Right to Privacy: Social Interest and Legal Right

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Note

Right to Privacy: Social Interest and Legal Right

I. INTRODUCTION

Prior to the late nineteenth century an individual's privacy was protected by means of legal fictions derived from the laws of property, contracts, and defamation, although there was no independent recognition of a tort action protecting one's right to be let alone. The subsequent rise of questionable commercial, governmental, and social practices, coupled with advances in modern technology, however, led some jurisdictions to provide legal protection of an individual's right to privacy apart from other legal interests. Because these encroachments on what has been termed "the most comprehensive of rights and the right most valued by civilized men" are certain to continue and become more serious, the purposes of this Note are to explain the nature of the social interest requiring legal protection, to determine whether existing law concerning privacy provides adequate protection for this interest, and to suggest an approach


2. For illustrations of the advances made with respect to electronic bugging devices and other such equipment, see, e.g., Jones, How To Be Alone, Science Digest, April, 1966, p. 20; (bug proof conference room); Neary, The Big Snoop, Life, May 20, 1966, p. 38.


Packard has offered the following hypothetical family situation as indicative of the status of privacy at the present time. The mother, while trying on a dress in a department store, is watched by a hidden close circuit T.V. installed by the store to prevent shoplifting. The father, while attending a business meeting, is being evaluated by a company spy planted in the meeting by the president. At the same time he is himself investigating the credit condition of others, and within a few hours he will have records showing their life histories, former employments, residences, family background, and very complete estimates of their past, present, and future financial status. Their son, at this time, is being given a polygraph and personality inventory test as a prerequisite for employment. The results will reveal to a stranger information of which he himself was not even conscious. These same prospective employers have already interviewed his associates and teachers concerning his political opinions. Finally, their daughter, a sophomore in high school, is completing a 250 item questionnaire which will analyze her family and sexual adjustment, to allow the school better to understand her. Id. at 3-4.

which will protect and promote this underlying social interest more effectively.  

II. THE RIGHT TO PRIVACY AS A SOCIAL INTEREST

An individual's wish for privacy is generally recognized to be a legitimate social interest.  However, since this social value has not lent itself to meaningful or precise definition, courts, legislators, and commentators have failed to fully comprehend the ends which the invasion of privacy tort should attempt to serve. Thus, before there can be an effective body of tort law to protect privacy, the social interest which underlies social respect for individual privacy must be clearly understood.

The basis underlying the right of privacy is a recognition of the concept of man's individuality and human dignity. As summarized by Professor Bloustein:

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. . . . Such a being, although sentient, is fungible; he is not an individual.

The conception of man embodied in our tradition and incorporated in the constitution stands at odds to such human fungibility. And our law of privacy attempts to preserve individuality by placing sanctions upon outrageous or unreasonable violations of the conditions of its sustenance.

5. The purely psychological, social, and political aspects of the privacy concept will not be considered, except as they may bear on the tort of invasion of privacy. For a consideration of these nonlegal aspects, see generally Arndt, The Human Condition (1958); Hoffer, The True Believer: Thoughts on the Nature of Mass Movements (1951); Orwell, 1984 (1949).

Further, this Note will not deal primarily with the constitutional right of privacy. For information regarding the constitutional aspects of privacy, see The Supreme Court Term, 79 Harv. L. Rev. 56, 162 (1965); Symposium, 64 Mich. L. Rev. 197 (1965).


7. It has been said that the right of privacy is: "More subjective even than 'liberty' and 'justice,' [and] the 'privacy' idea overlaps both, and even turns back on itself to create internal contradictions . . . ." Dixon, The Griswold Penumbra: Constitutional Charters for an Expanded Law of Privacy? 64 Mich. L. Rev. 197 (1965).

8. The Greeks viewed privacy as inconsistent with their theory of active participation in the community. In contrast, it seems no society has placed more importance upon privacy than American frontier society of the nineteenth century. Id. at 202-05. See generally Sabine, A History of Political Theory (rev. ed. 1950); Konvitz, Privacy and the Law: A Philosophical Prelude, 31 Law & Contemp. Prob. 272 (1966).

Aside from fostering human dignity, this approach improves and advances society by encouraging creativity and differentiation which prevents stagnation though uniformity.

Since the potential for intrusions upon an individual's privacy has rapidly multiplied, a denial of adequate legal protection for this independent right must be construed as an invitation for others to intrude even more "with complete immunity, and without regard to the hurt done to the sensibilities of the individuals whose private affairs might be exploited." Therefore, to best advance these complementary social values—the protection of individual dignity, and social improvement and advancement—the law should effectively safeguard an individual's privacy. Recognizing that, as a practical matter, only the hermit living totally outside the bounds of society can exercise an unqualified right to be let alone, the demands of our present society necessarily must encroach to some degree upon the desires for privacy held by its members. The problem thus becomes one of harmonizing this legitimate right to privacy with competing interests of other individuals and of society. Ultimately, the balance must depend upon whether privacy, as a social interest, is considered an "intrinsic" or "derivative" right. If privacy is an intrinsic right—a basic right in itself, akin to a natural right requiring no utilitarian justification—it must be given greater respect than a right which is viewed as merely derivative—remaining after all other interests have been satisfied. It is submitted that the intrinsic view of the social interest regarding privacy is more consistent with the "totality of the constitutional scheme under which we live."11

III. THE EARLY HISTORY OF THE LEGAL RIGHT OF PRIVACY

Some legal commentators have viewed the invasion of privacy tort as having originated in an early article authored by Samuel D. Warren and Louis D. Brandeis.12 While it may be

true that prior to the Warren-Brandeis article no jurisdiction in England or this country expressly provided for an independent cause of action protecting one's privacy, a number of early cases, understandable only in terms of judicial conservatism, utilized recognized legal principles as fictions in protecting privacy.\textsuperscript{13} Most commonly employed for this purpose were concepts derived from property, contracts, and defamation.

In \textit{Prince Albert v. Strange}\textsuperscript{14} the plaintiff was granted an injunction to prevent unauthorized reproduction of etchings made solely for his private enjoyment. While the decision spoke in terms of literary or artistic property, primary emphasis was placed upon a broader right—the right of privacy.\textsuperscript{15} The social interest involved was the plaintiff's privacy manifested in seclusion of thought and work, which is distinguishable from those interests normally involved in copyright and property law. To protect the latter, the law attempts to secure the profits derived from an unauthorized publication, while to protect the former, the law attempts to prevent unwarranted interference in private matters. The landmark decision of \textit{Roberson v. Rochester Folding Box Co.},\textsuperscript{16} which denied relief under facts indistinguishable from the \textit{Prince Albert} case, failed to recognize this distinction. Because the court became entangled in property concepts, it failed to grasp the interest of privacy which \textit{Prince Albert} actually served.\textsuperscript{17}

Other courts have protected privacy by straining the concepts of implied contracts or trusts. In \textit{Pollard v. Photographic
the defendant, who was authorized to take the plaintiff's picture, was ordered not to exhibit or sell it without the express consent of the plaintiff, except as provided by the express or implied terms of the underlying employment agreement. In spite of the court's reasoning, the result was to protect the plaintiff's privacy, whereas a contrary rule would have resulted in intolerable abuses and surreptitious appropriations of that privacy. This legal fiction, however, is workable only if there is an agreement to which a court can engraft a term or if there is an appropriate relationship to support such a trust. Obviously, since modern methods of invading privacy can avoid creating any direct relationship whatsoever with an aggrieved party, this approach is at best a haphazard way to protect privacy.

In Byron v. Johnson, the plaintiff successfully enjoined circulation by the defendant of an inferior poem falsely attributed to his pen. Since the defendant's acts were clearly damaging to his artistic reputation, the plaintiff probably had an action for libel. This case illustrates how many courts were able to protect an individual's privacy simply by ignoring the legal distinctions between two separate interests—that of reputation and that of privacy—and were able to conclude that they were granting relief from defamatory conduct, while actually vindicating the right to privacy.

In 1881, the first important American decision, De May v. Roberts, held that a person lacking a legitimate purpose or interest who intrudes into another's privacy, such as at childbirth, is legally liable for a violation of an independent right of privacy. The Michigan court, without reference to the law of property, contracts, or defamation, concluded:

It would be shocking to our sense of right, justice and propri-

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19. The court seemingly relied upon the conclusion that the defendant's conduct constituted a breach of an implied term of the contract and a breach of trust.
20. The Roberson court was of the opinion that Pollard was not valid precedent, despite language in that opinion that the existence of property was immaterial to the issue of granting the injunction. There is, however, no clear justification given for this rejection outside of misplaced reliance upon the legal fictions found in the Pollard opinion. 171 N.Y. 538, 548, 64 N.E. 442, 444 (1902).
22. "The fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation." Themo v. New England Newspaper Publishing Co., 306 Mass. 54, 57, 27 N.E.2d 753, 755 (1940).
ety to doubt even but that for such an act the law would afford
an ample remedy. To the plaintiff the occasion was a most
sacred one and no one had a right to intrude unless invited or
because of some real and pressing necessity... The plaintiff
had a legal right to privacy...  

This decision's value is limited, since the Warren-Brandeis arti-
icle's extensive review of the common law origins of this right
made no mention of it, and the same jurisdiction failed to men-
tion De May in a later decision which denied an independent
right of privacy.

By 1890, because numerous sociological and technological
changes had taken place, an individual was no longer able to
protect his privacy without legal support. The resulting moment-
num for a right of privacy motivated the Warren-Brandeis article.
At first, their theories met with little favor from either com-
mentators or courts, as is most clearly illustrated by the
right's evolution in New York, the first jurisdiction to consider
seriously the right of privacy as an independent cause of action.

New York's lower courts had frequently allowed such an
action, but in Roberson the court of appeals rejected the plain-
tiff's contention that unauthorized use of her likeness on the
defendant's product constituted an actionable invasion of pri-
vacy. The majority of a closely divided court reasoned that
such a tort action could not be recognized because of the subjec-

24. Id. at 165, 9 N.W. at 148-49.
(1899), the court apparently reversed its position and expressly denied
the existence of a separate tort to protect the right of privacy. Argua-
bly, the two cases are distinguishable. In Atkinson the court held that
the facts did not constitute an unreasonable intrusion, for the defendant
had merely exhibited a nondefamatory picture of the plaintiff, while in De May the invasion was so objectionable that relief was compelled.
Moreover, in the latter case no other legal relief was available, while
in the former, the court was of the view that the laws of defamation
were adequate to provide a remedy if one were necessary.

L.J. 137 (1931); O'Brien, The Right of Privacy, 2 Colum. L. Rev. 437
(1929).
28. The first known decision recognizing a separate right to privacy
was an unrecorded trial judge's opinion, Manola v. Stevens, N.Y. Sup.
Ct. 1890, reported in the N.Y. Times, June 15, 1890, p. 1, N.Y. Times,
June 21, 1890, p. 2. For recorded opinions, see, e.g., Schuyler v. Curtis,
147 N.Y. 434, 42 N.E. 22 (1895); Marks v. Jaffa, 6 Misc. 290, 26 N.Y.
29. This four to three split created such controversy that one of
the concurring justices felt compelled to take the unprecedented action
of publishing a law review article in defense of the decision. O'Brien,
supra note 26.
tive nature of the alleged injury, the fear of opening "the flood-gates of litigation," the difficulty of distinguishing between public and private persons and subjects, and the desire not to infringe upon the conflicting interest of free expression.

In a well reasoned dissent, Justice Gray expanded the Warren-Brandeis thesis, concluding that "the individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own." Inherent in the dissent was the idea that the plaintiff had been wronged, and that only separate recognition of the right of privacy could provide adequate relief, since the legal fictions employed in the past could not be extended to cover the facts then before the court. Thus, the Roberson situation was distinguishable from the common law cases on the very grounds which compelled the De May court to grant relief—the inability of recognized legal concepts to be stretched to grant adequate relief in privacy cases. Finally, despite the absence of direct precedent and legal commentary supporting its position, the minority recognized that as the progress of civilization creates new conditions and problems, principles of natural justice are necessarily manifested as new principles of the common law.

The New York legislature quickly reacted to the social interest left unprotected by the Roberson decision. It recognized the right of privacy by making it both a tort and a misdemeanor to take another's name or likeness without authorization for "advertising purposes, or for the purposes of trade..." Despite the apparent narrowness of the statutes, the New York courts have been willing to liberally construe them to handle privacy

30. 171 N.Y. 538, 557, 64 N.E. 442, 448 (1902).
31. Id. at 561, 64 N.E. at 449.
32. The dissent seemed to recognize that no definition of defamation would cover the facts there involved. Neither was there any basis for creating a contract. The court might have argued that the defendant had been benefited, at least negatively, in that he did not have to pay a model to pose. The problem with this approach is that it may not adequately compensate for the injury incurred. Therefore, the situation was that, while there existed a violation of the plaintiff's right of privacy, without express recognition of this right no remedy could be granted.
33. Id. at 561, 64 N.E. at 449.
problems as they arise. Three years after Roberson, the Georgia Supreme Court, in Pavesich v. New England Life Ins. Co., was presented with essentially the same facts. The Pavesich court, influenced by the Warren-Brandeis theory, the strong dissent from Roberson, a reading of the common law cases suggested by the proponents of the right of privacy, and most importantly, a consideration of the social interest needing legal protection, gave independent recognition to an individual's "right to be let alone."

The general trend until the 1930's, however, was marked by a refusal to recognize the invasion of privacy tort. Since that time, over three-fifths of the American jurisdictions have recognized the right to privacy as an interest to be protected by an independent tort action, either judicially or by statute. Presently, only four jurisdictions have yet to take a position on this question, while only four have clearly opposed recognition of this independent right.

IV. PRESENT APPROACHES TO THE RIGHT OF PRIVACY TORT

The Warren-Brandeis article was the first definitive inquiry into the nature of the interest in privacy and the first attempt to define the invasion of privacy tort. Numerous legal com-

36. 122 Ga. 190, 50 S.E. 68 (1905) (defendants unauthorizedly used plaintiff's name and likeness in advertisements).
37. After discussing the judicial conservatism which had been obstructing the recognition of this right, the court concluded:
   The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer . . . cannot be over-estimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writing upon the law can be called to demonstrate its nonexistence as a legal right.
   Id. at 213, 50 S.E. at 78.
38. See notes 26-27 supra.
39. For a complete compilation of those states which have expressly recognized the tort in some form, see Prosser, Torts § 112 (3d ed. 1964).
40. Ibid.
41. Ibid.
42. Ibid. These courts take a position very similar to the Roberson court and hold that any change in the common law must come from the legislature. E.g., Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).
43. Cooley, supra note 1, had considered the right to be let alone, but for all intents and purposes this article was the beginning.
mentators and courts have since attempted to clarify and improve upon this statement. Three basic approaches, clearly illustrated in articles by Dean William Prosser, Professor Fredrick Davis, and Professor Edward Bloustein, have been advanced to guide the courts and legislatures in this area.

A. THE PROSSER APPROACH

Dean Prosser's analysis is presently the most widely accepted, as evidenced by the fact that in the past decade nearly every reported case involving issues concerning privacy has alluded to this conception of the right to privacy, and that it will most likely be adopted by the American Law Institute in the second edition of the Restatement of Torts.

It is Prosser's position that the right of privacy does not involve a single tort, but rather a collection of four distinct invasions of three independent interests having little in common beyond an alleged interference with the right of privacy. The four distinct invasions involve:

1. Intrusions upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.

44. For example, thirteen articles concerning some facet of this right were published in legal periodicals between September, 1964 and August, 1965. See INDEX TO LEGAL PERIODICALS (1965).

45. Prosser, Privacy, 48 CALIF. L. REV. 383 (1960). This article was substantially incorporated into the most recent edition of his hornbook, PROSSER, op. cit. supra note 39. See also Wade, Defamation and the Right of Privacy, 15 VAND. L. REV. 1093 (1962).

46. Davis, supra note 11; see Kalvin, supra note 11; Seavey, Can Texas Courts Protect Newly Discovered Interests? 31 TEXAS L. REV. 308 (1953).

47. Bloustein, supra note 9. See also 1 HARPER & JAMES, TORTS 677-86 (1956).


49. Support for this contention is found in the fact that Prosser is the reporter for this restatement, and Dean Wade, an ardent supporter of the Prosser position, is one of the advisers. Moreover, Wade has publicly stated:

[T]here is every reason to expect that when the second edition of the RESTATEMENT OF TORTS is completed and adopted by the American Law Institute, [Dean Prosser's] analysis will be substituted for the rather generalized treatment now to be found in section 867.

16 VA. L. WEEKLY DICTA COMP. 8 (1964).
(4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.\(^{50}\)

The interests protected by these separate torts are inconsistent and irreconcilable, having nothing in common except being included under the same title. The first category protects freedom from mental distress;\(^{51}\) the second and third protect reputation;\(^{52}\) and the last protects a proprietary interest in one's name or likeness.\(^{53}\)

Rather than advancing the theory of an independent right of privacy, it would appear that Prosser's approach merely recognizes the existence of new means to commit the already existing torts of mental distress, defamation, and misappropriation. If this is true, there would be no need for the independent tort of invasion of privacy, since either there is no separate interest needing such protection, or if a separate interest does exist, it can be adequately protected within these other principles.

Such a position was expressly denied in the Warren-Brandeis article which concluded that violation of one's privacy was a separate, independent wrong beyond mere mental distress or economic loss; it was a legal *injuria*—an act wrongful in itself.\(^{54}\) Therefore, while a particular invasion of privacy may well result in injury to one's reputation, cause mental distress, or deprive one of some economic opportunity, each effect constitutes only an aggravation of the invasion. The injury is actually to the individual's dignity or "inviolate personality." Thus, Prosser's categories merely manifest different consequences that may result from the initial injury. Since Prosser is apparently convinced there should be a separate right, his formulation may be explained as simply a failure to articulate the underlying interest.

Most important, if the intrinsic interest underlying the right of privacy were not recognized and Prosser's approach were accepted, the result would be an inability to reconcile privacy as a tort concept with the concept found in other legal contexts. Arguably, the interest served by the constitutional right to privacy recognized in *Griswold v. Connecticut*\(^{55}\) or *Boyd v. United States*\(^{56}\) should be consistent with and reflect that of the right

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51. *Id.* at 392, 422.
52. *Id.* at 398, 401, 422-23.
53. *Id.* at 406, 423.
54. Warren-Brandeis at 197-98, 213.
55. 381 U.S. 479 (1965).
56. 116 U.S. 616 (1886).
of privacy in tort cases. Given Prosser's emphasis, this consistency cannot be achieved, since the underlying interests are different—the former right protects the "sanctity of a man's home and the privacy of life,"\(^5\) while the latter protects economic security, reputation, or mental stability. The same result occurs when Prosser's analysis is compared with statutes and common law rules involving the privacy concept.\(^5\) Therefore, the primary weakness in Prosser's approach is that while it recognizes that the right to privacy exists, it fails to understand, or at least to verbalize, the underlying social interest requiring legal protection—the protection of each individual's dignity. Thus, since it does not free the interest served by privacy from the shackles of law designed to serve entirely different ends, Prosser's approach leaves the tort of invasion of privacy "still that of a haystack in a hurricane. . . ."\(^6\)

**B. The Davis Approach**

Professor Davis concludes that however useful in a sociological sense the concept of privacy may be, it need not exist independently as a legal concept, since the social interest can best be protected by increased recognition of mental suffering and/or expropriation of personality or property.\(^6\) The proponents of this approach are, in effect, reemphasizing the rationale of the Roberson decision accepted in those jurisdictions rejecting the tort of invasion of privacy.\(^6\) This approach proceeds under the rationale that the right is too vague and too subjective to create an adequate basis for relief. The right to privacy is seen as merely a derivative interest resulting only from the protection of another more basic interest.\(^6\) As Davis concluded,

Indeed, one can logically argue that the concept of a right to privacy was never required in the first place, and that its whole history is an illustration of how well-meaning but impatient academicians can upset the normal development of the law by

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57. Id. at 630.
58. See notes 68–78 infra and accompanying text.
60. Davis, supra note 11, at 18–20. Davis reasoned:
The usefulness of the "right to privacy" as a jural concept can be more easily calculated if "privacy" is recognized as a condition or state achieved when other more elementary interests are safeguarded . . . . In other words, "privacy" is an interest or condition which derives from and is automatically secured by the protection of more cognizable rights.

Id. at 18.
61. See note 42 supra.
62. See note 60 supra.
pushing it too hard.\textsuperscript{63}

Thus, according to Davis, the right of privacy becomes little more than a sociological goal like the "pursuit of happiness." This approach also suggests that greater clarity will come only when courts cease to gather diverse and explicit torts under this nonlegal concept without articulating the actual legal basis for establishing the legal interests to be balanced or adjusted.

This analysis, even more than Prosser's, fails to realize that the common law concepts of defamation or property served only as legal fictions to enable courts to grant relief for invasions of privacy, an interest which now demands separate recognition. Moreover, Davis' definition of the social interest assumes that privacy is not an intrinsic right. It is for this reason that the Davis approach cannot be reconciled with the concept of privacy as it is understood in nontort contexts; like Prosser's approach, it attempts to focus upon and protect substantially different interests. However, the feature of Davis' position which is subject to the greatest criticism and which clearly distinguishes it from Prosser's view is its total denial of a legal right to privacy, a position which should not be maintained in light of increasing pressures upon privacy.

C. The Bloustein Approach

In answer to Prosser, Professor Bloustein\textsuperscript{64} has taken the position that in privacy cases "the injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered."\textsuperscript{65} Based upon this premise, the invasion of privacy becomes more than merely a new way to commit an old tort; it becomes a separate and independent tort action created to protect the individual's "right to be let alone." This right is an intrinsic interest involving more than property or reputation and more than a form of mental trauma; it is the attempted preservation of individual dignity. As a result, whether the personal information is true, is made public, or has economic value becomes immaterial.

This approach is consistent with both the underlying social interest and the Warren-Brandeis attempt to provide needed legal protection. As Bloustein perceptively indicates,\textsuperscript{66} this view al-

\textsuperscript{63} Davis, supra note 11, at 23.
\textsuperscript{64} Bloustein, supra note 9.
\textsuperscript{65} Id. at 1003.
\textsuperscript{66} Id. at 993-1000.
lows the reconciliation of constitutional law cases such as Griswold° or Silverman v. United States,° where an eavesdropping device used to monitor private conversations was condemned, with other invasions of privacy as found in Melvin v. Reid,° where unnecessary and unreasonable use of the plaintiff's identity in a motion picture gave rise to liability. While it is true that intrusions in the former cases involved state action, and the intrusions in the latter involved conduct of private parties, the underlying wrong in both situations was identical—the transgression of a right to privacy emanating "from the totality of the constitutional scheme under which we live."°

Some jurisdictions have accepted this position and have held state constitutional provisions similar to the fourth amendment applicable to actions of private persons.° Thus, recognition of the right to privacy by the law of torts forms a penumbra or zone of privacy, parallel to the constitutional right to privacy, which protects an individual from unreasonable invasions of his privacy by other individuals.° In Griswold, the Supreme Court recognized that the ninth amendment prevents government from unreasonably invading a citizen's retained right of privacy. As long as the interest lies in securing and protecting rights retained by individual citizens, there is no reason why individuals in the community should be able to infringe upon others' rights where the government cannot. In fact, greater justification can be found for governmental interference, at least where the ultimate beneficiary is society as a whole.

This common underlying interest in privacy can also be seen in a number of state and federal statutes, ranging from

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67. 381 U.S. 479 (1965).
69. 112 Cal. App. 285, 297 Pac. 91 (Dist. Ct. App. 1931). Nearly every privacy case could be used just as easily to illustrate this point, since they all may be understood in terms of the identical social interest involved.
72. Support for this proposition may be drawn from the ninth amendment which provides that certain rights are retained by the individual citizens. Arguably, the basic right of privacy is among these retained rights in light of Griswold.
"peeping tom" statutes to the Internal Revenue Code. Each of these statutes evidences a desire to protect against degradation of the individual and his privacy, irrespective of who may be the intruding party. Many expressly provide civil as well as criminal remedies, thereby enlarging the scope of the interest. Even where both are not expressly provided, courts often have created civil remedies by using the criminal violation to define the civil wrong. This engrafting of civil remedies upon criminal statutes illustrates that the right to privacy warrants and requires protection in many forms—civil and criminal—but the purpose in each situation is to give adequate legal protection to the underlying social interest. Both the statutes and the common law tort, in order to serve this end, provide against intrusions and disclosures, the alternative forms of injury to the social interest, thereby "making a man secure in his person, not only against prying eyes and ears, but against the despair of being the subject of public scrutiny and knowledge."

V. A PROPOSED STANDARD FOR THE INVASION OF PRIVACY TORT

From Bloustein's acute analysis of the nature of the interest demanding legal protection—the "inviolable personality" apart from any consequential injury to reputation, property or mental state—it follows that the primary focus should be placed upon what an individual may expect to keep private. Thus, it is sub-


77. See, e.g., Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960), aff'd, 365 U.S. 455 (1961); McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939). These jurisdictions apparently apply a negligence per se standard.

78. Bloustein, supra note 75, at 1000,
mitted that the general standard in any inquiry must be whether a particular invasion is unwarranted or unreasonable to a man of ordinary sensibilities.\textsuperscript{79}

This concept of privacy, just as negligence or due process, is not necessarily impaired because of the inherent vagueness as to its identity or limits. Instead, by the employment of these "general terms with an open textured meaning . . ."\textsuperscript{80} the judicial process is provided with a much needed flexibility whereby courts may recognize and protect the social interest with respect to the particular facts presented in light of changing attitudes.\textsuperscript{81}

Whether an intrusion is unwarranted or unreasonable in this context will, to a large extent, depend upon the conduct of the complaining party, as well as that of the defendant. If, for example, consent is given by the plaintiff to an intrusion into his privacy, he should be precluded from complaining.\textsuperscript{82} Consent may be manifested expressly\textsuperscript{83} or by implication from knowledge\textsuperscript{84} or conduct.\textsuperscript{85} Thus, where a person has voluntarily sought public exposure, he should be deemed to have consented to the invasion of his privacy.\textsuperscript{86} Once consent is manifested, it may be revoked at any time prior to the invasion if given gratuitously;\textsuperscript{87} if given for a consideration, it ought to be irre-
vocable. If, however, the actual invasion exceeds the boundaries of the consent given, the consent should only mitigate damages, not preclude liability.

Clearly, not every threat to privacy in the absence of express or implied consent should be actionable; interaction with others is inevitable and unavoidable in our crowded communities. Thus, while any individual remains a member of society, his right to privacy must be determined by balancing his expectations and desires with conflicting social interests. The most frequent and important competing interest is the right of free expression. As pointed out in Barber v. Time, Inc., the right of privacy is not inconsistent with freedom of expression but only limits its abuse. Therefore, the difficulty lies in determining when legitimate public curiosity becomes unscrupulous and unwarranted.

Consistent with the purpose of the constitutional guarantees of free speech and press, "the widest possible dissemination of information from diverse and antagonistic sources," courts have been hesitant to find the news media liable for violating an individual's privacy. The most recent example is Time, Inc. v. Hill, where the Supreme Court held:

that the constitutional protections for speech and press preclude the application of [the right of privacy] ... to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The thrust of the opinion was that to place sanctions against less than calculated falsehoods would discourage the press from

89. See Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956); Colgate-Palmolive Co. v. Tullos, 219 F.2d 617 (5th Cir. 1955).
90. This is especially true because of the subjective nature of this tort; the over-sensitive must expect and accept social interaction. One court stated the rationale, concluding that "persons living in organized communities must suffer some damage, annoyance, and inconvenience from each other. For these they are compensated by all the advantages of civilized society." Campbell v. Seaman, 63 N.Y. 568, 577 (1876). See also 4 ELLIOTs DEBATES ON THE FEDERAL CONSTITUTION 571 (1876).
92. 348 Mo. 1199, 159 S.W.2d 291 (1942).
95. 87 Sup. Ct. 534 (1967).
96. Id. at 542.
fulfilling its social responsibilities.\textsuperscript{97}

Justice Fortas' dissent,\textsuperscript{98} while recognizing the importance of the first amendment concluded:

> Difficulty presents itself because \ldots [privacy laws] \ldots may impinge upon conflicting rights of those accused of invading the privacy of others. But this is not automatically a fatal objection. Particularly where the right of privacy is invaded by words—by the press or in a book or pamphlet—the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required.\textsuperscript{99}

It is submitted that Fortas' position is the more accurate view of the necessary balance. In the \textit{Hill} case, the appellee and his family had been held hostage for nineteen hours by three escaped convicts. The family was treated courteously and released unharmed. Following this experience, the Hills attempted to avoid publicity and wanted only to return to their normal way of life. The following year, a novel, \textit{The Desperate Hours}, depicting a family being held hostage was published. Unlike the Hills' experience, the family was molested, insulted, and humiliated by the escaped convicts. Three years later, the novel was made into a play under the same title. At this point, \textit{Life} magazine published an article concerning the play, clearly implying that the Hill family's experience and the play were one and the same.\textsuperscript{100}

Thus, when the assertions of free speech go beyond the purposes this right is to serve,\textsuperscript{101} it no longer should operate as a limiting factor upon the right of privacy. Even where matters of public interest exist—events which are part of the history of the community\textsuperscript{102}—it should not be necessary to disclose private

\textsuperscript{97} Id. at 542-43.
\textsuperscript{98} Id. at 554. He was joined by Chief Justice Warren and Justice Clark.
\textsuperscript{99} Id. at 556.
\textsuperscript{100} This case arose under the New York privacy statute, which arguably is not really a privacy statute at all. See \textit{Oma v. Hillman Periodicals, Inc.}, 281 App. Div. 240, 118 N.Y.S.2d 720 (1953); Koussevitzky v. Allen, Towne & Health, Inc., 188 Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct.), \textit{aff'd}, 272 App. Div. 759, 69 N.Y.S.2d 432 (1947) (right to publicity). Nonetheless, the facts do illustrate a prime example for the proposition that the right to privacy may exist even where first amendment guarantees are involved.
\textsuperscript{101} See, e.g., \textit{Smith v. Doss}, 251 Ala. 250, 253, 37 So. 2d 118, 121 (1948).
\textsuperscript{102} See, e.g., \textit{Norman v. City of Las Vegas}, 64 Nev. 38, 177 P.2d 442 (1947); \textit{McGovern v. Van Riper}, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945) (pre-trial release of plaintiff's prints to rogues' galleries unnecessary invasion).
matters prematurely, to have them left in the public domain any longer than is reasonably required, or to disclose any more information than is reasonably necessary. Rather, to justify disclosure, some logical and reasonable connection between the plaintiff and a matter coming within the meaning of public interest ought to be established, and such exposure should be deemed legitimate only "until [the plaintiff has] ... reverted to the lawful and unexciting life led by the great bulk of the community . . . ."

Other courts have held that the process which underlies the first amendment may take many forms other than pure news reporting, such as publicizing entertainment and amusement, crimes, marriage, and other matters of questionable value but wide popular appeal. The rationale of this view is the fear of judicial censorship over what the public may read. The wisdom of extending constitutional protection to these areas in light of the social interest herein defined seems questionable. A better approach would be to attempt to balance these competing interests on a case by case basis.

This problem of competing interests which may limit the right of privacy has recently come into issue with respect to certain business and governmental practices which endanger the

107. RESTATEMENT, TORTS § 867, comment c (1939).
individual’s dignity by the accumulation, and often the unauthorized exposure, of personal information. The basic objections found in this area are that:

First, information out of a personal data file may be disclosed to an improper person. Second, such information may be false, or incomplete, or disclosed in a misleading way, so that its recipient receives a mistaken impression of the subject of the file.

Probably the most typical illustration of this increasing problem is the credit investigation most businesses conduct regarding customers seeking credit. Other examples are the use of polygraphs and personality profile tests as a prerequisite to employment or college admittance. While the individual, at least implicitly, consents to these intrusions, the issue becomes again a matter of determining where to draw the line between relevant information necessary to satisfy commercial, governmental, or social interests and irrelevant data. Since the inquiring party in all such situations has an advantageous bargaining position, due to the leverage he can exert, an individual’s privacy can be exposed to numerous abuses. Accordingly, the party with this leverage must not be allowed to justify his conduct solely in terms of consent.

Apart from the initial intrusion, the more serious danger is the possibility of improper disclosure. The information given in one context is easily retainable through the use of microfilm or computer tapes, and common practice seems to permit easy exchange of this information among business and governmental agencies. Perhaps it is in this context that the dangers are the greatest, and legal protection is most necessary.

Unlike the constitutionally protected freedom of expression, business and social interests do not appear as compelling when balanced against the right to privacy. There is here no con-


111. Karst, supra note 110, at 343.

112. Id. at 371-76. Karst considers the problems inherent in consumer credit investigation files in detail.

113. Id. at 342-43.

stitutional guarantee with which privacy must be balanced. Instead, the basic right of privacy derived from constitutional principles must be balanced against interests lacking this status. In this light, an understanding of privacy compels stronger sanctions to be placed against business and some governmental invasions.

Thus, under this approach, liability for invasions of privacy ought to be established, irrespective of the intruding party's intent or negligence. "The invasion . . . is equally complete and equally injurious, whether the motives . . . are . . . culpable or not." Therefore intent is immaterial. Given the primary emphasis upon an individual's expectations, the sole consideration should be whether the conduct in fact amounted to a violation of privacy.

Procedurally, flexibility should be applied. The suggested rules placing the burden of proof illustrate this goal. Initially, the claiming party should only be required to establish that the defendant's behavior constituted an invasion of his privacy. The burden of proof ought then to shift to the defendant to justify his conduct in terms of consent or some counter balancing social interest. Ultimately, the question will be one of fact, but by the above procedure, the intruder must show the reasonableness of his invasion.

While the right of privacy requires no new remedies, courts should realize that one of the purposes of this tort action is to vindicate the "inviolate personality," not merely to compensate personal injuries. In this respect a wider use of injunctions may prove a very effective means of controlling both invasions and disclosures of one's privacy, without raising the more difficult questions of damages. Punitive damages should be available where the defendant's conduct evidences malice with respect to the intrusion. Finally, in recognizing that an independent interest, which is also found in defamation or some other tort, is being threatened, there is little reason why a recovery for one precludes recovery for the others.

clearly illustrated by a type of commercial news found not to be within the first amendment's protection.

115. Warren-Brandeis at 218.

116. Id. at 218-19. Further, given the recognized underlying interest and ever increasing pressure being exerted upon that interest, there is little reason to concern oneself with issues of fault or intent.

VI. CONCLUSION

An understanding of the interest underlying the right of privacy shows that to provide adequate legal protection for this interest, recognition of a separate tort is necessary. Moreover, such recognition will allow other theories of law previously relied upon to protect this interest to develop more consistently with the ends with which they are primarily concerned. Nowhere is this more clearly illustrated than in the relationship defamation has had to the evolution of the invasion of privacy tort. Although it has been suggested that the right of privacy is merely an extension of defamation, designed to avoid its engrafted difficulties, ultimately "swallowing up and engulfing the whole law of public defamation," it is apparent that two separate social interests are involved.

Further, an attempt has been made to set out the general standards and terms which ought to be incorporated into the tort law of privacy, in order to keep pace with changing social conditions and attitudes. Many of the rules and procedures employed by various courts and advanced by commentators will be able to be carried over to this suggested clarification, subject to two requirements: that they be consistent with the underlying social interest; and that they be flexible enough to grow with the expanding concept they are to serve.

Thus, while the interest appears to have characteristics similar to other protected legal interests, it must be understood that "each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty." With this concept in mind, the courts may be able to avoid and cure the internal contradictions which have plagued the acceptance, extension, and understanding of each person’s right to privacy.

119. The problem so far has been that many of these appropriate procedures or rules are inaccurately applied because of failure to grasp the right involved. With a proper understanding of these already established rules, in addition to those suggested herein, an orderly solution of this aspect of the problem should be readily available.