Philosophical Dimensions of Privacy: An Anthology

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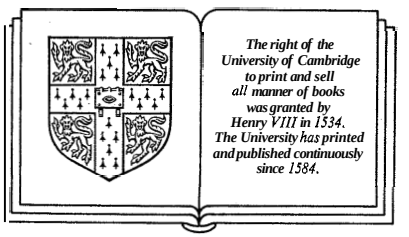

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Privacy as an aspect of human dignity

An Answer to Dean Prosser

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I. Introduction

Three-quarters of a century have passed since Warren and Brandeis published their germinal article, "The Right of Privacy."[1] In this period many hundreds of cases, ostensibly founded upon the right to privacy, have been decided,* a number of statutes expressly embodying it have been enacted,[3] and a sizeable scholarly literature has been devoted to it.[4] Remarkably enough, however, there remains to this day considerable confusion concerning the nature of the interest which the right to privacy is designed to protect. The confusion is such that in 1956 a distinguished federal judge characterized the state of the law of privacy by likening it to a "haystack in a hurricane."[5] And, in 1960, the dean of tort scholars wrote a comprehensive article on the subject which, in effect, repudiates Warren and Brandeis by suggesting that privacy is not an independent value at all but rather a composite of the interests in reputation, emotional tranquility and intangible property.[6]

My purpose in this article is to propose a general theory of individual privacy which will reconcile the divergent strands of legal development—which will put the straws back into the haystack. The need for such a theory is pressing. In the first place, the disorder in the cases and commentary offends the primary canon of all science that a single general principle of explanation is to be preferred over a congeries of discrete rules. Secondly, the conceptual disarray has had untoward effects on the courts; lacking a clear sense of what interest or interests are involved in privacy cases has made it difficult to arrive at a judicial consensus concerning the elements of the wrong or the nature of the defenses to it. Thirdly, analysis of the interest

involved in the privacy cases is of utmost significance because in our own day scientific 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.

The concept of privacy has, of course, psychological, social and political dimensions which reach far beyond its analysis in the legal context;[8] I will not deal with these, however, except incidentally. Nor do I pretend to give anything like a detailed exposition of the requirements for relief and the character of the available defenses in the law of privacy. Nor will my analysis touch on privacy problems of organizations and groups. My aim is rather the more limited one of discovering in the welter of cases and statutes the interest or social value which is sought to be vindicated in the name of individual privacy.

I propose to accomplish this by examining in some detail Dean Prosser's analysis of the tort of privacy and by then suggesting the conceptual link between the tort and the other legal contexts in which privacy finds protection. My reasons for taking this route rather than another, for concentrating initially on the tort cases and Dean Prosser's analysis of them, are that privacy began its modern history as a tort and that Dean Prosser is by far the most influential contemporary exponent of the tort. Warren and Brandeis who are credited with "discovering" privacy thought of it almost exclusively as a tort remedy. However limited and inadequate we may ultimately consider such a remedy, the historical development in the courts of the concept of privacy stems from and is almost exclusively devoted to the quest for such a civil remedy. We neglect it, therefore, only at the expense of forsaking the valuable insights which seventy-five years of piecemeal common law adjudication can provide.

The justification for turning my own search for the meaning of privacy around a detailed examination of Dean Prosser's views on the subject is simply that his influence on the development of the law of privacy begins to rival in our day that of Warren and Brandeis.[9] His concept of privacy is alluded to in almost every decided privacy case in the last ten years or so,[10] and it is reflected in the current draft of the Restatement of Torts.[11] Under these circumstances, if he is mistaken, as I believe he is, it is obviously important to attempt to demonstrate his error and to attempt to provide an alternative theory.

II. Dean Prosser's analysis of the privacy cases

Although it is not written in the style of an academic exposé of a legal myth, Dean Prosser's 1960 article on privacy has that effect; although he does not say it in so many words, the clear consequence of his view is that Warren and Brandeis were wrong, and their analysis of the tort of privacy a mistake. For, after examining the "over three hundred cases in the books,"[12] in which a remedy has ostensibly been sought for the same wrongful invasion of privacy, he concludes that, in reality, what is involved "is not one tort, but a complex of four."[13] A still more surprising conclusion is that these four torts involve violations of "four different interests,"[14] none of which, it turns out, is a distinctive interest in privacy.[15]

The "four distinct torts" which are discovered in the cases are described by Dean Prosser as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing facts about the plaintiff.
3. Publicity which places the plaintiff in a "false light" in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[16]

The interest protected by each of these torts is: in the intrusion cases, the interest in freedom from mental distress,[17] in the public disclosure and "false light" cases, the interest in reputation,[18] and in the appropriation cases, the proprietary interest in name and likeness.[19]

Thus, under Dean Prosser's analysis, the much vaunted and discussed right to privacy is reduced to a mere shell of what it has pretended to be. Instead of a relatively new, basic and independent legal right protecting a unique, fundamental and relatively neglected interest, we find a mere application in novel circumstances of traditional legal rights designed to protect well-identified and established social values. Assaults on privacy are transmuted into a species of defamation, infliction of mental distress and misappropriation. 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.

III. Dean Prosser's analysis appraised

A. Consistency with the Warren and Brandeis analysis

One way of testing Dean Prosser's analysis and of illuminating the concept of privacy itself, is to compare it with the Warren-Brandeis article.[20] Did those learned authors propose a "new tort" or merely a new name for "old torts"?

We may begin by noting the circumstances which stimulated the writing of the article. "On January 25, 1883," Brandeis' biographer writes,

> Warren had married Miss Mabel Bayard, daughter of Senator Thomas Francis'Bayard, Sr. They set up housekeeping in Boston's exclusive Back Bay section and began to entertain elaborately. The *Saturday Evening Gazette,* which specialized in "blue blood items" naturally reported their activities in lurid detail. This annoyed Warren who took the matter up with Brandeis. The article was the result.[21]

The article itself presents an intellectualized and generalized account of the plight of the Warrens beleaguered by the yellow journalism of their day.

> 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."[22]
>
> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[23]

Thus, Warren and Brandeis were disturbed by lurid newspaper gossip concerning private lives. But what, in their view, made such gossip wrongful? What value or interest did such gossip violate to give it a tortious character? How, in other words, were people hurt by such gossip?

On more than one occasion in their article, they allude to the "distress" which "idle gossip" in newspapers causes. "[M]odern enterprise and invention," they write, "have, through invasions . . . [of man's] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."[24] And they mention "the

suffering of those who may be made the subjects of journalistic or other enterprise."[25]

These allusions to mental distress seem to afford support for Dean Prosser's view that, in one of its aspects, at least, the right to privacy protects against intentionally inflicted emotional trauma; that the gravaman of an action for the invasion of privacy is really hurt feelings.[26] Such a conclusion, however, cannot be justified by the Warren and Brandeis article because, in fact, they expressly disown it. They point out that, although "a legal remedy for . . . [invasion of privacy] seems to involve the treatment of mere wounded feelings,"[27] the law affords no remedy for "mere injury to feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act is otherwise lawful the suffering inflicted is without legal remedy."[28] And they then go on to distinguish invasion of privacy as "a legal *injuria*" or "act wrongful in itself" from "mental suffering" as a mere element of damages.[29]

Thus, in Warren and Brandeis' view, idle gossip about private affairs may well cause mental distress, but this is not what makes it wrongful; the mental distress is, for them, parasitic of an independent tort, the invasion of privacy. Nor did they believe, as evidently Dean Prosser believes, that "public disclosure of private facts" constitutes a species of defamation and an injury to reputation.[30]

"The principle on which the law of defamation rests," they say, "covers . . . a radically different class of effects from those for which attention is now asked."[31] Defamation concerns "injury done to the individual in his external relations to the community," injury to the estimation in which others hold him; the wrong involved in defamation is "material."[32] The invasion of privacy, by contrast, involves a "spiritual" wrong, an injury to a man's "estimate of himself" and an assault upon "his own feelings."[33] Moreoever, invasion of privacy does not rest upon falsity as does defamation; the right to privacy exists not only "to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."[34]

The third interest or value which Warren and Brandeis examine as the possible basis of the wrongfulness of newspaper gossip concerning private lives is a proprietary or property interest. Here as well, their conclusion is the negative one that, although the invasion of privacy may involve, on occasion, a misappropriation of something of pecuniary value, this is not the essence of the wrong.

This conclusion is the more striking because the legal precedents upon which they rely for the erection of a right to privacy are cases enforcing so-called common law property rights in literary and artistic works and cases involving trade secrets.[35] It is also a strong argument against Dean Prosser's identification of a "distinct" tort of appropriation of name or likeness as involving the protection of a proprietary interest[36] because, although they primarily concentrate on publicity cases, they expressly take account of the cases involving an unconsented use of a photographic likeness.[37]

Warren and Brandeis announce at the outset of their article that they believe that "the legal doctrines relating to infraction of what is ordinarily termed the common-law right to *intellectual and artistic property*" can, "properly understood," provide "a remedy for the evils under consideration."[38] They distinguish, however, between the common law protection of such property and that secured by forms of copyright statutes. The common law right allows a man "to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all."[39] The statutory right, by contrast, aims "to secure to the author, composer or artist the entire profits arising from publication."[40]

This distinction between the purposes of common law and statutory protection of literary and artistic property provides, in the Warren and Brandeis analysis, a key to the underlying significance of common law rights to literary and artistic property. They are really nothing but "instances and applications of a general right to privacy"[41] because "the value of the production [of a work subject to *common law* property right] is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all."[42] This being so, "it is difficult to regard the [common law] right as one of property."[43]

It is admitted that the courts which erected the legal remedy which "secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others,"[44] had, for the most part, "asserted that they rested their decisions on the narrow grounds of protection of property."[45] Yet, according to Warren and Brandeis, no thing of pecuniary value, no right of property "in the narrow sense," is to be found at issue in many of the cases. The concept of "property" was put forward by the courts as a fiction to rationalize a form of legal relief which was really founded on other grounds of policy. In other words, what we mean by saying there is common law property in literary and artistic works is not that violation of the right involves destruction or appropriation of something of monetary value but rather only that the law affords a remedy for the violation.[46]

In sum, as far as Warren and Brandeis were concerned, newspaper

gossip about private lives was not a wrong because it destroyed character, caused mental distress, or constituted a misappropriation of property—a taking of something of pecuniary value. Although the yellow journalism which feeds luridly upon the details of private lives may incidentally accomplish each of these results, they are not the essence of the wrong. Mrs. Warren's reputation could have been completely unaffected, her equanimity entirely unruffled, and her fortune wholly undisturbed; the publicity about her and her husband would nevertheless be wrongful, nevertheless be in violation of an interest which the law should protect.

What then is the basis of the wrong? Unfortunately, the learned authors were not as successful in describing the interest violated by publicity concerning private lives as in saying what it was not. This explains, in part, the fact that after hundreds of cases enforcing Warren and Brandeis' "right to privacy," Dean Prosser, Harper and James,[47] the Restatement of Torts,[48] and other learned authorities[49] predicate the right on bases expressly rejected by Warren and Brandeis.

Warren and Brandeis obviously felt that the term "privacy" was in itself a completely adequate description of the interest threatened by an untrammeled press; man, they said, had a right to his privacy, a right to be let alone,, and this was, for them, a sufficient description of the interest with which they were concerned. This right, although violated by publication of information about a person's life and character, much in the same way the right to reputation is violated, is not the same as the right to reputation. Nor is the interest in being let alone like that of being protected against attempts to inflict mental trauma, even though distress is the frequent accompaniment of intrusions on privacy. And, although the common law property right to literary and artistic products is an instance of the right to privacy, privacy is not to be confused with something of pecuniary value.

Warren and Brandeis went very little beyond thus giving "their right" and "their interest" a name and distinguishing it from other rights or interests. It is only in asides of characterization and passing attempts at finding a verbal equivalent of the principle of privacy that we may find any further clues to the interest or value they sought to protect. Thus, at one point they remark, as I have indicated above, that, unlike reputation which is a "material" value, privacy is a "spiritual" one.[50] And they make repeated suggestions that the invasion of privacy, in some way, involves man's mentality,[51] that it involves an "effect upon . . . [a man's] estimate of himself and upon his own feeling ~ . " ~ ~

The most significant indication of the interest they sought to protect,

however, is in their statement that "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 *inviolate personality*."[53] I take the principle of "inviolate personality" to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being. It is because our Western ethico-religious tradition posits such dignity and independence of will in the individual that the common law secures to a man "literary and artistic property"—the right to determine "to what extent his thoughts, sentiments, emotions shall be communicated to others."[54] The literary and artistic property cases led Warren and Brandeis to the concept of privacy because, for them, it would have been inconsistent with a belief in man's individual dignity and worth to refuse him the right to determine whether his artistic and literary efforts should be published to the world. He would be less of a man, less of a master over his own destiny, were he without this right.

Thus, 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 which gave rise to a "new tort,"[55] not merely to a fancy name for "old torts."

As I have already indicated,[56] Dean Prosser's analysis of the privacy cases is remarkable for two propositions; the first, that there is not a single tort of the invasion of privacy, but rather "four distinct torts"; the second, that there is no distinctive single value or interest which these "distinct torts" protect and that, in fact, they protect three different interests, no one of which can properly be denominated an interest in privacy. I have considerable doubt that the cases support either of these conclusions.

B. The intrusion cases

This category of cases comprises instances in which a defendant has used illegal or unreasonable means to discover something about the plaintiff's private life.[57] Included in the category, thus, is a case in which a defendant was an unwanted spectator to the plaintiff giving birth to her child.[58] The Michigan court, writing nine years before Warren and Brandeis, declared the wrong was actionable in tort because "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."[59]

Another illustrative case is *Rhodes v. Graham,*[60] where the defendant tapped the plaintiff's telephone wires without authorization. In upholding the cause of action for damages the court declared that "the evil incident to the invasion of the privacy of the telephone is as great as that accompanied by unwarranted publicity in newspapers and by other means of a man's private affairs."[61] In still another case of the same type, where a home was illegally entered, a cause of action for damages was upheld on the theory of a violation of state constitutional search and seizure provisions.[62]

What interest or value is protected in these cases? Dean Prosser's answer is that "the gist of the wrong [in the intrusion cases] is clearly the intentional infliction of mental distress."[63]

The fact is, however, that in no case in this group is mental distress said by the court to be the basis or gravamen of the cause of action. Moreover, all but one of these decisions predate the recognition in the jurisdictions concerned of a cause of action for intentionally inflicted mental distress[64] and, in most instances, the lines of authority relied upon in the intrusion cases are quite different from those relied upon in the mental distress cases.[65]

Furthermore, special damages in the form of "severe emotional distress" is recognized by Dean Prosser[66] and other authorities[67] as a requisite element of the cause of action for intentionally inflicted emotional distress. Yet, many of the cases allowing recovery for an intrusion expressly hold that special damages are not required.[68] Except in a small number of the cases of this group, there does not even seem to have been an allegation of mental illness or distress, certainly not an allegation of serious mental illness. And even in one of the rare cases in which serious mental distress was alleged, the court expressly says that recovery would be available without such an allegation.[69]

The most important reason, however, for disputing Dean Prosser's thesis in regard to the intrusion cases is that, in my judgment, he neglects the real nature of the complaint; namely that the intrusion is demeaning to individuality, is an affront to personal dignity. A woman's legal right to bear children without unwanted onlookers does not turn on the desire to protect her emotional equanimity, but rather on a desire to enhance her individuality and human dignity. When the right is violated she suffers outrage or affront, not necessarily mental trauma or distress. And, even where she does undergo anxiety or other symptoms of mental illness as a result, these consequences themselves flow from the indignity which has been done to her.

The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversation may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.[70]

I contend that the gist of the wrong in the intrusion cases is not the intentional infliction of mental distress but rather a blow to human dignity, an assault on human personality. Eavesdropping and wiretapping, unwanted entry into another's home, may be the occasion and cause of distress and embarrassment but that is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma.

This view of the gravamen of the wrong of intrusion finds support in cases in which courts have expressly rested the right to recover damages for the intrusion on violation of constitutional prohibitions against search and seizure.[71] To be sure, these cases do not say that an unwanted intrusion strikes at one's dignity and offends one's individuality. But the suggestion of this constitutional basis of the right to damages is a step in that direction; at the very least, the cases contradict the view that mental distress is the gist of the action.

Cases in which some form of relief other than damages is sought for an intrusion violating the constitutional prohibition against unreasonable searches and seizures are even closer to the point. The Supreme Court of the United States has declared plainly that the fourth amendment to the federal constitution is designed to protect against intrusions into privacy and that the underlying purpose of such protection is the preservation of individual liberty.[72] These cases represent, it seems to me, a recognition that unreasonable intrusion is a wrong because it involves a violation of constitutionally protected liberty of the person.

Thus, from the early *Boyd* case[73] to the recent case of *Silverman v. United States,*[74] the Supreme Court has made clear that the "Fourth Amendment gives a man the right to retreat into his own home and there be free from unreasonable governmental intrusion"[75] and that this right is of "the very essence of constitutional liberty and security."[76] "The Fourth Amendment," the Court has declared, "forbids

every search that is unreasonable and is construed to safeguard the right of privacy."[77] Moreover, the Court has proclaimed that "the security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society."[78]

In all of these cases, the intruder was an agent of government and, without doubt, the forms of relief available against a government officer are to be distinguished from those available against intrusions by a private person.[79] This is not to say, however, that intrusion is a different wrong when perpetrated by an FBI agent and when perpetrated by a next door neighbor; nor is it to say that the gist of the wrong is different in the two cases. The threat to individual liberty is undoubtedly greater when a policeman taps a telephone than when an estranged spouse does, but a similar wrong is perpetrated in both instances. Thus, the conception of privacy generated by the fourth amendment cases may rightly be taken, I would urge, as being applicable to any instance of intrusion even though remedies under the fourth amendment are not available in all such instances.

Brandeis' dissent in the *Olmstead* case[80] is especially instructive in this regard.[81] In that case—decided before the enactment of Section 605 of the Federal Communications Act—the federal government had gained evidence of a violation of the Prohibition Act by tapping a telephone, and the defendant sought to preclude use of the evidence on the theory that it was gained in violation of the fourth amendment. The majority of the Court held that, since the wiretap did not involve a trespass, there was no violation of the fourth amendment and, therefore, the evidence so obtained was legally admissible. Brandeis and Holmes dissented.

It is apparent from Brandeis' dissent that, in the almost forty years which had passed since he had written his article on privacy, he had become as concerned about the evils of unbridled intrusion upon private affairs as he had once been about the evils of unreasonable publicity concerning private affairs. He had also begun to look upon the evils of wiretapping, eavesdropping and the like in the same perspective in which he regarded those attendant upon lurid journalistic exposés of private life.

Modesty seems to have kept him from citing his article, but he nevertheless "lifts" phrases out of it almost verbatim,[82] and the underlying conceptual scheme is identical. The article was written to thwart threats posed to privacy by "recent inventions and business methods,"[83] by "numerous mechanical devices";[84] the dissent is directed against "far-reaching means of invading privacy"[85] occasioned by "discovery and invention."[86] The article seeks to move the common law in the direction of protecting "man's spiritual nature,"[87] in the direction of recognizing "thoughts, emotions and sensations"[88] as objects of legal protection; the dissent attempts to enlarge the sphere of constitutionally protected liberty so as to encompass "man's spiritual nature," and so as "to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[89]

The parallelism between the privacy article and the *Olmstead* dissent is so close as to suggest strongly that Brandeis believed, at the time he wrote his dissent, that the fourth amendment was intended to protect the very principle of "inviolate personality" which he had earlier suggested was the principle underlying the common law right to privacy.[90] More recently, Justice Murphy of the Supreme Court has made this conceptual identification explicit. In his dissent in the *Goldman* case, he said that the "right of personal privacy [is] guaranteed by the Fourth Amendment" and in describing the right he relied upon the Warren-Brandeis article, as well as numerous tort cases.[91] The dissents of Brandeis and Murphy—and it should be noted that in each of these cases the Court divided over the scope of the protection of the fourth amendment rather than the analysis of the social value it embodies—provide authoritative support for believing that the social interest underlying the "intrusion cases" is that of liberty of the person, the same interest protected by the fourth amendment.

C. *The public disclosure cases*

The second group of privacy cases to which Dean Prosser addresses himself is that in which there is a public disclosure of facts concerning a person's private life.[92] Typically, these cases involve a newspaper story, a film, or a magazine article about some aspect of a person's private life. Two of the leading cases are *Melvin v. Reid*[93] and *Sidis v. F-R Publishing Corp.*[94] In the former case, the defendant had made a motion picture using the plaintiff's maiden name and depicting her as a prostitute who had been involved in a sensational murder trial. The scandalous and sensational behavior shown in the film took place many years before it was made and, when the picture was released, the plaintiff was living a conventionally respectable life. The California court upheld a cause of action for the violation of the plaintiff's right to privacy, relying upon the Warren-Brandeis article and upon a provision of the California constitution guaranteeing the "inalienable rights" of "enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."[95]

In the *Sidis* case, the New Yorker magazine had published a "profile" of a young man who, years before, had been an infant prodigy, well known to the public, but who, at the time of the article, had retired of his own will and desire into a life of obscurity and seclusion. The article, although true and not unfriendly, was "merciless in its dissection of intimate details of its subject's personal life"[96] and the court plainly indicated that Sidis' privacy had been invaded.[97] Recovery was nevertheless denied. Relying on a suggestion in the Warren-Brandeis article that "the interest of the individual in privacy must inevitably conflict with the interest of the public in news," the court concluded that, since Sidis was a "public figure," the "inevitable conflict" had to be resolved in favor of the public interest in news.[98]

After discussing ***Melvin v. Reid,*** the *Sidis* case and dozens of others like them, Dean Prosser concludes that "this branch of the tort is evidently something quite distinct from intrusion" and that the interest protected in these cases "is that of reputation."[99] As I have shown above, this analysis is completely at odds with that of Warren and Brandeis.[100] It is also, I believe, at odds with the cases.

What Warren and Brandeis urged, even before the decision of any of the public disclosure cases, about the differences between privacy and defamation makes eminent good sense in the light of the cases themselves,[101] and Dean Prosser nowhere attempts to meet it. The public disclosure cases rest on a "radically different principle" than the defamation cases because the former class of cases involves an affront to "inviolate personality" while the latter class of cases involves an impairment of reputation.[102] Moreover, the one class of cases rests on unreasonable publicity, the other on falsity. The right to privacy exists not only "to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."[103]

To be sure, ***Melvin v. Reid***[104] and many other of the cases of this type contain express allegations of loss of reputation, of being exposed to public contempt, obloquy, ridicule and scorn as a result of the public disclosure. To my mind, however, such allegations are only incidental to the real wrong complained of, which is the intrusion on privacy, and this wrong, as the ***Sidis*** case[105] makes apparent, is made out even if the public takes a sympathetic rather than a hostile view of the facts disclosed. What the plaintiffs in these cases complain of is not that the public has been led to adopt a certain attitude or opinion concerning them—whether true or false, hostile or friendly—but rather that some aspect of their life has been held up to public scrutiny at all. In this sense, the gravamen of the complaint here is just like that in the intrusion cases; in effect, the publicity constitutes a form of

intrusion, it is as if 100,000 people were suddenly peering in, as through a window, on one's private life.

When a newspaper publishes a picture of a newborn deformed child,[106] its parents are not disturbed about any possible loss of reputation as a result. They are rather mortified and insulted that the world should be witness to their private tragedy. The hospital and the newspaper have no right to intrude in this manner upon a private life. Similarly, when an author does a sympathetic but intimately detailed sketch of someone, who up to that time had only been a face in the crowd,[107] the cause for complaint is not loss of reputation but that a reputation was established at all. The wrong is in replacing personal anonymity by notoriety, in turning a private life into a public spectacle.

The cases in which undue publicity was given to a debt[108] and in which medical pictures were published[109] are founded on a similar wrong. The complaint is not that people will take a different attitude towards the plaintiff because he owes a debt or has some medical deformity—although they might do so—but rather that publicity concerning these facets of private life represents an imposition upon and an affront to the plaintiff's human dignity.

The essential difference between the cause of action for invasion of privacy by public disclosures and that for defamation is exhibited forcefully by examining how the fact of publication fits into each of the actions. In defamation, publication to even one person is sufficient to make out the wrong.[110] In privacy, unless the information was gained by wrongful prying or unless its communication involves a breach of confidence or the violation of an independent duty, some form of mass publication is a requisite of the action. As Dean Prosser himself points out, citing cases in support,

> It is an invasion of the right [of privacy] to publish in a newspaper that the plaintiff does not pay his debts, or to post a notice to that effect in a window on the public street or cry it aloud in the highway; but except for one decision of a lower Georgia court which was reversed on other grounds, it has been agreed that it is no invasion to communicate that fact to the plaintiff's employer, or to any other individual, or even to a small group, unless there is some breach of contract, trust or confidential relation which will afford an independent basis for relief.[111]

What at first seem like exceptions to the requirement of mass publication in privacy are easily explained. Where private information is wrongfully gained and subsequently communicated, the wrong is made out independently of the communication. Communication in such a

case, whether to one person or many, is not of the essence of the wrong and only goes to enhance damages. This, then, is not an exception to the rule of mass communication at all. Where, however, a person chooses to give another information of a personal nature on the understanding it will be held private and the confidence is broken, publication is indeed a requisite of recovery and even limited publication is sufficient to support the action. But the wrong here is not the disclosure itself, but rather the disclosure in violation of a relationship of confidence. Disclosure, whether to one person or many, is equally wrongful as a breach of the condition under which the information was initially disclosed.

It is in cases where public disclosure of personal and intimate facts is made without any breach of confidence that the rule of mass disclosure applies in full force. Why should it make a difference in such cases—other than in the amount of damages recoverable, as it does in defamation actions—whether a statement is published to one or many? Why should it make a difference in determining if an invasion of privacy is made out whether I tell a man's employer he owes me money or whether I shout it from the rooftops? In defamation, a statement is either actionable or not depending upon its subject matter and irrespective of the extent of publication. Why should actionability in privacy sometimes depend upon the extent of publication?

The reason is simply that defamation is founded on loss of reputation while the invasion of privacy is founded on an insult to individuality. A person's reputation may be damaged in the minds of one man or many. Unless there is a breach of a confidential relationship, however, the indignity and outrage involved in disclosure of details of a private life, only arise when there is a massive disclosure, only when there is truly a disclosure to the public.

If a woman who had always lived a life of rectitude were called a prostitute, she could succeed in defamation even if the charge had been made to only one individual. The loss of the respect of that single individual is the wrong complained of. However, absent a breach of confidentiality, if a respectable woman who had once been a prostitute was described as such to a single friend or small group of friends, no cause of action would lie, no matter how radically her friends' opinions changed as a result. The wrong in the public disclosure cases is not in changing the opinions of others, but in having facts about private life made public. The damage is to an individual's self-respect in being made a public spectacle.

The gravamen of a defamation action is engendering a false opinion about a person, whether in the mind of one other person or many

people. The gravamen in the public disclosure cases is degrading a person by laying his life open to public view. In defamation a man is robbed of his reputation; in the public disclosure cases it is his individuality which is lost.

It is admitted that no court has expressed such a view of the series of cases Dean Prosser identifies as public disclosure cases.[112] But then no court has adopted Dean Prosser's view of these cases either. The analysis I offer is, however—as I showed above—suggested by the Warren-Brandeis article.[113] Moreover, it finds support in the fact that *Melvin v. Reid,* one of the leading cases of this type, relied upon a constitutional provision guaranteeing life, liberty and happiness.[114] Even if this suggestion of a constitutional conceptual basis for privacy is considered "vague,"[115] it nevertheless points away from reputation and towards personal dignity and integrity as the gist of the wrong.

Further support for this analysis of the public disclosure cases is found in the fact that it brings these cases into the same framework of theory as the intrusion cases. Many of the intrusion cases rely upon the authority of the public disclosure cases and vice versa.[116] If Dean Prosser were correct, such reliance would be mistaken or, at the least, misleading. All else being equal, a theory of the intrusion and public disclosure cases which explains their interdependence and provides a single rationale for them is, I suggest, to be preferred. Physical intrusion upon a private life and publicity concerning intimate affairs are simply two different ways of affronting individuality and human dignity. The difference is only in the means used to threaten the protected interest.

Consider the childbirth situation involved in the *De May* case,[117] discussed above. The cause of action there, it will be recalled, was based upon the defendant's having been an unwanted and unauthorized spectator to the plaintiff's birth pangs. To the Michigan court, this was a defilement of what was "sacred."[118] But the same sense of outrage, of defilement of what was "sacred," would have ensued if the defendant had been authorized to witness the birth of the plaintiff's child and had subsequently described the scene in detail in the public press. An unwanted report in a newspaper of the delivery room scene, including the cries of anguish and delight, the sometimes abusive, sometimes profane, sometimes loving comments voiced under sedation and the myriad other intimacies of childbirth, would be an insult and an affront of the same kind as an unauthorized physical intrusion upon the scene. The publicity would constitute the same sort of blow to our moral sensibility as the intrusion.

The parallelism which can be constructed in the *De May* case cannot

be constructed in all of the intrusion and publicity cases. Sometimes public disclosure of what is seen or overheard can be offensive and, perhaps, actionable even though the intrusion itself may not be, as, for example, where a reporter "crashes" a private social gathering. Sometimes the details of private life which are publicly reported are not subject to being seen or overheard in a secret or unauthorized fashion at all, as in the case of a debt or a sordid detail of someone's past which is recorded in a public record. However, the fact that public disclosure of information might be actionable even though gaining the information by physical intrusion might not be, or vice versa, is not a ground for believing that the interest protected in each instance is different. The only thing it proves is that publicity concerning personal affairs and physical intrusions upon private life may each be the cause of personal indignity and degradation in ways the other cannot.

The underlying identity of interest in these two branches of the tort was lost sight of, I would suggest, because menacing technological means for intruding upon privacy developed at a later period than threateneing forms of public disclosure. Lurid journalism became a fact of American life before the "private eye," the "bug" and the "wiretap." At the time Warren and Brandeis wrote, the common neighborhood snoop was not a sufficient cause for public concern to arouse their interest and the uncommon snoop who uses electronic devices had not yet made his appearance. This possibly explains why their article neglects the three earliest forms of protection against physical intrusions upon privacy, the action in trespass quare clausum fregit, "peeping tom" statutes[119] and the fourth amendment.[120] However, by the time Brandeis wrote his dissent in the *Olmstead* case,[121] involving a telephone wiretap, the technology of intrusion had developed to the point where he saw that it presented the same threat to individuality as did lurid journalism. As I have already indicated,[122] Brandeis then drew the necessary consequences for his theory of privacy.

Another aspect of our social history which teaches us something about the gravamen of the public disclosure cases is that Warren and Brandeis did not write their article until 1890, when the American metropolitan press had turned to new forms of sensational reporting and when the social pattern of American life had begun to be set by the mores of the metropolis instead of the small town. A number of writers have recently pointed out that gossip about the private affairs of others is surely as old as human society and that the small town gossip spread the intimacies of one's life with the same energy, skill and enthusiasm as the highest paid reporter of the metropolitan press.[123]

Why then did it take "recent inventions" and "numerous mechanical devices," the advent of yellow journalism where "gossip . . . has become a trade,"[124] to awaken Warren and Brandeis to the need for the right to privacy?

Although the distinction should not be drawn too sharply—the mythology of ruralism is already too deeply embedded—the small town gossip did not begin to touch human pride and dignity in the way metropolitan newspaper gossip mongering does. Resources of isolation, retribution, retraction and correction were very often available against the gossip but are not available to anywhere near the same degree, against the newspaper report. The whispered word over a back fence had a kind of human touch and softness while newsprint is cold and impersonal. Gossip arose and circulated among neighbors, some of whom would know and love or sympathize with the person talked about. Moreover, there was a degree of mutual interdependence among neighbors which generated tolerance and tended to mitigate the harshness of the whispered disclosure.

Because of this context of transmission, small town gossip about private lives was often liable to be discounted, softened and put aside. A newspaper report, however, is spread abroad as part of a commercial enterprise among masses of people unknown to the subject of the report and on this account it assumes an imperious and unyielding influence. Finally, for all of these reasons and others as well, the gossip was never quite believed or was grudgingly and surreptitiously believed, while the newspaper tends to be treated as the very fount of truth and authenticity, and tends to command open and unquestioning recognition of what it reports.

Thus, only with the emergence of newspapers and other mass means of communication did degradation of personality by the public disclosure of private intimacies become a legally significant reality. The right to sue for defamation has ancient origins because reputation could be put in peril by simple word of mouth or turn of the pen. The right to privacy in the form we know it, however, had to await the advent of the urbanization of our way of life including, as an instance, the institutionalization of mass publicity, because only then was a significant and everyday threat to personal dignity and individuality realized.

D. The use of name or likeness

The third "distinct tort" involving a "distinct interest" which Dean Prosser isolates turns on the commercial exploitation of a person's name or likeness.[125] This group of cases is designed, he says, to protect

an interest which "is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of identity."[126]

In 1902, a flour company circulated Abigail Roberson's photograph, without her consent, as part of an advertising flier and, as a result, she was "greatly humiliated by the scoffs and jeers of persons who recognized her face and picture . . . and her good name had been attacked, causing her great distress and suffering in body and mind."[127] The New York Court of Appeals, in a 4 to 3 decision, refused recovery because they could find no legal precedent for Warren and Brandeis' right to privacy, on which Abigail relied.[128] To succeed, the majority indicated, the plaintiff in such a case had to prove either "a breach of trust or that plaintiff had a property right in the subject of litigation which the court could protect,"[129] and here the plaintiff could show neither.

Three years after the *Roberson* case was decided the same issue came before the Georgia Supreme Court which reached the opposite result. In *Pavesich v. New England Life Ins. Co.*,[130] the plaintiff's photograph was used, without his consent, in a newspaper advertisement for life insurance, which proclaimed to the world that Pavesich had bought life insurance and was the better man for it. There was no suggestion in the case that the plaintiff sought to vindicate a proprietary interest, that he sought recompense for the commercial value of the use of his name; since he was not well known, the use of his name or picture could hardly command even a fraction of the cost of the lawsuit. Nor did Pavesich claim, as the plaintiff in the *Roberson* case did, that he suffered severe nervous shock as a result of the publication.

The basis of recovery in the case was rather "a trespass upon Pavesich's right of privacy."[131] Relying heavily on the Warren-Brandeis article, the Georgia court recognized the right as derivative of natural law and "guaranteed . . . by the constitutions of the United States and State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law."[132] The use of the photograph, declared the court, was an "outrage":

> The knowledge that one's features and form are being used for such a purpose and displayed in such places as such advertisements are often liable to be found brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him, and as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is, for the time being, under the control of another, and that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his complete enthrallment than he is.[133]

The *Paveisch* case has probably been cited more often than any other case in the history of the development of the right to privacy, and it has been cited not only in cases involving use of name or likeness but also in the so-called intrusion cases,[134] and the public disclosure cases.[135] To my mind, *Pavesich* and the other use of name or likeness cases are no different in the interest they seek to protect than the intrusion and public disclosure cases. That interest is not, as Dean Prosser suggests,[136] a "proprietary one," but rather the interest in preserving individual dignity.

The use of a personal photograph or a name for advertising purposes has the same tendency to degrade and humiliate as has publishing details of personal life to the world at large; in the *Pavesich* court's words, the use of a photograph for commercial purposes brings a man "to a realization that his liberty has been taken away from him'' and "that he is no longer free."[137] Thus, a young girl whose photograph was used to promote the sale of dog food complained of "humiliation," "loss of respect and admiration" and Co-incident "mental anguish," and the Illinois court which upheld her cause of action cited the Illinois constitutional guarantee of life, liberty and pursuit of happiness as the basis of recovery.[138] Similiarly, where a lawyer's name was used for the purposes of advertising photocopy equipment,[139] where a young woman's picture in a bathing suit was used ta advertise a slimming product,[140] or where the plaintiff's photograph was used to advertise Doan's pills,[141] the wrong complained of was mortification, humiliation and degradation rather than any pecuniary or property loss.

The only difference between these cases and the public disclosure cases is the fact that the sense of personal affront and indignity is provoked by the association of name or likeness with a commercial product rather than by publicity concerning intimacies of personal life. In the public disclosure cases what is demeaning to individuality is being made a public spectacle by disclosure of private intimacies. In these cases what is demeaning and humiliating is the commercialization of an aspect of personality.

One possible cause for confusion concerning the interest which underlies these cases is that the use of name or likeness is held to be actionable in many of the cases precisely because it is a use for commercial or trade purposes. This seems to suggest that the value or interest threatened is a proprietary or commercial one. Such a con-

clusion is mistaken, however, because, in the first place, as I noted above, the name or likeness which is used in most instances has no true commercial value, or it has a value which is only nominal and hardly worth the lawsuit. In fact, it has been held that general rather than special damages are recoverable and this, in itself, is a refutation of the conclusion that the interest concerned is a proprietary one.[142]

In the second place, the conclusion that the plaintiff seeks to vindicate a proprietary right in these cases overlooks the true role of the allegation that the plaintiff's name or picture was used commercially. The reason that the commercial use of a personal photograph is actionable, while—under many circumstances, such as where consent to publication is implied from the fact the photograph was taken in a public place—the use of the same photograph in a news story would not be,[143] is that it is the very commercialization of a name or photograph which does injury to the sense of personal dignity. As one court has stated, "the right protected is the right to be protected against the commercial exploitation of one's personality."[144]

No man wants to be "used" by another against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interest of others. In a community at all sensitive to the commercialization of human values, it is degrading to thus make a man part of commerce against his will.[145]

Another reason which has possibly led Dean Prosser and others[146] to the conclusion that the interest involved in the use of name or likeness cases is a proprietary one, is that in some few of the cases,[147] the plaintiffs are well known figures whose name or photograph does indeed command a commercial price. In these cases, as Judge Frank has pointed out, the plaintiffs, "far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."[148]

The conclusion to be drawn from such cases, however, is simply that, under special circumstances, as where the plaintiff is a public figure, the use of his likeness or name for commercial purposes involves the appropriation of a thing of value. But it is important to note that, in this respect, such cases are distinguishable from cases like *Pavesich*[149] and *Eick*,[150] for instance, where the plaintiff had no public renown. In other words, the use of a name or likeness only involves an appropriation of a thing of value in a limited class of cases

where: the plaintiff is known to the public and where his name or likeness commands a price.

Some have said that in such cases a "right of publicity" rather than a right of privacy is involved.[151] It is a mistake, however, to conclude from these "right of publicity" cases that all the cases involving commercial use of name or likeness are founded on a proprietary interest.[152] Moreover, the very characterization of these cases as involving a "right to publicity" disguises the important fact that name and likeness can only begin to command a commercial price in a society which recognizes that there is a right to privacy, a right to control the conditions under which name and likeness may be used. Property becomes a commodity subject to be bought and sold only where the community will enforce an individual's right to maintain use and possession of it as against the world. Similarly, unless an individual has a right to prevent another from using his name or likeness commercially, even where the use of that name or likeness has no commercial value, no name or likeness could ever command a price.

Thus, there is really no "right to publicity"; there is only a right, under some circumstances, to command a commercial price for abandoning privacy. Every man has a right to prevent the commercial exploitation of his personality, not because of its commercial worth, but because it would be demeaning to human dignity to fail to enforce such a right. A price can be had in the market place by some men for abandoning it, however. If a commercial use is made of an aspect of the personality of such a man without his consent, he has indeed suffered a pecuniary loss, but the loss concerned is the price he could command for abandoning his right to privacy. The so-called "right to publicity" is merely a name for the price for which some men can sell their right to maintain their privacy.

Undoubtedly, there will be cases in which the publication of a name or likeness without consent is a boon and not a burden. Rather than suffering humiliation and degradation as a result, the beautiful but unknown girl pictured on the cover of a nationally circulated phonograph record might be delighted at having been transfigured into a modern Cinderella. Suddenly, she is a national figure, glowing in the limelight, and her picture and name have become sought after commodities as a result. Has privacy been violated when there is no personal sense of indignity and the commercial values of name or likeness have been enhanced rather than diminished?

I believe that in such a case there is an invasion of privacy, although it is obviously not one which will be sued on and not one which is liable to evoke community sympathy or command anything but a

nominal jury award. The case is very much like one in which a physician successfully treats a patient but is held liable for the technical tort of battery because the treatment extended beyond the consent.[153] However beneficent the motive, or successful the result, the "touching" is considered wrongful. As I view the matter, using a person's name or likeness for a commercial purpose without consent is a wrongful exercise of dominion over another even though there is no subjective sense of having been wronged, even, in fact, if the wrong was subjectively appreciated, and even though a commercial profit might accrue as a result. This is so because the wrong involved is the objective diminution of personal freedom rather than the infliction of personal suffering or the misappropriation of property.

I agree with Dean Prosser that, in one sense, it is "quite pointless to dispute over whether such a right is to be classified as 'property'";[154] as Warren and Brandeis long ago pointed out, there is a sense in which there inheres "in all . . . rights recognized by the law . . . the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property."[155]

But in one sense it is very important, as Warren and Brandeis saw, to decide whether the right to damages for the commercial use of name or likeness is called a property right. The importance resides in finding the common ground between the use of name and likeness cases, the public disclosure cases and the intrusion cases. In Dean Prosser's view the interest vindicated in each of these classes of cases is a different one. In my view the interest protected in each is the same, it is human dignity and individuality or, in Warren and Brandeis' words, "inviolate personality."

E. The "false light" cases

The fourth and final distinct group of cases which Dean Prosser identifies within the overall rubric of privacy are cases which he describes as involving "publicity falsely attributing to the plaintiff some opinion or utterance,"[156] cases in which "the plaintiff's picture [is used] to illustrate a book or an article with which he has no reasonable connection"[157] or in which "the plaintiff's name, photograph and fingerprints [are included] in a public 'rogues' gallery' of convicted criminals, when he has not in fact been convicted of any crime."[158] He says these cases all involve reputation and "obviously differ from those of intrusion, or disclosure of private facts [or appropriation]."[159]

I agree with Dean Prosser that all of these cases involve reputation,

but I am persuaded, though he is not, that they also involve the assault on individual personality and dignity which is characteristic of all the other privacy cases. The slur on reputation is an aspect of the violation of individual integrity.

Two California cases in which Mr. and Mrs. Gill sued for damages illustrate the point. They were photographed embracing in their place of business and the photograph was used in two different articles in the public press on the subject of love. In one of the articles, the photograph was used to illustrate the "wrong kind of love" consisting "wholly of sexual attraction and nothing else." In the other article, the photograph was used without any particular portion of the text referring to it. The plaintiffs succeeded against the publisher who characterized their love as being of the "wrong kind,"[160] but their complaint was dismissed as against the other publisher.[161]

The use of a photograph taken in a public place and published without comment in a news article could not be considered offensive to personal dignity because consent to such a publication, to the abandonment of privacy, is implied from the fact the Gills embraced in public. Use of the same photograph accompanied by false and derogatory comment is another matter, however. Although the comment may not be defamatory and, therefore, not actionable as such, when combined with the public exploitation of the photograph, it turns the otherwise inoffensive publication into one which is an undue and unreasonable insult to personality. It is the combination of false and stigmatic comment on character with public exhibition of the photograph which constitutes the actionable wrong.

Publishing a photograph in a "false light" serves the same function in constituting the wrong as does a use of the photograph for advertising purposes. The picture of Mr. and Mrs. Gill embracing could no more be used to cast aspersions on the character of their love than it could be used to advertise the aphrodisiac effects of a perfume. In both instances, such publicity "violates the ordinary decencies"[162] and impinges on their right to maintain their identity as individuals. (Significantly, the California District Court of Appeals which upheld the Gills' action cited a section of the California constitution guaranteeing the right to pursue and gain happiness[163] which is almost identical to the section of the Georgia constitution cited in the *Pavesich* case,[164] involving an unauthorized use of a photograph for advertising purposes.)

The use of a name in a "false light" is actionable for the same reasons as the use of a name for a commercial purpose. The "false light" in which the name is used makes the use wrongful for the same reason

that the use of the name for advertising purposes does. And, in fact, many of the cases which Dean Prosser cites as actionable for "falsely attributing to the plaintiff some opinion or utterance"[165]—including the leading *Pavesich* case[166]—are cases in which a name has been used for advertising purposes.

I suspect that the reason which leads Dean Prosser to distinguish the "false light" cases from the use of name and likeness cases is that, as I indicated above,[167] he mistakenly regards the latter group of cases as turning on a proprietary interest in name or likeness. If you believe the use for advertising purposes of a photograph of two ordinary people embracing is wrongful because it violates their pecuniary interest in their name or likeness, you will regard the use of the same photograph in a "false light"—illustrating a depraved kind of love-making, for instance—as involving a fundamentally different kind of wrong. However, once it is recognized ,that the use of a name for advertising purposes is wrongful because it is an affront to personal dignity,[168] the underlying similarity between the advertising and "false light'' cases becomes apparent. The "false light" and the advertising use are merely two different means of publishing a person's name or likeness so as to offend his dignity as an individual.

There is a recent tendency in the law of defamation which has extended the interest protected by that cause of action beyond the traditional reaches of character to include aspects of personal humiliation and degradation.[169] The cases pointing in this direction are those, for instance, in which recovery in libel has been allowed to a man whose published photograph represented him as grossly deformed[170] and in which recovery was allowed for publishing a photograph of an English sports amateur so as to suggest that he was commercially advertising chocolate.[171] These cases, it has been said, "have made it possible to reach certain indecent violations of privacy by means of the law of libel, on the theory that any writing is a libel that discredits the plaintiff in the minds of any considerable and respectable class in the community though no wrongdoing or bad character is imputed to him."[172]

This tendency in the law of defamation is consistent with, is, in fact, the counterpart of, the growth of the "false light" category of recovery in the law of privacy. It strongly suggests that the law of privacy may provide a valuable avenue or development for the law of defamation.[173] In this sense, however, it is the law of privacy which helps explain the defamation cases, rather than vice versa, as Dean Prosser suggests.

IV. Privacy in non-tort contexts

Besides introducing four principles to explain the tort cases involving privacy 'where one will suffice, Dean Prosser's analysis also has the unfortunate consequence that it makes impossible the reconciliation of privacy in tort and non-tort contexts. If privacy in tort is regarded as an amalgam of the infliction of emotional distress, defamation and misappropriation, it is impossible to find any common link between the tort cases and various forms of protection of privacy which are found in constitutions, statutes and common law rules which do not involve tort claims.

Actually, however, there is a common thread of principle and an identical interest or social value which runs through the tort cases as well as the other forms of legal protection of privacy. Thus, for instance, as I have already shown,[174] the fourth amendment to the federal constitution erects a barrier against unreasonable governmental entries into a man's home or searches of his person, and the Supreme Court has indicated on many occasions that this protection is of the very essence of constitutional liberty and security.[175] If the gravamen of intrusion as a tort is said to be the intentional infliction of emotional distress, the conceptual link between the tort and the fourth amendment is lost. But if the intrusion cases in tort are regarded as involving a blow to human dignity or an injury to personality, their relation to the constitutional protection of the fourth amendment becomes apparent.

The difference between the *De May* case,[176] involving an unauthorized witness to childbirth, and the *Silverman* case,[177] involving the use of a "spike" microphone in a criminal investigation to overhear a conversation in a home, is that the former involved an intrusion by a private person and a tort remedy was sought, while the latter involved an intrusion by a government agent and the remedy sought was the suppression of the use of the fruits of the intrusion. But the underlying wrong in both instances was the same; the act complained of was an affront to the individual's independence and freedom. A democratic state which values individual liberty can no more tolerate an intrusion on privacy by a private person than by an officer of government and the protections afforded in tort law, like those afforded under the Constitution, are designed to protect this same value.

A similar analysis may also be made of the public disclosure cases, the use of name or likeness cases and the "false light" cases. In these

cases the individual's dignity has been subject to challenge just as it was in the *Silverman* case, the *De May* case and the other intrusion cases. Respect for individual liberty not only commands protection against intruders into a person's home but also against making him a public spectacle by undue publicity concerning his private affairs or degrading him by commercializing his name or likeness or using it in a "false light." Each of these wrongs constitutes an intrusion on personality, an attack on human dignity.

It is true, of course, that the fourth amendment only protects against invasions of privacy perpetrated by state or federal officers.[178] This does not mean, however, that the wrong against which the amendment was erected is different from that which is involved where one private citizen intrudes upon another's home or subjects his person to an unwarranted search. Moreover, each state has a search and seizure provision comparable to that of the fourth amendment[179] and, in some states at least, it has been held that the provision applies to private persons.[180]

Thus, the protection which the fourth amendment secures against the enforcement of the criminal law by means of unreasonable searches and seizures involves the same underlying interest as that secured by the right of privacy in tort law. Although there are undoubtedly other considerations of policy involved in the fourth amendment cases,[181] they, like the tort cases, are intended to preserve individual dignity.

This same value is also enforced in numerous statutes which make intrusions on privacy a crime. The oldest of such are the so-called "peeping tom" statutes, which make it a misdemeanor to peer into the window of another's home.[182] The introduction of new means of "peeping," of electronic means of eavesdropping, has brought forth modern versions of the older "peeping tom" statutes. The Federal Communications Act makes it a crime to listen in to a telephone conversation without consent by tapping the telephone and subsequently disclosing what is heard.[183] And in New York, Illinois and Nevada it is a crime to eavesdrop "by means of instrument" on any conversation, telephonic or otherwise, or even to possess eavesdropping equipment.[184]

These statutes are obviously aimed at the same wrong against which the common law intrusion cases discussed above are directed.[185] Some of them provide for a civil remedy as well as a criminal penalty and thereby expressly enlarge the tort right to privacy.[186] Some courts have engrafted a civil remedy on the criminal prohibition, using the criminal statute—as is frequently done in the law of tort[187]—to define the wrong for which recompense in damages may be sought.[188]

Thus, for instance, in *Reitmaster v. Reitmaster,*[189] the defendants had violated the provisions against wiretapping in Section 605 of the Federal Communications Act and the plaintiff sued for damages. Although a jury verdict in favor of the defendant based on a finding of consent was affirmed, Judge Learned Hand, writing for the Second Circuit Court of Appeals, plainly indicated that a civil suit for damages would lie for a breach of Section 605. He said:

> Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the benefit of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.[190]

Such judicial creation of a civil remedy on the basis of the criminal wrong of wiretapping or eavesdropping, read together with the eavesdropping statutes which expressly provide coordinate civil and criminal remedies,[191] proves the identity of interest behind the civil and criminal remedies. It also provides an added reason for disputing Dean Prosser's contention[192] that the wrong in such intrusion cases is the intentional infliction of mental distress; if it were, the civil remedy would only be available on a showing of such distress, but, in fact, there is no such requirement. Finally, it should be noted that the theory expressed by Judge Hand in *Reitmaster* would provide an easy avenue for extending the civil right of privacy in New York, where it is a creature of a statute which limits recovery of damages to the use of name or likeness for purposes of trade or advertising.[193]

Another important class of statutes which are intended to protect against degradation of individuality are those which prohibit the disclosure of confidential information of various sorts. Thus, for instance, we are all required by law to divulge a great deal of information—of a personal as well as of a business nature—to the United States Government for the purpose of the census.[194] But all such information is made confidential by statute and unauthorized disclosure of it is a crime.[195] Although it is not as comprehensive, a similar prohibition against disclosure of data concerning personal lives and business affairs given for purposes of tax collection is to be found in the Internal Revenue Code.[196] And, in Title 18 of the United States Code, there is a broad prohibition, backed by criminal penalty, against disclosure by a federal officer of a wide range of confidential information concerning the operation of businesses.[197]

Similar statutes are to be found in state law. New York, for example, has a provision in its Public Officer's Law, which is not enforced by

a criminal penalty, forbidding any public officer from disclosing confidential information acquired in the course of his official duties.[198] In the Penal Law, there are provisions making it a crime for an employee of a telegraph or telephone company to divulge information gained in the course of his employment.[199] In another section of the Penal Law, disclosure by an election officer or poll watcher of the name of the candidate for whom a person has voted is made a misdemeanor.[200] In the Social Welfare Law, publication of the names of people receiving or applying for public assistance is made a crime, and all information obtained by and communications to a public welfare official, as well as all records of abandoned or delinquent children, are made confidential.[201]

The same pattern of protection is found in still other New York statutes. Thus, the Correction Law contains provisions intended to preserve the confidential character of criminal identification records and statistics.[202] The General Business Law forbids an employee of a licensed private investigator to divulge information gathered by his employer.[203] The Civil Rights Law forbids the publication of testimony taken in private by certain state investigative agencies.[204] And, finally, the Education Law forbids soliciting, receiving or giving information concerning persons applying for vocational rehabilitation training.[205]

This brief survey of federal and New York State statutes regulating disclosure of confidential information is not, of course, intended to be exhaustive. My purpose is rather to demonstrate by these statutes—and it should be noted that there are undoubtedly untold administrative regulations on the federal and state level which have a similar purport—that the same impetus which moved the common law courts to erect a civil cause of action founded on public disclosure of aspects of private life[206] also provoked action by the national and state legislatures intending to serve the same purpose.

Following Warren and Brandeis' lead, the common law courts responded to the threat posed to privacy by lurid journalism and demeaning advertising. Legislatures have responded to threats to personal dignity which were not yet manifest when Warren and Brandeis wrote. It was only after the turn of the century that the telephone and telegraph became instruments of everyday life, used to confide personal intimacies and business secrets. Unless some security could be found against people illicitly breaking in upon these private communications and divulging what was learned, an important area of private life would be subject to degrading public scrutiny, and public confidence in these instruments of communication would be destroyed. Section 605 of the Federal Communications Act[207] and various state statutes[208] were intended to prevent this consequence. Whether they were successful or not is, of course, another question.

Another avenue for impairing the privacy of our lives—again one which only became a cause for public concern after Warren and Brandeis wrote—was the increasing accumulation of information about each of us which finds its way into government records and files. Of course, the very fact that a government agency requires such information under the compulsion of law,[209] whether for the purposes of providing social welfare benefits, taking the census, or collecting taxes, is itself an intrusion upon our persons. Most of us have agreed, however, that the social benefit to be gained in these instances require the information to be given and that the ends to be achieved are worth the price of diminished privacy.

But this tacit agreement is founded upon an assumption that information given for one purpose will not be used for another.[210] We are prepared to tell the tax collector and the census taker what they need to know, but we are not prepared to have them make a public disclosure of what they have learned. The intrusion is tolerable only if public disclosure of the fruits of the intrusion is forbidden. This explains why many of the statutes which require us to tell something about ourselves to a government agency contain an express provision against disclosure of such information.[211] It also explains why there are general provisions prohibiting disclosure of information of a personal nature gained in an official capacity.[212] Again, I note that my purpose here is not to comment upon the effectiveness of these anti-disclosure statutes; it is only to describe their broad aims.

The parallelism between the intrusion and the disclosure statutes, on the one hand, and the intrusion and disclosure tort cases, on the other, illuminates, I believe, the common conceptual character of privacy which runs through all of them. Intrusion and public disclosure are merely alternative forms of injury to individual freedom and dignity. The common law courts provide civil relief against turning a man's private life into a public spectacle as well as against impairing his private intimacies by intruding upon them.[213] Similarly, legislatures have been impelled to prevent both eavesdropping *and* divulgence[214] or, where the intrusion is socially sanctioned, as in the census and tax fields, disclosure for other than sanctioned purposes. The disclosure provisions of the statutes, like the tort disclosure cases, preserve dignity by restricting publicity, by assuring a man that his life is not the open and indiscriminate object of all eyes. And, as the comparable tort cases do in relation to the tort intrusion cases, the statutory disclosure provisions complement the statutory intrusion provisions by

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. Conclusion: the invasion of privacy as an affront to human dignity

Dean Prosser has described the privacy cases in tort as involving "not one tort, but a complex of four,"[215] as "four disparate torts under . . . [a] common name."[216] And he believes that the reason the state of the law of privacy is "still that of a haystack in a hurricane," as Chief Judge Biggs said in *Ettore v. Philco Television Broadcasting Co.*,[217] is that we have failed to "separate and distinguish" these four torts.[218]

I believe to the contrary that the tort cases involving privacy are of one piece and involve a single tort. Furthermore, I believe that a common thread of principle runs through the tort cases, the criminal cases involving the rule of exclusion under the fourth amendment, criminal statutes prohibiting peeping toms, wiretapping, eavesdropping, the possession of wiretapping and eavesdropping equipment, and criminal statutes or administrative regulations prohibiting the disclosure of confidential information obtained by government agencies.

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 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.

Before he ascended to the bench, Justice Brandeis had written that the principle which underlies the right to privacy was "that of an inviolate personality."[219] Some forty years later, in the *Olmstead* case,[220] alarmed by the appearance of new instruments of intrusion upon "inviolate personality," he defined the threatened interest more fully.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[221]

Other Justices of our Supreme Court have since repeated, elucidated and expanded upon this attempt to define privacy as an aspect of the pursuit of happiness.[222]

More obscure judges, writing in the more mundane context of tort law, have witnessed this same connection. In two of the leading cases in the field, *Melvin v. Reid*[223] and *Pavesich v. New England Life Ins. Co.*[224]—one a so-called public disclosure case; the other a so-called appropriation or "false light" case—the right to recovery was founded upon the state constitutional provision insuring the pursuit of happiness.[225] Judge Cobb, writing in *Pavesich,* declared:

> An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy. The right of personal security is not fully accorded by allowing an individual to go through his life in possession of all his members and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail or free from other physical restraints. . . .
>
> Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. . . . 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.[226]

Some may find these judicial visions of the social goal embodied in the right to privacy vague and unconvincing. I find them most illuminating. Unfortunately, the law's vocabulary of mind is exceedingly limited. Our case law too often speaks of distress, anguish, humiliation, despair, anxiety, mental illness, indignity, mental suffering, and psychosis without sufficient discrimination of the differences between them. Justice Brandeis and Judge Cobb help us see, however, 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.

An intrusion on our privacy threatens our liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does. And just as we may regard these latter torts as offenses "to the reasonable sense of personal dignity,"[227] as offensive to our

concept of individualism and the liberty it entails, so too should we regard privacy as a dignitary tort.[228] Unlike many other torts, the harm caused is not one which may be repaired and the loss suffered is not one which may be made good by an award of damages. 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.

What distinguishes the invasion of privacy as a tort from the other torts which involve insults to human dignity and individuality is merely the means used to perpetrate the wrong. The woman who is indecently petted[229] suffers the same indignity as the woman whose birth pangs are overseen.[230] The woman whose photograph is exhibited for advertising purposes[231] is degraded and demeaned as surely as the woman who is kept aboard a pleasure yacht against her will.[232] In all of these cases there is an interference with individuality, an interference with the right of the individual to do what he will. The difference is in the character of the interference. Whereas the affront to dignity in the one category of cases is affected by physical interference with the person, the affront in the other category of cases is affected, among other means, by physically intruding on personal intimacy and by using techniques of publicity to make a public spectacle of an otherwise private life.

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. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.

The conception of man embodied in our tradition and incorporated in our 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. This, then, is the social value served by the law of privacy, and it is served not only in the law of tort, but in numerous other areas of the law as well.

To be sure, this identification of the interest served by the law of privacy does not of itself "solve" any privacy problems; it does not furnish a ready-made solution to any particular case of a claimed invasion of privacy. In the first place, not every threat to privacy is

of sufficient moment to warrant the imposition of civil liability or to evoke any other form of legal redress. We all are, and of necessity must be, subject to some minimum scrutiny of our neighbors as a very condition of life in a civilized community. Thus, even having identified the interest invaded, we are left with the problem whether, in the particular instance, the intrusion was of such outrageous and unreasonable character as to be made actionable.

Secondly, even where a clear violation of privacy is made out, one must still face the question whether it is not privileged or excused by some countervailing public policy or social interest. The most obvious such conflicting value is the public interest in news and information which, of necessity, must .sometimesrun counter to the individual's interest in privacy.[233] Again, identification of the nature of the privacy interest does not resolve the conflict of values, except insofar as it makes clear at least one of the elements which is to be weighed in the balance.

One may well ask, then, what difference it makes whether privacy is regarded as involving a single interest, a single tort, or four? What difference whether the tort of invasion of privacy is taken to protect the dignity of man and whether this same interest is protected in non-tort privacy contexts?

The study and understanding of law, like any other study, proceeds by way of generalization and simplification. To the degree that relief in the law courts under two different sets of circumstances can be explained by a common rule or principle, to that degree the law has achieved greater unity and has become a more satisfying and useful tool of understanding. Conceptual unity is not only fulfilling in itself, however; it is also an instrument of legal development.

Dean Prosser complains of "the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored" in the privacy cases.[234] Because he regards intrusion as a form of the infliction of mental distress, it comes as a surprise and cause for concern that the courts, in the intrusion cases, have not insisted upon "genuine and serious mental harm," the normal requirement in the mental distress cases.[235] Because he believes the public disclosure cases and the "false light" cases involve injury to reputation, he is alarmed that the courts in these cases have jettisoned numerous safeguards—the defense of truth and the requirement, in certain cases, of special damages, for instance—which were erected in the law of defamation to preserve a proper balance between the interest in reputation and the interest in a free press.[236] And because he conceives of the use of name and likeness cases as involving a proprietary interest in name

or likeness comparable to a common law trade name or trademark, he is puzzled that there has been "no hint" in these cases "of any of the limitations which have been considered necessary and desirable in the ordinary law of trade-marks and trade names."[237]

The reason for Dean Prosser's concern and puzzlement in each instance is based on his prior identification of the interest the tort remedy serves. If the intrusion cases serve the purpose of protecting emotional tranquility, certain legal consequences concerning necessary allegations and defenses appropriate to the protection of that interest seem to follow. The same is true for the other categories of cases as well. If he is mistaken in his identification of the interest involved in the privacy cases, however, the development of the tort will take—actually, as I have shown above, it has already taken—an entirely different turn, and will have entirely different dimensions.

The interest served by the remedy determines the nature of the cause of action and the available defenses because it enters into the complex process of weighing and balancing of conflicting social values which courts undertake in affording remedies. Therefore, my suggestion that all of the tort privacy cases involve the same interest in preserving human dignity and individuality has important consequences for the development of the tort. If this, rather than emotional tranquility, reputation or the monetary value of a name or likeness is involved, courts will be faced by the need to compromise and adjust an entirely different set of values, values more similar to those involved in battery, assault and false imprisonment cases than in mental distress, defamation and misappropriation cases.

The identification of the social value which underlies the privacy cases will also help to determine the character of the development of new legal remedies for threats posed by some of the aspects of modern technology. Criminal statutes which are intended to curb the contemporary sophisticated electronic forms of eavesdropping and evidentiary rules which forbid the disclosure of the fruits of such eavesdropping can only be assimilated to the common law forms of protection against intrusion upon privacy if the social interest served by the common law is conceived of as the preservation of individual dignity. These statutes are obviously not designed to protect against forms of mental illness or distress and to so identify the interest involved in the common law intrusion cases is to rob the argument for eavesdropping statutes of a valuable source of traditional common law analysis.

A similar argument may be made concerning other contemporary tendencies in the direction of stripping the individual naked of his human dignity by exposing his personal life to public scrutiny. The

personnel practices of government and large-scale corporate enterprise increasingly involve novel forms of investigation of personal lives. Extensive personal questionnaires, psychological testing and, in some instances, the polygraph have been used to delve deeper and deeper: into. layers of personality heretofore inaccessible to all but a lover, an intimate friend or a physician. And the information so gathered is very often stored, correlated and retrieved by electronic machine techniques. The combined force of the new techniques for uncovering personal intimacies and the new techniques of electronic use of this personal data threatens to uncover inmost thoughts and feelings never even "whispered in the closet" and to make them all too easily available "to be proclaimed from the housetops."[238]

The character of the problems posed by psychological testing, the polygraph and electronic storage of personal data can better be grasped if seen in the perspective of the common law intrusion and disclosure cases. The interest threatened by these new instruments is the same as that which underlies the tort cases. The feeling of being naked before the world can be produced by having to respond to a questionnaire or psychological test as well as by having your bedroom open to prying eyes and ears. And the fear that a private life may be turned into a public spectacle is greatly enhanced when the lurid facts have been reduced to key punches or blips on a magnetic tape accessible, perhaps, to any clerk who can throw the appropriate switch.

This is not to say, of course, that the same adjustments of conflicting values which have been made in the tort privacy cases can be assumed to apply without modification to resolve the questions of public policy raised by the use of sophisticated electronic eavesdropping equipment, psychological techniques of probing the individual psyche or the electronic data processing equipment. Nor is to say that the expansion of the tort remedy will provide a satisfactory legal or social response to these new problems. It is rather only to say that, in both instances, community concern for the preservation of the individual's dignity is at issue and that the legal tradition associated with resolving the one set of problems is available for us in resolving the other.

NOTES

1 **Warren & Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890) [hereinafter cited as Warren & Brandeis].**

2 **See, e.g., Annot., 138 A.L.R. 22 (1942); Annot., 168 A.L.R. 446 (194'7); Annot., 14 A.L.R.2d 750 (1950).**