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Privacy and the News Media

Stephen Cooper¹

The right of the public to know and the right of the individual to be let alone are inherently in conflict. The origins of these rights are quite different: the former derived from the First Amendment's protection of a free press, the latter in a law journal article published in the late nineteenth century. So, too, has the development of these ideas followed different paths: the former as Constitutional law, the latter as tort law. His article examines the relationship between privacy law and the press. A century ago two lawyers called for legal relief from aggressive newspaper reporters. At the present time, the development of electronic media, and struggles over group identities have given privacy concerns a new life and new urgency.

It has been a little more than a hundred years since Samuel D. Warren and Louis D. Brandeis (1890) published an essay titled "The Right To Privacy" in the *Harvard Law Review*. The story of the privacy tort weaves together social, economic, political, and technical forces in our society. We might mark the milestones in our idea of privacy in this way:

- from a fact of frontier life in the early United States,
- to an endangered luxury of urban culture,
- to the advocacy of two young Boston lawyers,
- to the gradual common law recognition of tort actions,
- to the Supreme Court's elevation of the idea to Constitutional status,
- to privacy's continuing evolution in response to social changes and electronic media.

By the present time our legal idea of privacy has broadened so far as to include sexual practices and family planning. This paper restricts its focus to the relationship of privacy and the news media. There is still a lot of ground to travel in the plot originally surveyed by Warren and Brandeis in 1890.

Historical and Cultural Antecedents

The complexities of privacy are for the most part our modern or postmodern inventions. Geographic or spatial isolation long served as both the enforcer, when desired, and cause of privacy. Earlier times offered ready access to seclusion in the form of physical isolation from fellow humans. While the idea of privacy as individual autonomy has taken some time to evolve in European political and religious institutions, privacy as solitude was simply a part of ordinary life (Hixson, 1987).

The nineteenth century expansion of urban centers changed the nature of privacy. Physical isolation was not as easy to come by in the cities as in the countryside; domiciles were close together and the sources of possible intrusion, intentional or inadvertent, greater in number. Solitude, a given in rural America, was a luxury in the city. The decrease in physical space

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accompanied, and likely helped cause, a lack of "information privacy"; the rise of the Penny

Press and the popularization of the news ushered in the prying newspaper reporter (Dickens-Garcia, 1989, p. 198 ff.).

While in Colonial America the house had been the place where family members came together and thus shared intimacy (Hixson, 1987), the home in Industrial America became a barrier against the inhospitable outside world, and the sanctuary of a person's privacy. No longer a readily available state of being, privacy became linked to the home as a territorial object (Levine, 1980).

Warren and Brandeis saw invasive print journalists, "overstepping in every direction the obvious bounds of propriety and of decency" (1890, p. 196), as a social problem requiring response. The journalistic excesses of the time called for legal protection of individual citizens.

It is an interesting footnote that there is evidence to show that it was the reach of the press into social affairs in private homes that prompted Warren and Brandeis (Hixson, 1987; Pember, 1972). While the passage of time has given their article something of a patina of egalitarianism, Pember notes caustically that it was "essentially a rich man's plea to the press to stop its gossiping and snooping, not an argument for an improvement of general journalistic standards" (1972, p. 23).

The Origin of the Tort of Privacy

The tort of privacy is the response of our legal system, over time, to the Warren and Brandeis essay, "The Right To Privacy" (1890). Just as common law adapted in the past to other social changes, Warren and Brandeis advocated a recognized right of privacy, necessitated by contemporary changes in social attitudes, journalistic practices, and in communication technology.

Over time the common law gradually broadened its protection against harm to persons and to tangible property, extending finally to intellectual property, the "products and processes of the mind" (Warren & Brandeis, 1890, p. 194). The idea of a right to life broadened from simple protection against battery, to freedom from undue restraint, to "the right to enjoy life,--the right to be let alone" (Warren & Brandeis, 1890, p. 193). Along this path was recognition that the law should protect not just the material aspects of life, but also the emotional, spiritual, and philosophical. As society became more complex, so did the individual's need for retreat and solitude grow greater.

Warren and Brandeis saw developments in photography and journalism as menacing this enjoyment of life. Both in the acquisition of information and the publication of information, new technology and journalistic practices had created a pressing need for a tort of privacy.

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' (Warren & Brandeis, 1890, p. 195)

The contemporary press was out of control, they thought, and exploiting a weakness of the common law for its own commercial gain. To them there was no doubt the public needed protection, and no possibility the press would reform itself: "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" (Warren & Brandeis, 1890, p. 196). Nor was the danger just to individuals, but to the culture itself: "No enthusiasm can flourish, no generous impulse can survive under its blighting

influence" (Warren & Brandeis, 1890, p. 196).

If, then, there was a pressing social need for legal protection of the individual's privacy, was there an existing principle which could support this protection? Because the intrusion was mediated (i.e., published) there was a resemblance to defamation (Warren & Brandeis, 1890, p. 197), but this would require proof of material damages to be actionable, and Warren and Brandeis recognized they were effectively arguing for injury to feelings. Rather, they linked their privacy right to intellectual property rights: "the legal doctrines relating to...the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy" (Warren & Brandeis, 1890, p. 198).

The thread of their argument is this: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others" (Warren & Brandeis, 1890, p. 198). There are strict limits on the degree to which this communication can be forced, even in criminal trials. This right is independent of the medium or form of the expression, and ceases only when the individual chooses to make the expression public (Warren & Brandeis, 1890, p. 199).

Although the courts were at the time in the habit of describing this right as a property right, often invoking breach of contract (Warren & Brandeis, 1890, pp. 207-211), some cases had supported the right even when there was no significant monetary value (Warren & Brandeis, 1890, pp. 201-204). These, Warren and Brandeis held, were in fact examples "of the enforcement of the more general right of the individual to be let alone" (1890, p. 205). The underlying legal principle, therefore, was in reality "that of an inviolate personality" (Warren & Brandeis, 1890, p. 205).

Warren and Brandeis realized that their privacy tort was conceptually in conflict with the public's access to information. They exempted several classes of information from protection: material of public interest (Warren & Brandeis, 1890, p. 214), about voluntary public figures (Warren & Brandeis, 1890, p. 215), on the public record (Warren & Brandeis, 1890, p. 216), oral (rather than printed) speech (Warren & Brandeis, 1890, p. 217), and when there is consent to publication (Warren & Brandeis, 1890, p. 218). For the most part these protected categories were recognized by the courts as the privacy tort developed in the twentieth century.

Development of the Right of Privacy

The privacy tort took hold slowly in case law. There was no specific U.S. Supreme Court action until 1967, but a large number of cases were heard in state courts, gradually developing the tort. Most states have by now recognized privacy as common law. Although Warren and Brandeis asserted that sufficient legal precedent existed in 1890 for a tort of privacy, they nonetheless expressed a desire for criminal penalties (1890, p. 219). Relatively few states, however, have enacted legislation compared to the large number of privacy cases decided at the state level.

Scholarly recognition came in 1960 with Prosser's description of four distinct privacy torts: public disclosure of private facts, appropriation of likeness, intrusion, and false light in the public eye (Prosser, 1960). Recently, Smolla has suggested two more privacy torts the courts may recognize in the future: intentional infliction of emotional distress, and accumulation of public facts (Smolla, 1992, p. 122).

The list of privacy cases is long, and a paper of this scope cannot be complete in its examination, or even its enumeration, of the cases. The following section notes cases and legislation

important to the development of the privacy tort, and identifies the major principles of the tort. Many cases were heard in New York, as that state passed the country's first meaningful privacy statute.

Significant Cases, and Their Legal Principles

Corliss v. E. W. Walker Co. (Pember, 1972, p. 61 ff.) is the first privacy suit decided in a federal court. The First United States Circuit Court in Massachusetts denied on appeal in 1894 a request to restrain publication of a biography of a deceased inventor. Even while noting that the man should properly be considered a public figure, the decision rested on the principle that a right to privacy could not interfere with the free press.

Schuyler v. Curtis (Pember, 1972, p. 59), an 1895 case in New York, concerned a proposed exhibit commemorating a deceased philanthropist. The Schuyler family sought to restrain the exhibit and won in lower court. On appeal, the verdict was reversed on the grounds that an individual's right of privacy dies with the individual.

In 1902 the New York Court of Appeals, in *Roberson v. Rochester Folding Box Co.* (Pember, 1972, p. 64 ff.), denied plaintiff Abigail Roberson relief against a manufacturer which had used her likeness on advertising posters without obtaining permission. The court found that in New York a legal right to privacy did not exist, and therefore no recovery was possible. Public outcry at the perceived injustice of the decision prompted the New York legislature to pass the country's first workable privacy law in 1903. This law was restricted in scope to appropriation of an individual's likeness for commercial purposes.

The first nonstatutory approval of a right to privacy came from the Georgia Supreme Court in 1905 (Hixson, 1987, p. 40 ff.; Pember, 1972, p. 70 ff.). In the case of *Pavesich v. New England Mutual Life Insurance Co.*, the court granted recovery to artist Paolo Pavesich, whose picture had been used without consent in a newspaper advertisement. Unlike the decision in *Roberson*, the Georgia court held that freedom of the press did not bar a right to privacy, and drew a distinction between free expression of ideas and commercial speech.

Defending against a privacy suit by arguing the newsworthiness of the information traces to two cases in the New York Supreme Court, *Moser v. Press Publishing Co.* in 1908 and *Jeffries v. New York Evening Journal Publishing Co.* in 1910 (Pember, 1972, p. 68 ff.). In both cases the plaintiffs argued that using their pictures and names in published news stories constituted a trade purpose since the newspapers were for sale, and thus violated New York's privacy statute. Both cases were denied on the basis that granting damages would make it virtually impossible for the press to bring accounts of daily news to the public.

The boundaries of newsworthiness were further explored in *Binns v. Vitagraph Co.*, decided by the New York Court of Appeals in 1911 (Pember, 1972, pp. 84-85). The plaintiff, a hero in an actual steamship collision, objected to a motion picture reenactment of the incident which used his real name. In this case the court found the fictionalized account of the news story to constitute a trade purpose, and was thus actionable as a violation of privacy.

Could an individual lose the right to privacy involuntarily, by being involved in a newsworthy event? The Kentucky Supreme Court established the involuntary public figure rule in the 1929 case of *Jones v. Herald Post Co.* (Pember, 1972, p. 89 ff.). The plaintiff had been quoted and photographed in a news story of a killing, and argued that since she was not a public figure the newspaper should have obtained her consent before publication. This decision established that a private person may unwillingly become a public figure by being involved in an event of public

interest, and thereby lose some of the right to privacy. The involuntary public figure question would again come up in the 1984 California case of *Sipple v. Chronicle Publishing Co.* (Lance, 1980, pp. 91-92, 106-107; Smolla, 1992, pp. 130-132).

Further clarification of what constitutes a trade purpose came in the 1937 New York Supreme Court case of *Sarat Lahiri v. Daily Mirror* (Pember, 1972, p. 111 ff.) In denying the plaintiff recovery for the newspaper's use of his photograph in an article debunking the "rope trick," the court held the use of the photograph to be news, not a trade purpose. The decision described four rules: a photograph used in an advertisement was actionable, a photograph accompanying fiction was actionable, a photograph connected to news was not actionable, and a photograph connected to a non-fiction article of general interest was not actionable.

The mores test emerged in the 1931 California Court of Appeals case of *Melvin v. Reid* (Freedman, 1987 p. 49; Pember, 1972, p. 96 ff.; Prosser, 1960, pp. 392-393, 396-397). The plaintiff, a reformed prostitute once tried for murder, sought damages for the use of her actual maiden name in a movie based on her life story. While the decision held the events of her life to be public information, relief was granted for two reasons: the plaintiff's name was used, and the purpose of the movie was profit and not to provide the public with useful information. In large measure the decision seemed to be based on sympathy for an individual who had reformed a less than virtuous life, and then been drawn back into the public eye for a crass commercial purpose.

On the other hand, when a person had at one time voluntarily been a public figure, could that individual recover the status of private citizen by deliberately trying to avoid the public eye for a period of time? William James Sidis, a former child prodigy and mathematical genius, sued the *New Yorker* magazine for publishing an article about his adult life as an obscure clerk (Freedman, 1987, pp. 46-47; Hixson, 1987, p. 43 ff.; Pember, 1972, p. 118 ff.; Prosser, 1960, p. 397). In *Sid is v. F-R Publishing Corp.*, decided in 1940, the Second United States Circuit Court denied recovery, holding that public interest in Sidis' life overrode his own desire for seclusion. In contrast to *Melvin v. Reid*, the published information about Sidis was not considered offensive to community mores, and hence Melvin could recover but Sidis could not.

The question of whether coverage of an event of public interest constitutes a trade purpose came up again in the 1952 case of *Gautier v. Pro-Football, Inc.*, this time concerning broadcast television (Pember, 1972, p. 180 ff.). The plaintiff, an animal trainer who performed during the half time activities of a televised football game, argued that the presence of commercial messages showed the broadcast to be a trade purpose. The New York Court of Appeals denied recovery finding that television, just as print, is free to distribute information of public interest despite the inclusion of advertising material.

Television docudramas were first considered in the 1955 case of *Bernstein v. NBC* (Pember, 1972, p. 182 ff.). The Washington DC Federal District Court denied recovery to the plaintiff, whose troubles with the law were the subject of a fictionalized television program. Since the plaintiff's real name was not used in the program and the court judged that the circumstances of the case were still of public interest, the plaintiff's right to privacy was not violated. Subsequent cases reinforced the liability of using, and the wisdom of avoiding, an individual's real name in fictionalized stories.

The United State Supreme Court ruled on a privacy suit for the first time in the 1967 case of *Time, Inc. v. James J. Hill* (Hixson, 1989, p. 495 ff.; Pember, 1972, p. 210 ff.). The Court overturned an award to Hill, who had sued following a *Life* magazine article about a Broadway play based on an incident in which the Hill family had been held hostage. This decision applied the actual malice test of libel, knowing falsity or reckless disregard for truth, to the false light

privacy tort. The 1974 Supreme Court case of *Margaret Mae Cantrell et al. v. Forest City Publishing Co. et al.* (Hixson, 1989, p. 498 ff.) followed this test, in that case finding actual malice on the part of the newspaper.

The Supreme Court affirmed another limitation on the privacy tort in *Cox Broadcasting Corp. et al. v. Martin Cohn*, decided in 1975 (Freedman, 1987, p. 54; Hixson, 1989, p. 500 ff.). In this case the Court reversed a judgment against a television station for broadcasting the name of a rape victim, noting that the information was part of the public record. This decision established a higher priority for the fact of the material's inclusion in public records than for the *mores* test of the offensive quality of the information published.

The Supreme Court addressed the issue of access to information in government databases in *United States Department of Justice v. Reporters Committee for Freedom of the Press* (1989). In this case the FBI had denied a reporter's request under the 1966 Freedom of Information Act (FOIA) for access to the "rap sheet" on Charles Medico. The Court held that disclosure of this information would constitute an invasion of the individual's privacy, noting that the purpose of the FOIA was to allow public access to information about the activities of government agencies, not to data the agencies had accumulated about private citizens.

More recently, the U.S. Court of Appeals for the Second Circuit ruled that the presence of a television crew during a Secret Service raid of an apartment was illegal, and allowed recovery to the residents of the apartment (Sullivan, 1994). Although an agent had invited the crew along to tape for the CBS reality show, *Street Stories*, the court held this to be a violation of the Fourth Amendment's prohibition against unreasonable search and seizure: "Video pictures taken by camera crew constituted a 'seizure' under the meaning of the Fourth Amendment" (*Ayeni v. CBS Inc.*, 1994, p. 363). Further, the court found the videotaping to be a trade purpose, rather than protected newsgathering: "The television crew was present only for proprietary reasons -- i.e., potential profit to the television broadcaster" (*Ayeni v. CBS Inc.*, 1994, p. 364).

Privacy Today, Privacy Tomorrow

In 1960 William Prosser cited a comment that the privacy tort was as orderly as a "haystack in a hurricane" (1960, p. 407). Perhaps since then we have clarified the situation to the level of a nor'easter. By now the right of privacy has undergone considerable development: there is now a considerable body of case law, a few statutes, a number of U.S. Supreme Court decisions, and a piece of federal legislation. Still, the conflict of the individual's right to be let alone and the public's right to know is often heated, and technological development relentlessly pushes the law's ability to adequately respond to contemporary media practices and public concerns (Brenner & Rivers, 1982). In one sense it has been a long journey since the Warren and Brandeis article in 1890; in another, we really have not gone anywhere at all. Prosser (1960, p. 410) describes the privacy tort as the "slow evolution of a compromise" between the Constitutional guarantee of a free press and the common law right to hold the press at bay.

One change is the way we conceive of privacy. In earlier and simpler times privacy was solitude (Hixson, 1987), a consequence of physical isolation. To be private was the natural state, and people sought community with others rather than having it thrust upon them. With the industrial revolution came urbanization, and the loss of physical space. It is not surprising that curiosity about one's fellows grew, nor that the press would fill the demand for information. By the time Warren and Brandeis proposed a legal right to privacy, the desire was for protection from intrusion.

The "right to one's personality" (Warren & Brandeis, 1890, p. 207), for instance, underlies the tort of appropriation via *Pavesich* and the New York privacy statute via *Roberson*. Courts were understandably reluctant to move hastily to a general notion of privacy, but instead extended cautiously the idea of property interests into new ground, that of personality. New York in *Roberson* found the freedom to publish to have absolute priority, and thereby sparked the outcry for protective legislation. Georgia in *Pavesich* drew a distinction between commercial speech and expression of ideas.

So, too, did the limitations of the right to privacy develop along the lines acknowledged by Warren and Brandeis. Publication of information about public figures, of public interest, voluntarily released by private individuals, or on the public record is protected. For example, *Cox Broadcasting* established that the press may publish facts on the public record, even when the information is offensive. The U.S. Supreme Court, however, has given the press more latitude than Warren and Brandeis seem to have wanted. While they had hoped to keep the defenses against a privacy suit distinct from the defenses against libel, *Time v. Hill* borrowed the actual malice test from the libel case of *New York Times v. Sullivan* (Hixson, 1989, pp. 337-339), putting a greater burden of proof on the plaintiff.

Predictably, issues have arisen that Warren and Brandeis did not foresee, and likely could not have foreseen. Without the involuntary public figure rule stated in *Jones v. Herald Post Co.* much newsgathering would simply be impossible. Consequently the question arose how a person might regain private citizen status, having once been a public figure. The *Melvin* and *Sidis* cases gave a complex answer. Time out of the public eye is not sufficient in itself to erase the exposure to scrutiny, or else William James Sidis would have been allowed recovery. Nonetheless, the privilege of publication is not limitless and forever, and Gabrielle Darley Melvin was granted damages given the distasteful (i.e., offensive to contemporary mores) nature of the information about her.

Fictionalization is another issue that might have been difficult to anticipate. In *Bernstein* and *Binns* the courts laid down the cardinal rule for creative use of news stories: do not identify if you alter the story. Fictionalized accounts of news stories, unlike hard news, do indeed constitute trade purposes and are thus less privileged than news; privacy is protected, and liability avoided, by concealing the identities of the people depicted.

Some have expressed concern that the courts have enlarged the scope of the privacy torts too much. Prosser (1960, p. 422) worried that the public disclosure and false light torts have encroached on the area of defamation, but without the "defenses, limitations and safeguards established for the protection of the defendant." The mores test was of particular concern: "the courts, although cautiously and reluctantly, have accepted a power of censorship over what the public may be permitted to read..." (Prosser, 1960, p. 423). Prosser might also have been troubled how readily the U.S. Supreme Court expanded the "penumbra" of privacy into apparently unrelated areas, despite the absence of specific Constitutional reference, in *Griswold v. Connecticut*, *Katz v. U.S.*, and *Roe v. Wade* (Hixson, 1989, p. 510 ff.). Perhaps the actual malice test adopted in *Time, Inc. v. Hill* would reassure him that balance was being restored. On the other hand, the current popularity of tabloid television shows would likely revive the original *raison d'etre* of the privacy torts.

Now, as information is increasingly an electronic commodity, and ever freer of the physical and temporal limitations which previously constrained newsgathering and publication, we are coming to think of privacy as the ability to control information about ourselves (Richards, 1980, p. 136). Electronic information is intrinsically different from earlier media: easier to disseminate,

easier to store and recall, easier to collate and analyze, easier to edit or reuse. Katsh notes that "privacy is dependent on limiting the communication of information and keeping some information separate from other information" (1989, p. 196). Unlike the prying and snooping reporters which so troubled Warren and Brandeis, much of the information collected today by electronic means is revealed voluntarily, although the ultimate receivers of the information are no longer controlled by the individual. The problem may now be more one of encroachment than invasion.

More than a decade ago Levine warned of the danger of "a complex social system which needs information to survive and which is forever expanding the scope and intimacy of data regarded as relevant" (1980, p. 20). The threat is no longer potential, but actual. Piller (1993, p. 127-128) was able to quickly and inexpensively construct profiles of 18 prominent California residents, including "essential financial, legal, marital, and residential histories" (Piller, 1993, p. 128), using only online searches of commercial and government sources, and only legally accessible data.

In many states, motor vehicle agency records can be a rich source of personal data in addition to driving records. In some states, names and addresses are available to match license plate numbers (Hernandez, 1994, p. 19); state laws controlling information in motor vehicle records vary widely (Prime, 1994, p. 40). Journalists have responded to privacy advocates' demands that access to the records be closed, by proposing an "opt-out" option similar to unlisted phone numbers (Hernandez, 1994; Prime, 1994). Marketing firms already make extensive use of transaction generated data, information about consumer interests and preferences created by credit card and "frequent shopper" card purchases (Healey, 1994). Electronic communications and transactions, in which we engage voluntarily, have a capability to generate information about ourselves with which we are not always comfortable, as the debate over caller ID blocking demonstrates (Mitchell & DeCew, 1994; Wald, 1994; Wald 1995).

We can expect such electronic profiles to become easier and less expensive to compile, in absence of legal restrictions. A likely byproduct of greater user-friendliness in computer technology is erosion of the gatekeeper's role: more people will be able to access more data on their own. A likely byproduct of market competition among database services is lower pricing: the financial commitment to such inquiry will be smaller. A likely byproduct of networking is greater convenience: records that had formerly been scattered across many discrete databases will be pooled. The richness of electronic data sources has not escaped the notice of journalists (see, for instance, Abernathy, 1993). As Sussman (1993, p. 70) comments, "the phenomenal increase in the power and connectivity of computers is rapidly eroding whatever de facto protection may have existed."

In response to the proliferation of databases Smolla proposes a new tort of accumulation of public facts (1992, pp. 149-150). While it might be that no one item of data is private, the totality of the information in the database forms "a composite picture of a person's life in which the offensiveness of the whole is worse than the sum of the parts" (Smolla, 1992, p. 149). In plain language, we do not want anyone to know everything about us, even if we have nothing in particular to hide.

We might see this increase in the fluidity of information as the final stage in the devolution of physical space as a safeguard of privacy. When people had greater physical space in which to live, seclusion provided privacy. When news was disseminated via print and gathered by face-to-face reportage, information could still be contained by physical restrictions. Electronic data can be accessed from virtually anywhere, quickly transported virtually anywhere, and are difficult in practice to secure against intrusion.

Electronic media seem to be affecting our social roles themselves. Meyrowitz (1985) has described how electronic media have broken down the integrity of traditionally private areas. The "backstage" regions are increasingly open to public view; public figures adapt by cultivating a "sidestage" or middle region persona, less formal than the traditional "onstage" presence. The public has lately come to expect a less official and more personal view, even of the chief executive of the federal government.

As an example, consider whether today's White House press corps would be willing to keep the secret of President Franklin D. Roosevelt's paralysis. Consider also whether FDR would have appeared in public revealing an abdominal scar, as did Lyndon Johnson, or playing a saxophone, as did Bill Clinton. It may be that public figures will have to endure ever more revealing or embarrassing disclosures. One might question whether information about Judge Kimba Wood's brief stint as a cocktail waitress trainee was relevant to her nomination as Attorney General, yet it became part of public discourse thanks to news reportage (Berke, 1993).

This erosion of privacy may well be due to the ease with which electronic information can transcend limitations of space and time, including limitations on searching prior texts and records. The electronic media break down spatial and temporal barriers that traditionally facilitated the maintenance of private areas of life. At the very least, if we cannot prove causality, we are forced to notice the coincidence of electronic news and the penetration of the public eye into formerly private regions.

There is other evidence that our culture is tending toward more disclosure and less privacy. When news reporters tape their "standups" outdoors, there will often be a number of passers-by vying to get into the shot (Powers, 1980). What a difference from the picture Warren and Brandeis painted of the press hounding reluctant citizens! As Rosenblatt comments, "privacy in our time has not only been invaded; it's been eagerly surrendered" (1993, p. 24). Guests on confessional television shows such as Phil Donahue's and Oprah Winfrey's routinely disclose information that not long ago would have been considered intimate, and most do so with relish. Consider, too, that the disclosure is made not just to the audience of strangers in the television studio, but to the completely anonymous audience of broadcast viewers. One study found that some guests revealed information they themselves considered stigmatizing in the hope of legitimating a social group to which they saw themselves belonging; "any hesitancy about disclosure was outweighed by the perceived benefits to society and to the standing of one's marginalized group" (Priest Dominick, 1994, p. 83). Clearly, these individuals used their television appearances to communicate instrumentally, and were not at all invaded or harassed by the press.

The crucial question, of course, is whether the willing self-disclosures of some members of society ought to condition an expectation of universal renunciation of privacy. Do I *have* to tell Oprah about my sexual habits because others *want* to disclose theirs? Voluntary disclosures, while distasteful to many, are not violations of privacy rights. More troubling, though, is the possibility that in the future it may not be my own choice to disclose or not disclose information I consider to be personal. Taylor (1994), for instance, has questioned whether a legal system based on individual rights can adequately serve the identity and political needs of minority groups in a pluralistic society. Appiah makes the suggestion explicit: "There can be legitimate collective goals whose pursuit will require giving up pure proceduralism" (1994, p. 157).

The practice of "outing," publishing information about an individual's homosexuality without his or her consent, provides a contemporary example. This type of journalism would seem a clear case of the public disclosure of private facts tort described by Prosser (1960). The practice has

been defended on the grounds that public disclosure will over time legitimate homosexuality, and thus the group benefit of outing can outweigh the privacy claims of the individual whose sexuality is involuntarily placed in the public eye (Elwood, 1992, pp. 747-748). McCarthy, for example, holds that "outing can sometimes be justified as a tactic for eliminating enemies, destroying the closet, and asserting gay dignity" (1994, p. 28). At the very least, defenders of outing argue that the right to privacy should not constitute an absolute prohibition against outing, which must be considered on a case-by-case basis: "no general rule against outing can be maintained since outing others may be defensible as one pursues one's own legitimate legal and moral interests" (Chekola, 1994, p. 67). Critics of outing, on the other hand, maintain the primacy of the individual's privacy interests.

When activists out a prominent figure to provide a positive example of homosexual -- so-called "role model" outing -- information about his sexuality is relevant only to the general, sociological issue of the role of gays in society. In such cases, the privacy interest is at its apex while the interest in disclosure is at its nadir (Elwood, 1992, p. 776).

Perhaps the crux of it is whether or when personal information should be deemed newsworthy. Newsworthiness is a classic defense against a privacy suit, but what qualities cause information to become newsworthy in a legal sense? Pember cites three factors: public interest, public figure, public record. "Broadly speaking, when the topic under discussion is of legitimate public interest, or when the subject is a voluntary or involuntary public figure, or when the facts of the story have been taken from the public record" there will be no recovery (1972, p. 162).

But *who* then should have the power to determine what matters are of public interest? If the press is indeed a crucial supplier to a marketplace of ideas in which truth emerges from competition (Emord, 1991, pp. 121-122), we are led to giving the press the latitude to delineate public interest; that "whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness" (Kalven, 1982, p. 89). Prosser says that in fact this is the case: "to a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news" (1960, p. 412). Smolla, too, holds that we must "[defer] to the press's own judgment on the issue" (1992, p. 133), and when there is a conflict between a privacy interest and news interest, "newsworthiness always wins, whether the plaintiff is a public figure or a private figure" (Smolla, 1992, p. 127). Despite some recent decisions against a television show's taping of police raids (Viles, 1994), it would seem the absolutism of *Sidis* has for the most part carried the day over the kinder, gentler *mores* test of *Melvin*. Even though *Cox Broadcasting* affirmed "a zone of privacy surrounding every individual" (cited in Emerson, 1982, p. 99), public scrutiny nonetheless enjoys the benefit of the doubt.

One Last Word...

The free press serves a vital public need, and hence enjoys special protection, under the First Amendment, not provided any other business (Stewart, 1982). The conflict between the public's right to know and the individual's right to be protected from undue public scrutiny cannot be resolved, but only balanced. Much of the difficulty comes from the changes in our expectations of privacy (Emerson, 1982, p. 114).

In a sense, the 1966 Freedom Of Information Act and the 1974 Privacy Act typify our desire to both know everything about everybody yet retain our own mystery. Privacy law is pressured by information technology and the journalism market. An analogous situation existed in the late nineteenth century, and Warren and Brandeis framed the problem well: "recent inventions and business methods call attention to the next step which must be taken for the protection of the person" (1890, p. 195).

What Warren and Brandeis could not have foreseen was the late twentieth century elevation of group identity and group rights, and the resulting retrenchment of personal privacy in situations involving the press. While our privacy law has thus far proved adaptable when stressed by changes in information technology, the challenge posed by the politics of recognition (Taylor, 1994) is far more radical. At bottom, the privacy tort is a recognition of a special kind of property right, that of one's own personality. If we choose to subordinate the individual's privacy right to the group's collective need to legitimize its social identity, we undermine the very rationale for privacy, and indeed the only means of its survival in an electronic age.

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