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Battle for the Disclosure Tort: Scholars’ Untold Story

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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 like Chemerinsky, Posner, and Solove—shows that notwithstanding enormous efforts by some of America’s most respected contemporary academics, would-be reformers of the disclosure tort have not budged it since Prosser defined it in the Restatement (Second). The article presents both a lesson and a warning for modern scholars who seek to affect—not merely discuss—privacy tort law.

CONTENTS
Introduction.................................................................................................................................................................................. 2

I. FROM WARREN AND BRANDEIS TO POUND, GOODRICH, AND THE FIRST RESTATEMENT........................................................................................................................................................................ 4
   A. 1890: Warren and Brandeis Introduce the Right to Privacy .......................................................... 4
   B. The Privacy Tort’s Toddling Steps: Early Scholarly Calls and Gruff Judicial Responses 7

II. 1940–1965: PROSSER AND THE DEFINITION OF PUBLIC DISCLOSURE OF PRIVATE FACTS ........................................................................................................................................................................ 18
   A. Pre-Prosser Scholarship and Judicial Response.............................................................................. 19
   B. Prosser’s 1960 Article and the Restatement (Second) of Torts ................................................. 21

III. 1960–PRESENT: LARGE, INEFFECTIVE QUANTITIES OF SCHOLARSHIP ........... 23
   A. The Scholarly Proposals, Attacks, and Suggestions .................................................................. 24
   B. Judicial Expansion of the Disclosure Tort in the Face of Scholarship................................... 30

Conclusion: What the Future Might Hold and Lessons for Scholars .................................................. 30
Appendix: Post-Prosser Scholarly Proposals Regarding the Disclosure Tort.............................. 32

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INTRODUCTION

Law professors, frustrated by their inability to create or shape the law despite their grand ideas, have recently tried a new approach to changing doctrine: they have exponentially increased their amicus brief filings to the Supreme Court and, presumably, to other courts, but the Justices generally don’t even read the briefs, let alone give weight to them.¹ Scholars have not always had such difficulty affecting the law. Indeed, less than a century ago a law professor might have expected to have his views heard and, depending on the professor and the court, followed. The creation and solidification of the public disclosure of private facts (the “disclosure tort”) typifies the effect scholars can have on the law under proper conditions, but the history of scholars’ attempts to modify the tort since about 1965 typifies the inability of scholars to practically change doctrine, even in the controversial area of common law privacy.

The disclosure tort, recognized in most states as one of four privacy torts,² is simply defined but practically thorny due mainly to First Amendment concerns. By definition, a person is liable to another for invasion of privacy if she publicizes a private matter whose publication would be highly offensive to a reasonable person and is not of legitimate public concern.³ In practice, it is difficult to determine what is not of legitimate public concern, and courts generally err on the side of permitting disclosure when public interest might be involved.

In this article, I explore the history of the disclosure tort by tracing scholarly attempts to affect it over time. The tort’s story, perhaps sadly for modern academics,⁴ is one of scholarly

² These are intrusion, public disclosure of embarrassing private facts, false light, and appropriation.
⁴ 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.
creation and initial definition only: beyond the work of Warren and Brandeis, a few key scholars during the tort’s early development, and Prosser in the Restatement (Second), the tort has belonged to judges, who have ignored the 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, 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 trend can be seen in scholars’ attempts, the history of this tort is a stark example—possibly replicable by modern scholars willing to build something new—of the power of academia, properly placed in time and social feeling, to form the law.

To reach these conclusions, Part I examines the roots of the disclosure tort as part of an undefined concept: the vague and unitary “invasion of privacy” tort inspired by Warren and Brandeis. During this prefatory period, courts and scholars focused on the invasion of privacy not by disclosure of embarrassing facts but by using another’s likeness in advertising. The tort had such a constrained early life for two formalistic reasons, both of which were substantially overcome by the late 1930s: the general prohibition of equitable relief for non-property torts and the pervasive denial of actions based on mental suffering.

Part II explores the second period of scholarly influence, from roughly the late 1930s to 1965. This period saw the evolution of the first Restatement’s nebulous hedging to the four-tort

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privacy battery of 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 that has seen many First Amendment attacks on the disclosure tort, some calls for its abolishment, and a few proposals for expansion. Despite the thousands of change-seeking pages written on the topic, the sparse clarifications of its limits have come from Supreme Court cases. In short, the disclosure tort remains Prosser’s. The inability of modern academics to change it might be attributed to neo-conceptualism or the path-forming power of the Restatement, leading judges to accept tort doctrine as established while ignoring academic commentary. Whatever the reason for their impotence, scholars who want to change the law should seek unsettled doctrinal territory, where judges are still willing to listen.

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* is one of the most cited law review articles in history. Not only have multitudes of scholarly pieces and judicial opinions pointed to that short work as giving birth to the privacy torts; articles have even been written to validate that Warren and Brandeis did, indeed, first conceptualize the privacy right generally.\(^7\) True, it was recognized even in 1890 that something akin to privacy had been protected before *The Right to Privacy*,\(^8\) but this recognition


\(^8\) 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. L. Rev. 193, 193 (1890).
is generally coupled with respect for Warren and Brandeis as having made familiar and actionable what was before faintly inequitable.\textsuperscript{9}

Popular attention to the idea of privacy protection grew with the expansion of urbanity, portable “snap” cameras, and sensationalist yellow journalism.\textsuperscript{10} 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 the scholars. 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.\textsuperscript{11}

*The Right to Privacy* was purportedly precipitated by Samuel Warren’s sensitivity to the press reports of his private life—the curse of marrying a senator’s daughter.\textsuperscript{12} From the display of merely personal information to the publication of family tragedies, Warren’s anger apparently arose from a mixture of intrusion into and disclosure of private facts.\textsuperscript{13} Indeed, *The Right to Privacy* itself mainly proposed what we know today as 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.”\textsuperscript{14} Unwilling to advance an unlimited concept, and probably 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

\textsuperscript{9} See, e.g., Richards & Solove, *supra* note 5, at 124.
\textsuperscript{13} 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.
\textsuperscript{14} Warren & Brandeis, *supra* note 8, at 206.
protected against disclosure.\textsuperscript{15} This boundary—with the later rule that the private facts must be outrageous\textsuperscript{16}—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 their focus on disclosure, it might seem odd that disclosure-type claims were unavailable for decades after 1890. Instead, as soon as the privacy tort was released, it fell into a one-track rut of compensating people for having their likeness used for advertising purposes—in other words, instead of intrusion or disclosure, the concepts at which the article chiefly aimed, \textit{The Right to Privacy}’s first success was what we now call appropriation—the only theory barely intimated, if at all, by Warren and Brandeis. 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). Early disclosure claims were shunned due to these limiting vestiges of history.\textsuperscript{17} The inadequacies in the common law had to be rectified before the privacy tort could be taken seriously and grow to the point at which Prosser could classify its subparts. Scholars played a key role in rectifying both defects.

\textsuperscript{15} \textit{Id.} at 214–15.
\textsuperscript{16} 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. The creation of the outrageousness requirement is, in my view, the most significant limitation to Warren and Brandeis’s conception of the limitation on disclosure.
\textsuperscript{17} 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.” \textit{Id.} at 219. 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.” \textit{Id.} at 219.
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.”

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.” Notwithstanding the definition’s failure as an intelligible demarcation of legal principles, it marked the expansion of the privacy tort beyond what Doctor Ragland called its “strictly limited” application to a “single stereotyped set of facts.” The first Restatement’s definition meant release of the privacy tort from the two barriers that had fenced it into appropriation only. Thus, although unclear, the new definition was a major and long-sought victory for legal realists.

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

Warren and Brandeis struck a popular note, but courts trod gingerly on the new privacy ground, staying within rigid guidelines that would win appellate panel majorities. So, privacy claims were permitted only where a property interest accompanied them, overcoming the mental damages limitation and, if applicable, the limitation precluding injunctions for non-property interests. The normal set of facts was one in which the plaintiff’s image was used by the defendant in advertising. This set of facts teed up the two dominant privacy questions of the

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18 Movsesian, supra note 4, at 6.
19 RESTATEMENT OF TORTS § 867 (1939).
20 George Ragland, Jr., The Right of Privacy, 17 Ky. L.J. 85, 85 (1929).
period: does the right to privacy exist, and if so, how should it be protected? The influential New York Court of Appeals, aided by formalist scholars—and despite its tentative recognition of privacy in 1895—rejected the right and never definitively reached the question of how the right should be protected. Yet despite formalist resistance, other courts began to answer the first question affirmatively and give limited, property-based answers to the second question.

In Schuyler v. Curtis, the most prominent state court in the nation declined to repudiate the privacy tort and even suggested that damages—but not an injunction—might be recovered by a deceased person’s next of kin when the deceased’s likeness was used in a way that would have offended her when alive and was therefore offensive to her living family. The case, which incited a flurry of scholarly commentary on privacy, involved the stepson of a woman whose name and likeness the Woman’s Memorial Fund Association was using to create a statue entitled “The Typical Philanthropist.” The statue was to be paired with one of Susan B. Anthony as “The Representative Reformer.”

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. After she died and her family learned of the planned statue and World’s Fair exhibit, her stepson, unable to

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22 Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).
23 Schuyler, 147 N.Y. at 444–45.
24 See generally Herbert Spencer Hadley, The Right to Privacy, 3 N.W. L. REV. 1 (1894); Augustus Hand, Schuyler against Curtis and the Right to Privacy, 36 AMER. L. REG. 745 (1897); John Gilmer Speed, The Right to Privacy, 163 N. AM. L. REV. 64 (1896); Recent Cases, Torts—Right to Privacy, 13 HARV. L. REV. 415 (1900); Note, Atkinson v. Doherty, 5 VA. L. REG. 710 (1899); Case Comment, The Right to Privacy, 12 HARV. L. REV. 207 (1898); Comment, A New Phase of the Right to Privacy, 10 HARV. L. REV. 179 (1896); Comment, The Right to Privacy—The Schuyler Injunction, 9 HARV. L. REV. 354 (1895); Comment, Marks v. Jaffa, 2 N.W. L. REV. 91 (1894); Note, Development of the Law of Privacy, 8 HARV. L. REV. 280 (1894) (critiquing Hadley’s The Right to Privacy and concluding that the emerging right is in no danger of obsolescence); Comment, Is This Libel?—More about Privacy, 7 HARV. L. REV. 492 (1894); The Right to Privacy, 4 MADRAS L.J. 17 (1894), reprinted in 6 GREEN BAG 498 (1894); The Right to Privacy, 3 GREEN BAG 524 (1891); Comment, The Right to Privacy, 5 HARV. L. REV. 148 (1891); Case Comment, The Right to Privacy, 7 HARV. L. REV. 182 (1893).
stop the production by letter, sought an injunction, Warren and Brandeis’s article in hand.25 The trial court granted the injunction, finding that the defendants had interfered with Ms. Schuyler’s relatives’ privacy. The Supreme Court at General Term affirmed, but the Court of Appeals reversed (long after the World’s Fair had passed without the presence of Ms. Schuyler’s statue) and 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 . . .”.26

The importance of this case, pointed out by the young privacy defender Augustus Hand,27 was that the Court of Appeals did not deny the existence of the right to privacy; instead, it held only that the right was not so impinged as to allow for an injunction, leaving the door open for privacy torts.28 This supposed common law right to privacy, however, had its scholarly detractors who were instrumental in turning the New York court against privacy altogether.

One of the most important, if fledgling,29 detractors was Herbert S. Hadley, who combatted the idea that equity jurisdiction could ever protect personal privacy; any protection of privacy must be by legislatures, not courts. Still a student in 1894, 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 with considerations of ‘moral fitness’ except as the

25 Augustus N. Hand, Schuyler against Curtis and the Right to Privacy, 45 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.”).
26 Schuyler, 147 N.Y. at 449.
27 Augustus, cousin to Learned, would become a judge for the Southern District of New York and then the Second Circuit.
28 Hand, supra note 25, at 751.
29 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 Dec. 15, 2011).
inconvenience or injury that a person may suffer is connected with the enjoyment or possession of property.\textsuperscript{30}

Thus Hadley framed the debate between the legal formalists, who would, with considerable protest, be displaced, and the legal realists, who would take a comparatively practical and policy-oriented approach to equity and its ability to protect personal rights.\textsuperscript{31} But Hadley’s main attack was that a right to privacy did not exist at all; his other conclusions were merely responses to what he saw as a hypothetical: what if the right does exist?

Hadley bolstered his argument with a protracted history of English equity jurisdiction, applauding the early shift from individual chancellors’ interpretations of fairness to a categorized system of tenable and untenable equity claims. He then claimed that privacy fell into none of the tenable categories because (1), unlike copyrights to the products of one’s mind, a person has no property interest in his privacy; and (2) “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. . . .”\textsuperscript{32}

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 . . . .”\textsuperscript{33} It is notable, of course, that Hadley had recognized the evolutionary changes to equity by giving its history, but his central point—like that of other “legal scientists”—was that the common law had finally reached a state of stable classification in little need of disturbance from previously-unavailable causes of action.

\textsuperscript{30} Herbert S. Hadley, The Right to Privacy, 3 N.W. L. REV. 1, 4 (1895).
\textsuperscript{31} See G. Edward White, Tort Law in America 64–75 (Oxford Univ. Press expanded ed. 2003).
\textsuperscript{32} Hadley, supra note 30, at 8 (footnotes excluded).
\textsuperscript{33} Id. at 8–9.
Thus, after arguing that the dicta relied on by Warren and Brandeis supported not a right to privacy but 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.\(^34\) He ended: “That our law is a system that grows and develops in response to the demands of advancing civilization, is due to the fact that new occasions and new circumstances arise which come within the principles upon which our laws were founded; not because new principles and new rights are created to afford that protection or redress which seems to be required.”\(^35\) In other words, new harms recognized by society had to conform to existing law or be borne by the harmed, as the law would never conform to the injury.

A more faithful statement of legal formalism was never made, but formalists were not the only legal thinkers at the time. Certainly, the legal realism movement had not taken hold by 1900 (according to Professor White, its influence did not mature until about 1910\(^36\)), but its central tenets were being whispered in legal scholarship to support the right to privacy. For example, in addition to Hand, Guy Thompson, in 1898, 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.\(^37\)

Ignoring the nascent infidelity to formalism, and aligning itself with Hadley’s criticisms, a divided New York Court of Appeals decided not to recognize a right to privacy at all.\(^38\) In Roberson, a milling company used the image of an attractive girl in advertisements and on flour

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\(^{34}\) Hadley cites Corliss v. Walker Co., 57 Fed. Rep. 434 (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.

\(^{35}\) Hadley, supra note 30, at 20–21.

\(^{36}\) WHITE, supra note 31, at 64.

\(^{37}\) Guy Thompson, The Right of Privacy as Recognized and Protected at Law and in Equity, 47 CENTRAL L.J. 148 (1898).

\(^{38}\) Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (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).
bags without her consent. Ridiculed as the “flour girl,” she took to her bed with nervous shock. When she sued the company for damages and an injunction, the trial and intermediate appellate courts found a cause of action for the invasion of her privacy. The Court of Appeals reversed.

Chief Judge Parker, 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 . . . .” 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 . . . .” Such a principle would lead “not only to a vast amount of litigation, but litigation bordering upon the absurd . . . .”

With his precedential and policy arguments established, Parker, citing the young Hadley and borrowing his tactics, countered Warren and Brandeis’s history by portraying equitable jurisdiction as a protector only of private property and suggesting that only the legislature could

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39 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 that “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 (Beacon Press 2009).

40 Roberson, 171 N.Y. at 544.

41 Id.

42 Id. As discussed in Part III, this fear is not justified, even under the free speech restrictions suggested by Warren and Brandeis, as this restriction, in the form of newsworthiness, provides little incentive to bring a disclosure case unless the facts are just right.
protect “the so-called right to privacy.” As for the common law, libel provided an appropriate remedy for those seeking redress for malicious publication.

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

Bucking Roberson, and unlike some other states, Georgia was the first to expressly recognize the right to privacy, doing so by explicitly following, along with more than a dozen law review articles, Judge Gray’s dissent. Pavesich was, like Roberson, a case of a company profiting by the unauthorized use of a portrait, and many states soon adopted this limited right to privacy and began issuing injunctions to protect people’s images from being used as advertisements or as the basis for copyrights. That is, the second question of the age was

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43 Id. at 547.
44 Id. at 556–57.
45 Id. at 561 (Gray, J., dissenting).
46 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.
49 Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912) (holding that, where photographer took unauthorized photos of dead conjoined twins and got copyright on the image, father could sue for damages); Foster v. Chinn, 134 Ky. 424 (1909); Moore v. Rugg, 44 Minn. 28, 46 N.W. 141 (1890); 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., 73 N.J. Eq. 136, 141, 67 A. 392, 394 (Ch. 1907).
answered only with respect to property injuries. 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. Yet, notwithstanding this slow progress toward redressing privacy invasions, by 1916 Roscoe Pound was tired of the sluggish evolution and called for practical change.

i. Pound’s Call for Expanded Injunctive Relief

The realist movement being anything but coherent, Harvard’s Pound has been presented as a proponent of sociological jurisprudence and an opponent of Karl Llewellyn, the Yale professor who actually coined the term “realism.” I treat Pound as a realist in the broad sense: a present-thinking reactor against formalism and a proponent of practical jurisprudence flexible enough to adjust to society’s demands. Indeed, even before his 1930–31 academic debates with Llewellyn, Pound was intently focused on practical changes in the law, one of which he sought in 1916—the year he became dean of Harvard Law School—when he wrote *Equitable Relief against Defamation and Injuries to Personality*. He sought in the article’s capacious second section to expand injunctive privacy protection from property to person. Whereas the courts that recognized privacy had purported to follow *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.

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50 As of a 1910 survey of the cases made in the Yale Law Journal, the anonymous author concluded that “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 privacy interests are generally property interests and that injunctions should normally be allowed, as “[o]nly in so far as the law recognizes these interests are legal rights created.”).


52 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 196.

53 29 Harv. L. Rev. 640 (1916).
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) in such cases as the publication of embarrassing but monetarily worthless letters, the fraudulent use of a husband’s name to affix to the birth certificate of a child conceived in adultery, and the wrongful, public expulsion from social clubs.54 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.55 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,56 but defining the right and giving it more protection took time.57

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

The privacy torts generally, and the disclosure tort in particular, could not have emerged with this barrier in place, as the right to privacy is the right—if not to the property of one’s story, reputation, or image—to be free from unwarranted emotional and mental injury brought on by

54 Id. at 670–76.
55 Id. at 682.
56 See, e.g., Stark v. Hamilton, 149 Ga. 227, 99 S.E. 861, 862 (1919) (holding that father had property and personal privacy interest, protected by equity, in his daughter not being held as a prostitute); Snedaker v. King, 111 Ohio St. 225, 250, 145 N.E. 15, 23 (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).
57 This process of acceptance and definition is best chronicled by Prosser, Privacy, 48 CAL. L. REV. 383, 385–87 (1960).
unauthorized publication of intimate matters. Indeed, for decades after Warren and Brandeis’s article, compensation for emotional harm was strictly parasitic to damages for physical injury.\footnote{See, e.g., Archibald H. Throckmorton, \textit{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 not resulting in physical injury is, in contemplation of law, no injury at all, and hence no foundation of an action.”).} By 1922, however, Dean Herbert Goodrich\footnote{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. In this last position, he was a close coworker of William Prosser. John W. Wade, \textit{William L. Prosser, Some Impressions and Recollections}, 60 CAL. L. REV. 1255, 1257–58 (1972) (incidentally, Wade would succeed Prosser as Reporter). That they shared some ideology is indisputable, as shown by Prosser’s own article on the recognition of mental injury, discussed below.} was ready to call for more recognition of mental injury—not in the realm of privacy, per se, but mental injury generally. The problem he faced was that the law did not regard mental and physical injury on the same plane. Thus, he naturally sought this modification by speaking the critics’ language: rather than calling for recognition of mental injury whether it was physical or not, he argued that mental injury \textit{was} physical. Thus, Goodrich began his article by drawing in the skeptics: “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.”\footnote{Herbert F. Goodrich, \textit{Emotional Disturbance as Legal Damage}, 20 MICH. L. REV. 497, 497 (1922).} After establishing that fear and other emotions, such as anger, worry, and grief, produce harmful, observable disturbances—and therefore should be included in categories of legal damage\footnote{\textit{Id.} at 497–504.}—Goodrich moved on to the problem of how to assign money damages to mental harm without too much guesswork. He quickly disposed of this difficulty, calling it “no more difficult a problem here than in any case of non-pecuniary damage—a broken leg or a bruised head.”\footnote{\textit{Id.} at 504.} Measurement is, as with any other injury, a simple matter of professionally tracing a given cause.
to a given effect and proving the price of the effect.  

Borrowing Pound’s technique of showing the courts that they already do what he recommends, Goodrich pointed out “how far courts have already gone in making feelings a matter of recovery... [Mental] injury is compensated.”

This, as with Pound’s argument, is Goodrich’s convincing force. Not only was mental suffering normally compensated as parasitic to physical and property injury; independent actions for assault, malicious prosecution, defamation, wrongful arrest, seduction, and unlawful search and seizure were all based on inner injury.

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

Despite his efforts, by 1929 most jurisdictions still allowed no cause of action based on mental anguish alone. The tide was turning, however, and two law review articles in the 1930s—in addition to the inclusion of “the interest in freedom from emotional distress” in the first Restatement—marked the recognition of courts and scholars that mental harm was harm enough to support a tort action.

The first article was written by Calvert Magruder, who was Vice Dean of Harvard Law School when, in 1936, he wrote Mental and Emotional Disturbance in the Law of Torts. In that

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63 Id. at 503–04.
64 Id. at 509.
65 Id. at 510.
66 Id. at 511–513.
68 RESTATEMENT OF TORTS §46 (1934).
69 49 HARV. L. REV. 1033 (1936). Perhaps importantly, Magruder had clerked for the Prince of Privacy himself: then-Justice Louis Brandeis. Magruder did mention privacy in his emotional disturbance article, but it was not the focus.
article, he painstakingly built on Goodrich’s—and others’—expositions of the inconsistency of the common law’s recognition of mental suffering in some instances but not others similar or more deserving. 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. Magruder and Prosser assumed one of Goodrich’s main concerns: that mental suffering is legitimate suffering. They had no reason to return to that contention because so many courts had already recognized it. Instead of speaking to judges in the words of Darwin and other physiologists, as Goodrich did, they spoke 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) or with regard to outrageous behavior meant to cause emotional shock to another (in Prosser’s). These two articles, along with Goodrich’s and others, interacted with judicial reasoning to expand privacy torts. Thus they chipped away both the prohibition against injunctions for non-property injuries and the skepticism of mental injury, allowing for growth of privacy and, later, the disclosure tort.

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

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70 See, e.g., Roscoe Pound, Interests of Personality in SELECTED ESSAYS ON THE LAW OF TORTS 87, 103 (Harvard L. Rev. Ass’n 1924); Bohlen & Polikoff, Liability in New York for the Physical Consequences of Emotional Disturbance, 32 COL. L. REV. 409 (1932); Throckmorton, supra note 58.


By 1940, legal realism was the dominant force behind tort theory.\textsuperscript{73} The flexibility of this approach to adapt law to society stood in stark contrast to the collective wisdom of Hadley and Parker’s day. 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.\textsuperscript{74}

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 being that the right to privacy was ordinarily assumed and only its boundaries, underlying interests, and resulting protections, were debated),\textsuperscript{75} and the period saw, in addition to stretching privacy to cover film, television, radio, etc., a division of common law privacy into four distinct torts.

\textbf{A. PRE-PROSSER SCHOLARSHIP AND JUDICIAL RESPONSE}

\footnotesize
\textsuperscript{73} White, supra note 31, at 64.

\textsuperscript{74} Louis Nizer, \textit{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.

\textsuperscript{75} 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:

\begin{quote}
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 \textit{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 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.
\end{quote}

Francis H. Bohlen, \textit{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.
Prosser, the most influential categorizer of privacy torts, was not the first.\(^{76}\) 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.\(^{77}\) Keeping Warren and Brandeis’s three interests (personality, property, and relations with others) as his main categories, he placed various sub-interests and harms under the heading of each. His effort, a good first classificatory step, categorized interests and harms related to the single privacy tort.

Going beyond Green, the first serious attempt to divide privacy into distinct torts, not just interests, appears to be that of the young Gerald Dickler in 1936.\(^{78}\) Bucking the vague Restatement definition,\(^{79}\) he divided the privacy torts into three categories: (1) trespass-related “intrusions”; (2) libel-related “disclosures”; and (3) unfair trade practices-related “appropriations.”\(^{80}\) Citing dozens of law review articles and commentaries to prove a negative,\(^{81}\) 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,”\(^{82}\) and his categories were not ignored. In fact, they coincided directly with three of Prosser’s four privacy torts, proposed twenty-four years later.

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

\(^{76}\) Of course, he was not the last, either. See, e.g., Daniel J. Solove, A Taxonomy of Privacy, 154 U. PENN. L. REV. 477 (2006).

\(^{77}\) Leon Green, The Right of Privacy, 27 Ill. L. REV. 237 (1932).


\(^{79}\) RESTATEMENT OF TORTS § 867 (1939).


\(^{81}\) Id. at 436.

\(^{82}\) Id. at 456.
privacy torts (such as public interest in information disclosed, the effect of waiver/consent, etc.), but many courts were still granting redress for privacy violations under the guise of some other right. Long gone, however, was the debate between the Hadley / Parker formalists and the emerging realists of the late 19th and early 20th centuries. The two decades leading to the development of the Restatement (Second) saw boisterous waves of ideas, proposals, and classifications—all while more courts adopted the right to privacy.

**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 apparently close to the same move. Four jurisdictions had recognized privacy by statute, and only a few courts had rejected privacy protection as unbecoming the common law. Thus, just as he did with his well-received intentional infliction of emotional distress proposal, Prosser waited until most jurisdictions—and an overwhelming majority of

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83 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 case law and that boundaries were cleanly 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. 499, 519–20 (1952) (giving nine-point list of right of privacy, its scope and limitations); 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).


85 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.


those that had addressed the question—agreed with him before declaring the existence of, and clearly describing, four new torts.

Marshaling his 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, the holes in the jigsaw puzzle have been largely filled in, and some rather definite conclusions are possible.”88 Then, one-upping Dickler, Prosser proposed and detailed four distinct privacy torts: intrusion, public disclosure of embarrassing private facts, false light, and appropriation.89 Supported by judicial opinions, Prosser, as he and others had done to change the fortunes of privacy in the past—argued that courts had already recognized these four torts without knowing it (or at least without saying so); the only thing lacking was a bit of systemization.

Prosser recognized that Warren and Brandeis were mostly concerned with the public disclosure of private facts, but he also recognized that this privacy protection was “slow to appear in the decisions.”90 He traced the disclosure tort from the debtor cases (in which a creditor publicly displays the debtor’s debt and the time it has been overdue) to the broadcasting cases (in which a screenplay or radio dramatization is based on a person’s private life)91 and finally to various oddities that fit comfortably into his definition of the disclosure tort. He then gave its plainly evident limitations: the disclosure must be public, not private;92 the facts must be private, not public;93 the matter must be one that, if made public, “would be offensive and objectionable

88 Prosser, supra note 86, at 388–89.
89 Id. at 389.
90 Id. at 392.
91 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).
92 Prosser, supra note 86, at 393.
93 Id. at 394–96.
to a reasonable man of ordinary sensibilities.”94 He then applied the public figure and public interest limitations,95 along with the consent defense,96 to all four of his torts, recognizing that interpretation and social values might further shape these limits.

After publishing his instantly-classic Privacy article,97 Prosser, the Restatement Reporter, ensured that his four-part framework would become part of the Restatement (Second), ending the thirty-year reign of the unworkable privacy definition in the first Restatement.98 Thus ended the era of one imprecise tort and began the era—in which we still live—of four somewhat less imprecise torts.99 Scholars have attempted for decades to change Prosser’s conception of privacy and the disclosure tort, but they have failed.

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

Scholars have written mountains of research and suggestions in attempting to make their mark on the disclosure tort. As of now, however, the elements given in the Restatement (Second) are generally followed. The one major change to the tort since Prosser came from the Supreme Court, which has said that where information disclosed is in the public domain (for example, an unsealed court record), it is of de facto public concern and automatically newsworthy. This

94 Id. at 396–98.
95 Id. at 410–419.
96 Id. at 419–20.
98 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. at VII.
99 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 that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. Id. at § 652D (1977).
newsworthiness defense has narrowed the tort, but more successful disclosure suits have been seen recently than in its first few decades, notwithstanding scholars’ efforts.100

A. The Scholarly Proposals, Attacks, and Suggestions

Path dependence might best explain the disclosure tort’s immobility over the last fifty years.101 Starting with the persuasive force of the Restatement (Second) and the spreading notion of privacy protection noted by Prosser in 1960, courts quickly established the privacy torts as precedent. During this era of consensus legal thought and, from 1970 onward, what White calls “neoconceptualism” (a modern, somewhat realist categorization spirit that has followed from decades of consensus-seeking among scholars),102 the disclosure tort’s relatively simple elements were engrained into precedential documents that continue to provide guidance in applying the tort to new problems and technologies.

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 past fifty years, to buck Prosser will be left for another article. 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, given more compactly in the Appendix, of the post-Prosser concerns, hopes, desires, and demands by tort and constitutional scholars, as “free speech and

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101 For a description of three common law strands of path dependence (here, 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 (2001).

102 WHITE, supra note 31, at 211–43.
“press” has become a rallying cry for disclosure tort opponents. Through it all, the tort has remained remarkably stable, even growing in acceptance from state to state while remaining a purposely\textsuperscript{103} limited 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—a proposition he found suitable, given that defamation was holding on to too many antiquated restrictions and complications.\textsuperscript{104} 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.”\textsuperscript{105} 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. The disclosure tort, assault, defamation, and false light all still exist as distinct torts.

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 explanation is to

\textsuperscript{103} It appears that Prosser intentionally limited the disclosure tort to prevent it from overwhelming defamation and IIED. Neil M. Richards & Daniel J. Solove, \textit{Prosser’s Privacy Law: A Mixed Legacy}, 98 CAL. L. REV. 1887 (2010). Richards and Solove, two privacy fanatics, are quite displeased with Prosser and the retrained course he set for us.

\textsuperscript{104} John W. Wade, \textit{Defamation and the Right to Privacy}, 15 VAND. L. REV. 1093, 1093–96 (1962). As mentioned in note 103, \textit{supra}, Prosser did not likely share Wade’s worry, as Prosser guided the tort to avoid conflicts with defamation and IIED.

\textsuperscript{105} \textit{Id.} at 1125.
be preferred”106—in other words, Prosser had violated Ockham’s razor. 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.”107 With this justification not to ignore Prosser, whose four-part concept was already in the Restatement drafts, Bloustein said that “if he 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.”108

Alleging that Warren and Brandeis would not support Prosser’s taxonomy, Bloustein attempted to show that the four torts (and some crimes) were really one, with one underlying interest: to protect a person’s dignity. If privacy is invaded through inappropriate information gathering (even Fourth Amendment and statutory concerns such as wiretapping) or dissemination, a tort or crime has been committed that is based on “personal dignity and integrity” alone.109 In short, his argument was that privacy is a monolith, and should be, because that’s how Warren and Brandeis, rest their souls, would have wanted it.110 Bloustein’s article has been frequently cited, even in Supreme Court cases, but the disclosure tort nonetheless became part of the Restatement (Second).

Since Bloustein’s early article, the most salient attempts at tort-based reform have been those of Richard Posner and Neil Richards & Daniel Solove. They have attempted not to create minor adjustments to disclosure but to reform the judicial approach altogether.

Posner, in his quest for economic efficiency, proposed in 1977 and again in 1981 that information be seen as a good within a marketplace in which more information is better than

107 Id. at 963–64.
108 Id. at 964.
109 Id. at 981–82.
110 Id.
less, but in which nobody has a right to information meant to conceal fraud or misrepresentation, either in the commercial or private context.\textsuperscript{111} Protections like the disclosure tort might allow people to shield their fraud and misrepresentation, preventing others from knowing relevant information when dealing with them. Thus, the disclosure tort should be limited only to those situations in which someone’s character is not being unmasked. Unmasking is good, even if one is unmasked against her will. 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. Finally, from an efficiency standpoint, privacy for the purpose of innovation (similar to what others have called “intellectual privacy”\textsuperscript{112}) should be protected beyond privacy for the purpose of concealment or misrepresentation.\textsuperscript{113}

Richards and Solove see the disclosure tort as far too limited in the Information Age to protect much privacy. Unlike Posner, they find inherent value in protection against disclosure: it encourages individual autonomy, freedom of association, and even peoples’ security.\textsuperscript{114} The tort does not offer sufficient protection against disclosure, however, given the newsworthiness defense. Thus, it should be reenergized for our 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) reaching a better understanding of 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 other technology. Further, in concurrence with Posner, intellectual privacy should be protected.\textsuperscript{116} Finally, privacy protections should expand not only in tort but by statute, contract, and certainly by a fundamental reshaping of the meaning of privacy and the disclosures that are meant to be protected.\textsuperscript{117}

Neither of these proposals has taken hold in courts, although Richards and Solove’s proposals might need more time to ripen. As of now, notwithstanding the myriad proposals of tort and privacy scholars,\textsuperscript{118} Prosser’s conception stands as the dominant common law protection against disclosure.

2. First Amendment Concerns

There is nothing new—and there hasn’t been for more than a century—about the privacy tort’s free speech and free press limitations.\textsuperscript{119} Nonetheless, scholars treated two First Amendment cases, \textit{Cox Broadcasting v. Cohn}\textsuperscript{120} and \textit{Florida Star v. B.J.F.},\textsuperscript{121} as though they were death knells of the tort. They weren’t. The Court in \textit{Cox Broadcasting} held that a Georgia law prohibiting disclosure of a rape victim’s name was a free press violation, while the \textit{Florida Star} Court held that where information is in the public sphere (here, an official police report), the press can disclose it without tort liability even if the information is otherwise protected by statute. After \textit{Cox}, scholars said that the newsworthiness defense had all but completely abolished the disclosure tort.\textsuperscript{122} The \textit{Florida Star} commentary produced more grieving,\textsuperscript{123} some

\textsuperscript{115} Richards & Solove, \textit{supra} note 103.

\textsuperscript{116} Richards, \textit{supra} note 11, at 1347–52; Richards, \textit{Intellectual Privacy}, \textit{supra} note 112.

\textsuperscript{117} Neil M. Richards, \textit{The Limits of Tort Privacy}, 9 J. TELECOMM. & HIGH TECH. L. (forthcoming 2011).

\textsuperscript{118} See the Appendix for a more thorough idea of the proposals and arguments, both in favor of and against Prosser’s conception.


\textsuperscript{120} 420 U.S. 469 (1975).

\textsuperscript{121} 491 U.S. 521 (1989).

\textsuperscript{122} See, e.g., Alfred Hill, \textit{Defamation and Privacy under the First Amendment}, 76 COLUM. L. REV. 1205 (1976).
of which continues as an attempt to reform the tort. Other scholars have said, and they are closer to the truth, 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.

Some, however, have argued that the Supreme Court had abolished, or should abolish, the disclosure tort. These thinkers see the tort, with its purpose to curb truthful speech, as simply unconstitutional. Perhaps the oddest story among these constitutional attackers is that of Erwin Chemerinsky, who in 2006 extolled the virtues of Brandeis and his tort, lamented the fact that the Supreme Court had not yet supported such a right in cases like Cox Broadcasting and Florida Star, and called for “judicial protection of a constitutional right to informational privacy and greater safeguards through tort law and statutes.” 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. This unexplained turnaround is astounding and has thus far yielded no practical result.

So, in the constitutional area, as in that of tort theory, scholars for and against disclosure have yet to make a practical change. In fact, the tort in most states looks as it did in the early 1970s, although the Supreme Court has clarified the trends.

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128 Chemerinsky, supra note 126.
B. JUDICIAL EXPANSION OF THE DISCLOSURE TORT IN THE FACE OF SCHOLARSHIP

By 1940, twelve states had explicitly recognized the right to privacy under the common law, and two had adopted it in legislation.\textsuperscript{129} Six states had refused it, and the rest, twenty-eight of forty-eight, had yet to decide. By the early 1950s, the number accepting the right had expanded to sixteen by one count\textsuperscript{130} and nineteen (plus three who recognized privacy in statute) by another.\textsuperscript{131} According to Prosser, twenty-seven (plus four by statute) had recognized the right by 1960.\textsuperscript{132}

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.\textsuperscript{133} Four others (Alaska, Mississippi, South Dakota, and Wyoming) have yet to definitively speak on the matter, and many protect particular private matters by statute.\textsuperscript{134} In other words, forty states explicitly recognize disclosure claims, and most of them follow Prosser’s conception of it as found in the Restatement (Second)—not the conception of would-be modifiers.\textsuperscript{135} Prosser wins.

CONCLUSION: WHAT THE FUTURE MIGHT HOLD AND LESSONS FOR SCHOLARS

Many believe that tort doctrine follows prevailing legal ideology, which is heavily influenced by legal scholars.\textsuperscript{136} Taking this as true—and surmising that the disclosure tort still

\begin{footnotes}
\footnotefont{132} Prosser, supra note 86, at 386–87.
\footnotefont{134} Id. (see description of each state’s legislation throughout).
\footnotefont{135} Richards & Solove, supra note 103, at 1890.
\footnotefont{136} White, supra note 31, at xxiv.
\end{footnotes}
exists in its current form because of path dependence—perhaps its accumulating inefficiency (assuming it is inefficient, as Posner and others argue) will eventually lead to its expansion, modification, or abolishment. Similarly, if consensus-oriented and neo-conceptualist judges (who, like their conceptualist forbears, apply law because the last court did) are replaced with neo-realists (who are willing to change law to meet the demands of society) or even economist (efficiency-seeking) judges in the future, 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 really aren’t listening and don’t plan to listen, then all of the practical, well-researched proposals meant to increase efficiency, promote free speech and a free press, or expand privacy protection, will have been made in vain—at best a conversation with other scholars with perhaps a fleeting footnote in a reported case. Scholars, or rather a small, mostly elite group of them, 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, then, who seek to change the law, should either take a new approach to this tort or move on to less established doctrines.
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<td>Edward J. Bloustein, <em>Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser</em>, 39 N.Y.U. L. Rev. 962, 963 (1964).</td>
<td>TT</td>
<td>Negative</td>
<td>Privacy is a single concept, not four or more. It is centered on human dignity, not property or anything else. Thus, Prosser was wrong and PDPF should not be a distinct tort.</td>
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<td>Harry Kalven, Jr., <em>Privacy in Tort Law--Were Warren and Brandeis Wrong?, 31 L. &amp; CONTEMP. PROBS. 326 (1966).</em></td>
<td>TT</td>
<td>Negative</td>
<td>Warren and Brandeis gave rise to a trivial, incomplete, simplistic, and petty tort that should not exist at all. It is a tort that was created not of powerful argument but of grandiose rhetoric touching the spiritual side, not the rational side, of judges and legislatures. Abolish privacy torts.</td>
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<td>Charles Fried, <em>Privacy</em>, 77 YALE L.J. 475 (1967).</td>
<td>TT</td>
<td>Positive</td>
<td>People feel that invasions of privacy injure their very humanity because privacy is intimately related fundamental ends and relationships, including respect, love, friendship, and trust. Without privacy, these things are inconceivable, so privacy must be protected by such things as PDPF.</td>
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<tr>
<td>Edward J. Bloustein, <em>Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional as Well?, 46 TEX. L. REV. 611 (1968).</em></td>
<td>TT; FA</td>
<td>Positive</td>
<td>Responding to Professor Kalven’s 1966 attack on the privacy torts, as well as <em>Time, Inc. v. Hill</em>, 385 U.S. 374 (1967), in which the Supreme Court limited recovery against publishers of false reports to those who publish with actual malice. Protecting privacy by tort is neither petty nor wrong-headed. Finally, though the 1960s saw an expansion of First Amendment protection for speech of public concern, the expansion did not swallow the disclosure tort.</td>
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<td>Melville B. Nimmer, <em>The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy</em>, 56 CAL. L. REV. 935 (1968).</td>
<td>FA</td>
<td>Positive</td>
<td>The First Amendment privilege should be narrower in PDPF cases than in defamation cases—even to the point of denying it altogether—because injury to reputation can be remedied by more speech, but injury to privacy cannot be. Additionally, reputation, but not the intimate activities of named individuals, may be important for fruitful public dialogue or for a valid exercise of self-expression.</td>
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<td>Edward J. Bloustein, <em>The First Amendment and Privacy: The Supreme Court Justice and the Philosopher</em>, 28 RUTGERS L. REV. 41 (1974).</td>
<td>FA</td>
<td>Positive</td>
<td>Notwithstanding some recent Supreme Court cases (particularly <em>New York Times v. Sullivan</em>, 376 U.S. 254 (1964) and <em>Time, Inc. v. Hill</em>, 385 U.S. 374 (1967)), a proper understanding of free speech from the standpoint of society needing information rather than the speaker wanting to speak will draw the appropriate distinction between what is public and what is private and, therefore, what is protected by the disclosure tort and what is not. The disclosure tort is, and should remain, a protection against the unauthorized disclosure of embarrassing private facts.</td>
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<td>Alfred Hill, <em>Delamation and Privacy under the First Amendment</em>, 76 COLUM. L. REV. 1205 (1976).</td>
<td>FA</td>
<td>Neutral</td>
<td>PDPF has been all but swallowed up by the newsworthiness / public interest doctrine. The media are immune from publicizing facts of public record, per <em>Cox Broadcasting</em>. Juries should not be allowed to decide whether a publication is unconscionable where allowing it to do so would best the jury with power to penalize speech.</td>
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<td>Tom Gerety, <em>Redefining Privacy</em>, 12 HARV. C.R.-C.L. L. REV. 233 (1977).</td>
<td>TT</td>
<td>Negative</td>
<td>False light and appropriation should be abolished, as they allow for unlimited terms of &quot;control&quot; and &quot;identity,&quot; respectively. PDPF, too, allows for too much interpretation. Privacy, by litigation, should only protect &quot;intimacy,&quot; &quot;identity,&quot; and &quot;autonomy&quot; after these terms are limited.</td>
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<td>Richard A. Posner, <em>The Right of Privacy</em>, 12 GA. L. REV. 393 (1977).</td>
<td>TT</td>
<td>Negative</td>
<td>Protection of privacy is protection of information, and the information market should generally be uninhibited. The current right to privacy is often inefficient, both in the commercial and the private context. Commercial privacy, as protected by tort, is a right to hide information by business, promoting fraud. The right to private privacy should be an economic one (allowing the subject to receive compensation from the publisher or refuse publication) only where the publisher gains some benefit (e.g., selling newspapers) by conveying private information. The Restatement’s PDPF test, which involves a balance between offensiveness and newsworthiness, roughly captures the essential economic elements of the problem; a better economic test would limit recovery to cases in which publicity does not unmask someone who has concealed truth to misrepresent himself to others. Privacy rights in the common law should be disaggregated to allow for efficient responses to different types of privacy facts. There should be no unitary right to privacy and no unitary PDPF. (This article garnered symposium responses from many scholars. Only Bloustein’s response is included in this table.)</td>
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| Richard A. Posner | Privacy, Secrecy, and Reputation | 28 Buff. L. Rev. 1 (1978) | TT | Negative | The 1977 article needed expansion. From an economic efficiency perspective, privacy (i.e., private facts) for the purpose of innovation (e.g., inventions) should be treated differently than privacy for the purpose of concealment and misrepresentation (which limits relevant information—e.g., not telling a spouse that one has a communicable disease), which should be treated differently than privacy for the purpose of communication. (Posner continued with these ideas in The Economics of Privacy, 71 Amer. Econ. Rev. 405 (1981).)
| Linda N. Woito & Patrick McNulty | The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness? | 64 Iowa L. Rev. 232 (1978) | TT | Neutral | The newsworthiness defense to PDPF should be tempered by a decency requirement: a publication is only newsworthy if it treats the subject matter decently by community standards.
| Thomas I. Emerson | The Right of Privacy and Freedom of the Press | 14 Harv. C.R.-C.L. L. Rev. 329 (1979) | TT | Negative | Prior restraint (i.e., injunction) should never occur in PDPF cases, contrary to what courts have allowed. Additionally, PDPF should be so defined as to emphasize intimacy while not protecting waived rights, public information, or matters of public concern.
| Richard A. Epstein | A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic | 9 J. L. Studies 665 (1980) | FA | Negative | PDPF must remain a fringe tort because of its restraint on speech. In fact, it may be best to erase this tort altogether, because it does not allow third party disclosers to decide for themselves the weight and significance of true information about the plaintiff—it hands that role to the court.
| Diane L. Zimmerman | Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort | 68 Cornell L. Rev. 291 (1982) | FA | Negative | PDPF deserves to be ended, as its constitutional problems are too severe for it to continue. If it does continue, it should be so limited that only a substantial state interest in an individual’s privacy can overcome constitutional concerns, and even then, the meaning of “private information” and “newsworthy” would have to be severely limited and clearly defined.
| W. A. Parent | A New Definition of Privacy for the Law | 2 L. & Phil. 305 (1983) | TT | Negative | Prosser’s four torts are poorly conceptualized and poorly defined because Prosser did not question what privacy was; rather, he took privacy to mean whatever a court said it meant, and courts said imprecise and contradictory things. Privacy needs to be redefined as the right “not to be victimized by gratuitous or indiscriminate snooping, prying, spying, etc.”; then the torts can follow and avoid First Amendment concerns.
| Phillip E. DeLaTorre | Resurrecting A Sunken Ship: An Analysis of Current Judicial Attitudes Toward Public Disclosure Claims | 38 Sw. L.J. 1151 (1985) | TT | Positive | Courts across the country have been developing strict defendant-oriented rules in PDPF. The tort should be resurrected by courts turning these strict rules into mere suggestions and seeking to answer a single question: whether the plaintiff had a reasonable expectation of privacy in the disclosed information.
| Robert C. Post | The Social Foundations of Privacy and Self in the Common Law Tort | 77 Cal. L. Rev. 997 (1989) | TT | Negative | The requirement in the Restatement (Second) of “public” disclosure (often interpreted as “not to a small audience”) ignores the underlying values of the requirement. Often, the interest is to not have one’s private matters disclosed to close friends, family, coworkers, etc.—that is, one person or a small group of people. This requirement should be modified. Further, the requirement that a disclosure must be offensive should include not only the content but the manner of the disclosure. Finally, the “newsworthiness” test is being adopted in varying iterations by different courts and is unpredictable; it should be redefined clearly.
| Peter B. Edelman | Free Press v. Privacy: Haunted by the Ghost of Justice Black | 68 Tex. L. Rev. 1195, 1223 (1990) | FA; TT | Positive | The Supreme Court was cowardly and wrong in its Florida Star decision, which, sadly, ends PDPF.
| Lorelei Van Wey | Note, Private Facts Tort: The End Is Here | 52 Ohio St. L.J. 299 (1991) | FA | Negative | Florida Star marks the demise of PDPF because of the Supreme Court’s practical and analytical restrictions placed on it. The tort was not useful anyway, so it will not be missed.
| Ruth Gavison | Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech | 43 S.C. L. Rev. 437 (1991) | FA | Positive | The First Amendment should only curtail PDPF when creativity and self-expression, the worthy pursuit of truth, democracy and accountability, and stability and peaceful change are hampered. When these matters are not at play, privacy should beat free speech.
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<th>Title</th>
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<th>Evaluation</th>
<th>Results</th>
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<td>The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990, 80 CAL. L. REV. 1133 (1992).</td>
<td>Randall P. Bezanson</td>
<td>TT Negative</td>
<td>Given the modern context of individualism and diversity of values, the emphasis of PDPF should be shifted from controls over publication to a duty of confidentiality imposed on holders of private information.</td>
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<td>Trafficking in Stolen Information: A &quot;Hierarchy of Rights&quot; Approach to the Private Facts Tort, 105 YALE L.J. 727 (1995).</td>
<td>Joseph Elford, Note</td>
<td>TT Negative</td>
<td>Because PDPF is failing under the First Amendment, it should be replaced by the following new tort: a publisher or broadcaster liable for disclosure of private facts if (1) it, or one of its sources, obtained information by improper means such as physical invasion of privacy, breach of fiduciary duty, or breach of a duty of confidentiality, and (2) the defendant had actual knowledge or reason to believe that the information was obtained improperly.</td>
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<td>The Remains of Privacy’s Disclosure Tort: An Examination of the Private Domain, 55 Md. L. REV. 425 (1996).</td>
<td>Jonathan B. Mintz,</td>
<td>FA; TT Negative</td>
<td>The private domain approach to First Amendment analysis is PDPF’s last chance at survival. A “zone of fair intimate disclosure” offers a justifiable definition of this domain for PDPF purposes, but would only allow PDPF where information is taken directly from the zone of fair intimate disclosure of the plaintiff.</td>
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<td>Property Rights in Personal Information: An Economic Defense of Privacy, 84 GEO. L.J. 2381 (1996).</td>
<td>Richard S. Murph, Property Rights in Personal Information: An Economic Defense of Privacy, 84 GEO. L.J. 2381 (1996).</td>
<td>TT Negative</td>
<td>PDPF fails from an economic and practical standpoint because it does not recognize that private information is property to be bought and sold on a market. The question of PDPF should not be privacy versus the First Amendment but a question of property rights. Because of this oversight, the property right to private information is by default assigned to the party (defendant) who uncovers it—a result that is often economically inefficient.</td>
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<td>The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts, 36 SAN DIEGO L. REV. 489 (1999).</td>
<td>John A. Jurata, Jr., Note,</td>
<td>FA; TT Positive</td>
<td>In the first 90 years of PDPF, only 18 cases were won by plaintiffs. Since 1993, at least 21 plaintiffs have prevailed, including 10 in 1998 alone. Even newspapers and television stations have been liable, notwithstanding Florida Star. In short, the newsworthiness doctrine has been limited to allow more plaintiffs to prevail. This limitation has come for four reasons: (1) judges are willing to protect suspect classes and medical information; (2) plaintiffs are more skillful in selecting non-media plaintiffs, (3) tabloid journalism has increased, and (4) rise of secretly-obtained video and other information disseminated through the internet—not by the press but by individuals. Newsworthiness needs a clearer definition from the Supreme Court, so state courts know where the First Amendment boundary lies.</td>
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<td>Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You, 52 STAN. L. REV. 1049 (2000).</td>
<td>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 (2000).</td>
<td>FA; TT Negative</td>
<td>Calling a speech restriction a property right, as Murphy attempts to do, does not change the fact that it is a speech restriction and that First Amendment principles must still be applied. The question should not be who owns a property right but whether personal information is property—or should be treated like it—at all. It shouldn’t. Many suits that people would like to bring under PDPF are suits that should fall to First Amendment concerns, and First Amendment concerns are more important to society generally.</td>
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<td>The Public Disclosure of Private Facts: There Is Life after Florida Star, 50 DRAKE L. REV. 93, 98 (2001).</td>
<td>Patrick J. McNulty, The Public Disclosure of Private Facts: There Is Life after Florida Star, 50 DRAKE L. REV. 93, 98 (2001).</td>
<td>FA; TT Positive</td>
<td>PDPF is not dead, nor close to it. Florida Star only applies to cases in which the information is already in the public domain. Additionally, Florida Star should not apply to non-media defendants—in these situations, conditional privileges such as those used in defamation law better balance speech and privacy and allow for more plaintiffs to recover against non-press defendants.</td>
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<td>Conceptualizing Privacy, 90 CAL. L. REV. 1087 (2002).</td>
<td>Daniel J. Solove, Conceptualizing Privacy, 90 CAL. L. REV. 1087 (2002).</td>
<td>TT Negative</td>
<td>The law of privacy generally, including the PDPF tort, is confused because we are still unsure what privacy means and when it deserves protection. A bottom-up contextualized approach should be used to reconceptualize privacy, given the rapidly changing nature of technology. That is, privacy interests should be split into categories of contexts—situations in which privacy should be protected, and situations where it should not be protected by tort or otherwise.</td>
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<td>The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure, 53 DUKE J. 967 (2003).</td>
<td>Daniel J. Solove, The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure, 53 DUKE J. 967 (2003).</td>
<td>FA; TT Positive</td>
<td>The argument against PDPF from free speech critics like Singleton and Volokh is flawed. Not all speech is of equal value, and the First Amendment should not always win when clashing with PDPF. The focus should be on relationships in which information is transferred and the uses to which information is put, as the propriety of disclosure depends on the purpose of the disclosure—not just the type of information (public or private) disclosed. Additionally, the argument against PDPF from critics, like Posner, 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.</td>
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<td>A Social Networks Theory of Privacy, 72 U. CHI. L. REV. 919 (2005).</td>
<td>Lior Jacob Strahilevitz, A Social Networks Theory of Privacy, 72 U. CHI. L. REV. 919 (2005).</td>
<td>FA; TT Positive</td>
<td>PDPF should be flexibly expanded to cover modern social networks. Social network and information dissemination practices and theories can give courts a consistent methodology to determine when an individual has a reasonable expectation of privacy in facts shared with one or two others in-network. The question should be whether the information would have been widely disseminated regardless of the actions of the defendant. If so, there can be no liability.</td>
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<td>Daniel J. Solove</td>
<td><em>A Taxonomy of Privacy</em>, 154 U. PENN. L. REV. 477 (2006)</td>
<td>FA; TT</td>
<td>Positive</td>
<td>Nobody knows what privacy means, so judges cannot consistently apply PDPF. Disclosure protection, is an important piece of the taxonomy of privacy because disclosure can harm even where the discloser has no relationship with the plaintiff. Additionally, disclosure can inhibit the very interests protected by free speech—e.g., individual autonomy, freedom of association, etc. Finally, disclosure can threaten people’s security and hardly enhances our ability to judge about someone, as it makes people prisoners of the recorded past. Disclosure must be protected by tort and otherwise.</td>
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<td>Erwin Chemerinsky</td>
<td>Rediscovering Brandeis’s Right to Privacy, 45 BRANDEIS L.J. 643 (2006).</td>
<td>FA</td>
<td>Positive</td>
<td>PDPF and other protectors of informational privacy have not found much favor with the courts. Judges, particularly those on the Supreme Court (which have disregarded privacy concerns in decisions like Cox Broadcasting and Florida Star), should rediscover Brandeis’s right to privacy and give much more protection to informational privacy against the public disclosure of private facts. The First Amendment should not be a mammoth bar to these claims. &quot;There needs to be judicial protection of a constitutional right to informational privacy and greater safeguards through tort law and statutes.”</td>
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<td>Erwin Chemerinsky</td>
<td>Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts, 11 CHAP. L. REV. 423 (2007).</td>
<td>FA</td>
<td>Negative</td>
<td>PDPF liability is objectionable under the First Amendment because it creates civil liability for truthful speech. The Supreme Court’s decisions in this area, including Florida Star and Cox Broadcasting, do not go far enough in curbing PDPF and protecting speech. Liability for PDPF should only be allowed where there is substantial threat to safety—loss of privacy that causes mental distress, without a risk to safety, should never be actionable.</td>
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<td>Neil M. Richards</td>
<td><em>The Puzzle of Brandeis, Privacy, and Speech</em>, 63 VAND. L. REV. 1295 (2010).</td>
<td>FA; TT</td>
<td>Negative</td>
<td>PDPF as conceived by Warren and Brandeis, and solidified by Prosser, is not very useful because its defenses swallow it. It is an inadequate tool for the Information Age. A concept of intellectual privacy, as given by Brandeis later in life, would be better, as it pinpoints important private facts—ideas and beliefs to be developed away from others. Additionally, statutes do and should continue to protect privacy where PDPF and the other privacy torts fall short.</td>
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<tr>
<td>Neil M. Richards &amp; Daniel J. Solove</td>
<td>Prosser’s Privacy Law: A Mixed Legacy, 98 CAL. L. REV. 1887 (2010).</td>
<td>FA; TT</td>
<td>Negative</td>
<td>Prosser solidified privacy torts but, despite this service, he gave no guidance to privacy tort development, making adaptation to new circumstances difficult. PDPF is so limited today because Prosser gave it such a narrow scope. He sought to prevent privacy from consuming defamation and IIED. PDPF should be rehabilitated for the Information Age by moving beyond Prosser’s limited definition of privacy and accounting for (1) the social contexts in which information is shared with individuals (not just the type of information, public or private, that is shared); (2) a more sophisticated conception of harm to readily encompass psychological harm; (3) a better understanding of the relationship between free speech and privacy (to see that they are not always in conflict), and (4) a recognition of new duties and sources of duty in tort law—particularly regarding computer databases and other technology.</td>
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<td>Samantha Barbas</td>
<td>The Death of the Public Disclosure Tort: A Historical Perspective, 22 YALE J. &amp; HUM. 171 (2010).</td>
<td>FA; TT</td>
<td>Negative</td>
<td>PDPF is dead because the newsworthiness concept is so broad. Newsworthiness became so powerful as to swallow PDPF because of cultural devaluations of privacy from the 1920s to the 1940s. People did, and do, want more publicity, not less; this cultural trend got infused into the newsworthiness concept, ending PDPF.</td>
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<tr>
<td>Neil M. Richards</td>
<td><em>The Limits of Tort Privacy</em>, 9 J. TELECOMM. &amp; HIGH TECH. L. 357 (2011).</td>
<td>FA; TT</td>
<td>Negative</td>
<td>PDPF is a poor vehicle for modern privacy problems, just as it has been weak against the First Amendment. Moving forward, PDPF will be of little use, and we need to either expand it and other privacy torts or come to a new conception of privacy altogether.</td>
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* This column shows the perspective from which the author approaches the disclosure tort: TT: Tort Theory; FA: First Amendment Protection against Disclosure Tort (referred to here as PDPF—public disclosure of private facts) Liability. Sometimes the distinctions are blurred, making me give multiple labels to a piece.

“Positive” and “Negative” are assigned by my interpretation of the author’s stance vis-à-vis Prosser’s PDPF conception. If the author advocates an expansion or maintenance of the existing framework, I label the piece Positive. If the author advocates a major restriction of or movement away from the existing framework, I label the piece Negative.

*** A few notes must be made regarding the descriptions: (1) I left out most technology-based arguments, of which there are many, because these arguments are generally encompassed in Richards’s and Solove’s recent works and because they often focus on a single technology, which was, I felt, too narrow a focus for inclusion here; (2) I tried to include those pieces of scholarship strongly related to the disclosure tort in particular—not just privacy in general, of which there are many more; (3) the description does not include, in many instances, the thesis of the entire piece but rather a description of the thesis or sub-thesis most applicable to the disclosure tort; (4) these forty works are not exclusive by any stretch—many disclosure-related pieces were left out as overlapping other pieces, being too tenuously connected to the tort, or, also a possibility, I just missed them.