy.[5] Much more controversial is their premise concerning the harmfulness of violations of privacy. Some of the criticism is directed at Warren and Brandeis's claim that invasions of privacy were primarily motivated by gossip mongering.[6] I do not share the view that journalism is motivated primarily by a desire to disseminate gossip, nor that the dissemination of or the reading of gossip is necessarily undesirable. However, I do want to defend a different, much weaker premise, which is all Warren and Brandeis needed and which is of crucial importance: *Some invasions of privacy by unwanted publicity of truthful information may be harmful to both individuals and society.* I will explain the importance of this insight below. At this stage I shall stress only that Warren and Brandeis themselves distinguished two types of harm that may be involved in circulating gossip. The first was the emotional harm to the individuals who are denied the

---

5. People like James Barron and Don Pember, who claim that the press was not overstepping in 1890, probably would concede this point. *See* DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT (1972); Barron, *supra* note 2. The new scope and speed of national publication and the development of an industry whose main task is the accumulation of information, including personal information, have clearly changed the ways in which publicity about individuals can be given. The premise does not make assumptions about what is private and what is not. Nor does it make assumptions about whether the threats that technological developments pose have materialized. Similarly, it does not say that the materialization of these threats is necessarily undesirable. This therefore is an extremely weak, though necessary, premise. If they had lived in the second half of this century, Warren and Brandeis probably would have added sophisticated electronic surveillance devices and computerized data banks as new sources of threats against privacy that require new forms of legal protection. The Clarence Thomas-Anita Hill hearings in October 1991 dramatically illustrated the plausibility of this premise. Can anyone seriously doubt that the extensive coverage was an important factor in the extent of loss of privacy for those involved? Again, this premise does not consider, at this stage, whether the loss of privacy was justified.

6. Warren and Brandeis asserted:

> Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

Warren & Brandeis, *supra* note 1, at 196. From reviewing the press of the time, the critics doubt that gossip was offensive, that the disclosures were motivated by gossip, or that the gossip was idle or vicious. *See* PEMBER, *supra* note 5, at 33-42.

benefits of a necessary retreat from the world and of privacy and solitude. These individuals suffer "mental pain and distress far greater than could be inflicted by mere bodily injury."[7] The second was the harm to the social climate. Insensitivity to privacy "both belittles and perverts" the aspirations of man and distorts proper priorities.[8]

Several famous privacy decisions illustrate that losses of privacy can result in catastrophic consequences to the individuals involved.[9] The social effects of not respecting privacy are harder to identify and are less likely to arise in individual litigation. This does not mean, however, that these effects do not occur or that they are not important and profound.[10]

Despite the sketchiness of their account, Warren and Brandeis correctly identified the types of harms that invasions of privacy may cause. Subsequent literature that elaborates on the interest in privacy has expanded and documented the importance of privacy and the harmfulness of its denial. Furthermore, Warren and Brandeis emphasized that the wish not to be the subject of discussion in public is not an isolated, unintelligible wish; it is connected to human dignity, to inviolate personality, and to the well-being of individuals and societies. Thus, although the paradigmatic case discussed by Warren and Brandeis is freedom from unwanted publicity, it is seen as just one aspect of a more general concern for human dignity.[11]

---

7. Warren & Brandeis, *supra* note 1, at 196.

8. *Id.*

9. One is Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940), in which a famous child prodigy grew to become a regular adult intent on keeping his anonymity, tried in vain to prevent an accurate and detailed account of his life by the press, and then committed suicide. *Id.* at 807. Another is Melvin v. Reid, 297 P. 91 (Cal. Dist. Ct. App. 1931). In *Melvin* the court granted a remedy to a former prostitute, who was acquitted of murder and then rehabilitated herself and married into a community not familiar with her past, against those who made a movie about the trial and identified her real name, her current location, and her current identity. *Id.* at 93-94. Yet another of a more recent vintage is Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Ct. App. 1983). In *Diaz* the court declared that a prima facie cause of action existed for invasion of privacy when a newspaper published the well-guarded fact that the first woman president of a college was, in fact, a man who had undergone a sex-change operation. The plaintiff suffered serious emotional difficulties because of the publication.

10. For example, press and privacy norms have changed considerably in this century. In the 1930s and 1940s many people did not know that FDR was paralyzed. Today, this would be inconceivable. As recently as the 1950s the press did not discuss private affairs of candidates for office, such as their sexual orientations or patterns of behavior. Even the idea of conducting a televised investigation into the details of private conversations in the workplace, as was done in the Clarence Thomas-Anita Hill hearings, would have been unthinkable not too long ago. Some may lament these developments, and some may welcome them, but one cannot deny that they affect the kind of society in which one lives.

11. Some critics agree that losses of privacy may have consequences, but they claim

Because of their belief in the importance of privacy, Warren and Brandeis reached another conclusion, which was a premise in their argument for legal protection and one with which I agree: *Some invasions of privacy are undesirable even if one takes legitimate public interests in publication into account.* Warren and Brandeis did not speak at great length or in great detail about the conflict between privacy and free speech. However, they were keenly aware of it. "Legitimate public interest" is the first defense that they considered and granted. They described the purpose of the law in these terms:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever their position or station, from having matters which they may properly prefer to keep private, made public against their will.[12]

They conceded that the judgment of what is of legitimate public interest is predicated not only on the nature of the information, but on the identity and the role of the individual concerned. They further conceded that it is desirable to repress only "the more flagrant breaches."[13] Their tentative definition of unjustified invasions of privacy was:

> matters . . . which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.[14]

For reasons explained in Part IV, this general resolution of the conflict, under which many, but not all, privacy-invading statements will be justified, is preferable to the position that Warren and Brandeis's critics advocate. Their critics believe that all truthful publications about individuals are protected under the First Amendment no matter how intimate the information or how irrelevant to any justified purpose of free speech. Warren and Brandeis's formula is vague and

---

that these harmful consequences often are trivial, that the complaints are petty, and that the way of life that Warren and Brandeis wished to protect was patrician. *See, e.g.*, Barron, *supra* note 2, at 914-18. It is extremely difficult to reason about such observations. For many rape victims whose names are disclosed against their wishes or many homosexuals outed against their will, the consequences clearly are substantial. I do not find the wish of parents not to have to face the picture of their disfigured child who they have just lost in an accident to be a very patrician sentiment.

12. Warren & Brandeis, *supra* note 1, at 214-15.

13. *Id.* at 216.

14. *Id.*

open-ended. It allows for many and constantly changing conceptions of what statements should be justified because of legitimate public interest. The critics' formula has the benefit of clarity and no inhibition of speech. However, it trivializes the offensiveness and the humiliation involved in some violations of privacy by publication. This may lead both to individual tragedies and to an undesirable social climate, just as Warren and Brandeis noted.[15]

A final point worth repeating is Warren and Brandeis's insistence that the truth and the absence of malice should not be defenses in an action for invasion of privacy.[16] To them this was a defining feature of the protected interest; it is not an interest that portrayals be accurate, but rather an interest that some aspects of life should not be portrayed at all. Warren and Brandeis did not offer the new remedy in order to expand remedies for injuries to reputation in which truth was generally accepted as a defense. They saw the interest in privacy as distinct, unique, and irreducible to those in reputation or mental tranquility.

To summarize Part II: Although the premises that support Warren and Brandeis's classic argument need more support and might need some qualifications, in their essence they are valid and illuminating. They provide a foundation for an argument for some cause of action for blatant invasions of privacy by publication.

III. The Impact of the Warren and Brandeis Analysis

In principle, whether Warren and Brandeis's article was influential and whether this influence was understandable in terms of legal craft are distinct from the questions of the validity and strength of their position on the conflict between privacy and free speech. They could have been right, but not influential, or wrong and nonetheless influential, or neither. One of the complexities of this piece of legal history, however, is that the substantive criticism of their position on the conflict always has been combined with a demystification of the magnitude of their contribution. As a result, many of their most powerful critics[17] have argued with different emphases for three theses: (1) Their rhetorical influence was immense; (2) this influence, when analyzed more closely, was in fact very small; and (3) this influence was what it should have been because their message was ultimately undesirable.

I take issue primarily with the third thesis. The second thesis of

15. *See id.* at 196.

16. *Id.* at 218.

17. *See* Kalven, *supra* note 2, at 327 (describing it as the most influential law review article ever written); *see also* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960); Zimmerman, *supra* note 2, at 293.

the critics, however, also has limits. I think Warren and Brandeis would have liked to have seen a bit more protection of privacy in the bottom line of decisions, as well as a different approach to privacy. Nonetheless, the critical assessments claiming that the law did not respond to their concerns distort the law of privacy in ways that unfortunately affect not only the image of Warren and Brandeis's contribution but also the progress of the law of privacy.

History has not judged the article to be misguided and wrong. The power of Warren and Brandeis's analysis is persistent and enduring. Much of the greatness of the American tradition is reflected in the grand contours of their approach. This includes the often elusive realizations that freedom is a complex social value and that privacy and human dignity are freedom's essential components.

It is notoriously difficult to document and analyze the possible influences that the ideas of Warren and Brandeis have had on other ideas, including Brandeis's own attitude towards the conflict between privacy and speech, both of which he championed, and the developments of the law of privacy. It is impossible to do justice to the voluminous literature on the Warren and Brandeis article in the confines of this paper. I shall, however, sketch the grounds often given for claiming the great influence of the article. These are the data with which the critics need to deal. The critical approach is represented by many scholars and has been made on many levels of analysis. Three different statements, in combination, capture the essence of the critique. I will structure my own analysis of the law and its desirability around these three theses.

The Warren and Brandeis article was published in 1890. After an initially slow progress,[18] recognition of the right to privacy gained momentum. By 1960, when Prosser published his influential analysis,[19] all but four states recognized the tort, the Restatement (First) of Torts included it, and the tort, discussed and analyzed in hundreds of judicial decisions, was seen as an integral part of tort law.[20] Then, in 1965 the *Griswold v. Connecticut*[21] decision launched, and its progeny has since integrated, the constitutional right to privacy. This right now encompasses such diverse items as wiretapping and Fourth Amendment

18. This was highlighted by judicial rejection of the cause of action in Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902), and followed by a public outcry that resulted in a legislated and limited right to privacy.

19. Prosser, *supra* note 17.

20. For a summary description of the development, see W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 117, at 849-51 (5th ed. 1984) [hereinafter PROSSER & KEETON].

21. 381 U.S. 479 (1965).

decisions[22]; personal decisions in the area of family life, contraception, abortion and marriage[23]; and watching pornography in one's home.[24]

If one looks under "protection of privacy" in contemporary American jurisprudence, one will find a large variety of legal measures—civil, criminal, and constitutional—all designed to promote and protect privacy. It is therefore easy to conclude that the law gave Warren and Brandeis's idea an enthusiastic reception.

Against this background we need to look at the critique of their effort. As mentioned above, this critique consists of three different themes.

First, when we look at situations in which the courts granted a remedy in tort for invasion of privacy, often relying on the Warren and Brandeis article, we find that the courts gave remedies in four different types of situations involving four different interests: Intrusion, appropriation, false light, and public disclosure of private facts. Warren and Brandeis were concerned with only the latter. Their article therefore generated a body of law that obscured important distinctions, and only one part of this body of law responded to the problem they identified. In fact, we do not have a tort of invasion of privacy, but instead have four distinct and different torts, three of which have nothing to do with privacy.[25]

Second, the defense of newsworthiness or public interest meant that plaintiffs rarely won for pure disclosure of true private facts. Usually, plaintiffs won cases that involved other elements such as intrusion, illegal acquisition of information, commercial exploitation, or falsehood. Furthermore, this cause of action is likely to be unconstitutional because it is not clear that truthful publications can ever be actionable under the First Amendment. Therefore, the only tort that responds to Warren and Brandeis's concerns is at best marginal and at worst unconstitutional. Moreover, predicting when a plaintiff might win is extremely difficult. Occasionally, plaintiffs win for trivial reasons. Thus, although the availability of a cause of action deters speech,

---

22. Katz v. United States, 389 U.S. 347 (1967). For a recent analysis of cases, see Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077 (1987).

23. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

24. Stanley v. Georgia, 394 U.S. 557 (1969).

25. This line of analysis has become famous and influential primarily through its exposition by Prosser. *See* Prosser, *supra* note 17. The Restatement (Second) of Torts incorporated a version of this analysis. *See* RESTATEMENT (SECOND) OF TORTS § 652 (1977). Most courts and scholars now use this as the standard analysis of privacy law. However, the idea did not originate with Prosser. *See, e.g.*, Frederick Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D. L. REV. 1 (1959); Gerald Dickler, *The Right of Privacy: A Proposed Redefinition*, 70 U.S. L. REV. 435 (1936).

generates a chilling effect, and creates litigation costs, it does not protect privacy. What it does do is arbitrarily and unpredictably censure speech.[26]

Third, the constitutional right to privacy is indeed an exceptionally important part of the law. There is, however, no connection whatsoever between this constitutional right, its underlying rationale, and the tort of public disclosure of private facts that was advocated by Warren and Brandeis.[27] The use of the same label has created confusion rather than illumination. Warren and Brandeis's right to privacy was in fact denied constitutional status in decisions such as *Time, Inc. v. Hill*,[28] in which the Court applied the actual malice test required in *New York Times Co. v. Sullivan*[29] to false light privacy cases.

The conclusion is that, at best, the impact of the analysis is the creation of a tort in which plaintiffs rarely win and that might be unconstitutional. All the other parts of the so-called privacy law may be traced in part to the successful rhetoric of Warren and Brandeis, but they do not reflect a positive response to their concerns. Many feel that their analysis confused issues and obscured the fact that so-called privacy claims involved different issues.

These critical descriptive theses all have grains of truth in them. However, they also are extremely misleading. Unfortunately, they have now become very influential and reinforce the acceptance of their adequacy as descriptions and in turn affect the development of the law.[30]

---

26. Kalven and Zimmerman mounted the most systematic criticisms in this direction. *See* Kalven, *supra* note 2; Zimmerman, *supra* note 2.

27. For one of the many recent discussions of the constitutional right that explicitly makes this point, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

28. 385 U.S. 374 (1967).

29. 376 U.S. 254 (1964).

30. The law of privacy therefore reflects at least twice the complicated relationship between descriptions or analyses of the law and its development. Warren and Brandeis themselves did precisely that. Their success in persuading some courts that the common law did protect privacy and their descriptive analysis led many courts to declare a legal remedy for the invasion of privacy. Prosser's presumed analysis of past decisions then crystallized into a definitive formulation of the law, thus affecting its development. For example, Prosser's analysis left out of the law of privacy the disclosure of intimate information to a limited audience. The disclosure is not an intrusion, often it is not an appropriation, and it is not a "public disclosure of private facts." However, this appears to be a strange result that is not justified by any principled analysis and seriously limits the capacity of the law to deal with important invasions of privacy that do not involve a conflict with freedom of the press, as distinct from the freedom of speech of individuals. It is interesting to note that the law, to some extent, found a way around this anomaly. The first edition of Prosser on Torts to appear after Prosser's death repeated his four torts thesis, *see* PROSSER & KEETON, *supra* note 20, § 117, at 851, and called the relevant tort "public disclosure of private facts," *id.* at 856, but explicitly acknowledged that

The following is a condensed version of an alternative description of the American law of privacy.[31]

First, many of the remedies given for invasions of privacy under intrusion, appropriation, and false light claims in fact reflect a wish to protect privacy and do respond to Warren and Brandeis's original concerns. Some decisions that granted relief under categories such as property or freedom from the intentional infliction of mental distress addressed these same concerns.

Many of the first cases in which courts granted remedies for invasion of privacy involved the use of names or pictures in commercial advertisements. It was easy to classify them as cases of appropriation. It is even true that in some of these cases, although this happened only later, the plaintiffs really were not concerned with their privacy. The issue was not the wish to avoid publicity, but the wish to be paid for the use of their names or pictures. In most of these cases, however, a primary motivation was an interest in privacy.[32]

This is even clearer in intrusion cases. Intrusion may be, and often is, an obvious invasion of privacy.[33] Furthermore, in many of the pri-

---

neither logic nor all the cases accepted the requirement that the disclosure be public, *see id.* at 857-58.

31. Bloustein has argued forcefully and persistently for this alternative view. *See* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U L. REV. 962 (1964); Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?*, 46 TEX. L. REV. 611 (1968) [hereinafter Bloustein, *Privacy, Tort Law, and the Constitution*]. For an extended critique of reductionist analyses of the law of privacy in general and Prosser's account in particular, see Ruth Gavison, Privacy and Its Legal Protection (1975) (unpublished D. Phil., thesis, Oxford University) (on file at Oxford, Yale, and Harvard Universities).

32. Professor Post documents in some detail the development of the tort of appropriation and the oscillation between elements of privacy and pure elements of property. *See* Post, *supra* note 4. The right to publicity first appeared in 1953. Pavesich v. New England Life Insurance Co., 50 S.E. 68 (Ga. 1905), is a classic example of an appropriation case in which the plaintiff was not a celebrity, there was no commercial value to the use of his picture, and the basis of the relief was a violation of privacy.

Celebrities also are interested, at times, not in benefiting from some commercial use of their pictures, but in preventing it altogether for reasons of human dignity. The discussion of appropriation is further confused by the fact that in some states, notably New York, the basis of the right to privacy is an appropriation-like statute. *See* N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1992). Courts that wanted to provide a remedy in cases that did not neatly fall within this definition of cases, such as invasions of privacy by noncommercial publication, therefore had to find routes other than mere privacy in order to justify a remedy.

33. One of the classic illustrations is a case that preceded the Warren and Brandeis analysis. *See* De May v. Roberts, 9 N.W. 146 (Mich. 1881). In *De May* the court granted a remedy for trespass when a person intruded upon the plaintiff's childbirth. *Id.* at 149; *see also* Byfield v. Candler, 125 S.E. 905, 906 (Ga. Ct. App. 1924) ("A passenger upon a

vacy cases the crux of the complaint was not the injury to an interest in property as Prosser suggests. Instead, property was used as a way to protect privacy. Warren and Brandeis clearly thought that intrusions into the privacy of the home, either in order to acquire information for publication or for other reasons, were invasions of privacy. Moreover, Prosser's analysis of the intrusion cases is very telling. He started by saying that intrusion is very different from appropriation.[34] He then proceeded to say that acquisition of information or its publication in public places is no intrusion, but added the following qualification: "And even in a public place, there can be some things which are still private, so that a woman who is photographed with her dress unexpectedly blown up in a 'fun house' has a right of action."[35]

Finally, the false light cases are wrongly classified as truly cases of defamation that protect the accuracy of one's portrayal and reputation. This classification obscures the important difference between the two interests that Warren and Brandeis identified. In fact, the two false light cases that reached the Supreme Court are good illustrations of this point.[36] In both cases the real gravamen of the complaint was not the inaccuracy of the portrayal, but the fact that it was made. The plaintiffs had to stress the falsehood because they were told that they could not recover unless the publication was false. But this was a legal constraint that did not reflect the essence of the case. The remedies, when given, affirmed the interests of people not to be depicted in the press without a legitimate public interest.[37] In fact, treating cases in

---

vessel is entitled to the privacy of the room to which he or she has been assigned . . . .").

34. *See* PROSSER & KEETON, *supra* note 20, § 117, at 854-56.

35. *Id.* at 856 (citing Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964)). The *Graham* case obviously is a case of "public disclosure of private facts," according to Prosser's own classification. If any such disclosure is an intrusion, the distinction between the two categories disappears. I think an important difference exists between intrusions and disclosures because only the latter clashes directly with free speech. However, an important similarity also exists: they are both invasions of the same interest individuals have in privacy.

36. *See* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967).

37. *Cf.* Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 383-91 (1989). Zimmerman agreed that the analogy between defamation and privacy is misleading, *id.* at 393, but wished to deduce from that conclusion that defamation law is better grounded than privacy law and that states should eliminate false light as a cause of action because it is not sufficiently similar to defamation, *id.* at 452. I believe, along with Warren and Brandeis, that privacy should be considered as an independent candidate for protection because it is different from defamation. The confusion in the literature and cases is partly related to the New York statute. *See supra* note 32; *see also* Dorsey D. Ellis, Jr., *Damages and the Privacy Tort: Sketching a "Legal Profile"*, 64 IOWA L. REV. 1111, 1121-22 (1979) (pointing out that in *Cantrell* the damages award reflected the seriousness of the invasion of privacy through

which the essence of the violation is a privacy invasion according to the rules of defamation is inadequate.[38]

Warren and Brandeis's analysis therefore is responsible for initiating most of the tort remedies for invasion of privacy, and their argument might have been helpful in developing the law of intentional infliction of emotional harm as well. In most cases these remedies do respond to their concerns. The reductionist analysis therefore is misleading both as a description of the law and as a framework for its development. The main distortion of the reductionist analysis to the initial Warren and Brandeis analysis is not in the details of the cause

---

accurate report, although the falsehood was used to allow recovery in the face of the assumption that truth should have been a defense as it would be in cases of defamation). The limited influence of law reviews is apparent because a number of commentators immediately pointed out this problem. *See, e.g.*, Melville B. Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968). The uniqueness of privacy may become clearer when we recall that the law of defamation covers only disparaging statements, whereas the interest in privacy is not limited in the same way. *See* Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885 (1991).

38. In the constitutional development of defamation law the balancing between reputation and free speech involves two sets of variables: (1) The nature of the information and the identity of the plaintiff and (2) the falsity of the information. Because falsehood is irrelevant to privacy claims, these defamation decisions are not much help in deciding privacy cases. Moreover, even the classification of cases on a public-private spectrum does not help. The most private of the defamation cases may not raise any privacy problems. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). On the other hand, some cases that are treated as defamation actions may raise privacy concerns. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976). *Dun & Bradstreet* dramatically illustrates Warren and Brandeis's insistence that the interests are different. It dealt with credit information that the defendant disseminated in the ordinary course of his business. The only problem with the information was that it happened to be wrong. On the other hand, invasions of privacy concern the publication of items that should not have been published at all. The details of the divorce trial of Ms. Firestone belong in this group. For an analysis of the interests behind defamation and privacy, see Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989) [hereinafter Post, *The Social Foundations of Privacy*].

In addition to the different types of harm caused by some injuries to reputation and some injuries to privacy, a major difference exists between the two possible remedies. While an injury to reputation by false disclosure can and should be amended by a correction, no analogous way exists to amend an injury to privacy. This is another reason why *Dun & Bradstreet* seems to be wrongly decided. The error was based on a mistake that was corrected immediately and effectively. Liability, especially punitive damages, seems to have been wrongly imposed. *Dun & Bradstreet* does raise one issue of privacy: The Court apparently punished the defendant because he refused to disclose the list of firms that received the original statement.

of action,[39] but rather in the analysis of its grounds. Warren and Brandeis were fighting the specter of a cheapened and standardized society, a society in which the most noble aspirations of man were belittled. For Warren and Brandeis unwanted publicity of intimate details was just one way in which a society could reach that lamentable state. Intrusions and publicity were objectionable partly because of their inhibiting effect on freedom and perceived affront to dignity. Prosser's analysis left the justification for the private facts tort at the level of mental distress, which is often trivial, petty, and abusive.[40]

Second, it is not true that once one clarifies the picture, legal remedies for the publication of true information about individuals are almost nonexistent and probably unconstitutional. It is true that in many dramatic privacy cases courts have denied recovery to plaintiffs, for whom the courts had some sympathy, because of the publication's newsworthiness or public interest.[41] It is true that since 1975 the Supreme Court has refused on four occasions to grant relief for embarrassing disclosure of true facts[42] and that at least one justice expressed the opinion that truth should always be a defense for the press under

---

39. These exist, however, and are not trivial. I already have mentioned some implications of the four torts analysis. *See supra* note 30 and accompanying text. Additionally, Prosser's analysis cannot deal adequately with any of the many privacy threats created by computerized information systems. Even the critics of the private facts tort acknowledge this as a threat to privacy. *See, e.g.*, Zimmerman, *supra* note 2, at 362. Warren and Brandeis's analysis definitely could have encompassed this threat by, for example, developing limitations on acquisition, accumulation, and disclosure of information related to such data banks. The four torts analysis is much less susceptible to such a development of the law. This creates an unnecessary discrepancy between the scope of the law labeled privacy law and its functions in social life.

40. Analyses such as Bloustein's were not influential. We shall have to wait and see whether attempts at reidentifying the essence of the tort remedy of the kind that Post offered will fare better. *See* Post, *The Social Foundations of Privacy*, *supra* note 38. Post argued that the real purpose of privacy rules is to protect the sense of civility, which is itself a defining feature of communities and selves. Post's nonreductionist analysis of privacy is superior to Prosser's, but I think Post also failed to do full justice to the many functions that privacy serves in our lives. Although civility is important, more is at stake when privacy is invaded. However, Post is committed, unlike Prosser, Kalven, and Zimmerman, to the view that invasions of privacy are serious losses and threats to important social goals.

41. The most dramatic one is Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). Time, Inc. v. Hill, 385 U.S. 374 (1967), is another example. In the *Hill* case there was a powerful dissent that urged a decision in Hill's favor. *Id.* at 411-20 (Fortas, J., dissenting).

42. The first case was Cox Broadcasting Publications v. Cohn, 420 U.S. 469 (1975). The most recent was Florida Star v. B.J.F., 491 U.S. 524 (1989). For a discussion of the series of decisions, see Peter Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990).

the First Amendment.[43] It also is true that the lines demarcated by the Supreme Court in these cases would have made recovery unlikely for plaintiffs in some of the situations in which they did recover under tort law.[44] Finally, at least two states explicitly rejected the private facts tort.[45]

But this is only a part of the picture. There are strong dissents in a number of Supreme Court privacy cases, and the decisions that denied recovery were often met with critical commentary.[46] Some plaintiffs have won for public disclosure of true facts, including some recent cases, despite explicit and powerful arguments on behalf of the press and the importance of freedom of expression.[47] The sentiments that

---

43. Cox Broadcasting Publications v. Cohn, 420 U.S. 469, 497-500 (1975) (Powell, J., concurring).

44. According to present decisions, liability could be imposed only if a statute exists that explicitly prohibits the publication of some true information (such as the identity of rape victims, the type of publication involved in both *Cohn* and *Florida Star*), the court holds that this statute is not unconstitutional, and the information was not voluntarily, even if mistakenly released by the government. The Supreme Court has explicitly refused to pronounce these statutes unconstitutional. In fact, in the wake of the William Kennedy Smith rape case a lower court in Florida has held that a statute which makes disclosure of rape victims an offense is unconstitutional. *See* Michael Crook, *Tabloid Charges May Be Dropped*, MIAMI HERALD, Dec. 17, 1991, at 1B. It appears, however, that the classic privacy cases which allowed recovery, such as Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931); Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Ct. App. 1983); and Briscoe v. Readers' Digest Ass'n, 483 P.2d 34 (Cal. 1971) (en banc), could not survive this test of constitutionality. On the other hand, the Supreme Court decisions have not addressed problems relating to lapse of time, although the decision in Time, Inc. v. Hill, 385 U.S. 374 (1967), may suggest that this might not work in favor of plaintiffs. One possible exception might be Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942), in which the information was gathered by trespassing into the plaintiff's hospital room.

45. Hall v. Post, 372 S.E.2d 711 (N.C. 1988); Anderson v. Fisher Broadcasting Cos., 712 P.2d 803 (Or. 1986) (en banc) (relying on Kalven and Zimmerman's critiques of the tort). In *Hall* the concurring opinion suggested that the cause of action should be recognized, but that no remedy should be given in the instant case because of the public interest in publication. 372 S.E.2d at 717 (Frye, J., concurring).

46. Both *Hill*, 385 U.S. at 411-20 (Fortas, J., dissenting), and *Florida Star*, 491 U.S. at 542-53 (White, J., dissenting), contain such dissents. For criticisms of these decisions and their reasoning, see Edelman, *supra* note 42; Nimmer, *supra* note 37. *See also* Barbara L. Pedersen, Case Note, Florida Star v. B.J.F.: *The Rape of the Right to Privacy*, 23 J. MARSHALL L. REV. 731 (1990); Marta G. Stanton, Comment, *The Wrongful Obliteration of the Tort of Invasion of Privacy Through the Publication of Private Facts*, 18 HASTINGS CONST. L.Q. 391 (1991).

47. Cases in which the courts were sympathetic to privacy complaints include Huskey v. NBC, Inc., 632 F. Supp. 1282 (N.D. Ill. 1986) (mem.); Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Ct. App. 1983); and Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580 (D.C. 1985). It is somewhat surprising that the defendants in these cases did not make constitutional challenges in view of the decision in *Cohn*. The reports of these cases may indeed be unintentionally misleading. They mostly are rejections of motions for summary dismissal. They probably were either settled or lost in some later

privacy is an important value that should be balanced against free speech and that the category of cases in which privacy might override free speech is not empty are echoed by many and are reflected by the Restatement (Second) of Torts.[48] The Supreme Court has been extremely cautious and has not held that any recovery for truthful publication is inconsistent with the First Amendment. In addition, concerns with privacy are prevalent in editorial policies and decisions. The number of cases in which plaintiffs have won is not the only, and probably not the most important, index of success. More important is the scope of situations in which editors refrain from publishing for reasons of privacy, either because they have internalized the importance of the value or because they are afraid of legal, public, or professional criticism.[49]

The legal and social response to the narrowest of their concerns, the one that the public disclosure tort addresses, is not that of a clear rejection. It seems that Warren and Brandeis would have wanted some of the plaintiffs who have lost over the years to win, but arguably there is not that much of a difference between their profile of the tort and the Restatement's.[50] For some critics this may be just restating the

---

stage of the litigation, as seems to have happened in the famous case of Briscoe v. Readers' Digest Ass'n, 483 P.2d 34 (Cal. 1971) (en banc).

48. *See* RESTATEMENT (SECOND) OF TORTS § 652D special note (1976).

49. One can quarrel, of course, with the details of these policies. I do not want to enlist the presumed views of Warren and Brandeis. Today, many doubt the wisdom and the morality of exposing the sex lives and the minor childhood transgressions of political candidates. For my purposes here, however, it is sufficient to say that even within the journalistic profession the prevalent approach is that publication of privacy-invading material should be justified. Journalists may be quick to find relevance and justification, but most of them accept in principle that some justification must exist. *See infra* part IV.

50. Section 652D of the Restatement defines the private facts tort as follows:

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

RESTATEMENT (SECOND) OF TORTS § 652D (1976).

The difference between profiles is in the guidelines given to help apply this standard of legitimate public concern. Warren and Brandeis talked mainly about explicit consent and political candidates as public figures, who may expect less privacy than anonymous individuals. On the other hand, the definition of the Restatement is much broader:

> One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him. . . . [T]he legitimate interest of the public in [such an] individual may extend be-

problem; they probably think that the Restatement, and the law it reflects, should be modified. But for other critics, including Prosser and many staunch supporters of the First Amendment and its values, all that is needed is to carefully draw the lines that are required by close attention to the importance of freedom of speech and freedom of the press.[51]

Third, the tort-law right to privacy and the constitutional right to privacy share important concerns. The use of the same term, although it may obscure some important differences between cases, does identify similarities that are no less important. It generally is true that judges and commentators see the constitutional right to privacy as different and distinct from the tort that Warren and Brandeis advocated.[52]

The picture blurs, however, on closer examination. Blood tests, self-incrimination, searches, and wiretapping, which are all instances concerning constitutional privacy, clearly raise issues similar to the fear of intrusion and compelled disclosure of the privacy tort.[53] Brandeis's dissent in *Olmstead v. United States*[54] was very similar to parts

---

yond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private. *Id.* cmt. e.

The Restatement then proceeds to identify "involuntary public figures," who may become newsworthy without seeking publicity. *Id.* cmt. f. Similarly, the Restatement suggests that the ultimate decisionmaker on legitimate public concern is the community itself. It therefore may give more credence to curiosity and demand than Warren and Brandeis would have been willing to give.

51. KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE 142-43, 302 (1989); Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329 (1979).

52. The Supreme Court has refused to grant privacy constitutional status in the sense of freedom from publication or the interest in reputation. Whalen v. Roe, 429 U.S. 589 (1977) (holding that a law which required reporting and identifying customers of drugs involves tort privacy but does not raise constitutional privacy issues under the Fourteenth Amendment); Paul v. Davis, 424 U.S. 693 (1976) (refusing to base a remedy for disclosure of the fact that petitioner was arrested for shoplifting on the constitutional right to privacy). In *Paul* three justices dissented and claimed that the interests in reputation and the presumption of innocence are values of a constitutional status. 424 U.S. at 734 (Brennan, J., dissenting).

Many commentators treat the two types of privacy as completely different. *See, e.g.*, Rubenfeld, *supra* note 27; Zimmerman, *supra* note 2. However, others treat all legal protection of privacy, tort, and constitutional aspects as if they belong to the same cluster of concerns. *See, e.g.*, Bloustein, *Privacy, Tort Law, and the Constitution*, *supra* note 31; Emerson, *supra* note 51; Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

53. Therefore, it is no surprise that in Prosser's discussion of the intrusion cases many of the examples are related precisely to these types of cases. PROSSER & KEETON, *supra* note 20, § 117, at 854-56.

54. 277 U.S. 438 (1928).

of the 1890 article.[55] The liberty-privacy cases started by building on emanations of the Fourth and Fifth Amendments, but soon established their own direction and rhetoric.[56] Despite these connections, the development of the constitutional right of privacy has not affected the privacy tort much. As we saw, the Court has not given privacy, in the sense of freedom from unwanted publicity, a constitutional basis. Such a basis might have given privacy a better chance when it conflicted with the newly constitutionalized public interest defense to publication torts. It also would contribute to the sense that the two interests are, in an important way, aspects of one and the same concern.[57]

This may be another achievement of Prosser's reductive analysis of the tort, which disregarded Warren and Brandeis's and the courts' sense that privacy was a coherent interest that has to do with human dignity. This disassociation between the tort and the constitutional right stemmed mainly from the fact that, as many commentators noticed, the Court seemed to invoke the constitutional right to privacy in order to address issues of liberty, such as issues of freedom from interference, as opposed to issues of freedom from intrusion, attention, scrutiny, and publicity, which were the center of concerns with privacy.

I am among those who think that the distinction between these two interests is important and that a good way to maintain the distinction is by labeling the latter as privacy interests and the former as liberty interests. However, I am sorry if this has led to a failure to see

---

55. *Olmstead* involved a conviction for smuggling liquor during the prohibition. The evidence was acquired through wiretapping. The Court held that the Fourth Amendment does not cover the use of listening devices without trespass. *Id.* at 466. Brandeis, who dissented, extolled the importance of the privacy of the home. *Id.* at 471-85 (Brandeis, J., dissenting). Brandeis's position was later accepted by the Court in Katz v. United States, 389 U.S. 347 (1967).

56. In Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Douglas took special care to note that a prohibition of the use of contraceptives would entitle the police to monitor the bedrooms of married couples, *id.* at 485, a paradigmatic invasion of privacy that was only indirectly related to the limitation of liberty involved. This attenuated connection between privacy and liberty disappeared altogether when the right to privacy was invoked to legalize interracial marriages.

57. An obvious reluctance by the Court to see privacy in the sense of freedom from publicity as a constitutional right is exhibited in Paul v. Davis, 424 U.S. 693 (1976) and Whalen v. Roe, 429 U.S. 589 (1977). The *Cox-Florida Star* line of cases also exhibits this reluctance. However, other tendencies may be reflected in other contexts. *See, e.g.*, United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 485 U.S. 1005 (1988) (holding that the privacy exemption to the Freedom of Information Act includes criminal records). For a suggestion that the constitutional nature of privacy would not change the type of balancing involved, see Braun v. City of Tafts, 154 Cal. App. 3d 332 (1984) (holding that the fact that the right to privacy was incorporated into the state constitution did not change the nature of the balance between public interest and privacy).

that these two distinct values are closely interrelated. One of the main functions of privacy is its crucial contribution to liberty. A society without privacy, in the more limited sense, likely will not enjoy much freedom or have robust individuals who are willing to experiment, dare, and challenge their governments and the positive morality of their societies. The constitutional right to privacy is different from the interests that the privacy tort protects, but both are inspired by the same ideal of individuals and societies and by the fear of the same specter—that of a totalitarian and leveling organization of society.[58] Therefore, at least on the level of importance and status, the conflict between privacy and free speech should be seen as a conflict between two ideals of the same level and not between the most sacred constitutional principle and a suspect, trivial, and petty tort.

In summary, although a general agreement exists that the number of successful plaintiffs under the disclosure of private facts category never has been substantial, there is considerable controversy concerning the implications of this agreement to the impact and the validity of the Warren and Brandeis analysis. Some commentators believe that the tort is merely a confusing myth. In direct opposition to the Warren and Brandeis analysis, these commentators also believe that we will be better off if we acknowledge that there should be no liability for truthful publications. Others believe that we shall lose something significant if we reach this conclusion and that freedom from unwanted publicity and robust public debate can be made consistent without giving up all privacy protection, thus vindicating the general approach of Warren and Brandeis even if not the particulars of their analysis. In the last part of this paper I wish to explain why I want to join this latter group.

IV. TOWARDS A BETTER ANALYSIS OF THE PRIVACY AND FREE SPEECH CONFLICT

The desirable legal resolution of a conflict between two values is very complex. It involves a large number of questions, which belong to different discourses. First, we need to have a clear analysis of the two competing values involved, what they are, why they are desirable, and how they relate to each other. This may require some conceptual analysis and a lot of moral and human understanding of the ways in which ideals and goals work in our lives and affect other goals that we have as

58. Both parts of the argument—the importance of maintaining a distinction between being free from observation and publicity and being free from regulation, and the pervasive relationships between the justifications of privacy and the ideals of freedom, autonomy, and human flourishing—appear in Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

individuals and a society. When we proceed to discuss *conflicts* between rights, values, or interests, it is crucial that we not lose sight of what we have learned in the first stage by analyzing the different values. We should remember this because situations of conflict are painful. Therefore, we have a tendency, once we have resolved the conflict as we must, to undervalue what we have given up in order to be at peace with the decision that we have adopted.

The resolution of conflicts is undertaken in the context of some ethical and meta-ethical framework. What should be counted? What weight should be given to wishes, ideals, goals, and interests? How do we identify them? In a pluralistic society of the type in which we live, disagreement is likely on many parts of these frameworks. Such disagreements may impede our chances of gaining consensus on the moral resolution of conflicts between values. Nonetheless, agreement on at least some working assumptions, both substantive and methodological, may be possible. As a substantive starting point I suggest the principle that harming other individuals or society should be justified.[59] I do not impose constraints on what can count as a justification at this point. Methodologically, I suggest two distinctions. One is between first-order and second-order arguments for the resolution of conflicts. The other is between the morality of an issue and its legal resolution.

My argument, in a nutshell, is that the resolution of conflicts is likely to be more adequate if we heed these guidelines for discussing conflicts. Identifying the conflicting interests and their justifications, identifying the kinds of harms caused by infringement of these values, and attending to the distinctions between first- and second-order justifications and between the morality of some behavior and its legal status all help in resolving these conflicts. Moreover, Warren and Brandeis's analysis is closer to this desirable model than many of the judicial opinions in the field and many of the analyses that criticize their seminal argument.

Many of the weaknesses of discussions on the free speech and privacy conflict consist of insufficient attention to certain points. The justified fear of curbing free speech results in inattention to both the acute harmfulness of some invasions of privacy and to the relative inapplicability of some general justifications of free speech to privacy.[60]

---

59. I leave out the more controversial question concerning harm to self.

60. This problem is not unique to the free speech and privacy conflict. It is encountered in many other areas of conflict between free speech and other values such as reputation, equality, and dignity threatened by hate and racist speech. A similar argument against free speech rhetoric is made by feminists in their attempt to regulate pornography. Although important differences exist between these issues, there also is an important structural similarity between them. Decisions for speech should be made on an informed basis, taking into full account the costs of such decisions in terms of other values.

Moreover, it leads to an overemphasis on the *conflict* between the two values without attention to the interrelationships between them—the ways in which they belong together and reinforce each other.

The same fear of legal remedies that might chill worthy expression and considerations that concern difficulties of enforcement and fear of abuse[61] justify a second-order argument for some protection of unworthy speech in some areas. They also may justify the refusal to make speech actionable even if it is seen as morally objectionable. There is an enormous difference, however, between this kind of an argument for the legality of all privacy-invading speech and an argument that such speech is morally desirable or at least permissible. The difference occurs on a number of levels. The rhetoric and the attitude of the law towards the victim of an unjustified invasion of privacy who will lose in court should be sympathetic because the victim is required to pay a heavy price for the good of us all.[62] The extralegal difference is even more important. If losses of privacy are insignificant and morally permissible, there is no need for any educational or attitudinal effort to minimize such losses. If, on the other hand, such losses are not made actionable because of second-order considerations or because of the limits of the law, we should all try to attain the proper balance between privacy and free speech by minimizing unjustified invasions of privacy. The two current journalistic debates about outing and the publication of the names of rape victims make this point most dramatically. Most accept that there is no *legal* remedy for most cases of such publications, and many accept that this is as it should be. There is, however, a vibrant debate within the press and within the community about the *morality* of such publications.[63]

Although many of the flaws in the analysis tend to support speech in situations in which such support seems questionable, they may well lead to unjustified limitations on speech. I believe, for example, that the decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), is wrong because it creates too much liability for speech and that the award in Time, Inc. v. Firestone, 424 U.S. 448 (1976), was much too large. I want to clarify that I think that the Court's *decisions* on the whole are better than their reasoning and opinions. My quarrel is mainly with the jurisprudence of the First Amendment, not with particular decisions.

61. The best way to protect privacy after publication is not to start a long court proceeding that publicizes the initial publication. Laws that protect against unjustified invasions of privacy may be used to inhibit and discourage justified publications.

62. The justifiability of the invasion may not affect the pain of the losing plaintiff, and it is always important to be sensitive to this pain. There is a difference, however, between a plaintiff who is losing because the first-order claim in favor of publication is stronger and a plaintiff subjected to an unjustified invasion that we decide not to make actionable because of second-order considerations. The defense of judges that express these kinds of judgments goes much beyond the confines of the present paper.

63. *See, e.g.*, Andrea Dworkin, *The Third Rape*, L.A. TIMES, Apr. 28, 1991, at M1 (criticizing the press practices that followed NBC's and the New York Times's disclosure

A full defense of my position would require a detailed account of an answer to a number of questions including: Under what circumstances are invasions of privacy prima facie unjustifiable? When justifications exist, mainly the suggestive but elusive legitimate public interests that might override privacy at the first-order level, what, if any, are the second-order justifications for allowing free speech even when it does or is likely to unjustifiably invade privacy? Do the limits of law and fear of abuse require even more protection of the press than suggested by these second-order arguments? These are fascinating questions, on many levels.[64] They are complex, and many of them are extremely controversial. Sincere supporters of free speech can and do take different positions on these issues.[65] I have addressed these questions in some detail.[66] Because I cannot do justice to the subject here, I have decided to limit my argument to the claim that something has gone importantly wrong with the way we think about the privacy and free speech conflict. Let me elaborate on these points.

A. Losing Sight of the Importance of Privacy

Americans are justly proud of their free speech jurisprudence, which reflects a deep commitment to the importance of this value. Yet this pride is quite consistent with the observation that free speech analysis is not always what we would hope for. Nonetheless, there is broad agreement that freedom of expression is crucial to democracy, to a free society, and to the constitutional design of the United States. Judicial opinions and the literature abound with references to the justifications for free speech and the dangers that might be encountered if free speech is curbed. There is a strong, almost irrebuttable, presumption in favor of freedom of speech.

I would not want this to be any different. Freedom of speech is very important. We must stress the need to protect freedom of speech against all kinds of attempts at repression and censorship. Nonethe-

---

of the name of the woman that was the alleged victim in the William Kennedy Smith Palm Beach case).

64. Notice, for example, that I have not taken a position on the question whether the conflict should be resolved by ad-hoc balancing or by principled balancing or whether and how such balancing can be done.

65. *Compare* Kalven, *supra* note 2, at 327 (concluding that there should be no protection of privacy) *with* Emerson, *supra* note 51, at 359 (concluding that there should be a legal remedy at least for cases in which the disclosure is blatant and its relevance to the need of the public to know is minuscule or speculative).

66. *See* Ruth Gavison, *The Prohibition of Privacy-Invading Publications: The Right to Privacy and the Right of the Public to Know, in* CIVIL RIGHTS IN ISRAEL: ESSAYS IN HONOUR OF H.H. CONN. 177 (Ruth Gavison ed., 1982) (Heb.).

less, we need to remind decisionmakers that losses of privacy are intensely harmful, that they are harmful in a variety of ways that affect both individuals and the societies in which they live, and that freedom of expression is so important because of its relationship to the kind of individuals that we want to have and the kind of society in which we want to live. In order to have that very society, we need more than freedom of speech. We need other forms of freedoms, virtues, and aspirations. Privacy is not merely another important value that occasionally conflicts with free expression. Privacy is essential, in different ways, to the very same goals that we seek to pursue through freedom of expression.[67]

While the legal literature has discussed the importance of privacy,[68] the main support for privacy's importance comes from philosophical and psychological literature.[69] There is an agreement that pri-

---

67. *See* Ruth Gavison, *Information Control: Availability and Exclusion*, *in* PUBLIC AND PRIVATE IN SOCIAL LIFE 113 (Stanley I. Benn & Gerald F. Gaus eds., 1983) (discussing the immanence of the conflict to the ideals of autonomous individuals and free societies). The same position is endorsed by Thomas Emerson, one of the most outspoken and consistent defenders of free speech. He says that privacy must be allowed a place in the American system of individual rights and that an accommodation with free speech must be found that allows limited legal remedies for publication of true intimate information. Emerson, *supra* note 51, at 332-49. Emerson wrote:

> [T]he areas of conflict between the right to privacy and freedom of the press are quite limited . . . . At most points the law of privacy and the law sustaining a free press do not contradict each other. On the contrary, they are mutually supportive, in that both are vital features of the basic system of individual rights.

Id. at 331.

68. *See* ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 35-53 (1988); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968). This literature discussed privacy as fundamental to individual and social freedom, sanity, and growth and emphasized the contribution of privacy to basic human relations such as trust, friendship, and love. *See also* Post, *The Social Foundations of Privacy*, *supra* note 38 (stressing the role that rules of privacy and defamation may have in maintaining the civility which is definitive and constitutive of communities that provide, in turn, an important part of an individual's self-image and self-respect).

69. *See, e.g.*, CARL D. SCHNEIDER, SHAME, EXPOSURE, AND PRIVACY (1977); Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* NOMOS XIII: PRIVACY 1 (John W. Chapman & J. Roland Pennock eds., 1971); James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323 (1975); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26 (1976); Barry Schwartz, *The Social Psychology of Privacy*, 73 AM. J. SOC. 741 (1968). The justifications for privacy may be discussed in either of two ways. One is to specify how invasions of privacy are harmful; the other is to describe the functions of privacy in our life. In many ways the two are similar. Frustrating an important function in our life is often harmful. However, this is not always the case, and the differences may be relevant in the following way: Harm usually refers to a perceived sense of being harmed. The sense of injury may be intense for one person when another would not feel offended and presumably when no acknowledged function of privacy has been

vacy is intimately connected to freedom and autonomy in a variety of ways. In many situations our freedom is not protected by the absence of regulation and its chilling social effect, but by the fact that we enjoy privacy, either in the sense of being alone or intimate with others, to behave in ways that would be unlikely in public. When this behavior is desirable or permissible, privacy acts to enlarge our freedom in an unproblematic way. This may include many types of conduct that require intimacy or spontaneity and provide valuable learning experiences. If we have to think that everything we do is observed and may be publicized, we shall have poorer lives.[70] We also shall have less of a tendency to do the things that we are not sure about, fewer chances to experiment and acquire competence through trial and error, and fewer opportunities to experiment with behaving differently. The losses of these expansions of freedom may be great for both individuals and societies. I doubt that we could have many great pianists if individuals could practice only under the scrutiny of their not-always-sympathetic peers.

Privacy also is helpful for other types of unlikely behavior that are desirable, indeed essential, to our ideal society. An obvious example is the secrecy of the ballot. Ideally, people should have courage in their convictions and be able to vote publicly in the same manner in which they vote privately. But often this will not occur. We prefer the secrecy of the ballot, with its opportunities for abuse and hypocrisy, to simple public accountability.

Democracy, one of the strongest justifications for free speech, is related to privacy in additional ways and is justified by a variety of arguments. Primary among them is the recognition of the importance of human dignity and the wish to encourage autonomous and self-di-

---

frustrated. The wish to protect people against losses of privacy extends to both the perceived sense of harm and privacy's function. We do not want people to suffer human-caused pain unless it is necessary or justified. The more intense the pain, the greater the desire to minimize it. But we also do not want people to be denied important aspects of the good life, even if they are not aware of the contribution of these aspects to their life and of the price that they are paying. The language of functions is more suitable for this approach.

70. My assumption is that we shall always live in a society in which actual or anticipated exposure may cause inhibitions and that many types of conduct which are likely to be inhibited, such as trial and the inevitable error, are desirable and crucial to a full human life. I do not feel the need to address the difficult question of whether, in an ideal world in which publicity creates no stigmatizing, humiliating, or crippling effects, we would still need this function of privacy to expand our freedom. Nor will I address whether publicity is justified to coerce individuals to come out in public in order to fight unjustified stigmas, such as forcing the disclosure of rape victims' names to fight the belief that rape happens only to those who provoke it and that there is something shameful about being raped. In any event, even if all these arguments suggest that some functions of privacy may be undesirable, functions exist that are unaffected by these theories.

recting individuals who will actively participate in decisions affecting the life of their communities. These are the individuals for whose benefit we want to have a free press so that they will share in the commitment to participate in public affairs on the basis of intelligent and informed decisions. But autonomy, a sense of self-worth, and a willingness to respect oneself and others include respect for the distinctness of individuals and for their wishes concerning their own lives. People are unlikely to develop a tendency to exercise autonomous judgments in an environment that does not allow for privacy. Furthermore, democracy scholars are quick to note that freedom of speech must be complemented by freedom of association and that associations should be protected against coerced disclosure of their membership and of their private meetings. The privacy of associations is seen as the road to participation in public life. Denial of that privacy will be a threat to public life, not an enhancement of its accountability.[71]

It therefore is striking to see many judges and commentators that are critical of privacy so willing to discount these functions of privacy by suggesting that the primary function of privacy in people's lives is either the wish to effectively deceive others[72] or some hypersensitive and inexplicable aversion to publicity, with the loss of privacy causing no serious harm to either individuals or society.[73] Under this approach there will be very little willingness to sacrifice any free speech in favor of privacy.

B. Inapplicability of Some General Free Speech Concerns

When one tries to resolve the tension between two values, it is helpful in the first-order resolution to identify the scope of the conflict before seeking the resolution. The fact that there are many ways to protect privacy against threats that do not involve publication enforces

---

71. The Supreme Court conceded this important point in NAACP v. Alabama, 377 U.S. 288 (1964). For the importance of private associations and the need to protect them even against claims of inequality, see Roberts v. United States Jaycees, 468 U.S. 609 (1984).

72. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978). I do not claim that no one has ever invoked privacy to deceive. Posner's analysis illuminated the situations in which individuals have attempted to hide information that may affect the behavior of others towards them. However, two points need to be made. First, a wish to hide information is not always unjustified or deceptive. For example, when employers hire employees based in part on irrelevant information such as sexual orientation, it might be reasonable not to require disclosure of this information and, accordingly, not to regard a misleading answer as undesirable deception. Second, there are important situations in which the invocation of privacy has nothing to do with the wish to avoid a negative reaction from others.

73. *See* Zimmerman, *supra* note 37, at 367.

the argument that privacy should give way when it conflicts with free speech.[74] On the other hand, there are types of speech whose protection typically serves purposes that cannot be promoted by an invasion of an individual's privacy. For these types of speech the conflict between the two values does not exist on the first-order analysis. In free speech analysis, however, we often find a tendency to assume that all speech performs all the many functions of free speech, so that any limitation on any speech endangers all these functions. This approach may create a serious bias in favor of speech.[75]

One illustration of this is the typical argument supporting free speech that a free marketplace of ideas will facilitate reaching the truth and holding one's opinions in a nondogmatic way. Obviously, this particular rationale cannot support the many privacy-invading statements that do not concern ideas or attempt to explain truth. To recall, the interest that is protected is an interest in not being discussed at all, not an interest in being known in an accurate way. Nonetheless, Zimmerman spends many pages and great energy to argue that false privacy-invading statements should not be repressed because of this argument. What we need, instead, is an argument that explains why publicly seeking the truth about, for example, the love life of individuals, is something morality, law, or the First Amendment should protect.[76]

---

74. *See, e.g.*, Emerson, *supra* note 51, at 332-33; Zimmerman, *supra* note 37, at 382. If it is possible to protect privacy adequately without imposing legal liability on speech, this should indeed be the preferred position.

75. Again, the point is structural and goes both ways. On one hand, it may lead to a valid argument for extending the protection of speech. On the other, it may work to limit the protection. For example, many shops install closed-circuit televisions that monitor the shop, including changing rooms, to fight and discourage shoplifting. Indignant customers may claim that this is an invasion of their privacy. The shop will claim justification through self-interest. It would be misleading to support the customers' claims for privacy by arguing that customers face the loss of their capacity for learning, intimacy, spontaneity, or growth. Some violations of privacy, like constant surveillance, may indeed have these undesirable effects. However, known cameras in places that are not designed to be areas of creativity, learning, or growth do not. Thus, some strong arguments for the importance of privacy are inapplicable to this particular instance of its loss.

76. As indicated above, this paper does not undertake this analysis. However, the lines along which the analysis must proceed will include the harmfulness of types of disclosures and the relevance of such disclosures to legitimate social needs. The need to make informed political decisions is a legitimate social need. Knowing about possibilities, life-styles, and ways of dealing with difficulties and predicaments are extremely important. In some of these cases there may not be a need to identify the individuals concerned. In others volunteers may provide all the information that we may need to have. There always will be the questions of whether the decision should be made by the individual concerned or by the media and whether the individual should have at least some control over the way such disclosures are made. One area of controversy in which legisla-

Of the four types of justification often adduced in favor of free speech—creativity and self-expression, truth, democracy and accountability, and stability and peaceful change[77]—the first usually can be protected almost completely without an invasion of privacy. Many privacy-invasion situations do not involve any worthy pursuit of the truth. Many of them involve no issues of relevance to democracy or to politics, even when these terms are taken in their broadest meanings. Most are unrelated to stability and peaceful political change.[78] So, even if we are willing to resolve all hard cases in favor of free speech, there will be quite a number of issues in which any first-order balancing will suggest that privacy should be victorious.[79]

C. First- and Second-Order Arguments

Many arguments suggest that there are invasions of privacy that are not justified by free speech concerns, but that, nonetheless, it would be a bad policy to protect them by a general rule. In general, if the number and frequency of cases in which privacy should override is small, if it is difficult to identify those cases, and if a rule for ad-hoc calculus is likely to be abused, we may be better off with a clear rule that protects all truthful publication, so as not to endanger free

---

tors often adopt a proprivacy stance is the disclosure of the identity of rape victims. It is clear why the disclosure may be extremely painful. If part of the problem with rape is that it is perceived as shameful and a cause for guilt and if society wants to fight this image of rape, is it not good to have women feel free to say that they were raped? Furthermore, should we not help them recognize this by paternalistically forcing them? My intuition is that the answer is no, but this particular answer does not affect my general discussion.

77. For a classic treatment, see THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 1-15 (1966).

78. *See, e.g.*, Neff v. Time, Inc., 406 F. Supp. 858 (W.D. Pa. 1976). In *Neff* the plaintiff's picture was taken while he was participating in a noisy support of some football team. His group was interested in the publicity and willingly posed for the picture. However, the plaintiff was not aware that his trouser zipper was open. His picture was singled out for publication, causing him understandable embarrassment and humiliation. None of the classic first-order justifications of speech apply.

79. The same considerations apply to private defamation when the publicity concerns matters that are of no relevance to political questions, taken in a broad interpretation of the term. The size of this group will clearly be controversial. I confess to being biased in favor of privacy. I do not see why the public has a right to know that *X*, who grew up in her community as the daughter of *B*, was in fact the biological daughter of *A*, who had left her years ago in *B*'s custody. For a case with these facts that denied recovery, see Hall v. Post, 372 S.E.2d 711 (N.C. 1988); *see also supra* note 45 and accompanying text. Similarly, I do not think that Johnny Carson's love-life is a legitimate subject for a press article, despite the fact that he is a public figure. *But see* Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976). For a discussion of other complexities, see *supra* note 44.

speech.[80]

I think that none of the three conditions are met here,[81] but this is not my main point. If the argument against privacy is a second-order argument, and to some extent it is, this should affect our general approach to the subject. We cannot dismiss the plight of victims of invasions as the result of hypersensitivity or a lack of appreciation for the virtues of free speech. These are people who are required by us to pay a heavy price for our need to tolerate the press's freedom to publish unjustified invasions of privacy so that it will have the power to continue and do what we must have it do: publish what we have a right and a need to know. These victims are entitled to our sympathy and to our apology. We should see their pain as the inevitable cost, which we should try to minimize if we can, of living in society and human error. Because there is no way of amending the injury, publishers should be more willing to apologize and grant the victim vindication, even if they fight against regarding the publication as unjustified. I am sure that I do not need to document the claim that this is not done.[82] I shall re-

---

80. A first-order analysis is the right decision of a particular case, taking all its features into account, that is made within the moral and meta-moral framework adopted by the decisionmaker. A second-order analysis is the move from the decision of a case to the decision of a type of case by a rule. Second-order arguments have to do with the features of the situation that is involved in the creation and the application of the rule, expectations about the ease and clarity of the directive, and the identity of the decisionmakers under various arrangements. They are not secondary or less important. Indeed, in many circumstances they dictate an answer quite different from the one suggested by first-order arguments. The distinction may be made in many ways. *See, e.g.*, JOSEPH RAZ, PRACTICAL REASON AND NORMS (1975); FREDERICK SCHAUER, PLAYING BY THE RULES (1991); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

81. As I indicated above, I think the harmfulness of invasions of privacy may be great and that occasions of unjustified invasions of privacy are not infrequent or insubstantial. I further think that, even if cases of doubt are resolved in favor of free speech, some invasions of privacy will be easily identified as unjustified. Finally, with some attention the dangers of abuse can be minimized. Besides, we cannot argue in favor of abolishing the legal remedy for invasion of privacy based on the present behavior of the press. We cannot know the extent to which blatant invasions are in fact deterred by this law. I am confident that nothing of great value has been lost because the press was chilled by the privacy tort. The dangers of the chilling effect may be reduced by attending to the distinction between liability and remedy, which is an avenue pursued in the context of defamation law reform. If the media create an atmosphere in which the imposition of liability for invasion of privacy is of sufficient deterrent effect, I see no reason against seriously limiting the kinds of compensatory remedies available to privacy plaintiffs. On the other hand, actual litigation costs should be afforded as an incentive to prelitigation settlements. Finally, it might be interesting to analyze in some detail the changes in the norms of the press toward more disclosure that cannot be related to changes in legal norms. It appears as if the real constraints and chilling effects are generated by press norms rather than by the law.

82. Good examples are the details about the positions taken by defendants in cases such as Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Ct. App. 1983); Huskey v.

turn to this point below.

D. Morality and Legality

As explained above, a second-order justification for the permissibility of publication is very different, morally speaking, from a first-order justification of this publication. The same applies, with greater strength, to the move between the conclusion that some publications which invade privacy may be morally unjustified, on the combined first- and second-order level, and to the judgment that such invasions of privacy should be legally actionable.[83]

Some moral objectionability may be a necessary condition for legal remedy, but it is not a sufficient condition for it. Legal constraints, institutional considerations, and reluctance to have the government and its machinery determine when publications should be censored may sever the tie between immorality and illegality.[84] Consequently, the absence of a legal remedy may attest to the perceived legitimacy and justifiability of conduct, even its desirability. It may, however, simply signify that, despite the immorality of some conduct, a legal remedy is not considered proper. Legally, at least in a narrow sense, no difference exists between the case in which the defendant's behavior is immoral but legal and the case in which it is both justifiable and legal. Plaintiffs should lose in both. But the law will fail in fulfilling its social tasks if it does not reflect the difference between these two situations and guide defendants away from those types of conduct that may be legal, but that are immoral and undesirable.[85] Analysts of the law will

---

NBC, Inc., 632 F. Supp. 1282 (N.D. Ill. 1986) (mem.); and Florida Star v. B.J.F., 491 U.S. 524 (1989). The media consistently argued against finding anything wrong with publication. In *Florida Star* the newspaper claimed that publication was fine despite the fact that it conceded that publication was both against explicit law and against its own policies. For similar complaints against the tone and the approach of the media in cases of private defamation, see Ronald H. Surkin, *The Status of the Private Figure's Right to Protect His Reputation Under the United States Constitution*, 90 DICK. L. REV. 667 (1986).

83. Some arguments against actionability may look a lot like second-order arguments about moral permissibility, especially those concerning the identity of possible decisionmakers and their likely biases. Indeed, these may be arguments applicable at both stages. But only the legal system brings into the question the special institutionalized features of law and the special role of government.

84. In fact, in the area of free speech we explicitly grant legal protection to a variety of immoral speech. Again, constraints of time do not permit me to argue in detail why I agree with Warren and Brandeis that these arguments, although they have some force, do not conclusively establish that a legal remedy for some invasions of privacy by publication should not be recognized.

85. I am aware that this is a controversial description of the tasks of law. The point is clearly beyond the bounds of this paper, but I am willing to defend this conception of

fail if they do not unpack the legal bottom line to uncover the types of considerations that motivated and required the decision.

E. The Benefits of the Warren and Brandeis Analysis

In their seminal article Warren and Brandeis did not exhibit a full appreciation of the important functions of publicity: the satisfaction of curiosity and the need to give people information about life-styles and relations. Additionally, they espoused an unduly restrictive notion of "legitimate public interest."[86] Similarly, they made too quick a move from their conclusion that privacy is important and its violation undesirable to legal remedies. In this they acted as advocates, not as academics. Also, they created an invitation to the American legal community to experiment with legal protection of privacy. Experimentation, elaboration, and discussion do improve their proposal.

Their approach nonetheless is basically sound: they kept in mind the importance of both privacy and free speech and sought to find a proper balance between them. They erred in underestimating the benefits of free speech and publicity, but to a much lesser extent than commentators who lose sight of the importance of privacy. They conceded that in cases of doubt, speech should win. They accepted a threshold requirement. They even recognized some second-order arguments in favor of free speech. The most important, and enduring, part of their analysis, however, is their taking the harmfulness of invasion of privacy seriously. They linked privacy to personhood, freedom, and dignity. They identified the dangers that lack of privacy may create.

Because of the difficulty of answering the substantive question whether the invasion of privacy in a particular case is justified, who is entrusted with the decisionmaking power becomes extremely important. Warren and Brandeis's article reminds us that the media, which

---

law against the conception that resolving disputes according to law and indicating what is and is not legal exhausts law's task. I believe that the law participates—not uniquely, but importantly because of its visibility and its monopoly over state force—in validating society's values. Much of the rhetoric of judicial opinions, and the uses made of them in politics and in civics education, makes sense only if the role of the law goes beyond these narrow, though central and important, tasks. It is not clear whether and how the law could achieve the complex goal of affirming the legality of speech while indicating that it was unjustified. Maybe the dissent in *Florida Star*, and the approach of judges such as the one who decided in favor of the press in *Neff* while criticizing its conduct, have the desired effect: the press is not held liable, but the court provides cues that the conduct is deemed undesirable. However, such conduct may have the opposite impact: the condemnation is registered, but the message is clear that the press may proceed to act by its own lights, knowing that it can do so with impunity.

86. Nonetheless, their formulations, which are careful and full of ambiguous key terms, could well serve as a general guideline to the proper resolution of the conflict.

have this power in the absence of norms, are not simply a disinterested defender of an ideal of free speech. The ultimate question might be who should decide what should be regarded as offensive, unethical, and maybe illegal. Zimmerman explicitly acknowledged that her critique means that the decisionmakers are going to be the press itself.[87] Warren and Brandeis said that there is a sense of legitimate public interest distinct from what the public is in fact interested in and that the press itself is unlikely to be able to identify this interest well. They prefer the judges, not the victims. Nor do they prefer the violators who generate the threat and benefit from its materialization.[88]

Not all journalists publish gossip. There are many people in the mass media who are seriously trying to strike a good and sensitive balance between privacy and speech.[89] The present state of the law, however, does not encourage them or identify them as the model. The present state of the law tells the press that they have the right to publish, that they do not have to apologize, and that they do not have to take care—all because we cannot afford to risk their independence. It is true that we cannot afford to risk the independence of the press. Nevertheless, we should avoid thinking that a serious loss of privacy is not something to be lamented, condemned, and educated against. What is interesting about the *Lost Honor of Katharina Blum*[90] is not so much the journalist's behavior, but the way in which his colleagues saw him as a victim of free speech. Warren and Brandeis reminded us, especially the press, that combined with the press's effect on freedom, protest, and democracy, the press participates, even if it does not mean to, in a process of leveling and standardization, thus creating mores that might themselves be inhibitive.

This effect can be achieved in a number of ways, all very familiar

---

87. Zimmerman, *supra* note 2, at 353-55.

88. I prefer Warren and Brandeis's idea that it is possible to identify legitimate public interest on normative grounds and that this idea should not be reduced to the community's notions of decency. *See* Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185 (1979). I grant that the choice between these two is not simple. *See* Post, *The Social Foundations of Privacy*, *supra* note 38, at 977 (analyzing privacy in terms of civility and noting that it is not clear whether these standards stem from the community as it is, or from some idealized sense of the community). For my purposes here, however, this would not make much of a difference, as long as we do not say that the best judges of what the community thinks should be published are the media.

89. In Florida Star v. B.J.F., 491 U.S. 524, 528 (1989), the newspaper defended its identification of a rape victim, but readily conceded that the publication was a mistaken departure from its own voluntary guidelines.

90. HEINRICH BOLL, LOST HONOR OF KATHARINA BLUM: HOW VIOLENCE DEVELOPS & WHERE IT CAN LEAD (Leila Vennewitz trans., 1975).

to observers of the media. The first is the fate of voluntary public figures. The position in American law and journalistic ethics is that any person who willingly runs for office, or joins into a debate or issue in which the public has a legitimate interest, does not have a right to keep anything about their lives private.[91] Because it is probably possible to unearth some embarrassing facts about anyone, many individuals may decide to avoid becoming public figures. Therefore, a pattern of investigation and disclosure may seriously limit the life plans of worthy individuals and cost society its more explorative and inventive potential leaders. The leaders are then likely to be individuals who have never tried anything nonconformist or extraordinary, who never challenged accepted norms, and who never made mistakes. A related but distinct point is the fact that significant media exposure is humiliating, one-dimensional, and offensive even if it is accurate and sympathetic.[92] Thus, people may shun publicity even if they have no skeletons in their closets. A society in which public disclosure of this sort is the norm is one in which leaders and readers alike are accustomed to reading about persons and lives under the inevitable constraints of mass media. The motive may be nobler and more complex than gossip mongering, but the effect is nonetheless perverting and belittling.

Against this background Warren and Brandeis's call can be reformulated to be a call that the press itself will accept that it cannot be the judge of its own social adequacy. Because the press is always very articulate in demanding that no one else should be their own investigators and judges, can it sincerely claim to be the only exception to this beneficial rule?

V. EPILOGUE

This paper was originally written in October 1990. Soon after it was delivered, the public debate about the disclosure of rape victims' names became intense because of the controversy surrounding the decision to publish the name and details about the woman accusing William Kennedy Smith of rape. While I was preparing this paper for publication, I joined millions of people in watching the drama of the Clarence Thomas-Anita Hill hearings. Privacy and publicity clearly

91. The fact that they do not have a right to privacy does not necessarily mean that they inevitably lose all privacy. What the press actually publishes is governed by complex norms, including the press's sense of decency. It is true that the press knows many embarrassing private facts about many public figures that would not ordinarily be published. However, when these private facts are published, the victim usually has no legal recourse. They often have no social recourse or vindication either.

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

were issues. Thomas made moving comments about the fact that the loss of privacy involved for him was too much for any job, including that of a Supreme Court Justice. Feminist commentators spoke of the hearings as a victory for the claims that what happens between an employer and employee in the workplace is not entitled to be private and that sexual harassment has stopped being a private matter between powerful employers and submissive or apprehensive employees. Yet others felt that, although the hearings were clearly powerful material, they should have been conducted *in camera* and not covered live and brought to the homes of all those interested in watching and hearing. In fact, some viewers probably were not really interested, but merely could not bring themselves to get away from it. Part of the anger about the adequacy of the proceedings in the Senate Committee was because the Committee did not conduct private inquiries to determine the issue of Hill's credibility. Yet others felt that the Committee could not have been trusted with the job and that the secrecy would have invited abuse. They therefore argued for a public hearing despite the losses of privacy involved.[93]

Clearly, the question here is not one of legal liability. No one has suggested imposing it.[94] But I think that the hearings can teach us things about privacy, publicity, and their costs.

First, the pain of the loss of privacy to an individual, even if the loss is justified, may be immense. Similarly, the consequences to the individual's career and to the country's leadership may be substantial.[95] Second, even if there is legitimate public interest in denying public office to a person who behaves unacceptably, there may be different degrees of losses of privacy involved in different routes.[96] Third, the procedure may send complex signals about the adequacy of investigating into a candidate's behavior through statements of friends, inti-

93. The hearing could have been made public in a different manner. For example, it could have been public but not broadcast live, as are many court hearings. This kind of limited publicity would have allowed some public accountability without bringing the actual pictures, voices, and details into the living rooms of all Americans.

94. There may be a question of legal liability for leaks. Leaks are related to privacy in direct ways. In this case they may have triggered the process that led to the publicity. However, legal liability for leaks is different from liability for publication itself.

95. The American people know quite a number of candidates for office who have lost, at least in large part, because of a disclosure of facts from their private lives. These include presidential candidate Gary Hart for an extra-marital affair and Supreme Court candidate Douglas Ginsburg for smoking marijuana.

96. Ginsburg's withdrawal involved less of a loss of privacy than the procedure Thomas went through. However, this raises a series of issues. Do we want to encourage withdrawals like Ginsburg's? This may entail less of a loss of privacy, but encourage more low-visibility withdrawals. Such withdrawals may be undesirable because they may be based on taking into account facts that are not really relevant to the job in question.

mates, or employees.[97] Fourth, the hearings exposed a fascinating debate about the boundaries between private and public life. Sexual harassment is a criminal offense. Almost by definition committing sexual harassment, especially by the head of the agency designed to protect its victims, is a matter of legitimate public concern.[98] One is not entitled to keep the fact that one behaves in this way private. However, besides clear cases of blatant sexual harassment, there may be many harassment cases in which the facts may be interpreted in different ways. In at least some of them, a tribunal may decide that no sexual harassment took place and that it was a matter of bad taste, not harassment.[99] Thus, investigating and trying the charges may involve substantial losses of privacy in intimate relationships, irrespective of the conclusion of the process. With the loss of privacy, or the fear of loss of privacy, may come losses in the spontaneity and freedom of intimate relationships.[100]

But, whatever emerges on the privacy aspects of these hearings, it should be clear that they were important and central. We should not encourage a framework of discussion in which these aspects tend to be lost or belittled. All may have been better off if this affair had been handled differently.

---

97. In Thomas's case those who wanted to hurt his nomination by the disclosure failed. Therefore, one possible interpretation is that facts of this sort are not relevant and should not be examined. I believe that this is an unlikely reading of the process. Many believe that the information was unearthed too late in the confirmation process. If it had been unearthed before the political fight over the nomination was finished, the course of events might have been different. This case may lead to more intensive investigations at earlier stages of the process.

98. One may argue that if there is a controversy about whether the behavior is undesirable or illegal, as is the case concerning consensual homosexual relationships between adults, illegality per se does not create a legitimate public interest. Additionally, one may argue that if a long time has elapsed since the alleged behavior, the interest in letting individuals put their past behind them is larger than exposing their past mistakes. The case against disclosure may become stronger if the two factors operate together as, some argue, in Ginsburg's case.

99. The actual hearings did not directly raise this issue because the hearings turned exclusively on credibility. Thomas conceded that the behavior Hill described would amount to sexual harassment. The hearings did raise the issue indirectly through the disclosure of details about Thomas's interactions that would have been viewed as private absent the allegations.

100. In some circumstances this may justify not seeing sexual harassment as an offense. However, in a culture that is committed to seeing such harassment as a serious social wrong, this conclusion is unacceptable, although it is not clear that the Clarence Thomas-Anita Hill hearings are very encouraging to individuals who wish to come forward and complain about sexual harassment. A way must be found to discourage harassment and encourage women not to tolerate it without sacrificing too much in both the quality of work relations and in the freedom and intimacy crucial for developing personal relationships.