

# Three Milestones in the History of Privacy in the United States

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## I. INTRODUCTION

The subject of privacy rights fits somewhere within the far broader subject of personality rights. Personality rights of course are numerous and diffuse. As Jean Dabin defined them, they are “rights whose subject is the component elements of the personality considered in its manifold aspects, physical and moral, individual and social.”<sup>1</sup> They may be classified by general headings under which related interests are grouped together. On the Continent and in countries where a general theory of personality rights has developed, privacy will be regarded as one of the individual’s social personality rights. It is only one of many personality interests that the law should protect. The rights relating to the physical and affective personality receive separate consideration.<sup>2</sup>

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1. Quoted (as translated) in Gert Bruggemeier, *Protection of Personality Interests in Continental Europe: The Examples of France, Germany and Italy, and a European Perspective*, in Niall Whitty & Reinhard Zimmermann (eds.), *RIGHTS OF PERSONALITY IN SCOTS LAW—A COMPARATIVE PERSPECTIVE* (Dundee U.P. 2009) [hereinafter WHITTY & ZIMMERMANN].

2. Swiss law, for example, presents the following tableau:

In the United States, however, where the phrase “personality rights” suffers from unfamiliar resonance and disconcerting generality, the law of privacy has developed fitfully, without the benefit of general theory and with little attention to taxonomy.<sup>3</sup> In the unstructured environment of case-by-case development, understandably the concept has taken on unusual meanings. Certainly today it means more than *la vie privée* or privacy in a narrow sense.<sup>4</sup> During the course of more than a 120 year development it somehow acquired, absorbed and incorporated various tangential interests such as the right to control use of one’s name, one’s image, one’s writings, one’s life story, and even the right to exploit one’s own publicity value. Obviously those who seek to capitalize upon the publicity value of their name or talent are not in fact seeking privacy in the usual sense of the word, and yet American tort law protects the publicity right either in the name of privacy or describes it as a related offshoot. Somewhat more remarkable is that our Supreme Court, in the name of protecting “privacy,” has swept together various liberties not expressly stated in the Constitution, like the decision freely to marry, the

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- I. Rights of the physical personality
    - Right to life
    - Right of corporeal integrity
    - Liberty of movement
    - Sexual Liberty
    - Protection of the body after death
  - II. Rights of the affective personality
    - Right to relations with loved ones
    - Right to respect for loved ones
    - Right to conjugal sentiments
    - Right to family heirlooms
  - III. Rights of the social personality
    - Right to name and other identifying signs
    - Right to one’s image and voice
    - Right to private life

See PIERRE TERCIER, *LE NOUVEAU DROIT DE LA PERSONNALITÉ* (Schulthess 1984) (my translation). On French law, see E.H. Perreau, *Des droits de la personnalité*, 8 RTDC 501 (1909); RAYMOND LINDON, *LES DROITS DE LA PERSONNALITÉ* (Daloz 1974); PIERRE KAYSER, *LA PROTECTION DE LA VIE PRIVÉE* (3ed Economica 1995); JEAN CARBONNIER, *DROIT CIVIL I/LES PERSONNES* (Thémis 2000).

3. There has been limited discussion. See Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915); Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932). Green’s scheme of personality interests recognized seven categories: physical integrity, feelings or emotions, capacity for activity or service, name, likeness, history and privacy.

4. Compare the more limited meaning and scope of privacy under the European Human Rights Convention: “Art. 8 Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence.”

right to procreate, the freedom to have an abortion or not, to educate one's children in a foreign language and so forth. These rights, important as they are, are not exercised in private but in public settings, as in public schools, public hospitals, and churches. Such rights and liberties do fall somewhere on an inclusive tableau of personality rights,<sup>5</sup> but the question remains: are they aspects of privacy? Why should they be called "privacy"? If privacy is supposed to mean all these things, in tort law and constitutional law, how can it be defined? My paper does not dwell upon the definitional question. It merely assumes that privacy cannot be defined coherently to mean so many things. It simply asserts that privacy in the United States is now an umbrella concept under which diffuse personality interests are brought together. I believe that how this came about is interesting and to understand the development we must follow the course of the development of this intriguing concept back to its beginnings in American law.

This paper can only retell a few chapters of the story of privacy in the United States.<sup>6</sup> I think you will find it is not like the story in France, where the judges built an impressive jurisprudence upon a Roman foundation in the 19<sup>th</sup> century,<sup>7</sup> nor is it anything like the story in Germany where the fathers of the BGB turned their backs upon the Roman heritage and banished personality rights from the civil law, only to see them later return under the Bonn Constitution.<sup>8</sup> Nor is it even similar to the English story where personality rights and privacy itself remain somewhat unfamiliar and unrecognized concepts.<sup>9</sup> Compared to the paths of European privacy, the United States has followed a unique trajectory, and compared to the concept of privacy on the Continent, it is a *sui generis* creation.

I will discuss three milestones in this 120 year journey. The first was the original treatment of the subject by Samuel Warren and Louis

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5. In the Swiss tableau in note 3 above, these diverse liberties come under headings I and II.

6. No attempt has been made to cover the myriad federal and state statutes in the United States dealing with protection of privacy. For an overview, see JOHN SOMA & STEPHEN RYNERSON, *PRIVACY LAW IN A NUTSHELL* 74-185 (2008), and DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* (Harv. 2008).

7. See French authorities in Bruggemeier, *supra* note 1.

8. See Florian Wagner-von Papp & Jorg Fedtke, *Germany*, in Koziol & Steininger (eds.), *EUROPEAN TORT LAW 2008* (Springer 2008); HANS-JOACHIM CREMER, *HUMAN RIGHTS AND THE PROTECTION OF PRIVACY IN TORT LAW: A COMPARISON BETWEEN ENGLISH AND GERMAN LAW* (Cavendish 2011); Bruggemeier, *supra* note 1.

9. To this day invasion of privacy is not a recognized tort as such under English Common Law. See *Wainwright v. United Kingdom* [2007] 44 EHRR 40. The closest analogue would be the action for breach of confidence which appears to have recently undergone a name change. It is now called misuse of private information. *Campbell v. MGN* [2004] UKHL 22.

Brandeis in their famous article “The Right of Privacy,”<sup>10</sup> in which the authors conceived of the need for such a right and through some combination of prestige and persuasion they set the American common law on an historical trajectory which turned out to be more far-reaching than in other common law jurisdictions. Following a seventy-year period of incubation and growth in which privacy rights received broad recognition, a second milestone was reached with the reformulation of the privacy right by William Prosser.<sup>11</sup> Prosser restructured all invasions of privacy into four separate torts and successfully implanted his own taxonomy directly into the Restatement 2<sup>nd</sup> of Torts. He effectively reshaped the landscape of American tort law until this day. The third milestone, which began in the 1960s and has by no means run its course, saw not only the application of constitutional limits on the common law torts, but the recognition of new constitutionally based privacy rights with origins independent of the common law. In the latter development, however, privacy encompasses a set of fundamental rights with little or nothing in common with the privacy protected by tort law. It concerns personality rights arising from the constitution, not a series of torts limited by the constitution. These rights protect against governmental rather than private invasion and require balancing of one constitutional right against another.

These milestones will provide a loose framework for an overview of this subject in which I hope to trace the progress and problems that privacy rights have encountered over the past century.

## II. A FIRST MILESTONE: WARREN AND BRANDEIS’S INVENTION OF PRIVACY

Curiously the right of privacy in American law had its inception not in a case or a statute, but in a law review article. That is usually considered an inauspicious beginning for common law development, yet no one seems to doubt that privacy rights achieved “takeoff” in the United States because of the special attributes of this famous article.

Samuel Warren and Louis Brandeis were classmates at the Harvard Law School and had been law partners in Boston up until 1889, one year before the article’s publication. The immediate reason for their concern about privacy rights was probably heavy media coverage of the private affairs of Warren, a socially prominent Bostonian who had married into an important political family. According to William Prosser, they sought

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10. Samuel Warren & Louis Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

11. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 423 (1960).

to curb the prying eyes of the press, which had covered in great detail the comings and goings of Warren's family.<sup>12</sup> The article itself does not disclose or discuss in so many words the personal motives of the authors yet one widely quoted passage pointed to the excessive curiosity of the tabloid press:

The press is overstepping in every direction the obvious bounds of propriety and 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. . . .<sup>13</sup>

In the context of the late nineteenth century these complaints about the press's disregard for privacy can be paired with similar complaints in other countries. Privacy had not found its way into the leading documents of the 18<sup>th</sup> century Enlightenment. Neither the American Constitution nor France's Declaration of the Rights of Man made any reference to it, apparently because there was as yet no formulated political or legal demand.<sup>14</sup> Nor had it received any attention in the French Civil Code of 1804, or the BGB of 1900.<sup>15</sup> Further, our more remote ancestors apparently had little interest or need for privacy, for as

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12. Recent research has uncovered as many as 60 articles in New York, Washington and Boston newspapers which give details about Mrs. Warren's various parties, luncheons, and social affairs, including accounts of the funeral of Mrs. Warren's sister and her mother, and of her own marriage to Mr. Warren. See Amy Gajda, *What If Samuel D. Warren Hadn't Married A Senator's Daughter?: Uncovering the Press Coverage That Led to "The Right of Privacy,"* 2008 MICH. ST. L. REV. 35.

13. Warren & Brandeis, *supra* note 10. Prosser would lead us to believe that the motives for the piece may be traced to Warren and the intellectual contribution to Brandeis, but it is difficult to assess such assertions.

14. Of course the 3rd and 4th Amendments to the U.S. Constitution may be read as protecting privacy interests, but the protections were narrow and the word was not used.

15. Elspeth Reid notes, "Few of the issues of privacy and confidentiality which so concern us today troubled Portalis, or the fathers of the German Civil Code." Elspeth Reid, *Protection of Personality Rights in the Modern Scots Law of Delict*, in WHITTY & ZIMMERMANN, *supra* note 1, at 310. The clear trend of the 20th and 21st centuries, however, is to emphasize and enumerate personality rights in the Civil Codes. The Swiss Civil Code (1907)(its Book I contained the "Law of Personality") was of course first in line and was inspired by French court practice. For the more modern trend see the Civil Code of Quebec (1991), art. 3 ("Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.") and thereafter arts. 10-11, 35-37, 42, 55; the Civil Code of Czechoslovakia (1964) art. 11 ("A citizen is entitled to protection of his personality, in particular his life and health, civil honor, as well as his name and expressions of a personal nature."), and thereafter arts. 12-17. To my knowledge the most extensive treatment is to be found in the new Chinese Civil Code (2009) where an entire title consisting of seven chapters (Title IV Personality Right Law) is devoted to the subject.

E.L. Godkin asserted, “Privacy . . . is one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies. The savage cannot have privacy, and does not desire or dream of it.”<sup>16</sup> Robinson Crusoe, it appears, had perfect privacy but neither he nor his contemporaries were actually seeking it. Society began to evidence prepolitical interest in privacy in the 18<sup>th</sup> century, as new architectural forms, home furnishings, diaries, letters and novels began to reflect a desire for intimacy.<sup>17</sup> Arguably in 19<sup>th</sup> century America the right may have already existed for many well before Warren and Brandeis highlighted the issue. A physical intrusion on privacy, for example, was already considered a tort, and there were a variety of protections—e.g., criminal laws against peeping Toms, prohibitions against opening private letters in the mails and telegraph messages, protections for confidential disclosures to confessors, doctors and spouses, not to mention the Fourth Amendment guarantee against unreasonable search and seizure—all of which addressed the issue in piecemeal fashion.<sup>18</sup>

In the latter half of the century the demand for privacy may have quickened with the rise of the mass-circulation daily newspapers and the invention of “instantaneous photography.” Facilitated by the availability of hand-held cameras<sup>19</sup> and other technological breakthroughs, photojournalism now became the standard accessory of the news reporter.<sup>20</sup> Photographs of those in the news were taken not only with greater ease, but often for illustrative purposes and without permission. The intrusive effect was apparently first felt by those who excited public curiosity the most, namely the noble families, political leaders and famous celebrities. Indeed the first cases we have were brought on behalf of towering figures like Chancellor Bismarck of Germany, Queen Victoria of England and the famous French actress Rachel.<sup>21</sup> Of course

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16. *The Rights of the Citizen: To His Reputation*, 8 SCRIBNER’S MAG. 58, 65 (1890)

17. See PATRICIA MEYER SPACKS, *PRIVACY: CONCEALING THE EIGHTEENTH-CENTURY SELF* (Chicago Press 2003); A. PARDAILHÉ, *LA NAISSANCE DE L’INTIME* (1988).

18. See Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1895 (1981) (sacred “right of privacy” violated when doctor brought an unqualified assistant into the bedchamber of a woman in childbirth).

19. See Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 AM. Q. 24 (Mar. 1991).

20. The practice of illustrating news stories with photographs was made possible by printing and photography innovations between 1880 and 1897. While newsworthy events were photographed as early as the 1850s, presses could only publish from engravings until the 1880s. Early news photographs required that photos be reinterpreted by an engraver before they could be published.

21. Bismarck’s case involved what we would now call in the United States the “intrusion” tort. On the evening of Bismarck’s death (July 30, 1898), two photographers stole into his bedroom at 4 a.m. and took flash pictures of the prince in his deathbed, then offered to sell these

in one sense this dynamic has not fundamentally changed even if it is more democratized. The modern law of privacy continues to be driven by privacy-seeking, curiosity-inspiring celebrities. It seems fair to say that Warren and Brandeis's complaint fits the pattern of a watershed period when the privacy of the prominent was initially disturbed.

Given the relatively recent origins of the demand, the authors wisely made no attempt to claim that privacy was an ancient "natural right" or a liberty interest protected under the constitution. Nor did they boldly seek to be the first to delimit the meaning of privacy. As we know, they only borrowed the memorable phrase of Judge Cooley that it was the right "to be let alone".<sup>22</sup> This left its meaning open to anyone's interpretation of what being left alone meant. Of course if we look closely at the authors' descriptions of privacy violations, their various arguments and hypotheticals, and the case authorities they considered relevant, it is possible to trace a more helpful outline of their thought. An inductive search through the article reveals they had several kinds of privacies in mind. The invasions apparently included the unauthorized "circulation of portraits" in the press and elsewhere;<sup>23</sup> the publication of "gossip" about domestic events; the unauthorized publication or display of private letters, works, creations,<sup>24</sup> and even lectures at the university;<sup>25</sup> the publishing of catalogues and lists of one's creations or possessions; intrusions into the domestic foyer to obtain private information,<sup>26</sup> including access by trespass or eavesdropping;<sup>27</sup> and finally the

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to the press. At the family's request, the police confiscated the plates and the photographers received prison sentences. The photo was suppressed until 1952. See *Bismarck on His Deathbed*, iconicphotos.wordpress.com. A somewhat similar situation occurred after the death of Elisabeth "Rachel" Félix. The actress was photographed on her death bed with the permission of her sister, but on the express understanding that no copy was to be given to anyone else. Pencil drawings based on the photograph, however, were made and put up for sale. The family obtained a court order to have the drawings seized and destroyed. *Félix v. O'Connell*, 16 juin 1858, Trib. Civ de la Seine, 1ere Ch., D. 1858, 3.62. Prince Albert's and Queen Victoria's effort to prevent a gallery from displaying their amateur etchings is detailed in the case of *Prince Albert v. Strange* 2 De Gex & Sm. 652 (1849).

22. Warren & Brandeis, *supra* note 10, at 194.

23. "For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons. . . ." *Id.* at 195.

24. *Prince Albert v. Strange*, *infra* note 8. (etchings by Queen Victoria for her private amusement).

25. *Abernethy v. Hutchinson*, 3 L.J. Ch. 209 (1825) (unpublished medical lectures).

26. ". . . idle gossip which can only be procured by intrusion upon the domestic circle." Warren & Brandeis, *supra* note 10, at 196.

27.

But can it be supposed that the court would hesitate to grant relief against one who had obtained his knowledge by an ordinary trespass—for instance, by wrongfully looking into a book in which the secret was recorded, or by eavesdropping? Indeed, in *Yovatt v.*

publication of secret and intimate knowledge in breach of confidence.<sup>28</sup> From these indicia, it seems they sought protection for at least three phases of the personality: (1) control over the use of one's name, likeness or photograph, (2) a reserved sphere of personal and family life, and (3) control over one's creations, writings and thoughts. In some respects their concept was spatial, as in emphasizing that the domestic circle and the sanctuary of the home were off-limits to information gathering. In other respects, however, it was non-spatial, as when the individual sought to prevent the circulation of her photograph or writings in the press. One side of the coin implied a limit on society's access to the individual<sup>29</sup> but the other called for the individual's right to control information or creations that were already in other people's hands.

Warren and Brandeis's article distinguishes itself, methodologically, by the boldness of its approach. They critiqued the existing common law (equity here included) by close attention to the underlying social interests protected by individual actions. The orthodox method of the common lawyer attempting to prove the existence of a right such as privacy would normally lead to analogizing judicial precedents and bending the forms of action. Warren and Brandeis, I submit, argued the matter the other way round. They treated the right to privacy as if it already existed. They spent no time debating this point.<sup>30</sup> It may be significant that their title was "The Right of Privacy" as opposed to "Is There a Right of Privacy?" The right stemmed from the underlying interests and needs of contemporary society;<sup>31</sup> it was not sought in the marrow of the common law remedial system.<sup>32</sup> They assumed the right's existence would precede

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Winyard, 1 J. & W. 394 (1820), where an injunction was granted against making any use of or communicating certain recipes for veterinary medicine, it appeared that the defendant, who had been in plaintiff's employ, had surreptitiously gotten access to his book of recipes, and copied them. Lord Eldon "granted the injunction upon the ground of there having been a breach of trust and confidence;" but it would seem to be difficult to draw any sound legal distinction between such a case and one where a mere stranger wrongfully obtained access to the book.

*Id.* at 212.

28. Warren & Brandeis, *supra* note 10, at 211.

29. ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 10 (1988); E.L. Godkin, *Libel and Its Legal Remedy*, 12 J. SOC. SCI. 69, 80 (1880).

30. They essentially disregarded the mine of legal authorities collected in the Note, *supra* note 18.

31. The term "interest" is being used in the sense the Restatement of Torts Second uses the term, i.e., to denote an object of human desire (ALI 1977, § 1).

32. James Gordley observes as an historical matter that the later common law tort writers began a process of rationalizing and classifying the forms of action in terms of the interests each protected. In doing so, they made it sound as if someone in authority had actually decided what interests should be protected, when nothing of the kind had ever actually been decided. Arguing in a circle, the writers measured the scope of an interest by the scope of the individual action.

the common law's recognition of it. The common law might recognize the right but it did not create it.<sup>33</sup> Theirs therefore was a method of arguing from right to remedy rather than from remedy back to right. This argument (uncharacteristic of common lawyers) enabled them to concentrate upon showing how imperfectly the common law protected the privacy interest.

Their critique showed that privacy interests were not protected except as the indirect effect of protecting something else, for example in the course of protecting reputation or property rights. What protection there was for the privacy interest was always the oblique result of shoehorning plaintiff's facts into one of the older, recognized torts. For example an author's control over his literary and artistic compositions was already a recognized property right, but this had forced courts to distort the usual meaning of property. It was conceded that an artist's compositions certainly possess "many of the attributes" of ordinary property, but when the issue was not who should profit from works of this kind, but rather who has the right to control or prevent dissemination of private information with no intellectual or literary significance, the property theory hardly covered the real interest at stake. To use one of their examples, if a man's diary merely stated that he dined at home with his wife, it was difficult to regard this information as a form of property, at least not "in the common acceptance of that term." In such a case the real thing to be protected was simply a kind of private information. What judges had been calling the author's "property" would be more logically explained in terms of the right to privacy. Of course if one cared to stretch language as far as possible, it would indeed be possible to restate all interests (even that of bodily integrity or reputation) in terms of

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FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 169 (OUP 2006). The tort writers never grounded those interests in social conditions, as Warren and Brandeis did. They instead assumed the common law was the source and that it supplied the scope of the protected interest. They rationalized these interests in an after-the-fact, circular, fashion. Warren and Brandeis posited a privacy interest before there were actions in privacy to rationalize.

33. Their approach resembles Pound's interest-oriented approach in *Interests of Personality*, where he states:

A legal system attains its end by recognizing certain interests,—individual, public, and social,—by defining the limits within which these interests shall be recognized legally and given effect through the force of the state. . . . It does not create these interests. . . . [T]hey arise, apart from the law, through the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies. The law does not create them, it only recognizes them.

Pound, *supra* note 3, at 343-44.

property, but surely this would denature the word and rob classification of all value.<sup>34</sup>

They likewise showed that the actions for breach of contract, trust or confidence were equally limited in protecting private information. Actions of that kind presupposed the betrayal of some antecedent relationship of trust or perhaps the breach of a promise not to disclose private information about plaintiff. The action could not lie if the disclosure came from someone with whom plaintiff had no prior relationship, for example if disclosure was made by the press or some stranger from whom plaintiff had received no undertaking of confidentiality.<sup>35</sup> What was missing was protection *erga omnes* as opposed to an action which presupposed relational privity.<sup>36</sup> The law of libel and slander also offered inadequate piecemeal protection. Those actions dealt with reputational interests, the lowering of a person's estimation in the community, and thus affected the individual's external relations to the community. They had no reference to the humiliation or embarrassment or indignity caused by an invasion of privacy. The common law had no action equivalent to the Roman action for *injuria* which took feelings and man's spiritual side into account.<sup>37</sup> Indeed, so long as defendant published only true and accurate facts, or published private facts that would not necessarily lower plaintiff's reputation,

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34. Leon Green once noted that if language is distorted sufficiently all legal interests (whether personality interests or interests in relations with others) could be restated as property interests. See *The Right of Privacy*, 27 ILL. L. REV. 237 (1932). He cited the statement of Vice Chancellor Malins in *Dixon v. Holden* (1869) L.R. 7 Eq. Cas. 488, as an example of this logic: "What is property? One man has property in lands, another in goods, another in business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these (even in a man's good name) is in my opinion destroying property of a most valuable description." Green thought it would also be possible, though equally distortive, to try to protect property interests by stretching the language of personality interests or to protect both property and personality interests by classifying them as interests in relations with other persons.

35. These two criticisms were broadly applicable to, and were no doubt inspired by, the reasoning in the leading case of *Prince Albert v. Strange*, [1849] EWHC Ch J20, which Warren and Brandeis cited extensively. In that case drawings and etchings which Queen Victoria and Prince Albert had made for their own amusement were surreptitiously taken and ended up in the hands of defendant Strange who planned to exhibit them at his gallery. An injunction was issued to prevent the exhibition as well as to prohibit publication and sale of an exhibition catalogue describing the works. The plaintiffs' argument was wholly based upon protecting the Queen's and Prince's property in these unpublished works. The Lord Chancellor upheld the injunction on the ground of property and/or breach of trust. "Both appear to me to exist in this case."

36. The privity limitation on this action still applies in some American jurisdictions, see, e.g., *Doe v. Portland Health Ctrs.*, 99 Or. App. 423, 782 P.2d 446 (1989), but has been removed at English common law. See *infra* note 45.

37. Warren & Brandeis, *supra* note 10, at 197 ("[O]ur law recognizes no principle upon which compensation can be granted for mere injury to the feelings.").

regardless how that might make plaintiff feel, an action for defamation would not lie. It could not vindicate the interest in privacy.

One further methodological point of interest is Warren and Brandeis's use of comparative law, in particular their reference to French legislation. France had arguably the most developed protection of privacy in late 19<sup>th</sup> century Europe. It impressed Godkin who wrote an influential social essay in 1880 that the authors had evidently absorbed.<sup>38</sup> Warren and Brandeis introduced the French experience quite laconically: "The right to privacy, limited as such right must necessarily be, has already found expression in the law of France." That assertion was true enough in 1890 and yet it was not based upon the rights which the courts of France had progressively recognized in the 19<sup>th</sup> century under the general clause of the Code Civil (art. 1382 CC). The authors made no allusion to the line of cases such as "l'affaire Rachel" (1858)<sup>39</sup> or "l'affaire Dumas" (1867)<sup>40</sup> in which the publication of private photographs was enjoined or caused liability.<sup>41</sup> Surprisingly their assertion was based upon the "ephemeral" 1868 Press Act<sup>42</sup> which imposed minor criminal sanctions for publishing "any fact of private life" in the newspaper. The curiosity is that this Act, which apparently had not been enforced by the government and indeed was repealed nine years before the Harvard article appeared, should be authority for France's recognition of the right of privacy. The explanation seems to be that the authors were less interested in the Act itself than the valuable ideas and instructions found in the Minister of Justice's Circular accompanying the Act. The Circular, from which they quoted several sections, advanced valuable ideas concerning how to balance and reconcile rights to the *vie privée* with freedom of the press. It offered concise guidelines how this right might operate consistent with the press's privileges and the defense of truth under actions for defamation. Brandeis and Warren leaned

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38. E.L. Godkin, *Libel and Its Legal Remedy*, XLVI ATL. MONTHLY 729-38 (Dec. 1880). "[O]n this point something is undoubtedly to be learned from French jurisprudence, which puts it in every man's power to prevent utterly those explorations of his private life which have lately become the fashion with a certain portion of the press and which especially in cases of bereavement or misfortune, give so much pain—often as exquisite pain as mortals know." *Id.* at 736. Warren and Brandeis cited Godkin's work and the influence extends to the replication of certain phraseology.

39. Trib. Civ. Seine, 16.6.1858, D.1858,3,62 (famous actress photographed on her deathbed)

40. C A Paris May 25, 1867.

41. Regarding the evolutionary development in France, see Pierre Kayser, *La protection de la vie privée par le droit* (3d ed. 1995); LINDON, *supra* note 2; FRANCOIS RIGAUX, *LA PROTECTION DE LA VIE PRIVÉE ET DES AUTRES BIENS DE LA PERSONNALITÉ* (1990); Bruggemeier, *supra* note 1; J.Q. Whitman, *The Two Western Cultures of Privacy*, 113 YALE L.J. 1151 (2004).

42. See LINDON, *supra* note 2, at 10-11.

heavily upon the Circular in deriving formula to limit the reach of the privacy right in a democracy. They adopted four key points from the Minister: the right of privacy would not prohibit publishing matters of public or general interest; public figures would necessarily have a smaller sphere of privacy protection than ordinary citizens; the right to privacy would not prohibit publication of privileged matter protected under the laws of defamation; there would be no defense of truth and no requirement of malice in actions for invasion of privacy. These four limitations were borrowed through comparative law research.

Others have noticed that Warren and Brandeis were somewhat vague on important issues. The meaning of privacy, as previously mentioned, was described but never defined. The omission has been criticized<sup>43</sup> but clearly it was wise to sidestep such an intractable issue. The different forms of privacy that have evolved in the past 120 years would confirm the difficulty of stating a definition even today, and the inspiring effects that the suggestive phrase “the right to be let alone” had on the imaginations and intuitions of future interpreters cannot be discounted. A different quality in their writing was their flexibility and pragmatism about theoretical matters. For example their arguments were usually at war with the property approach to privacy, but at the same time it was never suggested that the protections of property were wholly inappropriate or should be abandoned. Indeed some of their language suggests that if the common law broadened its conception of intangible property<sup>44</sup> it might allow privacy interests to be folded in. They were too sensible to discard a theory which already had the respect of a common law audience and could be usefully expanded. Perhaps most crucial in terms of pragmatism is one final point. In the last analysis they abstained altogether from recommending the means by which a right of privacy should be implemented. They offered no doctrinal steps, constructed no new torts, suggested no new catch-holds the common law judge should grasp to instantiate the right of privacy in the common law. Future steps are not even discussed. The solutions were simply entrusted to the judges.

Their *non-discussion* of implementation was in my view an act of pragmatic self-restraint. It reveals authors aware of their limitations, their

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43. According to Daniel Solove, their “right to be left alone” provides little guidance about the content of privacy, i.e., the matters in which we should be let alone. SOLOVE, *supra* note 6, at 18.

44. Thus throughout the essay they were careful to distinguish a narrow conception of property that was not capable of protecting privacy interests, as opposed to a wider or enlarged notion (“every form of possession—intangible as well as tangible”) that might englobe such interests. Warren & Brandeis, *supra* note 10, at 193.

audience's conservatism and the unpredictable nature, not to mention the glacial pace, of common law development. It was especially difficult to foresee the roads that English or American judges might actually travel in the future, and they did not presume to draw a roadmap. It was expedient to leave all avenues open. Surely they would not have foreseen the winding road of the past 20 years in England where the courts finally stripped the 'confidential relationship' requirement from the action for breach of confidentiality. Once freed of that limitation, the action seems to have become the principal means of enforcing information privacy in the United Kingdom.<sup>45</sup> The transformation, however, was unpredictable, long-range and actually it was precipitated by pressures from the European Convention on Human Rights. The authors would have also been hard put to foresee the future path of privacy in the United States, which, as we shall see, began in rejection, recovered in confusion, and later split into four torts.

A. *Intervening Years 1890-1970*

The Warren and Brandeis article inspired a long line of cases and a prodigious amount of commentary. In looking back over the first seventy years, William Prosser reported that more than 300 cases had been decided, only a few of which rejected the right. A great number of law review articles were also written, many by noted authors, including comparative law studies on the subject.<sup>46</sup>

Ironically the first step in the recognition process was a setback. In the 1902 case of *Roberson v. Rochester Folding Box*<sup>47</sup> the defendant company published without consent 25,000 copies of an attractive woman's photograph on its flour advertisements, and she sought an injunction against the distribution and damages for her humiliation and suffering. The New York Court of Appeal rejected her claim by a vote of 4-3. The majority opinion dismissed Warren and Brandeis's "clever article" and its "reasoning by analogy", declaring that the so-called right of privacy did not exist. Privacy had no existence apart from the right of

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45. See Reid, *supra* note 15, at 289-90; see also Gavin Phillipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act*, 2003 MOD. L. REV. 726.

46. Prosser, *supra* note 11; see H.C. Gutteridge, *The Comparative Law of the Right of Privacy*, 47 LQR 203 (1931); F.P. Walton, *The Comparative Law of the Right of Privacy*, 47 LQR 219 (1931).

47. 171 N.Y. 538, 64 N.E. 442 (1902).

property and to recognize it directly would spawn vast amounts of litigation.<sup>48</sup>

The decision was immediately unpopular and was legislatively overturned shortly thereafter. The New York legislature in the following session made it a misdemeanor and a tort for anyone to use the name, portrait or picture of another for advertising or purposes of trade without written consent.

Two years later, in the leading case of *Pavesich v. New England Life Insurance Co.*, the Supreme Court of Georgia in a unanimous decision rejected the Roberson precedent and gave relief on facts where the New York court had given none. The defendant published plaintiff's picture without permission in a newspaper advertisement, along with the false testimonial that plaintiff had purchased its life insurance. In an exceptionally thorough opinion, the Court placed the foundation of the right of privacy in natural law ("in the instincts of nature") and within the meaning of "liberty" under both the Georgia and United States Constitutions. "It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned." Contrary to the approach of Warren and Brandeis who thought the right was a new response to modern conditions and societal needs, the court turned privacy into an immutable "higher law" that had always existed. The relationship between privacy and the right of free expression would be a harmonious coexistence in which "One may be used as a check upon the other; but neither can be lawfully used for the other's destruction."<sup>49</sup> This case became the leading case in the country, and paved the way for recognition by many others.

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48. Justice Gray's dissent closely followed Warren and Brandeis, sometimes incorporating their phrases into his opinion. He noted, "The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement . . . , and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity." His argument at times rested privacy upon property theory, stating that plaintiff should have the same right of property in her own likeness as she has in her literary compositions. "[I]f her face or her portraiture has a value, the value is hers exclusively until the use be granted away to the public."

49. "There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision [the 1st amendment]. . . ." The same constitutional linkages would be made by subsequent courts. See *Melvin v. Reid*, 297 P. 91 (1931) (privacy linked to inalienable rights of liberty); *Barber v. Time*, 159 S.W.2d 291, 294 (Mo. 1942) (privacy part of the right to liberty and pursuit of happiness).

One of these was the much-discussed case of *Barber v. Time Magazine*.<sup>50</sup> There the magazine published a story entitled “Starving Glutton” about a woman with an insatiable appetite who had checked into a hospital to receive treatment. Reporters intruded into her room and secured a photograph of her in a hospital gown which was published under the caption “Insatiable-Eater Barber” “She eats for ten”. The Missouri court recognized the privacy right as a part of the inalienable right to liberty and the pursuit of happiness. “Certainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition . . . without personal publicity.”<sup>51</sup> In the California case of *Melvin v. Reid*,<sup>52</sup> a movie was made about a rehabilitated prostitute who had been living a respectable life for a long time. The film dredged up her life history, used her maiden name to identify her and caused her acute humiliation and embarrassment in her unsuspecting social milieu. The California Supreme Court linked the right of privacy to inalienable rights under the California Constitution and found that the movie invaded her privacy.

An important impetus to the acceptance of privacy rights was the backing provided by the First Restatement of Torts of 1939. The Restatement set forth a single provision on the right of privacy, but it had two parts. Privacy was the right to keep private facts out of the public eye and the right to control one’s own likeness.<sup>53</sup> Thus conceived, privacy would have to be protected by those two torts alone, and there was no indication that any more torts were gestating, though we know in hindsight that in fact two more were coming. In comments beneath the provision the reporter, Francis Bohlen, made no historical claims that the right emerged out of timeless natural law, as the Pavesich court had done in 1905. Echoing Roscoe Pound, Bohlen wrote “this interest appears only in a comparatively highly developed state of society. It has not been recognized until recently . . .”<sup>54</sup> Within the Restatement, the provision

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50. 159 S.W.2d 291 (1942).

51. *Id.* at 295.

52. 297 P. 91 (1931).

53. This was essentially the scope of the right discussed by Warren and Brandeis. Warren & Brandeis, *supra* note 10. Paragraph 867 of the Restatement of Torts provided: “A person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.” Five of the six illustrations under the section dealt with the unauthorized publication of a person’s photograph.

54. RESTATEMENT OF TORTS cmt. b at 399 (1939). In discussing the development of personality rights Roscoe Pound, *Interests of Personality*, approvingly quoted Miraglia’s statement: “A man’s rights multiply as his opportunities and capacities develop. The more civilized the nation the richer he is in rights.” Accordingly he argued that privacy is a recent

was classified under a hodgepodge of “miscellaneous rules” including those dealing with interferences to dead bodies, unborn children and the right to vote. Another curiosity is that the provision carried the caption “Interference with Privacy” but the word privacy appeared only in the caption, never in the text itself. Thus matters were couched cautiously, but at least the provision made clear that the right enjoyed an independent existence, and the prestige of the Restatement gave it momentum in American law.

The persistent problem running throughout these years, however, was that privacy was being gradually widened into a portal concept—it was a gateway to various personality rights other than privacy. The phrase “the right to be let alone” had prodigious breadth. It might mean, as Daniel Solove notes, any harmful conduct from a punch in the nose to a peep in the bedroom.<sup>55</sup> Nothing in this phrase restricted its application to the mischiefs decried by Warren and Brandeis. Interests like controlling one’s name, likeness, one’s life history or one’s past associations could all be addressed in the name of ‘privacy’. Even the emergence of a “right of publicity,” which allowed celebrities the exclusive right to exploit their fame and could be regarded as the antithesis of protecting privacy, was treated by some as a “legitimate offspring” of privacy.<sup>56</sup> Thus the undefined concept had become a proxy protecting more than privacy could reasonably suggest. All the judges in the cases, from *Pavesich* to *Melvin*, took part in the process of denaturing the word. Seventy years later it fell to William Prosser to restore order.

### III. A SECOND MILESTONE: PROSSER’S REFORMULATION OF PRIVACY

Once again a famous law review article brought momentous change to the subject. This milestone was William Prosser’s article “Privacy” published in 1960.<sup>57</sup> Prosser was undoubtedly the leading U.S. torts scholar of his generation. According to Daniel Solove, he reigned as “the undisputed king of the subject throughout the middle of the twentieth century”. Propelled by his personal influence, his article had such an

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demand growing out of the conditions of life in the crowded communities of today. They arise “apart from the law, through the competition of individuals with each other.” Pound, *supra* note 3, at 343, 445.

55. SOLOVE, *supra* note 6.

56. The first leading case was *Haelan Lab Inc. v. Tops Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), followed by Melville Nimmer’s *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954). For full background, see Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 DEPAUL-LCA J. ART & ENTER. L. 1 (1994/1995).

57. 48 CAL. L. REV. 383 (1960).

impact that some consider it more influential than the seminal work by Warren and Brandeis.<sup>58</sup>

Prosser begins by declaring that the right of privacy had been recognized by the overwhelming majority of the American courts and would probably soon be recognized by more. As of 1960 it stood rejected in only three or four states. Yet, he cautioned, only lately has there been any attempt to inquire what interests are we protecting, and against what conduct. His analysis of three hundred some-odd cases in the books forced him to a somewhat startling conclusion:

What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase of Judge Cooley, 'to be let alone.' Without any attempt to exact definition, these four torts may be described as follows:

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

Prosser's taxonomy was the centerpiece of the article and to this day it remains his central legacy. Much of the article was devoted to a discussion of each tort, mainly to show how the mass of cases really fit into these four piles, and how the actions and the interests protected were disparate and different. Prosser's achievement here was in one sense a reclassification at a lower level of generality. Peter Birks once observed that Prosser "balkanized" the protection of personality interests when he introduced his four privacies.<sup>59</sup> This can be taken to mean that he took a general right or interest in privacy and converted it into 'torticles,' some of which he admitted were not protecting privacy interests at all and were not related to the original concerns of Brandeis and Warren.<sup>60</sup> Prosser's lower-level headings reveal a quintessential common law trait, the tendency to create isolated torts rather than to accept broad subjective

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58. See Andrew J. McClung, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 897 (2006).

59. *Harassment and Hubris*, 31 IRISH JURIST 1, 44 (1997).

60. The expression 'torticles' is of course borrowed from Bernard Rudden, *Torticles*, 6/7 TUL. EUR. & CIVIL L.F. 105 (1991-1992).

rights. Indeed the broad success his taxonomy enjoys, I submit, reflects the prevalence of this tendency in Anglo-American legal culture.<sup>61</sup>

To someone interested in how Prosser (a “mere academic” as they say) achieved such a feat, it should be pointed out that his four torts did not emerge as a sudden brainstorm in and about the year 1960. It had been germinating in Prosser’s mind for many years. As early as 1941, (the date of the first edition of his classic treatise *The Law of Tort*) he had already divided privacy into three discrete actions—intrusions upon solitude, publicity of name or likeness, and commercial appropriation of elements of his personality.<sup>62</sup> He was three-fourths of the way there, and he alone among the treatise writers was thinking in these terms.<sup>63</sup> All that was missing at that point was ‘false light,’ and that idea came to him in time for the Cooley Lectures delivered at the University of Michigan in 1953. He inserted his new four-headed creature almost immediately into the 1955 second edition of his treatise. Thus one could well wonder why the 1960 article, which contained a classification scheme already five years old, has been regarded as a special “moment” in legal development. Neil Richards and Daniel Solove are surely correct in saying the 1960 article actually “broke relatively little new ground.”<sup>64</sup> Nevertheless the reason for its reputation consists in the article’s special qualities. It contained the first full exposition and reasoned justification of Prosser’s taxonomy. The long format of a law review article allowed him to enlarge upon the subject in ways that the treatise did not afford. He was able through extended discussion to persuade the reader that each tort had distinguishable characteristics, offered different protections, and did not duplicate or conflict with the other three. Suddenly the confusion lifted. Prosser appeared as a paladin who had slain a bewildering mass of cases. In addition the article furnished a long discussion of possible constitutional questions. Here he indicated how the privacy torts were

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61. Thus Basil Markesinis observes of English law “that when new needs arise it is better to deal with them by perverting existing institutions rather than by creating new ones.” See *The Familiarity of the Unknown*, in Swadling & Jones (eds.), *THE SEARCH FOR PRINCIPLE* (1999). Similarly Bernard Rudden observes that “wrongs which might go under general names, . . . are subject to pressure to fragment into more precisely named torts.” Rudden, *supra* note 60, at 128.

62. The breakdown into three categories was first suggested in an article by Gerald Dickler (“[T]he distinctions between these three groups of cases, which may be respectively denominated ‘intrusions,’ ‘disclosures,’ and ‘appropriations,’ have, for the most part, not wormed their way into the minds of courts and writers.”). See Gerald Dickler, *The Right of Privacy: A Proposed Redefinition*, 70 U.S. L. REV. 435, 436 (1936). Judging from Prosser’s very similar language, Dickler’s “trisection” of the cases was of considerable influence.

63. See FOWLER V. HARPER, *TREATISE ON THE LAW OF TORTS* ¶ 278, at 601-04 (Bobbs Merrill 1933); COOLEY ON TORTS ¶ 190, at 389-92 (Callaghan 1930).

64. Neil Richards & Daniel Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887 (2010).

constitutionally consistent with freedom of the press, the public figure doctrine and reporting on matters of public interest.<sup>65</sup>

A. *Prosser's Methodology Revisited*

Part of Prosser's success was that he made it sound as if the four torts simply emerged from a neutral reading of the cases. To anyone who would read over these same cases, however, Prosser might appear as something rather different than a neutral conduit. That he had normative notions which he superimposed and that he even harbored a certain hostility to this new "right," as Neil Richards and Daniel Solove point out, are in my opinion fair statements.<sup>66</sup>

The tort of "intrusion upon seclusion or solitude" offers a good example of Prosser's way of carving and slicing his torts from a mass of cases. In this instance he seems to have isolated a dramatic circumstance in a range of cases (i.e., *how* and *where* the invasion occurred) and by characterizing this recurring circumstance as 'intrusion' he made it the identifying element of the tort. The intrusion concept clearly required adoption of a spatial concept of privacy. There must be some actual 'thing' or 'area' intruded into, although it did not necessarily have to be owned by the plaintiff.<sup>67</sup> The necessity of an actual invasion was unique to this one tort; it played no role in the other three. This meant for most cases that protection of property rights served as the invisible tripwire of the tort of intrusion. Prosser admitted as much in saying, "The privacy action which has been allowed in such cases will evidently overlap, to a considerable extent at least, the action for trespass to land or chattels."<sup>68</sup> This tort had other special features not shared by the other three. Defendant's liability would not depend upon the publication of information acquired in the intrusion; if such publication did result,

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65. Richards and Solove say that in functional terms Prosser was as close to a lawmaker as any legislator or judge might have been. He made efforts to reach three audiences. In his role as Reporter on the Restatement of Torts and leading treatise author, he reached the judges and practitioners; as coauthor of a leading casebook, he shaped the views of students in the classroom; and as author of "Privacy," he reached the scholars and teachers with his most cogent account of the subject. *Id.*

66. My own view of Prosser's hostility toward the privacy right was reached at an early stage of this research, before coming across the insightful account by Richards and Solove, *id.* I found myself in basic agreement with their assessment of his role and I am indebted to their article in many respects.

67. It may be sufficient to have an expectation of privacy. See, e.g., *Nader v. Gen. Motors*, 255 N.E.2d 765 (C.A. N.Y. 1970) (following Ralph Nader into a bank was permissible, but standing in such a way to observe the denomination of bills he withdrew violated his privacy).

68. Prosser, *supra* note 11, at 389-90. As mentioned previously, the action in trespass had been expressly used to protect privacy interests well before Warren and Brandeis's article. Warren & Brandeis, *supra* note 10; see Note, *supra* note 18, at 1895-96.

however, the intrusion could not be justified by the newsworthiness of the information.<sup>69</sup>

Under the heading of intrusion Prosser grouped together such cases as barging into another's home without a warrant, or entering a hotel room or stateroom surreptitiously, or gaining access to private spaces by eavesdropping, secret wiretapping, or peering into windows, or hounding the debtor with telephone calls to the home. To further the impression the tort was distinct and stood on its own feet, he asserted that it was far from the type that Warren and Brandeis had in mind, for (he said) they were merely focused on the evils of publication of private information, not on intrusion upon a plaintiff's seclusion.<sup>70</sup> Of course here he overlooked what they had actually said. Warren and Brandeis had used the very words 'intrusion' and 'seclusion' in describing the privacy interest and they explicitly adverted to cases involving invasions by trespass or gaining access to information through surreptitious means. It was disingenuous to suggest that they did not appreciate or foresee spatial invasions, given their desire to free the right from the confines of a property-based rationale. Prosser's assertion was basically insensitive to their project. They sought a right of privacy grounded in "inviolable personality,"<sup>71</sup> not to define particular torts or sets of torts, and particularly not a new tort that would ultimately rest upon a property basis.

Prosser's tort of false light provides a second glimpse into his mind and method. False light, the last of the privacies to emerge, was essentially his own invention. It involved 'recharacterizing' a lot of cases that made no mention of the issue. Once again he isolated a factor or characteristic fact in a run of cases—the material published about plaintiff was *false* but not necessarily defamatory—and made this into the linchpin of the tort.<sup>72</sup> Given the lack of evidence he worked with, the

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69. DAN DOBBS, *THE LAW OF TORTS* ¶ 426, at 1201 (2001).

70. Of course, they would have treated such instances as a fortiori invasions and did not need to stress them.

71. "The principle which protects personal writings and all other personal productions, . . . is in reality not the principle of private property, but that of an inviolable personality." Warren & Brandeis, *supra* note 10, at 205. "[N]o basis is discerned upon which the right to restrain publication . . . can be rested, except the right of privacy, as a part of the more general right to the immunity of the person,—the right to one's personality." *Id.* at 207.

72. Perhaps an influence on Prosser was an early article by John H. Wigmore in which he classified various cases of "false attribution". Wigmore's cases included the circulation of poems falsely attributed to Lord Byron, a testimonial for Doan pills falsely attributed to Col. Chinn, and a wife's falsely naming (on a birth certificate) of her husband as father of an adulterous child. Prosser used these examples and regarded all of these as false light cases. See John H. Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 KENTUCKY L.J. 3 (1916).

wide acceptance of this tort is a great tribute to his personal stature and salesmanship.

As previously mentioned, this tort did not figure in his earliest treatment of privacy in 1941. It surfaced in the mid-1950s in his Cooley lecture, and he described its appearance in the cases as being “rather amorphous”,<sup>73</sup> which could almost be an autobiographical reference to his own agency. Partly accounting for the nebulous birth is surely the fact that no one but Prosser himself had ever referred to the cases he had in mind as “false light” cases. A close reading of the cases Prosser cited in support of the new tort reveals no earlier reference or discussion of the concept.<sup>74</sup> Many of these cases were indeed quite old and, interestingly enough, in prior writings he had classified them differently. For example, Prosser cited the old 1905 Louisiana case of *Itzkovich v. Whitaker*<sup>75</sup> and now classified it as a false light case. The defendant sheriff was allegedly about to put plaintiff’s photo into the “rogue’s gallery”, though plaintiff was a law-abiding citizen who had not committed a crime. The Supreme Court of Louisiana enjoined the sheriff from doing so, never mentioning false light, but simply emphasizing plaintiff’s right “to be let alone”.<sup>76</sup> Prosser also prominently relied upon the case of *Hinish v. Meier & Frank* and characterized it a false light case.<sup>77</sup> The plaintiff was a civil servant prohibited by law from engaging in political activity and his name was signed without his consent or knowledge to a telegram sent to the governor urging the veto of a bill sent to his desk. The Court viewed the defendants’ actions in signing plaintiff’s name as a wrongful appropriation of plaintiff’s personality. It stated: “defendants had appropriated to themselves for their own purposes, without the plaintiff’s consent and against his will, his name, his personality and whatever influence he may have possessed and injected them into a political controversy in which, as far as appears, he had no interest.” The court spoke only of appropriation; Prosser spoke of false light.

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73. WILLIAM PROSSER, *THE LAW OF TORTS* 638 (2d ed. 1955). In the subsequent edition of the treatise (1964 at 837) and in Prosser’s *Privacy* article, *supra* note 11, at 398, he spoke of its debut in the same way: “Over a good many years the principle made a rather nebulous appearance in a line of decisions. . . .”

74. The statement is made on the basis of reviewing the 27 cases cited by Prosser, *supra* note 11, at 398-401.

75. 39 So. 499 (1905). In the first edition of his treatise, WILLIAM PROSSER, *THE LAW OF TORTS* 1055 (1941), he classified *Itzkovich* in a broadly worded category: “publicity which violates the ordinary decencies given to private information about the plaintiff”.

76. “Everyone who does not violate the law can insist upon being let alone (the right of privacy). In such case the right of privacy is absolute.” 39 So. at 500.

77. 113 P.2d 439 (1941).

The *Hinish* case is one of a number of ‘name appropriation’ cases which Prosser converted into false light cases. The conversion could not be achieved without considerable creativity. In principle the unauthorized use of another’s name and influence for political purposes in *Hinish* was difficult to distinguish from the leading appropriation case in the country, *Pavesich v. New English Life Insurance Co.*<sup>78</sup> where an insurance company was held liable for the unauthorized use of plaintiff’s name, picture and a spurious testimonial endorsing their product. Yet in his article Prosser classified the two cases differently, calling *Hinish* false light and *Pavesich* appropriation.<sup>79</sup> Prosser never explained the difference nor why he was now changing his mind. *Pavesich*’s name, photo and words were clearly appropriated for commercial purposes, but of course at the same time the use of his identity in this way obviously portrayed him in a false light: He was not really insured by the defendant company and had not uttered the words attributed to him in the advertisement. The difficulty with creating an independent tort of false light would seem to be that every appropriation, whether the biographical facts were true or not, would tend to put the plaintiff in a false light. It would create at the very least the false perception in the mind of friends and associates that plaintiff gave his consent, and this alone could be enough to cause feelings of ridicule and humiliation.<sup>80</sup> Both false light and appropriation result in an alteration of personality, but appropriation was the broader, more inclusive category. One might say that appropriation precedes false light and is more fundamental to liability. The gist of the tort is a nonconsensual taking or alteration of personality. It is immaterial whether the material published is considered true or false. *Pavesich* would have recovered for invasion of privacy even if the defendant’s advertisement were perfectly factual.<sup>81</sup>

The point about Prosser’s role in the evolution of the false light category is therefore twofold. First, his creativity was evident in the liberties he took with the cases, retrofitting them to his purposes, and

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78. 50 S.E. 68 (1905).

79. Later in the Restatement (Second) of Torts, Prosser may have changed his mind again. *Hinish* is there the basis of an illustration of appropriation, not false light.

80. Thus in *Foster-Milburn v. Chinn*, 120 S.W. 364 (1909), the unauthorized use of plaintiff’s picture and testimonial created the perception that he had authorized the advertisement. As Wigmore noted in discussing the case (at 4), “the plaintiff had not written the letter, nor authorized it, and his friends had ridiculed him by reason of this false publication; moreover, there was a notorious custom of selling such testimonials to medicine-vendors, and this implied possible lack of integrity in the plaintiff.”

81. See DOBBS, *supra* note 69, ¶425, at 1198 (“Since the gist of the tort is the appropriation of the plaintiff’s identity or reputation, or some substantial aspect of it, no element of falsity is required.”).

boldly reading in a rationalization that the judges had not considered, or realized they needed.<sup>82</sup> Second, similar to the way he devised the intrusion tort, he once again singled out a factual element—the falsity of the material itself—and conceived a tort in terms of it. On the one hand, this tort differed only superficially from the tort of appropriation which inherently took account of the element of false light and, on the other hand, it differed only slightly from the tort of defamation as well as the tort of intentional infliction of emotional distress.<sup>83</sup> The niche for the new tort was therefore narrowly situated between closely resembling torts on either side. Dual and overlapping liability would arise easily in many factual situations. This may explain why some have questioned the usefulness of false light, that is, they have asked whether it is “a helpful addition to the armory or merely another piece of baggage that gets in the way.”<sup>84</sup>

### B. *Finding Order, Losing Sight of Privacy*

Judge Biggs once described the state of privacy law as “still that of a haystack in a hurricane,”<sup>85</sup> and Prosser was obviously disturbed by the disarray. His quest was to impose order, to find distinguishing and non-overlapping characteristics for each of his torts, so that none was exactly alike and each might have distinguishable rationale. Yet while the ‘complex’ had an appearance of order,<sup>86</sup> it did not have intellectual unity. Prosser acknowledged as much in saying that his privacies had *nothing in common* with each other.<sup>87</sup> Indeed if one looks at the structure closely, there is a complete disconnect between his four torts and the set of

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82. See *Kerby v. Hal Roach Studios*, 197 P.2d 577 (1942) (spurious erotic note signed with plaintiff’s name sent to 1000 men as advertising for a movie, causing plaintiff to receive unwanted telephone calls and visitors, and feelings of disgrace); *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.C. 1948); *Donoghue v. Warner Bros. Pictures*, 194 F.2d 6 (10th Cir. 1952).

83. *DOBBS*, *supra* note 69, ¶ 428, at 1209.

84. *Id.*

85. Quoted in Prosser, *supra* note 11, at 407.

86. Thus this account of the operating elements:

Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves use for the defendant’s advantage, which is not true of the rest.

PROSSER ON TORTS 843 (3d ed. 1964).

87. Prosser, *supra* note 11, at 389 (“The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are *tied together by the common name*, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, ‘to be let alone.’”).

privacy interests which was supposedly at its core. This disconnect was never so apparent in Prosser's earliest writings. It really became clear, however, when he became explicit about the underlying interests that each tort protected.<sup>88</sup> For example, the tort of appropriation of name and likeness was, as already stated, one of the core concerns of Warren and Brandeis ("circulating portraits"). The old 1904 New York statute and the Restatement of 1939 expressly included protections against unauthorized appropriations. Prosser's description of the protected interest, however, completely contradicted that provenance. "The interest protected," he said, "is not so much mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." This was actually a throwback to the forced and fictional theory of having a property interest in one's own name and identity. It rejects Warren and Brandeis's personality analysis<sup>89</sup> and reverts to the language of the 19<sup>th</sup> century English chancellors.<sup>90</sup> Something similar befell the tort of 'disclosure' when Prosser revealed the underlying protected interest. Prosser now said its purpose was to protect the interests of reputation because it is "in reality an extension of defamation into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth." Here again he differed from Warren and Brandeis who thought that disclosure of private facts is a wrong to "inviolate personality". Reputational interests in their view related more to man's external relations to the community rather than protecting his inner needs and feelings. Coming to false light, Prosser said the interest protected is "clearly that of reputation." In every

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88. The change in his interest analysis between 1955 and 1960 is palpable. In the second edition of his treatise he wrote "all three of these torts are primarily concerned with the protection of a mental interest, and that they are only a phase of the larger problem of the protection of peace of mind against unreasonable disturbance." PROSSER ON TORTS, *supra* note 86, at 639 (2d ed. 1955). By 1960, however, his view was that only the intrusion tort rested upon a mental element. The disclosure tort and false light protected reputational interests, while appropriation protected property interests.

89. See Richards & Solove, *supra* note 64.

90. One reason for Prosser's insistence on the proprietary theory is that he was committed to incorporating "right of publicity" cases in the same category with appropriation cases. The publicity right cases, however, had by then gained acceptance as a form of property with a distinct interest. Nimmer, *supra* note 56. Prosser's refusal to distinguish between the two kinds of appropriation interests (one wishing to prevent publicity, the other wishing to profit from it) may have driven him into the arms of the property theory. Ironically, if he had created a fifth tort covering invasion of publicity rights, he might have resisted that conclusion. Jonathan Kahn writes: "The early association of appropriation with such intangible, non-commensurable attributes of the self as dignity and the integrity of one's persona seems to have been lost or at least misplaced as property-based conceptions . . . come to the fore." Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTIST & ENT. L.J. 213 (1999).

instance, then, the protected interest for Prosser lay in pre-privacy causes of action, not in privacy itself. For that reason it would not be wrong to think of him as standing first in line among “reductionist” writers.<sup>91</sup>

Edward Bloustein, Prosser’s most incisive critic, immediately saw the dismantling of the Warren and Brandeis edifice, observing that after Prosser’s intervention there is no “new tort,” just new ways of committing “old torts.”<sup>92</sup>

But why did Prosser regress to the older protected interests? This cannot be known because Prosser did not tell us how or why he selected one interest over another. One possibility is that it came about by sorting the cases into piles while using an older tort as a template (for example using *trespass* for ‘intrusion’ and *libel* for false light), and then attributing to the new tort the characteristic interest associated with the old. But all we know in the final analysis is that Prosser assigned and attributed ‘interests’ that were *pre-privacy* interests. Privacy itself, the ostensible *casus belli*, was an interest lost in the process.

### C. *The Four Privacies Enter American Common Law*

The Restatement (Second) of Torts adopted Prosser’s four privacies in 1979. Using the prerogatives and powers of a Reporter, Prosser created a new chapter for the subject running to 28 pages (¶ 652(A-J) in which he essentially transplanted his entire taxonomy. A general principle of privacy was stated in ¶ 652A(1): “One who invades the privacy of another is subject to liability for resulting harm to the interests of the other.” The next section filled the space with the four torts, using terms nearly identical to Prosser’s original formulation.<sup>93</sup> At this point and for this purpose, he was the most important lawgiver in the United States. The comments stated that these four are the forms which have

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91. According to Daniel Solove, *supra* note 6, at 37, reductionists are theorists who argue that “privacy is reducible to other conceptions and rights.” Solove regards Judith Thomson as the most prominent proponent of this view. See Judith Jarvis Thomson, *The Right to Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 272 (F.D. Shoeman ed., 1984).

92. Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 NYU L. REV. 962, 965 (1964). He concluded that “the much vaunted and discussed right of privacy is reduced to a mere shell of what it has pretended to be.” If Prosser’s analysis is accepted, “the social value or interest we call privacy is not an independent one, but is only a composite of the value our society places on protecting mental tranquility, reputation and intangible forms of property.” *Id.* at 966.

93. RESTATEMENT (SECOND) OF TORTS ¶ 652A(2) (1979):

- (a) Unreasonable intrusion upon the seclusion of another
- (b) Appropriation of the other’s name or likeness
- (c) Unreasonable publicity given to the other’s private life
- (d) Publicity that unreasonably places the other in a false light before the public.

crystallized thus far, and others may still appear. But in fact there have been no new privacy torts since Prosser's death. The state courts followed his lead with relatively few exceptions. About forty-five states have adopted one or more of the privacy torts, nearly always following the Restatement definitions.<sup>94</sup> Even the rather controversial 'false light' tort is recognized in thirty states.<sup>95</sup>

The comments also contained special notes about constitutional questions. The comments about the disclosure tort (Publicity Given to Private Life) said:

It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment. . . . Since 1964, with the decision of *New York Times v. Sullivan* . . . the Supreme Court has held that the first Amendment has placed a number of substantial restrictions on actions involving false and defamatory publications.

Here the Restaters anticipated a certain amount of constitutional restructuring. To be sure it had always been recognized that privacy rights were subject to constitutional limits, but as Richards and Solove point out, the prior discussions were generally conducted "within the confines of tort law."<sup>96</sup> Scholars and judges sought the proper balance in the abstract and without the benefit of specific directions and minimum standards from the Supreme Court. That was in the day when tort lawsuits were considered private actions not attributable to the state and not subject to First Amendment scrutiny.<sup>97</sup> That picture changed in 1964 with *New York Times v. Sullivan*. Before long the new scienter requirements which shielded the press from defamation actions were extended to the tort of false light.<sup>98</sup>

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94. See McClung, *supra* note 58, at 897-98, for a comprehensive listing of the cases.

95. Nine states have expressly rejected it; eleven have yet to rule. Ohio was the 30th state to recognize false light, according to the opinion in *Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007). See also Jessica Long, *Let False Light Flicker On: An Argument in Support of States Adopting a False Light Invasion of Privacy Tort*, [www.jesslong.com/upload/falselight/\\_doc](http://www.jesslong.com/upload/falselight/_doc).

96. Richards & Solove, *supra* note 64, at 14.

97. In Richards' and Solove's phrasing, "Before then, tort law treated First Amendment interests . . . not as superseding considerations but as endogenous interests that were balanced in the crafting of legal rules." *Id.*

98. *Time v. Hill*, 385 U.S. 374 (1967) (actual malice standard applied to tort of false light—plaintiff must show defendant either knowingly or recklessly made a false statement without regard for the truth). The 'intrusion' tort may implicate First Amendment considerations as well. See the pending Supreme Court case of *Snyder v. Phelps*, argued October 6, 2010, involving protesters using a deceased marine's funeral as an occasion to object to homosexuality in the military. Adam Liptak, *Justices Take Up Funeral-Protest Case*, N.Y. TIMES, Oct. 7, 2010, at A17.

The most directly impacted action, however, may be the disclosure tort. Here the general question arises whether the truthfulness of the matter disclosed should be a complete defense, or whether truth, as Warren and Brandeis thought, is irrelevant to the question of liability. In *Cox Broadcasting Co. v. Cohn*<sup>99</sup> the Supreme Court held that the public disclosure of a rape victim's true name by the press was not actionable as an invasion of her privacy, at least not when her name was already published in official records and the information itself was of public interest. The ruling is a challenge to the very idea that truthful revelations of private facts are actionable under state common law.<sup>100</sup> If the disclosure tort is constitutionally hemmed in by two criteria (newsworthiness and prior recordation), there is almost no remaining space for its operation.<sup>101</sup> Indeed Novak and Rotunda go so far as to say that "The state should always recognize that truth is a defense in a defamation or right of privacy action—*unless* the defendant publishes confidential information that he himself has stolen."<sup>102</sup> If that were to emerge as the Supreme Court's position, and thus far it is difficult to predict, the disclosure tort might entirely disappear.

#### IV. THE THIRD MILESTONE: THE CONSTITUTIONAL TRANSFORMATION OF LIBERTY INTO PRIVACY

According to eminent authority, there is a certain paradox within the right of privacy. "It is revered by those who live within civil society as a means of repudiating the claims that civil society would make of them. It is a right that has meaning only within the social environment from which it would provide some degree of escape."<sup>103</sup> It is nothing less than "society's limiting principle."<sup>104</sup>

Starting in the 1960s, the Supreme Court jurisprudence began to transform the privacy concept well into a different set of individual freedoms. As Justice Stevens described the old and new senses of the term, privacy entails on the one hand an individual interest in "avoiding

99. 420 U.S. 469 (1975).

100. The Cox holding was reinforced in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (no liability for publishing a rape victim's name obtained from police report); *Landmark Commc'ns Inc. v. Virginia*, 435 U.S. 829 (1978) (no liability for publishing truthful information regarding confidential proceedings of judicial inquiry board); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (no liability for publishing lawfully obtained name of a juvenile delinquent).

101. Diane Zimmermann, *Requiem for a Heavyweight*, 68 CORNELL L.J. 291 (1983); McClung, *supra* note 58. On newsworthiness and public interest, see *Haynes v. Alfred Knopf*, 8 F.3d 1222 (7th Cir. 1993).

102. JOHN NOVAK & RONALD ROTUNDA, CONSTITUTIONAL LAW ¶ 16.36 (8th ed. 2010).

103. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW ¶ 15-1, at 1302 (2d ed. 1988).

104. *Id.*

disclosure of personal matters” but on the other hand an “interest in independence in making certain kinds of important decisions.”<sup>105</sup> His second category referred to a kind of decisional privacy, a sphere of personal autonomy in which the individual has a right to make fundamental personal decisions free from governmental interference.<sup>106</sup> The sphere included the freedom to marry, the freedom to procreate and rear children, the freedom to move about freely, and so forth. The newly minted category was no longer referring to a sphere of repose and sanctuary under the common law (the privacy of the social personality) which other members of society could not enter without permission. Whereas the emphasis in that sphere was upon the humiliated feelings of the individual, as a constitutional freedom it was upon his power to choose and control his world. This autonomy was not essentially about the individual’s power to control the circulation of information about himself. It related to a capacity to project one’s self forward in society, to assert her destiny and identity in the world, not merely the freedom to withdraw from it or control the publication of private information. Moreover, invasion of this constitutional right was not by the same invader. The focus was no longer the actions of the press, the gossip columnist or the trespasser, but rather the intrusions of legislatures and government agents. The Constitution protects vertically (freedom from *governmental* interference) rather than horizontally, and thus privacy in the decisional sense was not designed to deflect invasions by private actors. Finally there was another basic difference. This right of privacy was a nationwide guarantee. It was no longer a state-by-state question of tort law.

Fittingly, it was Justice Louis Brandeis who helped supply the hyphen between the older and the newer senses of the right in the case of *Olmstead v. United States*. The case involved the Fourth Amendment, considered the oldest constitutional right to privacy, which protects citizens against unreasonable searches and seizures. Defendants’ telephones were wiretapped by government agents from the outside street wires leading to his telephone. Evidence of a criminal conspiracy was thereby gathered without any physical trespass to office or home. The majority of the court found this presented no violation of the Fourth Amendment because there was no literal entry, seizure or searching of defendants’ property. Justice Brandeis in dissent, however, saw this

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105. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

106. See Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976).

nontrespassory wiretap as an invasion of privacy and a violation of the Fourth Amendment.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . 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. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>107</sup>

The *Olmstead* decision, however, was later overruled in *Katz v. United States* (1967) where the Court announced that the Fourth Amendment protects people, not places, and greatly relied upon Justice Brandeis's view.<sup>108</sup>

The first case explicitly to find a constitutional right to privacy was *Griswold v. Connecticut*,<sup>109</sup> where Justice Douglas famously found “zones of privacy” emanating from the First, Third, Fourth, Fifth and Ninth amendments to the Constitution. In striking down a state law banning the use of contraceptives by married couples, the Court said it violated a fundamental right to *marital privacy* which could be found in the “penumbras” of these guarantees.<sup>110</sup> Justice Douglas asked, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” The Court referred to marital privacy as a right “older than the Bill of Rights—older than our political parties, older than our school system.”<sup>111</sup>

Subsequent decisions showed that this fundamental right included various forms of freedom of choice in relation to an individual's life, for example, the decision to marry,<sup>112</sup> to bear children,<sup>113</sup> to maintain custody,<sup>114</sup> to live as an extended family under one roof,<sup>115</sup> and to exercise

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107. 277 U.S. 438, 478 (1928) (emphasis added).

108. 389 U.S. 347 (1967) (the Fourth Amendment protects people not places).

109. 381 U.S. 479 (1965). Earlier, in *Poe v. Ullmann*, 367 U.S. 497 (1961), Justice Harlan had articulated the concept of marital privacy in his dissenting opinion.

110. The penumbral approach by Justice Douglas has been characterized as an attempt to avoid the appearance of using the discredited *Lochner* approach. It has not been repeated in subsequent decisions. Erwin Chemerinsky considers it “ultimately a due process analysis” in any event. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* ¶ 10.3.2 (Aspen 2006).

111. *Id.* at 486.

112. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

113. *Roe v. Wade*, 410 U.S. 113 (1973); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

114. *Santofsky v. Kramer*, 455 U.S. 746 (1982).

choices in child rearing.<sup>116</sup> The precise clauses of the Constitution under which these cases were decided (the Equal Protection Clause, the Due Process Clause or the penumbras of certain provisions) were less important for present purposes than the Court's acknowledgment that a fundamental interest in autonomy and privacy was at stake. The most famous ruling was *Roe v. Wade* where the Court held that a woman's right to choose to terminate her pregnancy was part of her right of privacy.<sup>117</sup> The freedom to choose a sexual lifestyle was upheld in *Lawrence v. Texas* where a statute banning sodomy between persons of the same sex was struck down.<sup>118</sup> Whether an individual has a right to choose death over life, for example by refusing medical treatment or by committing suicide, has been considered by the court but there is no definitive ruling.<sup>119</sup> It is not out of the question that this may one day be recognized as a part of the right of privacy. Personal choices concerning hair length and clothes would also seem to involve one's autonomy and physical personality, but regulations mandating uniform dress and appearance regulations for school children and the police have usually been upheld.<sup>120</sup> Nevertheless for one eminent judge such regulations were an unacceptable effort to submerge and standardize individuality:

Hair . . . for centuries has been one aspect of the manner in which we hold ourselves out to the rest of the world. . . . A person shorn of the freedom to vary the length and style of his hair is forced against his will to hold himself out symbolically as a person holding ideas contrary, perhaps, to ideas he holds most dear. Forced dress, including forced hair style, humiliates the unwilling complier, forces him to submerge his individuality in the 'undistracting' mass, and in general, smacks of the exaltation of organization over member, unit over component, and state over individual.<sup>121</sup>

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115. *Moore v. City of Cleveland*, 431 U.S. 494 (1977).

116. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). These older decisions are usually regarded as privacy cases.

117. 410 U.S. 113 (1973) (the right of privacy in 14th Amendment is "broad enough" to encompass a woman's decision to terminate her pregnancy); *see also* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Earhart*, 530 U.S. 914 (2000).

118. 539 U.S. 558 (2003), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

119. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

120. *TRIBE*, *supra* note 103, ¶ 15-15, at 1384-89.

121. *Karr v. Schmidt*, 460 F.2d 609, 621 (5th Cir 1972) (Wisdom, J., dissenting).

## V. CONCLUSION

The subject of personality rights is sometimes presented as if it were exclusively a civilian concept<sup>122</sup> or possibly a civilian invention which emerged during the nineteenth century, inspired in large part by Revolutionary thinking, the French jurisprudence and German writers like Kant and von Gierke. The study of privacy in the United States, however, shows that personality rights can have an entirely different kind of history and taxonomy than on the Continent. Many personality rights are recognized in the United States as if they were aspects of privacy. The subsumption of these rights under privacy was accomplished by the growth of a somewhat vague and undisciplined category. Today it is the gateway to protections against unauthorized use of an individual's name, likeness, publicity rights, confidences, compositions, and life history; it is also the expression of a zone of autonomous decisionmaking relating to marriage, abortion, childbearing and childrearing. Lying at the intersection between private and constitutional law, it illustrates an interactive process whereby private law meanings influence constitutional meanings, and the counterthrust of the constitution defines the limits of the private law.

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122. Adrian Popovici, *Personality Rights—A Civil Law Concept*, 50 LOY. L. REV. 349 (2004).

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