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## ARTICLES

# The “Inviolate Personality”—Warren and Brandeis After One Hundred Years: Introduction to a Symposium on the Right of Privacy

SHELDON W. HALPERN\*

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.<sup>1</sup>

There is a clear consensus that “[t]he common law right of privacy was conceived in the late nineteenth century by the fertile intellects of Samuel Warren and Louis Brandeis, and was born on the pages of the *Harvard Law Review*”<sup>2</sup> in an article entitled simply *The Right to Privacy*.<sup>3</sup> One hundred years ago, these two young Boston lawyers, protesting against an intrusive press,<sup>4</sup> struck a major chord that

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

2. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 365 (1989).

Warren and Brandeis were convinced that individuals ought to have legal power to control dissemination of information about themselves when that information related to nonpublic aspects of their lives and, consequently, developed a tort theory to protect that selective anonymity.

*Id.* See also Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1581 (1979) (suggesting that Warren and Brandeis, “in the process of searching for [such a common law right], succeeded in inventing it”).

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

4. For a discussion of the background and context of the article, see J.T. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1987) § 1.3; 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); Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979).

continues to reverberate today, with overtones creating complexities that the courts continually struggle to resolve.<sup>5</sup> The profound influence of their article has served not only as a beacon for the legal scholar who hopes for a similar impact<sup>6</sup> but as justification for that American peculiarity, the law review. It "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law."<sup>7</sup> It has been, and remains, a source of considerable scholarly dispute. "Depending upon the biases of the viewer, the article's effect could be said to exemplify the power, the impotence, or even the perniciousness of legal scholarship."<sup>8</sup>

What commands less of a consensus than the genesis of the right of privacy is the characterization of that common law right, both as its progenitors perceived it and as it has come to be understood today. Professor Anita Allen<sup>9</sup> offers this symposium a feminist perspective on both the history of the Warren and Brandeis right—"the brainchild of nineteenth-century men of privilege . . ."<sup>10</sup>—and the modern function of that century old creation. Noting that "one hundred years after the Warren and Brandeis

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5. See, e.g., *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989).

6. As Professor Turkington observed:

The [Warren and Brandeis] article has acquired a special place in the fantasies of those who toil in the dusty basements of law libraries or sit bleary-eyed in front of a computer screen researching and writing with the hope that their efforts will produce insights that will dramatically shape legal history.

Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U.L. REV. 479, 482 (1990).

7. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 384 (1960). The Warren and Brandeis article has been called "that unique law review article which launched a tort." Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 612 (1968) and "that most influential law review article of all," Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

8. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983). Professor Zimmerman was concerned that "[t]he confusion that has attended the effort to create a firm legal contour for the tort merely reflects the inherent difficulty under the first amendment of treating truthful speech as tortious . . ." *Id.* at 293. This concern caused her to ask "Is it possible that the seemingly elegant vessel that Warren and Brandeis set afloat . . . is in fact a leaky ship which should at long last be scuttled?" *Id.* at 294. See also Kalven, *supra* note 7; Posner, *John A. Sibley Lecture: The Right of Privacy*, 12 GA. L. REV. 393 (1978). Cf. Zuckman, *Invasion of Privacy—Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 259-61 (1990).

9. Allen, *How Privacy Got Its Gender*, 10 N. ILL. U.L. REV. 441 (1990).

10. *Id.* at 441.

article, legal discussions of the privacy tort are largely silent about the social reality of gender bias and its impact on privacy law. . . ."<sup>11</sup> Professor Allen urges the courts to "turn self-consciously to the gender factor in privacy tort cases."<sup>12</sup>

Whether considered farsighted revolutionaries or conventional and conservative men of their times,<sup>13</sup> Warren and Brandeis attempted to carve out an interest—viewed by some as a "personality interest"<sup>14</sup> and by others in more proprietary terms<sup>15</sup>—without concomitantly attempting a clear description of that interest.<sup>16</sup> "Privacy" is an elusive concept; the word connotes an array of values, thoughts, and emotions that are enormously difficult to objectify, notwithstanding the fact that each of us, subjectively, can relate to it:

The word "privacy" has taken on so many different meanings and connotations in so many different legal and social contexts that it has largely ceased to convey any single coherent concept. Instant recognition of content is not provided by the "privacy" label. Most people will readily agree that they should have a "right of privacy." But when pressed for a definition, they will give widely varying responses. . . .

It is apparent that the word "privacy" has proven to be a powerful rhetorical battle cry in a plethora of unrelated contexts. . . . Like the emotive word "freedom," "privacy" means so many different things to so many different people that it has lost any precise legal connotation that it might once have had.<sup>17</sup>

The result of this definitional uncertainty has been a multi-levelled confusion. First there is the confusion of homophony: we refer both to the "privacy" *tort* and to the purported *constitutional* "right of privacy"; the former encompasses an individual's claim

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11. *Id.* at 469.

12. *Id.* at 477.

13. *Id.* at 466.

14. *See, e.g.,* S. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS"* 386 (1988).

15. *See, e.g.,* Posner, *supra* note 8; Prosser, *supra* note 7.

16. "Unfortunately, the learned authors were not as successful in describing the interest . . . as in saying what it was not . . ." Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 970 (1964).

17. J.T. MCCARTHY, *supra* note 4, at 1-3, 5-58. "The phrase 'a right of privacy' as used in law has almost as many meanings as Hydra had heads." Zimmerman, *supra* note 2, at 364.

against another who, in exercising an otherwise lawful right, impinges upon that individual, while the latter refers to an individual's rights as against an intrusive government.<sup>18</sup> It has been suggested that, as originally propounded, the personality interest embraced by the Warren and Brandeis tort is centered on individual anonymity with respect to others, as opposed to the constitutional right's concern with citizen autonomy with respect to the government.<sup>19</sup>

For most purposes we make a clear distinction between the tort and the constitutional right.<sup>20</sup> Nevertheless, while on the Supreme Court, and long after publication of his article, Justice Brandeis appeared to favor a synthesis of these disparate aspects of the idea of privacy into a unitary concept, referring to a constitutional "right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>21</sup> Professor Richard Turkington, in his

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18. See generally J.T. MCCARTHY, *supra* note 4, at § 5.7 for a discussion of this "constitutional privacy right." As Professor McCarthy has noted:

Further semantic confusion as to the legal meaning of the word "privacy" is created by the fact that, starting in the 1960s, the United States Supreme Court has used the word "privacy" as a shorthand label for a cluster of fundamental constitutional rights of citizens against various forms of governmental intrusion.

*Id.* at 1-4.

19. Zimmerman, *supra* note 2, at 364-65. Professor Zimmerman stated: In modern constitutional law, privacy may refer to freedom from illegal governmental searches as well as to preservation of individual choice in matters relating to family life or human sexuality. The common thread uniting these forms of constitutional right to privacy is the claim that each citizen has a right of autonomy—a right to decide how to live and to associate with others, free from all but the most carefully limited impingements by governmental authority. . . . For the past century, the common law, too, has identified and attempted to protect interests in privacy. . . . Although schematic in form, their [the Warren and Brandeis] idea of privacy had not so much to do with citizen autonomy as it did with an interest in what might be called selective anonymity. Warren and Brandeis were convinced that individuals ought to have legal power to control dissemination of information about themselves when that information related to nonpublic aspects of their lives and, consequently, developed a tort theory to protect that selective anonymity.

*Id.*

20. See, e.g., J.T. MCCARTHY, *supra* note 4, at § 5.7. Professor McCarthy observes that "such 'Constitutional privacy' in the context of governmental intrusion into private decision making is far afield from 'privacy' in tort law" (*Id.* at 1-4) and concludes "that the only significant thing that the Constitutional right of privacy and the common law right of privacy share is the label." (*Id.* at 5-55).

21. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissent-

symposium article,<sup>22</sup> elaborates upon this linkage between the tort and constitutional privacy rights.<sup>23</sup>

Second, and more significant,<sup>24</sup> is the conceptual disarray over the nature and extent of the *tort* itself, the personality-invasive acts with which Warren and Brandeis principally were concerned. It is in the latter context—understanding and formulating the cause of action that Warren and Brandeis first postulated—that there has been the most heat and the most diffracted light. The controversy is perhaps best exemplified by the distinctive works of Dean William Prosser and Dr. Edward Bloustein.<sup>25</sup>

Prosser attempted to rationalize the body of law that had developed during the first seven decades following publication of the Warren and Brandeis article. Seeking a unifying structure, Prosser created instead in 1960 a quadrupedal right of privacy as he postulated four distinct torts invasive of “privacy,” rather than one tort directed to a single interest.<sup>26</sup> Prosser’s theory of distinctive branches off a common privacy root—the “intrusion,” “embarrass-

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ing). See, e.g., Bloustein, *supra* note 16, at 975-77: “[B]randeis believed, at the time he wrote his dissent [in *Olmstead*], that the fourth amendment was intended to protect the very principle of ‘inviolable personality’ which he had earlier suggested was the principle underlying the common law right to privacy.” *Id.* at 977. See also A. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988) in which Professor Allen attempts to use the idea of an individual’s right to limit “access” as a unifying concept. As Warren and Brandeis had acknowledged, the phrase “the right to be let alone” was first used by Judge Cooley in *COOLEY, TORTS* 29 (2d ed. 1888). See Prosser, *supra* note 7, at 389.

22. Turkington, *supra* note 6.

23. *Id.*

24. Ultimately, the first area of confusion can be dealt with by the use of appropriate, albeit cumbersome, prefatory phrases to distinguish the different privacy rights.

25. Edward Bloustein, who died in December 1989, was, for many years preceding his death, the president of Rutgers, The State University of New Jersey. A 1959 graduate of the Cornell Law School, his legal academic career began at New York University Law School. Although he wrote significant work in the field of privacy during his years on the N.Y.U. faculty, Dr. Bloustein’s scholarly output continued during his long tenure as president of a large state university system and indeed up to the time of his death. Dr. Bloustein was to have been a contributor to this symposium as well as the principal speaker at the Defamation and Privacy Section presentation at the January, 1990 meeting of the Association of American Law Schools.

26. See Prosser, *supra* note 7. Dean Prosser maintained that the right of privacy involves “not one tort, but a complex of four [different] interests . . . tied together by the common name, but otherwise . . . [with] nothing in common.” *Id.* at 389.

ing facts," "false light" and "appropriation" torts<sup>27</sup>—became codified in the Restatement (Second) of Torts.<sup>28</sup>

Dean Prosser's analysis, while concededly "a source of some confusion in the law,"<sup>29</sup> has nevertheless survived, and "his influence on the development of the law of privacy . . . [rivals that of] Warren and Brandeis."<sup>30</sup> One is hard put to find a case touching upon privacy interests that does not go through the obligatory litany of casting the issue in Prosser's terms, even if only then to discard the implications of the distinctions.<sup>31</sup> Dean Prosser's analytic tool certainly has created great conceptual problems.<sup>32</sup> Not the least of the problems relate to the economically and celebrity based "right of publicity," as much judicial analysis has foundered on attempts to reconcile the interests embraced by that right with the "appropriation" leg of Prosser's privacy quadruped.<sup>33</sup> Criticism of the Prosser model, however appro-

27. The separate "torts" are described by Dean Prosser as: "(1) Intrusion upon the plaintiff's seclusion or solitude . . . (2) Public disclosure of embarrassing private facts . . . (3) Publicity which places the plaintiff in a false light . . . (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.* at 389.

28. RESTATEMENT (SECOND) OF TORTS § 652A (1977). Dean Prosser had been the Reporter for that section in the earlier years of the revision process.

29. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983).

30. Bloustein, *supra* note 16, at 964.

31. See Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1210 (1986) ("Dean Prosser's extraordinary effort to articulate and codify the right of privacy has become a straw man, to be raised, analyzed, distinguished, and dismissed.').

32. As then Professor Bloustein observed:

[T]he clear consequence of [Prosser's] view is that Warren and Brandeis were wrong, and their analysis of the tort of privacy is a mistake. . . . If Dean Prosser is correct, there is no "new tort" of invasion of privacy, there are rather only new ways of committing "old torts." And if he is right, the social value or interest we call privacy is not an independent one, but is only a composite of the value our society places on protecting mental tranquility, reputation and intangible forms of property.

Bloustein, *supra* note 16, at 965-66. See S. HALPERN, *supra* note 14, at 386 (1988):

Notwithstanding its appearance in opinions, almost as an obligatory prelude to discussion of "privacy," there is serious doubt as to the utility and validity of the Prosser quadrupedal analysis, particularly when one considers the interests underlying the different causes of action . . . . It is perhaps more useful to consider the "right of privacy" in terms of an individual's interest in anonymity, the personality interest in freedom from exposure.

33. See Halpern, *supra* note 31, at 1205-11.

Commercialization of personality only recently has invaded our daily lives. Courts, not surprisingly, examined early claims for economic injury from

priate and necessary to the development of an independent right of publicity, does not diminish Prosser's achievement in affording substance to a legal complex that was perhaps too ephemeral to permit significant development in the absence of that effort.<sup>34</sup>

The historical "privacy" entanglements of the celebrity's economic interest in the exploitation of personality underlies Professor Dorothy Glancy's study in this symposium.<sup>35</sup> Through the development of the privacy/publicity rights, Professor Glancy links the personality interests of Bette Midler and her much earlier counterpart, Marion Manola. I, and others, incline to the view that the right of publicity, protecting the economic exploitative value of personality, is quite distinct from the Prosser "appropriation" tort or other privacy considerations.<sup>36</sup> However, as Professor Glancy notes, there is "an implicit theoretical background [of privacy doctrine] which helps to explain and to justify why . . . the law ought to recognize and protect this particular form of property."<sup>37</sup>

If one characterizes Prosser's contribution as that of seeking to describe the body of the right of privacy, one may also say that Bloustein sought its soul, and found it in Warren and Brandeis' construct of the "inviolable personality."<sup>38</sup> In 1964, writing directly in

unwanted publicity in the light of societal attitudes associating that publicity with the emotional distress flowing from violation of the right of privacy. Unfortunately, in the current societal context in which commercialization of celebrity is commonplace, the Prosser analysis "does not explain *why* appropriation of personality may be described as the invasion of privacy [citing Frazer, *Appropriation of Personality—A New Tort?*, 99 *LAW Q. REV.* 281, 296 (1983)].

*Id.* at 1210 (footnotes omitted).

34. "That confusion has been rampant in this area is apparent from the cases themselves; to attribute the confusion to the Prosser analysis is an oversimplification, if not churlish." *Id.* (footnotes omitted). As Professor McCarthy has noted, "Prosser defined the terms and even his critics were forced to communicate in the language and categories he proposed." J.T. MCCARTHY, *supra* note 4, at 1-19.

35. Glancy, *Privacy and the Other Miss M*, 10 *N. ILL. U.L. REV.* 401 (1990).

36. *See, e.g.*, Halpern, *supra* note 31, at 1247-55. Indeed, such an approach is not necessarily antithetical to Prosser's conceptualization of privacy. As Professor Kwall has observed, "a careful reading of Prosser's article suggests that had the right of publicity been an established legal doctrine at the time of his writing, he might have been inclined to separate the appropriation tort from the other privacy torts." Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 *U.C.D. L. REV.* 191, 193 (1983) (footnote omitted).

37. Glancy, *supra* note 35, at 440 (footnote omitted).

38. "The principle which protects personal writings and all other personal productions . . . against publication in any form, is in reality not the principle of private property, but that of an inviolable personality." Warren & Brandeis, *supra* note 1, at 205.



response to the Prosser model, Bloustein proposed "a general theory of individual privacy [to] reconcile the divergent strands of legal development."<sup>39</sup> Believing "that the tort cases involving privacy are of one piece and involve a single tort [and] a common thread of principle,"<sup>40</sup> Bloustein found that common thread in "the interest in preserving individual dignity."<sup>41</sup>

Bloustein was concerned that Prosser's analytic dissection elided the underlying and unifying interest that Warren and Brandeis had sought to protect: "[T]he interest protected in each [of Prosser's distinct 'torts'] is the same, it is human dignity and individuality or, in Warren and Brandeis' words, 'inviolable personality.'"<sup>42</sup> Concomitantly, the injury flowing from a violation of the personality "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."<sup>43</sup> Bloustein urged a synthetic, rather than an analytic approach to a right of privacy essential to freedom:

I take the principle of "inviolable personality" to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being. . . . I believe that what provoked Warren and Brandeis to write their article was a fear that a rampant press feeding on the stuff of private life would destroy individual dignity and integrity and emasculate individual freedom and independence. If this is so, Dean Prosser's analysis of privacy stands clearly at odds with "the most influential law review article ever published," one

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39. Bloustein, *supra* note 16, at 963. This theme informed much of Dr. Bloustein's later writing. See, e.g., E.J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* (1979); Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?* 46 *TEX. L. REV.* 611 (1968); Bloustein, *Privacy is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 *GA. L. REV.* 429 (1978).

40. Bloustein, *supra* note 16, at 1000.

41. *Id.* at 986.

42. *Id.* at 991.

If Dean Prosser is correct, there is no "new tort" of invasion of privacy, there are rather only new ways of committing "old torts." And if he is right, the social value or interest we call privacy is not an independent one, but is only a composite of the value our society places on protecting mental tranquility, reputation and intangible forms of property.

*Id.* at 965.

43. *Id.* at 1003.

which gave rise to a "new tort," not merely to a fancy name for "old torts."<sup>44</sup>

It was such a reading of Warren and Brandeis some fifty years earlier that prompted the Georgia Supreme Court to begin the process of judicial recognition of the common law right which that article had urged.<sup>45</sup> With particular reference to the New York Court of Appeals' explicit rejection of such a right a few years earlier,<sup>46</sup> Georgia's Judge Cobb remarked: "So thoroughly satisfied are we that the law recognizes . . . the right of privacy . . . that we venture to predict that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . . ."<sup>47</sup>

It is easy, in a profusion of academic arguments, to trivialize the fundamental values lying at the core of the privacy construct. In making distinctions, however helpful that process is to our better understanding, we must also keep hold of the greater motivating forces.

The words we use to identify and describe basic human values are necessarily vague and ill-defined. Compounded of profound human hopes and longings on the one side and elusive aspects of human psychology and experience on the other, our social goals are more fit to be pronounced by prophets and

44. Bloustein, *supra* note 16, at 970 (footnotes omitted).

45. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

46. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

The court dismissed the Warren and Brandeis argument:

An examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place in our jurisprudence, and . . . the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.

*Id.* at 556, 64 N.E. at 447.

47. *Pavesich*, 122 Ga. at 220, 50 S.E. at 80-81. The New York court's non-recognition gave rise, subsequently, to legislative action creating a statutory right of privacy. See N.Y. CIV. RIGHTS LAW, §§ 50, 51 (McKinney 1976 & Supp. 1986). The Georgia/New York split was reflected in divergent approaches to the right of privacy in other jurisdictions, as some responded judicially and some legislatively; in any event, it now appears that every state recognizes, through common law or by statute, some form of privacy action. See *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 82 (W. Va. 1984). See also J.T. McCARTHY, *supra* note 4, Ch. 6, for a review of the various state responses.

poets than by professors. We are fortunate, then, that some of our judges enjoy a touch of the prophet's vision and the poet's tongue. . . . [T]he law's vocabulary of mind is exceedingly limited [but] Justice Brandeis and Judge Cobb help us see . . . that the interest served in the privacy cases is in some sense a spiritual interest rather than an interest in property or reputation. Moreover, they also help us understand that the spiritual characteristic which is at issue is not a form of trauma, mental illness or distress, but rather individuality or freedom.<sup>48</sup>

Paramount both to Warren and Brandeis and to the Bloustein perspective on privacy was concern over a technology threatening to create new and sophisticated breaches in the wall of anonymity:

[S]cientific and technological advances have raised the spectre of new and frightening invasions of privacy. Our capacity as a society to deal with the impact of this new technology depends, in part, on the degree to which we can assimilate the threat it poses to the settled ways our legal institutions have developed for dealing with similar threats in the past.<sup>49</sup>

This theme is explored by Professor George Trubow in his symposium article on the place of "informational privacy" in the overall privacy schema.<sup>50</sup> Professor Trubow urges recognition of a right to inhibit dissemination of compiled data as a necessary modern extension of the Warren and Brandeis approach to the individual's right of privacy. He proposes specific legislative and judicial means to accomplish that recognition and to shape the tort to be responsive to the realities of new technology.<sup>51</sup> Professor Richard Turkington, similarly concerned with "informational privacy," focuses upon privacy-based constraints on governmental dissemination of private information, urging an "unencumbered constitutional right to informational privacy" as a direct outgrowth of the Warren and Brandeis privacy construct.<sup>52</sup>

Much of the work of both Prosser and Bloustein creating the analytic and the conceptual foundations for our thinking about pri-

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48. Bloustein, *supra* note 16, at 1002.

49. *Id.* at 963.

50. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U.L. REV. 521 (1990).

51. *Id.*

52. Turkington, *supra* note 6.

vacy antedated the complex of Supreme Court opinions, beginning in 1964 with *New York Times v. Sullivan*,<sup>53</sup> that have "constitutionalized" much of the law relating to communicative torts. The extension of first amendment concerns to the privacy tort, and particularly to actions relating to public disclosure of truthful but embarrassing matter,<sup>54</sup> has raised serious question about the modern viability of Warren and Brandeis' central proposition.<sup>55</sup>

Citing Warren and Brandeis, the Supreme Court has said that "powerful arguments can be made and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press . . . ."<sup>56</sup> Although the Supreme Court has continued to articulate recognition of such a "zone of privacy,"<sup>57</sup> these sentiments have been dicta, uttered in a context in which the Court found the balance against the privacy interest.<sup>58</sup> A complex and serious problem is presented when the right of an individual to keep his or her personality "inviolable," truly "to be let alone," conflicts with what is perceived to be the first amendment right of a publisher to keep the public aware and informed of that which otherwise would be secret.<sup>59</sup> Resolution, such as it is, has taken the form of a particularly delicate balance, prompting judicial caution. As Justice Marshall observed in *Florida Star v. B.J.F.*:<sup>60</sup>

53. 376 U.S. 254 (1964). See Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C.L. REV. 273 (1990).

54. See *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

55. See, e.g., Zimmerman, *supra* note 8; Zuckman, *supra* note 8. Cf. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?* 46 TEX. L. REV. 611 (1968).

56. *Cox Broadcasting*, 420 U.S. at 487 (1975) (White, J.) (footnote omitted).

57. "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press." *Florida Star*, 109 S. Ct. 2603, 2613 (1989). (Marshall, J.). Justice Marshall would not "rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance [the state interest in protecting the victim]." *Id.* at 2611.

58. See *supra* note 54.

59. As Justice White observed in *Cox Broadcasting*: "In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." 420 U.S. at 491 (White, J.).

60. 109 S. Ct. 2603 (1989).

We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.<sup>61</sup>

Notwithstanding its refusal to make an absolute rule, the Court's refusal to recognize the privacy interest in *Florida Star*, an extremely compelling plaintiff's case, "seems to leave little vitality in the tort of disclosure of private facts."<sup>62</sup>

[T]he Court accepts [an] invitation . . . to obliterate one of the most note-worthy legal inventions of the 20th-Century: the tort of the publication of private facts. . . . Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons . . . from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers, or broadcast on television.<sup>63</sup>

If this observation by Justice White is accurate, if indeed there remains today only an extremely constricted "zone of privacy,"<sup>64</sup> then little also is left of the concept of "inviolable personality" that informed the Warren and Brandeis ideal of a right to privacy. At issue is the core human conflict of a democratic society, as the interest in human dignity—one essential attribute of freedom—collides with that other great attribute of freedom, the interest in openness and free dissemination of ideas.<sup>65</sup> The passage of a century since the great articulation of the right of privacy as an attribute of the "inviolable personality" need not mark the end of that right. Rather, time and

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61. *Id.* at 2609 (Marshall, J.).

62. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 90 (1990). "The Court insisted it was leaving open the possibility that publication of a rape victim's name might be actionable under some circumstances, but if *B.J.F.* was not such a case, it is difficult to imagine a case that would be actionable." *Id.*

63. *Florida Star*, 109 S. Ct. at 2618 (White, J., dissenting) (footnote omitted).

64. *Cf.* Zuckman, *supra* note 8, who argues that "the interest protected by Warren and Brandeis' tort is insubstantial" (*Id.* at 261) and that "[i]t was conceived in irrational anger and should die with few . . . mourning its passing." (*Id.* at 265).

65. *Cf.* Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979); Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772 (1985).

technology, judicial reflection and synthesis may have prepared us now to integrate the great interests. The possibility of integration is not so much dependent upon our ability to construct an appropriate first amendment theory as it is upon the more intractable concern with judicial capability to cope with questions of editorial judgement. The legal constructs may be too fragile to work effectively in this environment. Conversely, we may perhaps be ready for a sharpened focus, with enhanced sophistication and an appreciation of the complexities of the policy determinations, to find an effective way to harmonize two great but conflicting principles, each essential to the maintenance of a society in which both dignity and freedom may flourish.

