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Jared A. Wilkerson

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BATTLE FOR THE DISCLOSURE TORT

JARED A. WILKERSON*

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Legal scholars guided the creation and development of privacy torts, including what would become known as the disclosure tort, for about seventy-five years (1890–1965), a period in which most states came to recognize a common law or statutory right to privacy. Since then, scholarly attempts to curb or modify the tort have yielded little. This Article—beginning with the formalism-realism debate won by Brandeis, Pound, and Prosser and ending with modern experts—shows that notwithstanding enormous efforts by contemporary legal academics, would-be reformers of the disclosure tort have not budged it since Prosser’s Restatement (Second). The Article presents both a lesson and a warning for modern scholars who seek to change privacy tort law.

INTRODUCTION

Legal scholars, frustrated by their growing inability to attract judges’ attention with ambitious ideas in law reviews,¹ have recently tried a new approach to changing doctrine: they have exponentially increased their *amici curiae* filings to the Supreme Court and, presumably, to other courts.² The Justices often do not even read these briefs, and although law clerks perceive scholar filings as more credible than most others,³ there is little indication in most cases that the academy affects rulings.⁴ Scholars have not always had such difficulty impacting the law. Less than a century ago a law professor might have expected to have his views—even in law review articles—

1. See Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 415 (2012) (noting precipitous decline in Supreme Court citations to law reviews).

2. See Richard H. Fallon, Jr., *Scholars’ Briefs and the Vocation of a Law Professor*, 4 J.LEGAL. ANALYSIS, 223, 223–26 (2012).

3. *Id.*

4. A potential, but still notable, exception is the suspected impact Robert Cooter and Neil Siegel’s *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012) had on Chief Justice Roberts’s decision to view the Affordable Care Act’s individual mandate as a valid tax, in addition to the apparent impact that Randy Barnett and friends had on the commerce clause analysis in that decision. See Neal Kumar Katyal, *Forward: Academic Influence on the Court*, 98 VA. L. REV. 1189, 1190 (2012).

heard by judges and, depending on the professor and the court, followed. Development and solidification of the public disclosure of private facts tort (the “disclosure tort” or “PDPF”) typifies the effect scholars can have on the law under proper conditions. The history of scholars’ attempts to modify this tort since about 1965, however, demonstrates the inability of scholars to practically change relatively settled doctrine, even in the controversial area of common law privacy.

The disclosure tort, recognized in most states as one of four privacy torts,⁵ is simply defined but practically thorny—due mainly to First Amendment concerns. Under the tort’s definition, a defendant is liable for invasion of privacy if she publicizes a private matter about the plaintiff that is not of legitimate public concern and is highly offensive to a reasonable person in the plaintiff’s shoes.⁶ In practice, it is difficult to determine what is *not* of legitimate public concern, so courts generally err on the side of protecting speech whenever public interest is arguably involved.⁷

In this Article, I explore the history of the disclosure tort by tracing scholarly attempts to affect it over time.⁸ The tort’s story, perhaps sadly for modern academics,⁹ is one of scholarly creation and

5. These are intrusion, public disclosure of embarrassing private facts, false light, and appropriation. *See* RESTATEMENT (SECOND) OF TORTS § 652 (1977).

6. *Id.* § 652D (1977).

7. *See, e.g.*, *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Bowley v. City of Uniontown Police Dept.*, 404 F.3d 783 (3d Cir. 2005).

8. For a good social history of privacy generally, *see* Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973 (2012).

9. Modern scholars are not likely chagrined by the tort’s doctrinal stagnation since the 1960s if they haven’t really been trying to change it. If “American law professors think of themselves as writing primarily for other academics . . . to formulate new accounts of law and law’s social impact and to defend those accounts within the scholarly community,” Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, 12 IUS GENTIUM 121, 141–42 (2006); *see also* Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321–22 (2002), then they probably don’t mind that judges ignore their articles. I assume, however, that scholars mean what they say, and many have said that they want the disclosure tort to change in practice. It is true that some articles are written to engage other scholars rather than judges, but, as shown in Part III, *infra*, there is no shortage of theoretical and practical proposals directed at changing the bench’s

initial definition only. Beyond the work of Warren and Brandeis,¹⁰ a few key scholars during the tort's early development,¹¹ and Prosser in the Restatement (Second), the tort has belonged to judges following established doctrine—judges who ignore millions of words written in protest and pleading by the last half-century's would-be reformers. The articles and blog posts keep coming, but neither modern tort scholars nor First Amendment guardians, despite triumphant headlines,¹² have expanded, eliminated, or substantially modified this cause of action. Perhaps this is an example of path dependence or scholarly irrelevance; perhaps it is one of persistence that will pay off with future reforms. Whatever the trend illustrated by scholars' attempts, the early history of this tort is a stark example—possibly replicable by modern scholars willing to build doctrine in emerging areas—of the power of academia, properly placed in time and social sentiment, to craft the law.

To reach these conclusions, I examine in Part I the roots of the disclosure tort as part of an undefined concept: the vague, monolithic “invasion of privacy” tort inspired by Warren and Brandeis. During this prefatory era, courts and scholars considered the invasion of privacy as nothing more than the use of another's image in advertising without consent. The tort lived this constrained early life for two formalistic reasons, both of which were largely overcome by the late 1930s: (1) the general prohibition against equitable relief for non-property torts; and (2) the pervasive denial of legal actions based on mental suffering.

Part II explores the second period of scholarly influence, from the late 1930s to 1965. This period saw the evolution from the first Restatement of Torts, which gave a cloudy definition of the invasion

view of the disclosure tort.

10. Cf. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 124-125 (2007) (arguing that, contrary to the views of many, Warren and Brandeis did not *create* the law of privacy; they merely redirected an already-robust body of privacy law).

11. See *infra* Parts I–II.A.

12. See, e.g., A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000); J.R. Rolfs, Note, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107 (1990); Lorelei Van Wey, Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 299 (1991).

of privacy, to the four-tort privacy battery in the Restatement (Second). Thanks in large part to William Prosser, the disclosure tort was defined and packaged, ready for courts to adopt—which most have done.

Part III explores the scholarly doldrums from 1966 to the present, a period with many First Amendment attacks on the disclosure tort, some calls for its abolishment, and a few proposals for expansion. Despite the thousands of pages written to change the tort, sparse clarifications of its limits have come only from Supreme Court cases in which the Court took little advice from post-Prosser scholars. In short, the disclosure tort remains Prosser's. The inability of modern academics to change it might be attributed to neo-conceptualism pervading the legal academy or to the path-forming power of the Restatement, leading judges to accept tort doctrine as established while ignoring academic commentary. Whatever the reason for their modern impotence regarding the disclosure tort, scholars who want to change the common law should either seek unsettled doctrinal territory, where judges are still willing to listen, or mount massive popular campaigns that even judges cannot ignore.

I. FROM WARREN AND BRANDEIS TO POUND, GOODRICH, AND THE FIRST RESTATEMENT

A. 1890: Warren and Brandeis Introduce the Right to Privacy

The Right to Privacy, written by Samuel Warren and Louis Brandeis in 1890, is one of the most cited law review articles in history. Multitudes of scholarly pieces and judicial opinions point to that short work as giving birth to the privacy torts, and articles have even been written to validate that Warren and Brandeis did, indeed, first conceptualize the privacy right generally.¹³ While it was recognized even in 1890 that something akin to privacy was protected,¹⁴ this recognition is generally coupled with respect for

13. See, e.g., Benjamin E. Bratman, *Brandeis & Warren's The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 623-25 (2002).

14. Warren and Brandeis themselves tried to convince their readers that the right to privacy already existed and that it just needed more recognition and definition. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV.

Warren and Brandeis as having made familiar and actionable what was before faintly inequitable.¹⁵

Popular attention to the idea of privacy protection grew with the expansion of urbanity, portable “snap” cameras, and sensationalist yellow journalism.¹⁶ Warren and Brandeis played on these themes in their article, and legal scholarship triumphantly changed the law within a few decades, though not in the way envisioned by those scholars.¹⁷ That attempt would have to wait for Prosser, and even then, privacy protection in tort was arguably more limited than what Warren and Brandeis proposed.¹⁸

Samuel Warren’s sensitivity to press reports of his private life—the curse of marrying a senator’s daughter—is said to have led to *The Right to Privacy*.¹⁹ From the display of merely personal information to the publication of family tragedies, Warren’s anger apparently rose from a mixture of what we would now call intrusion and disclosure of private facts.²⁰ Indeed, *The Right to Privacy* itself mainly proposed what have become the torts of intrusion and disclosure, and, to a lesser extent, false light: “[T]he existing law affords a principle from which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for rewording or reproducing scenes or sounds.”²¹ Unwilling to advance an unlimited concept, and seeking credibility by exuding balance and objectivity, Warren and Brandeis confined their privacy tort within the basic free speech and free press boundary that still surrounds it: matters of public interest are not

L. REV. 193, 193 (1890).

15. See, e.g., Richards & Solove, *supra* note 10, at 124.

16. Warren & Brandeis, *supra* note 14, at 195–96.

17. *Infra* Part I.B.

18. See Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295 (2010).

19. Amy Gajda, *What If Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage that Led to “The Right to Privacy,”* 2008 MICH. ST. L. REV. 35 (2008).

20. On the presumed facts, the episode giving rise to *The Right to Privacy* would not have risen to the level of allowing a disclosure claim due to a lack of offensiveness.

21. Warren & Brandeis, *supra* note 14, at 206.

protected against disclosure.²² This boundary—with the later rule that actionable facts must be outrageous²³—has been the main limitation on disclosure claims since the early twentieth century, and certainly since the Supreme Court has been involved in the privacy tort's development.

Given the authors' focus on disclosure, it might seem odd that such claims remained unavailable for decades after 1890. Instead, as soon as Warren and Brandeis released the privacy tort, it fell into a one-track rut of compensating people for having their likeness used for advertising purposes.²⁴ Rather than intrusion or disclosure, the concepts at which the article chiefly aimed, *The Right to Privacy's* first success was what we now call appropriation—the only theory hardly intimated by Warren and Brandeis.²⁵

Why? The formalist legal world was unprepared for a tort that sought redress for mental anguish (something that could not officially be the basis for damages) and that rarely contained an anchor in property (something required for an injunction). These limiting vestiges of history stymied early disclosure claims,²⁶ so legal realists

22. *Id.* at 214–15.

23. Warren and Brandeis do not appear to have considered this potential limitation. Rather, they approached the right to privacy as being similar to a copyright: if A does not have permission to publish a photo of B, then A cannot do it, even if B is portrayed in a positive or innocuous light. Warren & Brandeis, *supra* note 14, at 213–14. The creation of the outrageousness requirement is, in my view, the most significant limitation to Warren and Brandeis's conception of privacy protection.

24. *Infra* Part I.B.

25. *Id.*

26. Warren and Brandeis recognized this latter limitation, comparing mental suffering of invasion and public disclosure to the property-derivative torts of libel and slander: “[T]he wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings.” Warren & Brandeis, *supra* note 14, at 197. Further, as to the former limitation, Warren and Brandeis (unlike Roscoe Pound, later) did not attempt to create a blanket right of injunction to prevent invasion or disclosure, instead recommending that, in addition to damages in all cases, there be allowed as a remedy “[a]n injunction, in perhaps a very limited class of cases.” *Id.* at 219.

had to rectify inadequacies in the common law before the privacy tort could grow enough for Prosser to classify its subparts. Scholars played a key role in remedying both defects.

B. The Privacy Tort's Toddling Steps: Early Scholarly Calls and Gruff Judicial Responses

"Classicism taught that judges should apply common law doctrines with relentless logic, without allowing for exceptions based upon new social propositions or the harshness of particular results."²⁷

In 1934, the American Law Institute published a nebulous definition of privacy in the first Restatement of Torts: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."²⁸ Notwithstanding the definition's failure as an intelligible demarcation of legal principles, it marked the expansion of the privacy tort beyond what some called its "strictly limited" application to a "single stereotyped set of facts."²⁹ The first Restatement's definition meant release of the privacy tort from the two barriers that had fenced it into appropriation. Thus, though unclear, the new definition was a major victory for legal realists, who sought to allow law to reflect society without mechanical application of past principles. How did the realists overcome these two obstacles by 1934?

1. Overcoming the First Barrier (No Injunctions for Non-Property Injuries)

Warren and Brandeis struck a populist note, but turn-of-the-century courts trod gingerly on the new privacy ground. Two questions had to be answered: first, does the right to privacy exist at all? Second, if the right exists, how should it be protected?

27. Movsesian, *supra* note 9, at 121.

28. RESTATEMENT (FIRST) OF TORTS § 867 (1939).

29. George Ragland, Jr., *The Right of Privacy*, 17 KY. L.J. 85, 85 (1929).

In *Schuyler v. Curtis*,³⁰ the nation's most prominent state court began to answer these questions. Although the court declined to repudiate a common law right to privacy, it suggested that the right would be corralled within traditional remedies. *Schuyler* involved the stepson of a woman whose name and image the Woman's Memorial Fund Association used to create a statue memorializing "woman as philanthropist."³¹ The statue was to be paired with one of Susan B. Anthony paying homage to "woman as reformer."³²

Ms. Schuyler had indeed been a philanthropist, but she was intensely private and, perhaps more importantly, did not sympathize with Anthony or the woman's rights movement.³³ After Schuyler died and her family learned of the statue and World's Fair exhibit, her stepson, seeing that the Association would ignore his requests, took Warren and Brandeis's article to court seeking an injunction.³⁴ The trial court granted the injunction, finding that the defendants had interfered with the privacy of Ms. Schuyler's relatives.³⁵ The Supreme Court at General Term affirmed, but the Court of Appeals reversed (long after the World's Fair had passed without Ms. Schuyler's statue).³⁶ In reversing, the Court of Appeals held that the dead had no right to privacy and the living were not entitled to an injunction because "the feelings of any sane and reasonable person could [not] be injured by the proposed act . . ." so long as the "real and honest purpose is to do honor to the memory of one who is deceased"³⁷ Nascent as the right, the court had not yet attached

30. *Schuyler v. Curtis*, 42 N.E. 22 (N.Y. 1895). The case spurred a flurry of scholarly commentary. See Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 146 & n.157 (2007).

31. *Schuyler*, 42 N.E. at 22.

32. *Id.*

33. *Id.*

34. Augustus N. Hand, *Schuyler against Curtis and the Right to Privacy*, 36(12) N.S. AM. L. REG. 745, 752 (1897) ("Indeed, [Warren and Brandeis] may flatter themselves with having pointed the way for both court and counsel in the Schuyler case.").

35. *Schuyler v. Curtis*, 24 N.Y.S. 509, 510 (1893).

36. *Id.*

37. *Schuyler*, 42 N.E. at 26–27.

the property anchor to the right to privacy, and instead decided the case on its merits.

The importance of this case, pointed out by the young privacy defender Augustus Hand,³⁸ was that while the Court of Appeals denied the injunction, the court did not deny that a right to privacy existed. Instead, it held that the right was not so impinged as to merit equitable relief, leaving the door open for privacy torts.³⁹ *Schuyler*, however, sent a signal that plaintiffs should anchor their claim to property and stay within traditional remedies that could garner appellate panel majorities.

These factual limitations, while restrictive, kept alive conversations between academics and appellate judges on whether the right to privacy existed and, if so, how it should be protected. Although privacy had its proponents, such as Hand, scholarly detractors would soon become instrumental in taking the New York court from a measured reaction to privacy in *Schuyler* to complete rejection a few years later.

One of the most important, if fledgling,⁴⁰ detractors was Herbert S. Hadley. Hadley argued that equity jurisdiction could *never* protect personal privacy; any protection of privacy must be by legislatures, not courts.⁴¹ Still a student while *Schuyler* was being decided, he said flatly:

The writer believes the right to privacy does not exist; that the arguments in favor of its existence are based on a mistaken understanding of the authorities cited in its support; that the jurisdiction of courts of equity does not on principle recognize the right to privacy, the right to be free from personal unpleasantness; that equity has no concern with the feelings of the individual or

38. Augustus, cousin to Learned, would become a judge for the Southern District of New York and then the Second Circuit. GREAT AMERICAN JUDGES 311 (John R. Vile ed., 2003).

39. Hand, *supra* note 34, at 751.

40. Hadley graduated from Northwestern Law School the same year he published his critique. He later became the Missouri Attorney General, a law professor, and chancellor of Washington University. *Herbert S. Hadley*, ABOUT WUSTL, <http://www.wustl.edu/about/facts/chancellors/hadley.html> (last visited Jan. 15, 2013).

41. Herbert S. Hadley, *The Right to Privacy*, 3 NW. U. L. REV. 1, 20 (1895).

with considerations of ‘moral fitness’ *except as the inconvenience or injury that a person may suffer is connected with the enjoyment or possession of property.*⁴²

Although the New York Court of Appeals did not refer to Hadley’s recent article until seven years later, Hadley framed the debate between the legal formalists (who would be displaced after considerable protest) and the legal realists (who would take a comparatively practical and policy-oriented approach to equity’s ability to protect personal rights).⁴³

Hadley began his article with a protracted history of English equity jurisdiction, applauding the early shift away from individual chancellors’ fairness decisions to a categorized system of tenable and untenable equity claims.⁴⁴ He then argued that privacy fell into none of the tenable categories for two reasons. First, unlike copyrights to the products of one’s mind, a person has no property interest in his privacy.⁴⁵ And second, “the common law does not recognize mental anguish as a ground for damages except where a physical condition results as the proximate cause of the act producing the anguish. . . .”⁴⁶

His strict view of equity jurisdiction established, Hadley applied formalism to privacy by contending that Warren and Brandeis’s call for privacy to protect personality “must rest upon the assumption that equity is a shifting, ambulatory system of jurisprudence which is to be exercised in any case where the relief asked for seems to meet the conscience of the Chancellor. . . . [E]quity is not such a system”⁴⁷ It is notable, of course, that Hadley had extolled evolutionary *changes* to equity by giving its history, but his central point—a goal common to “legal scientists”⁴⁸—was that tort law should reach and remain in a

42. *Id.* at 4 (emphasis added).

43. G. EDWARD WHITE, *TORT LAW IN AMERICA* 64–75 (Oxford Univ. Press expanded ed. 2003).

44. Hadley, *supra* note 41, at 4–7.

45. *Id.* at 8.

46. *Id.*

47. *Id.* at 8–9.

48. *See, e.g.*, WHITE, *supra* note 43, at 55 (noting that legal science maintained conflicting premises that the law is in flux but that legal principles should be established and applicable to all cases).

state of stable classification with little need for additional, previously-unavailable privacy claims.

Thus, after arguing that the dicta relied on by Warren and Brandeis did not support a right to privacy but rather a right to private property, Hadley claimed that people's personal feelings had not been, and therefore should never be, protected by courts of equity.⁴⁹ He concluded that advances in American civilization lead to new legal developments "not because new principles and new rights are created to afford that protection or redress which seems to be required" but because "new occasions and new circumstances arise which come within the principles upon which our laws were founded."⁵⁰ In other words, new harms recognized by society have to conform to existing law or be borne by the harmed. The law should never conform to new injuries.

A more faithfully formalistic statement has never been made, but formalists were not the only legal thinkers at the time. Certainly, the legal realism movement had not taken hold by 1900,⁵¹ but its central tenets were whispered in earlier legal scholarship to support the right to privacy. For example, in addition to Augustus Hand, in 1898 Guy Thompson argued—in true realist manner—that Justice Cooley's "right to be let alone" was a natural right regardless of property interest and that equity jurisdiction should protect it in response to society's demands.⁵²

By 1902, however, the divided New York Court of Appeals had read and agreed with Hadley's article. Ignoring Hand and Thompson's emerging infidelity to formalism, the court decided *Roberson v. Rochester Folding Box Company* by rejecting a right to

49. Hadley, *supra* note 41, at 3-4. Hadley cites *Corliss v. Walker Co.*, 57 F. 434 (D. Mass. 1893) as a rightly reasoned decision on the matter. He fails to note, however, that the case falls squarely into one of Warren and Brandeis's exceptions: public interest. In *Corliss*, the plaintiffs were the family of the deceased but famous inventor of the Corliss engine, and the defendant was a would-be biographer of George Henry Corliss.

50. Hadley, *supra* note 41, at 20-21.

51. According to Professor White, realism's influence did not mature until about 1910. WHITE, *supra* note 43, at 64.

52. Guy Thompson, *The Right of Privacy as Recognized and Protected at Law and in Equity*, 47 CENTRAL L.J. 148, 154 (1898).

privacy altogether.⁵³ In that case, a milling company used the image of an attractive girl in advertisements and on flour bags without her consent.⁵⁴ Ridiculed as the “flour girl,” she spent days in bed with nervous shock.⁵⁵ When she sued the company for damages and an injunction, the trial and intermediate appellate courts held that her right to privacy had been infringed.⁵⁶ The Court of Appeals reversed.⁵⁷

Chief Judge Parker,⁵⁸ in a starkly formalist majority opinion, first noted that “[t]here is no precedent for such an action to be found in the decisions of this court Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law”⁵⁹ Parker then, likely as a strategic move (had he presented the privacy proposal fairly, his opinion would have been difficult to write), garishly exaggerated the protection proposed by Warren and Brandeis as allowing everyone to “pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon”⁶⁰ Such a principle would lead “not only to a vast amount of litigation, but litigation bordering upon the absurd”⁶¹

53. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). The Court of Appeals has never changed its mind, making New York one of six states to deny common law privacy. See *infra* Part III.B.

54. *Id.* at 442.

55. *Id.*

56. *Id.* at 443.

57. *Id.* at 448.

58. Alton Parker left the court in 1904 to run for President as the Democratic nominee. He lost in a landslide to Theodore Roosevelt. During the campaign, distressed that reporters were following him on his daily swim in the Hudson and everywhere else, he complained at their intrusion. In response, he received a warm letter from Ms. Roberson exposing his hypocrisy and reminding him “you have no such right as that which you assert.” FREDERICK S. LANE, *AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT* 68–69 (2009).

59. *Roberson*, 64 N.E. at 443.

60. *Id.*

61. *Id.* at 444–45. As discussed in Part III, this fear is not justified, even under the free speech restriction suggested by Warren and Brandeis, as this restriction, in the form of newsworthiness, provides little incentive to bring a disclosure case

With his precedential and policy arguments established, Parker cited young Hadley and borrowed his tactics. He countered Warren and Brandeis's history by portraying equitable jurisdiction as protective only of private property and suggesting that the legislature alone could protect "the so-called right to privacy."⁶² As for the common law, libel offered sufficient remedy for those seeking redress for malicious publication.⁶³

Judge Gray, in his famous dissent, summed the budding realist counter to Hadley and Parker perfectly:

[T]he absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case, is not a fatal objection.⁶⁴

Notwithstanding his failed attempt to expand equity to protect non-contractual property, Judge Gray and his fellow dissenters, along with scholars like Thompson, affected the common law in other states and the statutory law in their own.⁶⁵

Thus, despite formalist⁶⁶ resistance, other states' high courts, starting with Georgia's,⁶⁷ followed Judge Gray's suggestions to

unless the facts are just right.

62. *Id.* at 443.

63. *Id.* at 448.

64. *Id.* at 449 (Gray, J., dissenting).

65. The New York legislature was so disappointed with *Roberson* that they immediately passed Sections 50 and 51 of the Civil Rights Law, prohibiting the unauthorized use of another's portrait for commercial gain and allowing for both injunctions and damages in these cases. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2011). Although New York has never recognized the disclosure tort under common law, the legislature has added Sections 50a–50e, protecting such things as people's HIV status, identity of rape victims, personnel records of police officers, etc.

66. Formalists generally sought to systematize and ossify legal principles, making them static, reliable, and beyond political considerations as society changed.

67. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 78–79 (Ga. 1905). Some state courts followed New York, however. *See, e.g.*, *Henry v. Cherry*, 73 A. 97, 108 (R. I. 1909).

maintain a palatably narrow right to privacy. They did this by recognizing the right and by giving limited, property-based answers to the question of how to protect it.

The Georgia Supreme Court, explicitly following Judge Gray's dissent—along with more than a dozen law review articles, decided *Pavesich v. New England Life Insurance Company* in 1905, just three years after *Roberson*.⁶⁸ *Pavesich* was, like *Roberson*, a case of a company profiting by the unauthorized use of a portrait, and many courts soon adopted the right to privacy under these limited facts, issuing injunctions to protect people's images from advertisers and copyrighters.⁶⁹ That is, the second question of the age was narrowly answered: as long as a property interest is involved, tort can protect privacy. These property-based decisions were small steps toward the disclosure tort and privacy rights as we know them, but they were necessary to open formalism's rusty door.⁷⁰ Notwithstanding this progress toward redressing privacy invasions, by 1916 Harvard's

68. *Pavesich*, 50 S.E. at 78–81.

69. *Kunz v. Allen*, 172 P. 532, 533 (Kan. 1918); *Vassar Coll. v. Loose-Wiles Biscuit Co.*, 197 F. 982 (W.D. Mo. 1912) (applying state law to determine that college had insufficient property right in its name to enjoin chocolate maker from using it); *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912) (holding that, where photographer took unauthorized photos of dead conjoined twins and got copyright on the image, father could sue for damages); *Munden v. Harris*, 134 S.W. 1076, 1079 (Mo. 1911) (“one has an exclusive right to his picture, on the score of its being a property right of material profit.”); *Foster v. Chinn*, 120 S.W. 364 (Ky. 1909); Note, *Right of Privacy: Nature and Extent of Right*, 26 HARV. L. REV. 275 (1913) (discussing cases, and *Douglas v. Stokes* in particular). Even the Supreme Court weighed in, by analogy: “A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property.” *Brown Chem. Co. v. Meyer*, 139 U.S. 540, 544 (1891). “If a man's name be his own property, as no less an authority than the United States Supreme Court says it is[,] it is difficult to understand why the peculiar cast of one's features is not also one's property . . .” *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. 1907).

70. In a 1910 case survey made in the *Yale Law Journal*, the anonymous author concluded: “injury to property, in some form, is an essential element to relief.” Note, *The Right of Privacy*, 20 YALE L.J. 149, 152 (1910). See also Note: *Possible Interests in One's Name or Picture*, 28 HARV. L. REV. 689 (1915) (arguing, in a realist argument couched in formalist terms, that many privacy interests are property interests for which injunctions should be allowed, but “[o]nly in so far as the law recognizes these interests are legal rights created.”).

Roscoe Pound was tired of sluggish evolution and called for widespread recognition of realistic privacy principles.

i. Pound's Call for Expanded Injunctive Relief

The realist movement being anything but coherent, Pound was a proponent of sociological jurisprudence and an opponent of Karl Llewellyn, the Yale professor who coined the term “realism.”⁷¹ Yet Pound was still a realist in the broad sense:⁷² a present-thinking anti-formalist and proponent of practical jurisprudence that could adjust to societal change. Indeed, even before his 1930–31 academic debates with Llewellyn, Pound was intently focused on practical changes in the law. For example, in 1916—the year he became dean of Harvard Law School—he wrote *Equitable Relief against Defamation and Injuries to Personality*.⁷³ In the article’s capacious second section, he sought to expand injunctive privacy protection from property to person. Whereas the courts that recognized privacy had purported to follow Georgia’s *Pavesich* by issuing injunctions only to protect property interests in the commercial value of portrait and identity, Pound challenged the notion that injunctions against privacy invasion should be reserved for property interests alone.⁷⁴

Ever the botanist, he created categories of cases in which “equity in truth secures personality, although purporting to secure substance only,” showing that courts in equity *already* were protecting personality (but calling it property).⁷⁵ Categories included publication of embarrassing but monetarily worthless letters, fraudulent use of a husband’s name to affix to the birth certificate of a child conceived in

71. See, e.g., N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (1998).

72. Professor Hull, too, ultimately saw Pound and Llewellyn under the same roof: “Apparently at odds, Pound and Llewellyn were searching for the same grail, and their search had taken them in roughly the same direction. Sociological jurisprudence . . . was close indeed to legal realism.” *Id.* at 223.

73. Roscoe Pound, *Equitable Relief against Defamation and Injuries to Personality*, 29 *HARV. L. REV.* 640 (1916).

74. *Id.* at 668–77.

75. *Id.* at 671.

adultery, and wrongful, public expulsion from social clubs.⁷⁶ Pointing out this under-the-table equitable privacy protection, he concluded:

Relief against injury to privacy and related wrongs involves unsettled questions as to the existence and scope of the legal right. . . . But we have proceeded long enough upon fictions and “technical bases” of jurisdiction. A century of judicial experience since the cautious *dicta* and bold action of Lord Eldon in *Gee v. Pritchard* [in which unauthorized publication of a monetarily worthless letter was enjoined] has taught us much. More is to be gained by perceiving critically the interests to be secured and the conflicting interests to be balanced against them, by looking the difficulties squarely in the face and by determining what may be done to secure and protect individual personality in view of the difficulties, than by continued lip service to a doctrine laid down only to be evaded.⁷⁷

Thus, Pound, appealing to judges’ sense of professional honesty, called for a clearer definition of the right to privacy and for expanded equity protection of that right. His call did not go unnoticed in the courts.⁷⁸ Defining the right and giving it more protection took time, but the first barrier fell.⁷⁹

2. *Surmounting the Second Barrier (No Damages for Mental Harms)*

For decades after Warren and Brandeis’s article, compensation for emotional harm was strictly parasitic to damages for physical injury.⁸⁰

76. *Id.* at 670–76.

77. *Id.* at 682.

78. *See, e.g., Stark v. Hamilton*, 99 S.E. 861, 862 (Ga. 1919) (holding that father had both property and personal privacy interest, protected by equity, in daughter not being held as a prostitute); *Snedaker v. King*, N.E. 15, 23 (Ohio 1924) (citing Pound’s article in dissent of judgment that wife could not be granted injunction preventing husband’s paramour from communicating and associating with him).

79. This process of acceptance and definition is best chronicled by Prosser, *Privacy*, 48 CALIF. L. REV. 383, 385–87 (1960).

80. *See, e.g., Archibald H. Throckmorton, Damages for Fright*, 34 HARV. L. REV. 260, 266 (1921) (arguing that fright leading to physical injury, including nervous shock, should be actionable, but “[t]he mere temporary emotion of fright

Yet privacy torts generally, and the disclosure tort in particular, could not have emerged without damages for mental harm. This is because the right to privacy is the right—if not to the property of one’s story, reputation, or image—to be free from unwarranted mental injury induced by unauthorized publication of intimate matters.

By 1922, however, Dean Herbert Goodrich⁸¹ was ready to propose standalone compensability of mental injury. The law did not place mental and physical injury on the same plane, so Dean Goodrich began by speaking the critics’ language: rather than calling for recognition of mental injury as compensable *mental* harm, he drew in the skeptics by arguing that mental injury was *physical*. He argued: “It would . . . help us in solving legal problems arising from claims for damages arising through emotional disturbance of a plaintiff . . . if we kept ourselves familiar . . . with what medical men and psychologists are finding out about emotion and its effect on the human body.”⁸²

After establishing that fear and other emotions, such as anger, worry, and grief, produce harmful physical disturbances—and therefore should be included in categories of legal damage⁸³—Goodrich moved on to the problem of how to assign money damages to mental harm without too much speculation. Quickly dispelling this difficulty, he called it “no more difficult a problem here than in any case of non-pecuniary damage—a broken leg or a bruised head.”⁸⁴

not resulting in physical injury is, in contemplation of law, no injury at all, and hence no foundation of an action.”).

81. Dean Goodrich was, in 1922, the dean of Iowa Law School, but he was made professor of law at the University of Michigan the same year. He would later serve as dean of the University of Pennsylvania Law School, after which he was appointed to the Third Circuit and became director of the American Law Institute. FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=882&cid=26&ctype=ac&instate=03> (last visited April 3, 2013). In this last position, he was a close coworker of William Prosser. John W. Wade, *William L. Prosser, Some Impressions and Recollections*, 60 CALIF. L. REV. 1255, 1257–58 (1972) (incidentally, Wade would succeed Prosser as Reporter). Prosser and Goodrich shared some ideology, as shown by Prosser’s own article on the recognition of mental injury, discussed below. *See infra* note 95.

82. Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 497 (1922).

83. *Id.* at 497–504.

84. *Id.* at 503.

Measurement is, as with any other injury, a simple matter of tracing a given cause to a given effect and proving the price of the effect.⁸⁵ Borrowing Pound's technique of showing the courts that they already do what he was recommending, Goodrich pointed out "how far courts have already gone in making feelings a matter of recovery. . . . [Mental] injury is compensated."⁸⁶ This, as with Pound's argument,⁸⁷ is Goodrich's convincing force. Mental suffering was traditionally compensated as parasitic to physical and property injury, but independent actions for assault, malicious prosecution, defamation, wrongful arrest, seduction, and unlawful search and seizure were all based on mental suffering.⁸⁸

Concluding, Goodrich argued that what was then parasitic would in the future be "recognized as an independent basis of liability."⁸⁹ The floodgates of litigation would not be opened wide to all injuries, as judges would prudently divide injury from pettiness, just as they do when denying recovery in trivial nuisance cases.⁹⁰

Despite his efforts, by 1929 most jurisdictions still did not allow a cause of action based on mental anguish alone.⁹¹ The tide was turning, however, and two law review articles in the 1930s marked the recognition of courts and scholars that mental harm was harm enough to support a tort action.⁹² Further, the 1934 Restatement included "the interest in freedom from emotional distress," which was a statement ahead of the common law.⁹³

The first article was written by a Vice Dean of Harvard Law School, Calvert Magruder. In 1936, Magruder wrote *Mental and Emotional Disturbance in the Law of Torts*,⁹⁴ where he painstakingly

85. *Id.* at 503–04.

86. *Id.* at 509.

87. *See supra* note 74 and surrounding text.

88. *Id.* at 510.

89. *Id.* at 511.

90. *Id.* at 511–13.

91. J.E.C., Note, *Damages: Recovery for Mental Suffering Alone*, 15 VA. L. REV. 575, 576 (1929).

92. *See infra* notes 94–98.

93. RESTATEMENT (FIRST) OF TORTS § 46 (1934).

94. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936). Perhaps importantly, Magruder had clerked for the

built on Goodrich's and others' expositions of the inconsistency of the common law's recognition of mental suffering in some instances but not in similar or more deserving situations.⁹⁵ Explicitly building on Magruder's piece, Prosser, then a law professor at the University of Minnesota, proposed formal recognition of intentional infliction of emotional distress, which courts had already established without saying as much.⁹⁶ Magruder and Prosser assumed one of Goodrich's main concerns: that mental suffering is compensable suffering. They had no reason to waste paper arguing that contention because, at that point, so many courts had already recognized mental suffering as compensable. Instead of speaking to judges in the words of Darwin and other physiologists, as Goodrich did, they had the luxury of speaking to judges in the words of other judges, focusing on the scores of cases in which courts had redressed mental and emotional anguish generally (in Magruder's article)⁹⁷ or with regard to outrageous behavior causing emotional shock to another (in Prosser's).⁹⁸

These academics, along with Goodrich and others,⁹⁹ interacted with litigants and judges to expand privacy torts. They chipped away both the prohibition against injunctions for non-property injuries and the skepticism of mental injury, allowing for growth of privacy generally and, later, the disclosure tort.

Prince of Privacy himself: then-Justice Louis Brandeis. Cite Magruder did mention privacy in his emotional disturbance article, but it was not the focus. Magruder, *supra*.

95. *Id.* at 1036, nn.11–13 (citing various articles, including Roscoe Pound, *Interests of Personality* in SELECTED ESSAYS ON THE LAW OF TORTS 87, 103 (Harvard L. Rev. Ass'n 1924); Francis H. Bohlen & Harry Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance*, 32 COLUM. L. REV. 409 (1932); Throckmorton, *supra* note 80).

96. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

97. *See, e.g.*, Magruder, *supra* note 94, at 1033–41.

98. *See, e.g.*, Prosser, *supra* note 966, at 881–86.

99. Some articles even connected expanding protection for mental and emotional distress with privacy concerns. *See, e.g.*, Gerald Dickler, *The Right to Privacy: A Proposed Redefinition*, 70 U.S. L. REV. 435, 435 (1936); Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426, 445–64 (1938); Basil W. Kacedan, *The Right of Privacy* [Part I], 12 B.U. L. REV. 353, 353 (1932); Basil W. Kacedan, *The Right of Privacy* [Part II], 12 B.U. L. REV. 600, 619, 645 (1932).

II. 1940–1965: PROSSER AND THE DEFINITION OF PUBLIC DISCLOSURE OF PRIVATE FACTS

By 1940, while legal realism was declining as the dominant force behind tort theory, its approach of adapting law to society had taken hold and stood in stark contrast to the rigid rules of Hadley and Parker's day.¹⁰⁰ Louis Nizer summarized the difference well:

The privacy doctrine has been handicapped in its development by the fact that it came into being after the common law had been fairly well crystallized. Many judges who were trained merely to apply the law as they found it ignored the tradition underlying our Anglo-Saxon system of jurisprudence and failed to apply the principles behind existing rules to new situations as they arose. Consequently the doctrine was hampered by the inability of some courts to accept the idea that it is not an interloper but a full-fledged, socially acceptable member of the legal family.¹⁰¹

With a zeitgeist more suited to adaptation, scholars and judges encouraged the development of privacy torts. The mid-century approach was markedly different than that of the early 1900s. One of the main differences was that the right to privacy was ordinarily assumed and only its boundaries, underlying interests, and resulting protections, were debated.¹⁰² The period saw, in addition to

100. WHITE, *supra* note 43, at 157–58.

101. Louis Nizer, *The Right to Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526, 559 (1941). This is a strong rebuttal against Hadley's contention that the common law was and had long been static, ignoring the "Anglo-Saxon system" of legal evolution by common law.

102. It is arguable that privacy was seen with widespread inflexibility even until 1938, when Professor Francis Bohlen (himself the Restatement Reporter from 1923–37) said:

Fifty years ago the right which every normal and decent person feels in living his life to himself appeared likely to be protected by a legal recognition of a right to privacy. Unfortunately the campaign for its recognition brilliantly begun by the article written by Justice Brandeis and published in the *Harvard Law Review* has almost completely failed. A very minor protection against the commercial exploitation of one's personality is given by decisions which are based upon the idea that one's personality may have a material value for advertising purposes. To this extent one has a

expanding the concept of privacy to film, television, radio, etc., a division of common law privacy into four distinct torts.¹⁰³

A. *Pre-Prosser Scholarship and Judicial Response*

Prosser, the most influential categorizer of privacy torts, was not the first.¹⁰⁴ Perhaps it was Leon Green, the dean of Northwestern Law School, who initially attempted to classify the types of interests and harms involved in privacy actions.¹⁰⁵ Keeping Warren and Brandeis's three interests (personality, property, and interpersonal relations) as his main categories, he placed various sub-interests under the heading of each, in addition to identifying three types of harm to privacy that courts had already implicitly recognized.¹⁰⁶ His effort, a good first classificatory step, categorized these interests and harms under the heading of a single privacy tort.

After Green, the first serious attempt to divide privacy into distinct torts appears to be that of the young Gerald Dickler in 1936.¹⁰⁷ Bucking the vague Restatement definition,¹⁰⁸ he divided the privacy torts into three categories: (1) trespass-related "intrusions"; (2) libel-related "disclosures"; and (3) unfair trade practices-related "appropriations."¹⁰⁹ Citing dozens of law review articles and

sufficient property interest in one's personality to make it proper to prevent the unpermitted publication of one's picture as an advertisement of another's wares.

Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 731 (1937) (footnote omitted). Yet the stage was set by this time—thanks to the availability of injunctions and damages for mental harm—for privacy torts to expand rapidly.

103. See *infra* II.A.

104. Of course, he was not the last, either. See, e.g., Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006).

105. See Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932).

106. *Id.* at 238.

107. Wolfgang Saxon, *Obituaries: Gerald Dickler, 86, Lawyer Who Aided Artists*, N.Y. TIMES (Feb. 18, 1999), <http://www.nytimes.com/1999/02/18/nyregion/gerald-dickler-86-lawyer-who-aided-artists.html>. Interestingly, he would later lead the American Broadcasting Corporation—one of the largest media outlets in the nation and a beneficiary of the Supreme Court decisions discussed in Part III.

Id.

108. RESTATEMENT (FIRST) OF TORTS § 867 (1939).

109. Gerald Dickler, *The Right to Privacy: A Proposed Redefinition*, 70 U.S.

commentaries to prove a negative,¹¹⁰ Dickler wrote of the ignorance of bar and bench to what he saw as clear categories. He called for recognition of something beyond “the same formless embryo which Warren and Brandeis discerned forty-six years ago,”¹¹¹ and his categories were not ignored. In fact, they coincided directly with three of Prosser’s four privacy torts, proposed twenty-four years later.¹¹²

Now that the barriers of equity and mental damages were no longer insurmountable, scholars pushed for consensus in light of—and in hopes of shaping—the case law. Thus, in the 1940s and 1950s, scholars and judges more freely debated the need for and boundaries of the privacy torts (such as public interest in information disclosed, the effect of waiver/consent, etc.),¹¹³ but many courts were still granting redress for privacy violations under the guise of some other right.¹¹⁴ Long gone, however, was the debate between formalists and the emerging realists of the late nineteenth and early twentieth

L. REV. 435, 435 (1936).

110. *Id.* at 436.

111. *Id.* at 456.

112. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

113. *See, e.g.*, Wilfred Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948) (noting that privacy protection was expanding in cases and that boundaries were emerging); Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960) (arguing that right to privacy in appropriation cases should be seen as right to be free from commercial exploitation rather than right to be let alone); Frederick J. Ludwig, “Peace of Mind” in *48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948) (advocating uniform privacy law); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (arguing, with Second Circuit, that right to privacy does not adequately address needs of public figures seeking publicity); Leon R. Yankwich, *The Right of Privacy: Its Development, Scope, and Limitations*, 27 NOTRE DAME L. REV. 499, 519–20 (1952) (giving nine-point list of right of privacy, its scope and limitations); Case Note, *Right of Privacy—Effect of Lapse of Time and Distortion of Fact*, 52 COLUM. L. REV. 664 (1952) (discussing boundaries of limitation that right to privacy does not extend to publication of details of one’s involvement in crime or calamity; exploring Third Circuit opinion that distortion of pedestrian’s involvement traffic accident, used twenty months after accident in magazine article incorrectly implying that pedestrian was at fault, could be basis for liability).

114. Ludwig, *supra* note 11313, at 757–58.

centuries. The two decades leading to the development of the second Restatement saw boisterous waves of ideas, proposals, and classifications—all while more courts adopted the right to privacy.¹¹⁵

B. Prosser's 1960 Article and the Restatement (Second) of Torts

By 1960, the courts of twenty-seven states had recognized the right to privacy in some form, with a few others expected to recognize it soon.¹¹⁶ Four jurisdictions had recognized privacy by statute, and only a few courts had rejected privacy protection as unbecoming the common law.¹¹⁷ Thus, just as he did with his well-received intentional infliction of emotional distress proposal, Prosser waited until most jurisdictions agreed with him before declaring the existence of, and clearly describing, four new torts.

Marshaling convincing evidence and nodding to fellow privacy scholars, he stated: "It is only in recent years, and largely through the legal writers, that there has been any attempt to inquire what interests are we protecting, and against what conduct. Today, with something over three hundred cases in the books, . . . some rather definite conclusions are possible."¹¹⁸ Then, one-upping Dickler, Prosser proposed and detailed *four* distinct privacy torts: intrusion, public disclosure of embarrassing private facts, false light, and appropriation.¹¹⁹ Supported by judicial opinions, Prosser—as he and others had done to change the fortunes of privacy in the past¹²⁰—argued that courts had *already* recognized these four torts without saying so; the only thing lacking was a bit of systemization.

115. These were the days of mass recognition of the right of privacy. No longer did courts have to protect privacy by calling it something else. As mentioned *infra* in Part III.B, many states were adopting the right.

116. Prosser, *supra* note 112, at 386-88. Such a proudly simple title displays Prosser's confidence.

117. *Id.* Some of these states, such as Texas, reversed course later and now recognize privacy in the common law. *See, e.g.*, Michael Sewell, *Invasion of Privacy in Texas: Public Disclosure of Embarrassing Private Facts*, 2 TEX. WESLEYAN L. REV. 411 (1995) (detailing the short history of disclosure tort in Texas).

118. Prosser, *supra* note 112, at 388-89.

119. *Id.* at 389.

120. *See supra* Part II.A.

Prosser recognized that Warren and Brandeis were mostly concerned with the public disclosure of private facts, but he also recognized that such privacy protection was “slow to appear in the decisions.”¹²¹ He traced the disclosure tort from debtor cases (in which a creditor publicly displays the debtor’s debt and the time it has been overdue) to broadcasting cases (in which a screenplay or radio dramatization is based on a person’s private life)¹²² and finally to various oddities that fit comfortably into his definition of the disclosure tort.¹²³ He then gave its plainly evident limitations: the disclosure must be public;¹²⁴ the facts must be private;¹²⁵ the matter must be one that, if made public, “would be offensive and objectionable to a reasonable man of ordinary sensibilities.”¹²⁶ Finally, he applied the public figure and public interest limitations,¹²⁷ along with the consent defense,¹²⁸ to all four of his torts, recognizing that interpretation and social values might further shape these limits.

After publishing his instantly classic *Privacy* article, Prosser, the Restatement Reporter, ensured that his four-part framework would become part of the second Restatement, ending the thirty-year reign of the first Restatement’s unworkable privacy definition.¹²⁹ Thus ended the era of one imprecise tort that was once ahead of its time and began the era—in which we still live—of four somewhat less imprecise torts, fresh and organized.¹³⁰ Like those who changed the first

121. Prosser, *supra* note 112, at 392.

122. For a discussion of unauthorized media portrayals, see Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1978).

123. Prosser, *supra* note 112, at 392.

124. *Id.* at 393.

125. *Id.* at 394–96.

126. *Id.* at 396–98.

127. *Id.* at 410–19.

128. *Id.* at 419–20.

129. RESTATEMENT (SECOND) OF TORTS, §§ 652A–652I (1977). The Invasion of Privacy division of the Restatement (Second), part of Volume 3, was not published until 1977—five years after his death. Before resigning in 1970, however, he had submitted drafts for the Advisers. *Id.*, Introduction to Volume 3, at VII.

130. The Restatement (Second) defines the disclosure tort:

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

Restatement's definition, scholars have attempted to change Prosser's conception of privacy and the disclosure tort for decades, but they have failed.

III. 1960–PRESENT: LARGE, INEFFECTIVE QUANTITIES OF SCHOLARSHIP

As explored below,¹³¹ scholars have written mountains of research and suggestions attempting to make their mark on the disclosure tort. As of now, however, the elements given in the Restatement (Second) are generally followed. Since Prosser, the one major change to the tort has come from the Supreme Court. The Supreme Court has established that where facts disclosed are in public record (for example, an unsealed indictment or publicly available police report), they are of *de facto* newsworthy public concern and cannot be limited by the state without narrow tailoring to a state interest of the highest order.¹³² This newsworthiness defense has narrowed the tort, but successful disclosure suits have nonetheless been on the rise.¹³³

A. *Scholarly Proposals, Attacks, and Suggestions*

Path dependence might best explain the disclosure tort's immobility over the last fifty years.¹³⁴ Because of the persuasive force

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

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

131. See *infra* Part III.A.

132. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495–97 (1975) (holding that, where reporter obtained name of rape victim from copy of indictment given to him by clerk of court, statutory rape shield liability disallowed because “States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.”); *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that, where reporter got rape victim's name from public police report, newspaper could not be subject to statutory rape shield liability because statute was not “narrowly tailored to a state interest of the highest order”).

133. John A. Jurata, Jr., *The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 509 n.132, 510 (1999) (noting that after *Florida Star*, from 1993–1999 alone, at least 21 plaintiffs prevailed; only 18 had prevailed prior to 1980).

134. For a description of three common law strands of path dependence (here,

of the Restatement (Second) and the spreading notion of privacy protection noted by Prosser in 1960, courts quickly established the privacy torts as precedent¹³⁵—something that was hardly possible under the first Restatement’s boundless definition. During this era of consensus legal thought and, from about 1970 onward, what Professor White calls “neoconceptualism” (a somewhat realist spirit of categorization that resulted from decades of consensus-seeking among scholars),¹³⁶ the disclosure tort’s relatively simple elements were engrained in precedential documents that continue to guide application of the tort to new problems and technologies.¹³⁷

This explanation is unsatisfactory in light of the scholars who overcame path dependence a hundred years ago to create the torts in the first place—using the same methods of conceptualization, case gathering, analogy, and proposals to stretch or modify existing practice. The likely complicated answer to *why* scholars have failed over the past fifty years to buck Prosser will be left for another day. The purpose of this subpart is not to explain but to expose modern scholars’ failure to do what their predecessors did: change the disclosure tort.

Below is a sampling of the post-Prosser concerns, hopes, desires, and demands by tort and constitutional scholars, as “free speech and press” has become a rallying cry for disclosure tort opponents.

it seems the first—“Increasing Returns Path Dependence,” with characteristics of large setup costs leading to falling unit costs as output increases; learning and coordination effects, and self-reinforcing or adaptive expectations—is most applicable), see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 606-22 (2001).

135. See, e.g., *Norris v. Moskin Stores, Inc.*, 132 So. 2d 321, 327 (Ala. 1961); *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 14 Cal. Rptr. 208, 213-214 (Cal. Dist. Ct. App. 1961); *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715, 717 (Fla. 1961); *Peterson v. Idaho First Nat’l Bank*, 367 P.2d 284, 287 (Idaho 1961); *Yoder v. Smith*, 112 N.W. 2d 862, 863-864 (Iowa 1962).

136. WHITE, *supra* note 43, at 211–43.

137. Many high courts expressly used the rubric of RESTATEMENT (SECOND) OF TORTS § 652(D) (1977) in this era. See, e.g., *Com. v. Wiseman*, 249 N.E. 2d 610, 615 (Mass 1969); *Vogel v. W. T. Grant Co.*, 327 A.2d 133, 135-36 (Pa. 1974); *Rawlins v. Hutchinson Pub. Co.*, 543 P.2d 988, 991 (Kan. 1975); *Indus. Found. of the S. v. Texas Indus. Acc. Bd.*, 540 S.W.2d 668, 683-84, n. 22 (Tex. 1976); *Nelson v. Maine Times*, 373 A.2d 1221, 1225 (Me. 1977).

Through it all, though, the tort has remained remarkably stable, even growing in acceptance from state to state while remaining a purposely limited¹³⁸ cause of action that arguably lacks flexibility for the digital age.

1. Concerns Based on Tort Theory

Early on, Dean Wade, who would take the Reporter helm from his friend Prosser, commented on the possibility that the disclosure tort (giving redress for a true outrageous statement) and false light (giving redress for a false outrageous statement) would so blend with defamation as to swallow it up. He found this proposition suitable, given that he saw defamation as holding on to too many antiquated restrictions.¹³⁹ He also predicted, however, that the disclosure tort and false light (along with defamation, assault, etc.) would be engulfed by the tort of intentional infliction of emotional distress, creating a “system of protecting plaintiff’s peace of mind against acts of the defendant intended to disturb it.”¹⁴⁰ Thus, Wade saw the disclosure tort as a small piece of a whole that would someday take shape in a clear ordering of protection against mental suffering. This hasn’t happened. Disclosure, assault, defamation, and false light all still exist as distinct torts.¹⁴¹

Another early challenge to Prosser’s conception of the tort was Professor Bloustein’s counter-theory, which labeled Prosser’s four-part classification a “congeries of discrete rules” that “offends the primary canon of all science that a single general principle of

138. It appears that Prosser intentionally limited the disclosure tort to prevent it from overwhelming defamation and IIED. Richards and Solove, two privacy activists, are quite displeased with Prosser and the restrained course he set for us. Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1889–90 (2010).

139. John W. Wade, *Defamation and the Right to Privacy*, 15 VAND. L. REV. 1093, 1093–96 (1962). As mentioned in note 138, *supra*, Prosser did not likely share Wade’s worry, as Prosser guided the tort to avoid conflicts with defamation and IIED.

140. *Id.* at 1125.

141. See RESTATEMENT (SECOND) OF TORTS, §§ 21 (assault), 558–623 (defamation), 652D (disclosure), 652E (false light) (1977).

explanation is to be preferred.”¹⁴² First, Bloustein noted that Prosser was “by far the most influential contemporary exponent of the tort. . . . [H]is influence on the development of the law of privacy begins to rival in our day that of Warren and Brandeis.”¹⁴³ With this justification for not ignoring Prosser, whose four-part concept was already in the Restatement drafts, Bloustein said that “if [Prosser] is mistaken, as I believe he is, it is obviously important to attempt to demonstrate his error and to attempt to provide an alternate theory.”¹⁴⁴

Alleging that Warren and Brandeis would not support Prosser’s taxonomy, Bloustein argued that the four torts (and some crimes) were really one, with a single underlying interest: to protect a person’s dignity.¹⁴⁵ If defendant invades plaintiff’s privacy through inappropriate information gathering or dissemination, torts (such as intrusion or disclosure) or crimes (such as illegal wiretapping) are based on violation of “personal dignity and integrity” alone.¹⁴⁶ Bloustein contended that privacy is a monolith, and should be, because that is how Warren and Brandeis, rest their souls, would have wanted it.¹⁴⁷ Bloustein’s article garnered attention,¹⁴⁸ even in Supreme Court cases,¹⁴⁹ but the disclosure tort nonetheless became part of the Restatement (Second).

142. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 963 (1964).

143. *Id.* at 963–64.

144. *Id.* at 964.

145. *Id.* at 971.

146. *Id.* at 981–82.

147. *Id.*

148. *See, e.g.*, *People v. Geever*, 522 N.E.2d 1200, 1209 (Ill. 1988); *Koepfel v. Speirs*, 808 N.W.2d 177, 180 (Iowa 2011); *Weeren v. Evening News Ass’n*, 152 N.W.2d 676, 680 (Mich. 1967); *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 477 (Mo. 1986); *French v. Safeway Stores, Inc.*, 430 P.2d 1021, 1022 (Or. 1967); *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 680 n.3 (Wash. 1982) *aff’d*, 467 U.S. 20 (1984).

149. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572 n.8 (1977); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 487 n.15 (1975); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 n.42 (1974); *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9, 404 (1967).

Like Bloustein, various scholars have attempted tort-based reform¹⁵⁰ of the disclosure tort, and some have even defended it.¹⁵¹

150. See, e.g., Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171, 172–73 (2010) (describing why newsworthiness defense has all but swallowed disclosure tort); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 919–22 (2005) (arguing that PDPF should be flexibly expanded to cover modern social networks); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You*, 52 STAN. L. REV. 1049, 1122 (2000) (arguing that PDPF, even if a property right, is speech restriction under First Amendment; First Amendment concerns generally should trump PDPF goals); Joseph Elford, Note, *Trafficking in Stolen Information: A “Hierarchy of Rights” Approach to the Private Facts Tort*, 105 YALE L.J. 727, 748–49 (1995) (arguing that because PDPF is failing under First Amendment, it should be replaced by new tort); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CALIF. L. REV. 1133, 1136 (1992) (arguing that emphasis of PDPF should be shifted from control over publication to duty of confidentiality imposed on private information holders); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1223 (1990) (arguing that Supreme Court was wrong in *Florida Star*, which ends PDPF); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 993–95 (1989) (arguing that requirement in the Restatement (Second) of “public” disclosure ignores underlying values); Phillip E. DeLaTorre, *Resurrecting a Sunken Ship: An Analysis of Current Judicial Attitudes Toward Public Disclosure Claims*, 38 SW. L.J. 1151, 1184–85 (1985) (arguing that courts should stop dismissing many disclosure cases on summary judgment, allowing jury to determine whether plaintiff had reasonable expectation of privacy in disclosed information); W.A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305 (1983) (arguing that Prosser’s four torts were poorly conceptualized; privacy needs to be redefined); Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 348–49 (1979) (arguing that injunction, as prior restraint on speech, should never occur in PDPF cases); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 234 (1977) (arguing that PDPF allows for too much interpretation and therefore little usefulness); Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 625–29 (1968) (arguing that individual privacy can only be invaded by mass publication when publication is relevant to purposes of self-government); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966) (arguing that “tort law’s effort to protect the right of privacy seems to me a mistake.”).

151. See, e.g., Diane Leenheer Zimmerman, *The “New” Privacy and the “Old”: Is Applying the Tort Law of Privacy Like Putting High-Button Shoes on the Internet?*, 17 COMM. L. & POL. 107 (2012) (arguing that balance struck between

The most salient attempts at change have been those of Richard Posner¹⁵² and Neil Richards & Daniel Solove.¹⁵³ They have attempted not to create minor adjustments to disclosure but to reform the judicial approach altogether.

In his quest for economic efficiency, Posner, in 1977 and again in 1981, proposed that information be seen as a good within a marketplace in which more information is better than less, but in which nobody has a right to information meant to conceal fraud or misrepresentation, either in the commercial or private context.¹⁵⁴ Protections, like the disclosure tort, allow people to shield their fraud and misrepresentation, preventing others from making informed choices.¹⁵⁵ Thus, the disclosure tort should be limited only to those situations in which someone's character is not being unmasked and where transaction costs to selling property rights are prohibitively high (such as when an unknown person is photographed as part of a large group).¹⁵⁶ Unmasking misrepresentations is always efficient,

privacy torts and First Amendment is sufficient to address complicated privacy problems in Internet Age).

152. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 46, 660–63 (1998); Richard A. Posner, *The Economics of Privacy*, 71 *AMER. ECON. REV.* 405 (1981); Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 *BUFF. L. REV.* 1 (1978); Richard A. Posner, *The Right of Privacy*, 12 *GA. L. REV.* 393 (1977).

153. Neil M. Richards, *The Limits of Tort Privacy*, 9 *J. TELECOMM. & HIGH TECH. L.* 357 (2011); Richards, *The Puzzle of Brandeis*, *supra* note 18 at 1347–52; Richards & Solove, *Prosser's Privacy Law*, *supra* note 138; Neil M. Richards, *Intellectual Privacy*, 87 *TEX. L. REV.* 387 (2008); Solove, *A Taxonomy of Privacy*, *supra* note 104; Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure*, 53 *DUKE L.J.* 967 (2003); Daniel J. Solove, *Conceptualizing Privacy*, 90 *CALIF. L. REV.* 1087 (2002).

154. Posner, *The Right of Privacy*, *supra* note 152; Posner, *The Economics of Privacy*, *supra* note 152. *But see* Edward J. Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 *GA. L. REV.* 429 (1977) (arguing that Posner is pretentious and immodest: his economic theory and privacy analysis violate Ockham's razor by inviting plurality without necessity and by ignoring complexity (by overemphasizing misrepresentation and concealment of one's past) where necessary). For another property-based approach, see Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 *GEO. L.J.* 2381 (1996) (arguing that PDPF fails because it does not recognize that private information is marketable property).

155. Posner, *The Right of Privacy*, *supra* note 152, at 395–97.

156. *Id.* at 414.

even if one is unmasked against one's will.¹⁵⁷ However, where a publisher is to profit by the disclosure of facts about someone, the revealed person has a property interest in the information and should be compensated for its disclosure.¹⁵⁸ Finally, from an efficiency standpoint, privacy meant to encourage innovation (similar to what others have called "intellectual privacy"¹⁵⁹) should be protected beyond privacy meant to misrepresent.¹⁶⁰

Richards and Solove, recognizing Prosser's service,¹⁶¹ see the disclosure tort as far too limited in the Information Age to protect much privacy.¹⁶² Unlike Posner, they find inherent value in protection against disclosure: it encourages individual autonomy, freedom of association, and even peoples' security.¹⁶³ The tort does not offer sufficient protection against disclosure, however, given the overbroad newsworthiness defense.¹⁶⁴ Thus, it should be reenergized for our

157. *Id.* at 419; see also Posner, *The Economics of Privacy*, *supra* note 152, at 408 ("why people should want to suppress such facts is mysterious from an economic standpoint."). *But see* Solove, *The Virtues of Knowing Less*, *supra* note 153, at 1032–43 (contending that argument against PDPF from critics, like Posner and Richard Epstein, that call for disclosure for the purpose of making accurate judgments about others is flawed because more information does not necessarily bring accurate judgments, as judgments are generally made quickly and out of context; the good of concealing one's past can often outweigh societal benefits of disclosure).

158. Posner, *The Right of Privacy*, *supra* note 152, at 412–18.

159. Richards, *The Puzzle of Brandeis*, *supra* note 18, at 1347–52 (arguing that PDPF is not very useful because defenses swallow it; it should be replaced by the intellectual privacy concept that Brandeis created later in life); Richards, *Intellectual Privacy*, *supra* note 153, at 404.

160. Posner, *Privacy, Secrecy, and Reputation*, *supra* note 152, at 9.

161. Richards & Solove, *Prosser's Privacy Law*, *supra* note 138, at 1889 (arguing that Prosser solidified privacy torts but, despite this service, he gave no guidance to privacy tort development for Information Age).

162. See, e.g., *id.*; Solove, *The Virtues of Knowing Less*, *supra* note 153 (contending that First Amendment should not always win when clashing with PDPF; additionally, more information does not necessarily bring accurate judgments, and the good of concealing one's past can outweigh societal benefits of disclosure); Solove, *Conceptualizing Privacy*, *supra* note 153 (arguing that we are still unsure what privacy means and when it deserves protection; given changing technology, a bottom-up contextualized approach should redefine privacy).

163. Solove, *A Taxonomy of Privacy*, *supra* note 103, at 530–33.

164. See Richards, *The Puzzle of Brandeis*, *supra* note 18, at 1345–47.

technological era by moving beyond Prosser's limited definition of privacy and by: (1) recognizing the social contexts in which information is shared with individuals (not just whether the information is public or private); (2) developing a more sophisticated conception of harm to readily encompass psychological injury; (3) better understanding the relationship between free speech and privacy (to see that they are not always in conflict, as Prosser assumed); and (4) understanding new duties and their sources in tort law, particularly regarding computer databases and similar technology.¹⁶⁵ Further, in concurrence with Posner, intellectual privacy should be protected.¹⁶⁶ Finally, privacy protections should expand not only in tort but by statute, contract, and by reshaping the meaning of privacy in light of which disclosures should be protected.¹⁶⁷

As far as I can tell, neither of these proposals has taken hold in courts, although Richards and Solove's proposals might need more time to ripen. For now, notwithstanding the myriad proposals of tort and privacy scholars, Prosser's conception stands as the dominant common law protection against disclosure.

2. *First Amendment Concerns*

Little has changed in the disclosure tort's free speech and free press limitations since Warren and Brandeis wrote *The Right to Privacy*.¹⁶⁸ Nonetheless, shortly after the tort's addition to the Restatement (Second), scholars began analyzing the tort on First Amendment grounds, and they have not stopped.¹⁶⁹ The Supreme

165. Richards & Solove, *Prosser's Privacy Law*, *supra* note 1388, at 1922–23.

166. Richards, *The Puzzle of Brandeis*, *supra* note 18, at 1347–52; Richards, *Intellectual Privacy*, *supra* note 153.

167. Richards, *The Limits of Tort Privacy*, *supra* note 153 (arguing that PDPF is poor vehicle for modern privacy problems, just as it has been weak against First Amendment)

168. *See, e.g.*, *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 73–74, 80 (Ga. 1905); Note, *The Right to Privacy Today*, 43 HARV. L. REV. 297 (1929). Warren and Brandeis were the first to note First Amendment concerns with their public interest limitation. *See also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214–16 (1890).

169. *See, e.g.*, Zimmerman, *supra* note 151; Patrick J. McNulty, *The Public*

Court has since decided two First Amendment cases addressing statutory disclosure protection, *Cox Broadcasting v. Cohn*¹⁷⁰ and *Florida Star v. B.J.F.*¹⁷¹ Sadly for scholars, almost no post-1965 scholarship is cited for the majorities' opinions, and the decisions did little to change, rather than clarify, the disclosure tort.¹⁷²

The Court in *Cox Broadcasting* held that applying Georgia's law prohibiting disclosure of a rape victim's name to a reporter who found the name in a publicly available indictment was a free press violation.¹⁷³ While in *Florida Star*, the Court held that the press was free to disclose information in the public sphere (here, a police report), even if the information is otherwise protected by statute.¹⁷⁴ After *Cox*, scholars said that the newsworthiness defense had all but completely abolished the disclosure tort.¹⁷⁵ The *Florida Star* commentary

Disclosure of Private Facts: There Is Life after Florida Star, 50 DRAKE L. REV. 93, 98 (2001); Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97 (2001); Volokh, *supra* note 150; John A. Jurata, Jr., Note, *The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489 (1999); Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425 (1996); Richard A. Epstein, *A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. L. STUDIES 665 (1980); Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 232 (1978); Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968); Bloustein, *supra* note 142.

170. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

171. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

172. In addition to citing Prosser and Warren & Brandeis, the Court in *Cox* cited three law review articles in a single footnote for the proposition that there is a zone of privacy surrounding individuals in which the state could protect its citizens from intrusion by the press—a privacy-expansive proposition not closely followed by the Court. In *Florida Star*, the only references to scholarly influence are to Warren and Brandeis's article, Prosser's (and coauthors') torts casebook noted in the dissent, and one law review piece (on punitive damages for libel) in a dissenters' footnote. In neither of these cases are post-Prosser scholars given much weight.

173. *Cox*, 420 U.S. at 495–97.

174. *The Florida Star*, 491 U.S. at 541.

175. See, e.g., Alfred Hill, *Defamation and Privacy under the First*

produced more grieving among scholars,¹⁷⁶ some of which still continues in attempts to reform the tort.¹⁷⁷ Other scholars closer to the truth have said that *Florida Star* adds no restraint that Warren, Brandeis, and Prosser did not, and that the disclosure tort actually encourages the same values supported by the First Amendment.¹⁷⁸

Some scholars, however, have argued that the Supreme Court should abolish or severely limit the disclosure tort as unconstitutional.¹⁷⁹ Perhaps the oddest story among these constitutional attacks is that of Erwin Chemerinsky. In 2006, Chemerinsky extolled the virtues of Brandeis and his tort, lamenting the fact that the Supreme Court had not yet supported such a right in cases like *Cox Broadcasting* and *Florida Star* and calling for “judicial protection of a constitutional right to informational privacy and

Amendment, 76 COLUM. L. REV. 1205 (1976) (arguing that PDPF had all but been swallowed by the newsworthiness / public interest doctrine).

176. See, e.g., Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1223 (1990); J.R. Rolfs, Note, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107 (1990); Lorelei Van Wey, Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 299 (1991). But see Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437 (1991) (noting that “[t]he Supreme Court has been extremely cautious and has not held that any recovery for truthful publication is inconsistent with the First Amendment.”).

177. See Patrick J. McNulty, *The Public Disclosure of Private Facts: There Is Life After Florida Star*, 50 DRAKE L. REV. 93 (2001) (arguing that the Supreme Court wrongly decided *Florida Star* and that, even if it is not, the disclosure tort will continue to apply to facts not already in public domain).

178. See, e.g., Solove, *A Taxonomy of Privacy*, *supra* note 104; Solove, *The Virtues of Knowing Less*, *supra* note 153.

179. See, e.g., Erwin Chemerinsky, *Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts*, 11 CHAP. L. REV. 423 (2007) (arguing that civil liability for disclosure is objectionable under the First Amendment because truthful speech should not be censored); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291 (1982) (arguing that the disclosure tort should be ended, as its constitutional problems are overwhelming; if it does continue, the meaning of private information and newsworthiness would have to be severely limited); Epstein, *supra* note 169 (arguing that erasing the disclosure tort might be best because of its constitutional problems and because it gives courts the function of deciding the weight and significance of true information about plaintiff).

greater safeguards through tort law and statutes.”¹⁸⁰ The very next year, he called for the utter abolishment of the disclosure tort in all cases except those involving a risk to personal safety and called on the Supreme Court to expand *Cox Broadcasting* and *Florida Star* to end the tort.¹⁸¹ This unexplained turnaround is astounding but has thus far, like other calls for change, yielded no practical result.

*B. Judicial Expansion of the Disclosure Tort
in the Face of Scholarship*

Despite often-furious attempts, neither constitutional nor tort scholars have induced practical change to the disclosure tort for decades. In fact, the tort in most states looks as it did in the early 1970s, although the Supreme Court has clarified the trends.

Further, courts have increasingly adopted the tort over time, even though scholars were trying to change or abolish it. By 1940, twelve states had explicitly recognized the right to privacy under the common law, and two had adopted it by legislation.¹⁸² Six states had refused it, and the remaining twenty-eight had yet to decide.¹⁸³ By the early 1950s, the number of states accepting the right had expanded to sixteen by one count¹⁸⁴ and nineteen (plus three who recognized privacy in statute) by another.¹⁸⁵ According to Prosser, twenty-seven (plus four by statute) had recognized the right by 1960.¹⁸⁶

Expansion continues. By 2010, as to the disclosure tort alone, only six states (New York, North Carolina, North Dakota, Nebraska, Montana, and Virginia) reject the common law cause of action.¹⁸⁷

180. Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 656 (2006).

181. Chemerinsky, *Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts*, *supra* note 179.

182. Louis Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526, 529–30 (1941).

183. *Id.*

184. Leon R. Yankwich, *The Right of Privacy: Its Development, Scope, and Limitations*, 27 NOTRE DAME L. 499, 505 (1952).

185. Joseph R. Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1123 (1953).

186. Prosser, *supra* note 112, at 386–87.

187. MEDIA LAW RESOURCE CENTER, MEDIA PRIVACY & RELATED LAW

Four others (Alaska, Mississippi, South Dakota, and Wyoming) have yet to definitively speak on the matter, and many protect particular private matters by statute.¹⁸⁸ In other words, forty states explicitly recognize disclosure claims, and most of them follow Prosser's conception as found in the Restatement (Second), rather than the conception of would-be modifiers.¹⁸⁹

CONCLUSION

Edward White believes that tort doctrine follows prevailing legal ideology, which is heavily influenced by legal scholars.¹⁹⁰ Taking this as true—and surmising that the disclosure tort still exists in its current form because of path dependence—perhaps its accumulating inefficiency (as Posner and others argue) will eventually lead to its expansion, modification, or abolishment. Such change might occur if consensus-oriented and neo-conceptualist judges (who apply law because the last court did) are replaced with neo-realists (who are willing to change law to meet societal demands) or efficiency-seeking economists. Perhaps then the picture might shift as it did when the guard changed from formalist to realist in the early twentieth century.

If, on the other hand, judges do not plan to listen, then all of the well-researched proposals meant to increase efficiency, promote free speech and a free press, and expand privacy protection, will have been made in vain—at best a conversation with other scholars, perhaps garnering a fleeting footnote in a reported case. A small and mostly elite group of scholars had privacy and the disclosure tort in their partial control for decades, and they had a practical dialogue with courts that changed the law. Whether such a change to the disclosure tort will ever happen again is impossible to say, but if the last half-century is any indication, scholars are going to say a lot of brilliant things to decision makers who are too busy or too doctrinally content to care.

Scholars who seek to change the law should either take a new approach to this tort, move on to less established doctrines for which

2010–11: MLRC 50-STATE SURVEY 1548–53 (Oxford Univ. Press 2010).

188. *Id.* (See description of each state's legislation throughout.)

189. Richards & Solove, *Prosser's Privacy Law*, *supra* note 138, at 1890.

190. WHITE, *supra* note 43, at xxiv.

judges are willing to seek academic help, start speaking directly to chambers by filing even more *amicus* briefs, or get serious about creating a public relations tsunami such as they did in the Affordable Care Act case.¹⁹¹ Whatever they do, academics seeking practical change would be wise to speak practically to the bench and bar in hopes of rekindling a dying dialogue between the academy and the courtroom—a symbiosis¹⁹² that will hopefully consist of more than articles on “the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria.”¹⁹³

191. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). As Professor Katyal notes, “[t]he plaintiffs’ strategy to attack the ACA . . . was not an attempt by an academic to influence the Court solely through law review articles. Rather, they employed a massive PR blanket—including think tank presentations, congressional testimony, media outreach, and blogging.” Katyal, *supra* note 4, at 1191.

192. WHITE, *supra* note 43, at 39 (noting that legal scientists “established a symbiotic relationship” with courts).

193. Debra Cassens Weiss, *Law Prof Responds after Chief Justice Roberts Disses Legal Scholarship*, ABA Journal (Jul. 7, 2011, 5:29 AM), http://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/.%20Rule%2018.