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Privacy, Personality, and Social Norms

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PRIVACY, PERSONALITY, AND SOCIAL NORMS

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I DO NOT consider myself an expert on the privacy tort, nor on the more general and jurisprudential idea of privacy. My principal area of interest, at least for the past ten or so years, has been the libel tort, so I bring a comparative perspective to the subject of privacy. One comparative perspective in which I have been interested concerns the sociology of the libel tort—how the libel tort functions in its social and cultural setting.[1] This is a perspective from which the privacy tort, too, can be productively analyzed.[2]

In view of my interest in the sociology of libel, it is perhaps fitting that I have been asked to comment upon Robert Post's paper, for in this paper as well as in his other writings he brings a large and incisive view to the very idea of privacy as it is reflected in tort law and to the social framework within which it must operate. I will embarrass Professor Post by saying that his article is insightful and superb, and I will probably not disappoint him when I say that I find little if anything in it with which I disagree. That is no small statement, given the broad range of ideas that he develops so ably and synthesizes so cogently.

I do, however, have something to say about his paper. Specifically, I want to address his conclusion and his suggestion, albeit

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1. *See* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987) (providing an analysis of libel litigation practice and problems as well as alternatives to litigation); Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789 (1986) (empirical analysis of libel suits and their outcomes relative to plaintiff expectations) [hereinafter Bezanson, *The Libel Suit*]; Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226 (1985) (arguing that plaintiffs win by filing suit and publicly repudiating the libel, making the actual outcome of the suit of lesser consequence); Bezanson & Murchison, *The Three Voices of Libel*, 47 WASH & LEE L. REV. 213 (1990).

2. *See* R. Bezanson, The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990 (October 1990) (paper delivered at Privacy Symposium, University of California, Berkeley (publication forthcoming)).

implicit and tentative, that we should attempt to give content to a normative version of privacy—one based not in the formalism of property, but instead in personality and notions of community.[3] In this Professor Post and I part company, for such an enterprise is not only impractical, but inadvisable as well.[4]

Let me begin with our points of agreement. I very much agree that there are two "faces" of privacy reflected in the various privacy torts and that the appropriation tort is a fitting instrument for pursuing those two themes because it rests most uncomfortably at the intersection of the two faces of privacy—descriptive versus normative, or property-based versus personality-based. In other words, the appropriation tort itself exemplifies the schizophrenia of privacy generally.

I also agree that Warren and Brandeis were seeking to identify a normative idea of privacy based on personality and on the attributes conducive to the co-existence of individual identity and freedom, on the one hand, and organized social and political institutions, on the other. This, of course, is the puzzle of privacy, especially in a society that, by its Constitution, seems to have organized freedom in individual rather than communal form. Our society has rank ordered the manifestations of unadulterated individual freedom—thought, belief, and expression—above the social preconditions to freedom—the constitutive social qualities necessary for individuality and, therefore, for the very conditions of free thought, belief, and expression. In this respect, the contribution of Warren and Brandeis has been, of late at least, inadequately understood and appreciated. Further, thanks to Prosser, it has been largely written out of the privacy torts.[5]

Finally, I agree with Professor Post's extremely able analysis of the appropriation tort, along with its confounding offspring, the right of publicity. In its execution, if not in its *Restatement* articulation,[6] the tort has persistently contained seeds of both descriptive and normative privacy: the former perhaps because of discomfort with the coherence of a normative approach and the

3. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991).

4. For an elaboration on much of this response, see R. Bezanson, *supra* note 2.

5. *See* RESTATEMENT (SECOND) OF TORTS § 652I (1976) (focusing on harm to a property right from invasions of privacy); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (arguing that privacy action based on harm to personality has proceeded too far, and limitations should be established to protect defendants).

6. *See* RESTATEMENT (SECOND) OF TORTS § 652C.

instrumental need for ascertainable legal rules, and the latter because of a belief that more than a commodity is at stake and that the property-based rules sweep too indiscriminately in terms of normative privacy interests as well as first amendment concerns.

Professor Post is therefore correct, I think, in advocating the disentanglement of the appropriation tort as part of a larger enterprise involving all of the privacy torts. I do not agree with him, however, that once disentangled the normative idea of privacy should be retained. Indeed, in my view we should dispense with legal recognition of normative privacy for reasons of tort law, not constitutional law.

I will not attempt in this brief response to explain the reasons for this conclusion in great detail, but I will outline them briefly. Let me begin with the concept of normative privacy itself. As Professor Post describes it:

> [N]ormative privacy[] conceives the identities of persons as dependent upon the observance of social norms of respect. The function of the law is to uphold those norms. In contrast the commodified personality . . . is not conceptualized as constitutive of the identities of particular persons, but as detachable from them. . . .
>
> At issue in the distinction between privacy and property . . . is the legal conception of the person. The question is whether the law ought to construct its doctrine on the presupposition that identity is essentially embedded within and dependent upon particular social arrangements . . . .[7]

Normative privacy, in short, assumes, in the context of public expression, certain identifiable and ascertainable communities, behavioral norms that can be enforced within those communities, and a system of social values that are sufficiently homogeneous to be embodied in law as restrictions on publication. It assumes, also, that the values, norms, and communities, while heterogeneous, have widely shared or common characteristics that are identifiable and concrete, for they must have sufficient composition to serve as instrumental sources of legal restrictions on expression.

For my part, I seriously doubt whether, in 1990, we can satisfy any of those prerequisites. We live in a society of shifting, increasingly specialized, and highly decentralized relationships, in contrast to the more commonly rural and communitarian fabric of

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7. Post, *supra* note 3, at 669.

the nineteenth century.[8] Within communities, even when we can identify them, habits of discourse and relationship are dramatically, if not radically, varied. Conduct acceptable in one community is unacceptable in another; indeed, within given communities the same conduct is at once condemned and condoned, depending upon the occasion or its justification. This is not due to whim or caprice but stems instead from deep-seated ambivalence about shared standards of conduct or taste in our culture. Perhaps most importantly, broadly held social values, at least those of the type Warren and Brandeis had in mind and those that can be safely imposed on the expressive activities of others, are simply unavailable. Our society is based, pervasively, on individualism within a highly pluralistic society. Our values, at all but the most abstract level, are relative. This is why we are, appropriately, a society based on individualism rather than assimilation.[9]

An example or two will help to illustrate this point. We can begin with the Sizemore case, which Professor Post also discusses. Chris Costner Sizemore, a victim of multiple personality disorder, lived a tragic life depicted in the movie *The Three Faces of Eve*.[10] Upon her recovery, the prior sale of the rights to her life's story foreclosed her sale of the rights to her new autobiography, a work that recounted her "reconstituted" life after recovery. Professor Post asks whether the law should "allow the objectification and alienation of a person's entire narrative history,"[11] and makes a compelling argument that tort law should not extinguish Sizemore's right to reconstitute her personality. Professor Post further argues that a powerful claim can be made that the law should protect her ability to do so, even at the expense of the right of another to appropriate the fruits of that new personality.

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8. *See* R. Bezanson, *supra* note 2; *see also* D. RIESMAN, THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER 83 (1950) (individualism has been subsumed within peer groups, and competitiveness has become a search for peer group approval); M. SCHUDSON, DISCOVERING THE NEWS 59-60 (1978) (movement from rural community to urban society caused a marked shift in social relationships and institutions, allowing the birth of modern journalism); G. SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 317-18, 416-24 (K. Wolff trans. 1950) (culture is becoming increasingly objective and impersonal as it moves from coherent families to metropolitan centers).

9. For an insightful discussion of the relationship between free expression, on the one hand, and cultural models of assimilation, pluralism, and individualism, see Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1988).

10. *The Three Faces of Eve* (20th Century Fox 1957).

11. Post, *supra* note 3, at 679.

If Professor Post's only point is that we should limit the effect of her consent, I might agree, although I would require that such a conclusion be grounded in descriptive rather than normative considerations. The case illustrates a larger problem, however. Can we seriously conceive, in this day and age and in this society, that we would countenance a normative restriction on discourse about her situation, even in a movie made for television? I think not.

The same, it seems to me, can be said about the human interest story reflected in *Canessa v. J.I. Kislak, Inc.*[12] There, a feature story pictured the plight of a desperate family with eight children attempting to find housing and the efforts of a local real estate firm in assisting them. The court reached the doubtful conclusion that use of the news article by the firm for advertising purposes was tortious but rightly avoided clothing this result in normative privacy garb. Professor Post suggests that the result was, in this sense, correct, for no normative principle is available to justify liability.[13] I am not so sure; the Canessas were, after all, reconstituting their lives. I nevertheless agree with Professor Post for the very different reason that no normative rationale should be available. I simply cannot imagine normative rules of decency that would foreclose the unconsented publication of the Canessas' story as social commentary, allegory, or a reflection of an individual's or group's ideological preferences, in a society in which Oliver Sipple's homosexuality,[14] Robin Howard's sterilization,[15] the names of rape victims,[16] and, most recently, the involuntary disclosure of a person's sexual preference, are public property.

The reason for my conclusion that normative, community-based standards of discourse cannot be imposed is that we are too committed to pluralism—too attuned to differences—to indulge in the assumption that such publications have no value, that external values are available by which we might rationalize such limitations, and that social norms of value and discourse embedded in relatively universal yet concrete communities are available for that purpose.

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12. 97 N.J. Super. 327, 235 A.2d 62 (1967).

13. Post, *supra* note 3, at 674.

14. *See* Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978).

15. *See* Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980).

16. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989).

Even in the context of appropriating aspects of personality for use in public discourse, our society is too committed to the value of public enlightenment, which can be served in myriad ways; too committed to seeing value as an instrumental outgrowth of ideology and group interest; and too committed to recognizing the role of individual personality disclosed in public discourse as allegory or metaphor to be comfortable with restrictions on disclosure, even setting aside the related yet distinct first amendment problems. The only exceptions to this rule of open discourse are, ironically but not surprisingly, reminiscent of property-based notions of privacy—when the appropriation is effected for purely commercial reasons, or when the appropriation represents a breach of contract or reflects, at base, the individual's decision to commodify his or her personality.[17] Therefore, the normative idea of privacy is inadvisable because it reflects a society in which we may want to live, but not one in which we do live, and it reflects values to which we might aspire, but not values that we now hold.[18]

Even if we could envision a normative form of privacy to be captured in tort law duties—that is, even if our society did consist of coherent communities with widely accepted norms of behavior and homogeneous values—I seriously doubt that such an idea could be practically embodied in law and at the same time satisfy the demands society makes of law. For tort law to serve its objectives it must have predictability, especially when the subject of liability is expression. Predictability provides fair warning to the tortfeasor of the conduct that may be subject to liability, and through that predictability permits the legal system to serve its twin objectives of compensating harm and, more relevant for present purposes, deterring future tortious conduct. Predictability also affords consistency in the incidence of liability, an essential ingredient of fairness in the legal system.

A normative concept of privacy cannot satisfy these criteria in a society that is pluralistic, decentralized, heterogeneous, and individualistic. I have suggested in the context of the libel tort that first amendment protection is built upon the mendaciousness

17. *See* RESTATEMENT (SECOND) OF TORTS § 652C comments a, b (1976) (likening the interest protected to a property right for the exclusive use of the individual, unless a licensing agreement is granted to a third person).

18. I do not suggest that the legal system dispense with all protection against disclosure of private or intimate information. Rather, the protection of such interests should be vested in a tort that is based on confidentiality rather than privacy. *See* R. Bezanson, *supra* note 2.

of our social and political arrangements.[19] In today's libel tort the fact of harm itself, much less the goodness or badness of motives,[20] has precious little to do, constitutionally speaking, with liability.[21] Similarly, liability for invasion of privacy should have little to do with perceived violations of a normative concept of privacy or with the goodness or badness of a publisher's motives. A normative privacy tort would require a reversal of these priorities, making the fact of harm and the goodness or badness of motives paramount. Much as I would like people to behave more constructively, or perhaps more sensitively, in their public and private discourse, I think it would be both wrong and impractical for us to assume that the legal system can accomplish that end through the imposition of liability.

I suspect that the futility of discerning any workable normative idea of privacy is the very explanation for the persistence of descriptive, or property-based, conceptions of the privacy torts. With such torts we can be more comfortable about the lines we draw, and rest liability more confidently on notions of ownership, contractual obligation, consideration, waiver, and the like. These are familiar instruments to the legal system, and it is understandable why this is so, as they are necessary to achieving consistency, predictability, and fairness. The unavailability of such instruments by which we might calibrate a normative concept of privacy is perhaps the best explanation for the fact that privacy in that form is, and has almost always been, a broken promise.[22] What is perhaps most important to understand is that the promise was broken, not under the auspices of the first amendment, but because of the very practical demands of tort law.

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19. *See* Bezanson, *The Libel Suit*, *supra* note 1; Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535 (1989); Bezanson & Murchison, *supra* note 1.

20. By this I mean ill will, spite, or tastelessness as opposed to knowledge of falsity, reckless disregard for the truth, or negligence. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974) (mere negligence sufficient where plaintiff is a private figure); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring a knowing or reckless publication of falsity where plaintiff is a public figure).

21. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (adopting the *New York Times* standard with respect to public figures claiming intentional infliction of emotional distress); R. BEZANSON, G. CRANBERG & J. SOLOSKI, *supra* note 1, at 195-200 (discussing how fault has replaced harm to reputation in determining liability).

22. This is particularly well illustrated by the patchwork career of the public disclosure tort, which represents perhaps the purest form of normative privacy protection. *See* Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press*, 64 IOWA L. REV. 1061 (1979); Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989).