California Law Review

VOL. 77 OCTOBER 1989 NO. 5

The Social Foundations of Privacy: Community and Self in the Common Law Tort

Robert C. Post†

In this Article Professor Post argues that the common law tort of invasion of privacy safeguards social norms, which he calls "rules of civility," that in significant measure constitute both individual and community identity. The tort is predicated upon the assumption that personality, as well as human dignity, are injured by the violation of these norms. Civility rules also create a "ritual idiom" that allows individuals to recognize and differentiate between respect and intimacy; fluency in this idiom enables individuals to become autonomous persons. In protecting civility rules, however, the law must transform social norms into workable legal doctrine, and it must determine the nature of the community whose norms it will preserve. Civility rules that control the dissemination of information conflict with the prerequisites of the "public," which is a social formation created when persons, otherwise unrelated, are united by access to common social stimuli. Within the "public," communication is driven by a logic of accountability that is largely indifferent to norms of civility. The values of privacy, and the identity of persons and communities predicated upon those values, are thus endangered by the vast contemporary expansion of the public created by the mass media.

† Professor of Law, Boalt Hall School of Law, University of California, Berkeley. A.B. 1969, Harvard College; J.D. 1977, Yale Law School; Ph.D. 1980, Harvard University. Many of the issues addressed in this manuscript stem from a seminar on the sociology of privacy that I was privileged to teach with Jerome Skolnick. His assistance and inspiration have been invaluable. I also want to acknowledge my profound debt to the advice and insights of Bruce Ackerman, Ed Baker, Melvin Eisenberg, Kristin Luker, Sheldon Messinger, Paul Mishkin, Hanna Pitkin, and Philip Selznick.

INTRODUCTION

Privacy is commonly understood as a value asserted by individuals against the demands of a curious and intrusive society.[1] Thus it is remarked that "[p]rivacy rests upon an individualist concept of society,"[2] and that one of "the main enemies of privacy in our own time" is "Community."[3] Consistent with this understanding, the function of the common law tort of invasion of privacy is usually said to be protecting the "subjective" interests of individuals against "injury to the inner person."[4] The stated purpose of the tort is to provide redress for "injury to [a] plaintiff's emotions and his mental suffering."[5]

The origins of the tort of invasion of privacy lie in a famous article on *The Right to Privacy* published in 1890 by Samuel Warren and Louis Brandeis.[6] Arguing powerfully for legal recognition of "the right to privacy, as a part of the more general right to the immunity of the person,—the right to one's personality,"[7] the article sparked the development of the modern tort,[8] which has now evolved into four distinct branches: unreasonable intrusion upon the seclusion of another,[9] unreasonable publicity given to another's private life,[10] appropriation of another's name or likeness,[11] and publicity that unreasonably places another in a false light

1. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 549 (1970). For an excellent discussion and critique of this understanding, see Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 1-3, 14-21 (1983).

2. R. HIXSON, PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT at xv (1987); *see also* A. WESTIN, PRIVACY AND FREEDOM 27 (1967); Andre, *Privacy as an Aspect of the First Amendment: The Place of Privacy in a Society Dedicated to Individual Liberty*, 20 U. WEST L.A. L. REV. 87, 89 (1988-89).

3. B. MOORE, PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY 267 (1984). Or, conversely, it is said that "[p]rivacy means alienation" and hence impedes the attainment of "authentic community." Freeman & Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 237, 238-39 (1987).

4. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 333 (1979).

5. Froelich v. Adair, 213 Kan. 357, 360, 516 P.2d 993, 997 (1973); *see also* Hazlitt v. Fawcett Publications, Inc., 116 F. Supp. 538, 544 (D. Conn. 1953).

6. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article "is perhaps the most famous and certainly the most influential law review article ever written." Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203 (1954). For a discussion of the historical circumstances surrounding the Warren and Brandeis article, see D. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 20-57 (1972).

7. Warren & Brandeis, *supra* note 6, at 207.

8. The tort is today recognized in one form or another in almost every jurisdiction in the nation. For a state-by-state overview, see LIBEL DEFENSE RESOURCE CENTER, 50-STATE SURVEY 1988: CURRENT DEVELOPMENTS IN MEDIA LIBEL AND INVASION OF PRIVACY LAW 924-67 (1988). The tort is still not recognized by English courts. J. FLEMING, THE LAW OF TORTS 572 (7th ed. 1987); *see also* W. PRATT, PRIVACY IN BRITAIN 16-17 (1979).

9. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

10. *Id.* § 652D.

11. *Id.* § 652C.

before the public.[12] In this essay I shall analyze the first two of these branches,[13] and attempt to demonstrate that the tort does not simply uphold the interests of individuals against the demands of community, but instead safeguards rules of civility that in some significant measure constitute both individuals and community. The tort rests not upon a perceived opposition between persons and social life, but rather upon their interdependence. Paradoxically, that very interdependence makes possible a certain kind of human dignity and autonomy which can exist only within the embrace of community norms.

Interpreted in this way, the common law tort of invasion of privacy offers a rich and complex apprehension of the texture of social life in America. That apprehension is sensitive not merely to the prerogatives of social norms in defining persons and communities, but also to the limitations of those prerogatives when faced with competing demands from, for example, the requirements of public governance and accountability.

I
THE TORT OF INTRUSION: PRIVACY, CIVILITY, AND THE SELF

The conceptual structure that underlies the branch of the tort which regulates unreasonable intrusion can be illuminated by consideration of an elementary case, *Hamberger v. Eastman.*[14] *Eastman* was decided by the New Hampshire Supreme Court in 1964, and constituted the state's first official recognition of the tort of invasion of privacy. I choose the case because it is so entirely unexceptional and representative in its reasoning and conclusions. The plaintiffs were a husband and wife who alleged that the defendant, their landlord and neighbor, had installed an eavesdropping device in their bedroom. The New Hampshire Supreme Court, adopting William Prosser's novel proposal that the tort of invasion of privacy be divided into four distinct branches,[15] characterized the plaintiffs' complaint as "the tort of intrusion upon the plaintiffs' solitude or seclusion."[16]

The plaintiffs alleged that as a result of the discovery of the eavesdropping device they were "greatly distressed, humiliated, and embarrassed," that they sustained "intense and severe mental suffering and

12. *Id.* § 652E.

13. I defer analysis of the "false light" branch because of its close affiliation with the tort of defamation; I similarly defer analysis of the appropriation branch because of its subtle and complex relationship with concepts of property rights in personal image.

14. 106 N.H. 107, 206 A.2d 239 (1964).

15. *See* Prosser, *Privacy,* 48 CALIF. L. REV. 383, 389 (1960); *compare id. with* RESTATEMENT OF TORTS § 867 (1939).

16. *Eastman,* 106 N.H. at 110, 206 A.2d at 241.

distress, and ha[d] been rendered extremely nervous and upset."[17] The New Hampshire Supreme Court had little difficulty in finding that, "by way of understatement," the type of intrusion suffered by the plaintiffs "would be offensive to any person of ordinary sensibilities."[18] It did not matter, said the court, that the plaintiffs could not establish that anyone ever "listened or overheard any sounds or voices originating from the plaintiffs' bedroom,"[19] since the gravamen of the plaintiffs' cause of action rested solely on the intrusive installation of the offensive device.

At first glance *Eastman* tells a rather simple story. "Marital bedrooms," as the United States Supreme Court has had occasion to observe in the first of its modern constitutional right to privacy cases, are "sacred precincts,"[20] in which we expect privacy and into which it is plainly highly offensive to intrude.[21] An invasion of privacy is "an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering more acute than that produced by a mere bodily injury."[22] The plaintiffs in *Eastman* experienced just such "mental suffering," and the function of the tort is to provide redress for that injury.[23]

In all probability this story accurately reflects how the vast majority of judges and lawyers understand the tort of invasion of privacy. It is a story, however, that places an intense and narrow focus on the actual mental suffering of specific individuals. The limitations of this focus become apparent once it is understood that the eavesdropping device in *Eastman* was not defined as an invasion of privacy merely because the plaintiffs were in fact discomforted, but rather because the installation of the device was "offensive to any person of ordinary sensibilities."[24] In the later language of the second *Restatement of Torts,* the placement of the eavesdropping device was actionable because it "would be highly offensive to a reasonable person."[25]

---

17. *Id.* at 109, 206 A.2d at 240.

18. *Id.* at 111, 206 A.2d at 242.

19. *Id.* at 112, 206 A.2d at 242.

20. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

21. For an historical account of the origins of these expectations, see W. RYBCZYNSKI, HOME: A SHORT HISTORY OF AN IDEA 15-49 (1986).

22. *Eastman,* 106 N.H. at 112, 206 A.2d at 242 (quoting 3 R. POUND, JURISPRUDENCE 58 (1959)); *see also* Emerson, *supra* note 4, at 333; Wade, *The Communicative Torts and the First Amendment,* 47 MISS. L.J. 671, 707-08 (1977).

23. "The action sounds in tort and when authorized is primarily to recover for a hurt to the feelings of the individual." Wheeler v. P. Sorensen Mfg. Co., 415 S.W.2d 582, 584 (Ky. 1967); *see also* Goodrich v. Waterbury Republican-Am., Inc., 188 Conn. 107, 128 n.19, 448 A.2d 1317, 1329 n.19 (1982); Froelich v. Adair, 213 Kan. 357, 362, 516 P.2d 993, 998 (1973); Billings v. Atkinson, 489 S.W.2d 858, 861 (Tex. 1973); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 87 (W. Va. 1984).

24. *Eastman,* 106 N.H. at 111, 206 A.2d at 242.

25. RESTATEMENT (SECOND) OF TORTS § 652B (1977). The *Restatement* provides that "[o]ne

The "reasonable person" is of course a figure who continually reappears in American common law, most especially in the law of torts. The important point about the reasonable person is that he is no one in particular; "[h]e is not to be identified with any real person."[26] He is rather, as a standard text would have it, "an abstraction," a representative of "the normal standard of community behavior," who embodies "the general level of moral judgment of the community, what it feels ought ordinarily to be done."[27] Thus in *Eastman* the installation of the eavesdropping device is transformed into an actionable invasion of privacy because the general level of moral judgment in the community finds it highly offensive for landlords and neighbors to spy on marital bedrooms. The *Eastman* court states that "[i]t is only where [an] intrusion has gone beyond the limits of decency that liability accrues."[28] The tort of invasion of privacy, we may thus conclude, is at least as concerned with policing these "limits of decency" as with redressing the mental distress of particular plaintiffs.

The *Restatement* characterizes these limits as those whose transgression would be "highly offensive." At first blush this notion of "offense" appears to describe the actual mental distress alleged to have been suffered by the *Eastman* plaintiffs. *Webster's Third New International Dictionary,* for example, defines "offensive" as that which gives "painful or unpleasant sensations" or causes "displeasure or resentment."[29] But the "displeasure" or "painful sensations" at issue in the *Eastman* case cannot be those of the plaintiffs, for their particular mental condition is not determinative of whether the installation of the eavesdropping device is an actionable invasion of privacy. So it must be the "reasonable person" who suffers. But that leaves us with something of an enigma, for the reasonable person is only a generic construct without real emotions.

For this reason, the pain or displeasure at issue cannot be understood as actual sensations or emotions. Because the reasonable person is not simply an empirical or statistical "average" of what most people in the community believe, the mental distress at issue also cannot be understood as a mere empirical or statistical prediction about what the majority of persons in a community would be likely to experience. Instead, because the reasonable person is a genuine instantiation of community norms, the concept of offensiveness at issue in *Eastman* must be understood as predicated upon a quality that inheres in such norms.

---

who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.*

26. *Id.* § 283 comment c.

27. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.2 (1956).

28. *Eastman,* 106 N.H. at 111, 206 A.2d at 242.

29. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1556 (unabr. 1986).

The dictionary suggests the nature of that quality when it states that the adjective 'offensive' "describes what is disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness."[30] The pain or displeasure associated with the offensive can be understood as flowing from this "outrage" or "affront." Outrage or affront, however, are ways of describing how it is appropriate to feel when certain social norms have been transgressed. Hence when the law asks whether the reasonable person would find certain invasions of privacy "highly offensive," it is not seeking merely to predict actual emotions, but rather to characterize those social norms whose violation would appropriately cause affront or outrage.

Thus a more precise characterization of the conceptual structure underlying *Eastman* is that a plaintiff is entitled to relief if it can be demonstrated that a defendant has transgressed the kind of social norms whose violation would properly be viewed with outrage or affront, and that the function of this relief is to redress "injury to personality." This legal structure typifies the tort of intrusion. It rests on the premise that the integrity of individual personality is dependent upon the observance of certain kinds of social norms.

This premise, of course, also underlies much of sociological thought. For purposes of analyzing the privacy tort, the most systematic and helpful explication of the premise may be found in the work of Erving Goffman. He most explicitly states the premise in his early article on *The Nature of Deference and Demeanor,* where he offers an image of social interactions as founded on rules of "deference and demeanor."[31] Rules of deference define conduct by which a person conveys appreciation "*to* a recipient or *of* this recipient, or of something of which this recipient is taken as a symbol, extension, or agent."[32] Rules of demeanor define conduct by which a person expresses "to those in his immediate presence that he is a person of certain desirable or undesirable qualities."[33]

Taken together, rules of deference and demeanor constitute "rules of conduct which bind the actor and the recipient together" and "are the bindings of society."[34] By following these rules, individuals not only confirm the social order in which they live, but they also establish and affirm "ritual" and "sacred" aspects of their own and others' identities.[35] Thus Goffman states that each "individual must rely on others to com-

30. *Id.*

31. E. GOFFMAN, *The Nature of Deference and Demeanor,* in INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR 47, 47 (1967).

32. *Id.* at 56 (emphasis in original).

33. *Id.* at 77.

34. *Id.* at 90.

35. *Id.* at 91.

plete the picture of him of which he himself is allowed to paint only certain parts":

> Each individual is responsible for the demeanor image of himself and the deference image of others, so that for a complete man to be expressed, individuals must hold hands in a chain of ceremony, each giving deferentially with proper demeanor to the one on the right what will be received deferentially from the one on the left. While it may be true that the individual has a unique self all his own, evidence of this possession is thoroughly a product of joint ceremonial labor, the part expressed through the individual's demeanor being no more significant than the part conveyed by others through their deferential behavior toward him.[36]

According to Goffman, then, we must understand individual personality as *constituted* in significant aspects by the observance of rules of deference and demeanor; or, to return to the more prosaic language of *Eastman,* by the rules of decency recognized by the reasonable man.[37] Violation of these rules can thus damage a person by discrediting his identity and injuring his personality. Breaking "the chain of ceremony" can deny an individual the capacity to become "a complete man" and hence "disconfirm" his very "self."[38]

It is for this reason that the law regards the privacy tort as simultaneously upholding social norms and redressing "injury to personality." We must be clear, however, that in any particular case individuals may or may not have internalized pertinent rules of deference and demeanor, and hence may or may not suffer actual injury to personality. But the device of the reasonable person focuses the law not on actual injury to the personality of specific individuals, but rather on the protection of that personality which would be constituted by full observance of the relevant rules of deference and demeanor, those whose violation would appropriately cause outrage or affront. I shall call such rules "civility rules," and I shall call the personality that would be upheld by these civility rules "social personality."

The concept of social personality points simultaneously in two distinct directions. On the one hand, the actual personalities of well-socialized individuals should substantially conform to social personality, for such individuals have internalized the civility rules by which social personality is defined. It is for this reason that the tort of intrusion, even though formally defined in terms of the expectations of the "reasonable person," can in practice be expected to offer protection to the emotional

36. *Id.* at 84-85.

37. George Herbert Mead similarly argues that "[w]hat goes to make up the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct." G.H. MEAD, MIND, SELF AND SOCIETY 162 (1934).

38. E. GOFFMAN, *supra* note 31, at 51.

well-being of real plaintiffs. But, on the other hand, social personality also subsists in a set of civility rules that, when taken together, give normative shape and substance to the society that shares them. In fact these rules can be said to define the very "community" which the "reasonable person" inhabits. They constitute the "special claims which members [of a community] have on each other, as distinct from others,"[39] and hence which create for a community "its distinctive shape, its unique identity."[40] Thus even if particular plaintiffs are not well-socialized and hence have not suffered actual injury because of a defendant's violation of civility rules, the law nevertheless endows such plaintiffs with the capacity to bring suit, thereby upholding the normative identity of the community inherent in the concept of social personality.

This interpretation of the tort explains what would otherwise be a puzzling aspect of its legal structure. Most torts require, as distinct elements of a prima facie case, allegation and proof that the violation of a relevant social norm has actually caused some form of harm or damage. For example, if you drive your car carelessly and have an accident, a lawsuit against you for negligence can succeed only if it establishes that your negligent behavior has actually caused some demonstrable injury.[41] The basic idea is "no harm, no foul." But the tort of invasion of privacy is qualitatively different because the injury at issue is logically entailed by, rather than merely contingently caused by, the improper conduct. An intrusion on privacy is *intrinsically* harmful because it is defined as that which injures social personality.

The profile of the invasion of privacy tort reflects this logical structure. In contrast to the usual cause of action for negligence, the privacy tort enables a plaintiff to make out his case without alleging or proving any actual or contingent injury, such as emotional suffering or embarrassment. The privacy tort shares this profile with other torts which redress "dignitary harms."[42] In the area of defamation, for example, where the law also seeks to uphold civility rules,[43] a plaintiff could at common law successfully prosecute a suit, and even receive substantial

39. J. GUSFIELD, COMMUNITY: A CRITICAL RESPONSE 29 (1975).

40. K. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 11 (1966).

41. *See* RESTATEMENT (SECOND) OF TORTS § 328A (1977).

42. The phrase comes from Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 341 (1966). Torts that redress dignitary harms share this structure with the larger category of "traditional intentional torts." *See* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 49-50 (1982). For a roughly analogous distinction between "damage" torts and "interference" torts, see F.H. LAWSON, *"Das subjektive Recht" in the English Law of Torts*, in 1 MANY LAWS: SELECTED ESSAYS 176-92 (1977).

43. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 707-19 (1986).

sums in "general damages," despite a defendant's credible proof that the plaintiff had suffered no actual or contingent injury whatever.[44] In their 1890 article, Warren and Brandeis conceived of the "remedies for an invasion of the right of privacy" as analogous to "those administered in the law of defamation."[45] In 1939 the first *Restatement of Torts* stated flatly that damages in a privacy action "can be awarded in the same way in which general damages are given for defamation."[46] In its second edition the *Restatement* was somewhat more circumspect,[47] stating:

> One who has established a cause of action for invasion of his privacy is entitled to recover damages for
>
> (a) the harm to his interest in privacy resulting from the invasion;
>
> (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
>
> (c) special damage of which the invasion is a legal cause.[48]

The *Restatement* thus enables a plaintiff to maintain a suit, and even to receive damages, because of harm to an "interest in privacy," notwithstanding the absence of allegations or proof of actual injury, such as mental distress. This in effect renders the invasion of privacy tort theoretically independent of any merely empirical or contingent consequences of the violation of the underlying civility rule.[49] The most plausible interpretation of this legal structure is that the *Restatement* has empowered plaintiffs to use the tort to uphold the interests of social personality, which are *necessarily* impaired by a defendant's breach of a civility rule.

The strength of this conclusion, however, should be qualified somewhat because of the paucity of reported decisions on point. I have been able to locate only a very few decisions where plaintiffs have been unable or unwilling to present any evidence of actual injury. But in those few cases courts have followed the implications of the *Restatement's* analysis

44. *See id.* at 697-98. In 1974 in Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974), the United States Supreme Court held that the first amendment sharply limits awards of such general damages, although in a recent decision the Court has somewhat loosened these constitutional restrictions. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 753-61 (1985).

45. Warren & Brandeis, *supra* note 6, at 219.

46. RESTATEMENT OF TORTS § 867 comment d (1939).

47. The circumspection was no doubt due to the Supreme Court's recent constitutional decision in *Gertz, discussed at supra* note 44; *see also* RESTATEMENT (SECOND) OF TORTS § 652H comment c (1977). (Query, however, the impact of the Court's subsequent decision in *Dun & Bradstreet.*) Because the tort of intrusion does not involve speech, it is not subject to the kind of first amendment limitations imposed by *Gertz.*

48. RESTATEMENT (SECOND) OF TORTS § 652H (1977).

49. Thus in the tort of intrusion the *Restatement* provides that a plaintiff can recover damages for the violation of his "interest in privacy," which means "the deprivation of his seclusion." *Id.* § 652H comment a.

and awarded damages,[50] even if only nominal.[51]

The minuscule number of such decisions is itself instructive, however, for it indicates that as a practical matter virtually every plaintiff will allege and be able to produce some credible evidence of contingent and actual injury in the form of emotional suffering. The very credibility of this evidence suggests how dependent our personalities in fact are upon the observance of civility rules, and hence confirms the close congruence between social personality and the actual individual personalities of those who use the legal system. The strength of this congruence is illustrated by the confidence with which we instinctively feel the plausibility of the emotional suffering alleged by plaintiffs in the *Eastman* case, even though we have absolutely no empirical knowledge of who those plaintiffs really are. This confidence can be grounded only on the almost irresistible assumption that the personalities of those plaintiffs have been forged by the same rules of civility as have shaped our own personalities.

The privacy tort thus represents a complex pattern in which legal interventions supportive of general rules of civility occur at the behest of specific aggrieved individuals. This pattern can be viewed as an attempt to disperse enforcement authority. In contrast to the criminal law, in which all power to prosecute infractions of important legal norms is concentrated in the hands of accountable public officials, the privacy tort devolves the authority of enforcement into the hands of private litigants. But concomitant with this decentralization—or perhaps because of it—the privacy tort is also concerned with the specific interests of those plaintiffs who take the trouble to bring violators of civility rules before adjudicative tribunals. This concern is particularly visible in how the tort is structured to redress the claims of those who have suffered actionable injuries.

We may roughly distinguish between two kinds of plaintiff interests. The first arises because of contingent psychological injuries that plaintiffs may suffer as a result of the violation of civility rules. Mental anguish and humiliation are examples of such injuries that are common and routine. But so are more exotic forms of damage. In *Eastman,* for example, the husband alleged that the discovery of the eavesdropping device in his bedroom had rendered him impotent; his wife alleged that she had been

50. *See, e.g.,* Socialist Workers Party v. Attorney General, 642 F. Supp. 1357, 1417-23 (S.D.N.Y. 1986).

51. *See, e.g.,* Manville v. Borg-Warner Corp., 418 F.2d 434, 437 (10th Cir. 1969); Cason v. Baskin, 159 Fla. 31, 41, 30 So. 2d 635, 640 (1947); S. HOFSTADTER & G. HOROWITZ, THE RIGHT OF PRIVACY 265-68 (1964). *But see* Brents v. Morgan, 221 Ky. 765, 774-75, 299 S.W. 967, 971-72 (1927); Hazlitt v. Fawcett Publications, Inc., 116 F. Supp. 538, 544 (D. Conn. 1953). In negligence actions, by way of contrast, awards of nominal damages are not permitted, because a plaintiff can succeed only if he demonstrates actual injury. RESTATEMENT (SECOND) OF TORTS § 907 comment a (1977).

made frigid. Although these injuries are idiosyncratic, they nevertheless deserve redress, and the tort is structured to provide that redress.[52]

The second kind of interest arises from the dignitary harm which plaintiffs suffer as a result of having been treated disrespectfully. Violations of civility rules are intrinsically demeaning, even if not experienced as such by a particular plaintiff.[53] This is because dignitary harm does not depend on the psychological condition of an individual plaintiff, but rather on the forms of respect that a plaintiff is entitled to receive from others.[54] We need to ask how the law can provide redress for the dignitary harm which results when these forms of respect are, in important ways, violated.

The answer can perhaps be found in those not infrequent cases where juries use the pretext of "psychic and emotional harm" to return "large verdicts, although little objective evidence is available"[55] to support them.[56] The *Restatement* shrewdly characterizes such damages as "vindicating" a plaintiff:

> [F]or certain types of dignitary torts, the law serves the purpose of vindicating the injured party. Thus, in suits for defamation [or] invasion of privacy . . . the major purpose of the suit may be to obtain a public declaration that the plaintiff is right and was improperly treated. This is more than a simple determination of legal rights for which nominal damages may be sufficient, and will normally require compensatory or punitive damages.[57]

The *Restatement's* conclusion that large damage awards which are

52. There is, however, a limit to the idiosyncracies that the law will recognize. The *Restatement* notes, for example, that a plaintiff may "recover damages for emotional distress or personal humiliation that he proves to have been actually suffered by him, *if it is of a kind that normally results from such an invasion and it is normal and reasonable in its extent.*" RESTATEMENT (SECOND) OF TORTS § 652H comment b (1977) (emphasis added). Apparently the law will not tolerate too great a divergence between social and individual personality.

53. The formulation of this point is a bit tricky, because often the question of whether a civility rule has been violated depends upon the subjective attitude of a plaintiff. For example, if the eavesdropping device in *Eastman* had been placed with the consent of the plaintiffs, we would not understand the defendant as having transgressed a civility rule, but rather as having entered into some mutual, erotic relationship with the plaintiffs. The point in the text, however, is that if the placement of the device has broken a civility rule—if, for example, the plaintiffs in *Eastman* had been unaware of its installation—then the plaintiffs would have been demeaned regardless of their subjective apprehension.

54. *Cf.* Feinberg, *The Nature and Value of Rights,* 4 J. VALUE INQUIRY 243, 252 (1970):

> [R]espect for persons . . . may simply be respect for their rights, so that there cannot be the one without the other; and what is called 'human dignity' may simply be the recognizable capacity to assert claims. To respect a person, then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims.

55. Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 594 (D.C. 1985).

56. On the issue of "excessive" damage awards, see, for example, LIBEL DEF. RESOURCE BULL., No. 11, Summer-Fall 1984, at 12-18; *Socking It to the Press,* EDITOR & PUBLISHER, Apr. 7, 1984, at 31.

57. RESTATEMENT (SECOND) OF TORTS § 901 comment c (1977).

seemingly unrelated to any contingent harm represent a form of vindication is an informed and convincing interpretation.[58] To say that the plaintiff in an invasion of privacy suit requires vindication, however, is to imply that he is somehow in need of exoneration. But this implication is puzzling, for the plaintiff has been the victim, not the perpetrator, of a transgression. The shame of the victim, however, is made explicable by the fact that he has been denied respect, and consequently his status as a person to whom respect is due has been called into question.

The victim of the breach of a civility rule, in other words, suffers a special kind of injury: He is "threatened" with being "discredited"[59] because he has been excluded from the "chain of ceremony" which establishes the respect normally accorded to full-fledged members of the community. Since the boundaries of a community are marked by the "special claims which members have on each other, as distinct from others,"[60] the defendant's disregard of the plaintiff's claim to be treated with respect potentially places the plaintiff outside of the bounds of the shared community. The plaintiff can accordingly be vindicated only by being reaffirmed as a member of the community. It is plausible to interpret the seemingly excessive damages that sometimes characterize invasion of privacy actions as such an affirmation, which occurs through the simultaneous enrichment of the plaintiff and the punishment of the defendant.[61] The privacy tort, in other words, functions not merely to uphold the chain of ceremony, but also, in appropriate cases, to reforge it when it has been fractured.

II
PRIVACY AND CIVILITY: SOME THEORETICAL IMPLICATIONS

We have come a long way, then, from the first simple story we were able to tell about the *Eastman* case. The underlying structure of the privacy tort is as much oriented toward safeguarding rules of civility and the chain of ceremony they establish, as it is toward protecting the emotional well-being of individuals. This understanding of the tort has several important theoretical implications, both for the concept of privacy and for the functioning of the law.

58. In the area of defamation, for example, the punishment of a defendant through the exaction of high civil damages can be interpreted as the law's attempt to "vindicate" a plaintiff's honor. *See* Post, *supra* note 43, at 703-06.

59. E. GOFFMAN, *supra* note 31, at 51.

60. J. GUSFIELD, *supra* note 39, at 29.

61. On the relationship between punishment and vindication, see Post, *supra* note 43, at 704-05.

A. The Normative Nature of Privacy: The Reconciliation of Community and Autonomy

Consider first the concept of privacy that underlies the tort. It is obviously quite different from the "neutral concept of privacy"[62] which some commentators have proposed, and which attempts to define privacy in purely descriptive and value-free terms. Ruth Gavison, for example, has defined privacy as a gradient that varies in three dimensions: secrecy, anonymity, and solitude. She believes that an individual's loss of privacy can be objectively measured "as others obtain information" about him, "pay attention to him, or gain access to him."[63] The presence or absence of privacy is thus a fact capable of ascertainment without regard to normative social conventions.

A "neutral" concept of privacy has certain obvious advantages and uses. It is useful, for example, in the cross-cultural analysis of privacy, because it creates an object of analysis that is independent of the various perceptions of the cultures at issue. It is also useful for efforts to create a functional account of privacy. The hypothesis that "privacy" is necessary to cause certain consequences will be cleaner and more easily verifiable if the "privacy" at issue is conceived as a measurable fact. Thus Robert Merton rests his claim that privacy "is an important functional requirement for the effective operation of social structure" on the neutral definition of privacy as "insulation from observability."[64] Privacy is necessary, argues Merton, because without it "the pressure to live up to the details of all (and often conflicting) social norms would become literally unbearable; in a complex society, schizophrenic behavior would become the rule rather than the formidable exception it already is."[65]

Whatever the virtue of such neutral definitions of privacy, they are most certainly not at the foundation of the common law, which rests instead upon a concept of privacy that is inherently normative. The privacy protected by the common law tort cannot be reduced to objective facts like spatial distance or information or observability; it can only be understood by reference to norms of behavior. A defendant who stands very close to a plaintiff in a crowded elevator will not be perceived to have committed a highly offensive intrusion; but the case will be very different if the defendant stands the same distance away from a plaintiff in an open field. In the common law, as in everyday life, issues of privacy refer to the characterization of human action, not to the neutral and objective measurement of the world.

Thus the sphere of privacy protected by the tort can only be per-

62. Gavison, *Privacy and the Limits of Law,* 89 YALE L.J. 421, 425-40 (1980).
63. *Id.* at 428.
64. R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 429 (1968).
65. *Id.*

ceived through the exercise of what Simmel calls "moral tact."[66] Gavison argues that privacy defined in terms of social norms "is simply a conclusion, not a tool to analyze whether a certain invasion should be considered wrong in the first place."[67] But in the end this objection simply highlights that the common law attempts not to search out and articulate first ethical principles, as would a certain kind of moral philosopher, but instead to discover and refresh the social norms by which we live, the very norms that to Gavison provide only the starting point for respectable critique.

Civility rules of course protect dignitary interests other than those of privacy. But because the common law has not attempted to define "privacy" in the neutral manner advocated by Gavison, it has on the whole been almost indifferent to any systematic effort to distinguish between those civility rules which protect privacy and those which safeguard other dignitary interests. For this reason the single act of a defendant will often be the basis for a lawsuit alleging various kinds of dignitary harms, ranging from invasion of privacy, to defamation, and to the intentional infliction of emotional distress.[68]

The common law attempts to distinguish privacy from other forms of social respect primarily through the specification of the formal elements of the privacy tort. The formal elements of the branch of privacy law known as "intrusion," the precise privacy law tort at issue in *Eastman,* require a plaintiff to allege that a defendant has intentionally intruded upon the plaintiff's solitude or seclusion in a manner that would be highly offensive to a reasonable person.[69] The formal elements of the tort of intentional infliction of emotional distress, on the other hand, require a plaintiff to allege that a defendant has, by means of extreme and outrageous conduct, intentionally caused the plaintiff severe emotional distress.[70]

Obviously these elements overlap substantially, and it is not surprising that plaintiffs will frequently allege both intrusion and intentional infliction of emotional distress.[71] But the elements of the two torts are

66. G. SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 324 (K. Wolff trans. & ed. 1950).

67. Gavison, *supra* note 62, at 426 n.18.

68. For a recent and notorious example in which all three torts were alleged, see Hustler Magazine v. Falwell, 108 S. Ct. 876, 878 (1988). For a more typical case, see Sawabini v. Desenberg, 143 Mich. App. 373, 372 N.W.2d 559 (Ct. App. 1985). For a statistical study of pleading practices with respect to dignitary torts, see Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution,* 23 WASHBURN L.J. 24, 36-44 (1983).

69. RESTATEMENT (SECOND) OF TORTS § 652B (1977), *quoted at supra* note 25.

70. *Id.* § 46. Although the tort of intentional infliction of emotional distress requires, as a formal matter, allegation and proof of contingent emotional injury, "the tort . . . in practice tends to reduce to a single element—the outrageousness of the defendant's conduct." Givelber, *supra* note 42, at 42-43.

71. *See, e.g.,* Galella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd in part and rev'd in*

logically distinct, for the intrusion tort focuses narrowly on policing what Simmel calls that "ideal sphere [which] lies around every human being" and which "cannot be penetrated, unless the personality value of the individual is thereby destroyed,"[72] whereas the tort of intentional infliction of emotional distress focuses upon preventing the intentional violation of civility rules for the purpose of causing harm to the personality. Thus the latter tort prohibits evil intentions, while the former guards against the penetration of private space. But this formal distinction is less helpful than it might appear, for the penetration of private space is often not "highly offensive" unless perpetrated with improper intent,[73] and so the boundary between the two torts is obscured.

That the common law lives comfortably with such ambiguity is evidence that it is primarily interested in maintaining the forms of respect deemed essential for social life, and relatively indifferent to whether particular forms of respect should be denominated as "privacy." Certain kinds of respect are in ordinary discourse understood to be concerned with privacy, and the common law roughly incorporates this understanding into the formal elements of the privacy tort. But the common law makes no great effort systematically to analyze that understanding so as to isolate the "private" as a distinct object of protection.

The intrusion branch of the privacy tort has intuitively obvious connections to ordinary understandings of privacy. Certainly in common usage a basic meaning of privacy is that of a private space, like a bathroom or a home, from which others may be excluded.[74] The forms of respect that underlie such spaces are well displayed by Erving Goffman in his essay on *The Territories of the Self*.[75] Goffman defines a territory as a "field of things" or a "preserve" to which an individual can claim "entitlement to possess, control, use, or dispose of."[76] Territories are defined not by neutral, objective factors, like feet or inches, but instead

part, 487 F.2d 986 (2d Cir. 1973); Fletcher v. Florida Publishing Co., 319 So. 2d 100 (Fla. Dist. Ct. App. 1975), *rev'd*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977); Pemberton v. Bethlehem Steel Corp., 66 Md. App. 133, 502 A.2d 1101 (Ct. Spec. App.), *cert. denied*, 306 Md. 289, 508 A.2d 488, *cert. denied*, 479 U.S. 984 (1986); Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970); Mead, *supra* note 68, at 49.

72. G. SIMMEL, *supra* note 66, at 321.

73. *See, e.g.*, Housh v. Peth, 165 Ohio St. 35, 40-41, 133 N.E.2d 340, 343 (1956) (violation of right to privacy where defendant acted "willfully or intentionally for the purpose of producing mental anguish and pain").

74. As Joel Feinberg notes:

> The root idea in the generic concept of privacy is that of a privileged territory or domain in which an individual person has the exclusive authority of determining whether another may enter, and if so, when and for how long, and under what conditions. Within this area, the individual person is—pick your metaphor—boss, sovereign, owner.

J. FEINBERG, OFFENSE TO OTHERS 24 (1985) (citation omitted).

75. E. GOFFMAN, *The Territories of the Self*, in RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 28 (1971).

76. *Id.* at 28-29.

are contextual. Their boundaries have a "socially determined variability" and depend upon such "factors as local population density, purpose of the approacher, . . . character of the social occasion, and so forth."[77]

That territories are defined by normative and social factors, as opposed to "neutral" or "objective" criteria, is well illustrated by the recent case of *Huskey v. National Broadcasting Co.*,[78] in which Arnold Huskey, a prisoner at the United States Penitentiary at Marion, Illinois, sued NBC because its cameras had filmed him while in the prison's "exercise cage," a room roughly twenty-five feet by thirty feet with a concrete floor and surrounding fence. Huskey was wearing only gym shorts, leaving several distinctive tattoos exposed. Huskey claimed that NBC had intruded on his seclusion, because he had expected that "the only ones able to see him would be persons 'to whom he might be exposed as a necessary result of his incarceration': the guard assigned to watch him, other prison personnel and other inmates."[79] NBC argued that it could not "be held liable for intrusion upon Huskey's seclusion because he was not secluded"; the exercise cage was " 'open to view and used by other prisoners.' "[80]

The court refused to accept the "neutral" fact of Huskey's visibility as determinative of the territory from which he could rightfully exclude others:

> Huskey's visibility to some people does not strip him of the right to remain secluded from others. Persons are exposed to family members and invited guests in their own homes, but that does not mean they have opened the door to television cameras. Prisons are largely closed systems, within which prisoners may become understandably inured to the gaze of staff and other prisoners, while at the same time feeling justifiably secluded from the outside world (at least in certain areas not normally visited by outsiders).[81]

The court concluded that the success of Huskey's claim would have to await further development of the factual record regarding the actual customs and usages of the exercise cage. These customs and usages, not the "objective" facts of visibility, secrecy, anonymity, and solitude, defined the territory in which Huskey could legally claim the right to undisturbed "seclusion."

Goffman's central and profound point is that territories, defined in this normative way, are a vehicle for the exchange of meaning; they serve

77. *Id.* at 31, 40. Goffman makes clear that the conduct of the individual claiming the territory is also relevant to the social recognition of the territory. *Id.* at 41-44.

78. 632 F. Supp. 1282 (N.D. Ill. 1986).

79. *Id.* at 1285 (quoting the Complaint at ¶ 9).

80. *Id.* at 1287 (quoting Respondent NBC's Memorandum at 8).

81. *Id.* at 1288.

as a kind of language, a "ritual idiom,"[82] through which persons communicate with one another. We indicate respect for a person by acknowledging his territory; conversely, we invite intimacy by waiving our claims to a territory and allowing others to draw close. An embrace, for example, can signify human compassion or desire, but if it is unwelcome it can instead be experienced as a demeaning indignity.[83] The identical physical action can have these two very different meanings only because its significance is constituted by the norms of respect which define personal space. It is characteristic of "territories of the self" to be used in this "dual way, with comings-into-touch avoided as a means of maintaining respect and engaged in as a means of establishing regard."[84]

Goffman's analysis suggests that by lending authoritative sanction to the territories of the self, the tort of intrusion performs at least three distinct functions. First, it safeguards the respect due individuals by virtue of their territorial claims.[85] Second, it maintains the language or "ritual idiom" constituted by territories, thus conserving the particular meanings carried by that language. Third, the tort preserves the ability of individuals to speak through the idiom of territories, and this ability, as Goffman notes,

> is somehow central to the subjective sense that the individual has concerning his selfhood, his ego, the part of himself with which he identifies his positive feelings. And here the issue is not whether a preserve is exclusively maintained, or shared, or given up entirely, but rather the role the individual is allowed in determining what happens to his claim.[86]

An individual's ability to press or to waive territorial claims, his ability to choose respect or intimacy, is deeply empowering for his sense of himself as an independent or autonomous person. As Jeffrey Reiman has noted, "[p]rivacy is an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individ-

---

82. E. GOFFMAN, *supra* note 75, at 60.

83. *See* Craker v. Chicago & N.W. Ry., 36 Wis. 657, 660 (1875) (railroad company liable for the "indignity" of the unsolicited advances of conductor).

84. E. GOFFMAN, *supra* note 75, at 60-61. For commentators making a similar point, see C. FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 142 (1970); Rachels, *Why Privacy is Important,* 4 PHIL. & PUB. AFF. 323, 327-29 (1975).

85. Since such respect is constitutive of the self, it is not surprising to find the early cases describing privacy norms in the language of "natural law":

> The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law.

Pavesich v. New England Life Ins. Co., 122 Ga. 190, 194, 50 S.E. 68, 69-70 (1905).

86. E. GOFFMAN, *supra* note 75, at 60.

ual—that his existence is his own. And this is a precondition of personhood."[87]

There is now a fierce debate in law and political philosophy between, speaking roughly, liberals and communitarians.[88] The former stress those aspects of the self which are independent and autonomous, the latter emphasize those aspects which are embedded in social norms and values. In the intrusion tort, however, this debate is miraculously transcended, for the tort presides over precisely those social norms which enable an autonomous self to emerge.

Some norms, like those prohibiting murder, cannot be waived by the consent of individuals. But the norms policed by the intrusion tort are different. They mark the boundaries that distinguish respect from intimacy, and their very ability to serve this function depends upon their capacity for being enforced or waived in appropriate circumstances. In the power to make such personal choices inheres the very essence of the independent self. This mysterious fusion of civility and autonomy lies at the heart of the intrusion tort.[89]

B. The Legal Enforcement of Civility Rules: Hegemony and Community

Our analysis so far has assumed that the common law incorporates civility rules from society in some relatively unproblematic way. The assumption reflects the common law's understanding of its own project. The elements of intrusion require it to enforce rules of civility as perceived by the "reasonable person," who is meant to embody "the general level of moral judgment of the community." The discernment and application of these civility rules is in general entrusted to a jury, which is a randomly selected group of persons designed to be representative of the community.[90] The prevailing image is that of a legal system transpar-

87. Reiman, *Privacy, Intimacy, and Personhood,* 6 PHIL. & PUB. AFF. 26, 39 (1976).

88. For an overview of this debate, see Gutmann, *Communitarian Critics of Liberalism,* 14 PHIL. & PUB. AFF. 308 (1985); Thigpen & Downing, *Liberalism and the Communitarian Critique,* 31 AM. J. POL. SCI. 637 (1987); Wallach, *Liberals, Communitarians, and the Tasks of Political Theory,* 15 POL. THEORY 581 (1987); Note, *A Communitarian Defense of Group Libel Laws,* 101 HARV. L. REV. 682, 689-92 (1988).

89. That fusion has been well captured by Edward Shils:

> Intrusions on privacy are baneful because they interfere with an individual in his disposition of what belongs to him. The "social space" around an individual . . . *belong[s]* to him. He does not acquire [it] through purchase or inheritance. He possesses [it] and is entitled to possess [it] by virtue of the charisma which is inherent in his existence as an individual soul—as we say nowadays, in his individuality—and which is inherent in his membership in the civil community. [It] belong[s] to him by virtue of his humanity and civility. A society that claims to be both humane and civil is committed to [its] respect. When its practice departs from that respect, it also departs to that degree from humanity and civility.

Shils, *Privacy: Its Constitution and Vicissitudes,* 31 LAW & CONTEMP. PROBS. 281, 306 (1966) (emphasis in original).

90. On the distinction between judge and jury with respect to the discernment and application

ently reflecting community norms.

This image, however, requires three important qualifications. First, social life is thick with territorial norms that contribute substantially to "the concrete density and vitality of interaction."[91] For obvious reasons, however, the common law can maintain only a small subset of these norms. The law itself claims to enforce only the most important of them, only those whose breach would be "highly offensive." This selection criterion serves the interest of legal institutions, which otherwise would be inundated with trivial lawsuits. It also, and somewhat less obviously, preserves the flexibility and vitality of social life, which undoubtedly would be hardened and otherwise altered for the worse if every indiscretion could be transformed into formal legal action.

Second, the legal system must translate civility rules into workable legal doctrine. The complex, tacit, and contextual territorial principles described by Goffman must be stiffened into the relatively clear, explicit, and precise elements of a formal cause of action. This transmutation is captured by Paul Bohannan's notion of "*double* institutionalization," which means that the law must domesticate general social norms so that they are compatible with the needs and functioning of the legal system.[92] Civility rules must thus assume the character of legal doctrine; they must be formulated according to the logic of the rule of law, which means that they must be articulated in such a way "that people will be able to be guided by [them]."[93] They must be capable of generating rules of precedent to constrain future judicial decisions. These transformations imply that legal doctrine is often, as Bohannan puts it, "out of phase with society."[94] If the objective of the law is to shape and alter social norms, this

---

of community norms, see Post, *Defaming Public Officials: On Doctrine and Legal History,* 1987 AM. B. FOUND. RES. J. 539, 552-54.

91. G. SIMMEL, *supra* note 66, at 323.

92. Bohannan states:

> Customs are norms or rules . . . about the ways in which people must behave if social institutions are to perform their tasks and society is to endure. All institutions (including legal institutions) develop customs. Some customs, in some societies, are *re*institutionalized at another level: they are restated for the more precise purposes of legal institutions. When this happens, therefore, law may be regarded as a custom that has been restated in order to make it amenable to the activities of the legal institutions.

Bohannan, *The Differing Realms of the Law,* 67 AM. ANTHROPOLOGIST 33, 35-36 (1965) (emphasis in original).

93. J. RAZ, *The Rule of Law and Its Virtue,* in THE AUTHORITY OF LAW 210, 213 (1979).

94. Bohannan, *supra* note 92, at 37. Bohannan notes:

> Indeed, the more highly developed the legal institutions, the greater the lack of phase, which not only results from the constant reorientation of the primary institutions, but also is magnified by the very dynamic of the legal institutions themselves.
>
> Thus, it is the very nature of law, and its capacity to 'do something about' the primary social institutions, that creates the lack of phase. . . . It is the fertile dilemma of law that it must always be out of step with society, but that people must always (because they work better with fewer contradictions, if for no other reason) attempt to reduce the lack of phase. Custom must either grow to fit the law or it must actively reject it; law must either

tension between law and custom is desirable. But if the law's purpose is to maintain social norms, as is manifestly the case for the common law tort of intrusion, this dissonance works against the very rationale of the law.

Third, and most important, it is something of a fiction to speak of a single, homogeneous community within a nation as large and diverse as the United States. There is every reason to expect that civility rules regarding privacy will differ "among communities, between generations, and among ethnic, religious, or other social groups, as well as among individuals."[95] It is said, for example, that Warren and Brandeis wrote their famous article because Warren, a genuine Boston Brahmin, was outraged that common newspapers had had the effrontery to report on his private entertainments.[96] As such the class content of the privacy norms advanced by the article is plain.[97] That content is also explicit in the writings of E. L. Godkin, which Warren and Brandeis cite with approval. Godkin characterized privacy as "one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies."[98] He illustrated the social consequences of the point by reciting the

> story of the traveller in the hotel in the Western mining town, who pinned a shirt across his open window to screen himself from the loafers on the piazza while performing his toilet; after a few minutes he saw it drawn aside roughly by a hand from without, and on asking what it meant, a voice answered, 'We want to know what there is so darned private going on in there?' The loafers resented his attempts at seclusion in

---

grow to fit the custom, or it must ignore or suppress it. It is in these very interstices that social growth and social decay take place.

Id. (citation omitted).

95. Anderson v. Fisher Broadcasting Co., 300 Or. 452, 461, 712 P.2d 803, 809 (1986). " '"Class, occupation, education, and status within various communities and organizations may significantly affect the way in which an individual thinks of himself as a 'private' individual and what he understands by 'the moral right to privacy.' "' " *Id.* at 461 n.8, 712 P.2d at 809 n.8 (quoting Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort,* 68 Cornell L. Rev. 291, 349 n.304 (1983), quoting Velecky, *The Concept of Privacy,* in PRIVACY 25 (J. Young ed. 1983)).

96. A. MASON, BRANDEIS: A FREE MAN'S LIFE 70 (1956).

97. "The Warren-Brandeis proposal was essentially a rich man's plea to the press to stop its gossiping and snooping . . . ." D. PEMBER, *supra* note 6, at 23. In the classic tones of the beleaguered aristocrat, Warren and Brandeis complain:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

Warren & Brandeis, *supra* note 6, at 196.

98. Godkin, *The Rights of the Citizen: To His Own Reputation,* SCRIBNER'S MAG., July 1890, at 58, 65.

their own rude way . . . .[99]

Godkin's story is plainly meant to demonstrate the class basis of privacy norms. In a world in which privacy norms are heterogeneous, however, the common law must choose which norms to enforce. It must pick sides in the confrontation between the traveller and the loafers. And this choice cannot be avoided by an appeal to the judgment of the "reasonable person," for it must first be determined to which community the reasonable person belongs.

In defamation law, the question of which community the law will serve is explicitly thematized as a doctrinal issue. Some courts have said that the law will uphold the values of "a considerable and respectable class in the community";[100] others have adopted the perspective of " 'right-thinking persons.' "[101] But this question is not explicitly addressed in the doctrine of the more recent tort of invasion of privacy, which speaks only in the majestic and abstract accents of the "reasonable person." Thus the civility rules recognized by the common law tort of intrusion are presented as "universalist norms, applicable to the society as a whole rather than to a few functional or segmental sectors, highly generalized in terms of principles and standards."[102]

Whether this claim to universalist status is justified, however, cannot be determined from the mere fact of a judicial decision. It could be that the civility rules enforced by a judicial decision genuinely are expressive of generally accepted norms in a society. I doubt, for example, if anyone would seriously question *Eastman*'s assertion that eavesdropping on marital bedrooms constitutes a serious violation of generally accepted civility rules. But the converse could also be true, and it is possible that the civility rules enforced by a particular court may be understood as hegemonically imposed by one dominant cultural group onto others.[103]

This suggests that care must be taken in evaluating the universalist pretensions of the tort of intrusion. Under conditions of cultural heterogeneity, the common law can become a powerful instrument for effacing cultural and normative differences.[104] The significance of this efface-

99. *Id.* at 66.

100. Peck v. Tribune Co., 214 U.S. 185, 190 (1909).

101. Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933) (quoting Sydney v. MacFadden Newspaper Publishing Corp., 242 N.Y. 208, 212, 151 N.E. 209, 210 (1926)); *see* Post, *supra* note 43, at 714-15.

102. T. PARSONS, SOCIOLOGICAL THEORY AND MODERN SOCIETY 510 (1967).

103. On the distinction between expressive and hegemonic functions of law, see Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment,* 76 CALIF. L. REV. 297, 299-300 (1988).

104. A good illustration of this potential is the case of Bitsie v. Walston, 85 N.M. 655, 658, 515 P.2d 659, 662 (Ct. App.), *cert. denied,* 85 N.M. 639, 515 P.2d 643 (1973), a decision interpreting the "appropriation" branch of the privacy tort, in which the court held that the "traditional" norms of the Navajo tribe could not be equated with the "ordinary sensibilities" of the reasonable person. *See*

ment, however, lies not only in its hegemonic consequences, but also in the commitment that it reveals to the task of constructing a common community through the process of authoritatively articulating rules of civility. The common law tort purports to *speak for* a community. Yet this very ambition authoritatively to forge a community simultaneously requires the common law to displace deviant communities. Under such conditions, community and hegemony necessarily entail each other.

III
THE TORT OF PUBLIC DISCLOSURE

The core of the invasion of privacy tort is commonly understood to lie in the branch of the tort that attempts to regulate the publicizing of private life.[105] The elements of that branch are described by the *Restatement* in the following manner:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.[106]

This branch of the tort (which for convenience I shall call simply "public disclosure") differs from intrusion in three fundamental ways. First, intrusion concerns the physical actions of a defendant, whereas public disclosure involves the dissemination of information. The tort in *Eastman* was complete when the defendant placed the eavesdropping device in the plaintiffs' marital bedroom. Liability did not depend upon whether the defendant actually listened to the device or acquired any information from it, or whether he revealed any such information to others. An essential element of the tort of public disclosure, on the other hand, is a defendant's public disclosure of private information. The tort of public disclosure thus regulates forms of communication rather than physical behavior.

Second, whereas both intrusion and public disclosure turn on what a "reasonable person" would find "highly offensive," the tort of public disclosure penalizes only certain kinds of highly offensive revelations of private life; namely, those in which a defendant has given "publicity" to the offensive information. To give "publicity" to information is to make it

---

also Benally v. Hundred Arrows Press, Inc., 614 F. Supp. 969, 982 (D.N.M. 1985), *rev'd on other grounds sub nom.* Benally v. Amon Carter Museum of Western Art, 858 F.2d 618 (10th Cir. 1988).

105. *See, e.g.*, Kalven, *supra* note 42, at 333.

106. RESTATEMENT (SECOND) OF TORTS § 652D (1977). Once again, it is important to stress that the specific elements of this tort can vary from state to state, but it is fair to conclude that the *Restatement* version contains by far the most common array of elements.

public. This concept of the public has no analogue in the tort of intrusion.

Third, the tort of public disclosure requires a plaintiff to establish that the offensive information "is not of legitimate concern to the public." This concept of "legitimate concern" also has no analogue in the tort of intrusion.

In the following sections of this essay I shall address these three important differences.

A. The Offensive Disclosure of Private Facts: Civility and the Protection of Information Preserves

The public disclosure tort regulates forms of communication rather than behavior. To be actionable, a communication must be about "a matter concerning the private life of another" and the matter must be "of a kind that would be highly offensive to a reasonable person."[107] At first glance, these two criteria appear to concern only the content of information contained in a communication. Either the information is about "private life," or it is not; either the information is "highly offensive," or it is not. In fact, however, these two criteria do not concern merely the information that may be contained in a communication. They serve instead as standards for the evaluation of communicative acts, and are used to assess not merely communicative content, but also such varied aspects of these acts as their timing, justification, addressees, form, and general context.

This distinction between the regulation of information and the regulation of communicative acts is illustrated by the facts of a venerable case, *Brents v. Morgan,*[108] which was the first decision to recognize the invasion of privacy tort in the state of Kentucky. It appears that in 1926 in the town of Lebanon, Kentucky, W.R. Morgan, a veterinarian, owed a debt of $49.67 to George Brents, a garage mechanic. Brents made several unsuccessful efforts to collect the debt, and in frustration finally put up a sign, five feet by eight feet, in the window of his garage facing one of the principal streets of the town. The sign stated:

> *Notice.*
>
> *Dr. W. R. Morgan owes an account here of $49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid.*[109]

Dr. Morgan sued Brents for damages, alleging that the sign had "caused him great mental pain, humiliation, and mortification," that it exposed "him to public contempt, ridicule, aversion, and disgrace," and that it

107. *Id.*

108. 221 Ky. 765, 299 S.W. 967 (1927).

109. *Id.* at 766, 229 S.W. at 968 (emphasis in original).

had caused "an evil opinion of him in the minds of tradesmen and the public generally."[110] Morgan's complaint was styled in the language of a typical libel or defamation suit. But in Kentucky, as elsewhere, truth was a complete defense to an action for defamation, and Dr. Morgan did in fact owe Brents $49.67.

The Kentucky Supreme Court, however, held that although truth may be a defense against an action for defamation, it does not constitute a defense against the "new branch of the law [which] has been developed in the last few years [and] which is denominated the right of privacy."[111] The right of privacy concerned "the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned."[112] The court concluded that Brents' posting of the sign violated Morgan's right of privacy. The facts of the case have been cited ever since as a paradigmatic illustration of invasion of privacy.[113]

The *Restatement* would have us ask two questions about the content of Brents' notice. First, we are instructed to inquire whether the information on the sign concerns "the private life" of Dr. Morgan. This inquiry, however, is somewhat puzzling, for it is not certain in what sense Dr. Morgan's debt, and his refusal to pay it, are "private" facts. Certainly these facts were known to Brents and were not viewed as "secret" by either party. And surely Brents would have been within his rights to discuss them with his wife or his banker or his accountant. We would even feel nothing improper about his relating them to a perfect stranger who was attempting to determine the worth of Brents' garage in the expectation of purchasing the business.

This suggests that we cannot determine whether the information on the sign concerns "private" facts simply by examining the content of the information; we must instead have some notion of the circumstances surrounding the revelation of that information. The same information can be viewed as "private" with respect to some kinds of communications, but not with respect to others. To say that the information on Brents' sign concerns "private life," therefore, is really to say that he should not have revealed it in the manner in which he did.

This conclusion is dramatically illustrated by the line of cases hold-

110. *Id.*

111. *Id.* at 770, 299 S.W. at 969.

112. *Id.* at 770, 299 S.W. at 970. The court quoted language to the effect that the foundation of the right of privacy

> "is in the conception of an inviolate personality and personal immunity. It is considered as a natural and an absolute or pure right springing from the instincts of nature. It is of that class of rights which every human being had in his natural state and which he did not surrender by becoming a member of organized society."

Id. at 773, 299 S.W. at 971 (quoting 21 Ruling Case Law § 3, at 1197-98 (1929)).

113. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D comment a, illustration 2 (1977).

ing that a defendant who reveals the past crimes of a rehabilitated felon can be liable for invasion of privacy. The California Supreme Court, for example, has held in *Briscoe v. Reader's Digest Association*[114] that a plaintiff who is leading an exemplary and respectable life can bring an action for public disclosure on the basis of a story in a national magazine revealing that he has been convicted of hijacking a truck eleven years earlier.[115] The Court distinguished between publishing "the facts of past crimes," and publishing the identity "of the *actor* in reports of long past crimes."[116] Liability could be predicated on the latter communication, but not on the former.

It is obvious, however, that the identity of the plaintiff was, at the time of his conviction, as "public" a fact as the events of his crime. The characterization of the information as "private," therefore, cannot possibly turn solely upon either its content or the extent to which it has previously been disseminated. It must instead depend upon an assessment of the total context of the communicative act by which that information is revealed. The court's conclusion makes sense only if it is read as resting on the perception that it was somehow deeply inappropriate for the defendant to have revealed the plaintiff's identity in that way, or at that time, or to that audience.

---

114. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

115. In 1975 the United States Supreme Court held in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), that the first amendment prohibited a plaintiff from suing for damages for invasion of privacy on the basis of "the publication of truthful information contained in official court records open to public inspection." *Id.* at 495. Subsequent cases, however, as well as the 1977 edition of the *Restatement,* have continued to view liability as appropriate if the publication of such information occurs after a sufficient lapse of time. *See, e.g.,* Conklin v. Sloss, 86 Cal. App. 3d 241, 247-48, 150 Cal. Rptr. 121, 125 (Ct. App. 1978); Roshto v. Hebert, 439 So. 2d 428, 431 (La. 1983); RESTATEMENT (SECOND) OF TORTS § 652D comment k (1977); *cf.* Capra v. Thoroughbred Racing Ass'n, 787 F.2d 463 (9th Cir.), *cert. denied,* 479 U.S. 1017 (1986). The *Restatement* provides that if publicity is given to a public event after a sufficient lapse of time, it must be determined

> whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community. This may be true, for example, when there is a disclosure of the present name and identity of a reformed criminal and his new life is utterly ruined by revelation of a past that he has put behind him. . . . [T]he question is to be determined upon the basis of community standards and mores.

RESTATEMENT (SECOND) OF TORTS § 652D comment k (1977).

The Supreme Court has itself recently signalled that the holding of *Cox* is to be narrowly parsed. In Florida Star v. B.J.F., 109 S. Ct. 2603 (1989), the Court emphasized that *Cox* did not "exhaustively" resolve the "tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other." *Id.* at 2607. The Court specifically refused to hold that "truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense." *Id.* at 2613. It held only that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ." *Id.*

116. *Briscoe,* 4 Cal. 3d at 537, 483 P.2d at 39-40, 93 Cal. Rptr. at 871-72 (emphasis in original).

The California Supreme Court had in fact explicitly articulated this sense of inappropriateness in *Melvin v. Reid,*[117] the precedent relied upon by *Briscoe. Melvin* upheld a plaintiff's claim of invasion of privacy against a defendant who had made a movie about the plaintiff's past life that accurately identified her as a notorious prostitute and an accused felon.[118] The court branded the movie as one made in "willful and wanton disregard of that charity which should actuate us in our social intercourse and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society."[119]

If the conclusion that a communicative act reveals the "private life" of a plaintiff ultimately turns on whether, under the circumstances, the communication wantonly disregards social norms of appropriateness, so also, and in a more obvious way, does the second question propounded by the *Restatement.* In assessing whether Brents' sign is an actionable invasion of privacy, the *Restatement* would have us ask whether the information contained in the sign "is of a kind that would be highly offensive to a reasonable person."[120]

The *Restatement's* formulation of the question invites us to focus on the content of the sign and to assess it according to community norms. We might say, for example, that community norms view the commission of a crime as inherently stigmatic, and hence that the communication of such information would be highly offensive. But the facts of *Brents* do not fit easily within this understanding of the question. Dr. Morgan's debt and his delinquency on that debt are not "inherently" offensive in the same way as would be his commission of a crime. Information about the debt, for example, would not be highly offensive as between Morgan and his banker, or as between Brents and Morgan, or as between Morgan and his wife or children. Indeed, twenty-four years after *Brents* the Kentucky Supreme Court held in *Voneye v. Turner*[121] that it was neither offensive nor an invasion of privacy to communicate the fact of a debt and the debtor's refusal to pay it to the debtor's employer.[122] As one

117. 112 Cal. App. 285, 297 P. 91 (Ct. App. 1931).

118. *Id.* at 292, 297 P. at 93-94.

119. *Id.* at 291, 297 P. at 93.

120. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

121. 240 S.W.2d 588 (Ky. 1951).

122. The court stated that conveying such information would not impair " 'the standing of an individual and bring him into disrepute with right thinking people in the community.' " The court explained:

> A debtor when he creates an obligation must know that his creditor expects to collect it, and the ordinary man realizes that most employers expect their employees to meet their obligations and that when they fall behind in so doing the employer may be asked to take the matter up with them. Indeed, most debtors would prefer to have their delinquencies referred to their employers in a courteous and inconspicuous manner rather than to have a suit filed against them and their wages garnished.

Id. at 591, 593 (quoting in part Neaton v. Lewis Apparel Stores, 267 A.D. 728, 48 N.Y.S.2d 492, 494

court put it, "An employer 'is not in a category with the general public which cannot have any legitimate interest in a purely private matter between a creditor and a debtor,' "[123] in large part because

> when one accepts credit, he impliedly consents for the creditor to take reasonable steps 'to pursue his debtor and persuade payment . . . .' It is only when the creditor's actions constitute oppressive treatment of a debtor, including the unreasonable giving of undue publicity to private debts, that such actions have been held to be an actionable invasion of a debtor's right of privacy.[124]

The offensiveness of the sign in *Brents,* therefore, is not merely a matter of the content of the information which it contains, but also of the "oppressive" manner in which it disseminates that information. This distinction is illustrated by the recent case of *Vassiliades v. Garfinckel's, Brooks Bros.,*[125] in which a woman sued her surgeon for public disclosure because he had shown "before" and "after" pictures of her cosmetic surgery on a television program. The trial court had directed a verdict for the defendant, in part on the theory that "the photographs were not highly offensive because there was nothing 'uncomplimentary or unsavory' about them."[126] The appellate court reversed, stating that the trial court had misconceived the issue. The question was not whether the content of the photographs was offensive, but rather "whether the publicity of Mrs. Vassiliades' surgery was highly offensive to a reasonable person."[127]

This formulation of the offensiveness requirement, however, essentially asks whether the communicative act at issue, considered in its full context, is "highly offensive."[128] But this inquiry is virtually identical to that which underlies the "private facts" requirement. Both focus broadly on the appropriateness of the communicative act in question, rather than narrowly on the specific content of that communication. The distinct contribution of the "offensiveness" requirement is primarily that it makes

---

(App. Div. 1944)). The holding of the Kentucky court is typical of decisions dealing with this issue. *See* S. HOFSTADTER & G. HOROWITZ, *supra* note 51, at 173-76.

123. Harrison v. Humble Oil & Refining Co., 264 F. Supp. 89, 92 (D.S.C. 1967) (quoting Patton v. Jacobs, 118 Ind. App. 358, 78 N.E.2d 789 (App. 1948)).

124. *Id.* (quoting Cunningham v. Securities Investment Co. of St. Louis, 278 F.2d 600, 604 (5th Cir. 1960)).

125. 492 A.2d 580 (D.C. 1985).

126. *Id.* at 588.

127. *Id.*

128. Consider, in this light, the ambiguity of the *Restatement's* own gloss on the "offensiveness" requirement:

> The rule stated in this Section gives protection only against unreasonable publicity, of a kind highly offensive to the ordinary reasonable man. The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.

RESTATEMENT (SECOND) OF TORTS § 652D comment c (1977).

explicit the notion that the law will not regulate every inappropriate revelation, but only those which are "highly offensive." Thus the public disclosure tort, like the intrusion tort, penalizes only serious transgressions.

As with intrusion, the elements of the public disclosure branch of the tort roughly approximate an everyday understanding of privacy. When we speak in ordinary language about violations of privacy, we often have in mind inappropriate revelations of intimate facts that ought not to be disclosed.[129] The twin requirements of "private facts" and "offensiveness" are a rough attempt to specify when such revelations are inappropriate. But, as with intrusion, the public disclosure tort does not depend upon a neutral or objective measure of when disclosures should be subject to legal liability. Instead the tort draws upon the social norms that govern the flow of information in modern society. And these norms, like those that define private space, have a "socially determined variability," and so are sensitive to such "factors" as the "character of the social occasion,"[130] the purpose, timing, and status of the person who makes the disclosure, the status and purposes of the addressee of the disclosure, and so on. Information about a debtor, which may be perfectly appropriate to disclose to his employer or banker or wife, would be inappropriate to disclose to his neighbors. Information that may be widely known in some circles, may be inappropriate to reveal in others.

We can understand information, then, as confined within "boundaries"[131] that are normatively determined. These boundaries function analogously to those which define the spatial territories analyzed by Goffman. And indeed, Goffman specifically notes that one kind of territory is an "information preserve," which contains the "set of facts about himself to which an individual expects to control access," and which is "[t]raditionally treated under the heading of 'privacy.' "[132] Goffman's point is that just as individuals expect to control certain spatial territories, so they expect to control certain informational territories. The almost physical apprehension of this informational space is evident, for example, in Warren and Brandeis' famous complaint that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency."[133] Because the boundaries of an individual's informational

129. Such revelations violate what Elizabeth Beardsley has termed "the right of selective disclosure"; in Beardsley's view, "selective disclosure constitutes the conceptual core of the norm of privacy." Beardsley, *Privacy: Autonomy and Selective Disclosure,* in PRIVACY 56, 70 (J. Pennock & J. Chapman eds. 1971) (NOMOS XIII).

130. E. GOFFMAN, *supra* note 75, at 31, 40.

131. Seipp, *English Judicial Recognition of a Right to Privacy,* 3 OXF. J. LEGAL STUD. 325, 333 (1983).

132. E. GOFFMAN, *supra* note 75, at 38-39.

133. Warren & Brandeis, *supra* note 6, at 196. For another example of this almost physical apprehension, see Brents v. Morgan, 221 Ky. 765, 774, 299 S.W. 967, 971 (1927) (defining a

space are "relative to the customs of the time and place, and . . . determined by the norm of the ordinary man,"[134] the public disclosure branch of the tort can be said to maintain those civility rules which establish information preserves, in the same way that the intrusion branch upholds the civility rules which define spatial territories.

Information preserves, like spatial territories, provide a normative framework for the development of individual personality. Just as we feel violated when our bedrooms are invaded, so we experience the inappropriate disclosure of private information "as *pollutions* or *defilements*."[135] Although the social norms that define information territories concern communications between defendants and third parties, we nevertheless depend upon those norms, and experience their breach to be "just as violent and morally inadmissible as listening behind closed doors."[136] Thus courts enforcing the public disclosure tort see themselves as protecting persons from "indecent and vulgar" communications that would "outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities,"[137] or that would have the effect of "degrading a person by laying his life open to public view,"[138] or that would threaten plaintiffs with a "literal loss of self-identity."[139]

The civility rules which delineate information preserves must therefore be understood as forms of respect that are integral to both individual and social personality. They comprise an important part of the obligations that members of a community owe to each other. This perspective helps to clarify a perplexing feature of the public disclosure tort. The tort has always seemed somewhat strange because a plaintiff can recover damages for the public disclosure of "private" facts only by definitively and widely re-broadcasting those same "private" facts through an official adjudicative process. Thus while few may have heard of Mrs. Vassiliades' plastic surgery as a result of her doctor's announcements over the television—in fact Mrs. Vassiliades could identify only two persons who had seen the broadcast—her surgical alteration is now forever imprinted in the law books, and the very process of her trial no doubt made the fact of her surgery known to many of her acquaintances who

violation of the right to privacy as "interference with another's seclusion by subjecting him to unwarranted and undesired publicity").

134. Wheeler v. P. Sorensen Mfg. Co., 415 S.W.2d 582, 585 (Ky. 1967).

135. Schoeman, *Privacy and Intimate Information,* in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 403, 406 (F. Schoeman ed. 1984) (emphasis in original).

136. G. SIMMEL, *supra* note 66, at 323.

137. Daily Times Democrat v. Graham, 276 Ala. 380, 382, 162 So. 2d 474, 476 (1964).

138. Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762, 767 (Ct. App. 1983) (quoting Nimmer, *The Right to Speak From* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy,* 56 CALIF. L. REV. 935, 959 (1968)) (emphasis omitted).

139. Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 534, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971).

otherwise would not have been aware of it. If the public disclosure tort is understood simply as a mechanism for protecting the secrecy of private facts, it would seem to be entirely self-defeating.[140] But if the tort is instead understood as a means of obtaining vindication for the infringement of information preserves, the disclosure of information in the course of a judicial action may be of only secondary importance so long as the plaintiff is ultimately reintegrated into that chain of ceremony which defines and embraces members of the community.

This suggests that the public disclosure tort fulfills the first two of the three functions we previously identified for the intrusion tort—safeguarding the respect due individuals by virtue of their territorial claims, and protecting the "ritual idiom" through which such respect finds social expression.[141] The idiom at issue in the context of public disclosure, however, appears somewhat different than that at issue in intrusion. This is because intrusion regulates dyadic relationships, which involve the appropriateness of direct interactions between plaintiffs and defendants, whereas public disclosure regulates triadic relationships, which involve the appropriateness of defendants' disclosures of private information about plaintiffs to third party addressees.

This difference has significant consequences. The intrusion tort regulates situations in which a plaintiff's direct control over whether to assert or to waive pertinent civility rules is constitutive of the most intimate aspects of his social existence. In public disclosure, on the other hand, the pertinent civility rules specifically control only the relationship between a defendant and his audience. It is therefore awkward to speak of these rules as norms that intrinsically establish the intimate life of a plaintiff. For this reason the idiom at issue in public disclosure is chiefly expressive of respect, and does not characteristically function in the "dual way" of the civility norms protected by intrusion, which mark the

140. *See, e.g.*, Anderson v. Fisher Broadcasting Co., 300 Or. 452, 462, 712 P.2d 803, 809 (1986); Gavison, *supra* note 62, at 458.

141. *See supra* text accompanying notes 85-86. This conclusion implies that it is a great mistake to view the tort, as some have proposed, as simply a device for protecting secrecy. *See, e.g.*, Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 393 (1978); Stigler, *An Introduction to Privacy in Economics and Politics*, 9 J. LEGAL STUD. 623 (1980). Secrecy depends upon a purely descriptive concept of privacy, which is quite different from the normative concept that actually underlies the tort. The difference is most apparent in the fact that the tort deems the right of privacy to be a "personal" right that "can be maintained only by a living individual whose privacy is invaded." RESTATEMENT (SECOND) OF TORTS § 652I (1977). Thus corporations, which have secrets to protect but which are not entitled to claims of social respect, have "no personal right of privacy" and cannot bring a "cause of action" to enforce any such right. *Id.* at comment c. For this reason, as Jack Hirshleifer has argued, privacy in the common law must be interpreted as signifying "something much broader than secrecy; it suggests . . . a particular kind of social structure together with its supporting social ethic." Hirshleifer, *Privacy: Its Origin, Function, and Future*, 9 J. LEGAL STUD. 649, 649 (1980). By preserving the civility rules that define a community, the tort constitutes nothing less than "a *way of organizing society.*" *Id.* at 650 (emphasis in original).

boundary between respect and intimacy. It follows from this that the public disclosure tort cannot systematically be linked to the third function that we attributed to the intrusion tort, that of preserving the ability of individuals to use the language of territories to develop a sense of their own autonomy. Viewed in this light, limitations on the tort of public disclosure carry somewhat less profound social implications than do limitations on the tort of intrusion.

B. The Requirement of "Publicity": The Tension Between Civility and Intimacy

The *Restatement* contains two explicit limitations on the tort of public disclosure that have no counterparts in the tort of intrusion. The first of these limitations is the requirement that a defendant give "publicity" to the information at issue. The *Restatement* defines giving "publicity" as communicating information "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge":

> Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.[142]

The effect of this rather stringent requirement is that the public disclosure tort differs from intrusion in that it will not offer redress for every highly offensive infringement of a territory. Although it would be highly offensive for Mrs. Vassiliades' surgeon to display her "before" and "after" pictures at a private dinner party, the surgeon would not be subject to liability under the public disclosure tort as defined by the *Restatement,* because he would not have given adequate "publicity" to the pictures.

These consequences are undoubtedly harsh. Perhaps because the purpose of the publicity requirement is unclear, courts have been uncertain about whether to follow the *Restatement* by enforcing a strict publicity requirement. Although the common law is still evolving, two distinct approaches can be identified. The first, a minority approach, is exemplified by the case of *Beaumont v. Brown,*[143] in which the plaintiff, a labor safety supervisor for the Michigan Department of Labor, had been

142. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).
143. 401 Mich. 80, 257 N.W.2d 522 (1977).

fired for leaving his job for a month of military duty without informing his supervisor or arranging for someone to take over his duties. The plaintiff appealed his discharge, and his supervisors wrote a long and very nasty letter to the Army Reserve, ostensibly seeking to verify the plaintiff's military duties. The plaintiff alleged that the letter constituted a tortious invasion of privacy. The Michigan Court of Appeals ruled for the defendants on the grounds that they had not given "publicity" to the contents of the letter: "Supportive personnel of the sender and receiver of a letter do not constitute the 'general public' or a 'large number of persons.' "[144] But the Michigan Supreme Court reversed, stating that the publicity requirement should not degenerate into a "numbers game": "An invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be . . . fellow employees, club members, church members, family, or neighbors."[145] The court even suggested that "publication of the embarrassing facts to only one person alone" might meet the test.[146] The issue, therefore, was not the amount of publicity, but rather whether the publicity was "unnecessary" or "unreasonable."[147]

The approach in *Beaumont* collapses the publicity test into the "private" facts and "offensiveness" requirements. These requirements, as we have seen, concern not merely the content of a communication, but also the appropriateness of its manner, addressees, and timing. To characterize publicity as unnecessary or unreasonable disclosure is simply another way of saying that the addressees of a communication are inappropriate. The publicity requirement is thus rendered superfluous; it ceases to interpose any independent barrier to the protection of informational territories. Hence it is not surprising that those courts which have followed the *Beaumont* approach have stressed the "need for flexibility" in interpreting the publicity requirement so that "[e]gregious conduct" may be "found actionable."[148]

The second understanding of the publicity requirement found in contemporary cases can be labelled the *Restatement* approach, for it attempts to follow the prescriptions of the *Restatement* and interpret the publicity requirement in a stringent way. Most jurisdictions have taken this path.[149] The contrast between the two approaches is well illustrated

144. Beaumont v. Brown, 65 Mich. App. 455, 464, 237 N.W.2d 501, 506 (Ct. App. 1975), *rev'd*, 401 Mich. 80, 257 N.W.2d 522 (1977).

145. *Beaumont*, 401 Mich. at 105, 257 N.W.2d at 531.

146. *Id.* at 100, 257 N.W.2d at 529.

147. *Id.* at 102-06, 257 N.W.2d at 530-32.

148. McSurely v. McClellan, 753 F.2d 88, 112 (D.C. Cir.), *cert. denied*, 474 U.S. 1005 (1985).

149. *See, e.g.*, Tureen v. Equifax, Inc., 571 F.2d 411, 419 (8th Cir. 1978); Beard v. Akzona, Inc., 517 F. Supp. 128, 132-33 (E.D. Tenn. 1981); Vogel v. W. T. Grant Co., 458 Pa. 124, 130-33, 327

by a comparison of *McSurely v. McClellan*[150] and *Pemberton v. Bethlehem Steel Corp.*[151] The court in *McSurely* followed the *Beaumont* approach and held that the disclosure to a husband of his wife's private premarital love letters constituted an actionable invasion of privacy, despite the fact that the communication was addressed to only one person.[152] The court in *Pemberton* held that the disclosure to a wife of her husband's extramarital affair was not an actionable invasion of privacy, because there had been no publicity.[153] *Pemberton* is a particularly striking case because of the egregious character of the disclosure, which formed part of the Bethlehem Steel Corporation's effort to discredit and harass a labor organizer.[154] Some of the evidence of the extra-marital affair anonymously sent to the organizer's wife was gathered by an eavesdropping device secretly placed in the plaintiff's motel room.[155]

Pemberton illustrates the powerful implications of the publicity requirement as codified in the *Restatement*. It underscores the need to inquire into the purposes served by that requirement. One hypothesis is that the requirement is meant to restrict the availability of legal redress so that not every social indiscretion will carry the potential of formal legal adjudication. Such a restriction would serve both the interests of the legal system in not being flooded with suits, and the interests of society in maintaining the spontaneity and informality of social life. This hypothesis, however, lacks explanatory power, for it is not clear why these anticipated effects should justify the publicity requirement. Those courts which follow the *Beaumont* approach are apparently willing to risk the potential "flood" of litigation and the possible formalization of social life. In the area of defamation courts have for centuries also been willing to risk these effects in order to regulate defamatory communications, even those published only to a single addressee.[156] Why then would these effects be determinative for those courts which follow the *Restatement* approach?

A second hypothesis to explain the publicity requirement is that the damage to a plaintiff becomes large enough to justify legal intervention only when disclosure is made to "the public at large, or to so many persons that the matter must be regarded as substantially certain to become

A.2d 133, 136-38 (1974); Lemnah v. American Breeders Serv., 144 Vt. 568, 575-76, 482 A.2d 700, 704-05 (1984).

150. 753 F.2d 88 (D.C. Cir.), *cert. denied,* 474 U.S. 1005 (1985).

151. 66 Md. App. 133, 502 A.2d 1101 (Ct. Spec. App.), *cert. denied,* 306 Md. 289, 508 A.2d 488, *cert. denied,* 479 U.S. 984 (1986).

152. *McSurely,* 753 F.2d at 113.

153. *Pemberton,* 66 Md. App. at 166, 502 A.2d at 1118.

154. *Id.* at 156, 502 A.2d at 1106.

155. *Id.* at 164-65, 502 A.2d at 1116-17.

156. RESTATEMENT (SECOND) OF TORTS § 577 (1977).

one of public knowledge."[157] The fallacy of this reasoning, however, is illustrated by the facts of *Pemberton*. It is often more important to a plaintiff to keep information from a few specific people than from an anonymous public.[158] In addition, the logic of the common law ordinarily dictates that considerations of the extent of a plaintiff's injuries go to the remedy aspect of a tort, to the amount of damages that a plaintiff might be entitled to receive, rather than to the liability aspect of a tort, to whether or not a plaintiff can even bring an action.

The most plausible justification for the publicity requirement is yet a third hypothesis, implied by the *Restatement's* suggestion that the requirement rests on a distinction in kind rather than of degree. The "distinction," the *Restatement* tells us, "is one between private and public communication."[159] The difference between these two forms of communication may be illustrated by the following example. Suppose a defendant, in the course of an address to a large audience, speaks truthfully about a plaintiff's adultery. The *Restatement* explicitly provides that a "statement made in an address to a large audience . . . is sufficient to give publicity within the meaning of the term as it is used in this Section."[160] Ordinarily, in other words, a statement made in such an address would be viewed as communicating "to the public at large." But suppose that the defendant is a minister, the audience is his church, and the statement is made in the course of a proceeding to administer church discipline to the plaintiff. Although the statement is made in an address to a large audience, we are likely to view the statement as qualitatively different from one made in the course of a lecture to a large audience of strangers. If the lecture to strangers feels unambiguously like a "public" communication, the church proceeding feels considerably less so.[161] Thus the publicity requirement cannot coherently turn merely on the number of persons in an audience; it must instead depend upon some qualitative judgment about the context of the relevant communication.

What is the nature of that judgment? How can we distinguish, for example, between addressing an audience that consists of a plaintiff's

157. *Id.* § 652D comment a.

158. As the Michigan Supreme Court said in *Beaumont*:

> Communication of embarrassing facts about an individual to a public not concerned with that individual and with whom the individual is not concerned obviously is not a "serious interference" with plaintiff's right to privacy, although it might be "unnecessary" or "unreasonable." An invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff.

Beaumont v. Brown, 401 Mich. 80, 104-05, 257 N.W.2d 522, 531 (1977).

159. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

160. *Id.*

161. *See* Buzzard, *Scarlet Letter Lawsuits: Private Affairs and Public Judgments,* 10 CAMPBELL L. REV. 1, 41-42 (1987); *cf.* Landis v. Campbell, 79 Mo. 433, 439-41 (1883); Shurtleff v. Stevens, 51 Vt. 501, 514-15 (1879).

church and an audience that consists of the general public? One obvious difference is that members of a plaintiff's church are united with the plaintiff in an explicit and recognized commitment to communal norms and forms of interaction. Members of the general public, however, need not share any such connections with a plaintiff. Thus Alvin Gouldner has observed that

> [a] "public" emerges when there is an attenuation between culture, on the one side, and patterns of social interaction, on the other. Traditional "groups" are characterized by the association and mutual support of both elements; by the fact that their members have patterned social interactions with one another which, in turn, fosters among them common understandings and shared interests, which, again in turn, facilitates their mutual interaction, and so on. A "public" "refers to a number of people exposed to the same social stimuli," and having something in common even without being in persisting interaction with one another. . . . "Publics" are persons who need not be "co-present," in the "sight and hearing of one another."
>
> . . . .
>
> . . . To make matters "public" means to open them even to those who are not known personally, to those who do not ordinarily come into one's sight and hearing. On the paradigmatic level, to make things public is to take them (or to allow them to go) beyond the *family,* where all is in the sight and hearing of others, and which constructs a context for communication that may, in consequence, be cryptic, allusive, seemingly vague.[162]

Gouldner's observations suggest that the publicity requirement, as defined by the *Restatement,* distinguishes communications which form part of the "allusive," affective, and primary interactions of a traditional group, like a church, from those which form part of the impersonal interactions of strangers who comprise a public. The *Restatement* and most courts require that only communications of the second kind comply with the civility rules enforced by the public disclosure tort. This is consistent with the common sense expectation that public interactions ought to be more formal and restrained, whereas private interactions may be more informal and spontaneous.[163] As Richard Sennett has observed, tradi-

162. A. GOULDNER, THE DIALECTIC OF IDEOLOGY AND TECHNOLOGY 95, 101 (1976) (citations omitted); *see also* J. BENNETT & M. TUMIN, SOCIAL LIFE: STRUCTURE AND FUNCTION 140 (1948).

163. Harold Garfinkel once asked his students as an experiment to act at home as if they were in public, as if they were "boarders," and thus "to conduct themselves in a circumspect and polite fashion." H. GARFINKEL, STUDIES IN ETHNOMETHODOLOGY 47 (1967). The results dramatically illustrate the perceived strangeness of acting according to civility rules within the privacy of the family. In eighty percent of the cases,

> family members were stupefied. They vigorously sought to make the strange actions intelligible and to restore the situation to normal appearances. Reports were filled with accounts of astonishment, bewilderment, shock, anxiety, embarrassment, and anger, and with charges by various family members that the student was mean, inconsiderate, selfish, nasty, or impolite. Family members demanded explanations: What's the matter? What's

tionally the "line drawn between public and private was essentially one on which the claims of civility—epitomized by cosmopolitan, public behavior—were balanced against the claims of nature—epitomized by the family."[164]

We can interpret the publicity requirement, then, as an attempt to ensure that public communications comply with minimum standards of civility, while liberating private communications from the threat of legal enforcement of such restraints. The requirement thus safeguards the personal and expressive quality of interactions among individuals who are not strangers. So interpreted, however, the publicity requirement in effect sacrifices the right to extract social respect through the maintenance of an information preserve to the "mutual dependency, affection, and tact"[165] associated with traditional group interactions.

This interpretation of the publicity requirement leads to results that are quite counter-intuitive from an individualist perspective. Precisely because primary group interactions are emotional and personal, they are also volatile and potentially very hurtful. We often care more about what those within our "group" think of us than we do about our reputation among the strangers who comprise the general public. Yet the publicity requirement, as defined by the *Restatement,* would impose sanctions for the disclosure of a husband's marital infidelity to the general public, but not for its disclosure to his wife, on the grounds that the law should not enforce the formal requirements of an information preserve between husbands and wives. The justification of such a requirement obviously cannot be the protection of individuals from mental distress or suffering. Its purpose must instead be understood in specifically *social* terms, as the maintenance of spontaneous and expressive forms of group interaction. The commitment to this purpose fundamentally divides the *Restatement* approach from the *Beaumont* approach.

---

gotten into you? Did you get fired? Are you sick? What are you being so superior about? Why are you mad? Are you out of your mind or are you just stupid? One student acutely embarrassed his mother in front of her friends by asking if she minded if he had a snack from the refrigerator. "Mind if you have a little snack? You've been eating little snacks around here for years without asking me. What's gotten into you?"

Id. at 47-48 (1967).

If Garfinkel's experiment illustrates the inappropriateness of acting with civility within the informal and private bounds of the family, David Karp's work demonstrates the converse, that even in situations of extreme public anonymity, "anonymity itself constitutes a norm to be maintained, and there are rules for preserving it, which, if broken, subject the transgressor to negative sanctions." Karp, *Hiding in Pornographic Bookstores: A Reconsideration of the Nature of Urban Anonymity,* 1 URB. LIFE & CULTURE 427, 446 (1973). Even anonymity, in other words, is "*produced* by actors" whose conduct is made meaningful by civility rules. *Id.* (emphasis in original).

164. R. SENNETT, THE FALL OF PUBLIC MAN: ON THE SOCIAL PSYCHOLOGY OF CAPITALISM 18 (1978). Thus Sennett observes: "[W]hile man *made* himself in public, he *realized* his nature in the private realm." *Id.* at 18-19 (emphasis in original).

165. A. GOULDNER, *supra* note 162, at 102.

The difficulty with the *Restatement's* delineation of a publicity requirement, however, is that it attempts to achieve this purpose in a way that obscures the pertinent underlying values. The *Restatement* defines the publicity requirement not merely in terms of the qualitative distinction "between private and public communication," but also in terms of the quantitative distinction between communications "to a single person or even to a small group of persons," and communications "to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[166] The *Restatement* appears to assume, in other words, that communications to a single person or to a small group of persons are necessarily part of the primary dynamics of group life. But this assumption masks a host of ambiguities.

Consider, first, the possibility that a defendant has communicated private facts to the members of a small group to which the plaintiff, but not the defendant, belongs. In *Pemberton,* for example, the Bethlehem Steel Corporation anonymously sent a detective's report of the plaintiff's marital infidelity to the plaintiff's wife. The plaintiff and the addressee of the communication were in a primary relationship to each other, but the defendant, Bethlehem Steel, was a stranger to that relationship. In this circumstance the publicity requirement might be defended on the grounds that members of a primary group have, so to speak, yielded to each other their claim to enforce their respective information preserves. The law's rejection of the plaintiff's claim could thus be seen to stem from its refusal to check the flow of information between spouses, a refusal calculated to promote the vitality of the very group to which the plaintiff and addressee both belong.

The publicity requirement must be defended on quite different grounds, however, if the defendant and his audience are members of a small and intimate group to which the plaintiff does not belong. If Mrs. Vassiliades' surgeon were to show her "before" and "after" pictures to a private dinner party, for example, the communication forms part of the dynamics of a group from which Mrs. Vassiliades is excluded. While it may make sense to view Mrs. Vassiliades as in some sense having "waived" her claims to an information preserve with respect to those groups in which she claims membership, it does not make sense to view her as having waived those claims with respect to a group consisting of her surgeon's dinner guests. In such circumstances the publicity requirement can be defended only on the grounds that it is more important to foster spontaneous communication among members of a group, than to enforce respect for the information preserves of non-members.

There is, however, yet a third possibility. It is conceivable that

166. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

neither the plaintiff, nor the defendant, nor the addressee of the defendant's communication are members of a common group. This situation is illustrated by the facts of *Lemnah v. American Breeders Service,*[167] in which the plaintiff was a local distributor and salesperson for the defendant, which produced and nationally marketed bovine semen. Plaintiff's contract with the defendant was terminated for delinquency in the payment of monies owing. The plaintiff alleged that defendant's employee had stated to a farmer, who was also plaintiff's customer, that the termination was in part due to the "heavy drinking problem" of the plaintiff.[168]

The three parties to this transaction—the plaintiff, the defendant, and the farmer—were in effect strangers to each other, connected only through the arm's-length transactions of the market. No two of them were members of a common group. Assuming that the defendant's communication was a highly offensive disclosure of a private fact, it is hard to understand what possible justification the Vermont Supreme Court could have had in using the publicity requirement to bar recovery. The use of the publicity requirement cannot be justified on the grounds of protecting some special relationship of conversation or good fellowship between the defendant and the farmer, nor can it be explained on the grounds of promoting the plaintiff's intimate relationship with the farmer. The communication to the farmer was, quite simply, a "public" communication, and the farmer can be expected to hold the plaintiff coldly and impersonally accountable for his drinking problem.

This suggests that there are circumstances in which the *Restatement's* rule does not correspond to the underlying sociological point of the publicity requirement. There may, however, be an explanation for this disparity. The accurate differentiation of public from private communications would require courts to develop explicit and workable criteria for distinguishing the exact kinds of intimacies or group dynamics that would preclude enforcement of the public disclosure tort. Thus, for example, we might characterize the communication to the farmer in *Lemnah* as "public" if the farmer were only the plaintiff's customer, but as "private" if he were the plaintiff's intimate friend. The recognition and justification of these distinctions would be difficult enough in the abstract; it would be virtually impossible in the context of the common law system of case-by-case adjudication, with its intense pressure to articulate explicitly the reasons for distinguishing or following pertinent cases. The drafters of the *Restatement* might with good reason have concluded that such a task was beyond the capacity of courts, especially given the subtlety and elusiveness of the sociological concepts at issue.

167. 144 Vt. 568, 482 A.2d 700 (1984).
168. *Id.* at 568, 482 A.2d at 700.

Thus they might have settled for a clear and workable rule-of-thumb, roughly associating private group communications with those to a single person or to a small group of persons, with full knowledge that in particular cases the rule would fail to accomplish its underlying purpose.

On this account, then, the *Restatement's* publicity requirement is an example of a social norm transformed by the practical necessities of the legal system. Although this "re-institutionalization" (to use Bohannan's phrase) of the norm obscures the social purposes of the legal rule and consequently leaves its underlying values ambiguous, such obscurity is occasionally the price for a workable system of legal doctrine. It is appropriate to take that price into account in evaluating the controversy between the *Beaumont* and *Restatement* approaches. The more fundamental question, however, is whether we believe it to be more important to promote group life than to require respect for individual claims to information preserves.

C. *The Concept of "Legitimate Public Concern": The Tension Between Civility and Public Accountability*

If the concept of the "public" plays a controversial and ambiguous role in the *Restatement's* "publicity" requirement, it takes undisputed center stage in the last element of the public disclosure tort. In order to satisfy this element a plaintiff must demonstrate that a defendant's communication "is not of legitimate concern to the public."[169] This requirement, which is sometimes called the "privilege to report news,"[170] or the "privilege to publicize newsworthy matters,"[171] is acknowledged by all common law courts that have recognized the public disclosure tort. The requirement is the single most important distinction between the intrusion and public disclosure branches of the invasion of privacy tort.[172] If the former seeks to regulate all highly offensive violations of spatial territories, the latter permits information territories to be freely broken if the information at issue is "newsworthy."

The reason for this difference is not obscure: It lies in the distinction between a territory conceived as a physical space, and a territory conceived as an array of information. Preservation of the former requires no more than the regulation of discrete forms of physical conduct; preservation of the latter, however, implies no less than control over the diffusion of information throughout an entire society. The common law long ago came to recognize the importance of that diffusion for maintaining social

169. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

170. Kalven, *supra* note 42, at 336.

171. Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976).

172. *See, e.g.,* Fletcher v. Florida Publishing Co., 319 So. 2d 100, 111 (Fla. Dist. Ct. App. 1975), *rev'd on other grounds,* 340 So. 2d 914 (Fla. 1976), *cert. denied,* 431 U.S. 930 (1977).

order and solidarity. In his 1826 *Treatise* on defamation law, for example, Thomas Starkie noted the "difficulties" involved in the regulation of information about persons, because its

> subject matter is more subtle and refined, and does not admit of the broad and plain limits and distinctions which may be established in respect of forcible injuries; for instance, in the case of battery of the person, the law can, without hesitation, pronounce, that any, the least degree of violence shall be deemed illegal, and entitle the complainant to his remedy; but, communications concerning reputation cannot be so prohibited; every day's convenience requires, that men, and their affairs, should be discussed, though frequently at the hazard of individual reputation; and it conduces mainly to the ends of morality and good order, to the safety and security of society, that considerable latitude should be afforded to such communications. The dread of public censure and disgrace is not only the most effectual, and therefore the most important, but in numberless instances the only security which society possesses for the preservation of decency and the performance of the private duties of life.[173]

From the perspective of individuals, respect for information preserves is a matter of common decency. From a more general perspective, however, decency would itself be undermined if individuals could hide immoral acts within the secrecy of information preserves. Moreover, as Starkie observes, legal protection of information territories would have other social costs, including those associated with transactions based upon imperfect information.[174]

Long before the Constitution was relevant to the regulation of the invasion of privacy tort,[175] the common law was sensitive to just such policy concerns regarding the diffusion of information. Warren and Brandeis, for example, flatly asserted that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest."[176] The first decision to recognize a right of privacy, *Pavesich v. New England Life Insurance Co.*,[177] stated with equal firmness that "[t]he truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest."[178] From the beginning, therefore, the task of the

173. T. STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS at xx-xxi (New York 1826).

174. *See* G. SIMMEL, *supra* note 66, at 323.

175. The first amendment did not become applicable to state law until 1925 in the case of Gitlow v. New York, 268 U.S. 652 (1925). It was not until 1964 that the first amendment was deemed to control state defamation law. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The first decision of the United States Supreme Court to apply the first amendment to state privacy law was Time, Inc. v. Hill, 385 U.S. 374 (1967).

176. Warren & Brandeis, *supra* note 6, at 214.

177. 122 Ga. 190, 50 S.E. 68 (1905).

178. *Id.* at 204, 50 S.E. at 74.

common law has been to balance the importance of maintaining individual information preserves against the public's general interest in information.

In conceptualizing the claims of the public, courts have tended to follow two distinct forms of inquiry. The first is directed toward the social status of the plaintiff; the second toward the social significance of the information at issue.[179] Both inquiries ultimately lead to the same issue, which is the nature of the public and its right to demand information.

The first inquiry is best illustrated by the example of public officials or candidates for public office. The obvious political importance of the dissemination of full information about such individuals has led courts to view them as having only extremely attenuated claims to information preserves.[180] Although the recent flap over the disclosure of Gary Hart's extramarital affair indicates that this view is still somewhat controversial,[181] it is profoundly unlikely that courts will intervene to decide what information may or may not be disclosed about a public official or candidate.[182] The underlying metaphor is that of the expropriation of private property, for "public men, are, as it were, public property."[183] The claims of public officials to a "private" information preserve are simply overridden by the more general demands of the public for political accountability.

Courts have reached a similar conclusion with regard to so-called "voluntary public figures." In the words of the *Restatement*:

> One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him. . . . [T]he legitimate interest of the public in [such an] individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private.[184]

---

179. This twofold inquiry has also formed the basis for contemporary first amendment regulation of state defamation law. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).

180. *See, e.g.*, Kapellas v. Kofman, 1 Cal. 3d 20, 36-38, 459 P.2d 912, 922-24, 81 Cal. Rptr. 360, 370-71 (1969); Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 194, 238 P.2d 670, 672 (Ct. App. 1952).

181. *See, e.g.*, Nelson, *Soul-Searching Press Ethics*, NIEMAN REP., Spring 1988, at 15.

182. *See* Levinson, *Public Lives and the Limits of Privacy*, 21 POL. SCI. & POL. 263 (1988); *cf.* Monitor Patriot Co. v. Roy, 401 U.S. 265, 273-75 (1971).

183. Beauharnais v. Illinois, 343 U.S. 250, 263 n.18 (1952); *see also* Mayrant v. Richardson, 10 S.C.L. (1 Nott & McC.) 347, 350 (S.C. 1818).

184. RESTATEMENT (SECOND) OF TORTS § 652D comment e (1977); *see also* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 410-11 (1980).

Although the reasoning of the *Restatement* is almost entirely in terms of the voluntary public figure's waiver of any right to an information preserve, this logic is ultimately incomplete. For in almost every case a public figure will bring an action for the disclosure of information which he has not voluntarily made public, and it would be patently fictional to assert that in such circumstances he has "waived" his claim to the protection of this information. In such cases, therefore, the law's refusal to protect the public figure's information preserve must be justified in terms of a substantive analysis of the public's "legitimate interest" in the information at issue.

The second line of inquiry that courts have used to interpret the "legitimate public concern" requirement contains just such a substantive analysis. This inquiry focuses not on the social status of the plaintiff, but rather on the nature of the information at issue. As the *Restatement* asserts, "Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.' "[185] Gouldner's discussion of the concept of the "public" suggests what is at stake in the common law's emphatic position that the public's interest in "news" overrides individual claims to an information preserve. According to Gouldner, "news is a public (and a public-generating) social phenomenon."[186] In large and diverse modern societies, in which common personal and patterned social interactions are quite limited, news provides precisely those "same social stimuli" that gather together the population into a "public."[187] Thus the "[e]mergence of the mass media and of the 'public' are mutually constructive developments."[188] To restrict the news is therefore simultaneously to restrict the public.

The public, however, has certain overriding claims to resist such restriction. One such claim, raised in the context of public officials, is

185. RESTATEMENT (SECOND) OF TORTS § 652D comment g (1977); *see, e.g.*, Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980); Virgil v. Time, Inc., 527 F.2d 1122, 1128-29 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); Logan v. District of Columbia, 447 F. Supp. 1328, 1333 (D.D.C. 1978); Neff v. Time, Inc., 406 F. Supp. 858, 861 (W.D. Pa. 1976); Kapellas v. Kofman, 1 Cal. 3d 20, 36, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969); Jacova v. Southern Radio & Television Co., 83 So. 2d 34, 40 (Fla. 1955); Cape Publications, Inc. v. Bridges, 423 So. 2d 426, 427 (Fla. Dist. Ct. App. 1982), *petition denied*, 431 So. 2d 988 (Fla. 1983), *cert. denied*, 464 U.S. 893 (1983); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 827-28, 76 N.W.2d 762, 768 (1956); Fry v. Ionia Sentinel-Standard, 101 Mich. App. 725, 729-30, 300 N.W.2d 687, 690 (Ct. App. 1980); B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION 447 (1987 Supp.).

186. A. GOULDNER, *supra* note 162, at 106.

187. *See* Molotch & Lester, *News as Purposive Behavior: On the Strategic Use of Routine Events, Accidents, and Scandals*, 39 AM. SOC. REV. 101 (1974).

188. A. GOULDNER, *supra* note 162, at 95-96. As de Tocqueville put it: "[T]here is a necessary connection between public associations and newspapers: newspapers make associations, and associations make newspapers . . . ." 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 112 (P. Bradley ed. 1945) (H. Reeve trans. 1st ed. 1840).

political. Because American law views the public, in its role as the electorate, as ultimately responsible for political decisions, the public is presumptively entitled to all information that is necessary for informed governance. This theory is well canvassed in the first amendment literature,[189] and it is responsible for the frequent reiteration by the Supreme Court that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' "[190]

But although the application of the theory of political governance to the public disclosure tort is uncontroversial, it is far too narrow to explain the broad scope of "legitimate public concern" that courts have felt compelled to protect. An excellent illustration is the classic case of *Sidis v. F-R Publishing Corp.*,[191] which involved William James Sidis, a famous child prodigy who in 1910 at the age of eleven had lectured distinguished mathematicians on the subject of four-dimensional bodies. His graduation from Harvard College at the age of sixteen attracted "considerable public attention."[192] But Sidis unfortunately never lived up to his promise. Soon after his graduation he slipped into a public obscurity from which he was rudely retrieved in 1937 by a biographical sketch in the "Where Are They Now?" section of *The New Yorker*. The sketch was "merciless in its dissection of intimate details of its subject's personal life, and this in company with elaborate accounts of Sidis' passion for privacy and the pitiable lengths to which he has gone in order to avoid public scrutiny."[193] The Second Circuit characterized the article as "a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life."[194] The court nevertheless concluded that Sidis could not recover for invasion of privacy, because the "public interest in obtaining information" was "dominant over the individual's desire for privacy."[195]

The court's decision to favor the interests of the public over Sidis' claim to an information preserve cannot be explained by a narrowly political theory of the public. The information contained in the article was not relevant to the governance of the nation. Nor, except in a purely tautological sense, can the court's decision be explained on the grounds that Sidis' present pathetic condition was "news," for by 1937 he had

189. *See, e.g.*, BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

190. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

191. 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

192. *Id.* at 807.

193. *Id.*

194. *Id.* at 807-08.

195. *Id.* at 809.

faded completely from public view. On what grounds, then, could the court conclude that the public was entitled to the information contained in the article?

The court reasoned that Sidis "was once a public figure" who had "excited both admiration and curiosity"; the article was "a matter of public concern" because it contained "the answer to the question of whether or not [Sidis] had fulfilled his early promise."[196] In effect, then, the court equated the notion of legitimate public concern with efforts to answer reasonable questions about public matters. Thus the court's analysis ultimately rested on the assumption that the public has a right to inquire into the significance of public persons and events.

This assumption has deep historical and sociological roots. Gouldner notes, for example, that because relations outside the family lack "affection, emotional dependency, tact, and . . . direct power over one another, there will be far fewer constraints in what may be questioned in public."[197] Thus public actions "are open to a critique by strangers who have fewer inhibitions about demanding justification and reasonable grounds,"[198] and for this reason such action must "routinely have to give an accounting of itself, either by providing information about its conduct or justification for it."[199] "The public," in short, "is a sphere in which one is accountable," and being accountable "means that one can be *constrained* to reveal *what* one has done and *why* one has done it."[200]

Gouldner's claim, of course, is not that public discussion is invariably characterized by a rational inquiry into accountability. Anyone familiar with the "unfair, intemperate, scurrilous and irresponsible"[201] character of much of our public discourse, or with the susceptibility of that discourse to manipulation by what Walter Lippmann called "publicity men,"[202] would know otherwise. Indeed, the discovery of the many irrational elements of our public discourse in the 1920s led to a serious "crisis" of democratic theory.[203] Gouldner's point is rather that the very attempt to assess the meaning of public phenomena implies "a cleared and safe space" in which the value of competing assessments may be "questioned, *negated* and *contradicted*."[204] The public search for

196. *Id.*

197. A. GOULDNER, *supra* note 162, at 102.

198. *Id.*

199. *Id.* at 103.

200. *Id.* at 102 (emphasis in original); *see also* Freeman & Mensch, *supra* note 3, at 243.

201. Desert Sun Publishing Co. v. Superior Court, 97 Cal. App. 3d 49, 51, 158 Cal. Rptr. 519, 521 (Ct. App. 1979).

202. W. LIPPMANN, PUBLIC OPINION 345 (1922).

203. E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 95-114 (1973).

204. A. GOULDNER, *supra* note 162, at 98 (emphasis in original); *see also id.* at 96-97.

accountability, in other words, creates a structure of communication which is inherently "*critical*."[205]

Gouldner's observations suggest that the public, as a collection of strangers united by access to common stimuli, is a social formation that has its own distinctive dynamic. An important aspect of this dynamic is the constant need to evaluate the significance of those stimuli whose "public" dissemination establishes the public's own continued existence. This need generates a critical logic in which no given evaluation can be rendered invulnerable to contradiction. The power of this logic is plainly visible in the reasoning of the *Sidis* opinion. The case in effect creates "a cleared and safe space" in which rival interpretations of the meaning of public persons and events may compete. The *Sidis* court refuses to circumscribe that space by withholding the information necessary for any given interpretation.

Thus *Sidis* ultimately rests on what might be termed a normative theory of public accountability, on the notion that the public *should* be entitled to inquire freely into the significance of public persons and events, and that this entitlement is so powerful that it overrides individual claims to the maintenance of information preserves. The theory is highly influential in modern case law, and it has led courts to interpret the "legitimate public concern" requirement as protecting the disclosure of all information having "a rational and at least arguably close relationship" to public persons or events "to be explained."[206]

The theory of public accountability offers a justification for the *Restatement's* rules regarding "voluntary public figures," for such persons are by definition already public, and hence subject to the free competition of rival interpretive assessments. Thus even if voluntary public figures have not "waived" their right to foreclose inquiry into nonpublic aspects of their lives, the public nevertheless has the right to scrutinize those aspects if they are relevant to its evaluation of the siguificance of public action.[207]

The theory also accounts for the *Restatement's* treatment of what it calls "involuntary public figures." These are individuals who, without their consent or approval, have become involved in public events like crimes, disasters, or accidents. The *Restatement* concludes that such persons

205. *Id.* at 98 (emphasis in original).

206. Virgil v. Sports Illustrated, 424 F. Supp. 1286, 1289 n.2 (S.D. Cal. 1976); *see, e.g.*, Gilbert v. Medical Economics Co., 665 F.2d 305, 308-09 (10th Cir. 1981); Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980); Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 1290-91 (D.D.C. 1981); Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 590 (D.C. 1985); Romaine v. Kallinger, 109 N.J. 282, 302, 537 A.2d 284, 294 (1988).

207. *See, e.g.*, Bilney v. Evening Star Newspaper Co., 43 Md. App. 560, 570-73, 406 A.2d 652, 659-60 (Ct. Spec. App. 1979).

> are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public . . . . As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.[208]

Because concepts of "consent" and "waiver" are obviously inappropriate, the *Restatement* cannot explain exactly why the information preserves of involuntary public figures should be subject to "authorized publicity." The theory of public accountability, however, would justify the dissemination of information necessary to assess the significance of the public events in which such persons have become embroiled. Publicity would be actionable only when it bears "no discernible relationship" to the public events that require explanation.[209]

The theory of public accountability, with its requirement that the legal system permit public events and persons to be critically assessed, can collide with the aspiration to subject public communications to civility rules, an aspiration embodied in the "publicity" requirement. This conflict can be seen by comparing *Sidis* with *Briscoe*. In *Sidis* a public figure was deemed accountable to the demands of public inquiry despite the passage of time and a successful quest for anonymity; in *Briscoe* the passage of time and the successful achievement of anonymity were deemed to signify that a public figure had "reverted to that 'lawful and unexciting life' led by others," so that "he no longer need 'satisfy the curiosity of the public.' "[210] In *Sidis* public accountability runs roughshod over civility; in *Briscoe* civility forecloses the potential evaluation of a public person and event, and hence impedes the critical process of public accountability.

The reconciliation of this tension is an essential problematic of the public disclosure tort. *Sidis* itself allows for the possibility that the public accountability of public figures may be theoretically limited by the requirements of civility, but it predicts that these limits will be so attenuated as to be practically nonexistent:

> We express no comment on whether or not the newsworthiness of

208. RESTATEMENT (SECOND) OF TORTS § 652D comment f (1977); *see, e.g.*, Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980); Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); Logan v. District of Columbia, 447 F. Supp. 1328, 1333 (D.D.C. 1978); Jacova v. Southern Radio & Television Co., 83 So. 2d 34, 37, 40 (Fla. 1955); Waters v. Fleetwood, 212 Ga. 161, 167, 91 S.E.2d 344, 348 (1956); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 827-28, 76 N.W.2d 762, 768 (1956); S. HOFSTADTER & G. HOROWITZ, *supra* note 51, at 116.

209. Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 302 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); *see also* R. SACK, *supra* note 184, at 411-12.

210. Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 538, 483 P.2d 34, 40, 93 Cal. Rptr. 866, 872 (1971) (quoting RESTATEMENT OF TORTS § 867 comment c (1939)).

> the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.[211]

The development of the law has in general supported *Sidis'* prediction. Even the California Supreme Court has come to characterize *Briscoe,* its own precedent, as "an exception to the more general rule that 'once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.' "[212] Thus the logic of public accountability has proved virtually overpowering with respect to the discussion of public persons or events. Any information with a "discernible relationship" to such public matters will likely be deemed "of legitimate concern to the public," and hence its dissemination to the public will not be actionable.[213]

That leaves open, however, the question of when information about nonpublic persons or events may also be protected as "of legitimate concern to the public." This question is nicely illustrated by the case of *Meetze v. Associated Press,*[214] in which the South Carolina Supreme Court held that a story reporting the birth of a healthy baby boy to a married twelve-year-old mother was of legitimate public interest, despite the mother's request that there be no "publicity."[215] The birth was not a public event until the Associated Press made it so, and for this reason the court's holding cannot be explained by any theory of public accountability. The publication of the story cannot be justified on the grounds of the public's need to understand public events or persons. Instead the court's protection of the story must depend upon a different theory, one which addresses the question of when events or persons may be made public in the first instance.

---

211. Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied,* 311 U.S. 711 (1940).

212. Forsher v. Bugliosi, 26 Cal. 3d 792, 811, 608 P.2d 716, 726, 163 Cal. Rptr. 628, 638 (1980) (quoting Prosser, *Privacy,* 48 CALIF. L. REV. 383, 418 (1960)); *see also* Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 1289 (D.D.C. 1981); Romaine v. Kallinger, 109 N.J. 282, 303-04, 537 A.2d 284, 294-95 (1988); McCormack v. Oklahoma Publishing Co., 6 Media L. Rep. (BNA) 1618, 1622 (Okla. 1980).

213. With regard to such matters, courts have registered their appreciation of the "force" in "the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness." Kalven, *supra* note 42, at 336.

214. 230 S.C. 330, 95 S.E.2d 606 (1956).

215. *Id.* at 334, 95 S.E.2d at 608.

One such theory is that of political governance. Because we understand the public, in its role as the electorate, to be the ultimate source of political authority, it follows that information pertinent to informed governance should be made public. As Walter Lippmann observed at the dawn of the modern first amendment era, "[N]ews is the chief source of the opinion by which government now proceeds."[216] But this theory, although uncontroversial, is too narrow to account for a case like *Meetze,* and the South Carolina Supreme Court made no attempt to use it. Instead the court defended its interpretation of the "legitimate public concern" requirement on the grounds that it "is rather unusual for a twelve-year-old girl to give birth to a child. It is a biological occurrence which would naturally excite public interest."[217]

This notion of "naturally" exciting public interest is puzzling. The precise issue posed by *Meetze* is whether a mother's information preserve should be forced to yield to the curiosity of the public. That the public is in fact curious may well be true, but it merely restates the problem. As the court itself notes, "[T]he phrase 'public or general interest' in this connection does not mean mere curiosity."[218] But this brings us back full circle, for we cannot distinguish between "natural" and "mere" curiosity without some criterion of when it is justifiable to drag nonpublic matters into the light of public scrutiny.

The second *Restatement,* in a widely cited and influential commentary,[219] offers just such a criterion. It suggests that the question of whether giving publicity to nonpublic matters is of legitimate public concern should be decided by reference to "the customs and conventions of the community":

> [I]n the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the

216. W. LIPPMANN, LIBERTY AND THE NEWS 12 (1920).

217. *Meetze,* 230 S.C. at 338, 95 S.E.2d at 610. The court expressed "regret" that it could not "give legal recognition to Mrs. Meetze's desire to avoid publicity but the courts do not sit as censors of the manners of the Press." *Id.* at 339, 95 S.E.2d at 610.

218. *Id.* at 337, 95 S.E.2d at 609 (quoting 41 AM. JUR. *Privacy* § 14 (1942)).

219. *See, e.g.,* Gilbert v. Medical Economics Co., 665 F.2d 305, 307-08 (10th Cir. 1981); Wasser v. San Diego Union, 191 Cal. App. 3d 1455, 1461-62, 236 Cal. Rptr. 772, 776 (Ct. App. 1987); Bilney v. Evening Star Newspaper Co., 43 Md. App. 560, 572-73, 406 A.2d 652, 659-60 (Ct. Spec. App. 1979); Montesano v. Donrey Media Group, 99 Nev. 644, 651, 668 P.2d 1081, 1086 (1983), *cert. denied,* 466 U.S. 959 (1984).

exposure.[220]

At first blush, the *Restatement's* interpretation would appear to explain why, for example, the South Carolina Supreme Court, thirty years after *Meetze,* would in *Hawkins v. Multimedia, Inc.*[221] uphold a finding of liability against a newspaper for publicly disclosing the identity of a teenage father of an illegitimate child in a story about teenage pregnancies. It is plausible to suggest that "community mores" would be more offended by such a story than by a comparatively inoffensive article identifying the married twelve-year-old mother of a baby son.[222]

Upon further reflection, however, the gloss placed upon the *Restatement* by a decision like *Hawkins* is inadequate, for it essentially equates the "customs and conventions of the community" that determine whether nonpublic matters are of legitimate public concern with the social norms that underlie the twin requirements of "offensiveness" and "private facts." It thus collapses the "legitimate public concern" test into the very criteria that define whether disclosures are actionable, thereby rendering the test superfluous. As a result the capacity of the news to make persons and events public would be completely subordinated to the civility rules enforced by the public disclosure tort.

Most courts, however, have refused to subordinate the news in this manner. In *Kelley v. Post Publishing Co.,*[223] for example, a newspaper was sued for publishing the photograph of a hideously deformed body of a child after a fatal automobile accident. While the display of such a photograph might well exceed the bounds of common decency, the court in *Kelley* ruled that it was not actionable for the newspaper to publish the photograph, on the grounds that any contrary conclusion would prevent the publication of pictures "of a train wreck or of an airplane crash if any of the bodies of the victims were recognizable."[224]

Kelley's reasoning rests on two widely-shared and important premises. The first is that we want information about events like disasters to be made public; the second is that we want this information disseminated even if doing so would violate the civility rules that would otherwise be

220. RESTATEMENT (SECOND) OF TORTS § 652D comment h (1977).

221. 288 S.C. 569, 344 S.E.2d 145, *cert. denied,* 479 U.S. 1012 (1986).

222. Thus in *Meetze* the court had offered

> another reason why the facts do not show a wrongful invasion of the right of privacy. It would be going pretty far to say that the article complained of was reasonably calculated to embarrass or humiliate the plaintiffs or cause mental distress. Although Mrs. Meetze was only eleven years old when she married, the marriage was not void.

Meetze, 230 S.C. at 338, 95 S.E.2d at 610. At first this reason appears to pertain to whether the story at issue is "highly offensive." But a case like *Hawkins* suggests that a lack of such offensiveness is equally pertinent to the judgment that the public's curiosity in Mrs. Meetze's delivery is not unjustified.

223. 327 Mass. 275, 98 N.E.2d 286 (1951).

224. *Id.* at 278, 98 N.E.2d at 287.

enforced by the tort.[225] It is clear that the *Restatement* shares these premises, for it explicitly states that "[a]uthorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature . . . and many other similar matters of genuine, even if more or less deplorable, popular appeal."[226]

Thus the *Restatement*, and in fact almost all courts, interpret the "legitimate public concern" requirement as insulating from legal liability news that is uncivil and "deplorable."[227] But this implies that the "community mores" which determine whether the disclosure of nonpublic matters is of legitimate public concern cannot be the same as the civility rules which determine whether communications are "highly offensive" disclosures of "private" facts. The *Restatement* tells us that the community mores at issue in the "legitimate public concern" test are instead those which identify "matters . . . customarily regarded as 'news.' "[228] These mores circumscribe the scope of the press' "reasonable leeway to choose what it will tell the public."[229]

But while this interpretation of the "legitimate public concern" requirement has the virtue of internal coherence, it simultaneously raises a distinct and pressing issue of public policy: Why should the press be confined by the customary definition of "news"? It is true that the mores which define newsgathering define the boundaries of public life as we now know it, but why should the law hinder attempts to enlarge that life, particularly if there is a public desire for the information constitutive of such enlargements?

The answer, of course, is that once persons or events are made public, the logic of public accountability will all but displace rules of civility. In the public sphere all persons and events are subject to an unblinking scrutiny that searches for meaning and significance; in the sphere of com-

225. A good example of the expression of these premises may be found in the recent remarks of the Dutch journalist Joop Swart, at an exhibition of the winners of the World Press Photo Competition:

> Some of the pictures you see here might shock you deeply. And some of you might be inclined to denounce them as sensational, distasteful, intruding into the privacy of the individual.
>
> But let me remind you that the photographers who made those pictures chose reality over escapism. . . .
>
> Let us be grateful to them, because they expanded our world.

Morris, *In Press Photos, the World at Its Worst,* Int'l Herald Tribune, May 12, 1989, at 9, col. 3.

226. RESTATEMENT (SECOND) OF TORTS § 652D comment g (1977).

227. *See, e.g.,* Cape Publications, Inc. v. Bridges, 423 So. 2d 426, 427-28 (Fla. Dist. Ct. App. 1982); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956); Beresky v. Teschner, 64 Ill. App. 3d 848, 381 N.E.2d 979 (App. Ct. 1978); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 827-28, 76 N.W.2d 762, 768 (1956); Costlow v. Cusimano, 34 A.D.2d 196, 311 N.Y.S.2d 92 (App. Div. 1970).

228. RESTATEMENT (SECOND) OF TORTS § 652D comment g (1977).

229. *Id.* at comment h.

munity such scrutiny is experienced as demeaning and as utterly destructive of the conventions that give meaning to human dignity.[230] The two spheres are deeply incommensurate and can coexist only in an uneasy tension. The common law therefore resists enlargement of the public sphere because it is inconsistent with the maintenance of social personality. What is ultimately at stake in this resistance is thus the protection of both individual dignity and community identity, as constituted by rules of civility, from the encroachments of the logic of public accountability.

In the modern tort the reach of this logic is as a practical matter determined by the application of the "legitimate public concern" test to nonpublic matters. The test thus bears an enormous social pressure, and it is not surprising to find that the common law is deeply confused and ambivalent about its application.[231] One jurisdiction abandons the field to the public sphere and refuses to enforce communal norms of civility,[232] while another gives full sway to " 'the customs and conventions of the community,' "[233] while yet a third holds that "in borderline cases the benefit of doubt should be cast in favor of protecting the publication."[234] Some courts confine the sphere of legitimate public concern to information that is, in Gouldner's phrase, "*de*contextualized,"[235] so that they "distinguish between fictionalization and dramatization on the one hand and dissemination of news and information on the other."[236] Other courts hold that "it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged."[237]

In these various and inconsistent interpretations of the "legitimate public concern" test one can trace the wavering line between the insistent demands of public accountability and the expressive claims of communal

230. *See* E. GOFFMAN, ASYLUMS 23-32 (1961).

231. *Compare* Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort,* 68 CORNELL L. REV. 291, 350-51 (1983) *with* Woito & McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?,* 64 IOWA L. REV. 185 (1979).

232. Hall v. Post, 323 N.C. 259, 269-70, 372 S.E.2d 711, 717 (1988); Anderson v. Fisher Broadcasting Co., 300 Or. 452, 469, 712 P.2d 803, 814 (1986).

233. Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976) (quoting RESTATEMENT (SECOND) OF TORTS § 652D comment f (Tent. Draft No. 21, 1975)).

234. Cordell v. Detective Publications, Inc., 307 F. Supp. 1212, 1220 (E.D. Tenn. 1968), *aff'd,* 419 F.2d 989 (6th Cir. 1969).

235. A. GOULDNER, *supra* note 162, at 95 (emphasis in original).

236. Garner v. Triangle Publications, Inc., 97 F. Supp. 546, 550 (S.D.N.Y. 1951); *see* Hazlitt v. Fawcett Publications, Inc., 116 F. Supp. 538, 545 (D. Conn. 1953); Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 134-35, 188 Cal. Rptr. 762, 773 (Ct. App. 1983); Aquino v. Bulletin Co., 190 Pa. Super. 528, 536-41, 154 A.2d 422, 427-30 (Super. Ct. 1959). On the distinction between newspapers getting "the facts" and getting "the story," see M. SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 88-120 (1978).

237. Jenkins v. Dell Publishing Co., 251 F.2d 447, 451 (3d Cir.) (footnote omitted), *cert. denied,* 357 U.S. 921 (1958); *cf.* Winters v. New York, 333 U.S. 507, 510 (1948).

life. Common law courts, like the rest of us, are searching for ways to mediate between these two necessary and yet conflicting regimes. We can understand the public disclosure tort, then, as holding a flickering candle to what Max Weber in 1918 called the "fate of our times," which is of course the "rationalization and intellectualization and, above all, . . . the 'disenchantment of the world.' "[238]

IV
CONCLUDING THOUGHTS: THE FRAGILITY OF PRIVACY

I hope I have made good on my initial claim that the common law tort of invasion of privacy reflects a complex and fascinating apprehension of the social texture of contemporary society. The tort safeguards the interests of individuals in the maintenance of rules of civility. These rules enable individuals to receive and to express respect, and to that extent are constitutive of human dignity. In the case of intrusion, these rules also enable individuals to receive and to express intimacy, and to that extent are constitutive of human autonomy. In the case of both intrusion and public disclosure, the civility rules maintained by the tort embody the obligations owed by members of a community to each other, and to that extent define the substance and boundaries of community life.

The tort's preservation of civility rules appears in its clearest and least qualified form in the branch of the tort that protects the seclusion of individuals from intrusion. But when civility rules attempt to control communication, as in the branch of the tort that regulates the public disclosure of private information, the common law must confront the tension between such rules and the demands of public accountability. The common law has been torn between maintaining the civility which we expect in public discourse, and giving ample "latitude"[239] to the processes of critical evaluation that are also intrinsic to that discourse.

This interpretation of the tort carries with it several significant implications for the understanding of privacy in contemporary society. First, it suggests that in everyday life we do not experience privacy as a "neutral" or "objective" fact, but rather as an inherently normative set of social practices that constitute a way of life, our way of life. The privacy protected by the common law has no special "function," like the protection of secrecy or the maintenance of role segregation, although it may, to a greater or lesser extent, accomplish each of these purposes. In the tort, "privacy" is simply a label that we use to identify one aspect of the many forms of respect by which we maintain a community. It is less

238. M. WEBER, *Science as a Vocation,* in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 155 (H. Gerth & C. Mills eds. & trans. 1958).

239. Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654 (D.C. Cir. 1966).

important that the purity of the label be maintained, than that the forms of community life of which it is a part be preserved.

Second, privacy understood as subsisting in the ritual idiom of civility rules can exist only where social life has the density and intensity to generate and sustain such rules. It is important to stress, however, that social life does not always have these characteristics. Certain kinds of "total institutions," for example, deliberately violate civility rules so as to degrade and mortify inmates.[240]

A less exotic and more significant example of the loss of civility rules can be found in the writings of James Rule, who has extensively studied large scale surveillance organizations like consumer credit rating agencies. Rule found that attempts to limit the access of such organizations to personal information in the name of privacy were invariably transformed into requirements that such organizations ensure the accuracy and instrumentally appropriate use of such information.[241] This transformation ultimately rested on the unimpeachable assumption that organizations could reach better, more precise decisions with greater information, and on the more questionable assumption that "both organizations and individuals shared an interest in [this] enhanced efficiency."[242] What Rule found striking was the absence of any strong privacy claims that could limit the *absolute* amount of information obtainable by such organizations.

This absence, however, is rendered explicable by Rule's own account of the nature of the "privacy" interest at stake, which in his view amounted to no more than " 'aesthetic' satisfactions in keeping private spheres private."[243] In the instrumental world of large surveillance organizations, in other words, the realm of the private has dwindled to the domain of the "instinctive."[244] This strongly suggests that relationships between individuals and large organizations like credit rating agencies are not sufficiently textured or dense to sustain vital rules of civility, and that as a result privacy has lost its social and communal character. But if the value of privacy can be conceptualized only in personal or subjective terms, it should be no surprise that its value has not proved politically powerful.

Third, the specific areas of social life that are governed by rules of

240. E. GOFFMAN, *supra* note 230, at 14-35.

241. J. RULE, D. MCADAM, L. STEARNS & D. UGLOW, THE POLITICS OF PRIVACY 70-71 (1980).

242. *Id.* at 70.

243. *Id.* at 71.

244. *Id.* at 22. In an earlier work, Rule characterized the value of privacy as the pre-social good of "autonomy." J. RULE, PRIVATE LIVES AND PUBLIC SURVEILLANCE 349-58 (1973). He expressed his hope that "values of individual autonomy and privacy can prevail in these contexts over those of collective rationality." *Id.* at 354.

civility are vulnerable to displacement by exogenous institutions. The preemption of civility by the rational accountability characteristic of the public sphere is only one example of such exogenous pressure. Another would be the claims of the state to control and regulate communal life. Stanley Diamond has eloquently documented how the modern state has "cannibalized" the "spontaneous, traditional, personal, [and] commonly known" aspects of "custom."[245] This tension between the prerogatives of state power and the norms of communal life is plainly visible in our fourth amendment jurisprudence, which attempts to subordinate the conduct of state law enforcement officials to the community's normatively sanctioned "expectations of privacy," while simultaneously balancing against these expectations "the government's need for effective methods to deal with breaches of public order."[246] In this balance it is not uncommon for the instrumental needs of the state to override community norms.

The ultimate lesson of the tort, then, is the extreme fragility of privacy norms in modern life. That fragility stems not merely from our ravenous appetite for the management of our social environment, but also from the undeniable prerogatives of public accountability. In the attempt to assess the meaning of public phenomena, the way of life that happens to constitute us, and to bestow our privacy with its meaning, appears to be merely arbitrary—a matter of aesthetics or instinct. And we are thus led to attempt to rationalize the value of privacy, to discover its functions and reasons, to dress it up in the philosophical language of autonomy, or to dress it down in the economic language of information costs. But this is to miss the plain fact that privacy is for us a living reality only because we enjoy a certain kind of communal existence. Our very "dignity" inheres in that existence,[247] which, if it is not acknowledged and preserved, will vanish, as will the privacy we cherish.

245. Diamond, *The Rule of Law Versus the Order of Custom*, 38 SOC. RES. 42, 44-47 (1971).

246. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); *see also* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985); Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1414 (1989).

247. Rorty, *Postmodernist Bourgeois Liberalism*, 10 J. PHIL. 583, 586-87 (1983).