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Symposium: The Right to Privacy One Hundred Years Later - Introduction

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SYMPOSIUM: THE RIGHT TO PRIVACY ONE HUNDRED YEARS LATER

ON DECEMBER 15, 1890, the *Harvard Law Review* published what is widely regarded to be the most influential law review article ever written—*The Right to Privacy* by Samuel D. Warren and Louis D. Brandeis. The article gave birth to the tort of invasion of privacy. Moreover, it developed and articulated a concept that provided some of the basis for the constitutional right to privacy, although the proximity of this relationship remains a subject of debate. It is not hyperbole to note that Warren and Brandeis's article pervades the law and remains the chief exemplar of the impact that legal scholarship can have on the development of the law.

Though its place in legal history is secure, the article's own vision of the law and the developments that the article has spawned are ripe for review. One hundred years ago it might not have seemed likely, at least not to Louis Brandeis, that the article would stir lasting curiosity. A few weeks before its publication, Brandeis wrote to his fiancée, "The proofs have come of the article on 'Privacy' & I shall write Charlie Nagel today enclosing him a copy. I have not looked over all of it yet, but the little I read did not strike me as being as good as I had thought it was."¹

Despite Brandeis's own reservations, *The Right to Privacy* created a tort, though it has since become a heading for four distinct causes of action. Viewing the evolution of the article and its tort over the last one hundred years raises important and difficult questions. To celebrate the centennial of this article, the Case

1. I. L. Brandeis, *THE LETTERS OF LOUIS D. BRANDEIS* 94-95 (M. Urofsky & D. Levy eds. 1971).

Western Reserve University School of Law and the *Case Western Reserve Law Review* sponsored a symposium, inviting fifteen leading scholars address some of these issues.

First, Professor Post examines the manner in which Warren and Brandeis conceptualized the appropriation branch of the privacy tort. He discovers that the article and subsequent case law rest on two very different notions of privacy: one normative and the other descriptive. Ultimately, Professor Post suggests that these two conceptual strains of privacy be disentangled.

Professor Schauer uses the occasion to question the value of truth. His primary vehicle for doing so is the public disclosure of private facts branch of the privacy tort. If the publication of true facts can be suppressed, or at least punished, what is the value of truth? Professor Schauer argues that this suggests truth is instrumental rather than ultimate and, significantly, truth is instrumental to power. The right to privacy, then, is properly viewed as a means of redressing the imbalance between relatively disempowered members of society and relatively powerful ones, particularly the media.

Professor Leebron steps back from the conceptualization of the particular privacy torts to view the place of *The Right to Privacy* in tort law generally. He contends that Warren and Brandeis's focus on the interest invaded, and hence on plaintiffs, indicates a rights-based view of tort law. This view is opposed to Holmes's theory of tort law, which focused on duty and hence on the conduct of defendants. Although tort law has developed along the lines suggested by Holmes, Warren and Brandeis's conception remains a significant contribution.

Professor Flaherty primarily concerns himself with the ramifications of information technologies for privacy protection. He brings a comparative perspective, analyzing the responses of Canada, Germany, and the United States to the challenges posed by the new information technologies. Professor Flaherty concludes that adequate protection of privacy requires both stronger constitutional safeguards and the establishment of an independent government agency charged with the protection of personal data.

Finally, Professor Gary Schwartz explores actions for false light invasion of privacy. He acknowledges charges that this particular tort is at best redundant given the existence of defamation actions. Professor Schwartz then responds by defining a limited ground not covered by defamation yet worthy of recognition. Specifically, he argues for the protection, under false light, of state-

ments that are highly offensive but cannot be considered disparaging. When limited to this context, the false light branch of the privacy tort ought to be preserved.

The symposium was held on November 15-16, 1990, at the Case Western Reserve University School of Law. Under the format of the symposium four papers were presented. Each presentation was followed by commentary from several panelists and then an open discussion. Professor Schwartz was originally scheduled as a commentator. After the program was set, he decided to present the article that appears below. It is for this reason that there are no commentaries on his piece.

An event such as this symposium cannot take place without the dedication of many people. Unfortunately, space does not permit us to mention all those who worked so hard to bring the symposium about. However, the efforts of Kerstin Trawick in running this event allowed it to take place. The assistance of Dean Melvyn Durchslag, Professors Jonathan Entin, Michael Grossberg, Lewis Katz, and William Marshall was, as always, outstanding beyond the call of their duty (or our right to expect it). The support and encouragement of Dean Peter Gerhart was typically generous and unflinching.

