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THE RIGHT OF PRIVACY AND FREEDOM OF THE PRESS

Thomas I. Emerson*

As an independent concept the right of privacy is a relative late-comer to the system of individual rights. It made its first appearance in American law as a tort, a civil suit for damages or an injunction to protect against an unwarranted invasion by others of the vague "right to be let alone."¹ Originated by Samuel D. Warren and Louis D. Brandeis in their famous article in the Harvard Law Review in 1890,² the privacy tort was given structure by Dean William L. Prosser in 1960³ and broader dimensions by Professor Edward J. Bloustein⁴ and Professor Alan F. Westin⁵ shortly thereafter. In the form of a constitutional right against governmental interference with the inner zones of space necessary to individual dignity and autonomy, a right of privacy was first established in Griswold v. Connecticut⁶ in 1965. A right of privacy, in the form of protection against government disclosure of the personal affairs of an individual under right to know principles, came to the fore with the passage of the Federal Freedom of Information

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¹ This phrase was introduced by Judge Cooley in his T. COOLEY, TORTS 29 (2d ed. 1888).
⁴ Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. REV. 962 (1964) [hereinafter cited as Human Dignity].
⁵ A. Westin, PRIVACY AND FREEDOM (1967).
⁶ 381 U.S. 479 (1965).
Act in 1966. And a right of privacy in the form of limitations upon the power of government or private enterprises to obtain, store in computers, or disseminate large quantities of information about a particular person, is just now struggling to be born. It is unsurprising, therefore, that the theoretical foundations of the right of privacy are relatively unformed and, indeed, are the subject of much current controversy. Efforts to formulate a comprehensive or unified concept, embracing all aspects of the right of privacy, have thus far not met with overwhelming success. And the application of such principles as do exist to particular concrete situations has not yet marked out fully discernable patterns.

On the other hand, freedom of the press has a long and well-established history in American law. Its origins stem from the abandonment of the English censorship laws at the end of the seventeenth century. It received public attention and legal support in America as early as the trial of Peter Zenger in 1735. And it has been placed upon firm constitutional footing in recent times by such Supreme Court decisions as New York Times Co. v. Sullivan in 1964, substantially limiting the ancient law of libel in the interest of freedom of the press; New York Times Co. v. United States in 1971, the Pentagon Papers case, which upheld freedom of the press even against insistent claims of national security; Miami Herald Publishing Co. v. Tornillo in 1974, protecting the press against legislative efforts to mandate a right of access for persons attacked in the press; and Nebraska Press Association v. Stuart in 1976, forbidding judicial interference through the use of gag orders on the press. The wall of immunity thus constructed for the press has some gaping holes, including the unwillingness of the Supreme Court to close off all exceptions in the

8 See generally A. Westin, supra note 5, at 158–68.
10 See THE TRIAL OF PETER ZENGER (V. Buranelli ed. 1957).
12 403 U.S. 713 (1971).
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cases just mentioned; the Court's refusal to accept reporter's privilege;\textsuperscript{15} the necessary government intervention in the electronic media because of the scarcity of physical facilities;\textsuperscript{16} the extension of government search and seizure powers into the operations of the press;\textsuperscript{17} and similar weaknesses. Nevertheless, as a general proposition, the constitutional foundations for a free press are solidly established in American law and show no signs of serious deterioration.

Against this background the urgent need for a right of privacy in the system of individual rights is manifest. The constantly increasing scope of governmental intercession in most areas of national life, the development of modern technology for ferreting out and monitoring everyone's affairs from womb to tomb, the closing in of physical and psychic space for the average person, all make the need for creation of an adequate law of privacy imperative for the future health of our society. It is essential, therefore, to reconcile this new area of individual rights with the established principles of freedom of the press. There are, of course, manifest dangers in this undertaking, because governmental interference with freedom of expression in any form inevitably poses a threat to the system of individual rights. Nonetheless we must make room for the new right of privacy. The press would be well-advised to accept the fundamental necessity of a privacy right and to assist in the search for an appropriate accommodation.

Actually, the areas of conflict between the right of privacy and freedom of the press are quite limited, and the task of reconciliation is by no means insurmountable. At most points the law of privacy and the law sustaining a free press do not contradict each other. On the contrary, they are mutually supportive, in that both are vital features of the basic system of individual rights. At other points there is only a minor likelihood of conflict. This is true, for instance of the protections afforded privacy through the law of trespass, theft, copyright and the like, where the press has long adjusted to limitations on the gathering of news, and the issues are hardly matters of controversy. There are, however, two major areas where an accommodation must be developed. One concerns the privacy tort, where the privacy right comes

\textsuperscript{15} Branzburg v. Hayes, 408 U.S. 665 (1972).
into sharp contrast with the right to publish. The other involves the right of the press to obtain information from the government, where invocation of right-to-know principles to force disclosure may run squarely into an individual's claim that data about one's personal affairs should not be disseminated to others. The two problems involve somewhat different considerations and will therefore be discussed separately.

I. THE RIGHT TO PUBLISH AND THE PRIVACY TORT

A. The Problem

Protection of the right of privacy through a civil suit for damages — the privacy tort — has developed slowly and uncertainly, but firmly, partly through legislation and partly through expansion of the common law. Analysis of privacy tort cases by Dean Prosser revealed that they fell into four categories. It has been a matter of dispute whether all four categories can be embraced within a single, comprehensive theory of privacy or whether each category represents a separate and distinct aspect of the privacy tort. Passing over that controversy for the moment, one can say that Prosser's classification does fairly describe the actual results reached in the privacy decisions.

The four categories into which Dean Prosser divided the cases are: (1) intrusion upon a person's solitude or seclusion; (2) appropriation, for commercial purposes, of a person's name, likeness, or personality; (3) public disclosure of embarrassing private facts about a person; and (4) publicity that places a person in a false light in the public eye. Of these, the first two have not raised serious problems in terms of a conflict with freedom of the press. Intrusion upon solitude or seclusion can ordinarily be dealt with through concepts of trespass law. Limitations upon newsgathering imposed by the law of trespass have never been thought to infringe upon any right of the press. Appropriation of a name, likeness, or personality for purposes of advertising or similar commercial gain raises issues that are normally treated under principles of property law. Although the line between advertis-

18 Prosser, supra note 3.
19 See Human Dignity, supra note 4.
ing for commercial gain and publication of news or information may be difficult to draw at times, the courts have generally been able to mark out satisfactory boundaries. Commercial speech is entitled to some protection under the first amendment but no one has suggested that freedom of speech or press authorizes impairment of copyright or similar property rights solely to promote the sale of commodities or services for a profit.

The two other Prosser categories do raise serious first amendment problems. Publication of true facts about a person, even though they are critical or embarrassing, is a core feature of the freedom of the press. The false light cases also raise issues that threaten freedom of the press. These fall into two subcategories: those where the facts are represented as true but are in fact false or misleading, yet are not defamatory; and those where the facts are presented as wholly or partly fiction. Limitations upon either subcategory can seriously curtail an "uninhibited, robust and wide-open" press. Established legal doctrines other than the concept of privacy do not afford any grounds for restrictions upon the press as to either of these categories.

It is necessary at this point to compare the law of privacy and the law of defamation. Three major differences should be noted. In defamation law only statements that are false are actionable; truth is, almost universally, a defense. In privacy law, other than in the false light cases, the facts published are true; indeed it is the very truth of the facts that creates the claimed invasion of privacy. Secondly, in defamation cases the interest sought to be protected is the objective one of reputation, either economic, political, or personal, in the outside world. In privacy cases the interest affected is the subjective one of injury to the inner person. Thirdly, in defamation cases, where the issue is truth or falsity, the marketplace of ideas furnishes a forum in which the battle can be fought. In privacy cases, resort to the marketplace simply accentuates the injury.

Conversely, there are marked similarities between the two bodies of law. The major common ground involves the dynamics of government intervention. Particularly in false light cases, but also in other privacy cases, as in defamation cases, the chilling effect of government controls inevitably tends to produce self-censorship. Any rules of law developed to deal with the situation must allow the press sufficient "breathing space" to perform its traditional function.
B. The Current State of the Law

State and lower federal courts have on a number of occasions found invasion of a statutory or common law right of privacy in embarrassing disclosure cases and in false light cases despite freedom of the press claims. In the former category they have essentially endeavored to balance the degree of intrusion on an individual’s privacy against the “newsworthiness” of the publication. If the communication is considered sufficiently newsworthy there is no liability; if it is not, and if its publication is felt to be offensive to a person of ordinary sensibilities, the privacy claim is allowed. In false light cases the courts tend to follow the rules employed in defamation matters, allowing greater leeway where the publication involves a “public figure” than where the subject is a more private person. These decisions thus establish that the right of privacy can override first amendment defenses under certain circumstances. But the rules of law are exceedingly vague, the theory not clearly formulated, and the results by no means consistent.

The Supreme Court has thus far not clarified the situation to any substantial degree. It has dealt with privacy tort questions in three cases, but has avoided addressing most of the core issues.

The first Supreme Court ruling was in *Time Inc. v. Hill*, decided in 1967. In that case *Life* magazine had published a story about the opening of a new play, *The Desperate Hours*, which was based on a widely publicized episode three years before in which the Hill family had been held hostage in their home by three escaped convicts. The Hills had attempted to avoid further publicity and had moved to another state. The *Life* account of the events was not entirely accurate in that it depicted the father and son as having been beaten and the

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daughter as having been subjected to verbal sexual abuse. The portrayal, however, was not defamatory. Hill sued for damages, under a New York statute, alleging that *Life* had revived a painful episode, causing serious emotional and nervous illness to his wife. In the New York courts he recovered $30,000 compensatory damages.\(^{22}\)

The Supreme Court reversed and sent the case back for a new trial. Six Justices were of the opinion that *Life* could be held liable for "false reports of matters of public interest," but only if there was proof of "actual malice."\(^{23}\) The standard of "actual malice" had been previously established in *New York Times Co. v. Sullivan*\(^{24}\) as a constitutional requirement for finding liability in defamation cases. It required proof that *Life* had published the statements knowing they were false or in reckless disregard of whether they were false or not. Justices Black and Douglas concurred in the reversal on the broader ground that the first amendment prohibited any restriction on communications relating to matters in the public domain.\(^{25}\)

The Supreme Court in *Time, Inc. v. Hill* was careful to limit its opinion to the false light situation before it. In a footnote the Court disclaimed any intention of considering other aspects of the privacy tort: "This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.'"\(^{26}\)

The second case in which the Supreme Court touched on privacy issues, *Cantrell v. Forest City Publishing Co.*,\(^{27}\) decided in 1974, was also a false light case. A newspaper story about a poverty stricken family, whose husband and father had been killed in the collapse of a bridge, contained false but not defamatory statements about the attitude of the mother and the living conditions of the family. The Court,


\(^{23}\) 385 U.S. at 388; *id.* at 415 (Fortas, J., dissenting).

\(^{24}\) 376 U.S. 254 (1964).

\(^{25}\) 385 U.S. at 398 (Black, J., dissenting).

\(^{26}\) *Id.* at 383 n.7 (quoting in part from Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).

\(^{27}\) 419 U.S. 245 (1974).
applying the actual malice rule, upheld a judgment for the family. Justice Black was no longer on the Court and Justice Douglas alone dissented, contending that the first amendment protected any report on "matters of public import." 28

After Time, Inc. v. Hill but before Cantrell the Supreme Court had held in Gertz v. Robert Welch, Inc. 29 that the actual malice rule applied in libel cases only where the false statement involved a public official or a "public figure," and that in cases of a private person the State could adopt any standard except one of absolute liability. In Cantrell the Court found it unnecessary to decide whether the same modification of the actual malice rule would apply in false light privacy cases. Since actual malice had been proved in Cantrell, "this case present[ed] no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in Time, Inc. v. Hill applies to all false light cases." 30

The third Supreme Court decision, Cox Broadcasting Corp. v. Cohn, 31 decided in 1975, did reach the issue of whether liability could be imposed, under a privacy theory, for a truthful statement. The case involved a suit under a Florida statute which prohibited publication of the name or identity of a rape victim. The name had been obtained from court records, which were open to public inspection, and broadcast in the course of a news report about the court proceedings in the case. The Supreme Court, with one Justice dissenting on other grounds, held that the broadcast was constitutionally protected. 32

The majority opinion in Cox Broadcasting noted the growing trend toward recognition of a privacy right and the broader implications of the case: "[P]owerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant

28 Id. at 255 (Douglas, J., dissenting).
30 419 U.S. at 250–51.
32 420 U.S. at 495.
The Court continued, after citing the Warren-Brandeis article: "More compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy." And it observed that the broadcasting station had urged "upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities." The Court nevertheless refused to plunge into deeper waters and confined its decision to the narrow position that the state could not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."

Thus the Supreme Court has held that interests of privacy, like interests in reputation, can be protected against false statements, at least where actual malice has been demonstrated. And it has made clear that truthful statements derived from public records may be published even though they may impinge on areas of privacy. Beyond this point the Court has not gone. The constitutional basis for the privacy tort thus remains largely an open question. Exploration of that issue requires examination of the value structures underlying the right of privacy and the right to freedom of expression.

C. Theories of the Right to Privacy

The right of privacy is clearly a vital element in any system of individual rights. Essentially it is designed to support the individual, to protect the core of individuality, in the relations of the individual to the collective society. As such it is designed to mark out a sphere or zone in which the collective may not intrude upon the individual will. It thus differs from time to time, and from society to society, depending on where the line is drawn between individual autonomy and collective obligation.

33 Id. at 487 (footnote omitted).
34 Id. at 488.
35 Id. at 489.
36 Id. at 491.
So far there is general agreement. Beyond this point, however, great difficulty has arisen in defining the right of privacy in such a way as to give it specific content and to distinguish it from other elements in the system of individual rights. Warren and Brandeis, going back to Thomas Cooley, originally defined privacy as a broad "right to be let alone." Subsequent attempts were made to refine and narrow the concept. Dean Prosser, as we have seen, broke it down into four disparate rights. Professor Alan Westin takes as his definition "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Professor Richard Parker considers privacy to be "control over when and by whom the various parts of us can be sensed by others."

On the other hand, some recent efforts to delineate the privacy area have reverted to more sweeping language. Professor Edward Bloustein considers privacy as involving the "interest in preserving human dignity and individuality." Professor Milton Konvitz refers to it as the "claim that there is a sphere of space that has not been dedicated to public use or control." Professor Paul Bender defines privacy as "the freedom to be one's self" and stresses that it is confined to activities that "do not affect the legitimate interests" of others. And Professor Tom Gerety, in what is perhaps the most successful effort to date, postulates three elements as comprising privacy: "autonomy, identity, and intimacy."

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37 Warren & Brandeis, supra note 2, at 195, 205.
38 Prosser, supra note 3.
39 A. Westin, supra note 5, at 7.
40 Parker, A Definition of Privacy, 27 Rutgers L. Rev. 275, 281 (1974) [emphasis deleted].
41 Human Dignity, supra note 4, at 1005.
These brief formulations do not, of course, do justice to the efforts of the authors just quoted to give meaning to the concept of privacy. Yet they do demonstrate how elusive the concept can be. A further dimension is added to our conception of privacy, however, if we look at the problem in terms of the more specific functions that privacy performs in our society. These have been summarized by Professor Westin as including (1) protection of personal autonomy — being free from manipulation or domination by others; (2) permitting emotional release — relief from the pressure of playing social roles; (3) opportunity for self-evaluation — a chance to integrate one's experience into a meaningful pattern and exert one's individuality on events; and (4) allowance of limited and protected communication — permitting one to share confidences and to set the boundaries of mental distance.45

Similarly, Professor Bloustein has described the role of privacy in maintaining autonomy:

The man who is compelled to live every minute of his life among others and whose every need, thought, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.46

Professor Charles Fried has stressed a somewhat different aspect of the significance of privacy in our lives:

It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most funda-

45 A. Westin, supra note 5, at 32–39.
46 Human Dignity, supra note 4, at 1003.
mental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence.47

An understanding of the functions of privacy illuminates the problem. But it does not supply a unified theory which can serve as a foundation for development of a comprehensive law of privacy. At least so far as the privacy tort is concerned, perhaps the best we can do at this time is to accept Professor Gerety's formulation. According to his analysis the right of privacy consists of protection for the three elements which are at the core of individuality. The first is autonomy, which is necessary in order to retain control over one's destiny as an individual. The second is identity, which is necessary to develop one's potential as an individual. The third is intimacy, which is the element that distinguishes privacy from the more general concept of liberty. All three elements take on form and substance in the light of the functions served by privacy in a modern technological society.

Even if we agree on these outlines of a value structure, however, it must be admitted that we are still some distance from having a definite, workable theory of privacy. A unified concept, which will embrace the privacy protected by the tort action, the privacy safeguarded by the constitutional right against government control, the privacy necessary to limit the collection or dissemination of information about us, and perhaps other aspects of privacy as well, has thus far escaped our grasp. In my judgment, however, this state of affairs is not necessarily a cause for alarm. Privacy is a developing right. It must emerge gradually from the traditions, experiences, and needs of our society. One cannot expect it to take final, concrete shape at this point in our history.

If the evolution of a privacy right is to be successful, however, we must keep in mind that it is a theory of privacy that we are searching for. We will not make much progress if we frame the problem in terms of a broader quest for "liberty." The recent tendency of the Supreme

Court to look upon privacy as merely an undifferentiated aspect of an amorphous right to "liberty" is a regressive step.\textsuperscript{48} We must start from the premise that there exists a concrete area of privacy, not merely a generalized right to "liberty," and that the boundaries of that area can over a period of time be ascertained.

\textit{D. Formulation of Legal Doctrine}

Our next problem is to translate the basic right of privacy theory into legal doctrine in the privacy tort area. So far as possible the individual must know to what extent privacy will be protected, the press must be able to assess its potential liability for infringement, and the judicial system must have appropriate guidelines for accommodating these often conflicting interests.

The first issue in this process concerns the fundamental tension between the right of privacy and freedom of expression. In broad outline the resolution of the conflict between the two seems reasonably clear. The purpose of establishing a right of privacy is to protect certain areas of individual autonomy, identity, and intimacy from any intrusion by society at large. This exclusion of collective action would extend to the rules developed by the society for safeguarding freedom of expression. Insofar as the guaranty of freedom of expression serves social interests — in discovering the truth, assuring participation in decisionmaking, and facilitating social change — the individual right of privacy would plainly take precedence over the collective interest. Insofar as freedom of expression serves individual interests — primarily in encouraging self-fulfillment — the two individual rights would seem to be in conflict. In such a situation, however, the guiding principle would be that the exercise of an individual right which injures another person would not be favored. Hence, here too the right of privacy would prevail over freedom of expression.\textsuperscript{49}

If we accept this analysis, then the preferable legal doctrine would be expressed in definitional terms. That is to say, the task would be to


\textsuperscript{49} For a more detailed discussion of the relationship of the right of privacy to the first amendment, see T. Emerson, \textit{The System of Freedom of Expression} 544–48 (1970).
define the right of privacy and accord that right full protection against claims based on freedom of the press. In view of our inability to articulate a precise theory of privacy, however, the definitional approach faces serious problems: Moreover, the courts have not been willing to follow this course, and show little disposition to do so in the immediate future.50

The alternative is the formulation of legal doctrine in terms of a balancing process, whereby the interest in privacy is balanced against the interest in freedom of the press. While this approach lessens the need for a clear-cut definition of privacy, it contains all the disadvantages that inhere in balancing tests used in the area of individual rights. It is difficult to find comparable units to balance against each other, the social interests are likely to prevail over the individual interest, and the whole process is so loose and vague that it affords few guidelines for those applying the test or those affected by it. Nevertheless, it may be possible to refine the balancing process by isolating specific types of interests, rejecting some claimed interests, giving special weight to others, utilizing presumptions, and otherwise laying the basis for a common law development of the issues.

One starting point is to give special weight to publications that are "newsworthy" or relate to "matters of public interest." This solution, however, is hardly satisfactory. The terms used are completely open ended. Anything that is published is by definition "newsworthy" and a "matter of public interest." Otherwise it would not be published. Such a standard, therefore, either evades the issue or gives exclusive weight to first amendment rights. Indeed, this standard was used by Justice Black and Justice Douglas to achieve exactly the latter result.51

A more attractive formula is that suggested by Professor Bloustein: to focus on the public's "need to know."52 Communication

50 See, e.g., Whalen v. Roe, 429 U.S. 589 (1977) (Supreme Court adopted a balancing rather than a definitional approach); Roe v. Wade, 410 U.S. 113 (1973) (same).


52 See First Amendment and Privacy, supra note 20. For a proposal which modifies Bloustein's formula, see An Accommodation, supra note 20.
about matters of which the public has a substantial "need to know" would not be subject to liability; otherwise the right of privacy would prevail. This standard would give weight to the major social interests protected by the system of freedom of expression: the search for truth, participation in decisionmaking, and facilitation of social change. And in some respects it is more manageable than other formulations. But there are serious problems with this approach. The formula is still vague. It gives almost exclusive weight to social interests rather than to the individual interest. And it requires the government to make a determination as to what speech is of value and what speech is not, a dangerous threat to any system of free expression. In short, while the need to know doctrine has possibilities it is not necessarily the best answer.

Another approach, and one that seems to me more fruitful, would place more emphasis on developing the privacy side of the balance. It would recognize the first amendment interests but it would give primary attention to a number of factors which derive ultimately from the functions performed by privacy and the expectations of privacy that prevail in contemporary society. Such an approach would involve the following:

(1) Emphasis would be put on the element of intimacy in determining the zone of privacy. Thus, so far as the privacy tort is concerned, protection would be extended only to matters related to the intimate details of a person’s life: those activities, ideas or emotions which one does not share with others or shares only with those who are closest. This would include sexual relations, the performance of bodily functions, family relations, and the like.

(2) Disclosures incidental to the formal proceedings for enforcement of the law by judicial or administrative tribunals would not be protected on privacy grounds. Administration of the legitimate rules of the collective society would be considered a proper function of government, which must be conducted in the open, and hence even unwilling participation in such events should not be grounds for invoking protection of the right to privacy.

(3) The extent to which a person has waived claims to privacy would be considered in the equation. Thus, a person who had voluntarily injected himself or herself into public affairs would not be protected by the privacy right as to matters relevant to his or her public status.
Other considerations could be added to this list. Their substance and weight would depend on developing experience. Over a period of time they would give specific content and greater predictability to the balancing process.

There is one final factor which is of prime importance in formulating legal doctrine in privacy tort law. It concerns the dynamics of imposing governmental controls upon the press. Any satisfactory standard of liability must allow the press "breathing space." It must not force the press into self-censorship, or in any way force it to refrain from legitimate expression, by reason of uncertainty as to where the boundaries lie, fear of costly litigation, or a desire to avoid possible trouble. Pressures on the press of this nature were given decisive weight in formulating the actual malice rule in defamation cases. The same considerations are applicable in privacy tort cases. They operate, of course, in the direction of imposing strict limitations upon the liability of the press.

Finally, it should be emphasized that the foregoing attempt to frame legal doctrine is addressed only to the problems of privacy tort cases. The proposals made here do not necessarily apply in all areas of privacy law. Such a comprehensive formulation must await development of a unified theory of the privacy right.

E. Application of Legal Doctrines

In order to give some content to the above proposals for creation of legal doctrine it is necessary to apply the various formulae to typical fact situations that arise in the area of privacy tort. Only a brief summary, by way of illustration, is possible here.

With respect to the false light cases, those that involve mere fictionalization do not seem to pose a problem under any theory. If the author, while writing about an identifiable person, makes clear that some of the events recounted are fictitious, the reader is on notice of that fact and no invasion of privacy occurs. The most that can be claimed in such a situation is the appropriation of an identity, in violation of a property right; but surely such a property claim should not be recognized. Were this not the case historical novels, such as Doctorow's *The Book of Daniel*, a fictional account of the two sons

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of Julius and Ethel Rosenberg, would not be publishable without their consent.

In false light cases where false but nondefamatory statements purporting to be true are made, different issues arise. If the Black-Douglas doctrine of no liability for publication on "matters of public interest" were followed there would, of course, normally be no cause of action. The Bloustein "need to know" theory would probably result in liability in most cases where any misrepresentation of a person's identity occurs. The courts have consistently taken the position that false statements have no social value and they would almost certainly conclude that false information was not something the public needed to know. The argument of John Stuart Mill that even expression that is false has social importance, in that it evokes response, stimulates rethinking and otherwise stirs debate, does not seem to have enough appeal to counteract this trend. The only limitation here would lie in recognition of the dynamics of controls. This might result in application of the "actual malice" rule.

A balancing theory with emphasis on delineating the right of privacy would probably arrive at different results. The invasion of privacy in false light cases normally consists only in the distortion of identity. There would be no intrusion on privacy, however, unless the element of intimacy were also present. In *Time, Inc. v. Hill*, for instance, the intimacy factor was weak or nonexistent. As Justice Douglas concluded, that case was really not a privacy case at all. The same may be said of the *Cantrell* fact situation; if any recovery were to be allowed in such a case it would be under a libel theory for injury to reputation. In other words these so-called false light cases would be treated the same as the embarrassing disclosure cases. Truth or falsity would in effect be irrelevant. Again, the opposite result would mean that a biography, such as Leonard Mosley's account of the Dulles family, could only be published on condition that it was completely accurate in all respects. Even an actual malice rule would not eliminate the risks, and costs, of litigation.

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54 J.S. MILL, ON LIBERTY (London 1859).
55 385 U.S. at 401 (Douglas, J., concurring).
The embarrassing disclosure cases are undoubtedly the most difficult to resolve. The Black-Douglas doctrine of "matters of public interest" would constitute the most narrow rule, allowing recovery in only the most extreme cases if at all. The Bloustein "need to know" doctrine would result in liberal recovery. And a balancing theory with the focus on privacy factors would occupy an intermediate position.

The proper result in some embarrassing disclosure cases is relatively clear, except under the Black-Douglas theory. Thus the situation in *York v. Story*, where police officers took and circulated nude pictures of a woman who had complained to them of an assault, presents a plain case. So also would *Barber v. Time, Inc.*, in which a story with photographs was published about a woman confined to a hospital with a disease that resulted in gross obesity. The alleged facts in *Doe v. Roe*—that a psychiatrist had published a case study of a patient without sufficiently concealing the patient's identity—is another example. Likewise publication of private telephone conversations illegally obtained by wiretapping, or of the recording of a private party at which Martin Luther King was present, further illustrates the type of case where liability should result.

Another line of privacy tort cases involves the publication of embarrassing facts about a person's past after that person has reformed or changed lifestyles. In *Sidis v. F-R Publishing Corp.*, one of the most famous of these, the Second Circuit denied recovery in a case involving a story in the *New Yorker* about a child genius, well-publicized at one time, who later sought to live a life of quiet and solitude. In contrast, the California Supreme Court in *Briscoe v. Reader's Digest Association* upheld the privacy claim of a former hijacker based on an article, published eleven years after he had reformed, which referred to his previous conviction. Under the Bloustein doctrine liability would exist in these cases unless the name of the person involved was withheld; the public's need to know would extend

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57 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).
58 348 Mo. 1199, 159 S.W.2d 291 (1942).
60 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).
61 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).
to the information, but not to the identity of the individual. Under a theory based on a more careful delineation of privacy, however, the opposite result would be reached in most of these cases. Usually the element of intimacy is not present in such cases. Moreover, as in Briscoe, the facts often relate to a law enforcement situation. By and large these cases concern facts that were clearly publishable at the time they occurred and the lapse of time would not ordinarily change the result.

Legislation prohibiting disclosure of the names of rape victims, or of other victims such as in spousal abuse cases, would fare differently under different theories. The Bloustein approach would lead the courts to uphold such laws. Unless there is some unusual circumstance which makes the name of the victim particularly significant, it would be argued, the public has no need to know the identity of the person. Such a conclusion would, of course, run counter to the Supreme Court's decision in Cox Broadcasting, at least in some aspects. The theory proposed here, on the other hand, would not sustain such legislation. Where public proceedings are commenced to enforce a valid law, the personal affairs of those involved cannot be preserved. This rule would not require, however, that government officials release the name of the victim prior to the institution of a prosecution. Such an issue concerns, not the right to publish but the right to obtain information in the government's possession. This result is therefore consistent with the Cox Broadcasting case, in which the Court reserved decision on the right of the government to withhold information in its files.62

Other problems involve matters which face the press frequently but are not ordinarily litigated in privacy tort cases. For example, to what extent is it proper for the press to publish stories about the sexual activities of public officials, public figures, or others? The Bloustein theory and the theory proposed here would be likely to reach very much the same result in such situations. The need-to-know standard would sanction publication only where the information related to the performance of official duty or otherwise touched upon public matters. A similar outcome would flow from application of waiver rules, that persons who operate in the limelight cannot expect the same degree of privacy about their personal lives.

This last example suggests a further factor which plays an important role in the practical application of privacy tort law. The mere institution of litigation greatly accentuates the original loss of privacy; in fact, it normally multiplies the very effect from which relief is sought. Nor are the results in money damages collected or deterrence achieved likely to be significant, unless the law is pressed to the point of serious self-censorship. In other words, a lawsuit is rarely a satisfactory way of assuring the privacy of the individual. By and large protection against invasions of privacy must be sought in other areas and by other means.\(^63\)

\*F. Remedies*

A final, and difficult, problem in privacy tort law concerns the question of remedies. Since a choice of one remedy over another would not impair the constitutional right of privacy, the issues do not involve a direct confrontation between freedom of the press and the right of privacy. They do bring into play, however, other constitutional doctrines as well as policy judgments.

A claim to money damages is the normal remedy in such tort cases and, while the measure of damages poses some intriguing questions, that matter will not be considered here. The main problem concerns the remedy of injunction. Where an injunction is sought against physical intrusion upon privacy, or other illegal methods of gathering news, no infringement on freedom of the press would appear to be involved.\(^64\) But where an injunction is sought against publication, an issue of prior restraint is presented.

The case for allowing prior restraint in privacy tort cases is appealing. In many situations it would provide the only remedy that would not expand the injury originally caused by the invasion of privacy. In that sense there is more warrant for prior restraint here than in other types of cases, including national security cases, where whatever damage is done by publication is done once and for all. Moreover,


\(^64\) See, e.g., Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).
the courts have taken the position that, while prior restraint is dis-
favored, it is not totally excluded.65

Nevertheless, a balance of considerations impels the conclusion
that prior restraint should not be permitted in privacy tort cases. The
controlling factor lies in the dynamics of that remedy. A prior restraint
is so easy to apply and so destructive in its impact upon freedom of the
press that its use cannot be justified. The only safe course is to confine
restrictions upon the right to publish to an award of damages.

II. THE RIGHT OF PRIVACY AND THE RIGHT TO
OBTAIN INFORMATION

The right of the press to obtain information, either from govern-
ment or from private sources, frequently comes into conflict with the
right to privacy. Both rights have taken on added importance in our
modern technological society. Never has it been more true that inform-
ation is power. And never has there been more information collected
in the files of government and in private centers of power. The vitality
of the democratic process itself rests upon citizens having access to this
information. And the citizenry must depend in large measure upon the
capacity of the press to discover it and to disseminate it to the public.
At the same time the autonomy, identity and intimacies of the indi-
vidual have never been put under greater strain by the collection and
storage of data. The dangers to privacy have been exacerbated not only
by the vast increase in information assembled but by the availability of
that information through computer networks.

Reconciliation of the individual and social interests at stake in-
volves somewhat different considerations from those relevant to the
conflict between freedom of the press and the privacy tort. For a
number of reasons the tensions are not as stressful, and the solutions
are more manageable. Before attempting to delineate the basis for an

65 See New York Times Co. v. United States, 403 U.S. 713 (1971); Organiza-
tion for a Better Austin v. Keefe, 402 U.S. 415 (1971); Times Film Corp. v. City of
Chicago, 365 U.S. 43 (1961); United States v. Marchetti, 466 F.2d 1309 (4th Cir.),
cert. denied, 409 U.S. 1063 (1972); Commonwealth v. Wiseman, 356 Mass. 251,
accommodation, however, it is necessary to set forth briefly the legal foundations of each of the rights with which we are concerned.

A. The Legal Basis of the Right of the Press to Obtain Information

The press has a constitutional right to obtain information from private sources on a voluntary basis, but it does not have any constitutional power to compel the production of such information. Moreover, there are a number of limitations upon the methods that may be employed. Thus the press is controlled in its quest for information by traditional laws against trespass, theft, fraud, wiretapping, and so on. These recognized restrictions, which are similar to those protecting the right of privacy against any physical intrusion, have not occasioned any serious conflict and need not be considered further.

The right of the press to obtain information from government sources stands on a different footing. In this situation the press can call upon the constitutional right to know. The Supreme Court has for a number of years recognized that the first amendment embodies a right to receive information — to see, read or hear communications protected by that constitutional guaranty — and this includes by implication a right to obtain information for the purpose of disseminating it to others. The Court has invoked the right to know in cases where the government has sought to interfere with the receipt of communications. And it has hinted that the right to know could be used to compel the government to produce information. In Pell v. Procunier and Saxbe v. Washington Post Co., the Court upheld regulations which prohibited journalists from interviewing the inmates of prisons. But it indicated that the decision might have been otherwise if the regulations operated "to conceal from the public the conditions pre-

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B. The Legal Basis of the Right of Privacy

It would appear self-evident that the constitutional right of privacy should operate to prevent the government from revealing to the public, including the press, certain types of information about the private affairs of a person. Disclosure of information is a classic example of an invasion of privacy. If the government is prohibited by the Constitution from infringing privacy by prohibiting an individual from using contraceptive devices or obtaining an abortion, it should likewise be prohibited from invading privacy by publishing information about an individual's private life. Moreover, if the constitutional right of privacy allows the government to provide a civil remedy under privacy tort law, the same constitutional right should protect the individual against publication by the government of the same kind of material. Yet there is no clear-cut decision of the Supreme Court vindicating such a constitutional right.

The Supreme Court came close to considering these issues in *Doe v. McMillan*, decided in 1973. That case involved a report issued by a congressional committee with reference to the District of Columbia school system. The report mentioned particular students by name and revealed their absence sheets, their test papers, and their disciplinary records. Parents brought suit against members of the committee, staff members, the public printer and the superintendent of documents, alleging an invasion of privacy. The Court held that members of the committee and staff members were entitled to immunity under the speech and debate clause of the Constitution, but that the suit could be maintained against the other defendants. As to these defendants, the Court remanded the case to the district court for consideration of whether their actions in publishing and disseminating the report served a legitimate legislative function. Thus it was not necessary to pass on the privacy issue. Justice Douglas, joined by Justice Brennan and Justice Marshall, concurred on the ground that Congress had "'no general authority to expose the private affairs of individuals without justification in terms of the function of the Congress.'"

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80 Id. at 317–18.
81 Id. at 324–25.
82 Id. at 330 (Douglas, J., concurring) (quoting Watkins v. United States, 354 U.S. 178, 200 (1957)).
vailing in federal prisons.'" Unfortunately the Court has not gone beyond this point. Thus the constitutional right to know remains as a potential weapon of first importance against unjustified government secrecy, but thus far it has not been utilized for that purpose.72

As a consequence the primary legal basis for the press to obtain information which the government does not wish to divulge rests upon legislation. The Federal Freedom of Information Act,73 adopted in 1966 and amended in 1974, provides that every government agency, upon request for identifiable records, "shall make the records promptly available to any person."74 Nine exceptions to this blanket obligation are set forth in the statute. One such exemption provides that the disclosure requirement does not extend to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."75 The term "similar files" has been broadly interpreted to mean that information in any government records, not merely files of the same category as "personnel" or "medical," would fall within the privacy exception.76 In addition the Government in Sunshine Act77 of 1976 requires that meetings of federal agencies must be open to the public. Again, various exceptions are made, including one which allows closed meetings that deal with "information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy."78

Similar legislation exists in many states. As a result the press now has access to vast amounts of government information, but its right to obtain such material is limited by broad exceptions for matters that would invade personal privacy.


74 Id. § 552(a)(3).
75 Id. § 552(b)(6).
78 Id. § 552(c)(6).]
Likewise in *Whelan v. Roe*,\(^8^3\) upholding a New York statute which required that the state be provided with a copy of every prescription for certain drugs, the Supreme Court noted that the constitutionally protected right of privacy embraced "the individual interest in avoiding disclosure of personal matters,"\(^8^4\) and recognized that "in some circumstances" the duty of the government "to avoid unwarranted disclosures . . . arguably has its roots in the Constitution."\(^8^5\) Justice Brennan, concurring, stressed these dicta in the majority opinion, saying that "[b]road dissemination by state officials" of medical information "would clearly implicate constitutionally protected privacy rights."\(^8^6\) On the other hand, Justice Stewart, also concurring, rejected "the proposition advanced by Justice Brennan" that prior cases had recognized "a general interest in freedom from disclosure of private information."\(^8^7\)

Some state and lower federal courts have come nearer to recognizing a constitutional right to prevent disclosure of personal matters. These decisions, however, are scattered and inconclusive.\(^8^8\)

When the courts come to deal with this aspect of the right to privacy, as they undoubtedly will in the near future, they will face the problem of determining the scope of the privacy right in this context. Obviously constitutional protection should be extended at least as far as the privacy rights which would be recognized in privacy tort law. There are strong arguments to support the proposition, however, that the right of privacy should have a broader scope in the government disclosure area than in the private tort situation. The first amendment claims of the press to publish information are far wider, and deserve far more protection, than its claim to obtain material from government

\(^8^3\) 429 U.S. 589 (1977).
\(^8^4\) Id. at 599 (footnote omitted).
\(^8^5\) Id. at 605.
\(^8^6\) Id. at 606 (Brennan, J., concurring).
\(^8^7\) Id. at 608, 609 (Stewart, J., concurring); cf. Paul v. Davis, 424 U.S. 693, 713 (1976) (state may publicize record of an official act such as an arrest); Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y. 1967) (state may sell copies of motor vehicle registration records), aff'd per curiam, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968).
files. Moreover, the dynamics of the two situations are entirely dif-
ferent; the chilling effect upon the press which inevitably accompanies
penalties on its right to publish does not come into play when the issue
concerns its right to gather news. Furthermore, the remedy available
in the latter situation is more readily invoked and applied than in the
former. In the disclosure situation all that is necessary is for the gov-
ernment to withhold the information; no protracted litigation is re-
quired.

When these factors are entered into a balancing test, they clearly
produce more favorable results, from the standpoint of the right of
privacy, than would otherwise be the case. If the outcome of such a
weighing of interests is ever to provide much certainty of result, how-
ever, the privacy rights protected in government disclosure cases will
have to be more precisely defined. Such an effort is similar to that
involved in marking out the boundaries of the privacy right in the area
of informational privacy, that is, the extent to which the constitutional
right of privacy limits the collection and storage of personal data. In
the present state of our knowledge and experience that task is a for-
midable one and will not be pursued further here. Fortunately, it is less
urgent because legislative protections against disclosure of govern-
ment information in many instances now supercede the need to rely on
the constitutional right.

One form of legislative protection against government disclosure
consists of the privacy exceptions to the freedom of information acts
and the sunshine laws. These provisions, however, are not fully ade-
quate. They authorize the government to withhold information, but
they do not mandate that it do so. Discretion as to whether to disclose
or not still rests with the government agency. Additional protection is
necessary and is frequently provided by privacy acts or personal data
acts.

The Federal Privacy Act of 1974\textsuperscript{89} provides that no agency
"shall disclose any record which is contained in a system of records
. . . to any person, or to another agency, except pursuant to a written
request by, or with the prior written consent of, the individual to whom
the record pertains."\textsuperscript{90} The term "record" is defined to mean "any

\textsuperscript{89} 5 U.S.C. § 552a (1976).
\textsuperscript{90} Id. § 552a(b).
item, collection, or grouping of information about an individual," 91 and the term "system of records" means "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number" or symbol. 92 Hence the act covers most of the information in the possession of the government that is specifically connected to a particular individual.

There are, of course, a series of exceptions to the blanket prohibition against disclosure without the consent of the individual. 93 Most of these are concerned with the official use of the records, but one extends to records that are "required" to be disclosed under the Freedom of Information Act. 94 Thus the Privacy Act prohibits the disclosure of any information "which would constitute a clearly unwarranted invasion of personal privacy." 95 Similar protections are to be found in state legislation, although in some instances the prohibition against disclosure is limited to enumerated categories of "personal data." 96

Several conclusions can be drawn. In the first place, the restrictions on disclosure embodied in the Federal Privacy Act were intended to embrace a wider area than the protections afforded by the constitutional right of privacy. This appears from the fact that "personal privacy," the term used in the act, is protected only against a "clearly unwarranted" invasion. If "personal privacy" were intended to be coextensive with constitutional privacy it would have to be fully protected; since less than full protection is afforded, Congress must have had in mind a broader meaning for the words "personal privacy." 97

It is also evident, from the language as well as the legislative history, that determination of what constitutes a "clearly unwarranted" invasion involves a balancing process. The right of the individual to "personal privacy" is to be weighed against the right of the public to government information.

A third consideration must be taken into account: the constitutional right of the press and the public, under right-to-know doctrine, to obtain information from the government. For reasons already stated where the refusal to disclose information is based on the constitutional right of privacy, that guaranty prevails over rights grounded in the first amendment. Where privacy protection is extended beyond the point required by the Constitution, a different issue is presented; the right to know becomes a relevant factor in the equation. In view of the weak support the Supreme Court has given to the right to know, however, it is unlikely there would be many situations in which the courts would find that the right to know overcame a legislative judgment to protect "personal privacy."

The foregoing principles, whether considered as constitutional requirements or as statutory policy, supply few guidelines for deciding concrete cases. The result reached in any particular matter is more likely to be grounded on general judgment and intuition than on any more certain basis. A brief examination of some typical problems which arise in this area, however, may help to throw light on the issues. And it may also allow us to judge whether the ultimate accommodation hammered out is likely to interfere with the functions performed by a free press.

C. Application of the Privacy Protection

Health and medical records represent an obvious example of information that should be protected from disclosure. Such material concerns the intimate details of one's life and would be considered private under any definition of the word. Ordinarily such information has no relation to matters of public concern. Even in those rare cases where the public interest is in question, such as those where the health of a high government official is involved, the issue of disclosure should be decided by some official body and not left to the choice of a single member of the general public.
There are also various kinds of information in the area of education which should not be open to public inspection. Such files include those which reveal a student’s work product, test scores, evaluations, disciplinary record, and similar matters. Here allowance for youthful experimentation, growth, and rebirth becomes important, and outweighs the value of making such data public knowledge. It is to be noted that the Supreme Court in *Department of Air Force v. Rose*, its only decision construing the privacy exemption of the Freedom of Information Act, assumed that the disciplinary record of identifiable cadets at the Air Force Academy would be protected against public disclosure by that provision.

Employment records are a third category of materials that require some privacy protection. These records include much information of a highly personal nature, such as test scores and evaluations by superiors which have not been subject to rebuttal or investigation. They also are likely to contain data about personal habits, family relationships, and finances. An exception should be made, however, allowing disclosure of the salaries of government employees. In this case public money is being spent and there is a significant and immediate public interest in disclosure. Moreover, the general expectation is that the salaries of public servants should be public knowledge.

Other materials in government files, such as tax returns, social security wage records, and the like, relate to individual finances. In our free enterprise society these matters are considered personal. Most citizens would probably agree that they should be protected against public disclosure. There are some situations, of course, where the public interest in disclosure would outweigh the individual right to privacy. For example, tax delinquencies ought to be made public, and there may be other similar exceptions to the right to privacy in one’s financial affairs.

Much personal information is also to be found in the records of welfare agencies. These files contain material that reveals a great deal about family relations, living conditions, income and expenditures, mode of life, and similar matters. The same is true of information held

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98 *Id.*

99 *Id.* at 380–82. The privacy issue in that case turned primarily upon whether adequate measures had been taken to conceal the identity of the individuals involved.
by other types of agencies, such as those which administer public housing. This material deserves protection.

More difficult problems arise in the area of criminal history. Most people would probably agree that records of criminal convictions normally ought not to be protected. Arrest records present a closer case. Certainly current arrest records, such as the police blotter, ought to be open to public view. But a strong argument can be made that arrest records where no conviction was obtained should, after a period of time, not be disclosed. Perhaps the best solution to this problem is not to deal with it under constitutional or general statutory protection of privacy, but to deal with it by separate legislation providing for the expunging of arrest records, and to some extent records of convictions, under specified conditions. There are times when the public interest in these records is substantial, but the privacy interest in allowing a person to alter a lifestyle or embark upon a new mode of self-fulfillment is at least equally important. Records of juvenile delinquency, which relate to young persons who have not yet achieved maturity, present a special case; existing rules for their protection against disclosure seem fully justified.

In addition to the foregoing, there are many situations which are not easily classified and which cannot be foreseen. An example would be the records of private conversations obtained by illegal wiretapping or bugging. The existence of such material makes it imperative that the privacy exception to freedom of information legislation be stated in general terms. Any effort to spell out in advance every type of material that deserves protection is doomed to failure.

Finally, several qualifications of the right to privacy protection need to be emphasized. First, the Federal Freedom of Information Act provides that where exempt and nonexempt information is included in the same record "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."100 This provision, which is also included in most state legislation, requires the government agency to pare down any material withheld to the bare essentials required by the privacy exemption. Second, the privacy exemption allows the disclosure of

much material, for statistical or other purposes, from which data that would link it to a particular person have been removed. The application of this technique does no injury to privacy and satisfies most significant public needs. Finally, disclosure of material required in judicial or other formal proceedings is governed by quite different rules. In such cases specific public needs more readily outweigh private interests.

Taken as a whole, reconciliation of the right of privacy and the right of the press to obtain information from the government along the lines indicated seems entirely feasible and fair. Privacy interests are protected, and incursions upon the liberties of the press are minimal.

CONCLUSION

Freedom of the press in America has an ancient lineage. The right of privacy has developed recently out of the needs of a technological civilization. Both are now vital features of our system of individual rights and some accommodation between them must be made. Structuring that accommodation entails some difficulties and dangers. Yet upon analysis the problems do not appear insuperable. In most areas there is no serious conflict; in fact, the two rights reinforce each other. Only in the case of the privacy tort and the privacy exception to the right to know does one find any clash of interests.

In strict theory the reconciliation should be accomplished through development of a careful definition of privacy, and material falling within that carefully defined sphere would then be afforded full protection. This approach would seem to follow from the very nature of the right to privacy — protection for the individual against all forms of collective pressure. Unfortunately there has been no agreement on such a definition. Hence no unified theory of the right of privacy, which would serve as the foundation for constitutional protection of the various kinds of interests, which we intuitively group under the notion of privacy, has been forthcoming. This Article has not solved that problem.

Nevertheless, it is possible to make some progress in formulating an accommodation between the right of privacy and freedom of the

press. Accepting a balancing theory, the effort should be directed toward developing, refining, and giving specific weight to the various considerations which go into the balancing process. This Article suggests that greater advances will be made by concentrating more on the privacy side of the equation than has been done in the past. The balancing operation will be somewhat different in the case of the privacy tort than in the case of the privacy exception to the right to know. Yet many factors are common to both areas, and the process is much the same.

In applying the suggested legal principles to the problem before us, the practical prospects for a fair accommodation seem favorable. As to the privacy tort, it is most unlikely that developments in this area will pose a serious threat to the press. The basis for recovery against the press can and should be held to narrow grounds. Moreover, the remedy itself is in many ways counterproductive; it widens rather than relieves the claimed invasion of privacy. One finds it hard to believe that the courts will ever move very far in the direction of penalizing the press for the publication of truthful material. The press is strong, healthy, and well-organized; the individuals whose privacy is at stake are scattered and weak. The press will continue to be free.

With respect to the right to obtain information from the government, the claims of the press are much less direct and immediate. It has never been asserted that the press ought to have open and unlimited access to all information in the government’s possession. Some regulation of the process is inevitable. Moreover, that regulation does not present the problems of self-censorship that penalty for publication does. Further, as one examines each of the separate issues raised for decision the solution does not appear unreachable. No one should underestimate the inclination or the capacity of the government to withhold information from the public. But these dangers are more likely to come from other directions, such as claims to national security. The possibility that the government can successfully evoke the right of privacy to undermine the people’s right to know seems somewhat remote. The press will continue to perform its function.