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How Privacy Got Its Gender

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I. INTRODUCTION

Like the Olympian Athena, the right to privacy was born not of woman, but of man. A century ago this year, Samuel D. Warren and Louis D. Brandeis published *The Right to Privacy*.[1] This "most influential law review article of all"[2] argued for express recognition of a new common law right, a right of privacy, protecting the "inviolate personality"[3] of the individual, the "sacred precincts of private and domestic life,"[4] and the "robustness of thought and delicacy of feeling"[5] in society.

The privacy tort was the brainchild of nineteenth-century men of privilege, and it shows. Harry Kalven noticed it, writing of the Warren and Brandeis privacy plea that "there is a curious nineteenth century quaintness about the grievance, an air of wounded gentility."[6] *The Right to Privacy*'s quaint gentility reflects not only the economically privileged perspective of its Harvard Law School-educated authors,[7]

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1. 4 HARV. L. REV. 193 (1890).

2. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROB. 326, 327 (1966). *See generally* T. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.3 (1989).

3. Warren and Brandeis, *supra* note 1, at 205.

4. *Id.* at 195.

5. *Id.* at 196.

6. Kalven, *supra* note 2, at 329.

7. A native Bostonian, Samuel D. Warren II was the son of a wealthy paper manufacturer and a member of Boston's social elite. Louis D. Brandeis' immigrant family owned a small mercantile shop in Louisville. *See* D. PEMBER, PRIVACY AND PRESS 21-24 (1972) (describing social backgrounds of Warren and Brandeis).

but also the pronounced sentimentality[8] and spirituality[9] that were characteristic of the period.

Moreover, as conceived by Warren and Brandeis and initially applied by the courts, the privacy tort bears the unmistakable mark of an era of male hegemony. This aspect of the privacy tort has gone all but unnoticed. Our aim is to suggest that attention to the privacy tort's social origins in an era of sexual inequality illuminates the course of its historic development. Scholarly and judicial analyses that appropriately acknowledge the significance of gender provide an important direction for the privacy tort's second century.

Part II sets the stage with brief, background perspectives on the meaning and value of privacy, the public/private distinction, and the history of opportunities for personal privacy and autonomous decisionmaking in American life.

Part III examines *The Right to Privacy* in context, stressing the outmoded normative assumptions about female modesty and seclusion implicit in its bid for more legal protection against unwanted publicity. The monumental legacy of Warren and Brandeis did not include a broad or egalitarian understanding of the need for privacy.

Part IV offers Charlotte Perkins Gilman's *Women and Economics* as evidence that such an understanding was within the grasp of

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8. *See generally* A. DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE, 6, 12-13, 289 (1976) (historical study of "[t]he minister and the lady" as socially appointed "champions of sensibility"). Focussing on the country's northeast region, Douglas identified in nineteenth-century American writing a sentimental emphasis on spiritual values, often symbolized by images of fair, fragile young women—hence the "feminization" of culture. According to Douglas, "[t]he sentimentalization of theological and secular culture was an inevitable part of the self-evasion of a society both committed to laissez-faire industrial expansion and disturbed by its consequences." *Id.* at 12.

9. *See generally* L. PERRY, INTELLECTUAL LIFE IN AMERICAN HISTORY 263-67, 277-78 (ideology of culture "upheld the far-reaching importance of spiritual values amid secular change" that included urbanization, industrialization, and "shallow commercialism"). The ideology culture was a major force in Harvard University intellectual life when Warren and Brandeis were students there. *Id.* at 285. NATION editor E. L. Godkin was a prominent pundit for the ideal of culture. *Id.* at 310-11. Although Warren and Brandeis would deny it fifteen years later, it has been suggested that an article by Godkin in SCRIBNER'S MAGAZINE in July, 1890 condemning press invasions of privacy inspired *The Right to Privacy*. *See* D. PEMBER, *supra* note 7 at 24-25; and *see* GODKIN, *infra* note 13. *See also* R. HIXSON, PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT 30 (1987) ("[T]here is reason to believe that Godkin's SCRIBNER'S piece, as well as the famous editor's reputation among intellectuals, contributed to their thinking . . . . Indeed, Warren and Brandeis cited Godkin . . . in their privacy article.").

the late nineteenth-century intellect.[10] An egalitarian understanding of women's privacy problems is certainly within our reach today. Regrettably, courts and scholars still defend legal privatization of family life and personal identity without always considering the complex role that concerns about female modesty and seclusion have had, and should have, in the law.

Many privacy problems women face as daughters, wives and mothers cannot be addressed effectively through tort law. Tort law cannot, for example, create more free time for new mothers. However, cases highlighted in Part V illustrate that privacy tort actions and emotional distress actions for "outrageous conduct" can potentially right privacy wrongs. Existing categories of privacy torts potentially have one of their most worthwhile applications as aids to female victims of gender-related privacy invasions. Stereotypes of heightened female modesty undermined the nominal victories of female privacy claimants in the decades immediately following *The Right to Privacy*. The cases we consider in Part V suggest that, despite origins in nineteenth-century gender bias, the privacy torts most states recognize can help to validate women's economic and dignitarian interests in freedom from physical and emotional abuse in the workplace.

II.

A. CONCEPT AND VALUE

Personal privacy exists wherever a degree of inaccessibility shelters persons or information about them from others.[11] Seclusion, solitude, anonymity, secrecy, confidentiality, and reserve are discrete forms of privacy.[12] While privacy is a phenomenon in every human

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10. C. PERKINS GILMAN, WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION (1898).

11. *See generally* A. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 11, 15 (1988) (analyzing competing philosophical definitions of "privacy") ("While no definition of 'privacy' is universally accepted, definitions in which the concept of access play a role have become increasingly commonplace . . . . To say that a person possesses or enjoys privacy is to say that, in some respect and to some extent, the person (or the person's mental state or information about the person) is beyond the range of others' five senses and any devices that can enhance, reveal, trace or record human conduct, thought, belief or emotion."). *Cf.* Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 969 (1989) (concept of privacy underlying privacy tort not neutral, descriptive, or value free).

12. A. ALLEN, *supra* note 11, at 18 ("Privacy is best viewed as a kind of parent or umbrella concept to those . . . [concepts such as seclusion, solitude, anonymity, confidentiality, secrecy, intimacy and/or reserve] that denote a person's conditions of inaccessibility to the senses and surveillance devices of others.").

society, its availability and perceived value vary with culture, economy, status, age, and gender.[13] Gender is a key social variable in the availability of certain forms of individual and group privacy.[14] Social scientist Barrington Moore suggests that in many cultures men achieve privacy at the expense of privacy-deficient women, whose domestic labor maintains patriarchic havens.[15]

Of special interest here, gender is also an important variable in how much value a society places on modesty, a form of reserve.[16] Modesty consists of acts of refraining from ostentation and self-praise. Traditional norms of *female* modesty in American culture required that women, much more than men, exhibit speech, dress, and behavior calculated to deflect attention from their bodies, views, or desires. Needless to say, expectations of female self-concealment and seclusion in the name of modesty have greatly diminished. But nineteenth-century women faced condemnation for immodesty when they sought the services of male physicians and lawyers, spoke publicly about politics, entered beauty contests, and pursued careers in medicine or as clergy.[17] Activist Elizabeth Cady Stanton criticized the socialites of her day, who attended balls in strapless gowns and danced in the arms of strangers, but balked at the immodesty of speaking out for women's rights in public places.[18]

Conditions of privacy are not always morally praiseworthy or psychologically desirable. Yet it is difficult to deny that meaningful forms of individual privacy empower persons and enhance their intimate relationships.[19] Moreover, because the well-being of a family

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13. ALAN F. WESTIN, PRIVACY AND FREEDOM 13 (1967). *But see* Godkin, *The Rights of the Citizen: To His Reputation*, 8 SCRIBNER'S MAGAZINE 58, 65 (1890) ("Privacy is . . . one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies. The savage cannot have privacy, and does not desire or dream of it."). Warren and Brandeis cited the Godkin article with apparent approval. *See* Warren and Brandeis, *supra* note 1, at 195.

14. *Cf.* Roberts and Gregor, *Privacy: A Cultural View*, in PRIVACY, 182, 210 (J. Roland Pennock and John W. Chapman ed. 1971).

15. B. MOORE, PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY 51-52 (1984).

16. A. ALLEN, *supra* note 11, at 19.

17. *Id.* at 20. *Cf.* P. GLAZER and M. SLATER, UNEQUAL COLLEAGUES: THE ENTRANCE OF WOMEN INTO THE PROFESSIONS, 1890-1940 12-13, 81 (1987) ("The medical training meant that she had to violate Victorian standards of female modesty regarding bodily functions."); L. BANNER, AMERICAN BEAUTY: A SOCIAL HISTORY 255-57 (1983) (middle-class morality initially hostile to women on display in commercial beauty contests).

18. A. ALLEN, *supra* note 11 at 20.

19. *Id.* at 45-52.

or community is a function of the well-being of its members, privacy can make a man or woman more fit for group contribution and participation.[20] According to some psychologists, privacy promotes beneficial states and activities. Self-reflection, imagination, and relaxation are but a few of the valued results of privacy.[21] Privacy is also thought to foster individuality and the autonomy of judgment presupposed by western morality and liberalism.[22] Although personal privacy is occasionally condemned categorically as furthering indifference, social alienation, and inefficiency, philosophers typically praise diverse forms of individual, corporate, and group privacy for their functional utility and moral value.[23]

B. PUBLIC AND PRIVATE

"Privacy" denotes conditions of physical or informational inaccessibility, such as solitude or secrecy. But it can also designate "the private sphere" and a degree of autonomy within it. The existence of privacy does not presuppose the existence of a private sphere; nonetheless the concept of privacy is often associated with the concept of a private sphere constituted by lives free of unwanted governmental and community interference. Our homes, families, sexuality, and friendships are deemed appropriately private affairs. Religion, education, and business are sometimes included among the appropriately private aspects of human society as well.

In *The Human Condition*, Hannah Arendt explained that the public/private distinction has been a feature of Western thought at least since the rise of the ancient city-state, when it denoted the political and household realms, respectively.[24] In Greek and classical Roman thought, the private sphere of the household was viewed as a sphere of necessity in which the dominant male of the family ruled over wife, children, and servants who were engaged in mutual efforts

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20. *Id.*

21. *See, e.g.*, A. BUSS, SELF-CONSCIOUSNESS AND SOCIAL ANXIETY (1980); T. MILBURN and K. WATMAN, ON THE NATURE OF THREAT: A SOCIAL PSYCHOLOGICAL ANALYSIS (1981); C. Schneider, SHAME, EXPOSURE AND PRIVACY (1977); S. SEAGERT, CROWDING IN REAL ENVIRONMENTS (1976). *See also* A. ALLEN, *supra* note 11, at 45.

22. A. ALLEN, *supra* note 11, at 48. *Cf.* Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989) (liberal privacy rights protect against totalitarian regulation).

23. *Id.* at 41-53.

24. H. ARENDT, THE HUMAN CONDITION 28 (1958). For a quite different presentation of the same history, see J. HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY, 2, 3 (1989) (T. Burger trans. 1962).

for survival. By contrast, the public sphere was seen as a sphere of freedom where men of virtue, who had mastered the private sphere, joined forces as equals and citizens to govern and defend their communities.

With respect to the United States and, indeed, the modern world in general, it is impossible to make a sharp distinction between the public and the private. Few aspects of contemporary American life are plausibly deemed wholly beyond public regulation. For example, because homosexual marriages are prohibited, marriage cannot be viewed as a wholly private matter between consenting adults. Child abuse and neglect statutes and the law of child custody reveal that childrearing is very much a matter of public regulation. The demarcation of public and private that may have once characterized the city-state does not apply as a description or ideal for the contemporary nation-state. The public and private are now merged into what Arendt usefully distinguished as a "social realm."[25] Government and community have taken on some of the protective attributes of the family. At the same time, women, children, and laborers have progressed toward the privileges and responsibilities of citizenship.

The idea of a social realm better describes the actual organization of American society than dichotomies of public and private. However, normative conceptions of public and private serve as powerful reminders of the still prevalent need to limit the reach of group life. The public/private distinction and the notion of appropriately public and private spheres persist in debates over the limits of collective regulation. They persist dramatically in debates over the rights of women, as exemplified by the current abortion law controversies.

In the nineteenth century, the ideology of "true womanhood" and the "cult of domesticity" justified the confinement of women in the private household as subservient caretakers.[26] Middle-class white women often had a great deal of privacy, in the sense of socially imposed isolation within a private household. However, across races and classes, women were seldom heads of households, had little time to themselves, and had little of the legal autonomy concerning sexuality, marriage, and the family that sometimes is called "decisional privacy" today.[27]

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25. ARENDT, *supra* note 24 at 68-72.

26. A. Allen, *supra* note 11, at 65. *But see* L. NICHOLSON, GENDER AND HISTORY 62 (1986) ("ideal of female domesticity in the nineteenth century never had as much relevance for black people as for middle class white people.").

27. Reacting to this tradition, feminists and other progressive thinkers have

C. WOMEN'S PRIVACY HERITAGE

A look at social history from the American colonial era to 1890 when Warren and Brandeis published *The Right to Privacy* gives rise to three important points about the period. First, physical and informational forms of privacy were within the reach of many women as incidents to rural or small-town life, or as required by norms of female modesty and domesticity. Second, women's physical seclusion within the home did not guarantee meaningful forms of individual privacy. The demands of childrearing, nursing, and housekeeping meant little independence or time alone. Third, women's privacy in the sense of autonomous decisionmaking (even about domestic matters) was closely circumscribed by legal and other social norms. By virtue of these conditions, both from our perspective in the 1990s and that of feminist Charlotte Perkins Gilman in the 1890s, women's privacy was problematic.

1. *Pre-Industrial and Rural Life*

Privacy was valued in colonial America for many of the same reasons it is valued today. Centuries prior to the arrival of the colonists, "privacy" was used in the English language to denote "the state or condition of being withdrawn from the society of others, or from public interest."[28] The value of privacy as the state of withdrawal from the public sphere was echoed in church commands to carry on devotions "with all possible Privacy and Modesty,"[29] and to keep prayer "publick [sic] in the Congregation, private in the Family, and secret in the Closet."[30] While privacy per se was not expressly recognized as the basis of a legal right in colonial America, privacy did play a part in custom and legal practice. In fact, the colonial legal system protected physical and informational privacy by limiting searches and seizures, prosecuting trespassers, hearing defamation cases, and

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sometimes equated the concepts of privacy and the private sphere with female subjugation. *See generally* ALLEN, *supra* note 11, at 45-56, 72-75 (stressing the equality of men's and women's normative moral entitlement to individual modes of privacy and autonomous decisionmaking). One feminist purported to reject the legal categories of privacy and the private sphere as "male ideology." *See* C. MACKINNON, FEMINISM UNMODIFIED 53 (1988). Recognizing a "debt to nurture," another has called for the restructuring of the private through forms of family life that do not "repeat the earlier terms of female oppression." J. ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN 322-53 (1981).

28. D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 10 (1972).

29. *Id.*

30. *Id.* at 11-12.

protecting privileged husband and wife communications in the courtroom.[31]

Yet, the colonial lifestyle "left little room for privacy or nonconformity even among the free and affluent."[32] The community spirit ran strong in the colonies and there was a pervasive belief that individuals and families should make sacrifices for the good of the community. Norms of mutual surveillance enforced by officials constrained disorderliness and moral deviance.[33]

However, the threat to privacy posed by government control was lessened by lax enforcement and respect for social relationships that were enhanced by privacy, such as courtship.[34] Respect for the family also undercut public regulation. The family household—often an extended conglomeration of spouses, children, servants, apprentices, and other dependents—was governed by male patriarchs.[35] The community delegated to men the authority to control those living within their domain and all family property. While appointed community officials were expected to insure families' conformity to public standards, landed males as heads of families were expected to maintain well-ordered and well-governed households. The structure of the colonial family thus mirrored the structure of the larger society; both were interdependent, hierarchical, and patriarchal.[36]

American colonial life centered around an agrarian and mercantile economy. It generally featured rural homesteads and sparsely populated towns. In rural areas, a large homestead built on several acres could be the common home of parents, married children, and employees, all subject to masculine family authority. In the towns, a male head of household often maintained a work area or business next to his home. Families tended to be large and households often included one or more domestic servants, apprentices, and other dependent workers.

There was little rigid delineation of responsibilities and duties within many early American homes. Rural life and interdependence among family members offered free colonial women many rights and

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31. *Id.* at 248.

32. S. KENNEDY, IF ALL WE DID WAS TO WEEP AT HOME: A HISTORY OF WHITE WORKING-CLASS WOMEN IN MODERN AMERICA 8 (1979).

33. FLAHERTY, *supra* note 28, at 248.

34. *Id.*

35. *Id.*

36. M. GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA 6 (1985).

liberties that women in other countries did not enjoy.[37] Yet, throughout the pre-industrial period, women remained subordinate and dependent in caretaking roles. The multitudes of women who lived as slaves or servants enjoyed the least privacy and autonomy of all. However, even free, working white women were short on privacy and independence.[38]

2. *Age of Industry*

Concern for privacy and privacy-related liberties achieved prominence as public issues in the nineteenth century when a sharp increase in technology and industrialization had begun to transform the agrarian and mercantile culture to one of urban capitalism. A marked growth in commerce and industry meant more people could work for pay and no longer had to rely on farming or apprenticing to earn a living. The home workshop was rendered virtually obsolete, and male breadwinners moved their trades into the urban centers that were rapidly springing up to accommodate large-scale mechanization and a growing labor force.[39]

Households declined in size in some social strata. Several factors worked to decrease the size of the average professional worker's household, including the greatly reduced need for apprentices and journeymen workers, the technological advances in home appliances that made a large force of domestic servants unnecessary, and the lack of housing in urban centers that would accommodate extended families. These demographic forces combined with republican[40] and

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37. *Id.*

38. *Cf.* S. KENNEDY, *supra* note 32, at 36-37 (lives of white women who worked in mills and as live-in domestics strictly controlled and scrutinized).

39. M. RYAN, CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865 147 (1981).

40. M. GROSSBERG, *supra* note 36, at 6-7. A notable feature of the republican ideology of post-Revolutionary American society was the idea that the preservation of the public good was the most important goal of a political society, and that this goal was attained through virtuous citizens who were willing to sacrifice individual interests to the needs of the public good, were independent of the political will of others, and who participated in politics and actively exercised their citizenship. *But see* L. PERRY, *supra* note 9, at 263 ("[B]y the latter half of the nineteenth century . . . [*culture*] served, much as virtue had done, to designate higher ideals that must shine atop the republic.") To these concepts could be added equality, in the sense that all citizens were entitled to representation in the civil and political process under a democratic system of laws. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J.I.H. 119-34 (1972), *cited in* S. WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850 14 (1984).

laissez-faire[41] sentiments to create the social, political and legal structures of the nineteenth century.

The impact of industrialization on privacy and autonomy resists easy summation. According to Alan F. Westin, nuclear family lifestyles, mobility in work and residence, and the decline of religious authority meant "greater situations of physical and psychological privacy."[42] While Westin associated urban industrialization with *more* privacy, Robert Copple recently associated the same developments with *less* privacy. Copple cited the convergence of the growth of cities that accompanied industrialization with the closing of the western frontier as a possible explanation for the emergence of articulated public concern about lost privacy during the late nineteenth century.[43]

It should be noted that, although personal privacy was not a salient issue in public life for most of the nineteenth century, it could be an acute concern in private life. For example, as revealed in period diaries, the group life required by safe westward passage imposed privacy-related hardships on women who were forced to depart abruptly from standards of female modesty and seclusion.[44] The biographies of African-American slaves reflect extremes of humiliation and shame suffered by women reared as Christians but treated as chattel unsuited for privacy and private choice.[45] Thus, neither the end of the westward

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41. M. RYAN, *supra* note 39, at 150-54.

42. A. WESTIN, *supra* note 13, at 21. *But see* A. ALLEN, *supra* note 11, at 66 (privacy also a function of character of life within nuclear family home).

43. Copple, *Privacy and the Frontier Thesis: An American Intersection of Self and Society*, 34 AM. J. JURIS. 87, 88 (1989) ("threat to frontier values of individualism and autonomy . . . [where an] impetus for the creation and adoption of . . . legal means to protect personal privacy and to officially recognize the right to a . . . degree of social distance").

44. The journals kept by women on the overland trails document quotidian features of their arduous treks across the continent in the company of many men and few other women. The demanding realities of daily life included cooking, washing, cleaning, gathering herbs and berries, looking after small children, and caring for the sick and dying. L. SCHLISSEL, WOMEN'S DIARIES OF THE WESTWARD JOURNEY 77 (1982). Women who travelled alone with groups of men wrote of a profound sense of isolation at the loss of female friendship, conversation, and co-workers. *Id.* at 98. The lack of shelter on the trail compromised their modesty concerns by exposing bodily functions such as excretion and menstruation. At least women travelling together could "provide a measure of propriety to a sister on the Trail" by extending their long skirts to act as a screen, creating a "curtain of modesty" for an otherwise embarrassing situation. *Id.*

45. *See, e.g.*, O. ALBERT, THE HOUSE OF BONDAGE (1988); SIX WOMEN'S SLAVE NARRATIVES (H. Gates ed. 1988) (collection of nineteenth-century slave narratives).

expansion Copple stressed, nor the growth of photography and "yellow journalism" Warren and Brandeis decried,[46] began Americans' concerns about their privacy.

Compared to the women of the 1820s, who "had neither legal, professional nor educational standing," the women of 1890 were seemingly on the road to equality.[47] Yet, the second half of the nineteenth century brought increased legal regulation of the "private sphere" of marriage, reproduction, and family life. As a consequence of legal expansion, when male freedom and self-reliance were held high as esteemed public values, the decisions of women concerning marriage, pregnancy, divorce, and child-rearing were subjected to new public scrutiny and regulation.[48] The Congressional passage of the Comstock Law in 1873 has come to symbolize the period.[49] Whether male or female, Victorian reformers often made no distinction between social concerns such as communicable diseases on the one hand, and moral concerns over women's exercise of reproductive autonomy on the other. Mid-century American society rested on the central tenets of "permanency of marriage, the sacredness of the home, and the dependence of civilized life upon the family."[50] Early writers told of the ills that would befall the nation if families failed to promote "industry, frugality, temperance, moderation, and the whole lovely

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46. Warren and Brandeis, *supra* note 1, at 196.

47. L. BANNER, WOMEN IN MODERN AMERICA: A BRIEF HISTORY 22 (1984).

48. Family law historian Michael Grossberg attributed increased interest in "governing the hearth" to a fervent family reform movement. The movement arose, he argued, when individualism and diversity were perceived as a threat to an ideal he called the "republican family." M. GROSSBERG, *supra* note 36, at 10-11. Grossberg maintained that in the republican family, the colonial rule of status and unquestioning obedience among family members was replaced by affection, respect, and reciprocity. Relationships were largely seen in contractual terms that stressed "voluntary consent, reciprocal duties, and the possibility of dissolution." Yet the perception of marriage as a contract called for a delineation of household and economic responsibilities among the sexes. Males were generally charged with supporting the family. For the female, the home became her "exclusive domain," and domesticity her most outstanding attribute. *Id.* at 6-7. Grossberg maintained that, as the republican family ideal gained ground, the faces of individualism and laissez-faire economics were creating diversity and deviations within and among families. Public concerns for the stability and well-being of the family contributed to a family reform movement that swept the nation, preaching paternalism, sexual restraint, and a strict economic division by labor. *Id.* at 10-11.

49. Act of 3 March 1873, 17 Stat. 258, *amended*, Act of 12 July 1876, 19 Stat. 186. Named after Anthony Comstock, the Comstock Law and the copycat state laws it spawned banned pornography, abortion and contraception devices. *See* BANNER, *supra* note 47, at 16.

50. *Id.*

train of republican virtues."[51] For reasons about which historians sometimes disagree, it became the perceived responsibility of women to safeguard and promote the highest ideals in their homes and children so as to keep society intact.[52]

According to Michael Grossberg—whose account of history may overstate the pervasiveness and egalitarianism of the republican family, and the novelty of legal patriarchy—popular obsession with family integrity led to the enactment of major new legislation governing the hearth. The law of the second half of the last century thereby created an unprecedented judicial patriarchy overseeing the household. Given added authority to determine the legal status and abilities of married women and other family members, nineteenth-century judges further perpetuated patriarchic authority. They wielded control over marriage and other domestic matters, as evidenced by the law of courtship, nuptials, and domestic conduct. The common law notion of parens patriae gave the courts power to enter even the most private aspects of family life. Grossberg concluded that the judicial acquisition and exercise of patriarchal authority "stemmed from the traditional assumption that married women lacked the economic and intellectual independence to act without male supervision (and thus needed special protection), combined with the new faith in separate and mutually exclusive spheres . . . central to the organization of the republican family."[53]

The law of domestic relations resulted in a janus-faced policy. With a view toward female protection, judges could rationalize rewarding women who successfully carried out their caretaking and household duties, and assisting women when problems arose during courtship and marriage. With a view toward female control, judges also could rationalize "invoking their authority to check radical alterations in the subordinate legal status of women."[54] On Grossberg's account, then, judicial patriarchy in domestic law ensured continuing paternal control and governance of the home. If paternal

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51. *Id.* at 10.

52. Grossberg's account stressed "republican" values, but Ann Douglas stressed "sentimentalization." *See* A. DOUGLAS, *supra* note 8, at 6-13. Echoing the mind-set Douglas identified, one legal writer announced that "[w]oman is generally conceded to be superior to man in beauty, sweetness, tenderness, parental care of children, virtue, sympathetic response, capacity to endure physical pain, home-making, refining influence on civilization and general moral and cultural excellence." Puller, *When Equal Rights are Unequal*, 13 VA. L. REV. 619, 629 (1927).

53. M. Grossberg, *supra* note 36, at 300.

54. *Id.* at 301.

control over the family broke down, the judicial patriarchy was there to take its place. Partly as a result of their own reformist activism,[55] nineteenth-century women gained a greater presence in domestic relations law. But they were not given the type of legal powers that brought greater economic, social, or political power inside or outside the home.

3. *The First Privacy Tort*

The assumption that women are properly dependent and confined to domestic roles had a corollary: women were deemed to be creatures of special modesty. Not only were women expected to observe conventional rituals of modesty, as a prerequisite of virtue or respectability; but others similarly were expected to limit their encounters with women as modesty demanded. Women who worked outside the home or participated in public life could easily have their virtue thrown into question.[56] Anyone taking liberties with respectable women were subject to social sanction. These facts of social life were reflected in the development of the privacy tort.

The standard of female modesty and seclusion was apparent in a much-cited Michigan case that predated the Warren and Brandeis article by nine years, *De May v. Roberts*.[57] The facts of the case were simple. A poor, married couple invited a physician to their home to assist them and a midwife in the delivery of their child. Because the night was "dark and stormy,"[58] the physician brought along Scattergood, an "unprofessional young unmarried man,"[59] to carry his umbrella, lantern, and other necessary items.[60] Scattergood was present in the Roberts' tiny house throughout the protracted labor. At the doctor's request, Scattergood held Mrs. Roberts' hand "during a paroxysm of pain."[61]

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55. L. BANNER, *supra* note 47, at 16, 18-22.

56. *See* A. ALLEN, *supra* note 11, at 65. In a lecture entitled "Of Queen's Gardens" the poet John Ruskin essayed that "the woman's true place" is the home, "the place of peace, the shelter . . . from all terror, doubt, and division. [In the sanctuary of the home] the woman must be enduringly, incorruptibly good, instinctively, infallibly . . . wise, not for self-development, but for self-renunciation: wise . . . with modesty of service." *Id.* Middle-class moralizers of both sexes viewed poor, immigrant and black women who were forced to work outside the home as falling short of the feminine ideal.

57. 46 Mich. 160, 9 N.W. 146 (1881).

58. *Id.* at 162, 9 N.W. at 147.

59. *Id.* at 165, 9 N.W. at 148.

60. *Id.* at 165, 9 N.W. at 147.

61. *Id.*

Some time after the birthing, the Robertses learned that Scattergood was not a medical practitioner. They filed a lawsuit against both Scattergood and Dr. De May. The jury awarded damages and the defendants appealed. Announcing that "[i]t would be shocking to our sense of right, justice and propriety to doubt . . . that . . . the law would afford an ample remedy,"[62] the court affirmed the finding that the defendants were guilty of deceit, and sustained the damages for Mrs. Roberts' "shame and mortification."[63]

The court's declaration that "the plaintiff had a legal right to the privacy of her apartment"[64] was a first in American privacy jurisprudence. Edward J. Bloustein's anachronistic reading of *De May* as judicial vindication of women's "individuality and dignity,"[65] missed an important dimension of the case. A closer look at its social context suggests that the case is better viewed as a vindication of women's modesty. For, absent exceedingly strong female modesty and seclusion standards, it is difficult to explain why Mr. Scattergood and Dr. De May should have been liable at all.

Bad weather, combined with Dr. De May's illness and fatigue, led him to bring Scattergood along. Those same conditions necessitated that Scattergood remain in the plaintiffs' fourteen-by-sixteen foot house for the delivery. The court's decision implied that not even an exigent circumstance—a virtual emergency—can convert what is otherwise an invasion of privacy accomplished through deceit into privileged conduct. And, the court found deceit where arguably there was none. The case for deceit was not strong. De May expressly introduced Scattergood to the Robertses as a friend brought along to carry his things, not as a medical student or doctor. Nonetheless, the court concluded, as a matter of law, that the Robertses had a right to presume that a doctor would not bring an unmarried young man who was not a medical professional to the scene of a delivery.

Strict adherence to a social standard of female seclusion and modesty is reflected in the court's conclusion as well as in its repetition of the adjective grouping "unprofessional, unmarried and young," when describing Scattergood. One is led to speculate that De May might have escaped liability by bringing along an old, married man to carry his things. In that case, the affront to the husband's household authority and the woman's presumed modesty would have been

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62. *Id.* at 166, 9 N.W. at 148-49.

63. *Id.* at 167, 9 N.W. at 149.

64. *Id.*

65. E. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 973 (1964).

less severe. A *young* man or a young, *unmarried* man—unlike an old, married man—is a potential seducer. These considerations suggest that Bloustein's analysis of *De May* as vindicating individuality and dignity is, at best, part of the truth.[66] It was mainly because women were deemed to be creatures of special modesty and their husbands their rightful protectors that the court found for the Robertses. Both in the elite urban East and the rural Mid-west, respect for women's dignity consisted of respect for their modesty and other feminine virtues. The notion that female dignity required individuality belonged scarcely to the period at all.[67]

III.

A. UNDERSTANDING "THE RIGHT TO PRIVACY"

In *The Right to Privacy*, Warren and Brandeis contended that political, social, and economic changes had created a category of emotional or spiritual injury inadequately addressed by the law: the invasion of privacy.[68] The article depicted the invasion of privacy as an increasingly common consequence of both a flourishing urban free press, and the unauthorized circulation and publication of photographs produced with new technology.

Warren and Brandeis argued that every man [sic] needs a place of solitude, a retreat from the "intensity and complexity of life,"[69] a sanctuary beyond the reach of scurrilous journalism, curiosity-seekers, gossips, and the prurient interests of the indolent public.[70] The famous coauthors urged that the right "to be let alone,"[71] the right of privacy,

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66. Bloustein inadvertently ascribed privacy a masculine gender even as he attempted to celebrate it as a human right. Relying heavily on masculine rhetoric, he wrote: "A *man* whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another is less than a *man*, has less . . . dignity, on that account." E. Bloustein, *supra* note 65, at 973-74 (emphasis added). Bloustein also suggested that "what provoked Warren and Brandeis to write their article was a fear that a rampant press feeding on the stuff of private life would destroy individual dignity and integrity and *emasculate* individual freedom." *Id.* at 971 (emphasis added).

67. *Cf.* L. BANNER, *supra* note 47, at 1 ("The 1890s were years of transition . . . . But in every area of women's experience discrimination still existed.")

68. Warren and Brandeis, *supra* note 1, at 193, 195, 196, 197.

69. *Id.* at 196.

70. *Id.*

71. *Id.* at 195.

should be recognized to vouchsafe "inviolate personality,"[72] the "sacred precincts of private and domestic life"[73] and the "robustness of thought and delicacy of feeling" in society.[74] Injuries to personality arising by virtue of acts "overstepping . . . the obvious bounds of propriety and of decency"[75] should be compensable, they argued, much as physical injury to body and property, interference with the peaceful use and enjoyment of property, and damage to reputation, family relations, and feelings were already legally compensable.

Overwrought by today's standards, the Warren and Brandeis article was a lofty defense of values of affluence and gentility.[76] The article's proposal for a privacy tort grounded on human spirituality reflected the "ideology of culture" that once played a major role in the intellectual life of the American Northeast.[77] *Culture* stood in opposition to the supposed crass effects of commerce and industry on the human spirit. One noted advocate of the standard of culture, E. L. Godkin, published an attack on journalistic invasions of privacy in 1890 in *Scribner's Magazine*. Godkin's article appeared just months before Warren and Brandeis published theirs;[78] *The Right to Privacy* cited Godkin's article and may have been influenced by it.[79]

Like Godkin, Warren and Brandeis reacted with disfavor to uses of journalism and photography that, while commonplace today, were once novel and widely criticized. Indeed, the development of the halftone plate that permitted the reproduction of photographs in newspapers in the 1880s led the way in the 1890s to gimmicks and spectacles, including beauty contests sponsored by circus entrepreneurs and mass circulation newspapers "whose editors boldly utilized sex and violence as part of their appeal."[80] The commercial exploitation of female beauty was a development initially fought by the middle- and upper-classes.[81] In the age of culture, commercial displays of

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72. *Id.* at 205.

73. *Id.* at 195.

74. *Id.* at 196.

75. *Id.*

76. Kalven, *supra* note 2, at 329.

77. L. PERRY, *supra* note 9, at 263-67, 277-78.

78. Godkin, *The Rights of the Citizen: To His Reputation*, 8 SCRIBNER'S MAGAZINE 58, 65 (1890).

79. Warren and Brandeis, *supra* note 1, at 195 n. 6. *But see* D. PEMBER, *supra* note 7, at 24. Brandeis wrote to Warren in 1905 that: "My own recollection is that it was not Godkin's article but a specific suggestion of yours, as well as your deepest abhorrence of the invasions of social privacy, which led to our taking up the inquiry." Warren concurred. *Id.*

80. L. BANNER, *supra* note 17, at 256-57.

81. *Id.* at 255.

women would have been difficult to reconcile with reigning myths of female moral superiority, spiritual leadership and heightened sensibilities.[82]

Personal experiences with unwanted publicity concerning his Boston Brahmin family's social life may have prompted Warren to coauthor the famous article.[83] Whatever its immediate causes, the article has had a decided impact on positive tort law.[84] The article also has had an impact on legal scholarship, setting into motion one hundred years of debate over the meaning and value of privacy, and the feasibility of protecting privacy through private and public law.

Praised for its role in helping courts to recognize that "privacy [is] an aspect of human dignity,"[85] the Warren and Brandeis article has been roundly criticized in recent decades as narrow and anachronistic. Critics say Warren and Brandeis spawned a petty, duplicative, and constitutionally problematic tort that has proven to be useless to plaintiffs and to society.[86] Without regard to the overall usefulness and constitutionality of the torts it spawned, the article can be criticized for inadequately addressing women's privacy and its historically problematic character. Warren and Brandeis employed language and arguments that perpetuated in the law the ideal of the cloistered lady.

B. A FRESH LOOK

Scholarly analyses traditionally focus on the large number of copyright and literary property cases Warren and Brandeis cited.[87] This focus is substantially warranted. Pressing that sensibilities and self-regard are the touchstones of the inviolate personality, Warren

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82. *See generally* A. DOUGLAS, *supra* note 8, at 6, 12-13; M. VICINUS, INDEPENDENT WOMEN: 1860 - 1920 4, 5 (1985).

83. *See, e.g.*, Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). *But see* T. MCCARTHY, *supra* note 2 (casting doubt on claim that Warren's anger over press intrusion in own life motivated article).

84. The article is cited in virtually every case utilized by the highest state courts as a vehicle for recognizing or refusing to recognize privacy rights. For a convenient list of these cases, see Copple, *supra* note 43, at 126-131. The RESTATEMENT (SECOND) OF TORTS § 652A (1977) credits the Warren and Brandeis article with originating the privacy tort.

85. *See generally* E. Bloustein, *supra* note 65.

86. *See generally* Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983) (plaintiffs seldom win and tort largely duplicative and constitutionally problematic); Kalven, *supra* note 2 (tort is petty, duplicative and constitutionally problematic).

87. D. PEMBER, *supra* note 7, at 44-52.

and Brandeis arrived at the legal basis for a general substantive law of privacy partly by drawing analogies to American and English judicial opinions, holding that individuals have property rights and contractual claims attached to the letters they send, the art they produce, and to the negatives and originals of their photographs.

However, commentators' traditional focus obscures the extent to which the rhetorical force of the article stems from Warren and Brandeis' skillful exploitation of social attitudes about gender. To see this, it is necessary to focus on aspects of *The Right to Privacy* that may first appear incidental. The story that Warren and Brandeis told about the "inevitable"[88] progressive development of the rights in civilized society described the broadening of the right to life from the narrow conception of noninterference with body and property to the noninterference with a man's "family relations."[89] To argue that the law had already begun to make progress in the direction of recognizing the compensability of offenses to our spiritual natures, they cited a line of cases in which parents and husbands were held to have had rights of recovery against male seducers. Their recognition of an historical "regard for human emotions"[90] was based on cases in which remedies were granted for the alienation of a wife's affections[91] and for wounded feelings, such as shame and dishonor, caused by a daughter's seduction.[92] In addition, they relied on Godkin's *Scribner's*

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88. Warren and Brandeis, *supra* note 1, at 195.

89. *Id.* at 194.

90. *Id.*

91. Winsmore v. Greenbank, Willes 577 (1745). Plaintiff's wife had left him "unlawfully." During their separation, after inheriting her father's fortune, she died. Plaintiff husband alleged that the defendant wanted decedent wife's money, and prevented her, against her will, from returning to him. The court held that the husband's alienation claim should prevail because he had completely lost the comfort and society of his wife, her aid and assistance in his domestic affairs, and the profit and advantage he would have gained from her estate.

92. Recompensing parents for shame and dishonor, seduction cases were a recognized exception to the rule that wounded feelings could not be compensated. Under the English law fiction of *per quod servitium amisit*, parents could maintain an action for the loss of a daughter's "services" caused by her seduction and pregnancy. When certain cases arose in which the daughter was not living with the parents, and thus was not in their "service," the courts created a "constructive service" doctrine based on the parents' right to recall the minor daughter into their keep at any time, thereby retaining the right to her services. Thus, the courts endeavored mightily to ensure that parents' moral grief over feminine transgressions would be compensable. *See, e.g.*, Lavery v. Crooke, 52 Wis. 612 (1881); Phelin v. Kenderine, 20 Pa. St. 354 (1835); Martin v. Payne, 9 John. 387 (1812); Bedford v. McKowl, 3 Espinasse 119 (1800).

essay, in which he vehemently argued for a greater appreciation of a man's reputation, with scant mention of women except as targets of social opprobrium for their misdeeds.[93]

Warren and Brandeis took pains to point out that the loss of services by female family members was not the only or central point of the right to recovery in the seduction cases. The doctrine of lost services, they implied, is a surrogate in the common law for an unarticulated doctrine akin to the doctrine of privacy they sought to advance.[94]

Women appear in the Warren and Brandeis article as seduced wives and daughters. They also appear through the memorable image of a prima donna in tights, "caught on the stage by a camera"—as the *New York Times* would report—but spared public mortification by a judicious court.[95] As noted, one of the specific privacy abuses that motivated the Warren and Brandeis article was invasive uses of photography. They thought photographic technology led to unconscionable, indiscriminate exposure to public view. Thus, Warren and Brandeis cited with approval the 1890 case of *Manola v. Stevens & Meyers*, in which an actress who had been surreptitiously photographed by her employer while the actress was dressed in tights successfully enjoined the publication of the photograph. The New York court granted Marion Manola an ex parte injunction to restrain the publication of her photograph, "owing to her modesty."[96] The defendant never appeared to contest the injunction.[97]

While Marion Manola was not within the private precincts of domestic life at the time the photograph was taken, and had been openly performing before the public, Warren and Brandeis had no problem exploiting her case for their argument. For indeed, viewed in one light, Marion Manola's case *was* their argument. Warren and Brandeis could safely assume that most readers conceived of women as creatures of special modesty.[98] The photographic assault on Man-

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93. Godkin, *supra* note 13, at 60.

94. *See* Lavery v. Crooke, 52 Wis. 612 (1881); Phelin v. Kenderine, 20 Pa. St. 354 (1835); Martin v. Payne, 9 John. 387 (1812); Bedford v. McKowl, 3 Espinasse 119 (1800).

95. N.Y. Times, June 15, 1890, at 2, col. 3. *See also* Warren and Brandeis, *supra* note 1, at 193, 195.

96. N.Y. Times, June 15, 1890, at 2, col. 3.

97. Warren and Brandeis, *supra* note 1, at 195 n.7.

98. An analysis of men's privacy claims provides an interesting counterpoint to the argument that gender inequality affected the courts and influenced the outcome of similar cases in dissimilar ways. In *Mackenzie v. Soden Mineral Springs Co.*, 18

ola's modesty was a paradigm of the kind of privacy invasion they thought the law ought to have remedied. The appeal to *Manola* was anything but peripheral to their article's argument.[99] Warren and Brandeis cited *Manola* as a clear example of judicial protection of inviolate personality and delicate feelings injured by unwanted publicity. The case was particularly strong for their purposes because it involved the courts going so far as to protect the residual modesty of an "undeserving" woman who had behaved immodestly in the first place and assumed the risk of even broader exposure. If courts must ascribe privacy rights to a stage actress, then clearly they also must ascribe privacy rights to ordinary men and women who live quietly and discreetly at home.

C. COURTS MANAGE MODESTY

In both *Manola* and *De May*, the courts went remarkably far to compensate female plaintiffs for privacy losses. The outcome of another late nineteenth-century case demonstrates a court going to great lengths to defend a woman's modesty. In *Union Pacific Railway Company v. Botsford*,[100] the United States Supreme Court echoed the sentiment that "the right to one's person" is the right "to be let alone."[101]

Mrs. Clara Botsford brought suit against a railroad company for head injuries she sustained while a passenger. The railroad requested the trial court to compel Mrs. Botsford to submit to a physical examination, assuring the court that the examination would be conducted by her personal physician and in such a manner as "not to expose the person of the plaintiff in any indelicate manner."[102] The court refused the request, Mrs. Botsford received a $10,000 award, and the railroad appealed.

The Supreme Court declared that "the inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."[103] It reasoned that a person should never be compelled to

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N.Y.S. 240 (N.Y. Sup. Ct. 1891), a physician successfully obtained an injunction against the unauthorized publication of his name in a medicine advertisement. Although the right to privacy was not discussed by the court, the injunction was granted under an implied right for the physician "to be let alone." 18 N.Y.S. 240 (1890).

99. *But see* PEMBER, *supra* note 7, at 55 (describing *Manola* and *DeMay* as "peripheral cases").

100. 141 U.S. 250 (1891).

101. *Id.* at 251.

102. *Id.* at 250.

103. *Id.* at 250.

expose her body for the purposes of a civil action, and that any unreasonable refusal to show injuries would only constitute a fact to be considered by the jury. Finding, therefore, that the trial court had no power to compel an examination, the Court affirmed the judgment.

Eleven years later, in the case of *Roberson v. Rochester Folding Box Company*,[104] the New York Court of Appeals seemed more concerned with the orderly growth of the law than with the claims of modesty. In *Roberson*, the defendant box company manufactured and distributed 25,000 copies of an advertisement for flour, each one bearing plaintiff Roberson's likeness. The advertisements were conspicuously displayed in stores, saloons, warehouses, and other public areas near Roberson's residence. Miss Roberson, who had not authorized the use of her likeness, complained of humiliation and severe nervous shock she suffered as the result of the jeers and remarks of people who recognized her from the advertisements.

Roberson's request for an injunction and damages was granted by the lower court on the ground that the defendant's unauthorized publication and circulation of her likeness for profit violated her right to privacy[105] and her property right in the use of her likeness.[106] In the appellate division, the judgment was affirmed even though the court could find no controlling precedent. However, the New York Court of Appeals reversed the lower court decision by a margin of four to three. Its principal reasons for the reversal were that (1) there was no precedent on point, (2) equity could not enjoin the defendant from merely hurting the plaintiff's feelings, and (3) recognizing a privacy or property right in a person's face would spawn litigation and restrict liberty of speech and freedom of the press. The court mentioned the Warren and Brandeis article, but found its argument for protecting inviolate personality unconvincing:

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104. 65 N.Y.S. 1109, *aff'd* 64 App. Div. 30, 71 N.Y.S. 876 (1901), *rev'd* 171 N.Y. 538, 64 N.E. 442 (1902). *Cf.* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (male plaintiff has privacy right in case against defendant who appropriated photographic image).

> 105. Privacy is regarded as a product of civilization, [which] implies an improved and progressive condition of the people in cultivated manners and customs with well-defined and respected domestic relations. The privacy of the home in every civilized country is regarded as sacred, and when it is invaded it tends to destroy domestic and individual happiness. It seems to me, therefore, that the extension and development of the law so as to protect the right of privacy should keep abreast with the advancement of civilization.

Roberson v. Rochester Folding Box Co., 65 N.Y.S. 1109, 1111, *aff 'd* 64 A.D. 30, 71 N.Y.S. 876 (1901), *rev'd* 171 N.Y. 538, 64 N.E. 442 (1902).

106. "Every woman has a right to keep her face concealed from the observation of the public. Her face is her own private property." *Id.*

> An examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place in our jurisprudence, and . . . the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.[107]

Although Roberson lost her case in the Court of Appeals, the standard of female modesty prevailed in the court of popular opinion. The *Roberson* decision was criticized in the press and by the bar. A year after the decision, the New York legislature enacted a narrowly drawn privacy statute, providing a remedy in cases where the name or picture of a person has been appropriated for commercial advertising purposes.[108] Judge Denis O'Brien, who had concurred in *Roberson*, was sufficiently perturbed by the public outcry that he wrote a law review article responding to the criticism.[109] O'Brien asserted that any harm suffered must have been to Miss Roberson's person or to her character because a lady has no property right in her form and features. Property rights in one's visage "would be altogether too coarse and too material a suggestion to apply to one of the noblest and most attractive gifts that Providence has bestowed upon the human race. A woman's beauty, next to her virtues, is her earthly crown . . . ."[110]

One critic of an early privacy case involving the unwanted publication of a young woman's portrait suggested that the case might have gone the other way, had the plaintiff been the judge's daughter.[111] This observation underscores the paradox facing women who brought privacy claims in courts during this period: even when they won, they did not really win. One way or the other, their claims would be analyzed and decided according to the conventional perspectives of the individual judges before whom they appeared. Typical judges were likely to be strongly influenced by pervasive notions of a need to take special care to preserve women's modesty as among their chief virtues.

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107. *Roberson*, 171 N.Y. 538, 64 N.E. 442, 447.

108. Civil Rights Law, Laws of 1903, ch. 132, sec. 2, p. 308.

109. O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).

110. *Id.* at 439.

111. *See id.* at 437. Judge O'Brien, however, disagreed, saying "that argument doubtless has some weight with the 'promiscuous lay public' although it really imputes to the judges rather a low standard of integrity since it contains the suggestion that their decisions may be controlled by their private interests or personal affections." *Id.* at 448.

Focussing on the nineteenth-century standard of female modesty and seclusion presents the Warren and Brandeis article in a new light. This new focus may help to explain why certain early privacy cases which seem silly or petty today were brought in the first place, or why plaintiffs won. We have in mind cases like *Atkinson v. John Doherty & Co.*,[112] in which a widow sought to enjoin the use of her deceased husband's name and picture on a cigar label; *Schuyler v. Curtis*,[113] in which the erection of a statute in honor of a prominent woman was protested by her family; *Smith v. Doss*[114] in which sisters complained that their notorious father's faked death was republicized in a radio broadcast; and *Peay v. Custis*,[115] in which a female cab driver's photo was published in a satirical article about Washington, D.C. taxis.[116]

We also have in mind *Kunz v. Allen*.[117] In *Kunz*, a woman who had been shopping in a dry goods store was filmed by the owners without her knowledge or consent. The merchants used their film of her "face, form and garments"[118] to advertise their business in a local theatre, causing the plaintiff to become "the common talk of the people in the community."[119] It was said that people thought "that she had for hire permitted her picture to be taken and used as a public advertisement."[120] She brought suit for damages for invasion of privacy, but the case was dismissed for failure to show actual damages.

On appeal, the court reversed the judgment, contending that if strangers were permitted to use a person's pictures without her consent for advertising purposes, they could exhibit it anywhere: "It may be posted upon the walls of private dwellings or upon the streets. It may ornament the bar of the saloonkeeper, or decorate the walls of a brothel."[121] Because of these lurking dangers, the court agreed that no one's face and features should be subject to nonconsensual commercial uses and recognized a valid claim for invasion of privacy.

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112. 121 Mich. 372, 80 N.W. 285 (1899).

113. 147 N.Y. 434, 42 N.E. 22 (1895).

114. 251 Ala. 250, 37 So. 2d 118 (1948).

115. 78 F. Supp. 305 (D.D.C. 1948).

116. *Cf.* Milner v. Red River, 249 S.W.2d 227 (1952) (republication of deceased criminal indictment did not invade survivors' privacy).

117. 102 Kan. 883, 172 P. 532 (1918).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Kunz*, 102 Kan. at 884, 172 P. 532, 533 (quoting Pavesich v. New England Life Ins. Co., 122 Ga. 190, 218, 50 S.E. 68, 80 (1905)).

Similarly, in *Graham v. Baltimore Post Co.*,[122] the court held that a woman has a claim for the unauthorized publication of her picture in a newspaper advertisement.[123] While the judge's expansive treatment of the development of privacy rights was admirable, he presented a discriminatory face when he announced that, "the same act that might well be a violation of the right of privacy, as applied to a woman, might be dismissed, with legal indifference, as applied to a man."[124] He also suggested that the social standing of a female plaintiff and the media organ would be relevant to her privacy claim, writing that, "[a] debutante's picture published . . . in the social section of a respectable Sunday supplement, or in certain magazines . . . might be unauthorized, but at the same time be unobjectionable when weighed by accepted standards of propriety."[125]

Drawing from *Melvin v. Reid*,[126] and echoing Warren and Brandeis' cultivated rhetoric, the judge also announced that disclosure of the past life of an "otherwise exemplary woman"[127] was actionable when the story would merely increase readership by "pandering to the maudlin curiosity and insatiate appetite of growing debased public taste."[128] The judge went even further, referring to an east Indian case in which a neighbor was granted relief against a man who had built his house so that he could see from his window the neighbor's wife and daughters when they were unveiled, a disgrace to women under Hindu custom.[129] From this, the judge referred to the custom of American widows to wear veils, and asked: "May not a woman, choosing to withdraw to seclusion, withhold her countenance from public gaze, even on the street? Has the press any more right to force her face on the front page, than a photographer would have to lift her veil on the street and take her photograph?"[130]

It is clear that paternalistic, patriarchal concern for feminine modesty and virtuous seclusion provided the judge with the basis upon which to rationalize his decision. Later courts and judges often followed suit, sometimes treating interference with female modesty as

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122. (Balt. Super. Ct. 1932), reported in 22 KY. L.J. 108 (1933).

123. *Id.*

124. *Id.* at 116.

125. *Id.*

126. 112 Cal. App. 285, 297 P. 91 (1931) (film's depiction of former prostitute invaded her privacy).

127. *Graham*, 22 KY. L.J. 108, 116.

128. *Id.* at 116.

129. *Id.* at 116-17.

130. *Id.* at 119.

the paradigm privacy tort.[131] Some courts, like the court in *Graham*, explicitly acknowledged that the sex of the plaintiff is relevant to liability in privacy cases.[132]

IV.

A. THROUGH A WOMAN'S EYES

Published in 1890, the Warren and Brandeis article prescribed a legal right to a private home and family life that included rights protecting female modesty and seclusion. But 1890 was the year of

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131. *See, e.g.*, Bennett v. Norban, 396 Pa. 94, 99, 151 A.2d 476, 479 (1959) ("If a *modest* young girl should be set upon by . . . ruffians who did not touch her but by threats compelled her to undress, give them her clothes, and flee naked through the streets, it could not be doubted that her privacy had been invaded as well as her clothes stolen.") (emphasis added).

132. *Graham*, 22 KY. L.J. 108, 116 (1933); *see also* Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291, 294 (1942).

The argument that gender bias has affected the reasoning or outcome of privacy cases is strengthened by comparing early women's privacy cases with early cases in which men claimed violations of their privacy rights. Warren and Brandeis defended spirituality or personality, not reputation and property, as the essence of the privacy tort. Nevertheless, courts emphasized the inherent or economic importance of reputation, good name, and community standing in men's privacy cases. *See, e.g.*, MacKenzie v. Soden Mineral Springs Co., 18 N.Y.S. 240 (N.Y. Sup. Ct. 1891) (male physician successfully enjoined unauthorized publication of name in medicine advertisement); Marks v. Jaffa, 6 Misc. 290, 26 N.Y.S. 908 (N.Y. Sup. Ct. 1893) (unauthorized publication of man's name and picture in newspaper enjoined); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (artist sought damages for unauthorized use of his photograph in advertisement); Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 A. 392 (Ch. 1907) (action to enjoin use of name and likeness on medicine label and advertisements); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909) (senator sues over unauthorized use of name and likeness in medicine advertisement); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911) (action for unauthorized publication of boy's picture in advertisement); State ex rel. La Follette v. Hinkle, 131 Wash. 86, 229 P. 317 (1924) (politician successfully enjoined use of his name by unaffiliated group).

Although reputational and economic concerns loomed large in early men's privacy cases, injuries to sensibilities were not wholly ignored. *See, e.g.*, Marks v. Jaffa, 6 Misc. 290, 26 N.Y.S. 908, 909 (N.Y. Sup. Ct. 1893) ("Private rights must be respected, as well as the wishes and sensibilities of people."). But in men's cases, rhetorical appeal to a need for social standing and property was typically more pronounced than rhetorical appeals to feelings and sensibilities. Moreover, the sensibilities referred to in men's cases were never overtly or intentionally gendered as masculine traits. And finally, modesty concerns, so prevalent in women's cases, were virtually absent in the men's cases.

the New Woman, the Gibson Girl.[133] By then, women were coming to realize that they had had too much of the wrong kinds of privacy. Affluent, urban women sensed that they had been confined for too long to the "private sphere" of domestic and caretaking roles. As wives and mothers, women typically lacked the solitude and peace of mind which privacy romantics like Warren and Brandeis associated with homelife. Women also lacked privacy in the controversial sense of decisional autonomy over marriage, sex, and reproduction. Cloaked behind conventions of modesty and retreat, women had enjoyed few meaningful forms of personal privacy.

Warren and Brandeis published an article that was deeply conventional and conservative when it came to gender. Far from privacy revolutionaries, they were men of their times whose essay presents a certain elitist, patriarchic view of privacy's importance. When it came to women's privacy, the Warren and Brandeis article lacked vision.

A good way to make this point stick is to compare the Warren and Brandeis article to a book written in the same decade by the utopian feminist Charlotte Perkins Gilman.[134] Begun in 1888, two years before Bostonians Warren and Brandeis published *The Right to Privacy* from nearby Cambridge, Massachusetts, *Women and Economics*[135] was published in Boston in 1898. Gilman may not have read *The Right to Privacy*, but she devoted a chapter of her book to exploding myths the Warren and Brandeis article enshrined. *Women and Economics* had an "immediate and enormous impact on radical and reform writers and critics," elevating Gilman into the position of a leading intellectual of the women's movement.[136]

The subject of Gilman's book is American women's predominant role in the expanding industrial economy. Women, she said, are domestic toilers, economically dependent upon men for their necessities, luxuries, and status.[137] Denied free productive expression,[138] sex-

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133. *Cf.* R. ROSENBERG, BEYOND SEPARATE SPHERES 54 (1982) (By 1890 American magazine writers could point to the "New Woman," the physical, extroverted, independent woman with ambitions that included a life outside home.); L. BANNER, *supra* note 47 at 21-22 (New Women, typified by Charles Dana Gibson's artistic depictions in a series of *Life* magazine drawings, were praised by feminists and both praised and derided by the press.). *See also* C. SMITH-ROSENBERG, DISORDERLY CONDUCT 46 (1985).

134. *See* A. LANE, TO HERLAND AND BEYOND: THE LIFE AND WORK OF CHARLOTTE PERKINS GILMAN (1990).

135. C. GILMAN, *supra* note 10. The book was originally published under the name Charlotte Perkins Stetson. Gilman later remarried and again changed her name.

136. A. LANE *supra* note 134, at 253.

137. C. GILMAN, *supra* note 10, at 18-22.

138. *Id.* at 117-118.

distinction and attraction are women's means of "getting a livelihood."[139] While men expend their energies in "struggle in the marketplace as in a battlefield,"[140] women overestimate the so-called duties of their position and overconsume goods and services.[141] The resulting "sexuo-economic" relation of man and woman debases female character, commercializes love, and dampens family feeling.[142] Looking to the future, Gilman predicted that, "[t]he free woman, having room for full expression in her economic activities and in her social relation, will not be forced so to pour out her soul in tidies and photograph holders. The home will be her place of rest, not of uneasy activity."[143]

Gilman offered a traditional proverb to summarize her estimation of women's lot: "A woman should leave her home but three times—when she is christened, when she is married, and when she is buried."[144] The condition of women is "confinement to the four walls of the home,"[145] and yet confinement limits women's ideas, information, thought-processes, and powers of judgment. "[O]nly as we live, think, feel, and work outside the home, do we become humanely developed, civilized and socialized."[146]

The subject of privacy arises in *Women and Economics* as a powerful myth and ideal of homelife. The "privacy of the home," she wrote, is the reason given for limiting women to domestic roles. The popular assumption is that homes are crucial preserves of personal privacy. Someone must maintain them, and women have that role. To undercut the privacy argument for female confinement, Gilman made a number of realistic counter-arguments. She contended that, to a remarkable degree, our homes are not as private as we like to think.[147] If we are affluent, our homes are filled with servants and service providers who inevitably learn our closest secrets.[148] Family

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139. *Id.* at 38.

140. *Id.* at 119.

141. *Id.* at 119-120.

142. *Id.* at 121.

143. *Id.* at 257.

144. *Id.* at 65. Gilman offered another telling proverb: "The woman, the cat and the chimney should never leave the house." *Id.*

145. *Id.*

146. *Id.* at 222.

147. *Id.* at 258-260 ("The home is the one place on earth where no one of the component individuals can have any privacy. A family is a crude aggregate of persons of different ages, sizes, sexes, and temperaments, held together by sex-ties and economic necessity . . . .").

148. Of all popular paradoxes, none is more markedly absurd than to hear

homes without servants are also no guarantors of true privacy, especially in the case of women, who face special obstacles to meaningful privacy.[149] Moreover, the urban poor cannot afford the kinds of homes that answer the privacy needs of family members. Their crowded lives are "distinctly degrading."[150]

One of Gilman's proposed solutions to women's special privacy problems as "dependent mother, servant wife"[151] was for families to take their meals away from home or collaborate on meals to provide good food more efficiently.[152] Whatever the solution, the important point for Gilman was that women's lack of meaningful opportunities for individual privacy is tied to their economic role. To have real privacy, women would have to be freed from their limited role in the economy as mere housekeepers and mothers. But Gilman did not reject family, "home comforts," and intimacy as such. She simply argued for norms of privacy and private life that permit for women no less than for men "the highest development of personality"[153] consistent with "the society of those dear to us."[154]

> us prate of privacy in a place where we cheerfully admit to our table-talk and to our door service—yes, and to the making of our beds and to the handling of our clothing—a complete stranger . . . .

Id. at 255.

Xenophobia can be seen in Gilman's mentioning the possibilities that one's servant might be of "an alien race" and worse, "a stranger by breeding." *Id.* at 256. Gilman was not always above the class, race, and sex prejudices of her day.

> 149. The progressive individuation of human beings requires a personal home, one room each for each person. . . . [F]or the vast majority of the population, no such provision is possible. To women, especially, a private room is a luxury of the rich alone. . . . At present any tendency to withdraw and live one's own life on any plane of separate interest or industry is naturally resented, or at least regretted by the other members of the family. This affects women more than men, because men live very little in the family and very much in the world. . . . [T]he women and children live in the home—because they must. For a woman to wish to spend time elsewhere is considered wrong, and the children have no choice. . . . Yet the home ties bind us with a gentle dragging hold that few can resist. Those who do resist, and who insist upon living their individual lives find that this costs them loneliness and privation; and they lose so much in daily comfort and affection that others are deterred from following them.

Id. at 258, 259-60.

150. *Id.* at 258 ("The effects of such grouping on modern people is known in the tenement districts of large cities, where families live in single rooms; and these effects are of a distinctly degrading nature.").

151. *Id.* at 262.

152. *Id.* at 225-270.

153. *Id.* at 260.

154. *Id.* at 260, 271.

Warren and Brandeis' sentimental attachment to the privacy of the home takes on an interesting complexion in view of Gilman's claim that it is one of the great "fatuous absurdities, mere dangling relics of outgrown tradition, slowly moulting from us as we grow."[155] Granted, Gilman might have agreed that the press, gossip, and photography pose serious threats to modesty and feelings. She might have agreed with Godkin that reputational damage is a troublesome consequence of many privacy invasions. But she clearly would have eschewed uncritical appeal to the "privacy of the home" and "inviolate personality" as co-rationalizations for a new legal privacy right. What good is "inviolate personality" when one is female and not permitted the "highest development of personality?" How can private and domestic life be sacred precincts, if one cannot escape them or disaggregate oneself within them?

B. FIRST CENTURY THEORY

Over one hundred years after the Warren and Brandeis article, legal discussions of the privacy tort are largely silent about the social reality of gender bias and its impact on privacy law. Gender-conscious discussion of privacy has been too often relegated to constitutional law and to the abortion debate, where conceptual controversies about the application of "privacy" make fruitful inquiry difficult.[156] Privacy tort scholars have consistently overlooked concern about women's privacy as a force in the development of the privacy tort. Scholars seldom focus squarely on the possibility that gender may have a role in explaining the shape of precedent.

Kim Scheppele's comparison of *Sidis v. F-R Publishing Co.*[157] and *Melvin v. Reid*[158] is illustrative.[159] These two influential cases have analogous facts and different outcomes. They thus represent a special explanatory challenge to Scheppele's excellent effort to present a unified, contractarian, descriptive theory of the law of privacy and secrecy.

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154. *Id.* at 260, 271.

155. *Id.* at 248.

156. Allen, *Privacy, Private Choice and Social Contract Theory*, 56 CIN. L. REV. 461 (1987).

157. 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940).

158. 112 Cal. App. 285, 297 P. 91 (1931).

159. K. SCHEPPELE, LEGAL SECRETS 218-19 n.45 (1988).

As an eleven year old, William James Sidis had been a prodigy in mathematics.[160] A reporter for the *New Yorker* discovered that Sidis the adult worked as a clerk and lived in a tiny, run-down apartment. After an article disclosing these facts was published in the magazine's "Where Are They Now?" feature, Sidis sued for invasion of privacy. He lost. The plaintiff in *Melvin v. Reid*[161] was a former prostitute and one-time murder suspect. She won her case, claiming that the film "The Red Kimono" told her life story, using her actual maiden name in violation of her privacy rights. Finding in her favor, the court stressed that the plaintiff had become a housewife and now "lived an exemplary, virtuous, honorable and righteous life."[162]

Why did the former prostitute prevail and the child prodigy lose? How can the two cases be squared? Scheppele struggled to give an account of why Sidis lost his case and Melvin won hers.[163] A possibility Scheppele failed to draw out is that the gender of the plaintiffs made a crucial difference to the perceived seriousness of unwanted publicity. Viewed in social context, the woman who wished to conceal a past of prostitution may have presented a more compelling claim than the man who wanted to conceal that he had failed to have the brilliant career anticipated, precisely because she was a woman and he was a man.

It is impossible to rule out attitudes about gender in accounting for judicial behavior. But it does not follow that the courts' attitudes about gender are always salient features of privacy cases. Nor does it follow that the outcome of tort cases can be wholly explained or predicted by reference to gender and attitudes about it. In fact, our examination of privacy cases, including the cases state and federal courts have used as vehicles for recognizing privacy torts, suggests the contrary. In many cases in which plaintiffs were women, gender appears to have been of little significance to the existence, reasoning, or outcome of the cases.[164]

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

161. 112 Cal. App. 285, 297 P. 91 (1931).

162. *Id.* at 286.

163. It may seem difficult to square *Melvin* with *Sidis* since in both of them the subjects' unique and visible pasts made identification [i.e., use of their real names] reasonable. Perhaps the difference lies in the degree of harm caused by the connection in the persons' present life with the person's past deeds. Sidis was being identified with a praiseworthy past while Melvin was being identified with a discreditable past. As was mentioned earlier, . . . publicizing information that puts the subject in a good light does not seem to be actionable.

K. SCHEPPELE, LEGAL SECRETS, at 218-19 n.45 (1988).

164. *See, e.g.*, Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947)

Yet, for better or worse, concern for the boundaries of women's privacy has played a significant role in establishing and shaping legal precedent for the right of privacy. Cases involving characteristically female experiences, such as childbirth,[165] objectification by reason of beauty,[166] sexual harassment in the workplace,[167] breach of confidentiality in the welfare system,[168] rape publicity,[169] and adoption[170] have contributed to shaping state and federal doctrine and clarifying the meaning of legal privacy. Future privacy scholars must consider gender as they seek to explain the dimensions, successes, and failures of the privacy tort.

The relevance of gender is now widely discussed by legal scholars in many fields of public and private law, including, to a limited extent, tort law. But privacy tort scholars have not yet exploited the illumination—and the justice—gender sensitive analysis of the law potentially generates. We have already argued that Bloustein misread *De May* in his attempt to establish generic human dignity as the normative basis of all privacy law protections. Bloustein went astray when he sought to explain the past without acknowledging the significance of gender. Adding insult to injury, he posited a future class of aspiring Cinderellas who will delight in uninvited publicity and therefore have weak damage claims.[171]

(requirement of police photographing and fingerprinting of liquor industry workers not an invasion of privacy); Eick v. Perk Dog Food, 347 Ill. App. 293, 106 N.E.2d 742 (1952) (blind girl's photo used without consent in connection with advertising campaign).

Female gender may have had a subtle role in privacy cases like *Reed v. Ponton*, 15 Mich.App. 423, 166 N.W.2d 629 (1968) and *Hendry v. Connor*, 303 Minn. 317, 226 N.W.2d 921 (1975), since women were more likely to shop, tend to sick children, and be poor. Male gender was not an irrelevant feature of *Vanderbilt v. Mitchell*, 72 N.J. Eq. 910, 67 A. 97 (Ct. Err. & App. 1907) (man alleged that use of his name on his putative child's birth certificate invaded his privacy).

165. De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881).

166. Roberson v. Rochester Folding-Box, 32 Misc. 344, 65 N.Y.S. 1109 (1900), *aff'd*, 64 A.D. 30, 71 N.Y.S. 876 (1901), *rev'd*, 171 N.Y. 538, 64 N.E. 442 (1902).

167. Phillips v. Smalley Maintenance Services, 435 So. 2d 705 (Ala. 1983).

168. Harris by Harris v. Easton Pub. Co., 335 Pa. Super. 141, 483 A.2d 1377 (Pa. Super. 1984).

169. Hubbard v. Journal Publishing Co., 69 N.M. 473, 368 P.2d 147 (1962); Cox Broadcasting v. Cohn, 420 U.S. 469 (1975); B.F.J. v. Florida Star, 109 S.Ct. 2603 (1989).

170. Humphers v. First Interstate Bank, 298 Or. 706, 696 P.2d 527 (1985).

171. "Undoubtedly, there will be cases in which the publication of a name or likeness without consent is a boon and not a burden. Rather than suffering humiliation and degradation as a result, the beautiful but unknown girl pictured on the cover of a nationally circulated phonograph record

An insightful article by Robert Post[172] is nonetheless disappointing for reasons not unlike the reasons that the Warren and Brandeis article is disappointing. To his credit, Post observed that "care must be taken in evaluating the universalist pretensions of the tort of intrusion."[173] He further warned that, "[u]nder conditions of cultural heterogeneity, the common law can become a powerful instrument for effacing cultural and normative differences."[174] Yet, his article which purported to describe the interplay between communities and selves, omitted women's social experiences. The article blind-sides both the specific respects in which the traditional family and the mother-child relationship pose special challenges for the concept of the home as a socially defined precinct of privacy, and the role that concern for women has played in the development of the normative foundations of the privacy torts.

Post maintained "the common law tort of invasion of privacy offers a rich and complex apprehension of the texture of social life in America."[175] But his article failed to depict that texture as it pertains to women's characteristic social experiences. This is especially problematic in the face of the argument that women are more prone to certain kinds of privacy invasions inside and outside the home than are men.[176] Moreover, had Post analyzed the case law and doctrine with a keen eye toward cultural differences of gender, he might have reached some different theoretical conclusions.

Take, for example, his claim that in the case of intrusion, privacy rules can enable individuals to receive and express intimacy.[177] Post

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might be delighted at having been transfigured into a modern Cinderella. Suddenly, she is a national figure, glowing in the limelight, and her picture and name have become sought after commodities as a result. Has privacy been violated when there is no personal sense of indignity and the commercial values of name or likeness have been enhanced rather than diminished?

I believe that in such a case there is an invasion of privacy, although it is obviously not one which will be sued on and not one which is liable to evoke community sympathy or command anything but a nominal jury award."

Bloustein, *supra* note 65, at 990.

172. Post, *supra* note 11.

173. *Id.* at 977.

174. *Id.*

175. *Id.* at 959.

176. For several reasons, women are arguably more prone to privacy invasions when they leave their homes for work or recreation. First, the absence of effective sanctions against harassment and women's roles as inferiors and ancillaries emboldens intruders; second, the assumption that women are limited by their obligations permits

could not have been contemplating the cases involving sexual harassment and public searches of women styled as intrusion cases by the courts. In *Bennett v. Norban*,[178] a woman suspected but innocent of shoplifting was accosted in a parking lot by a retailer's employee who searched her pockets and handbag. The court held in her favor, as it did in the recent case of a maintenance worker whose boss pressed her for private facts about her sex life.[179] The privacy rules of intrusion in these cases most directly enable individuals to reject, not receive intimacy—and to refuse, not express it. In fact, the privacy tort as applied to women has often functioned to reinforce the social rules of inaccessibility applicable to females. Because he was blind to gender, Post seemed unaware of key dimensions of how privacy rights function in the social realm.

V.

A pair of employment-related cases decided in the 1980s protected women's privacy interests but avoided outmoded conceptions of female modesty and domesticity.[180] In the first case, a self-described shy and modest woman subjected to egregious privacy invasions relied on the "outrageous conduct" tort to defeat a summary judgment motion. In the second case, a woman's damage award for wrongs that included one of Prosser's four privacy torts—"unreasonable intrusion upon the seclusion of another"—survived an appeal.[181] Neither case suggested that all women have heightened sensibilities or that protecting women's privacy is of special importance to guarding their virtue or gender roles. Far from relying upon the assumption that women

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easy rationalization of prying into their affairs; and third, the higher expectations of moral conduct to which they are held encourages both surveillance and exposure. *See* A. ALLEN, *supra* note 11, at 141. A significant body of privacy tort law deals with women's problems enjoying privacy in public places such as restrooms, fitting rooms, dressing rooms, hospitals, the workplace, and on the streets. *See id.* at 123-152 (discussing cases).

177. *Id.* at 19.

178. 396 Pa. 94, 151 A.2d 476 (1959).

179. Phillips v. Smalley Maintenance Services, 435 So. 2d 705 (Ala. 1983).

180. Bodewig v. K-Mart, 54 Or.App. 480, 635 P.2d 657 (1981); Phillips v. Smalley Maintenance Services, 435 So. 2d 705 (Ala. 1983).

181. *See* Prosser, *supra* note 83, at 383. *See also* RESTATEMENT (SECOND) OF TORTS § 652(b) (1977) ("One 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.").

belong at home, or that women who venture into the public realm of private employment "get what they deserve," these cases implied that women who choose to work outside the home are entitled to working conditions free of highly offensive intrusions.

A. STRIP SEARCHING THE CASHIER

Linda Bodewig instituted a tort action for "outrageous conduct" in Oregon state court against her former employer, K-Mart, Inc., and a K-Mart customer, Alice Golden.[182] The suit stemmed from an incident in which K-Mart employees and Golden persistently accused Bodewig of theft and forced her to undergo a strip search. The defendants' motions for summary judgment on the grounds of consent and justification were granted by the trial court, but reversed on appeal. The case was remanded for trial.

In March 1979, Bodewig was a part-time cashier at one of K-Mart's discount department stores. She was ringing up Alice Golden's purchases when a dispute arose over the price of a pair of window curtains. While Golden went to investigate curtain prices, Bodewig moved her purchases to a customer service desk and began checking out another customer.[183]

When Golden returned, she insisted that she had left $20 in cash with her purchases at the register. Bodewig denied any knowledge of the money. The ensuing commotion led the store's thirty-two year old male manager to intervene. The manager's search of the check-out area, Bodewig's pockets, and the cash register turned up no evidence of error or theft. Golden still contended that Bodewig had taken her money.[184]

The manager then asked Bodewig to disrobe in the public restroom in view of a female assistant manager and Golden to prove that she had not taken the money. Bodewig complied. Even after the strip search uncovered no money, Golden continued to accuse Bodewig.[185]

On her return to work the next day, Bodewig was told that her register keys had been lost, and that she would have to work on the register with another clerk. Believing that the store was using this stigmatizing procedure to monitor her, Bodewig quit her job at the end of her shift.[186]

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182. Bodewig v. K-Mart, 54 Or.App. 480, 635 P.2d 657 (1981).
183. 635 P.2d at 659.
184. *Id.*
185. *Id.*
186. *Id.* at 660.

The facts of *Bodewig* provided a compelling picture of a young woman, who described herself as modest and shy, subjected to a humiliating strip search by her employer and an accuser. Yet, to its credit, the court did not resort to a circa 1890-style female modesty analysis of the intrusion.

The court determined that K-Mart's employer-employee relationship with Bodewig made it liable for reckless behavior that was "beyond the limits of social toleration."[187] The humiliating and degrading experience, conducted at the direction of a manager who had already ascertained that Bodewig had not taken the money and who only ordered the search to prove this to a customer, rose to the level of actionable outrageous conduct. The court rejected, as a matter of law, K-Mart's claim that Bodewig had consented to the strip search. The manager's position of power to hire and fire may have led Bodewig to believe she had no choice but to go along with his request.

The appeals court found no special relationship between Golden and Bodewig. It nevertheless held that Golden could be liable for "outrageous conduct" if a trier of fact found that Golden's having persistently accused Bodewig was deliberate, socially intolerable, and the proximate cause of emotional distress.[188]

The right to privacy doctrines spawned by Warren and Brandeis, and restated by Prosser, played no role in *Bodewig*. But the case plainly involved vindication of privacy-related interests through the law. In *Bodewig*, the outrageous conduct tort did the work a privacy tort might have done, and in a way that avoided gender stereotyping.

B. SEXUALLY HARASSING THE JANITOR

In *Phillips v. Smalley Maintenance*,[189] the privacy tort itself does the work. Brenda Phillips sued her employer in federal court for invasion of privacy and violations of the Civil Rights Act of 1964. Phillips claimed she had been wrongfully discharged from her position with a maintenance services firm, in violation of Title VII's sex discrimination proscriptions, after she refused to answer questions about sex and to perform oral sex. The trial court awarded damages and the defendant appealed. On appeal, the Eleventh Circuit certified to the Supreme Court of Alabama questions about the scope of state common law raised by Phillips' pendent privacy invasion claims. In

187. *Id.* at 661.
188. *Id.*
189. Phillips v. Smalley Maintenance, 435 So.2d 705 (Ala. 1983).

holding that the facts of the *Phillips*' case supported a claim for invasion of privacy, the court did not focus on female modesty. Like the Oregon Court of Appeals in *Bodewig*, the Alabama court depicted the plaintiff as a virtual economic prisoner and thus highly susceptible to her employer's offensive demands.

Shortly after Phillips started work as an "overhead cleaner" for Ray Smalley, he began calling her into his office several times a week. Each time he would lock the door and pose questions about her sex life. Knowing that her family was "significantly financially dependent"[190] on her salary, Smalley insisted that Phillips have oral sex with him or risk losing her job. Once, when Phillips forced her way out of his office, Smalley hit her "across the bottom" with his hand.[191] After a stressful encounter with Smalley, Phillips one day left work early. When she attempted to return, the defendant informed her that she had been "laid off," and she was presented a final pay check.[192]

Phillips' eventual Title VII and privacy invasion action alleged damages for chronic anxiety and disruption of family personal relations. The trial court awarded $2,666.40 in damages for lost wages, $10 for battery, and $25,000 for privacy invasion.

In its consideration of the privacy invasion claim, the Supreme Court of Alabama focused on the intentional and highly offensive intrusion into Phillips' solitude, seclusion, and private affairs. Relying upon the analysis of privacy rights contained in the *Restatement (Second) of Torts*[193] and case law,[194] the court held that Smalley's assault on Phillips' "personality" or "psychological integrity" was actionable. The court reasoned that Smalley's actions easily qualified as intrusion upon seclusion even though he did not act surreptitiously, publicize Phillips' private affairs to third parties, or get the sexual information and sex he demanded.[195] In reaching this conclusion, the court recognized that "Smalley, aware of the importance to Plaintiff of her regular income, rendered her, in effect, an 'economic prisoner.'"[196]

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190. *Id.* at 707.

191. *Id.*

192. *Id.*

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

194. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (state statute making it illegal to distribute contraceptives to unmarried persons found to be in violation of the Equal Protection Clause); Griswold v. Connecticut, 381 U.S. 479 (1965) (fundamental rights entitled to privacy protection); Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959) (serious interference with anonymity and unreasonable intrusion).

195. Phillips v. Smalley, 435 So. 2d at 711 (Ala. 1983).

196. *Id.*

The future of the common law privacy tort at times appears uncertain.[197] *Bodewig* suggests that at least some privacy interests could be protected through actions for emotional distress. But if the privacy tort survives as a distinct cause of action, perhaps we shall increasingly observe in women's cases the break with the past that is evident in the language of *Phillips*. In both *Bodewig* and *Phillips*, women satisfactorily performing employment duties were subjected to gross invasions of their privacy by employers who exercised economic and psychological control over them. Recognizing that the abuse lay in a denial of the right to invasion-free employment rather than in offended virtue alone, the courts properly resolved the issues by emphasizing the right to work and not gender-biased claims of female modesty.

VI. Conclusion

The Warren and Brandeis article initiated a doctrinal revolution in tort law. But the article was business as usual when it came to gender. In the nineteenth century, popular views concerning women's limited capacities, proper role, and special virtues were reflected in legislation and court opinions. The law of marriage and family contributed to the problem of women's privacy within the home. That problem was the problem of too much of the wrong kinds of privacy—too much modesty, seclusion, reserve and compelled intimacy—and too little individual modes of personal privacy and autonomous, private choice.

Warren and Brandeis' plea for a right to privacy criticized interference with home life, personality, and modesty stemming from unwanted publicity and circulation of photographs. Unlike their contemporary, Charlotte Perkins Gilman, Warren and Brandeis were not critical of the ways in which homelife, assertions of masculine personality, and norms of female modesty contributed to women's lacking autonomous decisionmaking and meaningful forms of individual privacy. From the perspective of Gilman's feminism, Warren and Brandeis' version of the right to privacy was approaching obsolescence at its inception.

The first century of privacy law scholarship launched by Warren and Brandeis has produced increasingly sophisticated analyses. Continuing the trend, we must hope that the next century also produces careful scholarly analyses of the role that attitudes about gender have played in the development of privacy law. We must hope also that courts will turn self-consciously to the gender factor in privacy tort

197. *See generally* Zimmerman, *supra* note 86.

cases. Early jurists sometimes did so, but with an eye toward protecting their patriarchic visions of feminine modesty and domesticity. Future courts adjudicating privacy claims have an opportunity to focus on gender in new and better ways. A few have already done so. Today, women's predominate social status as ancillaries and inferiors gives rise to egregious losses of privacy, thoughtlessly or maliciously inflicted.[198] The privacy tort is potentially a vehicle for legitimating women's claims for peace of mind, dignitarian respect, and fair employment.

198. Women's privacy is an important but not consummate end. It can be problematically disregarded by the courts. *See* Yoekel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (Wis. 1956) (woman photographed using toilet in bar failed to recover in privacy action). But women's privacy can be reasonably placed second to business and economic concerns. *See* Lewis v. Dayton, 128 Mich.App. 165, 339 N.W.2d 857 (1983). *Lewis* shows that women's modesty is not the all consuming interest it once was. The court in *Lewis* held that there was no invasion of privacy where a retailer had posted signs warning customers that fitting rooms were under surveillance to deter theft.