

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 29
Issue 3 *Journal of Computer & Information Law*
- Spring/Summer 2012

Article 9

Summer 2012

Giving Credit Where Credit is Due: A Comment on the Theoretical Foundation and Historical Origin of the Tort Remedy for Invasion of Privacy, 29 J. Marshall J. Computer & Info. L. 493 (2012)

Alberto Bernabe
John Marshall Law School, abernabe@uic.edu

Follow this and additional works at: <https://repository.law.uic.edu/jitpl>



Part of the [Computer Law Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), [Science and Technology Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Alberto Bernabe, Giving Credit Where Credit is Due: A Comment on the Theoretical Foundation and Historical Origin of the Tort Remedy for Invasion of Privacy, 29 J. Marshall J. Computer & Info. L. 493 (2012)

<https://repository.law.uic.edu/jitpl/vol29/iss3/9>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

GIVING CREDIT WHERE CREDIT IS DUE: A COMMENT ON THE THEORETICAL FOUNDATION AND HISTORICAL ORIGIN OF THE TORT REMEDY FOR INVASION OF PRIVACY

ALBERTO BERNABE*

I. INTRODUCTION

In 1890 Samuel Warren and Louis Brandeis published what is considered by many to be the most influential law review article in the history of American tort law.¹ In this article, entitled *The Right to Privacy*, the authors attempted to argue that the common law protections provided by copyright law were not based on property rights but on a more general right of personality or individuality. They called this right a right to privacy and constructed their argument on the basis of a combination of sources including doctrines related to the law of property, contracts and copyright. The extent to which they succeeded has been questioned,² but there is no doubt as to the importance of their attempt.

* Professor of Law, The John Marshall Law School; B.A., Princeton University, 1984; J.D., University of Puerto Rico Law School, 1987; L.L.M., Temple University School of Law, 1994.

1. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). According to a recently published study, *The Right to Privacy* is the second most cited law review article of all time. Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012); see also James Barron, Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK UNIV. L. REV. 876, 877 (1979) (*The Right to Privacy* holds a hallowed place in both legal literature and history); Edward Bloustein, *Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 612 (1968) (perhaps the most influential law journal piece ever published); *Symposium: The Right to Privacy One Hundred Years Later*, 41 CASE W. RES. L. REV. 643 (1991); Diane Leenheer Zimmerman, *Musings on a Famous Law Review Article: The Shadow of Substance*, 41 CASE W. RES. L. REV. 823 (1991) (the most famous scholarly endeavor of its kind).

2. See, e.g., Harry Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997) (some writers who admire the article con-

Although not necessarily cogently, soon after the publication of the article, courts and legislatures slowly began to develop doctrines based on what the authors had argued and, in 1939, the concept of a right to privacy as an interest protected by tort law was adopted in the First Restatement of the Law of Torts.³

Years later, in another famous and influential law review article, William Prosser attempted to complete the work of Warren and Brandeis by reviewing the development of the law in the years since their article was published.⁴ Prosser argued that the result of Warren and Brandeis' call for the recognition of a new right was a mess of disorganized doctrines that needed to be structured better.⁵ Instead, his proposal for a new understanding of the right to privacy contradicted Warren and Brandeis' understanding of it and, in fact, altered the character of the concept.⁶ Nevertheless, it was later adopted in the Restatement of the Law Second, which is not too surprising since Prosser himself was the reporter for the Restatement until two years before his death in 1972.⁷ Once adopted by the Restatement, Prosser's analysis has become the basis of the torts doctrine as it relates to the notion of privacy throughout the United States.⁸

The traditional view of the origin of the concept of the privacy tort is

demn it for its sloppy doctrine); Zimmerman, *supra* note 1, at 823 (claim to fame of the article has become increasingly unclear); Robert Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE WES. RES. L. REV. 647, 662 (1991) (questioning whether Warren and Brandeis were correct in their interpretation that copyright law could be interpreted at the time to have been unconsciously protecting privacy); Barron, *supra* note 1, at 193 (Warren and Brandeis' theoretical basis did not support their conclusion); Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 964, 970 (1964) (Warren and Brandeis were not successful in describing the interest violated by invasions of privacy).

3. RESTAMENT (FIRST) OF TORTS §867 (1939).

4. William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). According to a recent study, this article is the 45th most cited law review article in history. See Shapiro, *supra* note 1, at 1490.

5. Prosser, *supra* note 4, at 388; Lisa Infield-Harm, *The Case for Reexamining Privacy Law In Wisconsin: Why Wisconsin Courts Should Adopt The Interpretation of the Tort of Intrusion Upon Seclusion of Fischer v. Mount Olive Lutheran Church*, 2004 WIS. L. REV. 1781, 1790 (2004) (although courts and legislatures were slow to consider a "privacy" right, by 1960 there were 300 cases involving a claim to a privacy right that had been inspired in some way by Warren and Brandeis's position).

6. Bloustein, *supra* note 2, at 965 (Prosser's article in effect repudiates Warren and Brandeis' analysis and reduces the concept of a right to privacy to a mere shell of what it has pretended to be).

7. Neil Richards and Daniel Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1903 (2010).

8. *Id.* at 1907 (stating that the overwhelming majority of courts have adopted wholesale the specific language of the Restatement).

that it was created by Warren and Brandeis⁹ and refined by Prosser.¹⁰ This view is, no doubt, partially correct, but tells only a small piece of a more complex and interesting story. A more careful reading of the story shows that the article by Warren and Brandeis has been given more credit than it deserves and that Prosser's attempt to organize the notion of privacy torts into a small number of categories was, at best, counter-productive if not altogether wrong. The real origin of the concept of privacy as an interest that deserves protection in tort law was the common law of torts itself, best exemplified by a decision of the Michigan Supreme Court published nine years before Warren and Brandeis' article. The right to privacy was not born in a law review article. It was born the day an uninvited stranger happened to be present when a woman was having a baby at home.

II. WARREN AND BRANDEIS' ARTICLE

At the time Warren and Brandeis published their article *The Right to Privacy*, the law of torts was characterized by two conceptual approaches.¹¹ One, usually identified with Judge Cooley, was based on the concept of rights, while the other was based on the concept of remedies. The main concern of the first approach was to identify interests that the law should protect. The second approach, usually identified with Oliver Wendell Holmes and much later exemplified by William Prosser, relied on identifying wrongful conduct. Ironically, using Cooley's torts treatise as one of their sources, Warren and Brandeis set out to argue for the recognition of a right,¹² but in reality only provided limited support for a remedy.

In *The Right to Privacy*, Warren and Brandeis proposed the recognition of a right to privacy independent of other rights related to property, contract, defamation and physical integrity and argued that the invasion

9. *Symposium, supra* note 1, at 643; Irwin Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703 (1990); David Leebron, *The Right to Privacy's Place in The Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769 (1991) (Warren and Brandeis created a new tort).

10. Richards, *supra* note 7, at 1887 (Warren and Brandeis may have popularized privacy in American law but Prosser was the law's chief architect); Kalven, Jr., *supra* note 2, at 331 (publication of Prosser's article in 1960 was an event rivaling the publication of the original Warren and Brandeis in importance for the law in the area of privacy).

11. Leebron, *supra* note 9, at 785.

12. Warren and Brandeis expressly stated their goal for the article this way: "[i]t is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is." Warren, *supra* note 1, at 197; *see also* Leebron, *supra* note 9, at 781 (while Warren and Brandeis miss cite Cooley, their approach is quite consistent with Cooley's rights analysis).

of this right justified an independent tort remedy.¹³ To get to that conclusion, however, they were proposing not the creation of a new right but the recognition that the right existed already even though it had not been properly identified as a basis of support for other types of claims.¹⁴ Thus, contrary to what the title of their article suggested, they were not proposing the recognition of a new right. They were proposing a new remedy for the violation of a right that, according to them, already existed.

About this last point, they were partially correct. By the time they wrote their article, American common law provided legal protection for a variety of privacy interests and had provided at least some recognition that a right to privacy existed.¹⁵ Most of the cases that provided support for the recognition of a privacy right had been decided on the basis of an established property right or of the tort of trespass.¹⁶ Oddly, however, Warren and Brandeis did not base their argument on cases that had already recognized a right to privacy in other contexts. Instead, they based their position on a novel, and weak, interpretation of what they argued was the underlying basis for the law of copyright.

According to Warren and Brandeis, English common law copyright cases were "but instances and applications of a general right to privacy" because, according to them, the foundation for the protection the com-

13. James Hilliard, *A Familiar Tort that May Not Exist in Illinois: The Unreasonable Intrusion on Another's Seclusion*, 30 LOY. U. CHI. L. J. 601, 603 (1999).

14. *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1893 (1981) (Warren and Brandeis did not purport to add a novel right to the legal universe, but instead drew upon some of the established legal doctrines protecting personal privacy to propose an extension of remedies against the press).

15. Richards, *supra* note 7, at 1891 (before the publication of Warren and Brandeis' article, American law provided protection to privacy interests); Leebron, *supra* note 9, at 777-78 (prior to publication of Warren and Brandeis article American law provided substantial protection to privacy interests); *see also* Moore v. NY Elevated R.R., 130 N.Y. 523, 527-28 (1892) (This case was decided two years after the publication of *The Right to Privacy*, in which the New York Court of Appeals recognized a cause of action for invasion of privacy by imposing liability on a defendant who did not physically intrude upon the plaintiff's property. In that case, the plaintiff sued the defendant railroad company for setting up a train platform from which people could look into the plaintiff's room. The court found this interfered with the plaintiff's privacy and held that there was no reason not to hold the defendant liable for the consequences of the loss of privacy.); *but see* Kramer, *supra* note 9, at 705 (although the law did provide some protection for privacy before Warren and Brandeis wrote their famous article, the protection consisted of limited legal theories whose shortcomings outweighed their usefulness); *see* Barron, *supra* note 1, at 885-86 (discussing that prior to the publication of Warren and Brandeis' article, the concept of a right to privacy had been discussed in the press. Articles in the periodical *Century* and in *Scribner's Magazine* had discussed the theoretical background on the right to privacy and called for the adoption of statutes to protect privacy interests).

16. Kramer, *supra* note 9, at 705 (the best relief for invasions of privacy in the nineteenth century was an action for trespass).

mon law of copyright provided was the right of a person to decide if and when their thoughts, sentiments and emotions would be communicated to others.¹⁷ In other words, Warren and Brandeis argued that the common law of copyright provided authors more than just protection from unauthorized publication of their work. They argued it provided a right to keep their works entirely private. For this reason, they concluded that the common law of copyright¹⁸ was really based not on a principle of property to control the right to publish or disclose someone's work, but on an unnamed right related to personality akin to the well-established intentional torts against a person:

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not be assaulted or beaten, the right not be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed – and (as that is the distinguishing attribute of property) there may some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

If we are correct in this conclusion, the existing law affords a principle from which may be invoked to protect the privacy of the individual from invasion . . .¹⁹

In addition to the argument based on this interpretation of copyright law, Warren and Brandeis argued that their position was supported by

17. In support of this proposition, Warren and Brandeis cited English cases in which injunctions were granted to stop the publishing of someone else's intellectual or artistic property without that person's consent. Warren, *supra* note 1, at 207-09. Their view was not entirely correct, though, because the common law of copyright at the time extended its protection to specific literary or artistic work created by the labor of the author and not, as Warren and Brandeis argued, to the thoughts, sentiments and emotions that went into that creative labor. Post, *supra* note 2, at 654, 658 (also arguing that no English case has interpreted the cases cited by Warren and Brandeis in the manner they advocated and that it appears that Brandeis himself later abandoned the view that copyright law could be given the interpretation he and Warren advocated in their article).

18. Warren and Brandeis argued the interest protected by the common law of copyright was different than the one protected by copyright statutes which they argued protected the profits related to a publication. Warren, *supra* note 1, at 205; Bloustein, *supra* note 2, at 968-69 (this distinction allowed them to argue that the common law protected a personal, rather than a property, right).

19. Warren, *supra* note 1, at 205-06; Post, *supra* note 2, at 650-51.

an interpretation of older cases that afforded protection against wrongful publication based on principles of breach of contract or of a trust or confidence:

This process of implying a term in a contract, or of implying a trust . . . is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse.²⁰

Warren and Brandeis recognized that it would be possible to address their concern over this type of abuse by simply using the doctrines of contract or of trust but they argued that this would not be enough. In doing so, they explained the most important concern that led them to argue for the recognition of a claim for invasion of privacy. Warren and Brandeis saw the need to recognize the right to privacy as a separate right because new technological advances allowed individuals to obtain images of, and information about, others without their knowledge:

[T]he narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.²¹

20. Warren, *supra* note 1, at 210.

21. *Id.* at 210-11. Warren and Brandeis did admit, however, that a cause of action in tort to claim compensation for an interference with the right to privacy would be limited by other important values. They argued, for example, that the right to privacy should not prohibit the publication of information of public interest, that there should be no cause of action if the publication was privileged under the law of defamation, that, under certain circumstances, the cause of action would have to yield to the interests of free speech, and that the right to privacy would cease if the plaintiff disclosed the information or consented to its disclosure. *Id.* at 214-18. Interestingly, Warren and Brandeis failed to explain how some of these limitations are not inconsistent with the argument upon which they based their notion of the right to privacy.

Although Warren and Brandeis may not have thought so at the time, this second argument provides a better line of support for their proposal because what they were trying to do was to articulate a concept of privacy as a legal interest that deserved an independent tort remedy. Unfortunately, however, this innovative argument is also the article's weakness. Warren and Brandeis did attempt to argue for the recognition of a tort remedy to protect a privacy right; they just did not make a particularly strong case for it.²²

By emphasizing the conduct they considered wrongful, they, perhaps unknowingly, moved away from their rights-based analysis to a simple attempt to find a remedy for conduct they found offensive. This approach in turn resulted in their vague description of a remedy that only addressed part of the problem and which did not really correspond to the right they had suggested ought to be recognized.

The conduct in question was that of the press, which according to Warren and Brandeis was "overstepping in every direction the obvious bounds of propriety and of decency."²³ They described the problem as follows:

[G]ossip 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. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of cul-

22. The article has been criticized for its sloppy doctrine. Bernstein, *supra* note 2, at 1554; Bloustein, *supra* note 2, at 964, 970 (Warren and Brandeis were not successful in describing the interest violated by invasions of privacy); Post, *supra* note 2, at 661-62 (no English case had interpreted the law in the manner advocated by Warren and Brandeis and Brandeis himself later abandoned the interpretation they advocated in their article). Likewise, Professor Harry Kalven has argued that the Warren and Brandeis' article reads . . . much like a brief and rests on an incomplete argument relying upon the wrong precedent and stretching it beyond its logical scope. Kalven, Jr., *supra* note 2, at 329; *see also* Barron, *supra* note 1, at 882, citing Pratt, *The Warren and Brandeis Argument for a Right to Privacy*, 1975 PUB. L. 161, 162 for the proposition that Warren and Brandeis were wrong and that their argument was not supported by their own evidence. Also, it has been argued that Warren and Brandeis offered *The Right to Privacy* as a meditation – or something of a lawyer's catharsis, on the nature of basic liberties rather than as a contribution to torts. Bernstein, *supra* note 2, at 1555 (citing Clark C. Havighurst, *Foreword*, 31 LAW & CONTEMP. PROBS. 251, 251 (1966)). In addition, it has been argued that the tort remedy proposed by Warren and Brandeis would be unconstitutional. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1982-83) (the Warren-Brandeis contribution has actually had a pernicious influence on modern tort law because it created a cause of action that, however formulated, cannot coexist with constitutional protections for freedom of speech and press).

23. Warren, *supra* note 1, at 196.

ture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. . . . Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in the lowering of social standards and of morality.²⁴

Thus, it is clear that Warren and Brandeis were advocating for the recognition of a tort remedy in order to create a mechanism to enforce control over norms of behavior which they considered objectionable.²⁵ Their position was that the right protected by their approach was what Judge Cooley had called the “right to be left alone,” which they now would call the right to privacy, and that it was the same right that they had found protected the right to control information in the common law of copyright. However, because they based their analysis on the need for a remedy rather than on the substance of the right, their analysis fell short. As explained by one commentator:

In the original Warren-Brandeis formulation, the phrase “right to privacy” referred to a right not to have information about one’s personal life exposed to the general public by the press – the private-facts branch of tort law. The authors never specifically defined the kinds of information that they believed the law should protect. Their primary standard appears to have been the personal tastes and preferences of the individual plaintiff, and they therefore did not require that the actionable information be especially intimate, or particularly offensive by objective standards. They seemed instead to believe that the details of one’s personal life “belonged” in some sense to the individual and could not be “used” by others without permission.²⁶

More importantly, Warren and Brandeis did not express much concern about the way in which the images or information was obtained. Rather, and consistent with the cases they had used as references to support their argument that the common law already seemed to recognize a privacy right – all of which were about the unauthorized publication of information – their concern focused on the effect of the disclosure of such

24. *Id.*

25. As explained by Professor Randall Bezanson, “*The Right To Privacy* was very much a manifestation of the social conditions of its era . . . The 1890s were a time of increasing tension between the inherited values of family and community on the one hand and the larger social order on the other. The concept of privacy was a manifestation of this tension.” Randall Bezanson, *The Right to Privacy Revisited: Privacy, News and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1137 (1992). Warren and Brandeis’s position has been criticized as petty, as arising from late-nineteenth-century gentility, and as the product of an overweening sense of Victorian prudery and of exaggerating the negative aspects of the conduct of the press. Infield-Harm, *supra* note 5, at 1792.

26. Zimmerman, *supra* note 22, at 295.

images and information. For this reason, the remedy they proposed was to recognize a cause of action for the disclosure of information rather than for the invasion they had mentioned was needed to obtain it.

III. WARREN AND BRANDEIS' REMEDY

Warren and Brandeis' main argument was that the common law of copyright, which was usually conceptualized as a property right, should rather be understood as being based on a personal right to privacy or personality.²⁷ Yet, the remedy they proposed for the transgressions of the press to which they were reacting was a remedy also based on a notion of property. Even though they argued that the remedy should be created to compensate for an emotional injury, it seems to be based more on the value of that which the press had taken from the victim or, in other words, the value of the person's identity or image. For this reason, when Dean William Prosser attempted to classify the different privacy interests many years later, he referred to the remedy described by Warren and Brandeis as "appropriation" and commented that this interest "ought to be founded upon an interest that is not so much mental as a proprietary one."²⁸

Not surprisingly, in the twenty years following Warren and Brandeis' article, as a new cause of action based on their notion of privacy began to develop in certain jurisdictions, all but one of the reported cases that discussed *The Right to Privacy* were about the appropriation of a name or likeness,²⁹ and the nature of the right to privacy became more ambiguous. Although the language upon which the claims were based made it sound like it was intended to protect a personal right, its application seemed to be based on a notion of property.

The first court decision adopting the notion of a right to privacy as support for a torts claim after the publication of *The Right to Privacy*

27. Post, *supra* note 2, at 648.

28. Prosser, *supra* note 4, at 406. Further, Prosser asserted that it would be "quite pointless" to debate over whether such a right is to be classified as "property" because, as he put it, "[i]f it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses." In support of this conclusion, Prosser cited one of the first decisions recognizing the concept of the "right to publicity." *Id.* Likewise, Professor Harry Kalven, Jr. has argued that the rationale of the appropriation element in Warren and Brandeis' notion of privacy was the straightforward principle of preventing unjust enrichment by the theft of good will. Kalven, Jr., *supra* note 2, at 331. See also *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62 (1967) (defining appropriation as an action for invasion of property rights).

29. For a discussion of some of the prominent first cases see Benjamin Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 638-643 (2002); Kramer, *supra* note 9, at 715-19; Leebron, *supra* note 9, at 793-98; Prosser, *supra* note 4, at 384-86.

exemplifies this problem.³⁰ In that case, the plaintiff was a private individual who sued an insurance company for the unauthorized use of his photograph in an advertisement. Using language that describes the defendant's conduct as a violation of a personal right, the court held the plaintiff could maintain an action for the violation of the plaintiff's right to privacy.³¹ Other cases, however, described the same claim as a violation of property rights.³²

In the end, the claim generated by *The Right to Privacy*, was not conceptually or in practical terms what Warren and Brandeis had envisioned. Conceptually, they wanted to design a remedy for the emotional injury caused by disclosure of private personal information. Instead, the article mostly generated claims for the commercial use of people's photographs.³³ For this reason, in practical terms, the claim was not particularly helpful to the common person,³⁴ and for celebrities, the remedy

30. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga 1905).

31. *Id.* at 80 (cited in Post, *supra* note 2, at 671).

32. Post, *supra* note 2, at 672-73; Zimmerman, *supra* note 22, at 297 (misappropriation tort protects one's property right in the economic benefit derived from the commercial exploitation of one's face or name). It has been argued that claims that authorize recovery in tort for what is a violation of a property right run "a serious risk of internal incoherence" and that the Restatement's definition of appropriation is incompatible with the notion of a remedy for indignity and emotional distress precisely because it is more consistent with an invasion of a property right. Post, *supra* note 2, at 674. Also one of the early cases on the subject rejected the claim holding that recognizing a tort claim for appropriation would inundate courts with petty, absurd claims of invasion of people's privacy, such as a comment upon one's looks, conduct, domestic relations or habits. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

33. Richards, *supra* note 7, at 1893, 1918-20 (privacy torts have proven disappointing in at least two ways. First, they have not provided the kind of protection against the media that Warren and Brandeis envisioned. Second, they have not adapted to new privacy problems such as the extensive collection, use, and disclosure of personal information by businesses).

34. Zimmerman, *supra* note 22, at 362 (despite the ever increasing number of claims under the Warren-Brandeis theory, plaintiffs rarely win; after ninety years of evolution, the common law private-facts tort has failed to become a usable and effective means of redress for plaintiffs). Professor Zimmerman likewise has argued that the tort generated by Warren and Brandeis' *The Right to Privacy* has resulted in "a substantive failure," and that "it has retained just enough life to give it nuisance value" while many courts refuse to apply it or reject it outright. Zimmerman, *supra* note 1, at 823-24. Other commentators agree. Barron, *supra* note 1, at 880 (the single aspect of privacy of greatest concern to Warren and Brandeis, the right to keep private activities of private persons out of the newspaper, is precisely the aspect for which the fewest number of suits have been brought and for which the courts have been most hesitant to grant injunctive or compensatory relief, citing D. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA AND THE FIRST AMENDMENT* (1970) (plaintiffs suffering because of news coverage of their private lives rarely recover damages)); Richards, *supra* note 7, at 1889 (the chorus of opinion is that the tort law of invasion of privacy has been ineffective and is now effectively dead); Kramer, *supra* note 9, at 722 (the lack of a legal profile left courts with little concrete guidance in deciding invasion of privacy cases); Kalven, Jr., *supra* note 2, at 338 (the achievement of

seemed to exist to protect the property or market value of their identity as a product.³⁵ The notion of a right to privacy slowly gave way to a right of publicity which in turn became indistinguishable from the notion of copyright:³⁶ a privacy right that transformed personality into an object with value measured by market forces.³⁷ Thus, Warren and Brandeis went full circle: from a copyright claim based on property rights which they claimed to be really based on privacy, to a privacy claim that was really based on property and indistinguishable from copyright.

Thus, in order to find a theory that could support the right that Warren and Brandeis were searching for – one based on personality, identity and dignity – it would be better to look elsewhere.

IV. PROSSER'S VIEW ON THE RIGHT TO PRIVACY

In the years following the publication of *The Right to Privacy*, courts began to decide cases based, in some way or another, on its suggestions. As stated above, and perhaps logically, the first cases were all about the unauthorized use of an individual's image, but later courts began to recognize remedies for different types of conduct judged wrongful in that it somehow interfered with the plaintiffs' undefined right to privacy. By 1960, when Prosser published an article attempting to make sense of all these cases, the concept of privacy had developed in many different directions. As Prosser himself stated, courts seemed to give little or no consideration to what interest the right to privacy actually protected.³⁸

Over time, Prosser tried to develop a more coherent interpretation of the case law in his classes and publications,³⁹ eventually culminating in a law review article entitled *Privacy*, which later became the blueprint

the new tort remedy has been primarily to breed nuisance claims while giving little practical protection to real victims of privacy invasions).

35. Post, *supra* note 2, at 666.

36. *Baltimore Orioles v. MLBPA*, 805 F.2d 663, 679 (7th Cir. 1986) (holding the right of publicity does not differ in kind from copyright).

37. Post, *supra* note 2, at 667-68 (the property created by common law copyright and the right to publicity transforms personality into a thing or an object whose value is to be determined by reference to the institution of the market; personality is commoditized).

38. Prosser, *supra* note 4, at 388.

39. There is no collection of Prosser's papers available but some conclusions about Prosser's thinking on the subject can be drawn from the notes taken by a student in Prosser's torts class during the 1938-1939 school year. To take a look at the actual notebook go to http://sunsite2.berkeley.edu:8088/xdlib//prosser/ucb/mets/cubanc_67_1_0_0064213.xml. For a study of the notebook see Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 577 (2010). Prosser's first detailed discussion of privacy appeared in the first edition of his treatise, *Prosser on Torts*, published in 1941. In February 1953, he delivered a series of lectures at the University of Michigan in which Prosser presented his four-part approach to tort privacy. Thereafter, all of Prosser's writings on privacy featured the four-part scheme. See Richards, *supra* note 7, at 1897-98.

for the Restatement's formulation of the concept. Prosser argued that the courts' decisions reflected the need to recognize four different causes of action all of which had been developed loosely based on the notion of a right to privacy and which he said had almost nothing in common with each other than the fact that each represented an interference with the right Judge Cooley had called "the right to be left alone."⁴⁰

This formulation, however, contradicted the notion advanced by Warren and Brandeis because according to Prosser the different types of cases recognized remedies to protect four different interests rather than one right to privacy. He argued that the different interests protected were freedom from mental distress,⁴¹ reputation⁴² and the proprietary interest in a name or likeness discussed above.⁴³

Given that Prosser's approach was adopted in the Restatement Second and quickly adopted by most courts, to this day, we are still searching for the real foundation to the concept of the right to privacy. In the end, Prosser may have helped⁴⁴ define the remedy but he certainly did not do much in order to define the right.

Prosser's approach to the concept of privacy in tort law was different from that of Warren and Brandeis. While Warren and Brandeis were interested in the recognition of a right worthy of protection, Prosser's attention focused on identifying a remedy for wrongful conduct. By classifying the different types of cases generated by Warren and Brandeis' article into a number of discrete causes of action, Prosser created rigid categories which, at least according to some, "stripped privacy law of any guiding concept to shape its future development"⁴⁵ thus making it difficult for privacy torts to evolve in response to the technological and cultural developments.⁴⁶ As explained by one commentator:

[U]nder Prosser's analysis, the much vaunted and discussed right to privacy is reduced to a mere shell of what it has pretended to be. In-

40. Prosser, *supra* note 4, at 389.

41. *Id.* at 392, 422.

42. *Id.* at 398, 401, 422-23.

43. *Id.* at 406.

44. There is a strong argument that Prosser did more harm than good and that his categorization of the causes of action resulted in a detriment to the development of the notion of privacy as a torts concept. For a long discussion of this argument, see Richards, *supra* note 7. Also, as stated above, the two categories that more clearly originated in Warren and Brandeis' article – appropriation and public disclosure of private facts – have proven to be inconsequential, as has the one Prosser called "false light." Zimmerman, *supra* note 1, at 825 (While Prosser's modernization gave courts a new shared language with which to discuss "privacy," this formulation was unsuccessful at breathing life into this languishing body of law).

45. Richards, *supra* note 7, at 1890.

46. *Id.* at 1889, 1918 (privacy torts have been disappointing because they do not provide enough protection and because they have not adapted to new problems).

stead of a relatively new, basic and independent legal right protecting a unique, fundamental and relatively neglected interest, we find a mere application in novel circumstances of traditional legal rights designed to protect well-identified and established social values. Assaults on privacy are transmuted into a species of defamation, infliction of mental distress and misappropriation. If Dean Prosser is correct, there is no “new tort” of invasion of privacy, there are rather only new ways of committing “old torts.” And, if he is right, the social value or interest we call privacy is not an independent one . . .⁴⁷

Unlike Warren and Brandeis, Prosser did not set out to create or articulate a theory in support of a right to privacy, and, in fact, undermined whatever little theory had been developed since the publication of *The Right to Privacy*.⁴⁸ Warren and Brandeis thought of privacy as a general principle out of which the common law could develop doctrines to protect the affected interest. Prosser did not, and his approach detached the concept of privacy from its underlying foundational principle.⁴⁹ As a result, through Prosser’s efforts, the approach to the concept of privacy torts shifted from one based on “rights” to one based on “wrongs.”⁵⁰ As explained by Professors Neil Richards and Daniel Solove:

Because he rejected looking for any connections between the different privacy torts and refused any attempt to give them more conceptual coherence, Prosser provided no direction for the further development of the law besides the continued entrenchment of the four categories he identified. Before Prosser, courts looked to Warren and Brandeis’s article and examined whether particular harms fell under the very broad principle of the right to be let alone. After Prosser, courts looked to whether a particular harm fit into one of Prosser’s four categories . . . [H]e left courts no conceptual guidance to assist in creating new categories or in shaping the torts in new directions.⁵¹

For this reason, any discussion of the concept of privacy as a “right,” must start with a description of the real interest protected by the right to privacy or of what it is that the different causes of action have in common. This is no easy task since, as discussed above, it looks like there is still no general agreement about it.⁵² However, I would argue that the answer must relate to the notions of autonomy and dignity. Obviously, this approach can be criticized because it offers a definition of a vague

47. Bloustein, *supra* note 2, at 965-66.

48. Richards, *supra* note 7, at 1913.

49. *Id.* at 1914; Kalven, Jr., *supra* note 2, at 333.

50. Zimmerman, *supra* note 1, at 825.

51. Richards, *supra* note 7, at 1915.

52. Zimmerman, *supra* note 22, at 294-95 (despite a vast literature on the subject there is no agreement on core of values or interests common to each of the cases in which the right to privacy has been applied in part because the phrase is a catch-all, attached to a broad range of interests which often have little or nothing to do with the tort originally envisioned by Warren and Brandeis).

concept like privacy based on other vague concepts,⁵³ but there does not seem to be any other better alternative. Words used to define human values are necessarily vague and ill-defined.⁵⁴

Arguing that the right to privacy is "the right to be left alone" is not satisfactory because the right to be left alone can be said to be the basis for defamation and for all intentional torts, particularly battery, assault and false imprisonment.⁵⁵ Thinking of autonomy as the right of an individual to make decisions as to their own personal identity and of dignity as that which makes people individuals and that gives them humanity, on the other hand, allows for a distinction between a cause of action for invasion of privacy and all those other torts. This view works better to support Warren and Brandeis' argument.⁵⁶

V. CREDIT WHERE CREDIT IS DUE: THE REAL ANTECEDENTS TO THE RIGHT TO PRIVACY

Having concluded that the Warren and Brandeis' view of the right to privacy is better seen as based on a notion of autonomy and dignity, and that neither Warren and Brandeis nor Prosser made a convincing argument for the recognition of such a right, where can one find the real basis for the right to privacy?

The best source is the case law that Warren and Brandeis ignored. As stated above, by the time they wrote their article, the American common law of torts provided legal protection for a variety of privacy interests mostly through the discussion of the tort of trespass.⁵⁷ It is in that case law that one finds the best source of analysis for a right to privacy.

Ironically, the most interesting and probably the most important of those cases may have been forever overlooked and forgotten had it not been for the fact that, years later, Prosser selected it for his casebook on torts to illustrate a different point.⁵⁸ It is the opinion in this case, and

53. Ronald Cass, *Privacy and Legal Rights*, 41 CASE WES. RES. L. REV. 867, 868 (1991).

54. Bloustein, *supra* note 2, at 1001.

55. Vincent Samar, *THE RIGHT TO PRIVACY: GAYS, LESBIANS AND THE CONSTITUTION* (1991) (the definition is unsatisfactory because it does not allow for the conceptual integrity of the various concepts of privacy); George Trubow, *PRIVACY LAW AND PRACTICE* 1-03 §1.01 (the idea of being let alone is not very useful in describing the right to privacy); Zimmerman, *supra* note 22, at 299 (as a descriptive or analytic term, right to privacy is virtually meaningless).

56. Autonomy also seems to be the underlying value the U.S. Supreme Court is concerned with in the constitutional context when it uses the phrase right to privacy to describe certain protections against governmental interference. Zimmerman, *supra* note 22, at 297-98.

57. *Id.*

58. In fact, it seems that Prosser had been discussing that particular case in class as early as the late 1930s since it is mentioned in a student's notebook from that period of time. See Richards, *supra* note 7, at 1897-98.

not *The Right to Privacy*, that provides the real origin to the law of privacy in the United States.

The case, decided nine years before the publication of *The Right to Privacy*, is called *DeMay v. Roberts*⁵⁹ and its facts are well known to all lawyers who studied torts using Prosser's textbook. On a dark and stormy night, Mrs. Roberts went into labor and Dr. DeMay was asked to come to her home to assist in the delivery.⁶⁰ Unfortunately, the roads to Mrs. Roberts' house were so bad that no horse could traverse them.⁶¹ For this reason, Dr. DeMay, who was sick and exhausted, asked his friend Scattergood to assist him by holding his umbrella and by carrying his medical equipment.⁶² Upon arriving at Mrs. Roberts' house, Dr. DeMay informed Mr. Roberts that he had "fetched a friend along to help carry [his] things."⁶³

Eventually, however, Scattergood did more than that, as he helped during the delivery by holding Mrs. Roberts down. Originally, Dr. DeMay, a Mrs. Parks, and Mrs. Roberts' husband were the only ones helping Mrs. Roberts; Scattergood was not involved.⁶⁴ He was sitting facing the wall away from the bed where Mrs. Roberts was lying down.⁶⁵ However, during the pains of labor, Mrs. Roberts kicked Mrs. Parks in the stomach and Mrs. Parks then went outside for a short time.⁶⁶ While Mrs. Parks was away, Mrs. Roberts began rocking and throwing her arms up in the air, at which point Dr. DeMay told Scattergood to "catch her."⁶⁷ Scattergood took Mrs. Roberts by the hand and stayed with her for a short time, until Mrs. Parks came back in the house.⁶⁸ Mrs. Parks took Scattergood's position and he went back to a spot in the house away from the action.⁶⁹ Soon, the baby was delivered successfully and without further incidents.⁷⁰

Later, however, upon learning that Scattergood was not a physician, Mr. and Mrs. Roberts sued. Although it is not entirely clear from the opinion of the court, it appears that the claim was either for battery based on the fact that Scattergood touched Mrs. Roberts or for trespass to property based on his presence in the house. In any case, the claim gave rise to the issue of whether Scattergood could raise a valid defense

59. *DeMay v. Roberts*, 9 N.W. 146 (1881).

60. *Id.* at 147.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 148.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

based on consent. It is precisely to discuss the issue of consent that Prosser included the case in his textbook.

Affirming the judgment for the plaintiffs, Chief Justice Marston of the Supreme Court of Michigan clearly rejects the claim that Mrs. Roberts consented to Scattergood's presence by her bedside, holding that her consent was obtained wrongfully and fraudulently by deceit.⁷¹ In doing so, he recognizes a cause of action in her behalf for the "shame and mortification" Mrs. Roberts suffered.⁷² This injury, however, is different than the physical touching that would support a cause of action for battery, thus suggesting the basis for the claim was something else. One could think the basis of the claim was trespass upon the plaintiff's property, but the injury mentioned and the language used by the court to describe the underlying reasoning for the cause of action suggests otherwise.

First, the court describes the defendant as someone "who intruded upon the privacy of the plaintiff"⁷³ which, according to the court, was made worse by the fact that the defendant was a young, unmarried man and a stranger to the plaintiff. Second, and most importantly, when discussing what it was about the circumstances that made the conduct actionable, the court explained:

[I]t would be shocking to our sense of right, justice and propriety to doubt even that for such an act the law would afford an ample remedy. To the plaintiff, the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and abstain from its violation.⁷⁴

Thus, nine years before the publication of *The Right to Privacy*, the court is clearly recognizing the principle of a right to privacy and a remedy in tort for its violation.⁷⁵ In fact, it clearly states it would be shocking not to do so.

Few would argue that the court got the issue wrong in *DeMay*. It is difficult to think of a more private moment than the moment when a

71. *Id.* at 149.

72. *Id.*

73. *Id.* at 146.

74. *Id.* at 148-49.

75. There are other old cases that mention an invasion of privacy as support for a claim for trespass, but none seems to be as clear in its recognition of the right and its remedy as *DeMay*. For a very early example see *Ives v. Humphrey*, 1 E.D. Smith 196, 201-02 (N.Y. Ct. C.P. 1851), in which the court recognizes that a remedy for trespass is meant to compensate for insult and invasion of privacy. Another good example is a case with less dramatic, yet similar facts, to those in *DeMay*, in which the court upheld a houseguest's right of quiet occupancy and privacy against the unwelcome intrusion of her host into the bedroom he had provided for her. *Newell v. Whitcher*, 53 Vt. 589 (1880).

woman is giving birth accompanied by her husband. This is a time when both of them are both emotionally and physically exposed and when they act and react in ways that, understandably, they probably would prefer to keep private. Births are not public events to which people can simply show up to witness. Not providing a way to respect a person's privacy during intimate moments would violate that person's dignity and autonomy to decide how to control who gets access to their person, space, home and information. For this reason, the interest protected is not really the emotional distress caused by the intrusion, but the interference with a person's dignity and autonomy. Without stating it expressly, thus, the court recognized a new right and a new interest protected by the law of torts.

Yet, even though they advocated for the recognition of a right of privacy based on a notion of dignity and personality, Warren and Brandeis did not mention this precedent in their article and set the path for the discussion of the concept of privacy in a completely different direction. Ironically, after authoring an outstanding description of the common law process in the introduction to their article,⁷⁶ Warren and Brandeis essentially impeded the common law process from taking its likely course toward the creation of the right for which they supposedly were advocating.⁷⁷

Even though the opinion of the court in *DeMay* expressed the foundation for a right to privacy more clearly and convincingly than anything written by Warren and Brandeis or Prosser, it received little attention and had no impact in establishing a general right to privacy.⁷⁸

76. Warren and Brandeis began *The Right to Privacy* stating that “[p]olitical, social economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.” Warren, *supra* note 1, at 193.

77. Zimmerman, *supra* note 22, at 362 (Warren and Brandeis’ tort may well have obscured analysis and impeded efforts to develop a more effective and carefully tailored body of privacy-protecting laws).

78. In one of the relatively few cases that have cited *DeMay* over the years, the Supreme Court of Maine had a chance to change this state of affairs. Sadly, however, it did not. See *Knight v. Penobscot Bay Med. Ctr.*, 420 A.2d 915 (Maine 1980). In this case, a nurse asked a doctor if her husband could witness childbirth and the doctor stationed the husband, who had put on hospital attire, where he could watch the plaintiff deliver her baby. No one asked the plaintiff of her husband for consent. Both of them could see the nurse’s husband observing through a glass window into their delivery room. Later, the plaintiffs – husband and wife – sued arguing that the presence of the nurse’s husband constituted an invasion of their privacy. The plaintiffs asked the court to include in the jury instructions, Judge Marston’s comments in *DeMay* about the right to privacy, but the trial judge refused choosing instead to read Prosser’s description of the tort of intrusion in the Restatement. On appeal, the Maine Supreme Court held the trial judge’s decision had not been an abuse of discretion and suggested the approach taken by the Restatement was preferable to that taken by the court in *DeMay* anyway.

VI. TOWARD A NEW OLD VIEW OF PRIVACY

The term privacy, at least when used in relation to the notion of a right the violation of which deserves a remedy in tort law, does not refer to an objective physical space, secrecy, solitude or anonymity,⁷⁹ but rather to the duty that members of society owe others to respect their dignity and autonomy. The term attempts to give legal definition to a "boundary between personal and public space – between occasions when personal information should be the business of others and occasions when it should be no one else's affair,"⁸⁰ a boundary that is a reflection of social habits and institutions.⁸¹ The cause of action for a violation of the right to privacy, thus, seeks to provide compensation for the injury caused by the breach of those forms of respect that define that boundary. This is the theory of privacy expressed in *DeMay v. Roberts*, but, under the influence of the Restatement Second, it does not appear to be the one prevalent today.

Under the Restatement's approach, as designed by Prosser, there is really not one theory of privacy as a right under tort law, but different categories of interests protected. However, if we were to think of *DeMay v. Roberts* as the basis for the concept of privacy, we could easily construct a theory that could encompass all these interests under one unifying concept of a right to privacy.

Prosser was simply wrong in stating that the different cases that developed over the years did not have much in common and that they described different interests protected by tort law. Instead, all those cases can be analyzed using the same point of view used by the court in *DeMay* to find that what they do have in common is that they recognized a violation of a duty to respect human dignity and autonomy.

Just like in *DeMay*, in cases involving disclosure of private information – the type of conduct Warren and Brandeis were most interested in – the wrong is not an injury to reputation but, again, an insult to dignity and autonomy. Just like Scattergood's unwanted presence was a wrong in and of itself, so would have been the publication of an account or of a photograph of what he witnessed.⁸² The wrong in a case like that, as one commentator has put it, "is in replacing personal anonymity [with] notoriety, in turning a private life into a public spectacle."⁸³ Similarly, in

79. Post, *supra* note 2, at 651.

80. Bezanson, *supra* note 25, at 1135.

81. *Id.* at 1172-73 (privacy represents a manifestation of deeply held convictions about the relationship between the individual and organized society, and about the responsibilities owed by a society to the individual).

82. Bloustein, *supra* note 2, at 982 (physical intrusion upon a private life and publicity concerning intimate affairs are simply two different ways of affronting individuality and human dignity).

83. *Id.* at 979.

cases of unauthorized use of a name or likeness – whether the complaint is for appropriation or false light – it can be said that the interest protected is the right to be free from being used by someone else without consent, which again, is an offense against human dignity and autonomy. Thus:

[R]espect for individual liberty not only commands protection against intruders into a person's home but also against making him a public spectacle by undue publicity concerning his private affairs or degrading him by commercializing his name or likeness or using it in a "false light." Each of these wrongs constitutes an intrusion on personality, an attack on human dignity.⁸⁴

Warren and Brandeis' right to privacy has been called an anachronism even at the time they formulated the original idea.⁸⁵ And the changes in approach developed by Prosser years later did not yield satisfactory results. For these reasons, some commentators have called for the elimination of the concept of a privacy tort altogether⁸⁶ or for the rejection of one or more of the categories created by Prosser and adopted in the Restatement Second.⁸⁷

Yet, there is a better, and simpler alternative: going back to the approach of the first Restatement which stated that "[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."⁸⁸ To be a bit more accurate the word "his" should be changed to "his or her" and the phrase "is liable" should be changed to "is subject to liability" or "can be liable," but with those small changes the notion of privacy as the basis for an action in tort would make more sense. Being more general, this formulation of the concept allows for an interpretation that recognizes a right to privacy that can include the different interests and types of conduct developed in the case law. It also allows for the concept to grow as the notions of privacy develop over time through the common law process.

Using the first Restatement's approach, the focus of a cause of action for invasion of privacy would be the injury to the victim's dignity, whether by the method used to acquire private information or by the use given to that information. It would also allow for a more sophisticated conception of the harm to develop, taking into account the social contexts

84. *Id.* at 995.

85. Zimmerman, *supra* note 1, at 823-24; Bezanson, *supra* note 25, at 1173.

86. Bezanson, *supra* note 25, at 1174.

87. Zimmerman, *supra* note 1, at 826-27; Kalven, Jr., *supra* note 2, at 327 (although privacy is an important value, tort law's effort to protect the right of privacy seems to be a mistake); Post, *supra* note 2, at 674 (appropriation tort is incompatible with a remedial focus on indignity and mental distress).

88. RESTATEMENT (FIRST) OF TORTS §867 (1939).

in which information is generated and shared and the relationship with the rights guaranteed by the First Amendment to the U.S. Constitution.

VII. CONCLUSION

Any recognition of a right to privacy as a right the violation of which deserves a remedy in tort law must be based on a general understanding that there is a social value in protecting it and on a broad-based agreement about what it is that society wishes to protect.⁸⁹ There has always been such an agreement when it comes to protecting against trespass and physical intrusions, as first explained in *DeMay v. Roberts*. To the extent that there might be some disagreement as to other circumstances and actions that have been developed over time under the title of invasion to privacy, courts would find a better approach by looking back in time to the underlying rationale of that case and to the formulation of the cause of action in the first Restatement.

It is important to give credit where credit is due; not to Prosser, not to Warren & Brandeis but to Chief Justice Marston who, in *DeMay v. Roberts*, was the real precursor to what we now refer to as the right to privacy.

89. Zimmerman, *supra* note 1, at 826-27.