

Noting that the Stolen Valor Act applied to false statements made “at any time, in any place, to any person,”<sup>1272</sup> Justice Kennedy suggested that upholding this law would leave the government with the power to punish any false discourse without a clear limiting principle. Justice Breyer, in a separate opinion joined by Justice Kagan, concurred in judgment, but did so only after evaluating the prohibition under an intermediate scrutiny standard. While Justice Breyer was also concerned about the breadth of the act, his opinion went on to suggest that a similar statute, more finely tailored to situations where a specific harm is likely to occur, could withstand legal challenge.<sup>1273</sup>

***Invasion of Privacy.***—Governmental power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication implicates directly First Amendment rights. Privacy is a concept composed of several aspects.<sup>1274</sup> As a tort concept, it embraces at least four branches of protected interests: protection from unreasonable intrusion upon one’s seclusion, from appropriation of one’s name or likeness, from unreasonable publicity given to one’s private life, and from publicity which unreasonably places one in a false light before the public.<sup>1275</sup>

Although the Court has variously recognized valid governmental interests in extending protection to privacy,<sup>1276</sup> it has nevertheless interposed substantial free expression interests in the balance. Thus, in *Time, Inc. v. Hill*,<sup>1277</sup> the *Times* privilege was held to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. Since *Gertz* held that the *Times* privilege did not limit the recovery of compensatory damages for defamation by private per-

<sup>1272</sup> 567 U.S. \_\_\_, No. 11–210, slip op. at 10 (Kennedy, J). Justice Kennedy was joined in his opinion by Chief Justice Roberts, and Justices Ginsburg and Sotomayor..

<sup>1273</sup> 567 U.S. \_\_\_, No. 11–210, slip op. at 8–9 (Breyer, J).

<sup>1274</sup> See, e.g., WILLIAM PROSSER, LAW OF TORTS 117 (4th ed. 1971); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY (1987); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 544–61 (1970). Note that we do not have here the question of the protection of one’s privacy from governmental invasion.

<sup>1275</sup> Restatement (Second), of Torts §§ 652A–652I (1977). These four branches were originally propounded in Prosser’s 1960 article, incorporated in the Restatement, and now “routinely accept[ed].” McCarthy, § 5.8[A].

<sup>1276</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967); and id. at 402, 404 (Justice Harlan, concurring in part and dissenting in part), 411, 412–15 (Justice Fortas dissenting); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487–89 (1975).

<sup>1277</sup> 385 U.S. 374 (1967). See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).