



LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 11-06-06

June 2011

THE LIMITS OF TORT PRIVACY

by

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The conception of tort privacy developed by Warren, Brandeis, and Prosser sits at the heart of American understandings of privacy law. Rooted in protection of private information against unwanted collection, use, and disclosure, tort privacy protects against emotional injury and was directed by design against disclosures of true, embarrassing facts by the media. In this essay, I argue that as conceived by Samuel Warren and Louis Brandeis and interpreted by William Prosser, tort privacy is a poor vehicle for grappling with problems of privacy and reputation in the digital age. Tort privacy, especially the disclosure tort, has from its inception been in conflict with First Amendment values. And when First Amendment values and tort privacy conflict, First Amendment values should prevail virtually all of the time. The disclosure tort will retain limited utility in the electronic environment, but privacy in the age of information and social media requires new strategies and new legal tools. Some of these strategies might include tort privacy as presently understood, but others require new approaches. These approaches can take either a broader look at tort privacy, including new torts and new theories of injury beyond emotional harm, or they can include new conceptions of privacy altogether, such as confidentiality law.

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* Professor of Law, Washington University School of Law. An early draft of this essay was presented at the Silicon Flatirons Conference on Privacy and the Press at the University of Colorado on December 4, 2010. For helpful comments and conversations about the ideas in this paper, thanks to Danielle Citron, Rick Garnett, Mark McKenna, Paul Ohm, Paul Schwartz, Dan Solove, and my Silicon Flatirons co-panelists Sandra Barron, David Lat, Helen Norton, and Steven Zansberg. Thanks also to participants in workshops at Notre Dame Law School and Berkeley Law School. Special thanks to Eric Schmidt and to Jim Stanley for outstanding research assistance.

INTRODUCTION

On September 19, 2010, Rutgers College freshman Darun Ravi used a webcam to covertly record a video of his roommate Tyler Clementi having sex with another student.¹ Ravi boasted about the incident on Twitter and attempted to record another of Clementi's sexual encounters two days later, inviting his Twitter followers to view streaming video of the sequel as an Internet event.² Ravi was apparently assisted in these actions by Molly Wei, a hallmate.³ On September 22, apparently as a result of the torment caused by these events, Clementi jumped to his death from the George Washington Bridge.⁴ Although it is not known whether Clementi's sexual orientation was a contributing factor in Ravi and Wei's decisions to target him, the incident helped prompt a national debate about harassment of young people on the basis of their sexuality and prompted the highly successful "It Gets Better Project" in support of gay youth.⁵ Ravi and Wei have been charged under New Jersey law with criminal invasion of privacy and transmission of the recording of a sexual act.⁶ It is likely that civil actions for invasions of privacy will be brought by Clementi's family and estate.⁷

On January 25, 2011, Egyptian dissidents opposed to President Hosni Mubarrak began a series of protests in Taksim square, using social media platforms like Twitter and Facebook to encourage attendance at their gatherings and keep readers around the world informed about their situation.⁸ In response, the Mubarak government attempted to shut off

1. Lisa Fodararo, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. See, e.g., Lisa Fodararo & Winnie Hu, *Online Musings Point to Student's State of Mind Before a Suicide*, N.Y. TIMES, Oct. 1, 2010, at A17; Sean Gardiner & Alison Fox, *Grief, Outrage at Rutgers*, WALL ST. J., Oct. 2, 2010, at A19; Brad Knickerbocker, *Tyler Clementi Suicide: Reaction Is Swift and Widespread*, CHRISTIAN SCI. MONITOR, Oct. 3, 2010, available at <http://www.csmonitor.com/USA/Society/2010/1003/Tyler-Clementi-suicide-Reaction-is-swift-and-widespread>; Kathleen Parker, *With Tyler Clementi's Death, Let's Try Friending Decency*, WASH. POST, Oct. 3, 2010, at A19; John Schwartz, *Bullying, Suicide, Punishment*, N.Y. TIMES, Oct. 2, 2010, at WK1. The "It Gets Better Project" videos are hosted at www.itgetsbetter.org.

6. Winnie Hu, *Legal Debate Swirls Over Charges in a Student's Suicide*, N.Y. TIMES, Oct. 2, 2010, at A15; Geoff Mulvihill & Samantha Henry, *N.J. Gay Video Suicide Case May Result in Bias Charges*, ST. LOUIS POST-DISPATCH, Oct. 1, 2010, at A23; Jeffrey Rosen, *Privacy Strikes Back*, NEW REPUBLIC, Nov. 11, 2010, at 5.

7. Nate Schweber, *Parents of Student Who Committed Suicide Tell Rutgers University They May Sue*, N.Y. TIMES, Dec. 23, 2010, at A30.

8. See Mansoura Ez-Eldin, *Date with a Revolution*, N.Y. TIMES, Jan. 21, 2011, at A19; Karim Fahim & Mona El-Naggar, *Across Egypt, Protests Direct Fury at Leader*, N.Y. TIMES, Jan. 26, 2011, at A1; Christine Hauser, *New Service Lets Voices from Egypt Be Heard*, N.Y. TIMES, Feb. 2, 2011, at A14; David D. Kirkpatrick, *Wired, Educated and Shrewd, Young*

almost all Internet access to the country.⁹ Such efforts have not been limited to Egypt. In Burma and Tunisia, Iran and Libya, anti-government protestors have used the same technologies as Ravi to build support and momentum for their political movements.¹⁰ Simultaneously, WikiLeaks founder Julian Assange has prompted an international diplomatic crisis by disclosing American diplomatic cables to international newspapers.¹¹

Each of these cases, from Clementi and WikiLeaks, to the “It Gets Better Project” and the Middle Eastern and North African cases, reveals the power of the Internet in the modern age. In an era of ubiquitous cameras and mobile computers, social networks, blogs, and YouTube, individuals have an unprecedented power to publish information to the world. Much of this information is trivial and mundane. But as these examples suggest, the power to broadcast to the world has tremendous potential to be used for good and for evil, to help and to harm. The *Clementi* case illustrates the power of these technologies to invade privacy and harm, while the Egyptian example shows their power to unleash important political speech. Of course, there are difficult middle cases as well—what would happen if a newspaper were to post the Clementi video on its website? What happens when the news is also an invasion of privacy? As we navigate the contours of privacy and speech, law will inevitably play an important role. How should our law conceive of these privacy issues, and what tools should it use to approach them?

For better or worse, American law currently uses tools developed in the nineteenth and mid-twentieth centuries to deal with these problems of the twenty-first. For the past 120 years, discussions of privacy in American law have been dominated by the tort conception of privacy

Egyptians Guide Revolt, N.Y. TIMES, Feb. 10, 2011, at A1; David D. Kirkpatrick & Michael Slackman, *In New Role, Egypt Youths Drive Revolt*, N.Y. TIMES, Jan. 27, 2011, at A1; Jennifer Preston, *Movement Began with Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES, Feb. 6, 2011, at A10; Anthony Shadid, *Yearning for Respect, Arabs Find a Voice*, N.Y. TIMES, Jan. 30, 2011, at A10.

9. Noam Cohen, *Egyptians Were Unplugged, and Uncowed*, N.Y. TIMES, Feb. 21, 2011, at B3; James Glanz & John Markoff, *Egypt's Autocracy Found Internet's 'Off' Switch*, N.Y. TIMES, Feb. 16, 2011, at A1; Matt Richtel, *Egypt Halts Most Internet and Cell Service, and Scale of Shutdown Surprises Experts*, N.Y. TIMES, Jan. 29, 2011, at A13.

10. Alan Cowell, *Protests Take Aim at Leader of Libya*, N.Y. TIMES, Feb. 17, 2011, at A14; Phoebe Kennedy, *Burma's Junta Can't Escape from the Net*, INDEP. (UK), Sept. 14, 2010, at 24; David D. Kirkpatrick, *Protests Spread to Tunisia's Capital, and a Curfew is Decreed*, N.Y. TIMES, Jan. 13, 2011, at A4; David D. Kirkpatrick & David E. Sanger, *A Tunisian-Egyptian Link That Shook Arab History*, N.Y. TIMES, Feb. 14, 2011, at A1; Brad Stone & Noam Cohen, *Social Networks Spread Iranian Defiance Online*, N.Y. TIMES, June 16, 2009, at A11.

11. Matthew Lee, *Leaked US Cables Reveal Sensitive Diplomacy*, REAL CLEAR POLITICS, Nov. 29, 2010, http://www.realclearpolitics.com/news/ap/politics/2010/Nov/29/leaked_us_cables_reveal_sensitive_diplomacy.html; Sarah Ellison, *Wikigate: The Twisted Inside Story of How Julian Assange Spilled the Government's Biggest Secrets*, VANITY FAIR, Feb. 2011, at 92.

advanced in 1890 by Samuel Warren and Louis Brandeis. In their famous article, "The Right to Privacy," Warren and Brandeis argued that tort law should protect a person's "inviolate personality" against their private affairs being "broadcast from the housetops," by an increasingly intrusive press.¹²

Over fifty years later, William Prosser assessed the cases that had adopted the Warren and Brandeis theory, organized them into four categories, and used his influence as the leading torts scholar of his day to ensure that his scholarly pruning became recognized by the law.¹³ Today, the law recognizes the same four privacy torts that Prosser announced in 1960: disclosure of private facts, appropriation of likeness, false light, and intrusion into seclusion.¹⁴ These four torts share several elements, but the most important ones are those exemplified by the disclosure tort—publicity given to private facts that causes emotional harm.¹⁵ Indeed, the disclosure tort conception of privacy is one that has been highly influential in American law, informing not just tort law, but civil and criminal statutes as well as widespread scholarly commentary.¹⁶

But at the same time, the disclosure tort has raised serious constitutional issues under the First Amendment, with many courts and scholars concluding that the disclosure tort is largely unconstitutional.¹⁷

12. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890); see also Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 128-31 (2007) [hereinafter Richards & Solove, *Privacy's Other Path*].

13. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); see also G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 176 (expanded ed. 2003); Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1904-07 (2010) [hereinafter Richards & Solove, *Prosser's Privacy Law*].

14. RESTATEMENT (SECOND) OF TORTS §652A(2) (1977); Melville Nimmer, *The Rights of Privacy and Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

15. "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS §652D (1977).

16. See 18 U.S.C. § 2511(1)(c) (2010) (providing criminal penalties when one "intentionally discloses . . . to any other person the contents of any wire, oral, or electronic communication" obtained through an ECPA violation); 18 U.S.C. § 2702(a)(1) (2010) ("[A] person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service."); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990); Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 330, 333-39 (1966); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

17. Jacqueline K. Rolfs, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107, 1128 (1990); Edelman, *supra* note 16, at 1207; 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); Zimmerman, *supra* note 16.

The conflict between privacy and speech is not merely an academic debate. Questions of information control and disclosure have become central to pressing questions of social policy in the digital age. How can we balance rights of privacy and rights of speech in the context of blogs, tweets, and other social networks?

This essay suggests a way forward. Part I outlines the theory and origins of tort privacy, paying particular attention to the common law tort of disclosure of private facts. Part II examines the conflict between disclosure privacy and free speech, concluding that because of the way American law has structured both free speech and the disclosure tort, the conflict is irreconcilable: We must ultimately choose between free speech or privacy protections along the lines of the disclosure tort. Part III demonstrates the limits of disclosure privacy in both traditional and social media contexts, arguing that the First Amendment should trump disclosure privacy in all but a narrow category of cases. But the harms the disclosure tort has tried but failed to remedy are real. The paper concludes by suggesting some ways other than disclosure privacy that the law can protect against some of these harms whilst also minimizing conflict with the First Amendment.

I. THE ORIGINS AND THEORY OF TORT PRIVACY

The disclosure tort has become the most successful legacy of Warren and Brandeis's "The Right to Privacy." That article's central claim is that the common law should be read to recognize a tort protecting the emotions of individuals from disclosures of private information (whether by words or pictures) about their lives. The basic argument for disclosure privacy is thus the basic argument of the Warren and Brandeis article.

Although the precise origins of the Warren and Brandeis project are unclear, the evidence suggests that the original idea for the article came from Warren and not Brandeis.¹⁸ Warren was a Boston Brahmin, a Harvard-educated lawyer and the heir to a successful family paper business.¹⁹ He married Mabel Bayard, the daughter of Senator Thomas F. Bayard.²⁰ When the Warrens became the subject of unwanted

18. James H. Barron, *Warren and Brandeis, The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890); *Demystifying a Landmark Citation*, 13 *SUFFOLK U. L. REV.* 875, 891-907 (1979); Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to the Right to Privacy*, 2008 *MICH. ST. L. REV.* 35, 44-57 (2008); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 *VAND. L. REV.* 1295, 1302 (2010) [hereinafter Richards, *Brandeis*].

19. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 68 (1946); Barron, *supra* note 18, at 908-09.

20. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 97 (2009); Gajda, *supra* note 18, at 36.

attention from the society pages of Boston newspapers, Warren enlisted Brandeis in the project, and the fruits of their labors were published in the Harvard Law Review in December 1890.²¹ The result was an argument that the common law should protect a right to privacy. It was as brilliant as it was loose with existing Anglo-American precedent.²²

I have written in greater detail about the Warren and Brandeis article elsewhere²³ and have no wish to duplicate those arguments here, but for present purposes three aspects of the article are relevant. First, the article sought to protect individuals against emotional harm—specifically the publication of private facts and photographs by journalists and others which produced hurt feelings. They argued that this “evil of the invasion of privacy” caused serious emotional and psychological damage.²⁴ “Instantaneous photographs and newspaper enterprise,” they argued, “have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”²⁵ The trade in gossip thus created by the press, the authors continued, included the publication of:

details of sexual relations and idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.²⁶

Emotional harm was thus the very essence of the injury Warren and Brandeis were seeking to remedy.

Second, Warren and Brandeis targeted newspapers as the primary source of this injury, and the core defendant for their proposed tort. They argued that although personal gossip was harmful, widely-circulated gossip by journalists was vastly more dangerous, and caused “the lowering of social standards and of morality.”²⁷ The threat posed by newspapers trading in gossip was thus a threat not just to individual feelings, but also to social morality itself. Viewed in this way, even harmless gossip would

21. Richards, *Brandeis*, *supra* note 18, at 1302.

22. Richards & Solove, *Privacy's Other Path*, *supra* note 12, at 129-31.

23. See *id.*; Richards, *Brandeis*, *supra* note 18.

24. Warren & Brandeis, *supra* note 12, at 195.

25. *Id.*

26. *Id.* at 196.

27. *Id.*

have the effect of “inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.”²⁸ By crowding out more serious and important information in the minds of citizens, gossip lowered social standards and encouraged “the weak side of human nature” to flourish.²⁹ Protecting privacy was thus essential to protect not just hurt feelings, but the level of public discourse itself. But by conceptualizing the tort in this way, “The Right to Privacy” called for liability of the press for disclosing truthful private information—a tort against true publications that hurt people’s feelings. By crafting the tort in such a way, “The Right to Privacy” gave birth to a tort that was inevitably going to come into conflict with the constitutional values protected by the First Amendment.

The third relevant dimension of “The Right to Privacy” was its reliance on the public/private distinction, both to the nature of “private” versus “public” facts, and to the scope of legitimate press inquiry as to those facts. The proposed tort would only protect facts “concern[ing] the private life, habits, acts, and relations of an individual,”³⁰ but would not “prohibit any publication of matter which is of public or general interest.”³¹ Thus, the tort would not prohibit the publication of information with a “legitimate connection” with the fitness of a candidate for public office or any actions taken in the public sphere.³² Acknowledging that this principle was more along the lines of a rough sketch, the authors conceded that they had not provided “a wholly accurate or exhaustive definition,” and left the contours of the distinction to the common law method of case-by-case adjudication.³³ But they insisted that the new tort’s lodestone should be the idea that “[s]ome things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.”³⁴

If Warren and Brandeis gave tort privacy its name and guiding principles, William Prosser gave it form and brought it into the mainstream of American tort law.³⁵ Although few courts adopted or

28. *Id.*

29. *Id.*

30. *Id.* at 216.

31. *Id.* at 214.

32. *Id.* at 216.

33. *Id.*

34. *Id.*

35. For a more detailed examination of Prosser’s ambivalent influences on the development

recognized privacy in the early years after Warren and Brandeis published their article, by the time Prosser began to write about privacy there were several hundred such cases.³⁶ Over four decades from the 1940s until the 1970s, Prosser worked to give the privacy torts order and form.³⁷ His principal contribution was to argue that the cases adopting the Warren and Brandeis formulation represented not just one tort but “four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by a common name, but otherwise have nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, ‘to be let alone.’”³⁸ Prosser described his four torts as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.³⁹

These four torts were recognized by the courts and today are the foundation of modern tort privacy.⁴⁰

But Prosser's influence on tort privacy was mixed. While he gave the torts a stature they had previously lacked, by including them as recognized causes of action in his casebooks and treatises, Prosser also limited tort privacy's ability to evolve.⁴¹ Today the four privacy torts remain on the books much as Prosser left them at his death in 1972—intrusion, disclosure, false light, and appropriation. Nevertheless, most states recognize some or all of Prosser's privacy torts. For example, in *Lake v. Wal-Mart Stores*, Minnesota became the 46th state to recognize some or all of privacy torts.⁴² The case involved the misappropriation and circulation in the community of holiday snapshots depicting the two female plaintiffs, Lake and Weber, “naked in the shower together.”⁴³ Unlike in the *Clementi* case, the photograph was apparently taken

of tort privacy, see generally Richards & Solove, *Prosser's Privacy Law*, *supra* note 13.

36. Prosser, *Privacy*, *supra* note 13, at 388.

37. Richards & Solove, *Prosser's Privacy Law*, *supra* note 13, at 1895-1903.

38. Prosser, *Privacy*, *supra* note 13, at 389.

39. *Id.*

40. Richards & Solove, *Privacy's Other Path*, *supra* note 12, at 1907-08.

41. *Id.*

42. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

43. *Id.* at 232.

consensually by Weber's sister who had gone on holiday with them. The plaintiffs had the film developed at Wal-Mart, only to discover a note when they collected the prints that some photographs had not been developed due to their "nature."⁴⁴ Over the next few months the plaintiffs became aware that the nude photographs had in fact been developed and were circulating in the community along with hurtful speculation about the plaintiffs' sexualities. Feeling their privacy to have been invaded, the plaintiffs sued Wal-Mart. Invoking both the Warren and Brandeis article and Prosser's *Restatement* formulation, the Court held that

Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close. Here [plaintiffs allege] that a photograph of their nude bodies has been publicized. One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection. Therefore, without consideration of the merits of Lake and Weber's claims, we recognize the torts of intrusion upon seclusion, appropriation, and publication of private facts.⁴⁵

Although liability in privacy cases appears to be rare, *Lake* illustrates how the four privacy torts remain alive, and that they also have an application beyond press defendants.

II. DISCLOSURE AND THE FIRST AMENDMENT CRITIQUE

Although the disclosure tort has been adopted in most states and influenced a variety of other kinds of privacy protections, it has always remained under something of a cloud because of its inherent tension with the free speech protections of the First Amendment. The conflict between the disclosure tort and speech was first recognized by its creators. Warren and Brandeis hoped that the public/private distinction would sufficiently balance privacy rights against free speech. They also acknowledged that their proposed tort should apply only to written disclosures of private fact, and not "grant any redress for the invasion of privacy by oral publication in the absence of special damage."⁴⁶ The authors explained that "[t]he injury resulting from such oral communications would ordinarily be so trifling that the law might well,

44. *Id.* at 233.

45. *Id.* at 235.

46. Warren & Brandeis, *supra* note 1212, at 217.

in the interest of free speech, disregard it altogether.”⁴⁷ This passage is interesting not only because it shows that even Warren and Brandeis were aware that their proposed tort raised free speech issues, but also because it illustrates that their primary concern was written communication by newspapers as mass media.

Prosser had even greater misgivings than Warren and Brandeis about the constitutionality of the privacy torts, especially disclosure and false light. He worried that tort privacy threatened to upset the carefully-crafted balances that tort law had established, and his codification of the privacy cases into his treatises and the Restatement (of which he was the principal reporter) reflected these concerns. In an influential 1960 article, he lamented the trajectory that was bringing the disclosure tort in particular into conflict with the First Amendment. In contrast to defamation law, which protected press defendants through doctrinal mechanisms like the retraction statutes, the truth defense, proof of special damages, the disclosure and false light torts in particular lacked any such limitations. Prosser was worried that liability in privacy cases could arise from the publication of non-defamatory truthful facts or even “laudatory fiction.”⁴⁸ Even worse, Prosser argued, was the likelihood that under open-ended tests like “ordinary sensibilities’ or the ‘mores’ of the community as to what is acceptable and proper, the courts, although cautiously and reluctantly, have accepted a power of censorship over what the public may be permitted to read, extending very much beyond that which they have always had under the law of defamation.”⁴⁹

Today, the concept of disclosure privacy is most clearly embodied in Section 652D of the Restatement (Second) of Torts. That section provides that

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.⁵⁰

Reorganizing this language slightly, we can think of the disclosure tort as having three basic elements: (1) publicity given to (2) private, non-newsworthy facts that are (3) highly offensive. Remarkably, *each* of these elements creates tension with the First Amendment. For example, the publicity requirement is usually interpreted to require “public communication.” As the official comment to this section of the

47. *Id.*

48. Prosser, *Privacy*, *supra* note 13, at 422.

49. *Id.* at 423.

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

Restatement makes clear, publicity “means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”⁵¹ Publicity can be oral, written, or electronic, but “any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity[.]”⁵² Because the publicity requirement is crafted in this way, the disclosure tort targets mass communications such as newspapers—exactly the kinds of publications likely to raise First Amendment concerns. By contrast, publicity is not triggered by communicating private facts “to a single person or even to a small group of persons.”⁵³ Some cases have read publicity more narrowly, allowing particularly harmful facts made known in a workplace, for instance.⁵⁴ But these cases remain a clear minority.

But because mass publicity is one of its key elements, the disclosure tort targets those disclosures most likely to raise First Amendment concerns because they bear a close resemblance to a news broadcast.⁵⁵ At the same time, the focus on mass publicity diverts attention away from other uses of words that may be both more injurious and less threatening to the First Amendment. Robert Post notes, for example, that “[w]e often care more about what those within our ‘group’ think of us than we do about our reputation among the strangers who comprise the general public. Yet the publicity requirement, as defined by the Restatement, would impose sanctions for the disclosure of a husband’s marital infidelity to the general public, but not for its disclosure to his wife.”⁵⁶ Recall once more the streaming of the Clementi sex video, which though announced on Twitter, was apparently only viewed by a relatively small number of people. Under the traditional definition of publicity in the disclosure tort, the circulation of a video to a small group of people would not by itself be actionable without some likelihood that the video became “a communication that reaches, or is sure to reach, the public.”⁵⁷

51. *Id.* at cmt. a.

52. *Id.*

53. *Id.*

54. *See, e.g.*, *Miller v. Motorola*, 560 N.E.2d 900 (Ill. App. 1990); *see also* *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. 1977); *see generally*, DANIEL J. SOLOVE & PAUL SCHWARTZ, *INFORMATION PRIVACY LAW*, 116 (3d ed. 2006) (collecting cases).

55. *Cf.* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (noting that private speech “is of less First Amendment concern”).

56. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 992 (1989); *see also*, Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 438 (1996).

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

The focus on publicity thus increases the constitutional risk, without necessarily focusing liability on the most harmful kinds of disclosures.

The second problem with the disclosure tort is that it requires judges to divide the world of press publications into public and private, requiring them to protect the public and hold liable the private. The public/private distinction comes into play in two areas of the common-law tort—the requirement that the information be “private,” and the limitation that the disclosure of information is not of “legitimate concern to the public.” Although these are today formally separate elements in the tort, it makes sense to treat them together. As Warren and Brandeis themselves recognized, these elements are usually related—information which is truly private is not fit for public consumption and vice versa.⁵⁸ Yet the distinction between private information and information that is protected in the interest of public debate can be a difficult one, because information can be in both categories at once (think Bill Clinton’s extramarital affairs) or can lie in the extremely fuzzy area between the two concepts, which are themselves poorly defined.

More difficult than the definitional problem is a substantive one: The idea that courts should police what publications are of “legitimate concern to the public” and which are not raises a serious risk of censorship. Warren and Brandeis recognized that this was a potentially fuzzy distinction, but they had faith in the ability of courts to police the line in a fair, principled, and determinate way.⁵⁹ Warren and Brandeis were writing before the First World War, during a period in American jurisprudence when First Amendment protections were thinly protected. Brandeis himself later admitted that he had not “thought through” the issues of the First Amendment until he was forced to rule on a series of important prosecutions under federal and state espionage acts from 1919–1927,⁶⁰ and there is evidence to believe that he backed away from his nineteenth century confidence in the ability of courts to police legitimate and illegitimate speech when he was confronted as a judge with the problems of the twentieth century. For example, Brandeis dissented from the Court’s recognition of a common law right preventing news services from the reprinting “hot news” gathered by competitors in *International News Service v. Associated Press*.⁶¹ Brandeis argued that the “free use of knowledge and of ideas” could be curtailed by the recognition of a quasi-property right in news reports.⁶² In a departure from the faith he placed in the common law’s ability to regulate the press in “The Right

58. See *supra* notes 28–32 and accompanying text.

59. Richards, *Brandeis*, *supra* note 18, at 1308.

60. *Id.* at 1340–41.

61. 248 U.S. 215 (1918).

62. *Id.* at 263.

to Privacy,” Brandeis suggested that while the common law “possesses capacity for growth and has often satisfied new demands for justice by invoking analogies or by expanding a rule of a principle,” this approach was unwarranted in the factual context of the news business.⁶³ Although common law rules could prove useful for simple legal problems involving only private interests, “with the increasing complexity of society, the public interest tends to become omnipresent.”⁶⁴

Subsequent disclosure cases bore out Brandeis’s suspicion that while the line between public and private is easy to understand in the abstract, in practice it is very hard to draw with any confidence or predictability. And as the twentieth century marched on, judges (especially Brandeis himself) came to link freedom of speech to democracy and to believe that questions as important as what constitutes a matter of public concern were not only becoming too difficult to leave to courts, but should as a normative matter be left to individual citizens to decide for themselves.⁶⁵ In a recent article, Samantha Barbas argues quite convincingly that in a series of mid-century disclosure tort cases, judges deciding tort actions were in reality thinking through the basic elements of free speech law, including broadening the notion of what was a legitimate matter of public concern. Surveying the mid-century disclosure tort cases, Barbas shows how in the disclosure tort cases, judges recognized a social

expansion of the definition of “the news” to encompass a wide variety of information, including private facts, and a reassessment of the significance of the news media to modern social life. We see the emergence of the concept of “the public’s right to know” about the world through the news media, and the ideas that the purpose of the news is not only to inform citizens about the complex workings of modern society but to generate public discourse. For the news media to achieve this function, there must be robust legal and constitutional protection for a free press, and news content must be as extensive as the public’s interests and concerns.⁶⁶

From the mid-twentieth century to the present, the Supreme Court’s First Amendment case law has taken a similarly broad view of the “legitimate public concern” standard. In *Time v. Hill*, the court first addressed a claim that privacy liability against the media offended the First Amendment, holding that a false light claim against *Time* magazine

63. *Id.*

64. *Id.*

65. See generally MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920 (1997); WHITE, *supra* note 13.

66. Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J. L. & HUM. 171, 173 (2010).

required the plaintiffs to satisfy the stringent actual malice standard from *New York Times v. Sullivan*.⁶⁷ Even though the case had been brought by a previously unknown family who had been the victim of a celebrated hostage ordeal, the Court held that the First Amendment required broad deference to the press's determination of what was in the public interest. As Justice Brennan put it,

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.⁶⁸

Time v. Hill represents a foundational and enduring commitment of the modern First Amendment—the idea that free speech is valuable because it helps to preserve an informed citizenry, and the state should not attempt to proscribe the fit subjects for public debate.⁶⁹ *Snyder v. Phelps*, the Court's most recent word on the intersection between tort liability for emotional injury and the First Amendment, also applied this standard, giving strong protection to even offensive and unrefined speech on matters “of interest to society at large.”⁷⁰ These ideas are also traceable back to Louis Brandeis, and represent the germination of his mature free speech jurisprudence which is directly at odds with many of the assumptions and arguments of “The Right to Privacy.”⁷¹

The mature Brandeis seems to have the better argument with respect to the direct separation of public from private by courts in privacy tort cases. My claim here is not that the public-private line is indefensible or always unworkable, but rather to suggest that as Brandeis predicted in *INS v. AP*, disclosure tort cases applying the test in practice have required courts to engage in a process that is, in the words of one scholar, an

67. *Time v. Hill*, 385 U.S. 374 (1967) (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

68. *Id.* at 385 (quoting *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

69. See Barbas, *supra* note 66, at 214.

70. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

71. Richards, *Brandeis*, *supra* note 18, at 1323–34.

“abstract, circular, and highly indeterminate question.”⁷² Moreover, because that indeterminacy operates in an area of First Amendment sensitivity, it raises additional constitutional concerns. Giving a court the power to declare information “illegitimate” under a malleable standard is to give that court the power to censor expression that it (or a jury) dislikes, and is at odds with modern commitments to the freedom of expression.

The third problem with the notions of tort privacy rooted in nondisclosure is the nature of the injury that the tort protects. Although Warren and Brandeis spoke in terms of the dignity of individuals whose private matters were made public, the injury the tort sought to remedy was psychological, rooted in embarrassment causing harm to what they called a person’s “involute personality.”⁷³ This move was part of a trend in cases in the late nineteenth and early twentieth century to broaden the conception of tort harm beyond physical and property injuries to include psychological injury.⁷⁴ In this respect both privacy and the emotional distress torts shared many similarities, and Prosser was involved in the shaping of both categories of these torts into their modern forms.⁷⁵ But remedying the emotional harm caused by words also conflicts with First Amendment norms. A central tenet of modern First Amendment law is the idea that words causing hurt feelings, without more, cannot be punished by the state or made the subject of civil liability. Thus, in *Cantwell v. Connecticut*, the Court held that the playing in a Catholic neighborhood of a vitriolic record denouncing the Pope was protected by the First Amendment even though it “aroused animosity.”⁷⁶ Although two years later the Court held in *Chaplinski v. New Hampshire* that the First Amendment did not protect “fighting words” on the theory that words that wound do not contribute to the processes of free speech, the category of fighting words has rarely been litigated and the Court has never upheld a subsequent conviction under the fighting words theory, even when presented with strikingly similar facts.⁷⁷

The idea that valuable speech must be protected notwithstanding any emotional harm it causes has continued to be a major feature of

72. Strahilevitz, *supra* note 16, at 921.

73. Warren & Brandeis, *supra* note 12, at 195.

74. See DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 175-76 (2008).

75. WHITE, *supra* note 13, at 173; Richards & Solove, *Privacy's Other Path*, *supra* note 12, at 1908-09.

76. 310 U.S. 296, 311 (1940).

77. 315 U.S. 568 (1942); see, e.g., Gooding v. Wilson, 405 U.S. 518, 528 (1972) (striking down an almost identical fighting words statute to the one it upheld in *Chaplinski* under an overbreadth theory); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (noting that speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger,” and striking down a fighting words statute for overbreadth).

modern First Amendment law. In *New York Times v. Sullivan*, the Supreme Court announced what commentators have called the “central meaning” of the modern First Amendment⁷⁸—that the First Amendment is principally a tool advancing democratic self-government through public debate in the press that is “uninhibited, robust, and wide-open,” and which frequently calls for “vehement, caustic, and sometimes unpleasantly sharp attacks” on public men and women and their role in society.⁷⁹ Consequently, at least when it constitutes protected speech, expression has been strongly privileged at the expense of even serious emotional harm. Although *Sullivan* was not a privacy case, dealing instead with the related cause of action of defamation, subsequent cases have made clear that the *Sullivan* privilege for speech over emotional harm applies in the privacy area as well. *Time v. Hill*, as noted above, extended the actual malice requirement to false light invasion of privacy claims against the press. And in *Gertz v. Welch* and *Firestone v. Time*, the Court noted that granting damages for speech alleged to have caused emotional harm risks punishment merely for unpopular opinion.⁸⁰ Other cases involving claims under the disclosure tort and similar legal theories have also been consistently rejected in favor of First Amendment deference, though the Court has been careful never to declare the disclosure tort unconstitutional in all of its potential applications.⁸¹

The most important case involving the clash between free speech and emotional harm is *Hustler v. Falwell*.⁸² That case made the strongest statement yet that tort liability for words causing emotional harm is a direct threat to the free exchange of information and ideas. At least where public figures are the subject of the intentional infliction of emotional distress, the First Amendment protects even “outrageous”

78. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 Sup. Ct. Rev. 191, 208.

79. 376 U.S. 254, 270 (1964).

80. *Firestone v. Time*, 424 U.S. 448, 475 n.3 (1976); *Gertz v. Welch*, 418 U.S. 323, 349 (1974).

81. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 526–28 (2001) (holding that a radio station cannot be prohibited from publishing newsworthy information of public concern, even where such information had been illegally obtained by a third party); *Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (holding that a state statute prohibiting the publication of the name of a rape victim was unconstitutional as applied to a newspaper that had obtained the name from a “publicly released police report”); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979) (holding the First Amendment prohibits a state from punishing a newspaper for publishing the name of a juvenile murder suspect because the press lawfully obtained the information); *Okla. Publ’g Corp. v. Okla. County Dist. Court*, 430 U.S. 308 (1977) (holding the First Amendment prevents a state court from prohibiting the media from publishing the name of a juvenile in a proceeding that a reporter attended); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding the name of a rape victim obtained by the press from public records cannot be prevented from being published by statute or made the basis for liability under the nondisclosure tort).

82. 485 U.S. 46 (1988).

attempts to cause emotional harm through crude caricature. Part of the problem is a practical one—it is difficult to separate out worthless speech causing emotional harm from valuable expression. Considering the question, Chief Justice Rehnquist noted that “if it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description ‘outrageous’ does not supply one.”⁸³ Moreover, the indeterminacy of the legal standard created by the emotional harm/valuable speech binary creates risks of censorship. As the Court put it,

“Outrageousness” in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.⁸⁴

When it comes to separating worthless emotional harassment from protected speech, the parallels to the public/private problem are striking, especially when applied to public figures or public matters.

The practical problem of separating the protected from the unprotected is hard enough for courts acting in good faith, but the indeterminate legal standard creates a second problem—the risk of overt or implicit censorship on the basis of viewpoint or dislike of the speaker. Thus, in the recent case of *Snyder v. Phelps*, the Supreme Court concluded that, at least for speech on a matter of public concern delivered in a public place, an outrageousness requirement is insufficient to protect free speech, as it still allows a jury to punish speech because of its viewpoint. When tort injury conflicts with free speech, the Court concluded, free speech must win because “in public debate we must tolerate insulting, and even outrageous speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”⁸⁵

These three problems inherent in the design of the disclosure tort—the media as a target, the public/private problem, and damages based on emotional harm—have rendered the disclosure tort a highly limited and constitutionally suspect remedy. This is particularly true in the very cases

83. *Id.* at 55.

84. *Id.*

85. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

which it was created to address—actions against the media for publishing private facts causing emotional harm. Perhaps ironically, disclosure-based theories of relief might be more applicable when the press is not involved, as in contexts like *Lake* and *Clementi*, because these cases do not involve public figures and thus seem to raise less of a First Amendment threat. The Internet has, however, blurred the distinction between public and private figures, and between the press and others.⁸⁶ If anything, this makes the good faith line-drawing exercises between press/non-press, public/private, and emotional harm/protected speech all the more difficult for courts to perform; it also increases the risk of bad faith or pretextual censorship under vague standards.

As a result, both because of the design of the tort and as a result of the evolution of the law, tort privacy remedies for disclosure against the press are largely unconstitutional under current law. And as a basis for protecting privacy, tort privacy is a very limited remedy. The history of the development of disclosure privacy and free speech over the twentieth century thus reveals that we must ultimately make a choice—either categorically or on a case-by-case basis—between disclosure privacy and freedom of speech.

III. THE LIMITS OF DISCLOSURE

If we must choose between disclosure privacy and speech in most cases, what choice or choices should we make? In this Part, I argue that when disclosure privacy conflicts with free expression, we should choose free expression, subject to a few limited exceptions. Although this question has taken on new importance over the past decade, the question has engaged prominent scholars across several generations.⁸⁷ At the risk

86. David Lat's essay in this volume makes many of these arguments in detail. See David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. ON TELECOMM. & HIGH TECH. L. 403 (2011); see also Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447 (2006); Anthony Ciolli, *Bloggers As Public Figures*, 16 B.U. PUB. INT. L.J. 255 (2007).

87. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 556 (1970); DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* (2008) [hereinafter SOLOVE, *FUTURE OF REPUTATION*]; Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis's Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611 (1968); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren & Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990); Marc A. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963); Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039 (2009); Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437 (1992); Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139 (2001); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957

of oversimplifying a fairly complex debate, scholars have coalesced around one of two positions.

On the one hand are the First Amendment critics of disclosure privacy. These scholars argue that the disclosure tort is unconstitutional, and should be jettisoned entirely in the interests of free speech. As early as 1967, Harry Kalven argued that “fascination with the great Brandeis trade mark, excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical sense of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored.”⁸⁸ Fifteen years later, Diane Zimmerman went further and suggested that the disclosure tort was not only unworkable in practice, but “created a cause of action that, however formulated, cannot coexist with constitutional protections for freedom of speech and press.”⁸⁹ Most recently, Eugene Volokh argued that “the right to information privacy – my right to control your communication of personally identifiable information about me – is a right to have the government stop you from talking about me.”⁹⁰ Unlike Kalven and Zimmerman, who were writing solely about the disclosure tort, Volokh’s First Amendment claims extend to almost the entirety of information privacy law.⁹¹

On the other hand, privacy scholars typically claim that disclosure privacy serves important social interests, and that we should be able to strike a balance between privacy and speech, preserving control over injurious gossip while maintaining a robust commitment to speech of legitimate public interest. For example, Robert Post maintains that the disclosure tort serves a social purpose in the “maintenance of rules of civility” that protect human dignity, and that in the “various and inconsistent applications of the ‘legitimate public concern’ test, one can trace the wavering line between the insistent demands of public accountability and the expressive claims of communal life.”⁹² Daniel Solove argues that the disclosure tort can be balanced with the First

(1989); Roscoe Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. RES. L. REV. 34 (1961); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005); Frederick Schauer, *Free Speech and the Social Construction of Privacy*, 68 SOC. RES. 221 (2001); Volokh, *supra* note 17.

88. Kalven, *supra* note 87, at 328.

89. Zimmerman, *supra* note 16, at 293.

90. Volokh, *supra* note 17, at 1050-51

91. *Id.*

92. Post, *supra* note 87, at 1007-08. Post goes on to assert that “Common law courts, like the rest of us are searching for ways to mediate between these two necessary and yet conflicting regimes. We can understand the public disclosure tort, then, as holding a flickering candle to what Max Weber called in 1918 the ‘fate of our times,’ which is of course the ‘rationalization and intellectualization, and above all, . . . the ‘disenchantment of the world.’” *Id.* at 1008.

Amendment, and can apply to “speech of private concern.” He argues that Brandeis “reconciled free speech and privacy with the newsworthiness test,”⁹³ and that the law should do a better job striking a “delicate balance” between speech and privacy in individual cases.

While my personal sympathies lie closer to the privacy advocates, I think on balance the First Amendment critics have the better of the argument with respect to the disclosure tort, at least most of the time. When the First Amendment critique applies in the disclosure context, it ought to triumph. Post is correct that, in its Gilded Age origins, and in its protection of emotional harm and propriety, disclosure privacy protects against egregious breaches of etiquette. Fundamentally, because of the way it is structured to remedy emotional injury, tort privacy runs into almost intractable problems when it restricts speech protected by the First Amendment, whether by the press or other speakers.⁹⁴ The problem with Post’s theory is that the core of the modern First Amendment protects a right to offend in furtherance of the robust exchange of ideas and information. First Amendment rights must trump disclosure privacy except in cases of truly extraordinary disclosures of private information. This is the case not merely as a formal matter because it applies the First Amendment rather than common law interests, but because free speech is a more important value.

But what about the sort of “delicate balance” that Solove calls for? As Part II demonstrated, the design of the common law disclosure tort renders it particularly subject to abuse by well-meaning courts as well as those who might use it as a pretext for censorship. In extraordinary cases, perhaps involving sexually-themed disclosures such as sex tapes, tort privacy might be able to survive a direct clash with the First Amendment. A few such cases impose liability for psychological injuries over free press challenges.⁹⁵ But such cases are likely to remain outliers, and appropriately so. As Brandeis himself grudgingly recognized later in life, a tort-based conception of privacy protecting against purely emotional harm must remain exceptional in a constitutional regime dedicated to speech, publicity, and disclosure.⁹⁶

How, then, should courts balance free speech against privacy in practice? While the free speech critique of tort privacy should triumph where it applies, we should recognize that the First Amendment does not immunize all true statements by all speakers (or even all journalists).

93. SOLOVE, *FUTURE OF REPUTATION*, *supra* note 87, at 129, 160.

94. Zimmerman, *supra* note 16; Volokh, *supra* note 17.

95. *See, e.g., Michaels v. Internet Entm’t Grp., Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (granting a preliminary injunction barring the Internet distribution of a sex video made by celebrity couple plaintiffs, notwithstanding the defendant’s claims of newsworthiness).

96. Richards, *Brandeis*, *supra* note 18, at 1323-24.

Even though Warren and Brandeis's core case of disclosure of private embarrassing facts by the press is largely unconstitutional, it does not follow that all privacy claims (even against the press) are unconstitutional, too. Under current law, the well-established rule is that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order."⁹⁷ Unpacking this standard suggests four exceptions to the general principle that press publication of the truth is always constitutionally protected.

First, if the information disclosed is not true, all bets are off, and we return to defamation law, which remedies false statements of fact. Of course, American defamation law after *New York Times v. Sullivan* is quite press-friendly, but where the information is false and intentionally disclosed, the press can be held liable under the actual malice standard for public figure plaintiffs, or lower standards for private or limited-purpose public figures.⁹⁸

If the information disclosed is not "lawfully obtained," the press can be held liable under a second theory. In *Bartnicki v. Vopper*, a radio DJ broadcast a recording of an intercepted telephone call that had been left in his mailbox by an unknown person. The Court held that even though the journalist knew the conversation had been illegally obtained in violation of the federal Wiretap Act, the First Amendment protected its broadcast.⁹⁹ But the Court also noted that if the journalist had participated or solicited the wiretap, the First Amendment would not protect him from civil or criminal punishment:

Our holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully. It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.¹⁰⁰

This is consistent with the idea in First Amendment law that the press has no exemption from "generally-applicable laws"—that the press should have wide discretion in being able to disseminate ideas and

97. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979). The Supreme Court most recently reaffirmed this standard explicitly in *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

98. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2000).

99. *Bartnicki*, 532 U.S. at 535.

100. *Id.* at n.19 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972)).

information, but that this discretion does not allow exemptions from the ordinary tort, contract, property, and regulatory laws that govern all of us in our daily affairs without dictating the content of our expression.¹⁰¹ From this perspective, there is a crucial distinction between breaking the law to obtain information (whether by wiretapping, trespassing, hacking, or other means) and the innocent dissemination of news generated by that law-breaking.¹⁰² It also suggests, going beyond disclosure for a moment, that restrictions sounding in trespass or other theories protecting against the collection of embarrassing information are less problematic from a First Amendment perspective when they remedy harms flowing from the *collection* and not the *disclosure* of the private information.

A third exception under current law is that disclosures of private information that is not of legitimate concern to the public (or “newsworthy”) are entitled to a lower level of First Amendment protection. Solove relies on this exception when he argues that because the Supreme Court has hinted that speech on matters of private concern is less protected than other kinds of speech, the Court “has thus left open an area for the public-disclosure tort to thrive.”¹⁰³ This interpretation of the law probably overstates the vitality not only of the disclosure tort, but of disclosure-based theories of privacy more generally. The Supreme Court in particular has been quite reluctant to second-guess the editorial judgments of journalists. For instance, in *Bartnicki* the Court deferred quite readily to the media’s argument that the intercepted telephone conversation was newsworthy.¹⁰⁴ Most courts tend to define what is newsworthy by what is published by the press, under the theory that the press is the best judge of what sells papers, but certain kinds of outrageous disclosures have been held to lie beyond the pale. In such extraordinary cases, usually involving sexually-themed disclosures, tort privacy can survive a direct clash with the First Amendment protections given to the press. As discussed earlier, a few such cases impose liability for psychological injuries over free press challenges, most famously one granting an injunction to actress Pamela Anderson against the distribution of a graphic sex tape.¹⁰⁵ But as noted above, such cases must

101. See, e.g., *Cohen v. Cowles Media*, 501 U.S. 663 (1991) (holding journalist liable for breach of promise of confidentiality to a source over First Amendment objections).

102. See Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650 (2009).

103. SOLOVE, *FUTURE OF REPUTATION*, *supra* note 87, at 129.

104. *Bartnicki*, 532 U.S. 514.

105. See, e.g., *Michaels v. Internet Entm’t Grp., Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (granting a preliminary injunction barring the Internet distribution of a sex video made by celebrity couple plaintiffs, notwithstanding the defendant’s claims of newsworthiness). See *supra* note 95 and accompanying text.

remain outliers. Insofar as the public disclosure tort remedies Post's breaches of etiquette, it is only the most psychologically harmful and outrageous breaches of social norms that would seem to satisfy this exception.

More generally, however, courts are reluctant to second-guess the views of individual citizens about what the legitimate topics of public debate really are. The power to declare facts or topics to be off limits to public discussion is in a very real sense the power to censor, and modern First Amendment theory is built around this idea—traceable to Justice Brandeis' opinion in *Whitney v. California* that the normal remedy for harmful, dangerous, or otherwise “bad” speech is more speech rather than censorship.¹⁰⁶ Given that courts have routinely held that the publication of the name of a rape victim is “newsworthy,”¹⁰⁷ and particularly given censorship concerns in this area, it is hard to imagine a category beyond the dissemination of videos of sexual or other intimate bodily activities that would satisfy this exception.

The fourth and perhaps largest exception to the principle of protection for true facts is the presence of a state “interest of the highest order.”¹⁰⁸ Restrictions on the publication of true, newsworthy, lawfully obtained facts invoke strict scrutiny, but one could imagine interests that could survive a strict scrutiny challenge. For instance, national security could trump the First Amendment if a newspaper is disclosing the lawfully-obtained names of spies, or (to use an old trope that runs through the case law) the “publication of the sailing date of transports or the number and location of troops” or other time-sensitive military secrets.¹⁰⁹ In the “Pentagon Papers” case of *New York Times v. United States*, the Court held that publication of the Pentagon Papers could not be enjoined absent a showing of a more serious threat to national security than the Nixon Administration made. The case stands for the proposition that it can be hard to get an injunction *before* publication because of prior restraint concerns, but it says nothing authoritative about whether the press can be punished *after* publication for injuring national security.¹¹⁰ Under current law, for example, it is a federal crime for anyone to disclose defense secrets that could be used to the “detriment of the United States or to the advantage of any foreign nation.”¹¹¹ This statute is likely constitutional even as applied to the

106. *Whitney v. Cal.*, 274 U.S. 357, 376 (1927) (Brandeis, J., dissenting).

107. *E.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989).

108. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

109. *E.g.*, *New York Times v. United States* 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (quoting *Near v. Minn.*, 283 U.S. 697, 716 (1931)).

110. In this regard, see Justice White's concurrence, *New York Times*, 403 U.S. at 730–40 (White, J., concurring).

111. 18 U.S.C. § 793(e).

disclosure of true, newsworthy, lawfully-obtained facts, but only as applied to materials for which the government can prove an actual and serious threat to national security.

The problem with the “interest of the highest order” exception for the constitutionality of disclosure privacy is that the showing necessary to satisfy the exception is extremely high—the compelling government interest and least-restrictive means required to satisfy First Amendment strict scrutiny. It is no coincidence that the standard example given here is harm to national security caused by the disclosure of defense secrets or dangerous technical information like the construction of bombs or weapons of mass destruction. In such cases the potential harm is lots of dead soldiers.

By contrast, it is unlikely that disclosure privacy could qualify as a sufficiently compelling interest except in the most extraordinary of cases. For example, in a line of free speech cases seeking the withholding of true but harmful information, very few interests other than national security have survived the scrutiny that this exception requires. In the *Landmark Press* case, the Court held that the confidentiality of a state judicial ethics investigation was an insufficiently strong interest to punish the press from divulging lawfully obtained information about an ongoing procedure.¹¹² Central to the Court’s reasoning was the availability of a less restrictive means—rather than punishing the press for publishing the truth, it suggested, the state should first try the more modest step of taking steps to reduce the likelihood of leaks from state employees to the press.¹¹³ In *Nebraska Press v. Stuart*, the state interest arrayed against the freedom of the press was of a constitutional magnitude—the fair trial rights of an accused defendant in a high-profile murder case whom the trial court sought to protect by enjoining reportage on his alleged confession.¹¹⁴ The constitutional criminal procedure rights of the defendant would seem to be at least as strong as tort privacy rights.¹¹⁵ But in this case as well, the Court held for the newspaper, reasoning that before taking the blunt step of restricting the free flow of true information in the press, the state could take other measures less restrictive of First Amendment rights, such as a change of venue, postponement of the trial until the media frenzy had abated, jury instructions to disregard facts learned outside the trial, or even sequestration of the jury.¹¹⁶ The recent WikiLeaks dispute garnered

112. *Landmark Commc’ns v. Va.*, 435 U.S. 829 (1978).

113. *Id.*

114. 427 U.S. 539 (1976).

115. The leading English privacy law scholar Gavin Phillipson has made this point recently. See Gavin J. Phillipson, *Trial By Media: The Betrayal of the First Amendment’s Purpose*, 71 L. & Contemp. Probs. 15, 16-17 (2008).

116. *Id.*

much speculation about whether Assange could be punished for the disclosure of diplomatic cables under this exception, and experts were divided about whether even this disclosure could be punished without additional factors present such as hacking or solicitation of leaks.¹¹⁷ Facing such a standard, the “state interest of the highest order” exception would also be a poor fit for all but the most egregious disclosure tort cases.

Let us return then to the example with which this essay began—whether disclosure tort theory would permit the punishment of something like the alleged sex video broadcast in *Clementi*. The punishment of someone who, like Ravi, was alleged to have secretly recorded a sex act would seem to be a relatively straightforward case under my interpretation of the First Amendment. Most clearly, the act of secret recording would be unlawful under the federal Video Voyeurism Prevention Act of 2004,¹¹⁸ or other state tort doctrines including the privacy tort of intrusion into seclusion. Because the video was not lawfully obtained, the punishment of such a defendant would be unlikely to offend the First Amendment. In addition, because the facts of such a case are an outrageous breach of social norms, and it is hard to see any legitimate public concern in the secret sex tape of another, it could also be argued that this would be one of the rare cases that lacked any newsworthiness. But even though the First Amendment might not preclude liability, it would be unclear that facts like these would satisfy the common law disclosure tort. As noted earlier, the disclosure tort requires “publicity,” and if the covert sex tape were only shown to a small number of people, with no likelihood that the video would come to circulate in the community, this would not satisfy the publicity requirement in most jurisdictions.

What if a newspaper received a copy of the Clementi video and decided to host a copy on its website—could the press be held liable for violating the disclosure tort? If *Bartnicki* is any guide, the answer would appear to be “no.” Because the press did not participate in the secret recording, the information would have been lawfully obtained by the press. Moreover, it is much harder in the case of press publication to argue that the tape would not now be “of legitimate concern to the public.”¹¹⁹ When a video like Clementi’s sparks a public debate on cyber-bullying and acceptance of different sexual orientations, what was an easier case of non-newsworthiness for a non-press defendant becomes much more complicated because the video would then be at the center of

117. Nick Bravin, *See You in Court Mr. Assange*, SLATE (Dec. 10, 2010) <http://www.slate.com/id/2276592>.

118. 18 U.S.C. § 1801.

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

a public debate. And when the debate centers around the contents of the video, it becomes impossible to say that those contents are not of legitimate public concern. In this case, then, the nature of the disclosure tort could preclude liability even in a case of enormous emotional injury and widespread publication. And the result that the disclosure tort could fail to protect even its core case shows the limits of disclosure as a theory of liability.

CONCLUSION: RETHINKING INVASION OF PRIVACY

Think back to why, in the last example, punishment of the secret recorder of a sex tape was relatively unproblematic: Because the recorder had broken the law by recording the tape, punishment for its disclosure was less troubling from a First Amendment perspective because it punished the act of recording and not any act of speaking or disclosure. But secret recorders can be punished for their surveillance, why bother with punishing the subsequent disclosure at all, particularly if invoking a disclosure theory creates additional doctrinal problems, both in terms of the structure of the tort and its complicated relationship to the First Amendment? One answer is that disclosure allows punishment and deterrence of downstream viewers—those like the press who have otherwise lawfully obtained the recording and who view or disclose it themselves. But we saw in both the example and the *Bartnicki* case that downstream users can invoke First Amendment protections not available to the secret recorder.

Recall also from the example, that the secret recorder had violated the common law tort of intrusion against seclusion. That tort provides that

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.¹²⁰

All of the elements of intrusion are satisfied by the example as well—we have (1) an intrusion (the secret recording) into (2) seclusion or private affairs (having sex in one's bedroom) that is (3) highly offensive (most people would be outraged to find secret listeners or hidden cameras in their bedrooms). However, there is an important difference between intrusion and disclosure—unlike disclosure, which requires the act of disclosure of words or images, no act of expression is necessary to satisfy the intrusion tort. Publication is only relevant to intrusion when damages

120. *Id.* at § 652B.

are computed. Thus, unless we are prepared to recognize a First Amendment right to break laws in pursuit of gathering news¹²¹ or to take secret video,¹²² the intrusion tort has been satisfied without implicating the First Amendment at all.

The intrusion tort shares more with the disclosure tort than a common origin in the Warren, Brandeis, and Prosser traditions. It shares both the element of private information and the element of high offensiveness to a reasonable person, making it another illustration of Post's argument that the privacy torts are best understood as remedies for gross breaches of social etiquette. But disclosure and intrusion are different breaches of good manners—whereas disclosure protects against emotionally harmful gossip, intrusion often protects against emotionally harmful collection of the gossip, by a secret recorder, secret listener, or other intruder.¹²³ Because the elements of the tort do not create civil liability for speech, thereby directly affecting the scope of public debate, the intrusion tort does not implicate heightened First Amendment concerns.¹²⁴ Moreover, if we are interested in protecting against what we colloquially call “invasions of privacy,” the intrusion model is a better fit with our intuitive linguistic understandings of that metaphor. Secret cameras would seem to “intrude” on our privacy more directly than publications about us that hurt our feelings. Thus, as we structure legal protections to protect private information from disclosure, the law should focus on preventing unwanted collections or accumulations of information, rather than preventing the dissemination of already-collected information.

Going beyond intrusion, there are other ways to remedy privacy harms that create fewer constitutional problems than the disclosure tort. We have become accustomed to thinking about privacy in terms of Prosser's four torts, but there are other torts sharing elements with some or all of the privacy torts that can also be used to regulate information. For example, there is a close analogy between intrusion and trespass, with the primary difference being that intrusion protects emotional harm from invasions into private areas or relationships, while trespass protects

121. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); *Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345 (7th Cir. 1995); *Dietemann v. Time*, 449 F.2d 245 (9th Cir. 1971); Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW U.L. REV. 1099 (2002).

122. In a recent article, Seth Kreimer makes a creative argument to this effect. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PENN. L. REV. 335 (2011).

123. This is the fact pattern of the famous intrusion case of *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964), in which a landlord had installed a secret listening device in the bedroom of his tenants, a married couple. But intrusion can also remedy invasions of private spaces that do not collect information – for example, a pattern of harassing phone calls that invade the tranquility of a victim's home.

124. See Solove & Richards, *supra* note 102.

property rights from similar invasions. But trespass is in reality a kind of privacy tort as well—protecting the privacy of the home from invasion, and another tort that creates fewer First Amendment problems than disclosure.

Breach of confidence is another privacy tort that has been underappreciated as a tool to regulate disclosures of embarrassing or harmful information.¹²⁵ Recall that in the press privacy cases, a less restrictive means than punishing disclosure was to prevent the press from collecting the information in the first place, rather than allowing the state to directly censor the speech under a disclosure theory. The press (or others) can obtain information by trespassing or intruding into private areas, or it can obtain it through a leak. Both the breach of confidence tort or confidentiality rules more generally allow the regulation of disclosure in a way that is less troubling from a First Amendment perspective than the disclosure tort. This is the case because confidentiality remedies not the emotional injury of published words, but instead the breach of an assumed duty.¹²⁶ Confidentiality has limits, too; most notably, it typically applies only to duties that are voluntarily assumed. But unlike the limits of disclosure, the limits of confidentiality enhance its consistency with our First Amendment commitments to robust public debate.¹²⁷

The issues of press and privacy raised by the rise of social networks, incidents like the Clementi suicide and WikiLeaks are likely to become some of the most important and difficult facing our society in the Information Age. Of course, law will not provide all the answers, but it must provide some answers, if only to regulate the competing demands of publicity and non-disclosure that these cases raise. Law will be necessary to determine whether a case is more like Ravi's tweeting in the Clementi suicide, or more like the tweets of the democracy protesters in Cairo's Taksim Square. At the same time, it is important to realize that the harms from privacy are real. Just because the disclosure tort is largely unconstitutional, it does not mean that many of the psychological injuries it seeks to remedy are not substantial. A broader and more imaginative conception of tort privacy can hopefully help us to protect against some of those harms, either through tort law or other forms of law modeled on tort, and also to avoid the conflict with First Amendment values that the disclosure model produces.

125. Richards & Solove, *Privacy's Other Path*, *supra* note 12, at 123.

126. See Solove & Richards, *supra* note 102.

127. *Id.*