IDEOLOGY, SOCIAL CONTROL, AND THE PRIVATE FACTS TORT

by

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ABSTRACT

This thesis involves an ideological examination of the Tort of Invasion of Privacy as it has been developed in United States case law, focusing specifically on the private fact component of the tort. The object of inquiry is to examine the extent to which dominant social structures, specifically gender bias and heterosexism, are reinforced and recreated by judicial constructions of the line between private and public facts. To this end the research begins with a theory component which places the law of privacy within the historically and socially contingent dynamic between state, society and the legal system. Having established privacy as a dominant ideological component in the make up of the American legal system, the thesis then turns to case analysis to establish the assertion that the tort, created at a time of considerable societal instability, has operated to restrict and control the behaviour of women, by denying privacy protection to those who step outside of acceptable social roles. The thesis then turns to consider the nature of heterosexism and the manner in which this dominant societal ideology has been interpreted and filtered through the tort, so as to exclude privacy protection to those who do not conform to heterosexual norms, and to grant it to those who keep their (non-heterosexual) sexual identities silent. In short, the thesis attempts to locate the tort in the context of changing social structures, and to examine the manner in which it has operated at an ideological level. Use of this framework allows for an alternative interpretation of the case law, and questions the seemingly neutral face of privacy law both within the common law context and in other fields.
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... knowledge is gained only by the criticism of knowledge. Thinking, therefore, is a continual transgression of established norms of truth. Thinking is a political act because these norms are socially constructed and maintained.
Lemert and Gillan, 1982 at 137.

INTRODUCTION

Privacy is of crucial organizational significance in the lives and social interactions of members of western industrial societies. It informs decision making in every aspect of our lives, from what constitutes public money and attention and where it should be focused, which behaviours are acceptable and which should be criminalized, to what should be reported in newspapers, what should be whispered amongst friends, and what should never be spoken at all. From earliest childhood, we seem to know instinctively that there are some things which are "private", that we have the ability or the freedom or the obligation to withhold certain knowledge from family, friends, and the wider community, and that there are certain private places where "authority" (for example parents, employers, or the state) can not legitimately intrude without permission.

Privacy has a neutral legal and philosophical face that is very difficult to penetrate. It is intertwined so essentially with our current social structure, and absorbed so thoroughly into our sense of personhood and community, that it seems impossible for a western industrialised society to imagine social life without it. Privacy is an essential underpinning of liberal theory; our understanding of the individual - a human being who is self governing and self reliant - is based on the freedom of the self to regulate her own life
and happiness. As members of liberal societies, we have internalised this standard of private individualism to such a degree that it has taken on its own truth; as an ideology, privacy has attained dominance or "hegemony". We look upon societies which do not function on an individual basis but rather on group principles as primitive, undeveloped, and undesirable.

The aim of this thesis is to challenge this "common sense" about privacy and develop a critique that identifies it as an ideological belief structure which is not "the truth" but an interpretation. And, furthermore, an interpretation which does not operate in a neutral, inevitable manner, but is actually continually reinforced and recreated by processes such as law and other dominant discourses within society. Such an approach will allow us to move beyond the assertions of universality and equality that surround the legal discourse of privacy to consider ways in which various social groups are "controlled" or "constructed" by privacy decisions.

The ability of the media and other groups to gather information and circulate it to huge audiences has become an ever present threat to notions of personal privacy as western industrialised societies have become increasingly urbanized and technologically sophisticated. The increasing vigour with which laws are being enacted to regulate access to and protect informational privacy is a clear indicator both of the official significance accorded to privacy, and of the importance of public perceptions of the vulnerability of privacy in modern society. Official discourses (for example, of the media, political
bodies, governments, legal systems, and the mental health profession) present us with conflicting pictures of privacy. While we are told that our regulated interdependent social structures have rendered privacy more essential than ever to our well being and happiness, these same social structures, by their very natures, make attaining and maintaining personal privacy extremely difficult. The result of these contradictory messages is that as individuals we internalise the codes of behaviour that are required to allow us to function in the social world and yet retain the status of being private.

An ideology operates to conceal inconsistencies and contradictions inherent in a system of social relations such as capitalism or gender inequality. It appears wholly natural and inevitable which allows for the smooth functioning of a society by obtaining the consent of the many to the dominance of a system which operates fundamentally to advantage the few. For example, the capitalist ideology within which western industrialised societies operate, whereby a very few hold the vast majority of a society's wealth, is not seen as contentious or questionable, but as normal, natural and inevitable. Privacy is likewise an ideology, in that it operates as a shared belief system that conceals its contradictory effects from those who live within it, and while doing so reinforces dominant power structures.

This thesis represents an attempt to delve beneath the surface of the ideology of privacy as it operates within the common law in the United States of America, to show some of the operational inconsistencies in the case law, and to posit reasons (or in other words,
the dominant power relations which are reinforced) for those results. The premise underlying the thesis is that the creation of the tort of invasion of privacy can be viewed as part of a more general reformulation of privacy articulated during the late nineteenth century, in an effort to maintain the status quo as America began the shift from being a predominantly agrarian rural society to being an industrialised urbanised society. The purpose of this thesis is to explore the relationship between the concept of privacy, the threats that societal shift posed to the status quo, and the role of law in maintaining social stability. The thesis presented below is that the privacy tort, understood in light of a changing economic and social system, is an example of the reactionary force of liberal legality. The tort was articulated, and has subsequently been interpreted, in a way which (re)creates and reinforces dominant social relations such as the gender dichotomy and, perhaps as a function of that dichotomy, the heterosexual nature of American society.

This thesis reflects several themes. The first is the importance of the perception of "choice" within liberal society - and specifically in law. Those plaintiffs who are considered to have "chosen" to move beyond socially accepted roles - for example by living openly as a lesbian or gay man, or by having a child out of wedlock, are also considered by courts to have "chosen" to give up any claim they may have had to personal privacy. While liberalism provides the space for an individual to make a "choice", it does so on the basis that there is no responsibility for helping in the making of the choice, and no protection from the brunt of societal disapproval for those who
deviate from the norm. Not surprisingly, when this is the message which is pervasive in society, and when those who do make unpopular choices are highlighted in the media and deprived of valuable privacy status, there will be considerable desire to make "choices" which recreate the status quo. The second theme that is highlighted by the caselaw is that when an individual moves beyond mere "choice" and speaks out loud about that choice, the courts will construct her as a political figure who has, without more, no claim to privacy. Again, this is part of the liberal ideology; while an individual is free to live her own life, liberalism perpetuates the view that this must be done within existing structures - the foisting of minority opinions on the majority goes against the democratic ideal, and, more importantly, threatens the status quo.

These themes are central to the thesis set out below, which is that privacy, in this case tortious privacy, exerts ideological influences which operate at a level of social control or construction. Specifically, I argue below that where the actions of individuals are reported in the media, the courts interpret the situation through what could be described as a "social utility" filter. That is, where publicization will allow members of society to learn of the pitfalls of breaching social convention, courts will find that no tortious breach of privacy occurred. On the other hand, where an individual's actions are involuntary and unrelated to any attempt to deviate from social norms, they will be constructed as private, even in situations where it seems clear that the black and white letter of the tort should not apply. These themes work together to create an atmosphere in which privacy operates as part of our socialisation; by watching and listening we learn that repressing
behaviours which do not conform to dominant social norms or belief structures is an efficient way of staying out of the spotlight and thus retaining personal freedom. The publicizing of instances of socially unacceptable conduct operates both to punish those who are caught in an act of defiance, and to train those of us who are watching in what is, and what is not, acceptable (that is, what is private, and what will be treated as public behaviour). Furthermore, as we are taught that privacy is desirable, we do what we can to maintain it.

In chapter one I will discuss the concept of ideology, examining the usefulness of an ideological analysis and at the same time questioning the creation and maintenance of the ideology of privacy itself. I will consider whether fears that (upper) class values (such as the ideal of the "cloistered lady" and freedom from scrutiny by the lower classes) were being eroded by modern technology and urbanisation provide a plausible explanation for the articulation of the tort of invasion of privacy. The form of privacy articulated was a predominantly privileged male perspective, which coexists uneasily in the face of much literature suggesting that women and other marginalised social groups experience privacy in fundamentally different ways than as the "haven" it is assumed to be in the tort. One of the results of that conception of privacy within the tort has been that while liberal theory promises individuality and autonomy on an equal basis by provision of the "private sphere" where all can be free, this equality and freedom are not achieved in the tort cases considered below. In fact, the form of privacy articulated in the tort has been detrimental to women and other social groups who step beyond social convention.
In chapter two I consider this analysis in light of a feminist perspective of privacy, examining the history of women and privacy, considering first the variety of ways in which women have been subordinated in society by legal interpretations of privacy, and then moving on to consider the operation of the tort itself in this process. While the tort of privacy claims to be upholding the construct of privacy as essential, unchanging and neutral, in examining the cases we will see that in fact it is overlaid with the dominant social mores of its time. Women who do not fit within socially accepted gender roles are denied privacy, and, as we will see in chapter three, so too are lesbians and gay men who live their lives in ways which challenge the ideology of heterosexism pervasive in United States society.

Chapter four provides some general conclusions on the case analysis, and some suggestions for the way that this type of ideological analysis of privacy can be used to reimagine the concept of privacy so that it revolves more clearly around the liberal commitment to genuine autonomy and individual freedom rather than the repressive moulding of individuals into dominant social norms.
CHAPTER ONE: IDEOLOGY AND PRIVACY

It is testimony to the fact that nobody is, ideologically speaking, a complete dupe that people who are characterized as inferior must actually learn to be so. It is not enough for a woman or colonial subject to be defined as a lower form of life: they must be actively taught this definition, and some of them prove to be brilliant graduates in this process. It is astonishing how subtle, resourceful and quick-witted men and women can be in proving themselves uncivilised and thick headed. In one sense, of course, this "performative contradiction" is cause for political despondency; but in the appropriate circumstances it is a contradiction on which a ruling order may come to grief.¹

Introduction: Why use an Ideological Analysis?

One of the effects of rendering our practices self conscious ... of formalising the tacit understandings by which they operate may well be to disable them....²

The purpose of this chapter is to provide the background and context for subsequent discussion on how the systems of belief, or "ideologies", of sexism and heterosexism operate beneath the surface of the legal discourse surrounding privacy. An analysis of ideology is crucial when looking for ways to challenge dominant modes of social relations, because by looking only for manifest, explicit discrimination or differential treatment of certain groups in society, the more subtle processes by which laws and judicial decision-making reproduce and reinforce various status quo's are often missed. While a dominant ideology remains invisible within a regulating structure such as law there is no opportunity to question it; rather it will be continually reinforced, and inequitable or discriminatory results will be perpetuated in the name of inevitability or "precedent". If, on the other hand, a dominant ideology can be located and "objectified" it is possible to


content it\(^3\) and thus challenge the assumptions which form the basis of that regulation.

This chapter attempts to locate the law of privacy as a site of ideological interpretation, articulation, and struggle, and to demonstrate that privacy in our liberal framework is an historically and socially contingent interpretation, rather than a necessary or unchanging phenomenon. We will consider the law which surrounds privacy, and specifically the tortious invasion of privacy, in light of the ideological processes which create and maintain our current system of lived relations; a system which allows for, and encourages, the domination and subordination of, among other dichotomies, women to men, racialized groups to the white population, and lesbians and gay men to the heterosexual population. In brief, the chapter provides a background for the thesis that will be considered in the ensuing chapters; that in the process of articulating the validity of privacy, and at the same time formalising systems that justify its deprivation, the state and specifically the judiciary reflect and reinforce a hierarchy of privilege in social life. The manipulation of a hierarchy of private instances and the continued bolstering of the value of privacy in our lives allows privacy doctrine, and specifically legal privacy doctrine, to become a forum in which dominant social relations are reproduced, and difference is subordinated and rejected.

In essence, the case analysis which builds on this introductory chapter asserts that although the liberal legal language in which the tort of invasion of privacy is framed and

\(^3\)Eagleton, supra note 2, at 33.
interpreted is neutral and free of any moral judgment, in applying it the judiciary operate within the ideological imperatives of liberal privacy. As such the tort is not the unbiased legal tool that legal discourse tells us it is, but rather a systematic process by which the actions of minority groups that threaten the status quo are contained. To understand how this process works, and to examine it in operation in the case law, we need to consider both the meaning and usefulness of the concept of ideology, and the ideological basis of the privacy tort itself.

1. What is an ideology?

An "ideology" in its broadest meaning refers to a system or current of ideas about the character of society. Law and religion are both examples of what is mean by an ideological belief system. An ideology provides the context in which social symbols are interpreted, and thus all accounts of social "reality", whether dominant or those that challenge dominant beliefs, can be viewed as ideological interpretation. In general we can say that the study of ideology is the study of the links between our ideas, opinions,

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4One of the difficulties of an ideological analysis is appreciating the effect of attaining "new" knowledge. Thus as Valerie Kurruish states "If theory is not to be ideological in the negative sense then it must be trying to find something out. The other thing is that it must be aware that at the very moment of finding, the context changes and a new horizon of knowledge opens." See Valerie Kurruish, *Jurisprudence as Ideology* (London: Routledge) 1991 at 15. Ideology moves into place against every advance in knowledge and understanding; in effect it is a form of closure. While admitting that we can not or should not assume that our interpretation is "the truth" is difficult indeed, this is the task we must set ourselves if we do not want to re-create the very problems we seek to override. An awareness of these issues means that any attempt to create a working definition of ideology in the context of finding a solution to a perceived inequality must be focused in such a way that will not simply provide room to characterise newly re-discovered assumptions as truths and thus allow our minds to be closed to alternatives.
and beliefs about social existence, and expressions of power in social relations. Ideology can be used to explain the place of social theory in its application to the analysis of law, particularly as it relates to the social position of various groups.

5Theorists such as Eagleton, Smith, and Sumner argue that to have the concept remain useful we must relate ideology to power struggles, and discriminate between those power struggles which are central to the creation or maintenance of a social order and those that are not. See Colin Sumner, Reading Ideologies (Edmonton: Academic Press) 1979, and Michael Smith, "Language, Law and Social Power: Seaboyer; Gayme v R, and A Critical Theory of Ideology" (1993) 51 University of Toronto Faculty of Law Review 118. Thus, while all accounts of social reality are in effect ideological, we have to distinguish between instances of the exercise of power, and other instances. Thus Michael Smith explains "although any discourse may exhibit a tendency to exclude and invalidate some ideas and include and endorse others, ideological discourse differs from non-ideological discourse in its linkage to the power struggles that are more or less central to the reproduction of a whole social order..." Thus while one might say that while all discourse is discursive, not all discourse is ideological, which is an important distinction to those who are seeking to transform the power relations that ideology frequently obscures." See Smith, at 124. Gramsci sees ideology as providing the mechanism through which participation in social life is made possible. Ideological struggle is, he says, the practical engagement in shifts and modification in common sense or popular consciousness. Gramsci uses the concept of hegemony to grasp the connection between the ways in which social consciousness is formed and the exercise of political or class rule under conditions of high levels of popular consent. In essence, hegemony is the active process which produces, reproduces, and mobilises popular consent, the spontaneous consent given by the populace to the general directions imposed on social life by the dominant group or groups. It is concerned with the leadership of the group, not the idea of consent itself. To attain this consent, a dominant group can not simply articulate its own immediate interests in an ideology, it must address and incorporate some aspects of the aspirations, interests, and ideology of subordinate groups. Thus the dominant group will incorporate values and norms that contribute to securing the minimum standards of life; and will also, by reason of struggle, engage in compromise to incorporate elements of the interests of a subordinate group, and will articulate values and norms in such a way that they take on significant trans-class appeal. This process gives us insight into the "reality" that ideology reflects, and shows us where the true/false dichotomy is played out. An ideology does not simply express social interests, it rationalises them; it engages significantly with genuine wants and needs and as such it speaks from different sites. Thus an ideology is not unitary; this is both its strength and weakness. An ideology draws power from its ability to combine diverse elements of society in ways which influence and structure the reality as seen by those who live within it, but at the same time, by giving recognition to the existence of difference, it opens itself to inspection. Thus the function of smoothing over contradictions is essential to ideology. Hegemony, the smoothing over of contradictions and acceptance of a unitary social vision, is attained when a group's own interests have become the interests of subordinate groups. Thus, for example, in the marxist interpretation we see that the interests of the capitalist class have been thoroughly encaptured by the working classes. Reflected in the ideology of our liberal capitalist society there is a complex superstructure which involves unity over political and economic goals as well as intellectual and moral knowledge. From the above discussion we can see that ideology is the site of constant struggle, as dominant groups constantly work to ensure that their own hegemony is maintained, and in the process deal with and incorporate aspects of alternative interpretations which are directed at negating or reversing the existing order. By means of ideological "domination" a social group can maintain hegemony in a way that it could not hope to do by force. Its power potential remains hidden, and as such, uncontested. See Antonio Gramsci, Selections from the Prison Notebooks Q Hoare and G Nowell Smith eds., (London: Lawrence and Wishart) 1971.
Ideological analyses start from the proposition that there is no direct or necessary correspondence between a particular realm of "knowledge" (such as privacy) and "the real", despite the fact that a central feature of ideological processes is to purport to disclose reality. Thus we are able to study the law surrounding privacy as a language or interpretation without presuming that it actually describes a reality. Legal discourse, such as that which created the invasion of privacy tort, can be examined as an event, rather than as a distillation of an essence. And this in turn allows us to go behind a judicial utterance and ask what power relations are being played out, how that is occurring, and thus to theorise as to what possibilities there are for allowing alternative interpretations to be heard.

The ideological process is such that values and interests which are specific to a certain time and place are projected as universal. If universalisation works and the ideology becomes dominant in society, then the beliefs within the ideology cease to appear as "an interest" and instead become global and historically certain. The historical certainty of ideology is one of its most attractive features, promoting as it does social stability. Those who operate within an ideology will only reluctantly admit that it was created, because to do so is to admit that it can be changed or dismantled.

Ideology is particularly powerful because it operates at an unconscious level. It remains

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7Eagleton, supra note 1 at 58.
subterranean while unchallenged; assumed, implied, an "of course". This lack of visibility stems from a characteristic of ideology to appear as an eternal truth, as total and complete. However it can only remain invisible so long as it is successful at defusing the claims of those who would seek to challenge it. Where social movements question and mount challenges to dominant ideologies, official, explicit elaborations of the ideology in question are required and this invisibility is lost. For example, "family values", the explicitly expounded vision of conservative morality set out by the Reagan/Bush administrations in the United States, was such an articulation. The premise of family values is that "the family" (defined as a patriarchal authority figure and dependant wife caring for dependant children) is the bastion of moral integrity and that without it society will self destruct. Until it was given a label, "family values" was an internalised standard for conduct within society; members of society either adhered to it or were simply excluded from social privilege. As internalised standards are not acknowledged as being standards, they leave no room for discussion and accordingly, there is no tolerance of deviance from social norms.

However, the common sense that surrounded that traditional form of family has been eroded by new social movements which have seen the implementation of formal equality for women and the creation of active lesbian and gay subcultures in American society. In the 1980's, under threat from these changing social norms, conservative elements within American society articulated explicitly the nature of family values. They relied on

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8Eagleton, supra note 1 at 59.
evidence such as the high rate of marital breakdown and single parent families and related it to perceived indicators of social discontent such as the rate of crime and poverty, to support their claims for a renewed commitment to traditional values.\(^9\)

"Family values" was used as focal point for initiatives to prohibit further reforms such as provision of sex education and contraceptive advice to young people, the ERA reforms, and particularly in the late Eighties, campaigns for gay equality. What we see now though, is that by externalising the ideology of the family, by providing explanations as to what made up the family and why, the whole area of morality surrounding family and relationships has become the site of considerable debate. Various groups are now in conflict over their inclusion or exclusion from its "of course" designation of social approval where before there was no forum for this discussion. Revealing the operating principles (and hence allowing inspection of the inconsistencies within) within an ideology is a powerful way of disabling it.

2. Law as a site of ideological interpretation

Within a society, the legal system provides substantial ideological underpinnings and a coherent legitimation for the existing social and economic organization. Law is a bundle of beliefs charged with regulating social behaviour. The majority of a society must subscribe to these beliefs at some level, because as a regulator law must inhibit certain forms of behaviour and it can only do so with some degree of acquiescence. In order to

\(^9\)Although this will be discussed in more detail in chapter three, for further information on the conservative force in American politics in the late Eighties and the 1990's, see Didi Herman, Rights of Passage: Struggles for Lesbian and Gay Legal Equality (Toronto: University of Toronto Press) 1994, especially at chapter five.
gain dominance in society, and more importantly, to retain that dominance, law must provide its own legitimation; it must find a way to justify, at least to a majority, the fact that it is a site of power and control. Without these justifications or beliefs hegemony cannot be attained or maintained. Within western liberal societies, "law" obtains that consent by creating a view of itself as a technocratic science administered by neutral disinterested professionals such as judges and lawyers. Liberal legality involves the theoretical separation of law from other varieties of social control, positing law as objective and neutral, with results that are predictable and definitive, whereas other types of enforcement of power (for example, religious or political power) are said to be partial and subjective.\(^{10}\) We are told that human involvement in law is largely irrelevant because justice is blind and neutral. We are also told that law is the only way to hold together our social formation without war or repression. In summary, law is constructed as distinct from political power and as a neutral arbiter of the natural order.

However, one of the effects of an ideological analysis of an area of law such as that to carried out below is to show that despite this self-perpetuated vision, law is a major instrument for the organization and extension of power relations in contemporary western societies, that it is actually constitutive of the way in which social relations are lived and experienced. The concepts of ideology and hegemony provide us with an entry into a discussion of how to overcome the inertia that results from viewing the legal

system as uncontroversial, neutral and inescapable. A recognition of the ability of law to give practical effect to the interests of dominant social groups, while at the same time being seen as universal, neutral and natural, is the starting point for an ideological analysis.

One method of revealing the ideological basis of a legal discourse, such as privacy, is to show that it is historically contingent, and thus that the belief structures within it are human constructions. Taking this further, we can see that by considering how various ideological components are selected and used in law, and acknowledging that these components are derived from different sources, both from within law and external to it, we will have a more effective insight into the way the law is made and the way it is used. In considering these points, Shelley Gavigan argues that courts are primarily ideological rather than instrumental or coercive institutions, and that as such what is most important is not whether courts resolve disputes but rather their capacity and opportunity to exert ideological influence. She sets out a two levelled test for inquiry into ideology which provides a useful framework for discussion. Her test is to first identify the ideological nature of legal doctrine and principles, and second to identify the extent to which the judiciary itself employs ideological thought, which she sees as formally external to the law

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11The inertia arises from our acceptance of the authority exercised by law and by dominant groups within society. We accept these forms of authority because we have learned that this is both necessary for our survival, or because this acquiescence seems to legitimate our own sphere of authority. This acquiescence leads to a belief that what is required to effect material change in social existence is either to change the personnel who control the machinery of law to the unequal benefit of certain groups, or to persuade those who presently control that machinery to fulfil the promises of liberalism in the pursuit of the natural balance and this limits or prevents radical social change. See Alan Hunt, Explorations in Law and Society (New York: Routledge) 1993, particularly chapters two and three for further discussion.
but which once incorporated into legal doctrine in judicial decisions becomes virtually unassailable,\textsuperscript{12} "transforming the non-legal into the legal".\textsuperscript{13}

Once we are able to appreciate the complexities of the ideological process, and the all pervasive nature of a dominant ideology such as liberalism, we can begin to understand that in any form of legal analysis, whether it be interpreting statutes, factual situations, or specific causes of action, courts, judges, lawyers, and the parties themselves, will all view the matters before them through a haze of beliefs and values about everything from the way the legal system operates and their place in that process, to socially acceptable modes of behaviour. Whilst the determinants of power and the way law expresses power relations are complex, and while we can not say that the law is in any sense a \textit{direct} expression of class interest,\textsuperscript{14} we can say that since ideology operates at an unconscious level, often we are unable to question dominant social relationships, or even to see them as the consequences of power relations. Inevitably, law and the rules formed to apply it, are created and interpreted in ways which reinforce the status quo. By understanding and interpreting a judicial judgment as a piece of ideological discourse it is possible to

\footnotesize{\textsuperscript{12}Shelley Gavigan, "Law, Gender and Ideology" in Bayefsky, ed., \textit{Legal Theory Meets Legal Practice} (Edmonton: Academic Press) 1988 at 284.}

\footnotesize{\textsuperscript{13}Michael Smith, \textit{supra} note 5 at 127. See also Gabel who says we need to distinguish between those processes that create the ideological characteristics embedded in law, and those consequences flowing from law that have ideological content. (Production vs Effectivity) He says that the form of law has no necessary ideological content, but that certain ideological values such as individualism, equality, privacy, become universal and preponderant values under capitalism, and thus function as if they were a form of law itself (ie the legitimating potential of law is shared or taken over by values the law only contingently embraces). See Peter Gabel "Reification in Legal Reasoning" (1980) in S Spitzer ed., \textit{Research in Law and Sociology}, Volume III (Greenwood, CT: JAI Press) at 25ff.}

\footnotesize{\textsuperscript{14}Roger Cotterell, \textit{The Sociology of Law: An Introduction} (London: Butterworths) 1992 at 111.}
see that those facts which will help to reinforce the "correct" view of the world (for example, that non-heterosexual identities should be hidden) will be emphasised and those that do not will be overlooked or explained away.

The purpose of such an examination of a specific area of the law is twofold. First, by analyzing the law in this way we can see the methods by which particular beliefs come to have legitimacy and predominance in society, and also how this leads to oppression of certain groups. This in turn allows us to consider whether it is the law itself which distorts and facilitates inequality, whether the law merely replicates and gives effect to ideological effects produced elsewhere, or whether it is some combination of the two.\footnote{While law may provide the mechanism for the production of knowledge which helps to secure the acquiescence of social groups to their own domination, it does not (without more) establish the actual fact of acquiescence. Oppressed groups must actively be taught their place in the social hierarchy and this is an active on-going process; they do not "simply internalize, reflexively and en masse, the values of their oppressors". If the latter were true, it would not be possible to explain resistance or countervailing belief structures which are constantly circulating within society. See Smith, \textit{supra} note 5, at 124. Law may participate in this process by way of the role it plays in educating members of society.}

This is important for those of us searching for effective sites on which to conduct struggles for social transformation because if law itself is not the location or basis of a perceived inequality, then amending the law may not result in substantive change.\footnote{By the same token, if law is found to be the key site of oppression, we could then choose not to focus struggles for change there, but instead to look for another more suitable and approachable site.}

The second purpose, which follows necessarily from the first, is that examining law or any other system of social relations for ideological content allows for a demonstration that the belief system in question is not "natural" or "inevitable", and this in itself provides a space for alternative interpretations to be heard.
By highlighting the employment of ideological interpretations within legal discourse, we can begin to challenge the "natural, "inevitable" label that attaches to legal decisions. We can show that the world is not just a matter of living out objectively determined social relations, but rather involves a process of people rationalising and justifying and acting and imagining. In this instance I seek to do this by searching for a theory which will show that what happens in a courtroom in a privacy decision is connected to the wider social/political/economic context, and that this wider context is active in suppressing challenges to dominant power relations in society.

3. The Role of Privacy in the Liberal Ideology

Liberalism, and liberal privacy, are instances of dominant ideology. Liberalism is the West's "world view", an ideology that pervades our interpretation of human nature and of social life. Within liberal ideology, a "social contract" requires obedience to some form of law. The social contract allows each individual to be seen as a rational being,

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18Liberal liberalism starts from an assertion that individuals create a political order to maximise the achievement of their individual goals. This is the social contract explained by Hobbes and Locke. Liberal legalism envisions "the rule of law" as a means for resolving the inevitable conflicts among the atomistic individuals who inhabit society. Jeremy Bentham stated, for example, that the purpose of the rule of law is to create harmony between private and public interests in order that the greatest balance of pleasure over pain, and the greatest happiness for the greatest number, be achieved. See generally J Bentham, supra note 10. Law, which consists of rules generated by this social contract and by the institutions established under it, is viewed as a knowable entity separate from the views of those who are asked to ascertain what it means. A neutral adjudicator is able, using legal analysis, to apply it objectively. Decisions are abstract and impersonal. Discussion of gender and the social contract will be discussed below as relates to the tort of invasion of privacy. For detailed discussion of the social contract and women within liberal legality, see Carole Pateman, The Sexual Contract (Stanford: Stanford University Press) 1988. For general critique of the liberal concept of the social contract see David Kairys, ed., The Politics of Law 2nd edition, (New York: Pantheon Books) 1989. See also Jed Rubenfeld who states that we need to look at the other side of this social contract, not so much at what is being "offered" by liberal individualism, but more at the
morally equal to all members of the group, and as such, free to act within the widest possible framework, constrained only when behaviour impinges on the rights and freedoms of others. To enjoy the security and order of social life and the advantages of living in a modern society, each must renounce the idea of complete liberty, by recognising the needs and rights of other individuals. This is achieved by delegation of power to the state to regulate society. Liberal legal theory is the means by which arbitrary power is controlled and individual freedom is ensured. This liberal ideology has attained such hegemony that we can only see it in contrast to radically different ways of understanding the world, such as totalitarianism. What provides the distinction between these different world views is our conception of "privacy". The articulation of the particular form of privacy discussed below is crucial to the success of the liberal state. Provision of a space for the continued pursuit of freedom through individual life and happiness provides a very powerful and attractive legitimation, in liberal theory, for the existence of a powerful state. Law is the process through which this privacy is created.

i) What is Privacy?

Privacy describes a particular relationship between the individual and society. Sociologists and philosophers within the liberal framework state that privacy is intended

totalitarian nature of the law, not what is being prohibited but what is being produced, for example, lives forced into heterosexual relations. Rubenfeld, "The Right to Privacy" (1989) 102 Harvard Law Review 737. See also Catherine MacKinnon who expressly rejects liberal privacy. She argues that privacy protects the existing distribution of power and resources within the private sphere, and that as the private sphere is the realm of women's "collective subordination, intimate violation and abuse" then privacy is incompatible with feminist goals. She argues that regulation of sexuality is a means of subordinating women, and privatising it means insulating it from the law, thus perpetuating subordination. This view has been the site of much debate within the feminist movement. MacKinnon, Towards a Feminist Theory of State (Massachusetts: Harvard University Press) 1989.
to, or does, provide a privileged lifespace within which an individual can create a personal sense of identity and then enjoy that individuality. This ideology posits privacy as valuable because it concerns autonomy and the capacity for self direction. Privacy is related to choice, autonomy, power and friendship, and the often subtle physical and psychological means whereby individuals maintain their own private space and respect that of others. We are told that privacy fulfils as profound a need in humans as the need to be social. In the liberal view "the right to privacy is clearly an attempt to protect the sphere of moral self government surrounding intimate personal life from the tyrannies of majoritarian values". Under the liberal conception of the autonomous private individual, self control is exercised each time an individual releases information to others or acts in the "public" world. Anything which takes away this power is considered a breach of privacy. Thus Edward Shil says "privacy exists where the persons whose actions engender or become the objects of information retain possession of that information, and any flow outward of that information from the person to whom it refers (or those who share it where more than one person is involved) occurs on the initiative of its possessors." Similarly, Alan Westin, one of the foremost

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19See Tom Gerety, "Redefining Privacy" (1977) 12 Harvard Civil Liberties Law Review 233. Gerety uses a normative approach as discussed above, viewing privacy as autonomy or control over the intimacies of personal identity. He also argues that we all have a common conception of what is private in our lives and a common commitment to the value of these private lives, but that it must be defined further or it can not be respected, regardless of its moral urgency or plainness.


scholars on liberal privacy, defines privacy as "the claim of individuals, groups, or institutions, to determine for themselves when, how, and to what extent information about them is communicated to others." He also gives a second definition, related but separate to the first; "viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means...." So while isolation from community is exile or exclusion, privacy is a voluntary retreat, the space which allows and is necessary for spiritual regeneration.

Liberal ideology holds that the state is merely the agent of the authority of its citizens, and as such it does not exercise independent power. This contradicts the common understanding of members of society that the state must exercise some authority to organise social life efficiently, and the realisation that this power is greater than can be controlled by individual citizens. As this authority must not appear to be limitless, fetters such as constitutions and Bills of Rights are established which operate to protect "private life". Thus this concept of privacy is both threatened and threatening in liberal democracy. To balance this inconsistency privacy becomes anchored in a negative

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23 See A Westin, *Privacy and Freedom* (New York: Athenaeum) 1967, at 7. However, there is the issue of whether control of information in all situations relates to privacy as such. For example, Gerety and Parker suggest that information relating to intimacy, identity, and autonomy are the only situations where privacy is involved. See R Parker, "A Definition of Privacy" (1974) 27 Rutgers Law Review 275, at 282; and Gerety, *supra* note 17 at 281-295. Gavison poses three elements to privacy and its make-up; 1) Information known about the individual; 2) Attention paid to an individual; and 3) Physical access to an individual. For detailed analysis of the constituent elements and their relation to each other, see Gavison, *supra* note 22, at 428-436.

evaluation, and is only invoked when the authority of the state has gone further than its agency mandates.\textsuperscript{25} The end result of this negative conception of privacy is that, effectively, privacy functions to serve and protect various status quos, rather than proactive rights to the self. The ideological processes which promote privacy not as an interest, or a construction, but rather as a natural part of the human condition, as valuable, inevitable and historically certain, hide the consequences of this negative conception. The purpose of this discussion is to focus attention on how perspectives of culture, politics and people have shaped privacy\textsuperscript{26} rather than, as is often assumed in legal scholarship,\textsuperscript{27} it being seen as an essential reality.

\textbf{ii) The Historic and Social Contingency of Privacy}

The western world view of privacy as a natural, even inescapable, part of social existence,

\textsuperscript{25}This tradition of the provision of negative freedom within liberalism has been seen in the past as so fundamental that it has been accepted without requiring further proof of its necessity. See A Westin \textit{supra} note 23 at 92. See also Colin Mellors, who suggests that early political scientists did not include privacy in their catalogue of basic human rights (of life, liberty and pursuit of happiness) simply because neither the inclination or the technology existed to threaten privacy. C Mellors, "Governments and the Individual: Their Secrecy and His Privacy" in J Young, ed., note 20 at 88ff.


\textsuperscript{27}Ruth Gavison provides an illuminating example of this. A renown privacy scholar within the liberal tradition, she believes that "privacy is central to the attainment of individual goals under every theory of the individual that has ever captured man's imagination." See Gavison, \textit{supra} note 22 at 445. Gavison provides a structure for viewing privacy as a distinct and coherent concept. She sets out a "neutral" definition which enables those situations where a valuable thing called privacy has been lost and should be remedied, to be identified. (I highlight her use of neutral because, as will be discussed below, she accentuates privacy as a positive good without reference to its inequalities and detriments). While she does not accept reductionist arguments which see privacy as mere rhetoric covering other interests, she does view it as essential because of its functions: "[Privacy is related to] functions in our lives: the promotion of liberty, autonomy, self hood, human relations, and furthering the existence of a free society." at 423.
and as essential to human development and happiness, is culturally and historically specific rather than universal.

One could compile a long list of societies, primitive and modern, that neither have nor would admire the norms of privacy found in American culture - norms which some Americans regard as "natural" needs of all men living in society...

For example, traditional Samoan villages and certain North American communities such as those of the Tlingit Indians, traditional Chinese societies, certain communal groups in Israel: these are all examples where the western conception of privacy is not evident. Privacy, if it exists at all, exists here in totally different forms than we in western liberal societies understand and experience it. Similarly, in the archaic preclassical days of ancient Greece, aristocrats had only what we would recognise as a "public" life: their concepts of self and legitimate activities had to do with responsibilities, virtues, and the rituals of public affairs. Aristocrats did not operate within a framework that allowed them to live for themselves, to withhold information or so on, rather they lived for the benefit of all. Public life was the life of an aristocrat, it was not merely a role, not even

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28 Alan Westin, "The Origins of Modern Claims to Privacy" (1967) at 60, in Schoeman, ed., Philosophical Dimensions of Privacy: An Anthology (Cambridge: Cambridge University Press) 1984. Westin bases his conclusions on "leading works of anthropology and sociology, a survey of the major ethnographic studies, and the relevant categories of the Human Relations Area Files at Yale University", at 61. He gives attention to the difficulties inherent in making cross cultural comparisons, and for this reason does not conclude that privacy does not exist, but that each society has its own customs and norms, and that privacy may be achieved in these apparently private-less societies by psychological means where physical or socially reinforced methods are not evidenced. See also Lubor C Velecky, "The Concept of Privacy" (1978) at 16, in Young ed., supra note 20.

29 See Neville, "Various Meanings of Privacy: A Philosophical Analysis" in Bier ed., supra note 24; and Schoeman, supra note 28, and Westin, supra note 23, for more detailed discussion of these points.
an important role as public office is viewed in western societies today. In comparison, non-aristocrats had no public life at all; except for the results of their work they were irrelevant to public affairs, and yet they did not make "individual" decisions either, at least in the way that we understand that concept. A non-public life was not distinguished as private in greek society, it was simply unpolitical.\(^{30}\) And furthermore, it was disdained.\(^{31}\)

\(^{30}\)The emergence of the city-states of the classical period, which required public responsibility from every citizen, changed this state of affairs. The aristocrat's prime loyalty to personal virtue was superseded in the city-state by the loyalty of all citizens to the welfare of the polis. This concept of civic loyalty created a new distinction; as all citizens were to be responsible for the public welfare, a split was perceived as necessary to allow energy and time to be spent on one's own affairs, tasks previously undertaken by non-aristocrats. The classical greek regard of the public/private divide is complex and contradictory. On the one hand personal identity consisted of equal parts public responsibility (koinon) and private life (idion). On the other hand, the democratic system required specialist skills from those who operated it, and most citizens did not have these skills. The result, as Plato envisaged, was the rule of one class over another, with public responsibility being viewed as essential and necessary for an individual to have a "good" life, to develop the whole person, but being carried out perfunctorily in all but a few individual's lives. Although this is a generally accepted view, it is indicative of the complexity of the concept of privacy that some argue that privacy was not distinguished at all until the nineteenth century. For example, Maurice Cranston in his 1974 Elliot Dodds lectures at the University of Leeds states that there was no word in ancient or medieval cultures that corresponded to the contemporary western privacy. See Velecky, supra note 28 at 16 for further discussion. Indeed, the primary focus of this chapter is that privacy, in the sense that it is enforced today, is the result of an articulation commencing in the nineteenth century. However, for the sake of a fuller understanding of the complexity of privacy, it is important to understand that it is a concept with a long and somewhat confusing history, which had it origins in very early democratic political theory, developed further by liberal theory. It is not a creation of the nineteenth century, but neither is it inseparable from human activity. This new recognition of "dual identity" was also a reflection of a newly perceived split between a sphere of necessity and a sphere of freedom. Whereas the public realm was now formed through the association of peers, based on notions of equality and individuality, the private realm was constituted by survival and continuity of the species. The private sphere was seen as the realm of privation; not so much about man as mate, and therefore repressive of individualism. See Robert C Neville, "Various Meanings of Privacy: A Philosophical Analysis" in Bier, ed., supra note 24 for further discussion of this point. Aristotle dealt with this issue in his Nicomachean Ethics, claiming that it should be the legislators aim to make individuals virtuous; thus there is a distinction between the hortatory powers of private individuals and the compelling powers of law and office holders, see 1103b of text, or W P Baumgarth, "Justice, Privacy, and the Civil Order" in Bier, ed., supra note 24 at 46 for detailed analysis. See Velecky, supra note 28 at 16ff for further detailed discussion.

\(^{31}\)Neville, supra note 30. The latin term "private" first meant to be "without public office"; related terms were also negative in meaning, Privatus: bereaved; Privare: to deprive. See Ruthann Robson, "Lifting Belly; Sexuality and Lesbianism" (1990) 12 Womens Rights Law Reporter 177 at 177.
Yet in 1994, we, as the heirs to the greek political system, value privacy enormously, and at least as far as the dominant ideology is concerned, uncritically. The central thesis here is that our current understanding and endorsement of privacy is predominantly the result of the articulation of the liberal ideology, commencing as the feudal period came to an end, and reaching a peak in the ideological struggles taking place in nineteenth century western societies as industrialisation took hold. The new capitalist states of the nineteenth century involved tremendous upheaval within the developing western world. Values and social structures which had remained unthreatened and unarticulated for centuries were now seriously challenged. A new work world was created, (one which dispossessed families of the physical tools of survival as it formed the new working class) and one of its effects was to alienate the members of society from "society" itself. The capitalist ideology was able to attain hegemony at least in part because it recognised the need for, and provided, reassurance that certain traditional values would not be lost as society moved forward. This new structure of consciousness was both complex and contradictory, positing dual spheres, (the work world and the private family/individual) which were at the same time in radical opposition, and yet dependent on each other for legitimacy. A new articulation of the nature of privacy provided the necessary legitimation and cohesion and smoothed over the contradictions inherent in this new system, and allowed for its attainment of hegemonic status in a relatively short period of


33See Olsen, supra note 32 at 1519. For further discussion of this point see chapters two and three below.
This articulation of privacy took two main forms. First, privacy in nineteenth century liberal discourse took the form of a set of social conventions imposed on communications among members of society. Prior to the nineteenth century privacy had been essentially undebatable both because the state had had neither the inclination nor the technical skills to encroach, and because the nature of pre-nineteenth century society had made physical and informational privacy, although essential in liberal theory, virtually meaningless in any practical sense. Autonomous decision making was closely circumscribed by legal and other social norms, particularly for women. The family was interdependent, hierarchical, and patriarchal: slaves, servants, and women had little or no privacy or autonomy at all. Industrialisation, and the articulation of the ideologies necessary to support it, revolutionised the role of families and made the individual a more meaningful construct. At the same time, this societal transformation brought the affairs of members of society into a much closer relationship in many ways. The paradox of encroaching urbanisation and a new prevailing philosophy of individualism resulted in the perceived need for the state to assume greater responsibilities for the regulation of society and the well being of individuals. As the previous constraints on group life such as geographic isolation and lack of technology were threatened by technological advances and urbanisation, for the first time there was felt to be a real need to limit the reach of group life. The academic assertion, and judicial recognition of a privacy tort - the specific articulation of the

ideological concept of individual privacy - reflected this concern. "The private" as provided by liberal theory was seen as the means by which to ensure that the newly articulated needs of the individual for a space free from the demands of an increasingly intrusive society would be met. In other words, privacy allowed an individual to prevent the world from being her audience, from watching her every move.

The second function of privacy follows from the first. Liberal discourse placed this free space within the physical boundaries of the home, and in the process solved two problems with one concept. Industrialisation and urbanisation meant that for the first time the work world and the individual were thrown into stark opposition; until now the individual and the work he or she had had to perform to survive had been part of the same concept, the family had been a business for survival, an unquestioned part of life. With its primary function now in question, there was a real risk of social instability. Thus a new role for the family was articulated; the family as the place where the virtues and emotions that were to be banished from the world of commerce and industry would be safe. The private home would be the "haven for those moral and spiritual values which the commercial spirit and the critical spirit were threatening to destroy", a reward for which men should gladly suffer in the earthly world of work, and an altruistic motive or justification for carrying on their (now individual) struggles.


36 F Olsen, supra note 32, at 1499.
As we will discuss in the following chapters, this new family ideology became, and remains, a considerable focal point for reinforcement of traditional values and social roles. The ideology located the family as the place where patriarchal freedom and authority was assured, and at the same time created rigid social boundaries for those who were not considered part of the new work world. Difference (that which is not valued by the public) was thus hidden in the home. This new conception of the private did not provide space for individuality in the way that we understand the liberal ideology to mean to provide it; instead it provided space for the rigid reinforcement of "traditional" social values. Thus this new articulation of privacy both ensured space for freedom from intrusions by the world (a form of trespass action) for those who viewed the home as a haven (being by definition those who were able to leave it and join the public world) and isolated the family from society by giving it the new function of moral purity and safety. The two roles are essentially different sides of the same issue, and were the result of time-specific problems.

As the capitalist structure has evolved, so have the discourses surrounding privacy. Modern western societies are vast, dense in population, complex, and precariously interdependent in structure. The evolving character of modern urban industrial society and the way that we lead our lives within these societies lead many to claim that privacy is disappearing, and still others go so far as to say that privacy is no longer a valued aspect of contemporary living. Our perception of the shifting nature of privacy and fears for the decreasing possibilities for experiencing "the good life" are not just simple matters
of fact, they are shaped by our conception of the nature of privacy itself. This perception finds expression in judicial decisions on privacy where increasingly opinions to the effect that we are in a new era of "disdain" for privacy are heard. We see judicial statements to the effect that plaintiffs seeking privacy have "chosen" to give up their claims to privacy by virtue of their personal conduct - conduct which indicates a disrespect for the whole notion of privacy. These statements come about in situations where the conception of privacy articulated by law (which anticipates that difference will go unregulated by the state only so long as it is silenced and kept hidden in the home) shows no correlation to the positive role individuals steeped in liberal ideology expect it to play in their lives. This positive role - privacy as the place which will allow difference and individuality without secrecy - contrasts sharply with that negative legal form of privacy. The difference we hear is the inconsistency between what is posited by liberal theory, and the reality of law operating to enforce certain status quos.

Much sociological literature describes those behaviours that the judiciary regard as

37 An example of this, and one which will be explored in much greater detail in chapter three, is that of the case of Sipple v The Chronicle Publishing Co [1984] 201 Cal Rptr 665. Here the judge referred several times to the fact that Sipple, a gay man living in San Francisco, did not value his privacy and had no right to maintain a privacy action as he had let "hundreds" and "dozens" of people in the Bay Area and in New York know of his sexual orientation by frequenting gay clubs and marching in a gay pride march.

38 Although this will be discussed in more detail in chapter three below, an illustration of what is meant by this is the provision of the "closet" for same-sex sex. Liberalism tolerates private "choices" because while they are of great importance to the individual, they are of little consequence to society as a whole. By allowing these choices to go on in the private, the law is saved from the embarrassment of disrespect and unenforcement, and at the same time, society does not have to renounce any of its biases and beliefs. Thus, same-sex sex is deviant and disgusting but as long as it does not show in public it is "ok". See Rhonda Copelon, "A Crime Not Fit to be Named" in Kairys, ed., supra note 18, for a discussion of this concept in relation to the Bowers v Hardwick case.
disdain for privacy as actually being calls for a new form of social existence, and a new
recognition of the role of privacy in individual life. What sociologists such as Levine call
"the new exhibitionism" is a reaction against the complexities of the modern system
of social existence, rather than a reaction against, or a desire for less, privacy. That is,
it is a reflection of the changing substance of privacy, rather than a rejection of it. As
individuals are assigned progressively smaller and increasingly specialised functions vis-
a-vis society, while at the same time being coerced into higher degrees of responsibility
in performing these functions, the social system is liberated from the control of human
will. Levine states that as we are deprived of the experience of being perceived as whole
and as we begin to sense that we can not participate creatively or effectively in shaping
our world, we are increasingly alienated from the social structure. Exhibitionism (that
which the judiciary and conservative elements of society view as disdain for "traditional"
private values, and thus as a rejection of privacy), he continues, is actually a reaction
against our isolation from a system which seems impervious to any influence we can
exert. Thus openly discussing sexuality and personal relationships is not so much a
rejection of the idea of private autonomous freedom but rather a search to give those
terms new and significant meanings in social life. In Levine's terminology, such
discussions are an attempt to break out of this isolation and bridge the alienation

39See Levine, supra note 24.

40He backs up this argument with claims that exhibitionism is not the only result of this change in
perceptions of privacy. For instance, he states that our collective and increasing recourse to psychological
and religious exercises have as their primary objectives the exercise of privacy. We practice these and
other forms of self expression to experience our own natures. Levine also states that increasing belief in
systems such as existentialism, expressionism, zen, and taoism (which emphasise individual experience) are
counter assertions against a society which pre-empts the individual in favour of his social role. See Levine,
supra note 24.
between individuals, and between individuals and society. What we can see here is the substance of privacy continuing to evolve. Whereas privacy as secrecy was acceptable, and attained hegemony in the social turmoil of the nineteenth century, it is becoming slowly less acceptable to various groups as we head into the twenty-first century. The courts, enforcing a form of privacy which does not admit to being flexible or evolutionary, are still re-enacting a status quo that does not fit as comfortably as it did in the past.

Our understanding, appreciation, and protection, of privacy are ideologically driven, rather than essential and inflexible. One of this ideology's primary functions is to maintain and (re)create particular social relations. The ideology of privacy which has dominance at the present time is rooted in the conservative values of pre-industrialised society, stemming from an effort to maintain social organizations and traditional values that were threatened by economic and social changes. The remainder of this thesis focuses on illustrating how these conservative values and dominant social institutions (such as gender differentiation and heterosexual privilege) are enforced by the creation of a hierarchy of the "privateness" of groups of individuals in society, and on how this hierarchy is established via liberal notions of choice and culpability so as to appear natural, seamless, and uncontroversial.
4. "The Right to Privacy Tort": Warren And Brandeis Speak Out

With the movement from country to city, from self-sufficient family economies to market based commercial and manufacturing economies, people ... faced new possibilities of impersonality in the social relations of modern life. Human ties, once conferred by family and residence, became more subject to choice .... At the same time that people became free to feel themselves as new and important beings, they also came to feel the weight of social relationships and social institutions - society took on an existence objectified outside the person. On the one hand, living became more of a spectacle of watching strangers ... reading about them in newspapers .... On the other hand, as people understood their own ordinary lives to be of value and of possible interest to others, they ... avoided them to protect a private space for the self. 

In 1890 Samuel Warren and Louis Brandeis published "The Right to Privacy: The Implicit Made Explicit" in the Harvard Law Review. They claimed that within the right to freedom assured by the liberal ideology, there existed another right; the right to be "let alone". Further they claimed that the invention of the mechanical press and instantaneous photography had seriously threatened this liberty. In essence their article was an attempt to have the common law recognise, and deal with, the political, social and economic changes in nineteenth century American society by creating a legal right to freedom from public scrutiny. In the tradition of the liberal legal system which they inhabited, they sought to extract, from the common law torts of copyright, defamation, trespass, and from other common law protection of property offenses, a broader doctrine based on liberal privacy, which would provide protection to individuals from encroachment by the media on issues of "private facts" about an individual. They claimed that an important foundation of liberal legality was a right of individuals to keep


certain things out of the public realm; "[there are] some things that all men alike are entitled to keep from popular curiosity." This right was more, they said, than simply a principle for the protection of private property; it went beyond previous judicially recognised concepts. They claimed that the right to keep personal facts out of the public realm was essential to provide room for "inviolate personality" which the liberal ideology claims is essential for individual fulfilment, and which was therefore crucial to the continued success of the liberal state. They claimed that:

Gossip ... has become a trade, which is pursued with ... effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilisation, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual.

In articulating their grievance and positing a legal solution, Warren and Brandeis were giving voice to both of the nineteenth century arguments "for" privacy mentioned above. First they claimed that invasion of privacy by media caused emotional harm to individuals who were denied a necessary retreat from the world, and secondly, they stated that such invasions caused harm to the whole social climate. In their words, such revelations were a form of illegitimate publication which "both belittles and perverts the aspirations of

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43 Warren and Brandeis, supra note 42 at 196.

44 Warren & Brandeis, supra note 42, at 194.
man and distorts proper priorities." The "right to privacy" they outlined covered the prevention of publication of any matters concerning the private life, habits, acts and relations of an individual. They believed that the law must protect

Those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.... There are persons who may reasonably claim as a right protection from notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation.... Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office.\footnote{Warren and Brandeis, supra note 42 at 195. See Ruth Gavison who supports Warren and Brandeis' articulation of the tort on the grounds that the wish not to be the subject of public discussion is connected to human dignity, inviolate personality, and to the general well being of individuals and societies as a whole. Gavison, "Too Early For A Requiem: Warren And Brandeis Were Right On Privacy Versus Free Speech" (1992) Carolina Law Review 437.}

The action did not depend on a specific injury; invasion on one's private life was enough on its own to warrant action. The right was said not to apply to publication of any information bearing on an individual's fitness for public office, even though it concerned the individual's private sphere of activities. The tort that they proposed had four requirements:

1. A truly public disclosure; which
2. Concerned genuinely private facts; which

\footnote{Warren and Brandeis, supra note 42, at 473.}
3. Were facts which, if disclosed, would be considered objectionable and offensive to a reasonable man of ordinary sensibilities; when

4. Those facts were not newsworthy facts.\(^{47}\)

From the outset the formulation of the tort provided a paradox. It was a rule which would hamper human discourse, which is a fundamental part of social existence, while at the same time giving effect to a philosophical concept which was required for the successful operation of the liberal capitalist state. This paradox was overlooked or considered insignificant because the site from which the tort was articulated allowed such an omission. Warren and Brandeis' article was based on a largely silent set of assumptions about what social existence meant and how communication functioned within that system. The form of privacy articulated by Warren and Brandeis posited a legal power to control the flow of information about oneself to other people. Although they argued to the contrary, at base they viewed privacy as a property right.\(^{48}\)


\(^{48}\)Property is seen within the dominant ideologies in western societies, as quintessentially private, and law operates (in reality) first and foremost to protect the rights of those who own this private property. Laws structuring ownership of, and transactions in, property are the predominant focus of western legal systems. One obvious result of this is that propertied people are granted more privacy (for example, in the form of decisional rights to self government, the ability to purchase more physical inaccessibility) than less propertied, or propertyless, people. The capitalist conception of privacy which is articulated within liberalism is that privacy can be *earned*; the poor are less deserving of it than the wealthy. This part of the ideology of privacy can be demonstrated by examining the extensive schemes of compulsory revelations of personal matters to government "to prevent fraud" by applicants and recipients of welfare in comparison to industrialists who receive government assistance - there seems to be an assumption that poor people are more susceptible to dishonesty. See Frances Fox Piven, "Women and the State: Ideology, Power and the Welfare State" (1984) 14 Socialist Review 2. Martha Fineman has argued that there is a designation of single mothers as public, which has been justified in terms of the welfare funding that is given to them by public agencies. Fineman, "Intimacy Outside Of The Natural Family: The Limits of Privacy" (1991)
and Brandeis were, perhaps, typical of their social position. They were principally concerned with a loss of (their) freedom resulting from intrusive reporting of behaviour that had previously taken place within the family and had never been exposed to the public, particularly as regards the upper social circles which they inhabited. They considered dissemination of information about family life by the press, as we can see from the wording of their article, as yet another way that the lower classes were overstepping previously accepted and enforced social standards. Privacy, to Warren and Brandeis, represented freedom from the masses. Beazanson thus argues that their article must be understood as an attempt to preserve the class values and institutions within which they had been brought up\textsuperscript{49} and as such, they overlooked the inconsistencies and contradictions inherent in their proposal, and within privacy itself.

In essence their proposal reflected the cultural ideology that at that time played a major part of the intellectual life of the American northeast.\textsuperscript{50} The language and arguments that they employed perpetuated in the law the ideals of that society. Thus they defined the difference between public and private information both as a function of the status of the individual and of some core of information which the public need to know.

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\textsuperscript{49}Beazanson, supra note 35.

\textsuperscript{50}Allen and Mack, supra note 34, at 456. By this Allen and Mack are making reference to the elitist intellectual society made up of Harvard and Yale and the other ivy league colleges on the east coast. That culture was based very much on traditional notions of proper conduct and social etiquette; it was a gendered and class oriented view of the world which saw women and other social groups (particularly racialised) as keeping to their "proper" places.
Information was designated as public or private based as much on the identity of the individual discussed as on the subject matter under discussion. The idea of a man's home being his castle was uncritically incorporated into the common law, and as such so were the rules of conduct which kept women and racial and ethnic minorities removed from public consciousness.

Where privacy is viewed by authors as a right, or a privilege, owing to them by way of social status, there is not a large incentive to consider the ways in which privacy has been found to be detrimental to the well being of those who are less privileged. Thus, the parallel that Warren and Brandeis drew throughout the article, that of a cloistered lady, encompassed a vision of womanhood which both imposed a class-specific distinction on women in general (thus ignoring the realities of many women's lives), and which, in any event, romanticised the actual consequences of privacy on the women to whom their class vision did apply. This view of women's privacy "privilege" has been attacked on many grounds by feminist scholars. The state has traditionally refused to acknowledge the (unequal) position of women within the family because the divide between public and private in liberal theory means that the home is part of the world into which the state (and hence the law) may not intrude. Thus domestic violence and

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51Women appear in the article as seduced wives and daughters, or as prima donnas in tights. In the age of culture that Warren and Brandeis lived in, commercial displays of women were hard to reconcile with reigning myths of female moral superiority, spiritual leadership and heightened sensibilities. They refer coyly to the Marion Manola case, which was at the time attracting considerable attention. The court in that case (where a photograph of the much admired actress was circulated without her permission) went out of its way to compensate her for embarrassment and suffering. See below for more detail on the gendered nature of the tort.
marital rape have been ignored and denied until the recent implementation of formal equality before the law. The sanctity of a man's castle took priority.\textsuperscript{52} This denial of equal individual status to women permeates the application of privacy. Women are denied decisional autonomy in reproduction,\textsuperscript{53} informational privacy in situations where they require state financial assistance\textsuperscript{54} or in divorce hearings, and often physical privacy in child custody proceedings and in criminal proceedings where intrusive birth control procedures can now be declared mandatory.\textsuperscript{55}

Issues of race and class inequality complicate the privacy issue even further for women (and minorities in general). So, for example, women of colour experience privacy in different, more complex, ways than do white women. They can be construed as deviant


\textsuperscript{54}See Martha Fineman, \textit{supra} note 48, who comments that there is no fundamental difference in the funding given to single mothers and the funding provided to married couples under taxation benefits and the like. With regard to single mother families not reliant on state support, such as those created by divorce, an increase in state supervision of mothering has also been noted, and a similar objective has been hypothesised - the need to ensure the continued role of the father in the post divorce family. An example of this denial of privacy is in the creation of mandatory paternity proceedings, whereby a mother needing welfare benefits must name the father of her child on that child's birth certificate. In divorce, the absence of Privacy is ensured by the form of custody proceedings, with mandatory counselling and mediation (for example, in New Zealand and in various jurisdictions such as New York in the United States), and the fact of the continued possibility of modification of custody orders.

\textsuperscript{55}Fineman, \textit{supra} note 48.
and thus as "public" because of their colour, or they may confront cultural barriers which prevent, even further, breaches of the private. These issues can intersect with issues of class, (for example in education), to mean, for instance, that immigrant women who are battered or raped within the home have even less support than is available to other women and less opportunity to have their voices heard. In a social system that locates difference in the private and refuses to acknowledge inconsistencies in application of the notion of formal equality, race, class and sexuality become crucial areas where the definition and operation of privacy acts to reinforce the status quo.

This tendency for privacy to recreate the status quo is illustrated clearly in the United

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57By this I am thinking of women who come from societies which do not allow women (and thus do not educate them in the possibilities or the methods) to act on their own behalf in the public world. Thus women from certain religious or ethnic backgrounds (from certain middle eastern or asian countries for example) may have additional layers of difficulty to deal with in leaving the private sphere to seek help from police or public agencies.

58We see this different privacy experience in many complicated ways when looking at women of colour and poor women. For example, Kimberle Crenshaw points out that women of colour are both more likely to be raped, because of the differential value placed on women’s bodies in a capitalist society, and far less likely to have their claims pursued in the criminal justice system than white women; for a variety of reasons stemming from the fact that they are less likely to be construed as victims/believable, to a more systemic distrust of the legal system and the lack of access that accompanies that. We see this clearly in the example of the of the New York Central Park jogger; a white middle class professional woman jogging in Central Park in 1991 was raped and severely beaten by a gang of young black men. The same week, a young black solo mother and occasional prostitute was also raped, stabbed over a hundred times, and murdered, by a gang. One woman became a rallying call for an end to male (read black) violence against women; one did not. See below in chapter two for further discussion of the distinction in the way that these cases were handled by the press. See Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour" (1991) 43 Stanford Law Review 1241, at 1247-49.

59See among others, Fineman, supra note 48, Kimberle Crenshaw, "Racist Ideology; Race, Reform, and Retrenchment" (1991) 101 Harvard Law Review 1331; and Dorothy Chunn From Punishment to Doing Good (Toronto: University of Toronto Press) 1992, for further discussion of these issues.
States by the enforcement of criminal sanctions against sodomy. While this issue is the focus of Chapter Three, and will be examined in much closer detail there, for the purposes of this discussion, we see two contradictory uses of privacy in liberal discourse to maintain the heterosexual status quo. First, state and society award excessive privacy to gay men and lesbians in the form of "the closet", a place where non-heterosexual expression can take place without becoming a state-sanctioned identity; the closet allows state and society to maintain that gay and lesbian lives are purely matters of sex, and do not reflect on the more significant of personal identity. At the same time that this facet of privacy operates actively in gay and lesbian lives (by creating a space for non-conformity), on another level privacy exists in the negative; to deny decisional privacy (moral autonomy) as regards same-sex relationships, for example by the ban on same-sex marriage.

Understanding privacy requires an understanding of the role that communication plays in social existence. Warren and Brandeis did not deal with this point; their article

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60 We can think of the closet as a socially accepted "release valve"; a recognition that there is a threat to the status quo of the absolute value of heterosexual relations, and by creating a closet the state retains a right to regulate its terms. So sodomy statutes are not enforced but exist to ensure that same-sex sex does not become overt or normal. See chapter three for this discussion.

61 Dianne Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell Law Review 291. Zimmerman builds a positive case for the value of gossip; she says that the community benefits from acknowledgments such as a scarlet letter, and does not benefit from the continued protection of reputations of those who do not deserve them. She argues that the reason for our ambivalence over gossip is not difficult to see, we all have traits that we prefer to keep unknown, but we also tacitly recognise that social cohesiveness depends on our being able to make evaluations about others. Gossip has a constructive role to play in communities, and she points out that the growth in the modern popular press has paralleled that of the growth of less intimate communities. The press is taking up the position formerly held by back yard discussion.
assumes without explanation that there is such a thing as a private fact, and that it should not be published. This approach assumes a privileged view of what "private" or home life means, and assumes without more that a right to secrecy is uniformly valued, and useful, and further more, that it will be applied equally. As we will see, this view of privacy fitted (and continues to fit) within the dominant ideologies of what the right to individuality actually means, and has been adopted uncritically into legal discourse, at least until recently.

The new tort, as developed by Warren and Brandeis, after initial doubts as to the validity of legal scholarship in judicial decisions, was met with considerable enthusiasm within the American legal community. It was adopted first by the New York Supreme Court in 1902 and over the next decade by almost two thirds of the state jurisdictions within the United States. By the 1950's, the tort was recognised in every state except Rhode Island. Although the jurisdictions have adopted the tort in slightly different forms, the Second Restatement of Torts 1977 is generally followed very closely. The Restatement states the tort in the following format:

652 A. General Principle

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by unreasonable publicity given to the other's private life, pursuant to 652D.

652 D. One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person;
(b) is not of legitimate concern to the public.

The debate surrounding the "legitimate public interest" defence (basically the right to free speech guaranteed under the US Constitution) is virtually the same in all of the jurisdictions. However, there is a variation in the degree to which state jurisdictions have recognised what factual scenarios will constitute a "private fact" under the tort, a variation that poses difficulty in this thesis. However, the point under consideration here is to theorise the reasons for official sanctioning of the notion of private facts at all. By identifying the differences between what is posited as a universal liberal ideology (the right to privacy) and the actual case results, we can demonstrate the creation of a hierarchy of private instances which is based on dominant ideological belief structures. Thus while the differences between the jurisdictions are worthy of study in themselves, they fall outside the ambit of this thesis. Where the variation is obvious, for example where courts have cited cases or refused to follow those put forward by counsel, I have drawn the comparisons. In other cases, I am seeking to show the judicial decision and the accompanying judicial statements as a form of ideological discourse that, despite differences in state regimes, is broadly consistent throughout both privacy discourse, and society as a whole.
Conclusion

The ideological nature of privacy is complex and contradictory; it pervades and would seem to be inextricable from the legal doctrine which articulates privacy. It is crucial to understand that our notion of privacy is an ideological creation. If we look behind the supposed essentiality of privacy to consider the possibility of ideological motivations and forces, we can see that a belief in privacy serves particular power relations. The thesis that will be explored in the remaining discussion is that at present our conception of privacy, in the context of a legal system which relies on acquiescence for legitimacy, allows for exclusion or overinclusion of various social groups from or in the public realm by ideological processes. These processes in turn act as a type of social control, constructing and coercing individuals into compliance with dominant perceptions of socially acceptable behaviour. Thus in Chapter Two we move on to consider the gendered nature of privacy and how this dynamic plays out in the tort, and in Chapter Three to consider the heterosexual nature of society and its implications for using privacy to claim protection or validity for the individuality of lesbian and gay identities.
CHAPTER TWO: "LADIES AND REALMEN": THE GENDERED NATURE OF THE PRIVACY TORT

It has been argued that there is a continued role for organized institutional political power in the quest for human freedom and that law may enhance, rather than stifle, self realisation. The recognition that immunizing the family realm has thus far reinforced woman’s identity as man’s property and obscured her subordination should spur our efforts to explore [the flaws in] this possibility.63

Introduction

So far the discussion has focused on the role of ideology in forming our perceptions of social relations, with particular reference to privacy, and on the possibility that social relations are constructed in ways that benefit particular social groups. We have focused on identifying the ideological nature of the legal doctrine of privacy, by seeing privacy both as an ideology in its own right (and thus as natural, legitimate and necessary), and, importantly, as a crucial part of the liberal ideology which posits law, and therefore privacy law, as neutral and applied equally to all. We have briefly outlined two of the ways in which privacy does not act as the neutral good that it purports to be, in spite of its appearance of universality. That theoretical discussion informs the following case examination in which we answer the second question in Gavigan’s framework for analysing law and ideology; the extent to which judicial actors themselves employ or adopt ideological thought which is formally external to law, thus reinforcing dominant power relations. This part of an ideological analysis allows for further consideration of the question posed in chapter one; is it the law of privacy itself which creates inequality, or does it merely give effect to inequalities created elsewhere? The argument which is

63Nadine Taub and Elizabeth Schneider, "Women’s Subordination and the Role of Law" in Kairys, ed., supra note 18, at 157.
developed below is that privacy protection is offered to those women (and men) who stay within the socially constructed rules of conduct for each gender and is denied to those who do not. The case analysis seeks to show that the privacy doctrine forwarded by the tort creates a judicially constructed line which is continually redrawn in ways which recreate and reinforce dominant gendered norms within society. These norms operate to deny women the promises of the liberal ideology; in, and through, freedom and individuality.

1. A feminist analysis of privacy
Throughout the history of our liberally constructed society women have been denied equality on all fronts; power or respect are denied in the public world, and are only surface deep in the private. The work women do, sustaining families and households, is not valued, in fact it is hardly even acknowledged. "Law" has played a central role in this subordination, both by explicitly discriminating against women in its practices in regulation of the public, and by refusing to regulate the "private" sphere in ways which would offer women protection from exploitation or harm. Women have been consigned and confined to the sum of their private responsibilities, namely "bearing and rearing of children, and providing men with a refuge from the pressures of the capitalist world."64 There is much literature to support the assertion that the history of women's privacy, rather than being the neutral and beneficial freedom posited by the dominant liberal ideology, has a complex and contradictory nature which applies differently (and causes

64Taub and Schneider, ibid, at 152.
more harm) to women than it does to men.\textsuperscript{65} That difference is articulated in the compulsory nature of privacy for women and other subordinate groups in society discussed above, highlighted further by the optional privileged form of privacy that attaches to men who fit with the dominant social grouping.

The ways that privacy is implicated in the subordination of women are often subtle and insidious. The negative form of privacy articulated within liberal theory identifies the "private" as the place where the state can not regulate conduct. As women have traditionally been located within that private sphere by the dominant ideologies surrounding gender, the absence of regulation was, and still is to a (less clear) extent, in itself a mechanism for the oppression of women. Women have been "controlled" within the private by physical means, by economic dependency, and by exploitation of domestic labour.\textsuperscript{66} This "control" is less easy to define today than perhaps it has been in the


\textsuperscript{66}See Susan B Boyd and Elizabeth A Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practices" (1986) 2 Canadian Journal of Women and Law 1 for a comprehensive bibliography on Canadian feminist approaches to the analysis of law; M E Ritchie "Alice Through the Statutes" (1975) 21 McGill Law Journal 685 (effects of male oriented statutory language excluding women from law); S J Menzies "The Uncounted Hours: The Perception of Women in Policy Formulation" (1975) 21 McGill Law Journal 615 (women's unpaid labour essential for the capitalist structure); K Cooper-Smith "Damages for Loss of Working Capacity for Women" (1978) 43 Saskatchewan Law Report 7 (tort law comprising male judicial bias in both formulating substantive rules and applying them); J McCalla Vickers ed., \textit{Taking Sex into Account} (Ottawa: Carleton Press) 1984 at 156 (women and children as property of men); Carol Smart,
past; clearly today women move between the public and the private worlds. However, general trends provide evidence that women are responsible to a large extent for tasks which state and society have defined as private (childcare, housework, caring for the elderly or the sick) and show that women are still largely constructed and confined by "the private". Clearly this analysis of women being constructed as private and as being confined to the home is complicated further by issues of race and class; thus women of colour have traditionally and continue to be present in the work force to a greater degree than middle class white women. But at a general level we can say that law has reproduced and maintained an ideological model of womenhood and impact on all women regardless of age, race, class or sexuality. Women have been both explicitly discriminated against by law (for example, denial of suffrage, exclusion from tertiary institutions, occupations, clubs and professional associations, equal pay) and implicitly

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^See Pat Armstrong and Hugh Armstrong, The Double Ghetto: Canadian Women and their Segregated Work 3rd edition, (Toronto: McClelland and Stewart Inc.) 1994. The fact that law has incorporated challenges to the public/private divide by means of legislation such as pay equity, parental leave, and affirmative action, has still not changed the fact that women are still predominantly grouped in lower paying, less "respected" careers, and that on top of this they are still predominantly responsible for the "private" side of existence.

discriminated against by a system which refuses to intervene in "private" situations where those situations invariably operate against the interests of women and children. An example of the flexibility of this conception of privacy as it affects women is the current ideology that family disputes are more suited to mediation than formal legal proceedings. Thus while there is now a formalised process by which the state will involve itself in the private sphere, the message we receive from law is the same as that received when there were no formal contacts; the "family" (hence women) is not a matter properly fitting into the (public) legal system. Whereas before the family was not "worthy" of status, now it is "too valuable" and the court too blunt an instrument to deal with its intricate, emotional, fabric. Denying the value of women's lives and the work they perform is a key ideological component in maintaining the status quo. Isolating women in a world where the law refuses to intrude obscures the discrepancy between women's actual situation and the liberal states commitment to equality. By favouring equality in the public sphere, while denigrating the need for real change in social roles, the law can purport to guarantee equality while simultaneously denying it.

69For example, contract law regulates the formation of the marriage contract and the end (divorce or death) but ignores all the events in between, in a way that it does not with other contracts. Similarly tort law, which concerns injuries inflicted on individuals by other individuals, has been (and still is to a large degree) considered inapplicable between family members. Criminal law is another example and traditionally has not been used to punish spousal rape, wife beating or child abuse. The effects of omission of law have allowed spousal rape, wife beating, and child abuse to go unchecked.

70For literature showing the emphasis placed on mediation, see Martha Fineman, "Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking" (1988) 101 Harvard Law Review 727; also Ruth Parry, Custody Disputes: Evaluation and Intervention (Toronto: Lexington Books) 1986; H H Irving and M Benjamin, Family Mediation: Theory and Practice of Dispute Resolution (Toronto: Carswell) 1987, particularly introduction.

71Taub and Schneider, supra note 63.
As we discussed in chapter one, Warren and Brandeis' tort stemmed primarily from their nineteenth century, privileged, peculiarly male, perspective of privacy. As we have seen, this perspective is built on a history of female subordination, and the result is reflected in a body of case law which demonstrates a distinctly gendered approach to privacy.

2. The gendered aspect of the case law

There were indications of a willingness to develop some form of tortious privacy prior to Warren and Brandeis' article, and in fact these cases, which indicated the special role privacy was held to have in nineteenth century, played an important role in their subsequent formulation of the tort. The earliest case is that of De May v Roberts.\(^{73}\)

\(^{72}\)Compare Warren and Brandeis' article to the writings of Charlotte Perkins Gilman, a contemporary author, who had quite a different perspective of privacy as it related to women. Whereas for Warren and Brandeis the "cloistered lady" was an ideal to be perpetuated and validified by privacy, she looked on an increased role for women in the expanding industrial economy as the way to change the way that privacy affected to women, in effect to allow women to attain the valuable privacy now only available to men;

the free woman, having room for full expression in her economic activities and in her social relations, 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. (quoted in Allen and Mack at 467)

She was arguing for the norms of privacy and private life to apply to women no less than men; for women the "highest development of personality". Allan and Mack, supra note 34, at 468. See Gilman, Women and Economics (New York: Harper & Row) 1898.

\(^{73}\)In that case, a physician came to the plaintiff's house to deliver her baby. He brought with him, and introduced, a friend who had been required to carry his bags in the inclement weather. Upon later discovering that this friend was neither a doctor, nor married, the De Mays sued both men for damages. There was much evidence to show that the friend, Scattergood, had only reluctantly agreed to accompany the doctor, doing so only because the roads were too poor to be ridden by horse, and the doctor, who was sick himself, had required assistance. He was introduced as "a friend" and the plaintiff's husband had been satisfied with this. The court agreed that "both of the defendants in all respects throughout acted in a proper and becoming manner actuated by a sense of duty and kindness". (at 148) Despite this, the court was of the opinion that the plaintiff and her husband had a right to presume that a practising physician would not take with him, in such a situation, someone who was not connected to the medical profession.
The court held that a female plaintiff was entitled to assume that only a medical doctor would be present when she gave birth, and went out of its way to find deceit on the part of a doctor who had brought along a friend to help him attend to her medical needs, even though the circumstances were such that the friend's presence had been necessary and the doctor had not represented him as being there in any professional capacity.

The next case to consider privacy as it applied to women was the *Marion Manola* case. Here an actress was surreptitiously photographed by her employer as she performed on stage one evening whilst dressed in tights. The New York court granted her an ex-parte injunction to restrain publication "owing to her modesty". This case sits uneasily with the analysis of the cases we will consider later in this Chapter where privacy is denied to women who breach social convention. Miss Manola was a dearly loved and extremely popular actress in New York at the time, and one explanation for the case may be an attempt to reconcile warring social conventions. While actresses were clearly not "good" women, they played an important part in the social life and culture of the times. It may be that one way around the difficulties this presented to public morality was to deem certain actresses with qualities of modesty and charm, thus allowing them to breach

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It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and distressing necessity... The defendant Scattergood, who intruded upon the privacy of the plaintiff, indecently, wrongfully and unlawfully laid hands upon and [thus] assaulted her... being a young unmarried man... while the plaintiff believed that he was ... a competent and proper person to be present and to aid her in her extremity. (at 149)

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convention but only in limited (and male controlled) circumstances. Perhaps the fact that her employer had acted in less than good faith had something to do with the decision, or perhaps it was merely a desire to keep pictures of scandalous women out of the public realm. While the reasons for what seems in light of subsequent analysis to be an anomalous decision are obscure, it does fit with the proposition that women were felt to have, in the late nineteenth century, a special quality of privacy attaching to them. In the *Botsford* case the Supreme Court had to review a damages judgment for injuries sustained when the top berth in a sleeping car fell on the plaintiff and caused her physical injury. Prior to the original trial the defendant moved for an order requiring the plaintiff to submit to a surgical examination in order that correct diagnosis be available to the court. The court gave strong voice to the liberal ideology of privacy, and more specifically to the special privacy needs of women:

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law... The right to one's person may be said to be ... let alone... The inviolability of the person is as much invaded by a compulsory stripping and exposure, as by a blow. To compel anyone, and especially a woman to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity...76

What we see in these cases is an articulation of the new nineteenth century morality discussed earlier; women, now charged with moral and spiritual pureness, are deemed

75*Union Pacific Railway Company v Botsford* [1891] 141 US 250.

76*supra* note 75, at 252, per Gray J.
to require special privacy. This privacy even carried over into the public sphere, with a court willing to extend privacy protection to an otherwise "undeserving" woman. This legal right to private home and family life necessitated female modesty and seclusion: moral purity was the new function of nineteenth century womanhood. It is with this sense of special privacy for women that the tort was developed and interpreted.

Yet this privacy of homelife was experienced differently by men and women. Warren and Brandeis seemed to associate it with solitude and peace. There is, however, much feminist literature to suggest that women confined to domestic tasks and caretaking roles

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Another interesting example of this is found in the case of Schuyler v Curtis [1895] 42 N E 22 1895 N Y Ct App. Here a benevolent fund decided to build 2 statues to commemorate "Woman as Philanthropist" and "Woman as Reformer". Mrs Mary Hamilton Schuyler (died 1865) was chosen as recipient of the honour of a bust engraved "typical philanthropist" with her name, to be displayed at the 1865 exposition. The organization did not seek permission from her family, and as a result a nephew brought an action for invasion of privacy to prevent it from displaying the bust. He failed in both courts, but the case is interesting in the "man on the street" attitude to privacy which it reflects.

Her nephew pleaded that the defendants ".. exposed the name and memory of Mrs Schuyler to adverse comment and criticism of a nature particularly disagreeable to her relatives and have caused [her to be associated with] disagreeable notoriety ..." This notoriety was due to the fact that the other bust, to be displayed in the same room, was dedicated to one Ms Anthony, a well known "women's libber". The court held that while

[the plaintiff was sure Mrs Schuyler] had not sympathised with or approved of the position taken by Ms Anthony upon the proper sphere of woman and her treatment by the law, and it was disagreeable and annoying to have the memory of Mrs Schuyler joined with a principle which [she would not have approved]... and while many of us may, and probably do, totally disagree with these advanced views of Miss Anthony's in regard to the proper sphere of women....

she has lived a long and distinguished life and no one could legitimately object to their relatives bust being placed in the same room as hers. The court held that what was at stake here was the plaintiffs' privacy and that as such what Mrs Schuyler would have wanted was irrelevant as her privacy died with her. The judgement was in the event based not on privacy (although the dissent was strongly critical of a decision that judge considered to make a public spectacle of a private righteous woman) but on the fact of cooperation (the bust was not displayed at the Exposition as had been the original plan) and the fact that the organisation that was responsible for the bust had as its primary aim the glorification of the values and respectability for which Mrs Schuyler stood.
did not experience quite the same quality of peace of mind in the home as men. Whether women were confined to the home by class conventions, or sent into the public by economic necessity and then back into the home at night, social convention was such that autonomy and freedom of action was prohibited for women in the late nineteenth century as much as it had been in the past. 78 If the home was to be a crucial preserve for individuals, someone must maintain the home - and that task fell to women. Women must therefore conform to stringent rules of conduct. Warren and Brandeis applied this vision of social harmony to their article, and as a consequence the tort was, and still is, based on a form of privacy which does not afford protection for those who attempt to disrupt the status quo by challenging dominant interpretations of gender roles. The tort is interpreted in light of the same ideological processes which created it, and as such the following cases demonstrate dominant constructions of gender in western liberal societies.

3. The Teenaged Parent Cases

Meetze v The Associated Press 79

Here newspaper articles reported the fact that a 12 year old mother had given birth to a healthy normal son. Whilst in the hospital the mother told reporters she did not want

78Thus Allen and Mack note that slaves, maids and other women who worked outside the home had little or no chance of attaining privacy, with regard to either a sense of autonomy or peace and solitude. Similarly, wealthier women who had household staff had little privacy within their homes. No matter what level of society women inhabited in the nineteenth century though, while the liberal emphasis on privacy in the home was posited as a replacement for the sense of individual control now impossible in the new market place, in fact women lacked meaningful privacy as much as they ever had. See Allen and Mack, supra note 32 at 466.

any publicity and she refused to give any interviews or to allow any photographs to be taken. Regardless of her stated wishes the newspapers published articles with rather sensational headlines, making much of her youth. The girl and her husband sued for invasion of privacy, complaining that the reports exposed her to "an unwanted public light... [making her] an object of scorn and ridicule because of [her youth] at the time of the birth.". Their claim was dismissed.

*Hawkins v Multimedia Inc*\(^{80}\)

Multimedia published a story concerning teen pregnancy. The article focused on one particular teenaged mother. A sidebar to the article identified by name the father of her child. The mother told the newspaper reporter that "Craig" was the father of her baby. The reporter rang Craig to talk to him about the baby and how he felt in general about being a father as a teenager, but the boy was reluctant to answer questions and after a short conversation terminated the call. After the article was published Craig sued for invasion of privacy, claiming that his name was not newsworthy and that the reporter had had no right to use his it when he had intimated he did not wish to be interviewed. His claim succeeded.

*Pasadena Star - News v Superior Court*\(^{81}\)


The Pasadena Star published two articles about a newborn baby who had been abandoned at a local hospital. The first article set out the facts as known, and stated that the police were seeking to identify both the mother of the baby and the man who had left the baby at the hospital. The second article, a week later, reported that the mother had been identified, that she had given birth at home without her family knowing, and that her brother had taken the baby to the hospital. The article set out both names, and the fact that charges would not be laid against either as the baby had not been placed in any physical harm. The girl sued the newspaper for invasion of privacy, arguing that the paper should not have published her name as she was not a public figure, and as it was not essential to an understanding of the event. In essence her primary argument was that her name in this situation was a non-newsworthy, private fact. Her claim was dismissed.

i) Legitimate Public Interest (Newsworthiness)

These cases have certain factual similarities. They involve young people and publicity focused on them as a result of teenage pregnancy; by definition placing them in situations not meeting societal definitions of "normal". Birth, like sexuality, is usually considered a private matter to which privacy as a right attaches. The *De May* case was an early indication of that social norm, and the standards of personal privacy behind the tort as defined by Warren and Brandeis and later by Prosser would place birth as a matter which concerns "the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he
is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity." 82 On similar lines, conception has been considered to be an essentially private fact as regards the tort. 83 So, given that the same "law" is being applied in these three cases, we have to consider what created a situation whereby a married 12-year-old mother and an unmarried teenaged mother were denied privacy, while an unmarried teenaged father was not.

In each case, the respective courts pursued what they considered to be a balancing act between the needs of society to know what was happening in the community and the right of the individual to be free from scrutiny. In matters of legitimate interest, at some point public interest wins out over private wishes. What a court must decide in a tortious privacy case is what constitutes a matter of legitimate concern to the public. In Meetze the court held that the right of privacy is relative to the customs of the society in which it takes place and that a twelve-year-old girl giving birth to a child was "a biological occurrence which would naturally excite public interest." 84 Further, the court held that to constitute an invasion the act must be of such nature as "... might and probably would cause mental distress..." 85 In spite of the plaintiff's vocal and repeated requests for privacy, and her well-founded fear of being made a spectacle by the media, the court

82Warren and Brandeis, supra note 42, at 474.

83See Y.G v Jewish Hospital [1990] 795 S W 2d 488, discussed below, where conception from an in vitro program is also considered an essentially private fact. See below at note 112, for further discussion.

84Supra note 79, at 607.

85Ibid, at 609.
held that the reporters had not realised the effect their actions would have, holding that:

[T]here is some justification for the complaint, ... [the reporter] visited the mothers room on the day following the birth. It would seem he could have waited a reasonable time before seeking to interview her. He was obviously an unwelcome visitor and a source of great annoyance, however the courts do not sit as censors of the manners of the press. \(^{86}\)

This decision contrasts vividly with that in *Hawkins*. In that case Multimedia sought to have the same court follow the precedent it created with *Meetze*, and again find that teen pregnancy was a matter of general interest. However, in *Hawkins* the court held that newsworthiness was not necessarily the test; that public curiosity was not enough to legitimate publication. The court cited Warren and Brandeis: "revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." and explained that the difference between *Meetze* and the factual situation now before it was that the public interest was far greater there than it was here;

It is rather unusual for a twelve year old girl to give birth to a child. It is a biological occurrence which would naturally excite public interest... It was an event ... entered on a public record... Manifestly an individual can not claim a right to privacy with regard to that which can not from the very nature of things ... remain private... \(^{87}\)

\(^{86}\) *ibid*, at 610.

\(^{87}\) *supra* note 80, at 199.
In fact the court went further than this. Not only was the court not prepared to find that Craig was part of a newsworthy story; the court considered that Multimedia had breached his right to privacy simply by not obtaining his consent to publish:

Multimedia failed to introduce any evidence of Craig's consent. While Craig did not terminate the conversation immediately, it was brief and he was "very shy". The reporter never asked Craig if she could use his name in a newspaper article. Craig ... was never told he would be identified...  

Although the *Hawkins* court cited *Meetze* with approval to show that Mrs Meetze had lost her right to privacy by warrant of her "acts, achievements, or mode of life [which meant she had] become a public character and lost to some extent the right of privacy as there are times when one, whether willingly or not, becomes an actor in an occurrence of public or general interest", it was not prepared to consider this principle applicable in the case now before it, both because the issue of Craig's fathering a child was not sufficiently legitimate as a news item, and because the defendant did not have his consent to publish. This seems interesting when held in light of the sentiment that the courts are not in the business of minding the manners of the press.

Two years later in *Pasadena*, counsel for the plaintiff sought to have the *Hawkins* decision applied in its (different) jurisdiction. The California Appeals Court was not prepared to consider the issue of consent or the intimacy of the facts being published.

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88*supra* note 80, at 146.

89*ibid*, at 148.
The court held that;

... the two articles ... relate to widely debated issues of unplanned pregnancy, children born to single mothers, and adoption, and by implication, contraception and abortion.\textsuperscript{90}

and as such were legitimately newsworthy without more. Counsel for the plaintiff argued that although the issue may have been newsworthy along the lines of Meetze, the plaintiff's name was not, relying on the same grounds as those in Hawkins. The court was not prepared to consider this point, holding that "while articles on such topics sometimes avoid divulging the names of individuals involved, no principle of tort law requires this journalistic approach",\textsuperscript{91} and holding further that to do so would mean revolutionising journalism, with the implication that this was excessive and unnecessary. As we shall see below, this "naming" debate arises in a wide variety of tort cases and is applied very selectively; there is a general tendency in such decisions to uphold certain (traditional and gendered) social values.

Although the facts of these cases are essentially the same, three young people who had parented children and did not desire publicity seem to have been judged according to two different standards. Clearly, to the court, a shy and retiring 15 year old father is not a matter which naturally attracts legitimate public attention, but a 12 year old mother

\textsuperscript{90} supra note 81, at 731.

\textsuperscript{91} ibid, at 731.
(even a married one), or a mother who abandons her child, is.

With regard to the decision in *Pasadena*, arguments have been made in other contexts about the designation of single mothers as "public" and undeserving of potentially valuable "private" status. Martha Fineman has argued that single mothers are considered as not conforming to important cultural and social norms; clearly, being a teenaged single mother adds another layer to that conception of deviance. The nuclear family norm dictates the form of the normal family, and

Mothers who fail to conform are "made public" - portrayed as in chronic need of state supervision in making decisions about their families.... The "public" nature of their perceived inadequacies justifies their regulation, supervision, and control... Private families, by living up to ideological expectations, can be considered to have earned the right to privacy - the right to be free from state supervision and control that accompanies the designation of deviancy.92

This "punishment" motif seems to be an important part of the public/private split. On the one hand, difference can be isolated and ignored, on the other it can be regulated and controlled. If we consider the thesis that privacy and privacy law operate to reward or enforce correct gender-behaviour we see the point of the difference between these cases. A teen-age boy is supposed to have sex; this myth is a strong part of our popular culture. However, girls represent purity and must not. Further, a "good" woman would not abandon a child; this does not fit in at all with the ideology of compulsory

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92Fineman, *supra* note 48, at 959.
motherhood which dominates gender-roles. A 12 year old girl who is having sex, even if married, presents considerable challenges to our notions of propriety and "normal" conduct. Clearly, so does a girl who abandons a baby. These challenges to social mores allows for the construction of such a plaintiff as deviant and by corollary a form of public property, a force to be controlled, examined, and made an example of. By publishing her sins, and denying her the right to privacy, others learn of the correct social standards to which they must adhere. Thus, for instance, Dianne Zimmerman argues that the "problem" with the tort is that it overlooks or seeks to dismiss the "genuine social values ... served by encouraging a free exchange of personal information." She argues that "Christianity ... values public exposure of an individual's faults and weaknesses as a way to stimulate better behaviour in others ... Hester Prynne becomes a powerful moral force ... because unlike her lover Dimmesdale, she must acknowledge her sin publicly." The point to note here is that it seems that women are consistently made examples of in order to stimulate better behaviour in others, while men are not. I would argue, contrary to Zimmerman's position, that the "problem" with the tort is not that it overlooks the "learn by example" aspect of socialisation, but rather that it incorporates it directly within its operation, in ways which reinforce and recreate gender inequality.

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94 Zimmerman, supra note 61, at 294.

95 ibid, at 326. (NB: she is referring to "The Scarlet Letter" by N. Hawthorne 1878.)
Another aspect of these cases to consider before we discuss the "naming debate", is whether the varying degrees of respect which is granted to speakers is part of the explanation for the differing results. As we have discussed, women, and even more particularly young girls, have much less voice in the public realm than do men. Thus when Craig indicated he did not wish publicity, the court may have felt that the press should have respected that wish, compared to the wishes of two young non conforming girls.

ii) The Naming Aspect: Names as Private Facts

We can continue our analysis of these three cases in the light of Melvin v Reid.

Melvin v Reid\(^6\)

In 1918 Gabrielle Darley, a young woman who was working as a prostitute, was tried and acquitted of the murder of one of her clients. After her acquittal she "abandoned her life of shame and became entirely rehabilitated; [in] 1919 she married Bernard Melvin and commenced the duties of caring for their home, and thereafter lived an exemplary, virtuous, honourable, and righteous life; [she] assumed a place in respectable society, and made many friends who were not aware of the incidents of her earlier life."\(^7\) This "respectable" life came to an end in 1925 when the defendant, a film company, released "The Red Kimono", a film which they advertised as being based on the true life story of

\(^6\)[1931] 297 P. 91.

\(^7\)ibid, at 91.
Gabrielle Darley. As a result she was shamed and shunned by "respectable society", and her new friends and her husbands family abandoned her. She sued the film company for invasion of privacy.

Surprisingly, the court upheld her claim. The "surprising" aspect of the decision comes from the fact that the court recognised that Melvin came squarely within the "public figure/legitimate public interest" exception, and would ordinarily have had no right to assert privacy. Indeed the court reluctantly conceded that the film itself did not provide grounds for a successful invasion of privacy action. As all of the incidents in the film were based on events listed in public registers, the circulation of the film was not offensive per se. However, the court was able to extend the tort to include her on the grounds that the film company infringed her privacy by using her true name in connection with the true incidents of her life. The court considered that this constituted an "...unnecessary and indelicate and a wilful and wanton disregard of that charity which should actuate us in our social intercourse...".98

The court considered that any person living a life of rectitude has a right to happiness and that this was sufficiently endangered by the film to constitute an invasion of privacy. The assumption that the tort is based on a tacit consensus that we not cause one another unnecessary pain is only of selective application in privacy tort decisions and we have already seen a confusing record on whether the court will enforce journalistic "manners"

98 Ibid, at 93.
or not. In all three of the previous cases this argument was raised by the plaintiffs. In *Meetze* that point was considered to have little significance, because the plaintiff's name was on the birth certificate, and being on a public register meant she could not claim privacy. Although this was the same situation in *Hawkins'* case, the court did not think that Craig's name was a necessary part of the story, and that by publishing it without his permission the press had invaded his privacy. Yet in *Pasadena* that same argument was dismissed summarily;

This contention has some superficial appeal, but only as an abstract proposition. Plaintiff would seek to ... overhaul journalism as we know it ... This would change the tone of stories about matters of the greatest public concern, many of which are stories about individuals of "no renown".... While articles on such topics sometimes avoid divulging the names of individuals involved, no principle of tort law requires this journalistic approach.99

Thus this "naming" aspect of the case law also seems inconsistent, and we must continue to search for an explanation for the case results.

a) Choice

We can continue the analysis of these inconsistent case results in light of the concept of "choice", and the relevance that the construction of a plaintiff as having "chosen" to act in certain ways has in the judicial decision-making process. Normally where a plaintiff

99*supra* note 81, at 731. This seems to fit into an economic valuation of "news". For example, Beazanson says that "the disclosures of private facts often have as their primary communicative value a contribution to the impact or attracting quality of news rather than an understanding of its substance ... [and] in many instances of tortious public disclosure ... their primary justification is impact..." - that is, names sell newspapers.
"chooses" to act in ways which breach social convention, courts expect that the plaintiff must bear the costs that attach to that choice.\(^{100}\) Interestingly enough however, what we find here is an inconsistent application of this general principle. We can consider this point by considering the *Times Mirror*\(^{101}\) case. In that case the California Appeals court decided that the reporting of a personal fact (the plaintiff's name) connected to a criminal investigation (although lawfully obtained) was not legitimate on the newsworthy grounds. The court held that the story could have, and should have, been reported without the name. The court claimed that "the state's interest in investigating crimes and protecting witnesses outweighs the publisher's interest in publishing the witness's name without risk of liability."\(^{102}\) In brief, the name of a woman who identifies a murder suspect is deemed not to relate to the public event in which she *unwittingly* became involved. A teenaged girl who has a baby in "abnormal" circumstances, on the other

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\(^{100}\)While I say "normally", it should be noted at the outset that this whole notion of choice is fraught with inconsistencies as will be demonstrated in the case analysis both in the remainder of this chapter and in chapter three. For the purposes of the immediate discussion, consider the decision of an appellate court in Ontario where a man was considered too drunk to be culpable of rape (see Vancouver Sun, front page, November 6 1994). While he chose to drink, he was not punished for his actions. Consider also the nature of "choice", which is very abstract in liberal theory; it is used mainly to justify inaction. So for example, in the issue of abortion, although women are given no public funding, limited access to abortion clinics, and often considerable harassment in getting to such a clinic, they are still considered to be able to make a "choice" as to whether or not to have an abortion. See *Webster v Reproductive Health Services* [1989] 109 S Ct 3040; *Planned Parenthood of Southeastern Pennsylvania v Casey* [1992] 112 S Ct 2791. The same sort of abstraction can be seen in the discourse surrounding single mother's "choice" not to work but to stay home and look after their children (see for instance the compulsory work registration schemes under discussion in New Zealand, the United Kingdom, the United States, and Canada).

\(^{101}\)[1978] 607 P.2d 729. The facts here were that a woman returned to her apartment and found her roommates body in the kitchen. She looked up and witnessed a man fleeing from the site by window. She provided a description of the intruder to the police who issued a search warrant for the alleged murderer. After publication of the woman's name and address, she received death threats from a man claiming to be the murderer, and had to go into police protection.

\(^{102}\)supra note 101, at 732.
Thus in *Pasadena* the court refused to follow *Times-Mirror*, stating that "Plaintiff was not merely the involuntary victim of an event of public interest; her own voluntary and extraordinary actions created the newsworthy event."103

The discourse that surrounds "choice" in liberal societies, particularly in the United States, is an important part of the legitimacy for social sanction. Involuntary actions cannot be legitimately punished, while chosen behaviours imply consent to societal sanctions. However, even assuming that teenagers who have sex and create babies are choosing their injury in a way that a witness to a crime does not, still there is the issue of *Hawkins* and *Melvin* and why they were granted the protection or privilege of privacy when their situations were, on the face of it, no different than those of the others.

b) Social Utility

Another principle, which we will call "the social utility of public disclosure", is of crucial importance in our understanding of these cases. It is also a principle which is obscured by the functioning of the ideology of liberal legality. This analysis requires that we consider what values are reinforced when an individual is named in the media. A useful starting place for this discussion would be an examination of the tort cases surrounding disclosure of rape victim identities. In *Ross v Midwest Communications Inc.* a television station used the name and photograph of the home of a rape victim in its report of the...
crime. When the raped woman claimed invasion of privacy, the court found against her, claiming that use of her name and home "provided a personalised frame of reference that fosters perception and understanding ... communication that this particular victim was a real person with roots in the community was of unique significance to the credibility and persuasive force of the story". In *Griffith v Rancousas* a woman sued for invasion of privacy after a police officer unofficially disclosed, and the media reported, her name in connection with her rape in a hospital carpark. She had asked that her name not be released. The court held that as a victim of a crime her name and address were substantially relevant to the story of the crime; whether or not the media obtained this information from a public record or otherwise. In *Florida Star v BIF* the Supreme Court held that the press have a legitimate right to publish a rape victim’s name and details and that a statute which purported to prevent this was invalid. The Supreme Court held that the right of the press to publish can only be overcome by a law which protects a privacy interest of the highest order and the statute in question was not such a law. The court held that because the law did not prevent individual discussion but only media publication of the issue, the legislature in question was not really serious in its intent to prevent publication. In *Doe v Sarasota-Bradenton Florida TV* a

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105[1982] 8 Media Law Reports 1760 (New Jersey Supreme Court)

106[1989] 109 S Ct 2603

107See also *R v Canadian Newspapers Company Limited* (1990) 43 C.C.C 3d 24. In this case the defendant challenged the constitutionality of Section 442(3) of the Canadian Criminal Code (prevents publication of identifying facts of the victims of sexual crimes without consent of victim) on the grounds that it interfered with the right to free speech. The Supreme Court of Canada upheld the validity of the statute, but left open the issue of whether that ban on publication might be overridden if the issue of a
television station ran video evidence from the testimony of a woman in the rape trial of her assailant. The (appellate) court in that case held that although the media had acted in "bad taste" it had not illegitimately invaded her privacy.

These cases do not fit with either the stated rationale behind the tort or the tests posed by courts in deciding what make up private facts, both of which would seem to indicate that in relation to such an offence, a name is a private fact. State legislation to this effect makes this proposition even clearer, and yet when this privacy is invaded, the tort is not found to apply. Nor do the cases make sense in light of the "choice" rationale. What then is the explanation? These cases do make sense in view of long standing societal attitudes towards rape and the women on whom it is inflicted. Publication of rape victims' names ensures condemnation and public scrutiny of women who are raped, and this in turn ensures that only a tiny percentage of women who suffer sexual violence at the hands of men come forward.109 When they do report the crime, the law of fair trial was to arise. The court held that there is a constitutionally protected interest in free publication, and that it can be examined in terms of "fairness". See Christine Boyle, "Publication of Identifying Information about Sexual Assault Survivors: R v Canadian Newspapers Co Ltd" (1990) 3 Canadian Journal of Women and the Law 602 for comment on the somewhat ambiguous outcome of this case, especially the way that feminist arguments such as publication of names as a form of voyeurism, were heard by the Court.


109So "there is now a well-documented process by which women's complaints of rape are filtered out of the legal system long before they get to the trial stage. Informal processes, which are less visible than the trial, operate to deny women's account of rape in the same way that a legal hearing does. In addition we know that many women will not enter into the endurance test of the legal process in the first place." See Carol Smart, supra note 66, at 37. What this means is that the state, which claims that it has an interest in preventing crime and protecting the lives of the members of society, is actually sabotaging its stated aim, as unreported crime is both unpreventable, and unpunished, crime.
privacy offers them (at least in the American context) no protection or sympathy. The effect of court attitudes such as those discussed above is to punish the victims of rape for coming forward. Naming adds to the stigma felt by raped women in a victim blaming misogynist culture. It is nonsensical to say that a woman’s name is important to an understanding of rape outside of an understanding of social life where male violence against women is both denied and legitimated. To say that a name is necessary before the issue becomes credible is a clear way of both saying that raped women are not credible, and that rape is not a real "public" issue but a personal, private one.

Compare these decisions with that in the case *Y.G. v Jewish Hospital* where a couple attended a public reception attended by media and other couples involved in an in vitro fertilisation programme at a hospital. In reporting the event, a television company broadcast pictures of the couple at the function for approximately three seconds on the

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110Lorenne Clarke and D Lewis claimed in 1977 that rape is only punished when the victim is a dependent female living under either parental or matrimonial control and in possession of those qualities that make her desirable as a piece of reproductive property available for the exclusive use of a present or future husband. See Lorenne Clarke and Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: The Women’s Press) 1977. While this may not necessarily be the case today, rape can be seen as a form of social control exercised over women; it instills fear in women and makes women the agent of a socialisation process that perpetuates subordination, and this is in turn reinforced by minimal support or protection by the state. See P Hughes, supra note 66; C Mackinnon, supra note 18. Christine Boyle, in examining the rape protection offered to married women, makes the observation that one reason for this ambivalent protection is the fact that law makers are both aggrieved "owners" of women and at the same time potential accused persons. See Boyle, supra note 107. See also Constance B Backhouse "Nineteenth Century Canadian Rape Law 1800-1892" in D Flaherty ed., *Essays in the History of Canadian Law* v.11 (Toronto: The Osgoode Society) 1983.

111Raped women have often been seen as non-credible or as liars. Consider the judicial statements referenced by Carol Smart "It is well known that women in particular and small boys are liable to be untruthful and invent stories", "Women who say no do not always mean no..." "Human experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons... and sometimes for no reason at all"; See Smart supra note 66, at 35.
evening news but did not name them or refer to them. The couple claimed that their privacy had been invaded, and the court upheld that claim, stating that "[T]he in vitro program and its success may well have been matters of public interest, but the identity of those participating in the program was ... a private matter."\textsuperscript{112}

While conception is clearly something that we would consider to be a private fact under the tort, and the fact of an in vitro fertilisation would not normally be of public interest, what we have here is a couple attending what is clearly a public function, which would seem to suggest that even if they did regard the fact as private, they were at least not claiming total secrecy for it. The couple attended a cocktail party where they knew that the media would be present. Thus although this couple had chosen to step out into the public, here the court is willing to extend privacy in a context where most reasonable individuals would not expect it.

Consider also the case of 	extit{Deaton v Delta Democrat Publishing},\textsuperscript{113} where the court decided that publication of the names and photos of mentally disabled children in an article about a state funded school was an actionable invasion of privacy. While it was conceded that the children were well known in their communities, the court held that "it is difficult to conceive that any information can be more delicate or private in nature

\textsuperscript{112}[1990] 795 S W 2d 488 at 500.

\textsuperscript{113}[1974] 326 So 2d 471.
than the fact that a child has limited mental capabilities\textsuperscript{114} and that publication of these details was unnecessary to bring the care or supervision of such children to the public attention.

While we may agree that in both of these cases the facts disclosed do fit within the personal fact category of the tort, it is difficult at first to see how they differ from those of the rape cases, or any of the cases we have discussed above where courts have refused to protect privacy. Certainly, these plaintiffs would seem to have had more choice with regard to publication of private facts than did the plaintiffs we have considered above, and this makes the social utility argument we have forwarded seem plausible.

We can usefully continue this discussion of social utility by considering the decision in \textit{Barber v Time Inc.}\textsuperscript{115} In this case a woman with an eating disorder was admitted to hospital. She had a misfunctioning pancreas which caused her to eat a great deal while still losing weight very quickly. While she was in the hospital and under mild sedation, reporters gained entry to her room and took a photograph of her eating, publishing it very prominently with an eyecatching caption about the beautiful young glutton with the strange disease. She sued for invasion of privacy and her complaint was upheld at both trial and appeal level. The court held that here the inherent limits of the right to publish had been exceeded:

\textsuperscript{114}\textit{supra} note 113, at 474.

\textsuperscript{115}[1942] 159 S W 2d 291
Limits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public, or where photographs of a person are surreptitiously taken and published... In determining liability, the knowledge and motives of the defendant; the sex, station in life, and previous habits of the plaintiff with reference to publicity... are considered.\textsuperscript{116}

Here the courts thought the plaintiff had a justifiable complaint; she had not consented to the photograph being taken and she had protested vocally against any publicity to no avail:

If there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition (at least if it is not contagious or dangerous to others) without personal publicity.\textsuperscript{117}

The court went on to say that the press could easily have identified her as "A" or "B" as is the practice in medical texts. Here however, the court surmised, the photograph was necessary to attract the reader's attention: the plaintiff was attractive and this would attract a greater readership. It is clear from a reading of the judgment that this aspect added considerably to the sense of injustice felt by the court on her behalf.

This sense of injustice needs explanation, as the case does not seem fundamentally different from that of Meetze where the court noted that the reporter was an unwelcome,

\textsuperscript{116}ibid, at 294.

\textsuperscript{117}ibid, at 295.
if not illegitimate, visitor to her hospital room. Why was the use of Mrs Barber's name illegitimate when Mrs Meetze's name was? The difference between the judicially constructed blameless, victimised "good" Mrs Barber and Mrs Meetze must, it seems, relate back to our social utility theme. Whereas Mrs Barber was a middle class married woman with several children who had done nothing to step outside the role she was expected to play except to fall prey to a malfunctioning pancreas, Mrs Meetze was a twelve year old girl who had married a young boy at the age of eleven and had obviously been engaging in sex, possibly before marriage. Such precocious behaviour allows her to be constructed as unusual and "other". She provides a useful example to others, whereas Mrs Barber, whose condition attracts every bit as much interest, serves no social utility and is allowed to remain private. All of the cases we have looked at thus far, when viewed in this framework, make sense. Actions are only rendered public when the community can benefit from their mistakes. Thus rape victims, who challenge underlying notions of sexuality in society, are made public and act as a disincentive to others to come forward. Mentally disabled children, on the other hand, are kept private, an act which furthers the sense of social shame and in the process allows their "otherness" to remain isolated and thus to go unquestioned. The publication of private facts surrounding attempts of married couples to conceive a child serve no useful purpose, but publication of the personal details of a mother who abandons her child, does. Privacy is granted or denied according to these underlying principles. Further, a woman who falls ill, or who finds a body in her apartment, has not chosen to breach social norms, and thus making her public serves no legitimate social purpose. In fact we
might go so far as to suggest that making such people "public" may actually do harm, by leading to the questioning of the appropriateness of the various public/private categories.

Consider our social utility thesis further in light of *Aquino v Bulletin Company*. Here the plaintiffs' daughter Theresa was secretly married in 1949. The marriage ended abruptly when it was discovered that the husband had no intention of "making her his wife" but rather had gone through the ceremony to spite her parents. Annulment proceedings were initiated, but eventually redirected and ended in a divorce decree. While the divorce records were not open to the public, the court opinion as to the annulment proceeding was, and it contained much personal detail about Theresa and her relationship with her husband. Her parents were not named in that opinion. The defendant newspaper published a rather sensational story about the case, and the parents brought an action alleging that their privacy had been invaded as their names were mentioned in the reports, notwithstanding that they had not been detailed in either the opinion or the court records. The court held that the daughter's marriage and subsequent divorce were newsworthy events, and that the newspaper had a right to report the case. Her parents, although not public figures, were held to be within a class of people who, however unwillingly, lose their privacy by being related to such a situation.

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118[1959] 154 A 2d 422.
The court was of the opinion that the act of divorce naturally leads to a loss of privacy. In light of the framework of privacy illustrated in the foregoing discussion, this would certainly seem to be a logical conclusion. Theresa and her parents violated several social norms; Theresa disobeyed her (father) by eloping, and as such her conduct could only be constructed as deviant. Her story serves as a useful illustration, both of why girls should not continue to see men of whom their (fathers) do not approve, and of what happens to them when they do. As for her parents, it is possible to argue that her (father) failed to exercise the control over his daughter that was expected of him, and his plight provides a similarly useful illustration. As far as divorce itself goes, clearly it is a radical breach of the private status of marriage, and involves a revocation of privilege. As to when the court decides where the line between public interest falls, it is possible that the "choice" criteria we have discussed before again plays a part. In the case of Time Inc v Firestone, the Supreme Court held that the socialite wife of a public figure retained a "zone of privacy" with regards to the divorce, which she did not, interestingly enough, initiate. That case was a libel suit, and is not therefore directly on point. However, given that she was what was considered a public figure, it is interesting to surmise whether notions of women as victims again came into play.

As discussed above, this seems to be the case in other (non-tortious) forms of privacy. So divorced mothers experience less privacy in their decision making regarding family life than married, (or possibly widowed) mothers. See Fineman, supra note 48. We can question whether this is still the case - divorce in the 1950's had a qualitively different social status and meaning than it does in the 1990's.

There is a contradictory problem here. The state has an interest in keeping divorce quiet, so that connections are not drawn; while marital failure is an individual anomaly rather than a systemic issue, the institution of marriage remains unquestioned. But, on the other hand, divorce must be discouraged, and making examples of those who fail is a clear part of the recent history of privacy.

iii) Societal Expectations: Fitting the Mould

*Sidas v F-R Publishers Corporation*¹²²

In 1937 New Yorker magazine published a biographical article and a cartoon about William Sidas, and referred to him again a few months later. The article was headed "WHERE ARE THEY NOW?" and was one in a series of exposes. This article offered an examination of Sidas' "decline" from child prodigy mathematician in 1910, into eccentric bank clerk. The article detailed his nervous breakdown as a child and "traced over the years through his attempts to conceal his identity, through his chosen career as an insignificant clerk who would not need to employ unusual mathematical talents, and through the bizarre ways in which his genius flowered...".¹²³ It reported where and how he now lived, his peculiarities, and personal characteristics. In other words, it was a very intimate examination of his life and history, detailing many events and points which would ordinarily be covered by the phrase "private fact:

> [T]he article is merciless in its dissection of intimate details of its subject's personal life, and this in company with elaborate accounts of Sidas' passion for privacy and the pitiable lengths to which he has gone in order to avoid public scrutiny. The work... may fairly be described as a ruthless exposure of a once public character.¹²⁴

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¹²²[1940] 113 F 2d 806


¹²⁴*Ibid*, at 807.
The court cited *Melvin v Reid* as one of the prominent cases in the area, but went on to say that that case "[did not] go so far as to prevent a newspaper or magazine from publishing the truth about a person however intimate, revealing, or harmful the truth may be."\(^{125}\) Recall that Warren and Brandeis claimed that certain public figures must sacrifice part of their lives to public scrutiny, and that "the private life, habits, acts and relations of an individual [which] have no legitimate connection with his fitness for public office" were excluded from the right of privacy. In *Sidás* the court took this exception and extended it further;

\[D\]espite eminent opinion to the contrary, we are not yet disposed to afford to all of the intimate details of private life an absolute immunity from the prying of the press. Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy. Warren and Brandeis were willing to lift the veil somewhat in the case of public officers. *We would go further, though we are not prepared to say how far... at least we would permit limited scrutiny of the "private" life who has achieved or has had thrust upon him, the questionable and indefinable status of a "public" figure.*\(^{126}\)

The court went on to say that

William James Sidás was ... a child prodigy... Of him great deeds were expected. In 1910 he was a person about whom the newspapers might display a legitimate intellectual interest... *but the precise motives of the press we regard as unimportant...* The article... sketched the life of an unusual personality, and it possessed considerable popular news interest... Regrettably or not, the misfortunes and frailties of neighbours and "public figures" are subjects of considerable interest and discussion... *and when such are the mores of the community, it would*

\(^{125}\) *ibid*, at 808.

\(^{126}\) *supra* note 112, at 809.
be unwise for a court to bar their expression in the newspapers, books and magazines of the day.\textsuperscript{127}

At first Sidas seems irreconcilable with Melvin.\textsuperscript{128} Indeed, Sidas would seem to hold a much stronger case for privacy than Melvin, because whereas Ms Darley’s details were a matter of public record, in William Sidas’ case considerable prying was necessary for the article to be written, and he had gone to extreme lengths to keep his private life out of the public eye. What then is the explanation? What we have been arguing here is that it is assumptions about correct gender roles that are playing out in judicial assessments of privacy, and what constitutes "normal". Melvin had given up a public life as a prostitute and reformed; she was no longer challenging societal attitudes towards women and their private natures. In Sidas we see the other side of gender assumptions; whereas women are private, men live in the work world where their accomplishments are valued by all. Sidas was meant to be a genius. He revoked the privilege that attaches to that, and failed to validify that as a man he valued public achievement, and by so doing became a curiosity; and a subversive one at that. In other words, he too challenged the gender norms of society. And in relation to the teenage parent cases,

\textsuperscript{127}ibid, at 809.

\textsuperscript{128}Sidas also seems difficult to reconcile with Barber. Scheppele distinguishes the two because in Sidas’ case his name was important to the story; if the public did not know who he used to be, why would they care who he is now? She says that the only limit on the press is that names not be used unless strictly necessary for understanding. This does not hold up when we examine the rape cases and the judicial reasoning within them, and indeed avoids the precise problem that we have identified; why does the public need to know about a private person whom they have forgotten about and who poses no threat to their safety or happiness? Surely The Red Kimono would not have been a film of interest if it had not been related to a real person, and yet Melvin was protected by privacy. See Kim Scheppele, Legal Secrets (Chicago: University of Chicago Press) 1988.
Hawkins fits into this framework, because it is only in the work sphere that men's actions are public. What they do in the private sphere, while socially essential in the domination of women, remains "their own business"; the private is after all their haven, the reward or retreat to which they go after their day in the public eye, and will only be made public if it goes against norms.

4. Gender and Politics

Kapellas v Kofman\textsuperscript{129}

Here an editorial was published in the Alameda Times Star in 1965, some of which is detailed below:

"CHILDRENS WELFARE MUST COME FIRST"

Mrs Inez Kapellas has taken a forceful interest in political matters in Alameda and now she is a candidate for the city council. This is a democracy, of course, and it is altogether fitting that [she] run if she wants to. But we question the wisdom of her decision. You see, Mrs Kappellas who has been married twice, is the mother of six young children... growing children need constant attention and care. Mrs Kappellas already has a job which keeps her away from her home during the day time. If she takes on city council, [this will extend to] evenings. We are thinking of the best welfare of the children involved... innocent victims if their mother is elected. Mrs Kappellas obligations at least at the present would seem to be more to her home and family....\textsuperscript{130}

Warren and Brandeis relied on the democratic notion of public accountability to provide

\textsuperscript{129}[1965] 81 Cal Rptr 360.

\textsuperscript{130}ibid, at 362 per Tobriner J.
an exception to their tort. Public figures, those running for public office, or those suggested for it, are deemed to lose privacy at least as regards their fitness for office. Clearly then, Mrs Kapellas must expect to lose some personal privacy. However here she alleged that the newspapers went further, that these things remained within her "zone of privacy" as imagined by Warren and Brandeis and as defined by the Supreme Court. The article went on to detail how some of her children had been in trouble for attempted burglary, loitering and truancy and stealing (from his mother). One of the girls had been found wandering around on her street and taken home. Obscene language had been "emanating from the Kapellas' household and heard by innocent neighbourhood children." The editorial, in its closing remarks, made the following observation, taken by the court as a sincere indication of kindly intent:

[As a courtesy to Mrs Kapellas we have refrained from publishing various police reports which would lead to the supposition that this newspaper is picking on her even though it is the policy of the Times Star to name youngsters when they repeatedly get into trouble with the law.]

She sued, claiming invasion of her privacy, invasion of her children's privacy, and further, malicious publication, because of a long standing dispute between herself and the owner of the paper. Her privacy claim failed, as did the privacy claim initiated for the children. The Supreme Court of California held that the facts about the children fell within

\[131\text{"Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office." Warren and Brandeis, supra note 42, at 473.}\]

\[132\text{supra note 129, at 363.}\]
allowable limits, and that she must expect to lose her own right to privacy when running for office;

Government officials and candidates for office have ... been considered the paradigm of public figures, who should be subjected to the most thorough scrutiny ... public must ... be afforded the opportunity of learning about any facet of a candidate's life that may relate [sic] to his fitness for office. ¹³³

The court held that a politician running for public office in effect offers his or her public and private life for perusal so far as it affects his or her bid for office. Why were Mrs Kapellas' children relevant to her ability to run for public office? Would a male politician's children be considered as relevant? Would they be reported? The court considered this question inadvertently by stating that:

Although the conduct of a candidate's children in many cases may not appear particularly relevant to [sic] his qualifications for office, normally the public should be permitted to determine the importance or relevance of the reported facts itself. ¹³⁴

Deckle McLean has examined the history of what he calls "selective media restraint" when it comes to public officials. He lists a long list of political (and entertainment) figures known by the media to have acted outside of societal norms, and yet were not exposed. He lists the extramarital affairs of Presidents F D Roosevelt, J F Kennedy, and

¹³³ibid, at 371.

¹³⁴ibid, at 372.
the various obsessive compulsive disorders of J Edgar Hoover. Although I do not presume to draw any conclusions from such limited grounds as just one case, it is interesting to note the language of the judgment and the result of the case in light of McLean's suggestion.

It seems arguable that the court here was supporting the message articulated by the newspaper; principles of motherhood and responsibility for the moral wellbeing of the plaintiff's family (the primary duty of a wife and mother) will be enforced at the expense of privacy. It is interesting to consider the links that can be made between privacy, politics, and motherhood. The dominant construction of "mother" is clearly one based on notions of privacy, and women who do not meet this norm by remaining private are construed as unfit and incapable mothers. Consider for example the case of Racine v Woods, where a First Nations woman in Canada trying to regain custody of her child was constructed as selfish and acting in her own interests; her "exploitation of media attention" manifests ... an incredible indifference to the effect such an incident might have on her child.... As Kline points out, although the court regarded the mother's politicization of the issue as being against the interests of her child, this view completely disregarded the possibility that the plaintiff was fighting for her child in an immensely frustrating and long running situation where publicity may have

135 Supreme Court of Canada [1983] 2 SCR 173,


137 See Kline ibid, quoting from Supreme Court judgment, at 179.
seemed the only way to have her needs dealt with. Another case that raises some of the same issues is that of *Tyabji v Sandana.*\(^{138}\) In that case, a member of parliament sought custody of her three young children. Custody was granted to the father of the children on the grounds (inter alia) that

Both the mother and [her new partner Mr Wilson] pursue political careers.... the career paths followed by both the mother and by Mr. Wilson, entail their absences from the home to a much greater degree than does the father's occupation. That is particularly true of the periods each year when the Provincial Legislature will be in session.... The history for both the mother and Mr. Wilson shows that their respective political roles have occupied a great deal of their time. I assess the mother as a person ... who has an intense interest in the advancement of her own career which will compete with the children's needs for her attention... I think the children will find a calmer, less aggressive lifestyle with the father than they would with the mother. They are less likely to learn that other peoples' views may be ignored. At this stage of their lives I think that is in their best interests. There will be time in the future for them to be spurred by their mother's [political visions]....\(^{139}\)

There are interesting connections between this kind of case\(^{140}\) and that of *Aconfora v Board of Education*\(^ {141}\) (dealt with below in chapter three) or the other education privacy cases we will discuss there. The same kinds of sentiments about those who

\(^{138}[1994]\) B.C.J. No. 469, British Columbia Supreme Court, per Spencer J.

\(^{139}ibid,\) pages 18-24.

\(^{140}\)See also *In the Matter of Baby M* Supreme Court of New Jersey [1988] 537 A. 2d 1227 where Wilentz CJ gave consideration to whether "by exposing her children to media attention, engaging in negotiations to sell a book [and] granting interviews that seemed helpful to her whether hurtful to Baby M or not ... suggest a selfish grasping woman ready to sacrifice the interests of Baby M ... for fame and wealth." Wilentz CJ held that however true this was, she would not be judged on this basis in the custody proceedings.

\(^{141}[1973]\) 359 F Supp 843. See chapter three below for this discussion.
challenge official discourses and channels of power are expressed in judicial cases which consider notions of privacy and proper social (gendered) conduct. The double bind that this creates for those who must challenge dominant social norms in order to have their needs met cannot be underestimated; on the one hand they cannot achieve their goals by keeping silent; on the other hand, by going public they are constructed as having chosen a political lifestyle to which no privacy can attach; and thus as having chosen simultaneously their punishment and their loss of personal privacy. This ties back to the theme within liberal theory that individuals have the right to live as they see fit as long as they do no harm and do not foist their choices on others; that is, there is no recognition of a right to political action in liberal theory.\textsuperscript{142} This is a theme which will be considered in more detail in chapter three below.

\textbf{Conclusion}

The foregoing discussion has attempted to illustrate that the judiciary may be employing ideological constructions of gender when they consider the cases before them, and that these thought processes need to be identified as a distinct form of control which must be addressed. The cases which involved privacy in the nineteenth century, those which led to Warren and Brandeis' tort, and those which followed it, demonstrate the high degree of privacy traditionally espoused by the courts for women. Nineteenth century ideology, as discussed in the previous chapters, was responsible for a new vision of womanhood, one which recognised their (supposed) special characteristics, their special

\textsuperscript{142}See T Brettel Dawson, \textit{Women, Law and Social Change} (Ontario: Captus Press) 1990 for general discussion of this analysis of liberal theory.
talent for modesty, and aimed to preserve women's (and thereby society's) innocence from this new industrial marketplace.

As we have seen, an explanation for the seemingly inconsistent results in these cases could well be judicial assumptions as to appropriate gender behaviour. Women who conform to dominant constructions of femininity, who are victimised, blameless, passive "good" women, are granted privacy, even in situations which seem public and to which we would think the "choice" doctrine would apply so as to prevent privacy protection. On the other hand, women who challenge social norms, by abandoning children, acting in a political fashion, or by challenging the social construction of sexuality in the context of rape, are deemed to have chosen to give up privacy, and are kept in the public light. This same theme applies to men in respect of their appropriate gender roles.

As we will see in chapter three, this notion of choice, and constructions of plaintiffs as "good/bad" or in other words as "political" or not, depending on the social utility of public disclosure, applies to plaintiffs who challenge the social norm of heterosexuality as well.
Ironically, we were wrong about sexuality. And if we were wrong about that, what else was wrong? ... The supposedly non-judgmental psychoanalyst had as the framework of his understanding of illness and treatment a prescriptive theory. That prescriptive theory was in many respects an ideology... designed and applied for the purpose of rationalizing interpersonal oppression of women by men, homosexuals by heterosexuals, and rebels by conservatives.

Alan Stone, President of American Psychiatric Association.

Introduction

Heterosexuality is a fundamental premise upon which contemporary western societies interpret social existence. It is a world view, a widely held belief that heterosexual relationships legitimated by marriage are natural, inevitable, and necessary for the continued survival and stability of society. As a result of that, and possibly in combination with other factors, any other form of relationship becomes a contradiction in terms, and is accordingly viewed as illegitimate and unnatural. The ideological

I would like to thank Richard Bootle for his helpful comments and suggestions in the drafting of this chapter.


144 The form of sanctified marriage is an interesting example in the changing language of dominant ideology. In the context of this discussion "marriage" is taken to mean the form of permanent relationship which is currently culturally acceptable; in the American context therefore, this means a man and a woman who qualify as legal or common law spouses.

145 What I am referring to here is the insistence of the heterosexist ideology that same-sex identities are purely based on same-sex sex. Thus in Bowers v Hardwick [1986] 487 US 186, the Supreme Court was not prepared to consider the emotional or spiritual aspects that exist in same-sex relationships, and that are consequently invalidated by sodomy statutes, insisting on discussing the case purely in terms of sexual acts. This is a consistent theme in American jurisprudence. See for example Jones v Hallahan [1973] 501 SW 2d 588 and Baker v Nelson [1971] 191 NW 2d 185 which were unsuccessful challenges to the definition of marriage as applying only to heterosexual couples. For overview of these and other cases and the basis on which they are rejected, see A K Wilson, "Same Sex Marriage: A Review" (1991) 17 William Mitchell Law Review 539. Note however the recent case of Baehr v Lewin [1993] Unreported Judgment of Supreme Court of Hawaii 5 May 1993, where the Supreme Court of Hawaii stated that it was
nature of heterosexism is systematically implemented and reinforced at every level of state activity, both actively by the creation and enforcement of laws which criminalise expressions of non-procreative (including by definition same-sex) sexuality (sodomy statutes in force in 32 American States technically prohibit all non-procreative sex) and to deny equal access to state protection and prestige for those relationships built upon (or presumed to be built upon) condemned expressions of sexuality, and covertly, by state sanctioned indifference to the effects of discrimination and violence directed at lesbians and gay men.

The purpose of the following discussion is to locate some specific tortious privacy outcomes within the context of this pervasive heterosexist ideology in North American society, to show that the tort, which we would expect to cover sexual identity as a "private unconstitutional to prohibit marriage on the basis of sex, and striking down a restrictive statute on this basis. It is uncertain at this point what the end result of this will be; the Attorney General declared after the judgment that the case would be appealed to the US Supreme Court, but in December announced that there would not be an appeal. It is unlikely, given the current make-up of the US Supreme Court that the decision would be upheld, and there has been little indication, at this point, that the case will be followed in other state jurisdictions.

146 For a full discussion of the effects of violence targeted at lesbians and gay men see Kendell Thomas, "Beyond the Privacy Principle" (1992) 92 Columbia Law Review 1431. He argues that homophobic violence is a form of terrorism with a clear communicative message that lesbians and gay men will be murdered if that is the only way to remove them. He says "the objective and outcome of violence against lesbians and gays is the social control of human sexuality. It aims to enforce the institutional and ideological imperatives of compulsory heterosexuality. It punishes and prevents deviations from heterosexual norms, so carries with it a determinate political valence and value." (see page 1467) He argues that homophobic violence is an extra legal exercise of police power. Thus citizens who perpetrate violence against lesbians and gays represent the state's constructive delegation of government power: ie such violence is a functional privatisation of state power. He argues that the defence of that violence in criminal proceedings, from the refusal to prosecute, the refusal of juries and judges to find the perpetrators guilty of criminal conduct, and the provision of special defences such as homosexual panic and homosexual advance, are simply further explicit examples of this. He notes wryly that if women were allowed to kill any man who made an advance toward them, the streets would be littered with dead bodies (at page 1484) - note that this probably has as much to do with the value placed on women's bodies as sexual objects for men as it does the importance men place on their own autonomy.
fact", will not, in its current interpretation, do that when the identity in question is not heterosexual. The social utility thesis which we considered in chapter two plays out in this arena to mean that individuals who challenge the heterosexual status quo by not keeping their (non-hetero) sexual identities totally secret will be denied privacy protection from harmful public disclosure, in tortious and in other legal privacy situations. Such plaintiffs are constructed as both having "chosen" their behaviour and thus also the detrimental consequences that go with such choices, and as having acted in a political fashion, another trait which allows for denial of privacy within liberal theory. This systematic denial of privacy allows gay and lesbian identities to be stigmatised as deviant publicly by media and courts, and this in turn recreates the heterosexual norm by encouraging others not to do the same. The operation of the ideology is again at an unconscious level, and the language in which such decisions are written and reported appears to be natural, logical, and neutral, although the results appear to contradict these assertions.

In the first part of this chapter I will set out a basis for the assertion that a heterosexist ideology operates within western liberal societies, and posit some reasons for that ideology's continued hegemony. The intent here is to show that heterosexism is not the unchanging and constant belief system that it appears to be, but that it requires constant propping up and manipulation, with the law surrounding privacy being a key part of this process. The second section is divided thematically to consider the issues of choice and the construction of the political plaintiff in light of the social utility thesis, focusing on
those tort cases which have dealt with sexual identity, but locating those cases within a wider body of privacy decisions that have considered issues of sexuality.

1. Ideology and the Reinforcement of the Heterosexual Norm

The term "homosexual" attained hegemony in professional medical discourse in the second half of the nineteenth century. Until the label was created, heterosexual, gay, or lesbian "identity" did not exist; rather there existed a potential in all members of society to experience sexuality in a variety of ways that did not touch on the matter of personal identity. The prohibition against unnatural (i.e. non-procreative) sexual acts applied to everyone, and existed as a reminder of the capacity for sin that lay within each individual. However, although the potential existed, the opportunity for non-

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147 Various societies have well documented acceptance of same sex desire. Thus greek, roman, and aristocratic french societies are examples of situations where expressions of male same-sex desire were celebrated. It is important to recall that "sodomy" which is now viewed almost exclusively in terms of the sexual acts of gay men, until relatively recently was the catch-all phrase for any non-procreative sex and was punished as strongly in heterosexual situations as it was in same-sex cases. (For example novels such as The Crucible (A Miller) and The Scarlet Letter (N Hawthorn) indicate the force with which this norm was articulated in early american society). The term "sodomy" itself has origins in the Book of Genesis. According to the old testament, the city of Sodom was destroyed by "brimstone and fire from the Lord out of heaven". (Genesis 18:20 and 19:24 king James Edition). The exact reason for this punishment is not clear. Modern biblical scholars argue that the sodomites were punished for violating customary law by showing a lack of hospitality. (One theory has it that the men of the city gang raped a (male) angel who sought refuge in the house of Lot. However, common knowledge has over the centuries produced a "truth" that it was sexual (mis)conduct for which the Sodomites were punished. The existence of conflicting interpretations has been denied and the prohibition against non-marital sexual conduct has been uncritically imported into secular law. Since the late nineteenth century that "truth" has again narrowed and the figure of the sodomite has merged with that of the "homosexual". Thus within the USA most proscriptions on sodomy were not gender based. In the thirteen colonies before federation, only three singled out sodomy between men, and two had no prohibitions at all. Most statutes applied to any form of non-procreative sex. The animosity towards same-sex sex distorts the historical facts and purposes of criminal sodomy statutes. See Janet Halley, "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity" (1989) 36 University of California Law Review 915. Also see Thomas, supra note 146, at 204; J McNeil, The Church and the Homosexual (Kansas City: Sheed Andrews & McMeel) 1976 at 42-56; and J Boswell, Christianity, Social Tolerance and Homosexuality (Chicago: Chicago University Press) 1980. Thus Foucault states "As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts, their perpetrator was nothing more than the juridical subject of them.
procreative sex was strictly limited by the more pressing concern for survival; the "individual" lived inside a family community which was reliant on the next generation to provide labour and support for the group. The nineteenth century medical discourse surrounding the "homosexual" had the effect of creating a new, pathological "other", in whom the capacity for sexual sin could rest, thus distancing the new family form from non-procreative sexual activity.  

This new medical discourse was, in effect, a recognition that industrial society had (probably inadvertently) created a space for individual freedom not previously contemplated, and at base replaced old economic restraints with new moral/medical restraints on sexual freedom, thus maintaining the status quo.

The 19th C homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology ... the Sodomite had been a temporary aberration, the homosexual was now a species. Foucault, The History of Sexuality: An Introduction (R Hurley trans) (New York: Vintage) 1980 at 43.

See this discussion of the changing form of the family above in Chapter One, at page 27.

There are several alternate theories as to the reasons behind the ideology of heterosexuality achieving dominance. In brief, the ideology fits in with the changing nature of nineteenth century society, and particularly that of the family unit, that we have discussed above. While sex had been developing as an area of social control since the middle ages (see St Thomas Aquinos who explained that not only did sex outside of procreative necessity violate natural law, more importantly it prevented man from thinking and acting rationally, thus sex must be distrusted and women, who pose the threat, must be subordinated and controlled) in the nineteenth century the nature of that discourse changed significantly to include these new exclusionary categories. Why was this new dichotomy needed? One thesis for this development is that this new, abnormal, "other" was born not so much from a need to control "deviance" as from a desire to maintain the traditional family form; a perceived need to keep society tied to heterosexual marriage. Growing industrialisation and urbanisation threatened the economic dependency and tightly knit nature of the family, and thus had the potential to cause widespread social change as previously subordinated groups "escaped" from the patriarchal family form. The result of this was that for the first time the family was forced to develop an image, a new attractive identity for itself. At the same time that the material and social functions of the family became less clear and family size decreased, an increasingly vocal delineation of the attractiveness of the ideological and emotional ideal of the family was articulated. At the same time, the possibility for survival outside of the traditional family meant that same-sex desire, which has always existed, could now begin the transformation from revolving purely around sexual acts, to being more central to personal identity and happiness. While the "gay" identity did not exist until the medical profession invented the term "homosexual", (See J D'Emilio, "Making and Unmaking Minorities:
At its core, secular opposition to relationships which fall outside the heterosexual norm rests on a defence of traditional ideas of family stability. This ideology of the family which we have discussed in Chapters One and Two does not reflect so much the idea of a good life for the individual, but rather a stable societal formation based on the heterosexual family unit. Dominant prevailing structures of social and family life mean that the adult heterosexual couple forms the nucleus of networks of social and kinship relations which are socially supported and privileged. The ideology of the family which we discussed earlier provides a context and a community in which to understand and value our lives, and to justify and explain the processes by which we live but have little control over. The ideology of the family is a mediating body between the state and the isolated individual at the centre of the new world. The essence of the ideology however, and its central paradox, is that it demands both that the patriarchal family be seen as natural, and yet at the same time, vulnerable. This paradox is acknowledged by conservative elements in society who articulate a need to privilege the traditional family so that people will be motivated to accept its demands and strictures.  

The tensions between gay politics and history" (1986) 14 New York University Review of Law and Social Change 915) the profession surely did so because of an actual phenomena that was beginning to challenge the way sexual relations had previously been understood. It was this actual experience that the medical profession saw and sought to treat, as part of the developing ideology of the morally superior family. By developing a pathological condition which labelled non-heterosexual sex as an illness, the family was distanced from sin and thus took on an added attractiveness. For more detailed discussions of the alternative theories about the rise of the heterosexist ideology, see Jane Ursel, Private Lives, Public Policy, 100 years of State Intervention in the Family (Toronto: Women's Press) 1992; Boswell, supra note 144; and Foucault, supra note 144.  

The ideology of the family is deeply entrenched in our most basic economic and political relations, and the paradox that it is both vulnerable and important is resolved by the ideology of heterosexism.\[151\] This ideology manifests itself in the rendering of same sex relationships as invisible, unthinkable, and (officially) impossible.\[152\] Without a dominant heterosexist ideology, our notion of family and thus the make up of western societies would quite possibly be considerably different than they are. Those involved in same sex relationships implicitly reject the existing social interpretations of family and economic and political life that are premised on gender inequality and differentiation, for example by challenging the notion that social traits such as dominance or nurturance are naturally linked to one sex or the other. The argument could be made that gender inequality was extremely important to the success of the new economic structure of the nineteenth century. If men were to be set free to devote the most significant part of their lives to employment outside the family circle, then women’s labour was essential to organize and take care of personal needs and the growth of the next generation of

\[151\] Conversely, the argument that heterosexism itself can be seen as "vulnerable". Thus much of the discourse which surrounds anti-gay reform initiatives focuses on the fact that children are inherently open to suggestion or persuasion, and that if left in the care of openly gay teachers or such will be "turned" gay. For an example of this concern in judicial form, see the case of Aconfora v Board of Education [1973] 359 F Supp 843, where the court discusses in considerable detail the effects that a openly gay teacher could have on his adolescent pupils. Didi Herman suggests that this fits in with Christian dogma; homosexuality must be a chosen behaviour (i.e. the work of Satan) because [sic] God would not deliberately create such creatures. Didi Herman, "(Il)legitmate Minorities: The Christian Right's Construction of Rights-Deserving Subjects" Faculty Seminar, Law School, University of British Columbia, 18 November 1994.

workers. Furthermore, that labour had to be "free" to make the new market cost effective. If women and men were to be encouraged to stay within the patriarchal family structure, then there had to be some compelling reason for it; a reason which would justify existing gender imbalances and allow the inhabitants of the institution to feel that they were morally and socially obliged to do so. At least in the nineteenth century context, it is difficult to imagine a more effective way of ensuring this than pathologising and criminalising same-sex sex, thus ensuring concurrent societal condemnation of any alternative focus of relational and personal satisfaction.

As such, Sylvia Law suggests that legal and cultural contempt for gay identity serves to preserve and reinforce the social meaning of gender. She argues that in the current context, sodomy laws punish violation of prescribed gender roles, not sexual acts. Although sodomy laws govern any non-procreative sex, wherever those laws are enforced, only gay (usually only male)\textsuperscript{153} sex acts are punished.\textsuperscript{154} Furthermore, sodomy statutes are rarely enforced,\textsuperscript{155} leading to the view that the purpose of such laws is not

\textsuperscript{153}The invisible nature of lesbians in society is even more profound than that of gay men; see Leonard for an excellent treatment of this issue. Leonard, supra note 137. See also Ruthann Robson Lesbian (Out)Law: Survival under the Rule of Law (Ithaca, New York: Firebrand Books) 1992.

\textsuperscript{154}Note the difference then between this modern day enforcement then, and the broader enforcement we have discussed earlier, when all non-procreative sex and adultery was punished, and the persecution of women as "witches" was common. See Zimmerman, supra for references to the novel The Scarlet Letter which dealt with this in colonial American society, and commentaries on Arthur Miller's The Crucible; for example, V Rajakrishnan, The crucible and the misty tower: morality and aesthetics of commitment in the theatre of Arthur Miller (Madras: Emerald Publishers) 1988.

\textsuperscript{155}For example in Bowers v Hardwick [1986] 487 US 186, (Supreme Court challenge to the constitutionality of sodomy statutes) the Georgia Attorney General refused to actually prosecute Michael Hardwick, although he was arrested in his bedroom in the act of violating the statute. See below at note 158 for further.
to prevent sex - an extremely difficult task to enforce - but rather to provide an ideologically constructed social context in which other restrictive laws such as those which prevent non-traditional families from forming or being seen as legitimate,\textsuperscript{156} appear natural, logical and inevitable where they otherwise may not.\textsuperscript{157} The development of the category of the "homosexual" is part of the on-going articulation of liberal ideology which views social existence in terms of fundamental dichotomies such as good/bad or public/private.\textsuperscript{158} It is a relatively new interpretation of social existence, rather than a constant one, and there is a sound theoretical grounding for the proposition that it expresses more about dominant power relations than it does an essential truth.

\textsuperscript{156}I am thinking here of laws such as those that govern custody, fostering, adoption and most importantly, marriage, all of which exclude (to varying extents in different American jurisdictions; see for example Hawaii in which the Supreme Court decided recently to allow same sex marriage (see Baehr v Lewin supra note 145), and California which has a more relaxed attitude towards custody of children by same-sex parents than, for example, Texas) same-sex couples from the "privileges" that attach to heterosexual families.

\textsuperscript{157}This form of argument is not new. A useful illustration of it is provided by Douglas Hay's work in considering the ideological implications in the creation and (non)enforcement of capital offense statutes in eighteenth century England. Between 1688 and 1820 the number of capital statutes quadrupled in England, and yet the execution rate actually dropped as the seventeenth century progressed. The statutes invariably involved offenses against property, and while conviction rates were extremely high, the vast majority were commuted to the sentence of transportation by use of royal pardon on judicial recommendation. As parliament itself resisted all attempts to reform the criminal code until the nineteenth century, and as there was not considered to be schism between the judiciary and parliament, Hay concludes that the law was being used here as a chief ideological instrument in the reification of property, and by combining terror with discretion, the public consciousness was moulded so that the many submitted to the few. Its effectiveness depended in large part on the weaknesses and inconsistencies in the system; by combining imagery, ideals, and force (in Hay's piece, majesty, justice and mercy) property laws ceased to appear as an interest and instead became universally respected. See D Hay, "Property, Authority, and the Criminal Law" in Douglas Hay, P Linebaugh, et al eds., Albions Fatal Tree: Crime and Society in Eighteenth Century England (New York: Pantheon) 1975.

\textsuperscript{158}For literature on the role that dichotomy plays in liberal theory, see T Eagleton, supra note 1; J Fudge, supra note 65; A Hunt, supra note 111; V Kerruish, supra note 4; and F Olsen, supra note 32.
2. Heterosexism Reinforced: The Private Fact Tort

This section seeks to demonstrate that the private fact tort not only reinforces gender relations but also that judicial reasoning employs ideological beliefs to come to conclusions which reinforce and recreate heterosexism and the power relations that are inherent within it. We will consider the two existing private fact tort cases which have revolved around the issue of sexual identity (both of which have occurred in the California jurisdiction), and place them in the context of a variety of other cases which have seen the doctrine of privacy used to maintain and reproduce the heterosexism pervasive in American society.\(^{159}\) As we have seen in chapter two, the line between a person or facts about a person being deemed "private" and "public" is flexible. This case analysis takes the structure used in Chapter Two and advances it further. The social utility thesis comes into play in this area of the law in such a way that plaintiffs who attempt to challenge the ubiquity and normalcy of heterosexuality, by speaking of their non-heterosexual identities are constructed as "political" or as having chosen to give up

\(^{159}\) As at 1/10/94 there had only been two tort cases which had dealt with the issue of sexual orientation in the United States. There have been several cases (of which I will discuss a grouping of cases surrounding education to demonstrate the inconsistencies in the decision making process but the uniformity in results) dealing with public employment and the right to free speech, all of which, to the author's knowledge, have been decided to the detriment of gay employees. Those cases have all been from jurisdictions in which same-sex sex, is (or was at the time of trial) criminalised. There have been a variety of articles on the tort and its relationship to the current "outing" debate in the United States, and all articles which I have read have concluded that the tort as currently interpreted can do nothing to aid a gay plaintiff who is "outed" against his or her wishes. A brief bibliography of these articles includes; B Moretti, "Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a remedy for disclosure of sexual orientation" (1993) 11 Cardoza Arts and Entertainment Law Journal 857; R F Wick, "Out of the Closet and into the headlines: Outing and the Private Facts tort" (1992) 80 Georgetown Law Journal 413; J E Grant, "Outing and Freedom of the Press: Sexual Orientations Challenge to the Supreme Courts Categorical Jurisprudence" (1992) 77 Cornell Law Review 103. See L Gross, *Contested Closets: The politics and ethics of outing* (Minneapolis: University of Minnesota Press) 1993 and M Signorile, *Queer in America; Sex, The Media and the Closets of Power* (New York: Random House) 1993 for discussion on outing generally.
their right to privacy in situations where that privacy would help them prevent state sanction for their sexual orientation. The cases provide a backdrop or context in which men and women who do not fit within the gendered heterosexual definition of "normal" in American society learn that the only way to avoid a similar decision in their own situation is to ensure the absolute secrecy of their non-heterosexual identity by disclosing it to no one and doing nothing to call the heterosexual presumption into question.

i) The Tort Cases

*Sipple v The Chronicle Publishing Co*160

In 1976 Oliver Sipple struck a gun out of the hands of Sarah Jane Moore as she aimed to fire at President Gerald Ford in downtown San Francisco. In reporting on the incident, The Chronicle, a San Francisco newspaper, revealed that one of his closest friends, on hearing of Sipple's actions, stated "that maybe this will help break the stereotype"161 while at a celebratory party held in his honour at his local gay pub. In 1990's terminology, the newspaper "outed" Sipple; revealing that he was gay. Sipple had been living in San Francisco for some years and had friends in the gay community, had

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161The exact wording of the article in the Chronicle stated that he was "the centre of attention at the Red Lantern, a Golden Gate Ave. bar he favours. The Rev. Ray Broshears, head of Helping Hands, and Gay Politico, Harvey Milk, who claim to be among Sipple's close friends, describe themselves as "proud - maybe this will help break the stereotype". Sipple is among the workers in Milk's campaign for Supervisor."
marched in gay pride marches and worked on an election campaign for Harvey Milk, a gay politico in the city. Despite his life in San Francisco, Sipple had not revealed his sexual orientation to his family or his friends outside of the city. Sipple became a hero throughout the United States as the news of the assassination attempt spread, and the American media quickly picked up on the references to his sexual orientation, in effect "outing" him to the world at large, and more particularly to his family and friends, claiming that he was "a prominent member of the San Francisco gay community". Sipple claimed that his privacy had been breached by those reports which disclosed his sexual orientation, the result of which had been his abandonment by his family and friends, causing him great mental anguish and humiliation. At both trial and appeal stages, Sipple was found to have no foundation for a privacy action as the facts disclosed were not private; and irrespective of their private status, they were newsworthy facts to which the privacy tort did not apply. The court held that there can be no privacy with respect to a matter which is already public or which has previously become part of the public domain, and that there is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public or when the further publicity related to matters which the plaintiff had left open to the public eye.

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162 supra note 160, at 666.
The breach of privacy alleged in *Diaz* was over the revelation, during a controversy over inappropriate use of student funds, that the female president of a student's association had had a sex change. Toni Diaz had had gender correction surgery several years previously and had scrupulously kept the fact secret from all but her immediate family and closest friends. She changed her name to Toni Ann Diaz and made the necessary changes in her high school records, her social security records, and on her driver's license. She tried unsuccessfully to change her Puerto Rican birth certificate. She did not change the gender designation on her draft card, however, asserting that it would be a useless gesture, since she had previously been turned down for induction. She was elected the first woman student body president of her college, and her election and a subsequent attempt to unseat her were reported in the college newspaper. She was later elected to the Board of Trustees as student representative, and this fact was reported in the college bulletin. She became embroiled in controversy when she charged college administrators with misuse of student funds. In following up the controversy a local paper, the Tribune, published an article stating that she had had a sex change.\(^{164}\) *Diaz v Oakland Tribune Inc\(^ {163}\)*

\(^{163}\)[1983] 188 Cal. Rptr. 762.

\(^{164}\)The exact wording, in an education column, stated that "students at the College of Alameda will be surprised to learn that their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio. Now I realize, that in these times, such a matter is no big deal, but I suspect his female classmates in PE 97 may wish to make other showering arrangements". It is interesting to note the wording of this particular outing campaign. The reporter apparently believed that having been a biological man made Diaz a threat to other women. The construction of an "other" as a threat to the norm is the primary purpose of defining difference at all. By reinforcing what is normal, the normal is recreated as superior. Of course, Diaz, now a woman, poses no threat to women, but possibly does to men, and obviously to the status quo. It seems likely in fact that the reason that the sex change is interesting is the
claimed invasion of privacy by unwarranted publicity of intimate facts; the newspaper claimed that the facts were newsworthy and that she was a "public figure". At first instance, and on appeal, the jury found that her sexual identity was a private fact, and that details of the sex change were not relevant to the public controversy in which she was immersed; that is, that the newsworthy test was not satisfied.

ii) Political Lifestyles and Sexual Orientation

We have seen in Chapter Two that women who are seen as "political" are constructed by courts as being bad mothers and as having no regard for their personal privacy, possibly in ways that men are not. The right to privacy and challenging the status quo are seen as fundamentally incompatible, even though privacy, when viewed as a means of granting autonomy and individuality, would seem to suggest that the ability to have one's claims heard is inherent in a liberal society. In this section we will consider how an openly gay or lesbian plaintiff is constructed in judicial language as being "political" and how this in turn operates to defeat claims to privacy protection under the tort.

Sipple was constructed as an activist. Within the judgment we see several references to the fact that "hundreds" and "numerous" people knew of his lifestyle. In stating that Sipple had left his sexual orientation open to the public eye the court held that his fact that Diaz steps outside of the gender norm by becoming a politician. By identifying her as a "man in disguise" the status quo (that women do not become politicians) is reinforced, and other women are discouraged from following in her footsteps. Of course, gender corrective surgery is not required for this social commentary to be heard; the dialogue surrounding women such as Margaret Thatcher (England) Hillary Rodham Clinton (USA) and Ruth Richardson (NZ) are prime examples of women who are held up as not conforming to proper gender roles.
Homosexual orientation and participation in gay community activities has been known by hundreds of people in a variety of cities, ... [New York, Los Angeles]... that prior to the assassination attempt appellant spent a lot of time in "Tenderloin" and "Castro", the well-known gay sections of San Francisco... that he marched in gay parades on several occasions; that he supported the campaign of Mike Caringi for the election of "Emperor"... in short since the appellant's sexual orientation was already in the public domain and since the articles in question did no more than to give further publicity to matters which appellant left open to the eye of the public, a vital element of the tort was missing....

We can provide a wider context within which to understand Sipple by considering it in the light of several non-tortious privacy cases where the concept of free speech has been manipulated in such a way as to deny gay and lesbian plaintiffs private status. In McConnell v. Anderson the plaintiff brought an action against the Board of Regents and the head librarian of a university that refused to pass a resolution confirming a post previously offered to, and accepted by, McConnell. The board refused to process his application on the grounds that his "personal conduct was not consistent with the best interest of the university". Shortly after the offer had been made and accepted, McConnell and his male partner told the head librarian that they were on their way to the county court house to file an application for a wedding licence. After applying for the marriage licence, he and his partner conducted several interviews with newspapers declaring that they should be entitled to get married, and that they hoped their actions would spur the legislature to action. Although the court accepted that McConnell had the necessary qualifications and indeed had previously been considered a proper person

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165 supra note 160, at 668.

for the appointment, they considered his "handling" of his private life to be a valid reason for withdrawing the offer. The court constructed McConnell as an "activist" and said that this meant that

This is a not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded because of a desire clandestinely to pursue homosexual conduct. It is rather one in which something more than remunerative employment is sought; it is a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands the right to pursue an activist role in implementing his unconventional views concerning the societal status to be accorded homosexuals and thereby to foist tacit approval of this socially repugnant concept on his employer... we know of no law which requires an employer to accede to such extravagant demands.\(^{167}\)

The foisting of tacit approval on the potential employer was the focus of court enquiry and the court held that it was not arbitrary, unreasonable or capricious to deny employment to someone who demanded a right to activism. Reaching this conclusion required some careful judicial manipulation. McConnell relied on a clear line of cases which indicate that speech is private rather than work related, or which does not substantially interfere in the work of a school or impinge on the rights of students and is objectionable primarily because the employer wishes to avoid the controversy which might result from such speech, can not be constitutionally prohibited.\(^{168}\) He also had

\(^{167}\text{ibid, at page 196.}\)

\(^{168}\text{Tinker v Des Moines Community School District [1969] 393 US 503 L Ed 731; a supreme court case where students won the right to wear black arm bands to school to protest the Vietnam war. Although this case has been widely applied before and after McConnell's action, here the court held that "Tinker, when read in light of its distinctive facts, can not offer McConnell any comfort" - see page 196 note 7.}\)
a sound argument for protection from employer sanction even if the court considered that his speech was not private, or that it was detrimental to school policy. There is precedent for a public employee's right to participate in public debate over administration of a public workplace, unless the statements are made recklessly and without support. The court decided however, that both lines of Supreme Court precedent were irrelevant, because McConnell was not demanding protection for his right to free speech, but rather protection of a right to implement his "unconventional ideas". The court made a distinction between speech and the fact that he was actively seeking change, and held that his speech was public and reflected on an employer in such a way that that denial of employment was justified.

In Rowland v Mad River Local School District a non-tenured guidance counsellor on a one year contract with an Ohio State school board was suspended after discussing her bisexual orientation with her secretary and several teachers at the school at which she worked. The principal suspended her, then reassigned her to a non-student contact position until her contract ran out. At trial the jury and court found for Rowland, holding that it did not matter whether the speech was private or public in nature, as her disclosure of sexual orientation did not interfere with the proper performance of anyone's duties, and that the school was improperly motivated to dismiss her solely because of

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169 Pickering v Board of Education of Township High School [1968] 391 US 563 20 L Ed 2d 811, where a teacher could not be dismissed for engaging in a debate through letters to the editor criticising the way the school board and school administration had handled revenue raising.

those statements. On appeal the court reversed that decision, holding that she had spoken not as a citizen upon matters of public concern but instead as an employee upon matters of purely personal concern, and that as such, if her employer found that speech objectionable, the court could not interfere with any consequences she may face. The court held that her statements were not protected speech as it was

Clear she was speaking only in her personal interest as an employee. There is absolutely no evidence of any public concern in the community with the issue of bisexuality when she began speaking to others about her own sexual preference.\textsuperscript{171}

Thus as there was no public discussion to which she could attach her speech (as there will not be if heterosexism is not challenged directly) and as she had spoken of her sexuality within the workplace, she was taken to be speaking as an employee on private matters and privacy protection was denied.\textsuperscript{172}

\textsuperscript{171}ibid at page 395.

\textsuperscript{172}Further, the court held that she could not prove a discrimination action unless she could prove that she was treated differently from others in her situation and that she had performed her job satisfactorily. As there was no evidence to show how other gay people were treated in a similar situation (at that school) the court held that she had no background to claim that she was treated any differently, and as her contract had not been renewed "clearly [she] failed to prove she was performing her job properly." \textit{supra} note 160, at 450. The case went to the Supreme Court where the court refused to hear an appeal. Justice Brennan and Justice Marshall in the Supreme Court lodged dissenting opinions to the effect that an appeal should be heard as the appeal court decision was erroneous. In both dissenting judgments there is reference to the factual findings of the jury and trial court; and the fact that

These facts are rendered completely invisible by the court's findings... the appeal court reversed based on a crabbed reading of our precedents and unexplained disregard of the jury and judge's factual findings. Because they are so patently erroneous, these manoeuvres suggest only a desire to evade the central question; may a state dismiss a public employee based on her sexual status alone? at 393.

Justice Brennan claimed that ". . . it is impossible not to note that a public debate is currently on going
We can continue the analysis further by considering *Aconfora v Board of Education*\(^\text{173}\) In this case a teacher who was "arbitrarily and unjustifiably transferred" because of his sexual orientation was found to have gone beyond the needs of his defence by making television and radio appearances to highlight his plight. As a student teacher, he was suspended from classroom duty when his employer discovered his membership in a gay rights group. He brought a law suit and was reinstated. After graduation, when applying for teaching jobs, he did not mention his sexuality or his affiliation with the student group. He was appointed to a teaching position and later applied for a teaching certificate, at which time he stated that he was gay and believed in gay rights, but would never bring those beliefs or his sexuality into the classroom with him. The committee conferred and decided to grant the certificate; thereby causing media interest and the ensuing release of details about his previous teaching experience. As a result of this publicity he was transferred without consultation to a non-contact position. Aconfora brought a legal action against the school board requesting reinstatement and in the process gave interviews to the media about the issues involved and the progress of the proceedings. In considering the transfer the court was not so much concerned with his regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate. Speech that touches upon this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination." at 394. Thus the appeal court's finding that her speech was "purely personal" is at least questionable, and the issue of first amendment protection open to consideration. This is especially relevant when the implications of the appeal court's decision are considered: in essence a plaintiff could never be the first one to bring a matter to public attention, and this goes against reason and Supreme Court precedent.

record as a teacher, as his conduct after the transfer. With a "public" concern about sexuality, especially in the context of the education system then, his public conduct became a valid criteria on which the school could evaluate his ability to teach. The court held accordingly that

The conduct of private life necessarily reflects on the life in public. There exists not only a right of privacy, so strongly urged by the plaintiff, but also a duty of privacy.

In the court's view, Anacora's actions sparked controversy, and while he did not have to hide the fact of his sexual orientation, he did have to be "discreet". By challenging discrimination on the basis of sexual orientation, he became a political figure, and lost the right to claim that aspects of his life were private and should not be used against him. The fact that the revelation of his political views had resulted in the first discrimination action and his subsequent transfer, was ignored.

These three cases illustrate the usefulness and mobility of the public/private divide in imposing or reinforcing heterosexism, within the context of state (education)

174 Although he had never brought his sexuality into the schoolroom or otherwise in his employment, the court felt that once his sexuality was known, it become a valid ground for school concern. There was a long and detailed discussion as to the effect of gay teachers on the youth in their care. The court accepted the evidence of an expert that junior high school was a "time of decision or choice... a known homosexual might serve as a model for confused children ... thus removal of the plaintiff would result in a freer choice ... the prevention of homosexuality is worthwhile goal." The court considered that the students who knew of his sexual orientation would be unable to separate his gay identity from his identity as a teacher and that this might have a deleterious effect on the classroom notwithstanding his desire not to do so. See page 845ff for this discussion.

175 Ibid, at 855.
employment. In *Rowland* the court constructs the plaintiff as a private figure in a private situation and as such freedom of expression is not held to apply, while in similar situations in *McConnell* and *Aconfora* the plaintiff is constructed as a public figure in a public situation who can not then ask that his public actions not affect his job. The issue of whether gay or lesbian sexual identity is a public issue is manipulated to ensure that the ultimate result is the continuation of the status quo and the silencing of challenges to that norm. These decisions prohibit not only gay advocacy but gay identity, which is the key component of the success of the heterosexist ideology. When we consider *Sipple* in light of this theme, we see that there are similarities in the way that the judgments are constructed. Sipple is made out to be an activist, he had campaigned to have a gay man elected mayor of San Francisco, he was friends with Harvey Milk, a gay political figure, in the same way that these points were made about McConnells' political connections and Aconforas' membership of a gay rights group while as a student. As in Rowlands situation, Sipple had not hidden his sexual orientation from the people with whom he lived and worked, and thus he could be constructed, as were all of these plaintiffs, as someone who had chosen to accept the consequences of his political and "non-conventional" lifestyle.

On the other hand, compare the situation of Diaz, who was on the other end of the spectrum. While she was living a "political" life (in the classical sense) she did not identify as a non-conventional figure (that is, as a gay man or as a lesbian) and was instead constructed by the court as a heterosexual woman who was attempting to lead
a "normal" life. While Sipple considered himself to have led a private life, and while he had not come out to his family or non-gay friends, in her case the court was able to hold that while her sexual identity appeared on public registers, such as the birth role, and public hospital records;

There is no evidence to suggest that Diaz's gender-corrective surgery was part of the public record. To the contrary, the evidence reveals that Diaz took affirmative steps to conceal this fact by changing her driver’s licence.... In order to draw the connection, Jones relied upon unidentified confidential sources. Under these circumstances, we conclude that Diaz's sexual identity was a private matter.... Moreover, matter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy.

This is the same rationale as that used in Melvin discussed in Chapter Two, and it has the same result; the pro-offering of moral support for an individual who is attempting to fit within dominant norms, and does not offer public challenge to constructions of gender or normalcy. The reasoning of this case suggests that non-heterosexual sexual identity can be a private fact when the person takes enough steps to keep quiet about it.

Consider this suggestion in light of Bowers v Hardwick. Michael Hardwick and his

176 Supra note 163, at 771. Also, see Briscoe v Readers Digest Association Inc, [1971] 483 P.2d 34.

177[1986] 487 US 186. By way of summary, Bowers is the most recent challenge to the constitutionality of the US sodomy statutes. Michael Hardwick and his lover were arrested and charged with the crime of sodomy in Hardwick's own bedroom, by a police officer who came to his house to serve an expired warrant. He had been the target of continued police harassment (and possibly violence) since the police officer in question had discovered that Hardwick was gay and worked in a gay bar. The history of Hardwick's claim, the fact that it was not an isolated incident but an example of continuing, systemic
lover were arrested and charged with the crime of sodomy in Hardwick's own bedroom. In the event, the sodomy charge against Hardwick was dropped.\textsuperscript{178} Unusually in this case however, Hardwick did not remain silent, but challenged the validity of the sodomy statute under which he was charged. The result is an explicit, official articulation of the ideology of heterosexuality.\textsuperscript{179} We see this articulation particularly clearly in the case

oppression, never found its way into the court records and this has two implications. First, the court is able to look at the issue in the official language of privacy without dealing with the need to offer protection to a targeted minority. That is, the court constructs the case as that of a group looking for special rights, rather than that of a group requiring protection from state persecution which prevents the exercise of a basic freedom; namely bodily and mental integrity. Secondly, and strongly connected to this, it becomes easy for supporters of gay and lesbian equality to simply dismiss the court decision as "prejudiced", rather than seeing it as part of an overall text; as the natural result, probably the only result, that the court would come to, in a society in which the ideology of heterosexism is as fundamentally entrenched as it is in the United States. \textit{Bowers} stands for more than just bigotry or confused decision making; it acts as a mechanism to maintain traditional sex roles challenged by gay and lesbian existence. By reinforcing a sharp dichotomy between heterosexual and homosexual identities "the (normal) group confirms not only its identity, but also its superiority, and displaces doubts and anxieties onto the person now called different" (see Copelon, below, at 276) and for that reason, this case is a good illustration of the way the concept of privacy (which lays claim to neutrality) is overlaid with moral claims operating at the level of ideology. The structuring of the decision shows a fundamental conflict about the essential nature of liberal legality; the majority began from a view that the state is authorised to regulate morality unless that regulation runs afoul of some closely held majoritarian value, whereas the dissent starts from the view that purely private conduct can not be regulated unless it is needed to serve an interest other than a state taboo. While Blackmun pleads in his dissent that the case should be evaluated in light of the values that underlie a constitutional right of privacy, he fails to convince the majority because those values can not be traced back to any declared will of popular law making. White, who presented the majority judgment claims that it is "facetious" at best to suggest that there is any protection in the constitution for sodomy. Thus the Court seeks shelter from charges of judicial activism at the expense of a vulnerable minority, seriously undervalues the harm caused and hiding its prejudice. For several interesting and well documented critiques of this case, see Rubenfeld, \textit{supra} note 18; Kendell, \textit{supra} note 146; and Rhonda Copelon, "A Crime Not Fit to be Named; Sex, Lies and the Constitution" in Kairys, ed., \textit{supra} note 18.

\textsuperscript{178} As we discussed above, this is not unusual; although such statutes exist, they are only very rarely enforced; as in the manner of all ideological reinforcers, their strength lies not so much in the enforcement but the threat, the point of sodomy statutes is not so much to prevent sex as it is to sanction other forms of state intervention in the private.

\textsuperscript{179}The judgment provides illustration of the ideological process, from the language that it uses, the way that it constructs the relevant issues, and on into the way it decides the case. For example, the court argues that non-heterosexual sexuality has always been condemned, ignoring the tradition of tolerance and affirmation which existed prior to the middle ages and the complexities of the strictures after this time; as we discussed in chapter one, such blanket denial of ambiguity or contradiction is one of the prerequisites for the continued survival of a dominant ideology.
Homosexual sodomy is anathema of the basic units of our society - marriage and the family. To decriminalise or artificially withdraw the public's expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institutions to merely alternative lifestyles.\textsuperscript{180}

The court ridicules the possibility of alternative interpretations about what constitutes a legitimate family, stating that it is, at base, facetious to claim that homosexuals can constitute a "family". The primary reason for this is circular; as sodomy is criminal there is no protectionable right to same-sex sex (as compared to the right to sex within heterosexual marriage\textsuperscript{181}) and as such heterosexual marriage forms the only legitimate basis for "family". The court states that "there is no connection between family, marriage, or procreation on the one hand and homosexual activity on the other".\textsuperscript{182} The court claims that there is no immunity for criminal conduct within the private and that as such there is no right to gay or lesbian sexual privacy;\textsuperscript{183} thus reinforcing the discourse which views same-sex sex as pathological and comparable to drugs, firearms, incest, bigamy and adultery. Same-sex sex is constructed as public and dangerous, and has no

\textsuperscript{180}Supra note 177, at 190.


\textsuperscript{182}Supra note 177, per Justice White, at page 190.

\textsuperscript{183}It is interesting to note the difference in this discourse and that prevailing in countries such as New Zealand, much of Australia, Canada, and the United Kingdom, which decriminalised same-sex sex on the basis that the state "had no business in the bedrooms of the nation" (Pierre Trudeau, Prime Minister of Canada during the 1970's reform).
relation to the private institution of marriage and family.\textsuperscript{184}

At first then, it would seem that the possibility that we read into \textit{Sipple} (that same-sex sex can be constructed as private in some circumstances) conflicts with \textit{Hardwick}, which constructs gay sexuality as public and criminal. However, we can reconcile this difference by the realisation that sodomy statutes are very rarely enforced. As we discussed above, as in the manner of all ideological reinforcers, their strength lies not so much in the enforcement but the threat. The enforcement of prohibitions against sexual acts would be extremely difficult, and, I would suggest, the level of intrusion necessary to do so would bring the legitimacy of the exercise of state authority into question. The ideological process which resolves this conflict is a mutual consent by both the dominant and subordinated groups that those who do not conform to dominant social behaviours are given de facto permission to breach those norms, as long as they do not do so flagrantly. That is, privacy is granted in the negative (taking the form of secrecy or the "closet") but denied in the positive (autonomy or freedom from regulation).

The \textit{Restatement} states that sexual relations are "normally entirely private matters"\textsuperscript{185},

\textsuperscript{184}This kind of attitude leads to the mentality that sees gay (men) living clandestinely. Thus when we compare the cases of \textit{McConnell} to \textit{Sipple} we wonder whether, if Sipple had frequented public toilets or parks, would he have been able to assert that he had not made his sexual orientation public? While there is no right to be let alone in a public place, if he had not been exposed by arrest or in some other public manner, is the court suggesting that he may be able to assert privacy, say for example if a family member let the press in on the "secret" without his permission.

\textsuperscript{185}The \textit{Restatement} considers sexual relations to be private, "Those facts which a person keeps entirely to himself or at most reveals only to his family or close friends are considered private. Sexual relations... family quarrels, humiliating illnesses, personal letters and certain parts of a person's past history..." (Subsection 652 D, comment b). Note that although we are not talking about sexual relations but sex
but also states that there is no liability for giving further publicity to what a plaintiff leaves open to the public eye. It would follow from this that if the press learns enough to make allegations about one’s sexual identity, then this is sufficient to make the newsworthy defence operable. Therefore, there could be no such thing as a private fact or the press would never be in a position to report anything. Clearly, given even the sampling of cases we have examined so far, this is not so. As we have posited before, it is not an issue of "whether" but to what extent, and to what effect, a plaintiff has revealed a fact. The California Supreme Court has recognised in previous cases that individuals have different roles to play in different situations. So in Briscoe\textsuperscript{186} the court held that a plaintiff may disclose facts to an employer which she would not to a neighbour. The question was considered there to be not so much of total secrecy as it was "the right to define one’s circle of intimacy [and to be able] to choose who shall see beneath the quotidian mask"\textsuperscript{187}, but although the court posed the question, it would not recognise the same privilege in Sipple, and the reason for this seems to relate back to the ideological underpinning of heterosexism and the social utility thesis we have discussed.

While transsexuality poses a real threat to established gender norms - possibly more so than do gay or lesbian identities - Diaz was granted privacy protection under the tort.

\textsuperscript{186}supra note 176, at 37.

\textsuperscript{187}ibid, at 37.
This makes sense if we are considering the issue in terms of construction of a plaintiff as a political figure, because Diaz did not politicize her "choice" or claim to transsexual status. Instead it seems (from what we can draw from the judgment) that she internalised the issue as being personal to her. Sipple, on the other hand, has questioned the heterosexual norm by living openly as a gay man. The example made of him, and the suffering that this publicity caused for him (his family disowned him and he later committed suicide), create a vivid illustration to others of the dangers of non-conformity. When we compare the result in *Diaz* to the results in the "political figure/mother" cases we considered in Chapter Two (such as *Kapellas* and *Tyabji*), and view them in light of our social utility thesis, the same message is reinforced. Whilst these three cases involved women in the political arena, in *Diaz* it was easier for the court to construct her as a victim who had done all she could to fit dominant social norms, whereas Mrs Kapellas, and Ms Tyabji were both women intent on pursuing careers to the perceived detriment of their primary role as mother.

**iii) The relevance of choice**

The primary, if not the only, similarity between the handling of *Diaz* and *Sipple* by the judiciary is that neither of the judgments challenge the plaintiffs on the "offensive to a reasonable person" test; courts think that public disclosure of non-heterosexual sexual orientation is offensive without more. On the other hand, there are some interesting distinctions to be drawn between the two cases. The first is that whereas Sipple was a private figure who had involuntarily assumed a position of public focus (where we would
expect courts to provide protection on the basis of harm and relevancy) Diaz had chosen to become a public figure by entering politics. In such a situation the rules governing the tort suggest that privacy protection would only reluctantly be granted, and yet this is not the result. The other interesting distinction is judicial refusal to acknowledge the significance of Diaz' operation being a matter of public record. It is a basic legal concept that anything on a public register (with exceptions for national security) is public information; indeed that is what cases such as Meetze\textsuperscript{188} specifically state. It seems probable that just as many people knew of Diaz' sexual identity as of Sipples. Her doctors, the bureaucrats who changed her papers, her family and friends; these would not constitute an insignificant group. Compare this to the speed with which the court was prepared to find that Sipples' attendance at gay bars was "public" notification of his identity. It would seem clear that "choice", the way in which the plaintiffs were constructed as having lived their lives, has much to do with this.

There are several levels on which we can interpret the difference between these cases. The first level is that Diaz had done all she could to keep her sexual identity out of the public eye; she changed public records, she did not discuss it with anyone, she did not seek to challenge the status quo. For this reason it goes against "heterosexual sense" to have the identity made public and therefore open to question.

\textsuperscript{188}See Stryker v Republic Pictures Corporation [1951] 238 P.2d 670; also Cox Broadcasting Corp. v Cohn [1984] 420 US 469 where the Supreme Court upheld this on constitutional grounds.
In *Sipple* the court finds that although he may initially have enjoyed an expectation of privacy in his sexual orientation, he forfeited any rights he may have had when he put it in the public domain by going to bars. He did not make a "secret of it", or in the words of the *McConnell*, he did not seek to live clandestinely, making it illogical for him to claim that publication violated his right to privacy. Consider this in the light of *Doe v Casey*, a non-tortious privacy case. Here a CIA career agent of nine years was fired after he voluntarily presented himself as gay to a CIA security officer in an interview in 1982. The federal appeals court dismissed his claim for damages and injunction. The judicial rationale is constructed in an either/or framework that makes it impossible for an "out" gay or lesbian employee to circumvent. The court found several "good" reasons for not requiring the Director of the CIA to furnish explanations or definitions of his criteria, despite holding that he was not allowed to discriminate on non-performance based criteria ("[he could not] for example, terminate Black employees simply because they are Black, or female employees because they are female"). Although it seems difficult to see how this can be enforced if the Director's discretion

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189[1987] 796 F 2d 1508 [1881]

190He was interviewed for ten hours and took and passed several lie detector tests aimed at discovering whether he had divulged any security secrets to lovers, or slept with foreign nationals. After being suspended, the director of the CIA declared that he posed a security risk, and asked for his resignation but declined to explain why. After refusing to comply, the agent was dismissed. He was told that he would receive a positive recommendation, but that if he ever applied for a job with a security clearance requisite, the CIA must be informed, and that upon being so informed, they would divulge his sexual orientation to prospective employers.

191One could perhaps draw an analogy between the results in this case and the current "Don't tell, Don't Ask" policy in the US military. President Clinton's compromise has left gay and lesbian military personnel in the situation of having to cover their sexual orientation to prevent being asked and thus dishonourably discharged.

192supra note 189, at 1518.
cannot be properly reviewed, nevertheless the court decided that the Director need not explain his reasoning as "we can not permit a witchhunt aimed at discovering the reasons for the invocation of [director's discretionary powers]. Quite simply, we could endanger national security if we were to require the CIA to explain each and every decision to terminate the employment of an employee". 193

One of the main concerns with the case comes in the second part of the judgment. The court held that Doe was not stigmatised by the CIA informing other employers of his homosexuality because of his refusal to admit that homosexuality was degrading to him:

Because Doe himself does not view homosexuality as stigmatising - and indeed, admits that he is a homosexual - he would have no liberty interest if all homosexuals were banned from CIA employment. If, on the other hand, the CIA terminated Doe because his homosexuality presented a unique security risk, then there would be stigmatisation. [But because] we conclude that Doe was given a meaningful opportunity to contest any allegation [and freely admitted to being gay and not ashamed of it] ... we can not say the constitution requires more... 194

Thus the court held that as he had claimed the label he could not legitimately evade the legal consequences of the label. The court both monopolises the power to define and control the experience of stigma, while establishing the fiction that those harmed by it have chosen their injury. This ties in clearly with the point made earlier about choice

193ibid, at 1522. The court also decided that as Doe was given polygram tests "this suggested that his mere status as a homosexual was not the main reason for his later discharge", and finally, that it was impossible for the court to say whether or not he posed a security risk; only the CIA had the ability to determine this.

194ibid, at 1524.
and its part in liberal theory and the justification for social sanctions. There is substantial focus within United States discourse about the relevance of homosexuality being an "acquired trait" or an innate characteristic. Conservative elements within that debate argue that as an acquired trait there is no need to alleviate state and social sanctions; in essence reinforcing the liberal interpretation that an individual may choose to act but the state need not do anything materially to aid the making of the choice.

What at first seems to be respect paid to a confident self identity as gay is not genuine approval, but justified inaction over discrimination. The judgment means that a self identified gay man or lesbian in government employment must subjectively regard his or her sexual orientation as degrading or scandalous, and as a result go to extreme lengths to hide it, to retain his or her job. Thus Janet Halley’s comment, that the judiciary often construes those who choose not to remain closeted to have made a simultaneous decision to wear whatever badge the majority determines is appropriate for them, seems particularly pertinent here. This case fits in with Diaz, because by exhibiting the fact that she does not desire to challenge the status quo, she in turn submits to the social construction of gender and thus reinforces it.

If one had more information to go on, it might be possible to take the analysis even further. "Gender corrective" surgery is a radical statement about the operation of gender

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195 See Didi Herman, supra note 9, chapters five and six.

196 Halley, supra note 147, at 958.
norms in a society.\textsuperscript{197} The existence of such techniques makes a stark statement about the pain that the social control exerted over our behaviour can cause some individuals. A man who feels intrinsically that his true nature can not be expressed in the context of the sex of his body may find it easier to undergo radical surgery than to fight the gender-ideology which underwrites social existence. Our social structures perpetuate this, by creating a medical discourse which explains it in terms of hormonal imbalances, or brain deficiencies, thus creating an "abnormal" (read pathological) tendency in a small segment of society. Men must be men, and if they can not live within those rules, then they must become women. There can be no blurring of the gender dichotomy.

Another aspect of the case is the problematic issue of newsworthiness. In Sipple The Chronical successfully argued that sexual orientation was a matter of public interest. As we have noted above, this finds resonance within judicial considerations, and with what we see in our day to day lives. It is interesting to note however, that where this is the case, the result is often a decision that has the effect of punishing a private plaintiff with what is often harmful public exposure.\textsuperscript{198} Where public interest could be turned into a positive element, (for example, by allowing a plaintiff such as Rowlands to discuss her sexuality with friends and work colleagues and not be discriminated against), it is


denied.\textsuperscript{199} The \textit{Times-Mirror} case suggested that there should be a balance struck between the newsworthy element of the topic and the harm it would cause to the victim. Here the court took the position that what was necessary was a revelation that was shocking to the community;

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the community is entitled, and becomes a morbid and sensational prying into the private lives for its own sake... In the case at bench the publication of appellant's homosexual orientation which had already been widely known by many people ... was not so offensive even at the time of the publication as to shock the community notions of decency.\textsuperscript{200}

However, the court in \textit{Sipple} would not use this test, and in fact turned the acceptability of the gay lifestyle in San Francisco against him, holding that sexual orientation is not offensive and that the reporting of it should not cause harm to a reasonable man in the 1980's. There are compelling arguments about the necessity for gay men and lesbians to come "out" and not to remain hidden within a socially constructed and ultimately detrimental closet, and it is not my intention to argue with them.\textsuperscript{201} Instead the

\textsuperscript{199} supra note 170.

\textsuperscript{200} supra note 101, at page 670. See also \textit{Virgil v Times, Inc.} [1975] 527 F.2d 1122 where court held "In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern."

\textsuperscript{201} See, for example, M Signorile, \textit{supra} note 199; J E Grant, \textit{supra} note 159; L Gross \textit{supra} note 159, for discussion on "outing" and its moral and political foundations and dilemmas.
purpose here is to highlight the fact that the apparent respect which accompanies this statement has the same effect as that offered in *Doe*. The decision paid no attention to the realities of his life, or the pervasive hostility that faces gay men and lesbians living in a heterosexist society; that newspaper publication in this context caused great harm to Sipple. What appears at first glance to be respect, is, just as it was in *Doe*, an implicit and unstated belief that Sipple is to blame for his own problems, and that as such he has no right to assert privacy at this late stage. And this of course fits in with the dominant discourse in America surrounding "the homosexual lifestyle" we discussed earlier in the chapter; the gay or lesbian identity is viewed as a personal choice, and as such an individual can either resist it, or accept the blame that attaches to it.

**Conclusion**

No gay or lesbian plaintiff can reasonably be expected to keep his or her sexual orientation completely or even substantially unexposed; to suggest that sexuality is something which can or should be kept locked away like a diary is to distort the very notion of what it is to be human: we rob ourselves and others of the opportunity to be social, to connect with one another. That judicial decisions expect it is an indication of the effectiveness of the heterosexist ideology within which they operate; gay and lesbian lives are restricted to purely sexual acts, the questions of identity and life style are wished away and in turn the heterosexual identity is both reified and (re)created.

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202 See above at note 195.
Liberalism would seem to suggest that law which operates to balance private needs with social organisation should operate in favour of tolerance. There are many important reasons for encouraging people to live their lives openly; the collective health and happiness of a society requires acceptance and acknowledgment of difference, both at an individual and societal level. A society which represses the needs of its members by ideological means can not lay claim to superiority over a state which represses its members by physical means.

In the context of privacy law, both within the tort and outside of it, a plaintiff who attempts to tackle the stigma by "coming out" to the people in her life, which would seem to be an effective way to tackle the "unknowing" of society and thus work to create new experiences on which to base re-interpretations about the nature of our lives, and which is surely part of the liberal commitment to individual satisfaction, is penalised severely for her lack of discretion. Such decisions are particularly effective methods of reinforcing the heterosexist bias of society and thus have the effect of repressing and controlling the behaviour of individuals while at the same time continuing the facade of legal neutrality.
CHAPTER FOUR: CONCLUSION

The claim of law's innocence is ideological. It is made within interpretations of our ways of life which give law a particular nature, purpose, and value. These interpretations claim their own truth and prescribe their own values. They imagine their own most persuasive case and pursue it against those who tell a different story - guilt must be punished if innocence is to survive.\(^{204}\)

Liberal ideology posits law as neutral, universal, equally applicable to all, and derived by some higher body than any single judge or law maker. Its claim to validity is built upon our understanding that the result in any one case is derived from a rational weighing up of the factual situation against a pre-determined objective test. The tort of privacy, originating at a time when changing social structures meant that the dominant understanding of privacy was under threat, is an effort to impose a liberally defined rational framework on the liberal concept of privacy. At first glance the tort appears to succeed in its aim: a neutral objectively determined test is posited and applied. However, such an analysis overlooks the possibility that privacy, itself an ideology, is already operating at another level to maintain dominant power relations within society, and that as such, dominant belief structures about other issues, such as morality and gender, become inextricably entwined with the apparently objective discourse under discussion.

Each issue in which privacy is implicated is complex and multi-faceted, and it is only by

\(^{204}\) Kerruish, supra note 4, at 2.
looking below the surface that we can see how ideological processes operate. To realise that our understanding of privacy is a human construct informed by liberal ideology, rather than a universal concept is crucial. If we look behind the supposed essentiality of privacy to consider the possibility of ideological motivations and forces, we can see that the form and processes of privacy within advanced capitalist states have operated to reinforce particular power relations. Although privacy within liberal ideology is said to protect an individual's right to enjoy an identity, this construction overlooks the fact that identity is forged by existing power relations, institutions and communities which embody social standards and morality. At present our conception of privacy allows for exclusion or overinclusion of various social groups; and this in turn can act as a repressive, constructive force in the lives of individuals. As we have discussed, when the identity sought does not fit within existing dominant social relations, privacy, and the right to be "different" without societal interference, tends to be denied. By viewing privacy as an ideological construct rather than a natural phenomenon we are able to consider the underlying power relations within it.

One of the processes by which an ideology attains dominance within a liberal society is its foundation in the belief of members of that society that successful communities depend on conformity as much as individuals depend on independent reason and free will. Within liberal theory, privacy is posited as the concept that achieves the balance between these two somewhat contradictory statements. However, as this thesis has shown, the line that separates individuality and conformity is manipulated to ensure only
certain forms of individuality are permitted. The creation of a system whereby disclosure of personal information to mass audiences is validified exacts a rigid conformity to the norms of that community, and does little to increase the individual's ability to develop her own values. Thus Beazanson says

Enforcement of behavioral norms and taboos can be accomplished by disclosure of private information within small communities when the family and circle of friends are the effective agents of control. When they are not, when work is the principal locus of individual identity, and when the shared moral values of fixed smaller communities are unavailable, the social control function of privacy is jeopardized.205

This examination of a selection of private fact tort cases which have involved issues of sexual identity and women who have been involved in incidents which are not regarded as "normal", has shown that there is a tendency within the tort, and possibly within liberal privacy at a more general level, to create either a space to conform to dominant social mores, or to keep deviations from these standards secret. It is this negative conception of privacy within tort law, this view of it as a "right to secrecy", which renders it vulnerable to co-option by dominant social groups, and enables it to be used to exclude social interpretations which challenge majoritarian social norms. Before it can be used in a positive sense, we have to recognise its ideological imperatives and the status quos which it perpetuates, and seek to change the way the tort is interpreted and applied.

The state has a vested interest in regulating privacy; the ideology which polices the

205Beazanson, supra note 35, at 1144.
boundaries of the private works to ensure that inequalities are not seen as systemic, and more importantly, as being outside of state responsibility. By isolating the issue, it does not need to be addressed. So for example, we can view the "private family" as a construction; the state has defined what it is, who it includes, who it excludes, and what roles each has within it. In the same way, the state has moulded expectations of uniform sexuality and maintained these expectations by reinforcing a negative perception of privacy that does not have so much to do with self control as it does the denial of difference. The legal language of privacy does not easily allow us to consider the consequences of these processes, and for this reason an examination of the operation of ideology and its effects within the tort is necessary before the themes underlying such judicial decisions can be fully appreciated.

In chapter one we considered the nature of ideology and its processes to make sense of our lived experience in a way that denied complexity and smooths over contradiction. Thus we value law as objective, non-interested, and non-human, despite the contradictions inherent in that standpoint. We considered privacy as an ideology within the liberal framework and its position in that body. We considered its historical and social contingency, and the ways in which it is not the neutral, equally applied doctrine that liberalism declares its doctrines to be. Having examined the inherent ideological nature of privacy, we then took this further in chapters two and three by examining specific ideologies of gender and heterosexism and how they played out in maintaining

the status quo in the case law.

In chapter two we considered the ideology of gender and how it plays out in the tort to re-enforce the notion of woman as morally pure and removed from the public world. We examined the extent to which the tort is ideologically structured so as to enforce a gendered status quo. Warren and Brandeis articulated a form of negative privacy which had little to offer women, who did not need to escape from the demands of the new work world so much as they needed public recognition of their existence. Nineteenth century privacy theory was based on a perceived need to increase the privacy of the home, and women who lived within it. This notion of privacy led inevitably to decisions which reinforced the notion of women as having special modesty and seclusion needs. Further, the ideological nature of privacy itself has been intertwined with judicial perceptions of correct gender behaviour, and the two have become virtually indistinguishable. Thus women who challenge the gendered status quo, for instance by having a baby out of wedlock, or stepping into politics, are deemed to have lost their right to privacy. Arguably, stepping outside that status quo challenges the validity of privacy, and one of the best ways to rebuild it as a value is to make a public spectacle of the challenger. Conversely, stepping "into" the status quo, for example by giving up a life of prostitution, or agreeing to maintain silence about inequality, allows for the application of privacy protection.

In chapter three we considered the ideology of heterosexism, examining how privacy
operates as a process to maintain and (re)create that ideological institution. Privacy is enforced both in its negative form (in the sense that the state will not intrude into the closet) and as a positive manifestation (in the sense that the state is active in ensuring that moving out of the closet is as difficult as possible) and is a good example of the flexible nature of privacy as an ideological tool in institutionalising and perpetuating social norms. Under current interpretations of the tort it will be difficult for an "out" gay person to claim a right to privacy for sexual orientation, even though the Restatement provides the grounds for sexuality to be considered singularly private.

Eagleton claims that "[i]t is not enough for a woman or colonial subject to be defined as a lower form of life: they must be actively this definition". The privacy cases that we have considered would seem to illustrate this principle. We learn in two ways from the denial of privacy; first we are presented with a clear illustration of what is not acceptable in society. Difference is labelled as deviance, and displayed to all the world, and we are encouraged not to follow in those footsteps. As we heard Eagleton say, guilt must be punished if innocence is to survive. Secondly, and really the flip side of that, is the lesson that as inasmuch as we are different ourselves, there is nothing to be gained by going public with our individuality. All sorts of closets are encouraged by privacy doctrine. While privacy is understood in the liberal tradition as deeply entrenched within the notion of the prevailing status quos, it is unable to hear the real issues in front of it. While difference is only to be tolerated while secreted in the private, the very action of

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Eagleton, supra note 1, at xiv.
having to make a claim for privacy will be viewed as a contradiction in terms. If an individual really valued privacy, she would never discuss her difference and thus would not have a need to claim protection. Until we define what it is to be individuals, and view difference as truly acceptable rather than an avoidance tactic for society, privacy will be more problematic than rewarding. Thus heterosexism has to be tackled directly and publicly before sexuality can really become a private fact, and gender bias has to be fought externally before privacy ceases to act as a form of oppression for women. Clearly though, there is room to imagine, our conceptions of privacy have changed over time, and ideologies, once identified, can be effective sites of struggle. The world is not frozen as we sometimes imagine it is; rather the limits on our imagination are collectively constructed and maintained. The world makes no sense outside of our shared meanings, thus we first need to reimagine and then to share those alternative interpretations with others, for change to be a genuine possibility.
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