

Volume 41 | Issue 3

1991

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Recommended Citation

Jonathan L. Entin, *Privacy Rights and Remedies*, 41 Case W. Res. L. Rev. 689 (1991)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol41/iss3/6>

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PRIVACY RIGHTS AND REMEDIES

*Jonathan L. Entin**

THE RIGHT OF privacy has become a staple of public discourse. Most commonly, this subject serves as a euphemism for abortion,¹ as the debate over the Supreme Court nominations of Judges Bork and Souter demonstrated. But privacy implicates more than what we do in our bedrooms. Under modern fourth amendment doctrine, for example, a "reasonable expectation of privacy" triggers the requirement that the authorities obtain a search warrant.² The census, in which we are all legally obliged to participate, assures us of the privacy of our responses, although those statutory assurances apparently have failed to persuade many persons to cooperate with the decennial enumeration of the population.³ As Professor Flaherty shows elsewhere in this symposium, various federal statutes allow individuals to verify the accuracy of personal information contained in official and unofficial data bases.⁴

On the centennial of the publication of the Warren and Brandeis article,⁵ then, we should note how much our conceptions of privacy have changed. Many of the changes in our thinking con-

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1. The qualified constitutional right to obtain an abortion is based upon the pregnant woman's right to privacy. *Roe v. Wade*, 410 U.S. 113, 155-56 (1973). This privacy rationale was an extension of the reasoning that had condemned state laws prohibiting access to contraceptives. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

2. *Katz v. United States*, 389 U.S. 347, 357 (1967).

3. The legal obligation to participate in the census is specified in 13 U.S.C. §§ 221-225 (1988). Concern over the accuracy and inclusiveness of the census has spawned an increasingly large body of litigation in recent years. *See, e.g., City of New York v. United States Dep't of Commerce*, 739 F. Supp. 761 (S.D.N.Y. 1990) (collecting cases); M. ANDERSON, *THE AMERICAN CENSUS* 131-235 (1988); Conk, *The 1980 Census in Historical Perspective*, in *THE POLITICS OF NUMBERS* 155 (W. Alonso & P. Starr eds. 1987). This concern is not exclusively a modern phenomenon, however. *See, e.g., P. COHEN, A CALCULATING PEOPLE* 175-204 (1982) (discussing the controversy over the 1840 census).

4. *See Flaherty, On the Utility of Constitutional Rights to Privacy and Data Protection*, 41 CASE W. RES. L. REV. 831 (1991).

5. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

cern the scope of the right. Various commentators have debated the nature of the interests protected by Warren and Brandeis's right to privacy and have questioned the substantiality of the injuries that are assumed to have given rise to the article and to many invasion of privacy claims.⁶ These are important and controversial issues, but they are not the only ones worth considering. While we debate the nature of the right, we may overlook the complexities of the remedy. Perhaps, though, thinking about the remedy might help us to understand the nature of the right.

I

Professor Post has given us a characteristically elegant analysis of the sociology of privacy law. Those who value only scholarship which provides an algorithm that generates predictable results in every plausible hypothetical lawsuit will find his paper disappointing. For reasons discussed below, however, this frank recognition of the difficulty of fashioning a reasonably straightforward legal rule is one of the paper's great virtues.

The elegance of Professor Post's analysis consists in his transcending a purely individualistic notion of privacy in favor of a more complex conception that emphasizes the interdependence of individuals and their communities. Here, as elsewhere,⁷ Professor Post synthesizes the work of such leading social theorists as Simmel, Mead, Parsons, Goffman, and Gouldner with traditional legal doctrine and commentary. Indeed, one of Professor Post's aims seems to be to break through the traditional intellectual antagonism between the law, viewed as an autonomous discipline, and the social sciences.⁸ Under this approach, the insights of social

6. See, e.g., Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

7. Of most immediate relevance to this symposium, see Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989); Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986); Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990).

8. On the increasing impact of intellectual perspectives from outside the law as traditionally defined, see Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 766-77 (1987). Judge Posner's prolific scholarship has contributed to the rise of the law and economics movement. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986). Interdisciplinary work by legal scholars is by no means new. An important strand of legal realism rested upon empirical studies drawing upon the research

theory enrich our understanding of the normative dimensions of privacy but preserve the primacy of lawyers and legal institutions in the resolution of legal questions in this field.⁹

Given this analytical framework, much of the difficulty in defining the precise contours of the right to privacy arises from the obvious pluralism of our society. The legal system emphasizes dichotomous thinking: winners and losers, rights and wrongs. Even in a time of four-part tests or reasonable persons, the law aims to simplify norms and customs so that legal institutions can define and apply legal rules in understandable and relatively consistent fashion.¹⁰ The debate over privacy arises precisely because of our cultural heterogeneity, as Professor Zimmerman has suggested.¹¹

Some of the uneasiness over recognition of Warren and Brandeis's right to privacy stems from concerns about remedies. Attempting to define privacy rights in terms of the possible means for their vindication should not strike anyone as novel. The scope of other substantive legal rights is affected by remedial concerns. The law of nuisance is a notable example.¹² Some jurisdictions have allowed plaintiffs injunctive relief whenever a nuisance causes "not unsubstantial" damages.¹³ Yet in two prominent nui-

traditions of sociology and psychology. See L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 3-44 (1986); W. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS* 610-14, 662-76 (1984). Despite the demise of the realist movement, however, the empirical tradition survives in the law and society field.

9. There is a different school of social science, one that is more explicitly quantitative in its orientation. That school of social research is represented by another commentator on Professor Post's paper, Dean Bezanson, who coauthored a monumental empirical study of libel litigation, R. BEZANSON, G. CRANBERG & J. SOLOSKI, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* (1987). This is not the occasion to compare these research traditions. It is sufficient to note that both the more qualitative analyses exemplified in the works upon which Professor Post relies and the more quantitative work of the kind Dean Bezanson has done reveal the ambiguity, inconsistency, and contextuality in our understanding of the world.

10. See Bohannon, *The Differing Realms of the Law*, 67 *AM. ANTHROPOLOGIST* 33, 37 (1965).

11. See Zimmerman, *supra* note 6, at 334-36.

12. Other instances include freedom of speech, *see, e.g.*, *Connick v. Myers*, 461 U.S. 138, 149 (1983); procedural due process, *see, e.g.*, *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976); and civil rights, *see, e.g.*, *Rizzo v. Goode*, 423 U.S. 362, 377-79 (1976). See Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 674-76 (1983) (collecting cases from additional areas).

13. *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 4-5, 101 N.E. 805, 806 (1913). The injunction allowed under this rule must be tailored to the circumstances. *See, e.g.*, *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 50-51, 81 N.E. 549, 552 (1907) (modifying injunction to permit defendant to change rather than cease its operations if it could do so without causing further harm to plaintiff).

sance cases courts have crafted novel remedies out of concern for the drastic efforts of injunctions. The first awarded permanent damages in lieu of an injunction where the injunction would have shut down a large company that employed over 300 people.¹⁴ The second required the plaintiff, which had come to the nuisance, to indemnify the defendant for its relocation expenses where both parties were engaged in socially desirable but mutually incompatible activities.¹⁵ Questions about remedies are also raised, but not answered, in connection with the appropriation tort that Professor Post discusses in his paper. It is to this subject that I now turn.

II

Warren and Brandeis expected damages to be the main remedy for invasion of privacy. As Professor Post notes in his discussion of appropriation, the philosophical basis for the tort affects the type of damages available to a plaintiff. If appropriation is viewed in property terms, damages will be commodified or measured by the market. If appropriation is viewed in personality terms, however, damages for mental or emotional distress will be available.¹⁶ More generally, damages for privacy claims based upon intrusion, public disclosure, and false light also may include recovery for mental and emotional distress.

It is precisely because plaintiffs can recover for psychic injury that some critics are uncomfortable with the privacy tort. As Professor Post points out, the common law was generally hostile to such claims both at the time that Warren and Brandeis wrote and for years afterward. Psychic injuries were viewed as idiosyncratic, intangible, and ephemeral. Underlying the skepticism about the privacy tort is a sense that juries will make extravagant awards to respectable plaintiffs who have suffered no real harm simply to punish unpopular or disfavored defendants. We need not look far for examples of this phenomenon in related areas of tort law. Consider the award of \$200,000 in damages to Jerry Falwell by a hometown jury on the basis of a modest showing of distress over

14. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 225-28, 257 N.E.2d 870, 873-75, 309 N.Y.S.2d 312, 316-19 (1970).

15. *Spur Industries, Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 184-86, 494 P.2d 700, 706-08 (1972).

16. See Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 670-74 (1991).

an offensive parody in *Hustler Magazine*,¹⁷ or the award of \$500,000 in damages to L.B. Sullivan by another hometown jury on the basis of factual errors in an advertisement that did not even remotely refer to him.¹⁸

Perhaps we should not despair over the work of juries. After all, a jury in Ohio recently refused to convict anyone involved in the display of provocative photographs by Robert Mapplethorpe, and a jury in Florida rejected criminal charges against the controversial musical group 2 Live Crew. I am uncomfortable with argument by anecdote, though, and the *Falwell* and *New York Times* juries suggest that the fear of unprincipled verdicts is not entirely unwarranted.

Although the Supreme Court overturned these awards on first amendment grounds, the Court has defined compensable actual damages in libel litigation to include "personal humiliation and mental anguish and suffering."¹⁹ Perhaps the answer is to adopt for privacy claims constitutional constraints analogous to those that apply to defamation, although the libel regime's emphasis on varying levels of fault for various permutations of parties and issues has left almost everyone dissatisfied.

The complexity of the libel regime has led to numerous reform proposals. Among these are nondamage schemes such as retraction,²⁰ repair,²¹ and judicial determination of truth or falsity.²² But these alternatives would not work very effectively for intrusion or public disclosure claims because they would entail further dis-

17. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47-48 (1988); see Entin, *Privacy, Emotional Distress, and the Limits of Libel Law Reform*, 38 *MERCER L. REV.* 835, 853-54 (1987).

18. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); see Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 *SUP. CT. REV.* 191, 194-200.

19. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

20. See, e.g., R. SMOLLA, *SUING THE PRESS* 241-42 (1986). The constitutionality of a compelled retraction or right to reply is unclear. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating state law conferring mandatory right of reply upon political candidates who are attacked by newspapers), with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding administrative regulation providing right of reply to persons attacked in broadcasts concerning matters of public importance).

21. See LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 *NEB. L. REV.* 249, 305-16 (1987).

22. See, e.g., R. BEZANSON, G. CRANBERG & J. SOLOSKI, *supra* note 9, at 209-19; Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 *HARV. L. REV.* 1287 (1988).

semination of the truthful private information that already had been improperly disclosed.

Other suggested changes have addressed the nature of permissible awards. One possibility would be to prohibit, or at least restrict, the availability of punitive damages on the theory that they are "private fines levied by civil juries."²³ Alternatively, a cap could be imposed on damages for invasion of privacy, or damages might be limited to actual pecuniary loss.²⁴

The attack on damage awards for mental and emotional distress in privacy cases raises broader questions that relate to complaints about a more general liability crisis in the contemporary tort system. Some of those complaints include examples of allegedly frivolous claims of psychic injury.²⁵ Whatever the merits of those complaints and however excessively pro-plaintiff tort doctrine has become, the common law has been awarding damages for dignitary and intangible harms for a long time. Perhaps Warren and Brandeis proceeded from a mugwump and even hypersensitive conception of the civility rules that ought to govern a heterogeneous society.²⁶ Maybe they drew the line in the wrong place. But are those of us who view their outrage over the seemingly trivial transgressions of the Boston press a century ago as excessive really prepared to deny that victims of racial, religious, or sexual harassment suffer genuine mental and emotional distress, or to say that such genuine distress should always go uncompensated?

If we are uncomfortable with damage remedies, at least for nonpecuniary injuries, we might consider some form of injunctive relief. A notable recent example is General Noriega's attempt to enjoin CNN from broadcasting the government's tape recordings of his privileged telephone conversations with his lawyers.²⁷

There are at least two problems with injunctive relief in pri-

23. *Gertz*, 418 U.S. at 350.

24. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771-72 (1985) (White, J., concurring); Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 756-73 (1984); Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 615 (1983).

25. *See, e.g., P. HUBER, LIABILITY* 121-27 (1988).

26. *See Post, supra* note 16, at 652.

27. *United States v. Noriega*, 917 F.2d 1543 (11th Cir.), *cert. denied sub nom. Cable News Network v. Noriega*, 111 S. Ct. 451 (1990). The preliminary injunction was later terminated by the district court. *See United States v. Noriega*, 752 F. Supp. 1045 (S.D. Fla. 1990).

privacy cases. First, the victim frequently will not learn about a privacy invasion before the defendant disseminates the information. An injunction cannot be effective in these circumstances. Second, an injunction against publication is a prior restraint, and prior restraints carry an enormous presumption of invalidity under the first amendment. The reasoning of *Nebraska Press Association v. Stuart*²⁸ suggests that Noriega's injunction request cannot overcome that presumption.²⁹ After all, the harm to General Noriega was caused by the government's misconduct in recording his privileged communications; CNN's actions cannot undo that injury, which might well require that all charges be dropped.

Perhaps this situation is more complex. After all, two lower courts upheld the interim injunction. Moreover, the Supreme Court has never endorsed a per se rule against prior restraints (and has upheld some arrangements that look remarkably like prior restraints).³⁰ Alternatively, perhaps these tapes compromise the attorney-client privilege, a relationship between particular individuals that protects the covered information from dissemination forever. This would distinguish the Noriega situation from *Nebraska Press*, where the information at issue would have eventually become public.

If some variant of this argument ultimately prevails,³¹ certain privacy claimants might find it possible to obtain injunctive relief. But the cost of such relief might prove substantial. The prior restraint doctrine is hedged about with exceptions and inconsistencies, focusing exclusively upon the timing of speech regulation and embodying no substantive vision of the first amendment.³² Never-

28. 427 U.S. 539 (1976).

29. *Id.* at 559.

30. On the rejection of a per se rule against prior restraints, see, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47 (1961); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). The Supreme Court has upheld licensing schemes against first amendment challenges, at least where those schemes provide appropriate procedural safeguards to assure prompt, unbiased decisions. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); cf. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1968) (suggesting procedural protections that would allow licensing schemes to survive constitutional challenge). Injunctions against publication are regularly issued to prevent copyright infringement. See, e.g., *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 144 (11th Cir. 1990); Post, *supra* note 16, at 664 n.90.

31. The district court in *Noriega* concluded that there was no factual basis for an injunction in that case. *United States v. Noriega*, 752 F. Supp. 1045, 1053-54 (S.D. Fla. 1990). This ruling does not preclude the possibility of entering an injunction in other circumstances.

32. See, e.g., Jeffries, *Rethinking Prior Restraint*, 92 *YALE L.J.* 409, 419-34 (1983);

theless, relaxing the presumption against prior restraints could have profound symbolic effects. Whatever the defects and limitations of the doctrine, everyone agrees that the first amendment was intended, at least, to discourage prior restraints.³³ Overturning this settled assumption might raise doubts about the vitality of many modern first amendment principles that remain controversial.

Finally, let us return to Professor Post's provocative suggestion that privacy doctrine reflects and seeks to enforce civility rules. If he is correct, an unlawful invasion of privacy injures not only the victim but also the community as a whole. Recall the Supreme Court's characterization of punitive damages as "private fines levied by civil juries."³⁴ This statement implies that the community has some role to play in enforcing its rules and punishing those who violate them. Perhaps we should treat at least some invasions of privacy as crimes. Indeed, some invasions of privacy, most notably intrusions, often are crimes.³⁵ Treating privacy violations as crimes would not necessarily preclude victims from maintaining tort actions, as we all learned in our first year of law school. But if privacy concerns not just atomistic individuals but persons embedded in a social environment, perhaps those who violate privacy norms should be made to compensate not just the individual victim but the collectivity within which the victim is embedded.

Imposing criminal sanctions for privacy invasions poses daunting problems, however. For example, expanding the categories of expression that could give rise to prosecution might have an unacceptably large chilling effect on constitutionally valued speech. Drafting a penal statute of sufficient precision to avoid running afoul of the overbreadth and vagueness doctrines will not be easy, either.

In sum, even if we agreed fully with Warren and Brandeis about the need to afford legal protection for privacy, serious remedial problems would remain. This brief discussion is intended to stimulate further thought about those problems. Perhaps the diffi-

but see Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

33. See, e.g., *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 462 (1907).

34. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

35. For example, a prominent AIDS researcher recently reported that intruders had broken into his home, apparently in search of scientific data. Culliton, *Gallo Reports Mystery Break-in*, 250 Sci. 502 (1990).

culty of crafting acceptable remedies will persuade us that Warren and Brandeis were pursuing a legal chimera. Alternatively, thinking about remedial issues might help us more clearly to define the substantive right that we call privacy

III

Like Professor Post, I have raised more questions than I have answered. In doing so, I take my cue from Professor Schauer, who has expressed the hope that we would come here to inquire and discuss rather than to debate or promote simple solutions to complex problems. I hope that some of my questions will stimulate responses, even if those responses show me how much more I need to know

