

DICTA

Kozinski Learns About Privacy

"I first learned about this tort [invasion of privacy] during my first year of law school and, to tell you the truth, I wasn't exactly blown away. I had no trouble with battery or negligence; I understood instinctively why the law ought to require compensation if, say, you ran over my foot with your steamroller. But invasion of privacy was a bird of an entirely different feather.

For one thing, it punished people who did things that were perfectly legal and who said things that were perfectly true. Also, the standard for what was tortious, was, well, mushy. Who decides community values and which community are we talking about? I suspect that the followers of Rev. Falwell and those of "Blind Idiot God" might disagree on some particulars. And what does highly offensive mean — is there some kind of a nausea threshold? Naively, I voiced my skepticism in class, but the professor cut me short:

Lookit, Mr. Kozinke," he sneered, pronouncing Kozinski as if he were rhyming it with how-stupid-can-you-be, 'this tort was discovered' — discovered mind you, like it had been there all along, like North America —

'by no less a legal scholar than Louis Brandeis. If you had any appreciation for human dignity in modern society you wouldn't be asking such questions.'

Well, I sure didn't want to be callous to human dignity. More importantly, I had no intention whatsoever of flunking torts. So on the exam I managed to discover literally dozens of good solid invasions of privacy that any self-respecting lawyer could bring on a contingency fee. I got the highest grade in the class, to the amazement of my professor, who never realized just what a sensitive soul I really was.

But my skepticism remained. So, the other day ... I went back and reread the ground-breaking Warren & Brandeis piece in the December 1890 issue of the Harvard Law Review. I must confess, I was awed. Seldom had I seen so much made out of so very little with quite so much zest. It was the legal equivalent of soufflé — all air, no substance, tastes great."

Ninth U.S. Circuit Court of Appeals Judge Alex Kozinski, in a recent speech.