Prosser's Privacy Law: A Mixed Legacy

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This Article examines the complex ways in which William Prosser shaped the development of the American law of tort privacy. Although Prosser certainly gave tort privacy an order and legitimacy that it had previously lacked, he also stunted its development in ways that limited its ability to adapt to the problems of the Information Age. His skepticism about privacy, as well as his view that tort privacy lacked conceptual coherence, led him to categorize the law into a set of four narrow categories and strip it of any guiding concept to shape its future development. Prosser's legacy for tort privacy law is thus a mixed one: He greatly increased the law's stature at the cost of giving it no guidance and making it less able to adapt to new circumstances in the future. If tort privacy is to remain vital in a digital age, it must move beyond Prosser's conception.

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INTRODUCTION

It is impossible to talk about privacy in American tort law without considering William Prosser. Samuel Warren and Louis Brandeis may have popularized privacy in American law with their famous 1890 article, *The Right to Privacy*,[1] but Prosser was the law's chief architect. Prosser divided Warren and Brandeis's vague "right to privacy" into a taxonomy of four torts and introduced it as a major topic in both academic and practical understandings of tort law.[2] Whereas Warren and Brandeis planted the germinal seed for tort privacy,[3] Prosser systematized and organized the law, giving it an order and legitimacy that it had previously lacked. Unsurprisingly, scholars have recognized Prosser as an essential figure in furthering the development of the privacy torts.[4] Edward Bloustein recognized as early as 1964 that Prosser's "influence on the development of the law of privacy begins to rival in our day that of Warren and Brandeis."[5]

In this Article, we examine the complicated relationship between Prosser and privacy law. In many subtle and not-so-subtle ways, inadvertently and intentionally, Prosser had a profound impact on the structure and future development of tort privacy. Although his contributions to privacy law are best remembered for his 1960 *California Law Review* article, *Privacy*,[6] Prosser was engaged with tort privacy throughout his career, from his earliest torts scholarship in the 1940s until his death in 1972. Over this period he was the key figure in shaping the way tort law understood and conceptualized privacy. Prosser first began to think and write about tort privacy fifty years after Warren and Brandeis's article. On the occasion of a half-century since the publication of his most famous contribution to the law of privacy, this Article attempts a critical assessment of Prosser's legacy to the American law of privacy, in tort law as well as more generally.

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 149 (2007) [hereinafter Richards & Solove, *Privacy's Other Path*].

3. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

4. *See, e.g.*, Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1554 (1997).

5. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 964 (1964).

6. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 388–89 (1960) (dividing tort privacy into four distinct torts).

Today, the chorus of opinion is that the tort law of privacy has been ineffective, particularly in remedying the burgeoning collection, use, and dissemination of personal information in the Information Age.[7] Diane Zimmerman notes that the public disclosure of private facts tort—perhaps the tort most central to Warren and Brandeis's concern about media privacy violations—"failed to become a usable and effective means of redress for plaintiffs."[8] Danielle Citron observes that the privacy torts have severe limitations in combating Internet harassment.[9] James Whitman argues that "it is generally conceded that, after a century of legal history, [the privacy torts inspired by Warren and Brandeis] amount[] to little in American practice today."[10] Lawrence Friedman states that "[i]n hindsight, it looks as if the Warren and Brandeis *idea* of privacy—protection from the despicable nosiness of the media—never got much past the starting post; and is now effectively dead."[11]

Prosser bears at least some responsibility for the failure of the privacy torts to evolve in response to the technological and cultural developments of the last fifty years. He shaped the torts into their current form, and their strengths and weaknesses flow directly from his vision of privacy.

Prosser did not create tort privacy, but through careful attention he gave it the order and visibility that only a scholar of his influence could have done. Prosser's engagement with the privacy tort cases over four decades allowed him to reduce a mess of hundreds of conflicting cases to a scheme of four related but distinct tort actions. He accomplished this feat through careful reading and scholarly pruning in the twentieth-century doctrinalist tradition. Thus, by 1960 he could confidently assert in his article that Warren and Brandeis's "right to privacy" consisted of not just one tort but "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost 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.'"[12] Prosser organized the torts as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his

7. *See, e.g.*, DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 57–62 (2004) (critiquing privacy torts in addressing problems involving the collection, processing, and dissemination of personal data); Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 78–81 (2007) (noting the limitations and ineffectiveness of the privacy torts in addressing harms caused by online gossip).

8. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983).

9. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 89 (2009).

10. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1204 (2004).

11. Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1125 (2002).

12. Prosser, *Privacy*, *supra* note 6, at 389.

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.[13]

Although he often stated that his methods were those of a collector and a synthesizer rather than a critic or theorist, Prosser held normative views of privacy law that influenced the way he classified the torts. Prosser was deeply skeptical of the privacy torts, and he expressed this skepticism in his *California Law Review* article. Despite taking a restrained tone, Prosser disapproved of privacy law's trajectory. In particular, he was concerned that its haphazard development threatened to swallow up established doctrines, such as defamation law, as well as new doctrines, such as intentional infliction of emotional distress, that he felt had greater promise. Therefore, to the extent that Prosser tried to shape the future course of privacy law, he aimed to steer it in a more cautious and limited direction than it had taken previously.

Courts readily embraced Prosser's formulation of privacy tort law. As the leading torts scholar of his time, Prosser was able to ensure that his interpretation of the privacy torts became the dominant one. In addition to being the most well-regarded torts scholar, Prosser was the leading treatise writer and casebook author. He was also the chief reporter for the *Second Restatement of Torts*, in which he codified his scheme for tort privacy. His influence encouraged courts and commentators to adopt his division of tort privacy into the four causes of action of intrusion, disclosure, false light, and appropriation. Even today, most courts look to the *Restatement*'s formulation of the privacy torts as the primary authority.

We therefore conclude that Prosser's legacy is a mixed one: Although Prosser gave tort privacy order and legitimacy, he also stunted its development in ways that have limited its ability to adapt to the problems of the Information Age. His skepticism about privacy, as well as his view that tort privacy lacked conceptual coherence, led him to categorize the law into a set of four narrow and rigid categories. This move stripped privacy law of any guiding concept to shape its future development. Prosser thus greatly increased tort privacy's stature at the cost of making it harder for privacy law to adapt to new circumstances in the future.

After Prosser's death in 1972, the torrid development of tort privacy slowed, and the torts ossified—due, in significant part, to Prosser's codification of his scheme of tort privacy in the *Second Restatement of Torts*. In many ways, overtly and subtly, Prosser thus retarded the growth of the very torts he had identified. The generative and creative energy sparked by the Warren and Brandeis article was calmed. As a consequence, the privacy torts struggle to

13. *Id.*

remain vital and relevant to the privacy problems of the Information Age.

In Part I, we identify and contextualize Prosser's arguments in *Privacy*, in light of his work as a whole and the tort law of privacy he inherited. In Part II, we develop our normative critique of Prosser's theory of privacy. We contend that while Prosser gave the American tort law of privacy a legitimacy and a coherence that it had previously lacked, his approach stultified the law, omitted a number of important interests from its taxonomy, and ultimately lacked a theory of privacy suitable to guide the future development of the law. Although Prosser remains a critical figure in the development of privacy law, his contribution to this development came at the cost of stunting any further growth in the law. In Part III, we examine the ways in which the privacy torts have not been responsive to the problems of the Information Age. We suggest that to be vital in the future, the law of tort privacy must move beyond Prosser's conception of privacy. Only if it does this can tort privacy adapt and remain relevant in the Information Age.

I.
PROSSER'S INFLUENCE ON PRIVACY LAW

A. From Warren and Brandeis to Prosser: Privacy Law's First Fifty Years

When William Prosser first began to write about privacy law around 1940, he was working in the shadow of another privacy article that had just celebrated a fiftieth anniversary—Warren and Brandeis's famous 1890 *Harvard Law Review* article, *The Right to Privacy*.[14] Before Warren and Brandeis, the Anglo-American common law had protected a variety of interests that modern lawyers would consider as involving privacy. Legal doctrines protecting these interests included blackmail law, evidentiary privileges, and duties of confidentiality imposed on a variety of special relationships.[15] Warren and Brandeis's article dramatically changed this landscape.

Through a creative reading of the existing precedents on literary property, confidentiality, and defamation, Warren and Brandeis argued that the common law should be read to protect a right to privacy.[16] They argued that the common law, with its evolving protections against emotional and psychological injuries, implicitly included a right against one's private affairs being "proclaimed from the house-tops," whether by the circulation of unauthorized photographs or the publication of private, potentially embarrassing facts. They termed their new right "the right to be let alone,"[17] and theorized that it protected against injuries

14. Warren & Brandeis, *supra* note 1.

15. *See* Richards & Solove, *Privacy's Other Path*, *supra* note 2, at 133–45 (confidentiality and evidentiary privileges); LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 8187 (2007) (blackmail).

16. Warren & Brandeis, *supra* note 1, at 213.

17. *Id.* at 195 (internal quotation marks omitted). Warren and Brandeis borrowed the phrase

to a person's "inviolate personality."

Warren and Brandeis's approach to privacy was in one sense profoundly conservative, as it was part of a broader legal strategy employed by late-nineteenth-century elites to protect their reputations from the masses in the face of disruptive social and technological change.[18] In another sense, however, Warren and Brandeis's article was both progressive and creative: the law did not protect against disclosures outside established relationships, so the authors ingeniously re-imagined the law in a way that would.[19] Because intrusive reporters did not have a pre-existing relationship with the subjects of their photos and articles, Warren and Brandeis cleverly shifted the focus of the law of nondisclosure from duties in relationships to hurt feelings and damaged personalities.[20] They noted that their proposed remedies against intrusive media were in some tension with the freedom of the press, but argued that judges could properly balance the interests between privacy and the public interest in disclosure. Although they discussed several potential legal options to protect the right to privacy, they viewed tort law as the principal remedy.[21]

Most law review articles register little impact on the development of law, and at first, it appeared the Warren and Brandeis article would suffer a similar fate. Although a few early cases toyed with recognizing tort protections of privacy, and California enacted a short-lived and ineffective[22] privacy statute in 1899,[23] it took over a decade before a privacy tort became clearly established under state law.[24] In the celebrated *Roberson* case, the New York Court of Appeals refused to recognize the tort when a flour company used the picture of

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from Thomas Cooley's treatise on torts. THOMAS M. COOLEY, THE LAW OF TORTS 29 (2d ed. 1888).

18. FRIEDMAN, *supra* note 15, at 221.

19. *See* Richards & Solove, *Privacy's Other Path*, *supra* note 2, at 147 & n.164.

20 *Id*.

21. Although Warren and Brandeis argued principally that privacy injuries should be remedied by tort damages, they also suggested that in some cases injunctive relief and even criminal punishment might be appropriate. *See* Warren & Brandeis, *supra* note 1, at 219.

22. DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 64 (1972); Louis Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526, 539 (1941).

23. 1899 Cal. Stat. 28, codified as Cal. Penal Code § 258 (1899), as repealed by 1915 Cal. Stat. 761, provided:

> It shall be unlawful to publish in any newspaper, handbill, poster, book or serial publication, or supplement thereto, the portrait of any living person a resident of California, other than that of a person holding a public office in this state, without the written consent of such person first had and obtained; *provided*, that it shall be lawful to publish the portrait of a person convicted of a crime. It shall likewise be unlawful to publish in any newspaper, handbill, poster, book or serial publication or supplement thereto, any caricature of any person residing in this state, which caricature will in any manner reflect upon the honor, integrity, manhood, virtue, reputation, or business or political motives of the person so caricatured, or which tends to expose the individual so caricatured to public hatred, ridicule, or contempt.

24. *See* Richards & Solove, *Privacy's Other Path*, *supra* note 2, at 146–47.

an attractive young woman to advertise its flour,[25] but after a popular outcry against the decision, the New York legislature passed a privacy tort statute allowing people to sue for invasion of privacy where their "name, portrait, or picture" was used without consent "for purposes of trade."[26]. Two years later, in the 1905 *Pavesich* case, the Supreme Court of Georgia recognized the tort under almost identical facts.[27]

Although courts developed these early torts in response to Warren and Brandeis's article, the torts involved a different context from the one that Warren and Brandeis had envisioned. They had been principally concerned with press intrusion into personal and family life, such as reportage on weddings and social events by the gossip columns and society pages of the new "Yellow Press."[28] But the typical fact pattern of the early privacy tort cases was one where a business had used the photograph of an ordinary person without permission as part of its advertising or trade dress.[29] These cases were not about press publication of domestic affairs, but what we would now think of more as an unfair trade practice.

Thus, ironically, the first privacy tort to be born from the Warren and Brandeis article was the one that Prosser would later categorize as the appropriation of name or likeness. Although there are passages in the Warren and Brandeis article that are helpful in justifying the appropriation tort, it was not what the authors primarily had in mind. But their article aimed to be broad and generative, and they refrained from suggesting one or a few specific torts to remedy privacy violations. Their article could therefore serve as an inspiration and foundation for a variety of different privacy protections.

Although most of the early privacy cases involved the misuse of photographs in advertising, courts during the interwar period began to recognize liability for the disclosure of personal information. Two cases were particularly influential. In *Brents v. Morgan*, the Kentucky Supreme Court found a violation of privacy where a man had posted a sign reading "Dr. W. R. Morgan owes an account here of $49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid."[30] *Brents* produced a flurry of scholarly commentary noting the significance of the recognition of a new kind of privacy

25. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).

26. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1903).

27. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

28. 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, 43–44 (2008). The "Yellow Press" was a development in American journalism at the end of the nineteenth century that focused on sensationalism and "attention to local news, especially crime and scandal and high society." MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 95 (1978).

29. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 174 (expanded ed. 2003).

30. 299 S.W. 967, 968 (Ky. 1927).

right in Brandeis's home state.[31] In 1931, the California Supreme Court decided *Melvin v. Reid*, recognizing a privacy claim by a reformed prostitute against a movie which told the story of her colorful earlier life as a sex worker tried for murder.[32] These cases were precisely what Warren and Brandeis had in mind, and further show the adaptability of their call for protection of privacy.

Other courts and legislatures recognized the tort in the ensuing decades. But while tort privacy remained an active source of scholarly commentary,[33] fifty years after the publication of the Warren and Brandeis article, it remained a doctrinal backwater. Privacy was a recognized but relatively unusual cause of action that operated as a "residual category of tort law," picking up intentional actions resulting in emotional injury that were not covered by the tort of intentional infliction of emotional distress, or injuries caused by publicity that was not actionable defamation.[34] It was treated as such by its placement in leading treatises[35] and casebooks.[36] In fact, it remained unclear whether the privacy tort would survive as a discrete cause of action, or whether it would be swallowed up by the more vibrant tort of intentional infliction of emotional distress.[37]

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31. *E.g.*, Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Rufus Lisle, *The Right of Privacy (A Contra View)*, 19 KY. L.J. 137 (1931); Roy Moreland, *The Right of Privacy Today*, 19 KY. L.J. 101 (1931); George Ragland, Jr., *The Right of Privacy*, 17 KY. L.J. 85 (1929). Many of these articles were cited a few years later by Brandeis himself in a Supreme Court case that raised a similar fact pattern but was decided differently. Senn v. Tile Layers Protective Union, 301 U.S. 468, 482 n.5 (1937). *See generally* Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295 (2010) (explaining how Brandeis's views on privacy evolved over time).

32. 297 P. 91 (Cal. 1931).

33. *E.g.*, Green, *supra* note 31; Lisle, *supra* note 31; Moreland, *supra* note 31; Nizer, *supra* note 22; Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902); Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915).

34. WHITE, *supra* note 29, at 174.

35. *See, e.g.*, FRANCIS M. BURDICK & CHARLES K. BURDICK, THE LAW OF TORTS 69 (1926) (noting the uncertainty of the "modern claim" of privacy in a chapter on the nature of tort law generally); H. GERALD CHAPIN, HANDBOOK OF THE LAW OF TORTS 288–91 (1917) (giving privacy a brief chapter and discussing cases involving the use of a plaintiff's name or portrait for advertising purposes); FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS 601–04 (1933) (placing privacy as part of a final chapter on "miscellaneous interests").

36. For instance, both Roscoe Pound and then Zechariah Chafee published supplements to their standard equitable relief casebooks that included privacy and defamation cases separately, to emphasize the evolving nature of the law. *See* ZECHARIAH CHAFEE, JR. & ROSCOE POUND, CASES ON EQUITABLE RELIEF AGAINST TORTS: INCLUDING DEFAMATION AND INJURIES TO PERSONALITY (1933); ROSCOE POUND, CASES ON EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY (1916); *see also* JAMES BARR AMES, JEREMIAH SMITH & ROSCOE POUND, A SELECTION OF CASES ON THE LAW OF TORTS 797–806 (3d ed. 1919) (adding a chapter entitled "Interference with Privacy").

37. WHITE, *supra* note 29, at 173–74. Prosser himself wondered the same thing in various editions of his treatise. *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1053–54 (1st ed. 1941) [hereinafter PROSSER, PROSSER ON TORTS]; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (2d ed. 1955) [hereinafter PROSSER, TORTS SECOND EDITION].

Moreover, despite the attention it received in the law review literature, at its half-century mark, privacy remained not only a minority doctrine, but one that had undergone little theoretical refinement or evolution. The 1934 *Restatement (First) of Torts* recognized a cause of action for "unreasonable and serious" invasion of privacy.[38] But by 1940, privacy had been recognized in only a distinct minority of U.S. jurisdictions—by common law in twelve states (California, Colorado, Georgia, Illinois, Kansas, Kentucky, Louisiana, Missouri, New Jersey, North Carolina, Pennsylvania, and South Carolina) and by statute in only two others (New York and Utah).[39] Thus, at its fifty-year mark, privacy was no more than an interesting but minor doctrine in tort law.

B. Prosser's Privacy in Context

William Prosser was born in 1898, eight years after Warren and Brandeis penned their article, and he graduated from the University of Minnesota with his law degree in 1928.[40] After a brief stint as a practicing lawyer, he returned to teach at Minnesota the next year as an adjunct, and became a full-time professor in 1930. He first taught torts in 1934, and published a series of articles on tort law during the 1930s.[41]

Although Prosser's papers do not survive, we know a little about how Prosser thought about torts in the late 1930s from a student notebook from one of his torts classes in 1938–1939.[42] The notebook belonged to Leroy S. Merrifield, who went on to become a distinguished torts professor at George Washington University. The notebook is organized like Prosser's casebooks and treatises—after some introductory materials, the notes start with intentional torts, including one of Prosser's favorite topics, the intentional infliction of emotional distress. Subsequent months cover negligence, strict liability, and finally, miscellaneous issues, including damages. Although the notebook cites cases that have been understood both at the time and by modern scholars as

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

39. Nizer, *supra* note 22, at 529. In addition to those twelve states, the tort had been recognized in the District of Columbia and in the Alaska territory. *Id.*

40. Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 852 (1986).

41. Although Prosser published a short review of a torts treatise in 1933, see William L. Prosser, Book Review, 19 MINN. L. REV. 257 (1935) (reviewing FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS (1933)), Prosser's torts scholarship began in earnest once he became a full-time torts teacher. *See, e.g.*, William L. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937); William L. Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19 (1936); William L. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936); William L. Prosser, *Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles*, 30 ILL. L. REV. 980 (1936); William L. Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 S. CAL. L. REV. 459 (1937).

42. Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 ILL. L. REV. 577 (2010); Leroy S. Merrifield, *Prosser Torts Notebook*, http://sunsite2.berkeley.edu:8088/xdlib//prosser/ucb/mets/cubanc_67_1_00064213.xml (last visited Sept. 27, 2010).

implicating privacy,[43] Prosser does not appear to have devoted any significant classroom time to tort privacy as such.[44]

Prosser's views on the significance of tort privacy seem to have changed shortly thereafter. In fact, his views on privacy can be measured over time by looking not just at his 1960 article, but at the various editions of his casebooks and treatises between 1941 and 1972. All of these texts share Prosser's typical scholarly methodology of reading lots of cases, and then restating them as embodying several clear legal principles.[45] Moreover, many of them share identical language, representing the revision over a period of thirty years of the same document, and the same arguments about the state of the law of privacy. Prosser confessed to copying extensively from his own previous work, and in the preface to the 1955 second edition of his treatise, he quoted a poem by Kipling for the proposition that "[r]esearch has been defined as plagiarism on the grand scale."[46] One of the most frequently repeated claims in Prosser's privacy writings is some variant of the sentence that privacy represents "the outstanding example of the influence of legal periodicals" on American law.[47] As it turned out, Prosser's own scholarship would transform privacy law in a number of important ways.[48]

Prosser's first detailed discussion of privacy[49] appeared in the first edition of his treatise, *Prosser on Torts*, published in 1941.[50] Prosser gave privacy a short treatment at the end of the book, along with other "Miscellaneous" topics

43. For instance, on page 34 of the notebook, as part of his treatment of fraudulent consent, Prosser alluded to the facts of *DeMay v. Roberts*, 9 N.W. 146 (Mich. 1881). In *DeMay*, a doctor was held liable when he allowed a young man called Scattergood to watch a woman give birth and to hold her hands when she was under the mistaken impression that Scattergood was also a doctor. *Id.* at 146–47. Mrs. Roberts sued, alleging that DeMay and Scattergood had "intruded upon [her] privacy," and the court agreed, holding that Roberts had "a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation." *Id.* at 149. The court used the word "privacy" twice at critical points, but it formally labeled the wrong as "deceit." *Id.*

44. Our examination of the notebook did not find any mention of privacy. This accords with a forthcoming study of the notebook, which does not mention privacy either. *See* Robinette, *supra* note 42.

45. For a discussion of Prosser's methodology, see Joyce, *supra* note 40, at 855; WHITE, *supra* note 29, at 172–73; *see also infra* Part III.D.

46. PROSSER, TORTS SECOND EDITION, *supra* note 37, at xii.

47. PROSSER, PROSSER ON TORTS, *supra* note 37, at 1050; WILLIAM L. PROSSER & YOUNG B. SMITH, CASES AND MATERIALS ON TORTS 1135 (1st ed. 1952) [hereinafter PROSSER & SMITH, CASEBOOK FIRST EDITION]; PROSSER, TORTS SECOND EDITION, *supra* note 37, at 635; Prosser, *Privacy*, *supra* note 6, at 383.

48. WHITE, *supra* note 29, at 173.

49. Prosser made a passing reference to privacy in his 1939 article on the intentional infliction of emotional distress, but characterized it as "nothing more than a right to be free from the intentional infliction of mental suffering." William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 884 (1939) [hereinafter Prosser, *Intentional Infliction of Mental Suffering*].

50. PROSSER, PROSSER ON TORTS, *supra* note 37. Subsequent editions in Prosser's lifetime were published in 1955, 1964, and 1972.

such as immunities, joint torts, and the remedy of restitution.[51] Prosser's discussion of privacy had three elements. First, he noted that although it remained a minority doctrine, "the majority of the courts which have considered the question have recognized the existence of a right of 'privacy,' which will be protected against interferences which are serious and outrageous, or beyond the limits of common ideas of decent conduct."[52] Second, in his characteristic style, Prosser had already begun to subdivide the mass of privacy cases into discrete causes of action, namely, "[1] intrusions on the plaintiff's solitude, [2] publicity given to his name or likeness, or to private information about him, and [3] the commercial appropriation of elements of his personality."[53] Although they were in embryonic form, one can see that as early as 1941, Prosser had identified three of the four torts he discussed in his 1960 article—intrusion, disclosure, and appropriation. All that was missing was the false light tort, which Prosser later acknowledged was the least important of the four.[54] Third, Prosser discussed the limitations on the right, namely, "a privilege to publish matters of news value, or of public interest of a legitimate character."[55] As commentators before him had done, he noted that the distinction between public and private matters had been drawn in the tort law "for the protection of the freedom of speech and press."[56] Prosser acknowledged the difficulty in drawing this distinction, but then offered the curious example that "a difference may at least be found between a harmless report of a private wedding and the morbid publication of the picture of a deformed child."[57] This example is puzzling given the origins of the right of privacy in the Warrens' irritation at the publicity given to their own wedding,[58] especially since Prosser himself understood this fact pattern to have been Warren and Brandeis's impetus for writing their article.[59]

Prosser took a leave of absence from teaching during the 1940s. After a year at Harvard, he assumed the deanship at Boalt Hall at the University of California (Berkeley) in 1948.[60] He published a torts casebook in 1952,[61] and in

51. *Id.*

52. *Id.*

53. *Id.* (numerals added).

54. Prosser, *Privacy*, *supra* note 6, at 400 (noting that there "has been a good deal of overlapping of defamation in the false light cases").

55. PROSSER, PROSSER ON TORTS, *supra* note 37, at 1050.

56. *Id.* at 1060.

57. PROSSER, PROSSER ON TORTS, *supra* note 37, at 1062.

58. Gajda, *supra* note 28, at 37.

59. Prosser, *Privacy*, *supra* note 6, at 383. Prosser believed that the press coverage surrounding the wedding of Warren's daughter had inspired the article, although subsequent scholarship has proven that this could not actually have been the case. *See* PEMBER, *supra* note 22, at 23–24; 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, 891–93 (1979); Gajda, *supra* note 28, at 38–39; Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1348–49 (1992).

60. Robinette, *supra* note 42, at 586.

February 1953 delivered a series of prestigious lectures at the University of Michigan . In a curious coincidence, the lectures were named after Thomas Cooley, the distinguished Michigan jurist who had first coined the phrase "the right to be let alone." Fittingly, in his lectures, published in book form in 1954,[62] Prosser announced his fully developed four-part approach to tort privacy, with the inclusion of the false light tort. This fourth privacy tort, "which ha[d] made a rather amorphous appearance in half a dozen cases," consisted of portraying the plaintiff "in a false but not necessarily defamatory position in the public eye, as by attributing to him views that he does not hold, or conduct with which he cannot fairly be charged."[63]

Thereafter, all of Prosser's writings on privacy featured the four-part scheme. In the second edition of his treatise, published in 1955,[64] Prosser summarized his understanding of the state of law as follows:

> Most courts now recognize the existence of a right of privacy, which will be protected against interferences which are serious and outrageous, or beyond the limits of common ideas of dangerous conduct. The right has been held to cover intrusions upon the plaintiff's solitude; publicity given to his name or likeness, or to private information about him; placing him in a false light in the public eye; and the commercial appropriation of elements of his personality. The right is subject to a privilege to publish matters of news value, or of public interest of a legitimate kind.[65]

Like the first edition of the treatise from which it was adapted, this passage also contains the three hallmarks of Prosser's conception of tort privacy: (1) its recognition by courts as protecting against outrageous breaches of social conduct resulting in emotional injury; (2) its division of the vague case law into a complex of what were now four distinct injuries; and (3) the nagging conflict between the right to privacy and the right of a free press to report the news.

Viewed in the context of Prosser's writings on privacy as a whole, his 1960 article broke relatively little new ground. Prosser still essentially rehearsed the state of his thoughts about privacy law up to that point, in some cases using identical language to the treatise.[66] He made his now-familiar

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61. PROSSER, CASEBOOK FIRST EDITION, *supra* note 47. Although Prosser coauthored the casebook with Young Smith, the Dean of Columbia Law School, the chapter on privacy draws heavily and directly on the text of his 1941 treatise.

62. WILLIAM PROSSER, SELECTED TOPICS ON THE LAW OF TORTS (1954).

63. *Id*. at 119.

64. PROSSER, TORTS SECOND EDITION, *supra* note 37.

65. *Id*. at 635.

66. See, for example, the reappearance of the trope that the Warren and Brandeis article "has come to be regarded as the outstanding example of the influence of legal periodicals on American law," at 383, and the claim that Warren and Brandeis gathered decisions "in which relief had been afforded on the basis of defamation, or the invasion of some property right, or a breach of confidence or an implied contract, the article concluded that such cases were in reality based upon a broader principle which was entitled to separate recognition," at 384. *Compare id*.

argument that the right to privacy remedied emotional injury, that it was "not one tort, but a complex of four," that had little in common except that they were injuries to the right to be alone,[67] and that a number of the torts (especially false light and disclosure) were in tension with the interest in protecting a free press.[68]

Although the text and structure of the article share a consistent message, organization, and language with his torts books, in a number of places Prosser went beyond the more narrowly descriptive language of his treatise and was more analytical and even opinionated about the state of the law in 1960 and its likely course in the future. Perhaps because it was a law review article with a scholarly rather than a student or practitioner audience, Prosser was unconstrained by the doctrinal or pedagogical limitations imposed by the treatise or casebook formats. As such, it represents the fullest statement of his normative conception of tort privacy. Thus, for example, he worried that the false light tort was "swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground."[69] And in a number of places, Prosser also considered the numerous procedural and substantive protections that tort law had developed in the context of defamation to protect a free press against overbroad causes of action for slander and libel. In the context of tort privacy, he wondered rhetorically whether it was "of so little consequence that [it] may be circumvented in so casual and cavalier a fashion?"[70]

At the end of *Privacy*, Prosser concluded with two pages of analysis in which he opined further about the state of the law, expressing his worries about privacy law's chaotic energy. In a departure from his mode as treatise writer, he complained that although courts had created four separate and "loosely related torts" based upon the suggestion of Warren and Brandeis, "[s]o far as appears from the decisions, the process has gone on without any plan, without much realization of what is happening or its significance, and without any consideration of its dangers. They are nonetheless sufficiently obvious, and not to be overlooked."[71] Prosser suggested that privacy law might have gone too far in a non-orderly way, and "that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we

with PROSSER, PROSSER ON TORTS, *supra* note 37, at 635 ("[A] number of cases in which relief had been afforded on the basis of defamation, invasion of some property right, or breach of confidence or an implied contract, and concluded that they were in reality based upon a broader principle which was entitled to separate recognition.").

67. Prosser, *Privacy*, *supra* note 6, at 389.
68. *See id*. at 410.
69. *Id*. at 401.
70. *Id*.
71. *Id*. at 422.

are to call a halt."[72]

Chief among the dangers evident from the reported privacy decisions, Prosser believed, was his earlier theme—"the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored."[73] For example, he was concerned that although the intrusion tort's main element was the intentional infliction of emotional distress, the tort of intentional infliction had already (under his own guidance[74]) been established. The intentional infliction tort required proof of such elements as extreme outrage, non-trivial injuries, and serious mental harm (often requiring physical proof), but intrusion lacked these important protections for defendants.[75] Prosser was worried that the current law of intrusion would allow liability for those suffering merely trivial or objectively unreasonable offenses.[76] He was also concerned that the appropriation tort created a new intellectual property right at the whim of a jury that was in no way constrained by "any of the limitations which have been considered necessary and desirable in the ordinary law of trade marks and trade names."[77]

Prosser expressed even greater concern that the same pattern was emerging in the false light and disclosure contexts, since both torts touched on reputation and thus encroached upon the territory of defamation. He argued that the danger posed by overbroad privacy torts in this area was especially severe because the procedural protections developed to protect free speech and a free press "as a result of some centuries of conflict . . . are now turned on the left flank."[78] Prosser lamented the absence in privacy law of defamation's careful protections such as the defense of truth, retraction statutes, proof of special damages, and requirement of "the need for any defamatory innuendo at all" — since liability could arise from the publication of non-defamatory truthful facts or even "laudatory fiction."[79] Worse still was the prospect that under tests as vague as "'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."[80] In this way, Prosser revealed his fear of privacy law's trajectory, and he criticized its energetic growth as a threat to the nuanced, moderated, and

72. *Id*. at 423.
73. *Id*. at 422.
74. WHITE, *supra* note 29, at 102–05; *see also* William L. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956) [hereinafter Prosser, *Insult and Outrage*].
75. Prosser, *Privacy*, *supra* note 6, at 422.
76. *Compare id*. *with* Prosser, *Insult and Outrage*, *supra* note 74.
77. Prosser, *Privacy*, *supra* note 6, at 423.
78. *Id*. at 422.
79. *Id*.
80. *Id*. at 423.

technical model of tort law which he had spent his whole career identifying, refining, and promoting.

Prosser's doctrinal restatement of privacy law in his treatises and other works should best be seen as an attempt to rein in privacy law, to regularize it and bring it into harmony with the rest of tort law. Prosser's writings on privacy from the publication of *Privacy* until his death in 1972 are best viewed as refining, restating, and entrenching into legal doctrine the concepts he developed earlier in his career. Although it again followed the form of prior editions, the privacy chapter in the 1964 third edition of his treatise was able to announce the near-widespread recognition of some or all of his four torts under the common law of the District of Columbia and thirty-one states, the codes of four other states, and its likely adoption in four more.[81] In the little more than two decades since the publication of his first torts treatise in 1941, Prosser's conception of tort privacy had become a majority doctrine.

Prosser's skills as a doctrinalist contributed directly to this process. For instance, in 1964 the New Hampshire Supreme Court decided *Hamberger v. Eastman*, an intrusion case which explicitly adopted Prosser's four-part scheme by citing with approval the recently-published third edition of his treatise.[82]. In the 1967 edition of his casebook and in subsequent privacy writings, Prosser could then cite *Hamberger* as judicial authority for his own conception of tort privacy.[83] Such a process—(1) the categorization of cases to create doctrine; (2) the adoption of the categories by a court; and then (3) the citation of the case as evidence of the categorization—was the hallmark of Prosser's method at its most influential, in privacy as well as other areas of tort law.[84]

Prosser's prediction that the privacy torts would come into increasing tension with press freedoms also came to pass. Prior to the 1960s, tort lawsuits were considered private actions not attributable to the state that did not implicate First Amendment scrutiny.[85] Because the First Amendment was inapplicable as a direct matter, tort law treated First Amendment interests in freedom of speech and press not as superseding considerations but as endogenous interests that were balanced in the crafting of legal rules. In torts such as defamation or the disclosure of private facts, the First Amendment interests were weighed against the plaintiff's interests in her reputation or the emotional injury that would result from publication.[86] Thus, the discussion in privacy law about the newsworthiness privilege in the disclosure tort took place

81. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 831–32 (3d ed. 1964) [hereinafter PROSSER, TORTS THIRD EDITION].

82. 206 A.2d 239 (N.H. 1964).

83. WILLIAM L. PROSSER & YOUNG B. SMITH, CASES AND MATERIALS ON TORTS (4th ed. 1967) [hereinafter PROSSER, CASEBOOK FOURTH EDITION].

84. WHITE, *supra* note 29, at 175–77.

85. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1658 (2009) [hereinafter Solove & Richards, *Rethinking Free Speech*].

86. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 430–31 (2008).

through balancing within the confines of tort law, and not by measuring tort law by reference to any external yardstick of minimum constitutionality.

This all changed in 1964, when the Supreme Court held in *New York Times Co. v. Sullivan* that private law rules restricting speech were subject to constitutional restrictions, just like criminal statutes that did the same thing.[87] The Court also held that some of the procedural protections that defamation law had developed to protect a free press were constitutionally required—most notably the requirement that truth be a defense to libel.[88] Henceforth, state-created tort law rules would have to provide minimum protections for speech and press, or be declared unconstitutional as violating the First and Fourteenth Amendments.[89] This would particularly be the case for torts like defamation and privacy that created civil liability for speech.

On the heels of the *Sullivan* decision, the Supreme Court decided a line of cases holding that torts imposing civil liability for speech would be held to a heightened standard of constitutionality.[90] Most notably, in the case of *Time, Inc. v. Hill*, the Supreme Court applied its new rules directly to the false light tort.[91] Holding that liability under the false light tort raised many of the censorship concerns that had troubled the Court in *Sullivan*, the Court held that *Sullivan*'s "actual malice" standard applied to false light as well, requiring the plaintiff to prove that the defendant had acted with "actual malice"—that the defendant had either knowingly made a false statement or had acted recklessly with regard to the truth.[92] It remained an open question whether the disclosure tort, which remedied the disclosure of *truthful* private facts, would be next.[93]

His 1960 predictions about the collision course between privacy and speech having come to pass, Prosser responded to these developments in the 1972 edition of his treatise, the fourth and final edition published in his lifetime.[94] Recognizing the momentous shift in the law occasioned by the

87. 376 U.S. 254, 277 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.")

88. *Id*. at 279–80 (discussing the actual malice standard).

89. Solove & Richards, *Rethinking Free Speech*, *supra* note 85, at 1656–57.

90. *Id*. at 1658–60.

91. 385 U.S. 374, 390–91 (1967).

92. *Id*.

93. The Court addressed this issue in the 1975 case of *Cox Broad. Corp. v. Cohn*, 420 U.S. 46, 495–96 (1975). In that case, the Court held that a disclosure tort action was unconstitutional where it provided liability for truthful speech by the press where the information was in the public record. Although pressed by the media defendants to do so, the Court declined to hold that disclosure tort actions required proof of falsity, a requirement that would have doomed the tort. In a line of privacy/free speech cases reaching to the present, the Court has frequently struck down privacy actions on First Amendment grounds, but has refused to hold that tort liability for truthful speech is *per se* unconstitutional. *See* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1197 (2005); Solove & Richards, *Rethinking Free Speech*, *supra* note 85, at 1659–60.

94. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971). [hereinafter PROSSER, TORTS FOURTH EDITION].

Supreme Court's constitutionalization of tort law, Prosser added a new chapter after the chapter on privacy entitled "Constitutional Privilege."[95] Although much of the chapter dealt with *Sullivan* and defamation law, Prosser concluded that *Hill* had also extended the constitutional privilege of discussion of public matters to the privacy context.[96] He noted that although the privacy cases had developed a common-law privilege of commentary on public figures in the disclosure and false light contexts, these privileges "were taken over under the Constitution,"[97] but that future cases would have to work out the contours of the constitutional public figure privilege.[98]

Prosser's final source of influence over the development of tort privacy was in his role in the American Law Institute's revision of the 1934 *Restatement of Torts*. Prosser served as the reporter for the revised *Restatement*, and he quite predictably incorporated into the *Restatement* his formulations of the privacy torts.[99] In 1967, the privacy torts section of the *Restatement* was complete, and an ailing Prosser resigned as reporter in 1970, two years before his death in 1972.[100] Although the *Restatement* was not published until 1977, the privacy torts section was largely untouched from the version Prosser oversaw.[101]

II.
ASSESSING PROSSER'S LEGACY IN PRIVACY LAW

A. Legitimization

Although tort privacy was gaining steam before Prosser, he brought it into the spotlight of orthodox tort law—worthy of a chapter of its own in treatises and as a separate unit in first-year law courses. Prosser gave his attention to privacy, and legitimized the tort. His surveys of the hundreds of cases recognizing Warren and Brandeis's right to privacy was the most exhaustive account of the privacy tort law to date.[102] Before Prosser embarked on his project, the law appeared unwieldy and sprawling, but he organized the cases into "four distinct kinds of invasion of four different interests of the plaintiff."[103] And in the four decades that Prosser was engaged with privacy law, it became transformed from a curious minority rule to a major topic in the

95. *Id*. at 819–33.
96. *Id*. at 823.
97. *Id*. at 827.
98. *Id*. at 829–30.
99. RESTATEMENT (SECOND) OF TORTS § 652A (1977).
100. Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 897 n.64 (2006).
101. Amy Gajda, *Judging Journalism, The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1052 n.63 (2009).
102. *See, e.g.*, Prosser, *Privacy*, *supra* note 6, at 388 (noting the existence of more than three hundred privacy tort cases).
103. *Id*. at 389.

law of torts—a doctrine recognized by the overwhelming majority of jurisdictions. Today, due in large part to Prosser's influence, his "complex" of four torts is widely accepted and recognized by almost every state.[104]

In his treatment of privacy, Prosser followed his particular pattern of scholarship—reading cases, synthesizing them, and then restating them in clear form.[105] As Craig Joyce has argued,

> Prosser saw spread before him a picture of vast and surfeiting disarray. To this untidy scene, he brought order. Prosser viewed the seemingly scattershot cases on the various issues of tort law as capable of reconciliation and harmonization, if only the individual parts of those decisions were disassembled, inventoried, and recombined to illustrate the common values that, taken as a whole, they sought to vindicate (or, in Prosser's view, *ought* to vindicate). In effect, he treated the "doctrines" of tort law as amalgams of principles and processes, each of which could be reduced to a relatively simple formula.[106]

Prosser's treatment of the privacy cases exemplified this process. In both the *Privacy* article and the various editions of his torts volumes for students, practitioners, and judges, Prosser examined numerous divergent and conflicting cases, and organized them into a taxonomy of first three, and finally four torts.

With his fame as the most renowned torts scholar in the United States, Prosser's attention to privacy law put this burgeoning yet often obscure body of law on the map. Prosser commanded the field of torts.[107] As noted earlier, he authored many of the most-influential articles and the leading treatise and casebook. He also served as the reporter for the *Second Restatement of Torts.*[108] As a functional matter, Prosser was as close to a law-maker in torts as a legislator or a judge might have been. And as a result of his articles and books on privacy law, Prosser brought extensive attention to the privacy torts. He transformed them from a "residual category of tort law" into a major topic of law, and an increasingly important topic of scholarly discussion. Before Prosser, it is fair to say privacy law was developing quietly. Prosser brought privacy law onto center stage.

B. Fossilization

In bringing the privacy torts into the mainstream of American tort law, Prosser also consciously sought to harmonize them with the law as a whole. Paradoxically, while Prosser gave tort privacy a legitimacy it had previously lacked, he also fossilized it and eliminated its capacity to change and develop.

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104. *See, e.g.*, ROBERT M. O'NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 77 (2001) (noting that only North Dakota and Wyoming fail to recognize any of the privacy torts in some form or another).

105. White, *supra* note 29, at 176.

106. Joyce, *supra* note 40, at 855.

107. *See, e.g.*, Joyce, *supra* note 40; White, *supra* note 29, at 176.

108. RESTATEMENT (SECOND) OF TORTS (1977).

When *Prosser on Torts* was first published in 1941, there were dozens of reported privacy decisions in a doctrinal and theoretical mess. Decisions invoking Warren and Brandeis's "right to privacy" included cases against the press for publication of private information,[109] advertising cases using photographs without permission,[110] eavesdropping and wiretapping cases,[111] private commercial disputes,[112] and cases resembling trespass,[113] defamation,[114] and the intentional infliction of emotional distress.[115] To an unusual degree, the cases embodied the characteristic creativity and *ad hoc* nature of the common law.

Although Prosser once dismissed (perhaps with false modesty) his approach as merely that of a "packrat,"[116] in reality his methods involved as much creativity as hard work. Prosser could not come up with one organizing principle to unite the privacy cases, and ultimately settled on four distinct theories to categorize them. A chief goal of his scholarship was to ensure the clear and orderly development of American tort law. Prosser's great scholarly gift was the assimilation and synthesis of enormous numbers of decided cases, and the restatement of them in clear and lively language.

Once Prosser had stated the law a certain way, he worked hard to ensure that his classifications and conclusions became doctrine.[117] The privacy torts represent a classic example of the way in which Prosser not only created doctrine out of chaos, but persistently ensured the survival of his doctrinal formulations. G.E. White characterizes this process as follows:

> A classification made seemingly for convenience (1941) had been expanded and refined (1955), hardened and solidified (1960 and 1964, when the "common features" of privacy were declared), and finally made synonymous with "law" (1971). Prosser's capacity for synthesis had become a capacity to create doctrine. One began an analysis of tort privacy by stating that it consisted of "a complex of four wrongs," and implicitly, *only* those wrongs.[118]

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109. *See, e.g.*, Melvin v. Reid, 297 P. 91 (Cal. Dist. Ct. App. 1931).

110. *See, e.g.*, Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911).

111. *See, e.g.*, Rhodes v. Graham, 37 S.W.2d 46 (Ky. 1931); McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E.2d 810 (Ga. Ct. App. 1939).

112. *See, e.g.*, Brents v. Morgan, 299 S.W. 967 (Ky. 1927).

113. *See, e.g.*, Byfield v. Candler, 125 S.E. 905 (Ga. Ct. App. 1924).

114. *See, e.g.*, Mau v. Rio Grande Oil, 28 F. Supp. 845 (N.D. Cal. 1939); Brents v. Morgan, 299 S.W. 967 (Ky. 1927).

115. *See, e.g.*, cases cited *infra* note 131.

116. PROSSER, TORTS THIRD EDITION, *supra* note 81, at xii.

117. White, *supra* note 29, at 176. White continues by noting that

> [h]is principal interest was in facilitating the orderly processes of the American legal system. In this effort he made sure to keep his writing clean, bright, and lively: when a doctrinal area was 'in hopeless confusion' Prosser's portrait of the chaos was clear enough, and when administrative difficulties muddled the thrust of legal reforms, Prosser cataloged the difficulties with dispatch.

Id. at 177.

118. *Id.* at 176.

To a scholar like Prosser, who believed that the common law worked best when it was rationalized, refined, and harmonized, the energetic chaos of privacy law must have seemed far out of balance. Prosser sought to categorize the torts and to limit them to as small a number of discrete causes of action as possible. Looking at the mess of cases he found in the reports, Prosser sorted them into his three initial causes of action in 1941: intrusion, disclosure, and appropriation.[119] When a handful of defamation-like cases defied this simple categorization, he recognized a fourth category—false light—in 1953.[120]

But Prosser refused to allow privacy to mean more than his four torts. As noted below,[121] he treated intentional infliction and breach of confidence as wholly unrelated torts. Moreover, Prosser refused to separate the "right of publicity" from appropriation, even though he acknowledged that the two torts rested on radically different theories of injury: appropriation protecting the emotional interests of private persons from unwanted publicity, and publicity protecting the financial interests of celebrities from misappropriation of their intellectual property interest in their celebrity personae.[122] Prosser's purpose here seems to have been to limit the growth of new conceptions of tort privacy into new causes of action and new contexts. He sought to limit the common law's innate capacity for growth in this area by tying privacy down lest its creative power upset other doctrines that represented the accumulated wisdom of generations.[123]

Once he had limited the torts in these ways, Prosser used his influence as the leading torts scholar to ensure that his interpretation would be the one adopted by scholars and courts. In the wake of Prosser's scholarship and the *Second Restatement of Torts* in 1977, courts readily referred to the *Restatement* formulations of the privacy torts. Based on our familiarity with several hundred privacy tort cases from the 1960s to the present, the overwhelming majority of courts have adopted wholesale the specific language of either the *Restatement* or Prosser's other works in defining the privacy torts.[124] Although there have

119. PROSSER, PROSSER ON TORTS, *supra* note 37, at 1054–56.

120. WILLIAM PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 119 (1954) (publication of 1953 lectures). Clark Kelso surveys the cases Prosser classified in *Privacy* as false light and concludes that the tort "existed only in Prosser's mind." J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 787 (1992). Kelso claims that "Prosser incorrectly extracted from these cases a principle nowhere to be found in the cases themselves." *Id*. at 788. Moreover, he argues,

> [N]early all of these cases could be decided the same way without resort to a false light cause of action. The only cases where false light clearly changes the result are a few statute of limitations decisions, the results of which are explainable by judicial hostility to limitation periods. When the smoke has cleared, there exist only two decisions in which state appellate courts have affirmed pro- plaintiff judgments solely on the basis of false light privacy.

Id. at 788.

121. *See infra* Part II.C.

122. Prosser, *Privacy*, *supra* note 6, at 406–07.

123. *See id*. at 422–23.

124. For instance, the most recent state supreme court to adopt the privacy torts adopted

been a few deviations on occasion, for the most part, the *Restatement* formulations of the privacy torts are almost universally adopted, nearly verbatim.

Although the privacy torts "complex" was Prosser's own idea—a casual way to make some sense of the chaos of hundreds of divergent cases—it has hardened into the dominant conception of tort privacy. Today, the privacy torts stand at the four Prosser identified,[125] and no new privacy torts have been created since Prosser's death.[126]

Thus, Prosser's Michigan Lectures and 1960 article can be seen as a pivotal turning point in the evolution of privacy law. In the fifty years following its publication, Warren and Brandeis's article spawned a wide variety of statutory and common law causes of action claiming the rubric of "privacy." This wave of legislative and judicial activity responded creatively to protect the "right to be let alone" and gradually gained intensity. Depending on whether one classifies the "right of publicity" as a separate tort or part of the tort of appropriation, at least four new torts were created during this period. This is a particularly large number considering that Warren and Brandeis never listed any specific torts in their article. In the fifty years between Prosser's article and today, the privacy torts remain fossilized largely as he left them.

C. Omission

Prosser's taxonomy of privacy torts consciously made some significant omissions. By recognizing only four conceptions of tort privacy, Prosser excluded from his scheme a variety of other legal theories protecting related interests in personality, seclusion, or nondisclosure that courts had also recognized. Most notable among these omissions were the torts of intentional infliction of emotional distress and breach of confidence. Examining how Prosser excluded these related actions from his treatment of privacy reveals a

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three of the four privacy torts, relying on Prosser's *Restatement* and the Warren and Brandeis article. Without realizing that it was echoing Prosser's own arguments, the court declined to adopt false light because it was "concerned that claims under false light are similar to claims of defamation, and to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased." Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).

125. The right of publicity is an offshoot of the appropriation tort, first recognized as such in 1953. In *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), Judge Jerome Frank held that "in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph." *Id.* at 868. "The appropriation branch of the right of privacy is invaded by an injury to the psyche" whereas "the right of publicity is infringed by an injury to the pocketbook." J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:61 (2000); *see also id.* at § 5:63.

126. *See, e.g.*, Jonathan P. Graham, Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 TEX. L. REV. 1395, 1406 (1987) ("Dean Prosser's categorization of privacy law into four torts, each with several indispensable elements has effectively frozen the development of privacy law despite the creation of new technologies that detrimentally affect individual privacy.").

great deal about the way in which he approached the privacy torts.

Prosser's first omission from the privacy torts was what he called "mental distress"—now more commonly known as intentional infliction of emotional distress. This tort, as defined by the current *Restatement*, provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[127]

The intentional infliction and privacy torts share many related features. Both are intentional torts, both provide a remedy for emotional injury, both rest on normative conceptions of unreasonable antisocial behavior, both are usually effected by words rather than actions, and both are products of tort law's expansion in the twentieth century to encompass psychological injuries rather than only physical injuries or injuries to property.[128] Given these rather obvious similarities, one might think, therefore, that Prosser would have treated these related torts alike; indeed, many of the early tort cases are indistinguishable from intentional infliction claims.[129]

Prosser himself recognized the significant overlap between intentional infliction and privacy.[130] As he put it in the introduction to the intentional infliction section of his first treatise, "the law has been slow to accept the interest in peace of mind as entitled to independent legal protection, even against intentional invasions. It has not been until recent years that there has been any general admission that the infliction of mental distress, standing alone, may serve as the basis for an action, apart from any other tort."[131]

This passage bears a striking resemblance to the beginnings of the Warren and Brandeis article. Prosser, like Warren and Brandeis before him, told a story of the common law's progress from the protection of tangible injuries to intangible mental ones.[132] One might think, then, given these similarities, that Prosser would have grouped the two torts together. However, he intentionally segregated them, placing them as far apart as possible in his treatises.[133]

It is likely that Prosser acted this way because he was trying to protect the

127. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

128. DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 175–76 (2008).

129. *See, e.g.*, Fitzsimmons v. Olinger Mortuary Ass'n, 17 P.2d 535 (Colo. 1932); Bazemore v. Savannah Hosp., 155 S.E. 194 (Ga. 1930); Young v. Western & A.R. Co., 148 S.E. 414 (Ga. Ct. App. 1929); Brents v. Morgan, 299 S.W. 967 (Ky. 1927); Thompson v. Adelberg & Berman, Inc., 205 S.W. 558 (Ky. 1918); Douglas v. Stokes, 149 S.W. 849 (Ky. 1912); Kelley v. Post Publ'g Co., 98 N.E.2d 286 (Mass. 1951); Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942); Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911).

130. PROSSER, PROSSER ON TORTS, *supra* note 37, at 1054.

131. *Id.* at 54.

132. *Compare id. with* Warren & Brandeis, *supra* note 1, at 193.

133. For example, in the first edition of the treatise, intentional infliction is contained in Chapter 2, "Intentional Interference with the Person," starting on page 54, while privacy is contained in the final "Miscellaneous" Chapter 21, starting on page 1050. PROSSER, PROSSER ON TORTS, *supra* note 37.

intentional infliction tort from being swallowed up by privacy, in the same way he later feared that false light might replace defamation and appropriation might overwhelm intellectual property.[134] Prosser had special interest in the "new tort" of intentional infliction, as it was one of the first areas of tort law in which he had made an impact.[135] He lamented that a number of cases that were clearly intentional infliction cases had been wrongly lumped into the privacy category, including the famous *Brents v. Morgan* case discussed above.[136] Indeed, in his discussion of the privacy torts, Prosser observed that both torts were part of the "larger problem of the protection of peace of mind against unreasonable disturbance."[137] He added his hope that "[w]hen the 'new tort' of intentional infliction of mental suffering becomes fully developed and receives general recognition, the great majority of the privacy cases may very possibly be absorbed into it."[138]

A second notable omission from Prosser's taxonomy was the tort of breach of confidence. This tort provides a remedy whenever a person owes a duty of confidentiality to another and breaches that duty.[139] The breach of confidence tort grew out of the same foundational English case as the Warren and Brandeis privacy torts—*Prince Albert v. Strange.* In *Prince Albert*, a printer was barred from exhibiting a catalogue of etchings entrusted to him by Prince Albert, Queen Victoria's Prince Consort, on grounds of breach of confidence and literary property.[140] Although it involved famous royal plaintiffs, the case rested on established legal principles. Indeed, in 1890, when Warren and Brandeis wrote, the common law provided much stronger precedent for breach of confidence than for any of the four privacy torts that emerged from Warren and Brandeis's article.[141]

The breach of confidence tort developed more fully in England than in America. English law rejected the Warren and Brandeis privacy torts, yet used *Prince Albert v. Strange* to develop confidentiality law. In England, breach of confidence grew into a robust tort that protects many of the same interests as Prosser's privacy torts. In America, the confidentiality tort remains a minor doctrine that has started to blossom only in the past few decades. Nevertheless, several American cases had recognized a breach of confidence tort before Prosser. For example, the Nebraska Supreme Court concluded in 1920 that

134. *See infra* notes 77–80 and accompanying text.

135. Prosser, *Intentional Infliction of Mental Suffering*, *supra* note 49. Craig Joyce calls this article one of the "landmarks in the development of both of the literature of torts and of the law itself." Joyce, *supra* note 40, at 852.

136. PROSSER, PROSSER ON TORTS, *supra* note 37, at 61 (citing Brents v. Morgan, 299 S.W. 967 (Ky. 1927)).

137. *Id*. at 1054.

138. *Id*.

139. Richards & Solove, *Privacy's Other Path*, *supra* note 2, at 156–57.

140. Prince Albert v. Strange (1849) 64 Eng. Rep. 293, 295 (Ch.).

141. Richards & Solove, *Privacy's Other Path*, *supra* note 2, at 133–44.

because physicians were "bound" by "professional honor and the ethics of [their] high profession" to maintain patient confidentiality, a "wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for damages naturally flowing from such wrong."[142] And in 1930 the Georgia Supreme Court recognized a confidentiality action against a hospital that had leaked a photograph of a deformed child.[143] Other cases reached similar results.[144]

Although the breach of confidence tort existed in America while Prosser was writing, he opted not to include it. As with the separation of privacy from intentional infliction of emotional distress, this was a conscious and deliberate choice. For instance, in the first edition of his treatise, he noted that Warren and Brandeis had relied on English breach of confidence cases to support the proposition that they rested on the broader ground that a right to privacy against the press was "essential to the protection of private individuals against the unjustified infliction of mental pain and distress."[145] Prosser also attempted to distinguish the confidentiality cases from privacy at the end of the chapter:

> The right of privacy, as such, is to be distinguished from liability found upon the breach of some confidential or fiduciary relation, as where a photographer violates his implied contract by publishing a picture which he has been employed to take, or a student publishes the notes taken in a professor's course. In such cases there may of course be liability for publications which would otherwise be entirely legitimate.[146]

Though Prosser gave no citations, the hypothetical situations he describes are the facts of two seminal English breach of confidence cases. The photographer scenario is identical to *Pollard v. Photographic Co.*,[147] and the student's publication of a professor's notes corresponds closely to the facts in *Abernethy v. Hutchinson.*[148] Both of these cases were key elements of Warren and Brandeis's privacy argument.[149]

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142. Simonsen v. Swenson, 177 N.W. 831, 832 (Neb. 1920).

143. Bazemore v. Savannah Hosp., 155 S.E. 194 (Ga. 1930).

144. *See* Douglas v. Stokes, 149 S.W. 849 (Ky. 1912) (finding photographer breached implied contract when he made extra copies of photos of father's dead babies); Smith v. Driscoll, 162 P. 572 (Wash. 1917) (assuming doctors can be liable for breaching the confidences of their patients while testifying in court).

145. PROSSER, PROSSER ON TORTS, *supra* note 37, at 1051.

146. *Id*. at 1062.

147. (1888) 40 Ch. D. 345. In *Pollard*, a photographer was hired to take a picture, but then retained the negatives and used them to make Christmas cards. The client whose likeness was reproduced and sold without her consent sued and won under a common law action for "breach of contract and breach of faith." *Id*. at 353.

148. (1825) 47 Eng. Rep. 1313 (Ch.). In *Abernethy*, a medical student attended a series of lectures by a distinguished surgeon and took notes. He then submitted transcripts of these lectures for publication in a medical journal. The court granted an injunction of the publication "on the ground of breach of contract or of trust." *Id*. at 1317.

149. Warren & Brandeis, *supra* note 1, at 207–10. Later editions of the treatise replaced the

Although Prosser never gave breach of confidence separate treatment in his work, he cited breach of confidence cases freely where it served his privacy arguments. A good example of this is his 1960 article, in which the discussion of the disclosure tort is replete with references to American confidentiality cases. But although many of these cases have similar or identical fact patterns to disclosure tort cases, Prosser repeatedly distinguished them. For example, while arguing that the disclosure tort requires widespread publicity to be actionable, Prosser noted that communication of facts to an employer, another individual, or even a small group is not an invasion of privacy and is only tortious if "there is some breach of contract, trust or confidential relation which will afford an independent basis for relief."[150] Citations to confidentiality cases run throughout his treatment of the disclosure tort,[151] but Prosser gives no reason why breach of confidence should not be included in his complex of four "loosely related" torts.

Prosser also included these cases in the third edition of his torts treatise in 1964.[152] In the fourth edition of the treatise, published in 1971, Prosser cited several breach of confidentiality cases when discussing the public disclosure tort. He described the cases not as establishing an independent tort but merely as an exception to one of the elements of the public disclosure tort. He noted the general requirement that the public disclosure be widely disseminated in order for there to be liability under the tort "unless there is some breach of contract, trust or confidential relation which will afford an independent basis for relief."[153] The cases he cited, however, were not public disclosure tort cases—they never mentioned the tort at all.

To be fair to Prosser, he might have been attempting to focus only on those privacy torts that emerged directly from Warren and Brandeis's article. Nevertheless, this would not extend to Prosser's exclusion of the confidentiality tort from the *Restatement.* Despite this defense, it represents a rather narrow vision of the legacy of Warren and Brandeis's article. Moreover, Prosser's argument that breach of confidence is a separate tort from his complex of four privacy torts seems unconvincing. When Warren and Brandeis relied on confidentiality cases to support their general claim in *The Right to Privacy*, and Prosser recognized the similarities between confidentiality and privacy, there would seem to be no reason to exclude breach of confidence. Confidentiality shares more in common with the disclosure tort than, for instance, intrusion, appropriation, or the subcategory of appropriation cases that constitute the

English case hypotheticals with citations to equivalent American cases. *See* PROSSER, TORTS SECOND EDITION, *supra* note 37, at 644 n.29 (citing *Holmes v. Underwood & Underwood*, 233 N.Y.S. 153 (N.Y. App. Div. 1929); Clayman v. Bernstein, 38 Pa. D. & C. 543 (Pa. C.P. 1940)).

150. Prosser, *Privacy*, *supra* note 6, at 393–94 & n.96 (citing Simonsen v. Swenson, 177 N.W. 831 (Neb. 1920)).

151. *See, e.g.*, *id.* at nn. 82, 83, 88, 96, 109, 111, 112.

152. PROSSER, TORTS THIRD EDITION, *supra* note 81, at 807 & n.97.

153. *Id.* at 810 & n.84.

"right of publicity."

Prosser's construction of the privacy tort cases as separate from intentional infliction and breach of confidence is curious given the interests and precedents these torts share with the four privacy torts he enumerated. These exclusions may have rendered the privacy torts more amenable to Prosser's tidy doctrinal boxes, but it also robbed privacy of much of the vitality it had possessed prior to his doctrinal pruning. As we discuss next, this decision has limited tort privacy's ability to evolve in novel and potentially useful ways.

D. Conceptualization

In setting forth a taxonomy of privacy torts, Prosser played an important role not just in the doctrinal development of privacy law but in its conceptual development as well. Prosser was a doctrinalist *par excellence*, in that he wrote scholarship that systematized, organized, and explained doctrine. He was also a legal realist insofar as he believed judges made law (sometimes influenced by scholars). In this respect, Prosser can be seen as responding to the crisis of indeterminacy found in the writings of Leon Green, Lon Fuller, and others with what G.E. White has called the "Consensus School" of torts.[154] Prosser agreed with the more radical realists in rejecting the formal rule-based approach to the law of legal classicism, but his response was that the common law, if subjected to close scrutiny, could reveal itself to be not only just but also rational and predictable.[155] Prosser's methodology—the analysis and restatement of the holdings of thousands of cases—sought to demonstrate just this fact. According to Craig Joyce, "he treated the 'doctrines' of tort law as amalgams of principles and processes, each of which could be reduced to a relatively simple formula. Each formula distilled the aggregate wisdom of countless cases."[156] As a realist, Prosser recognized that this wisdom was man-made, but as a doctrinalist with faith in the common law, he believed that it was rational and usually for the better.

Prosser defined his relationship to privacy as that of a passive reporter, noting the development of the law and offering a few reactions to it. He understated the extent to which his own hand was actively shaping the law. Because of his skeptical normative stance toward the privacy torts, he was not interested in helping to structure the law so it could develop more robustly. He appeared instead to view the privacy torts as a rather thoughtless and incoherent set of unwanted doctrines growing out of Warren and Brandeis's article. In *Privacy*, he frequently noted how the privacy torts deviated from more traditional torts in ways he found problematic. Privacy law was a set of weeds

154. *See* WHITE, *supra* note 29, at 85 (citing LEON GREEN, THE JUDICIAL PROCESS IN TORTS CASES (1931)); Leon Green, *The Duty Problem In Negligence Cases* (Pt. 1), 28 COLUM. L. REV. 1014, 1016 (1929); LON L. FULLER, THE LAW IN QUEST OF ITSELF (1940).

155. Joyce, *supra* note 40, at 856–57.

156. *Id.* at 855–56.

intruding into the more well-manicured garden of tort law—in which Prosser himself was the head gardener.

Although Prosser likely did not intend to articulate a conception of privacy, his taxonomic ordering of the doctrine served exactly that function, especially given that the theoretical landscape for conceptualizing privacy was relatively barren at the time.[157] Prosser's foray into the subject of privacy was the most important scholarly attention it had received since Warren and Brandeis wrote in 1890, but Prosser's conception of privacy was far less dynamic than that of Warren and Brandeis.

Warren and Brandeis had argued that the common law protected privacy via the "right to be let alone," an overarching principle in the common law:

> [T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not be assaulted or beaten, the right not be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.[158]

They had explained how various other legal protections were manifestations of this principle, and argued that the protection of "inviolate personality" rather than property was what justified the law's protection against the publication of personal writings.[159]

Courts used the broad principle Warren and Brandeis had articulated—the "right to be let alone"—to fashion the various tort remedies in the first half of the twentieth century. Although the "right to be let alone" was flawed because it was overinclusive and vague,[160] it was nevertheless quite fertile, for its breadth germinated countless new torts to redress a variety of related yet distinct harms.

Prosser, however, saw the law developing out of Warren and Brandeis's article as a discordant gaggle of cases. He noted that the law of privacy had

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157. A major wave of theorizing about privacy emerged in the late 1960s and early 1970s. A 1966 symposium in *Law and Contemporary Problems* contained extensive theoretical discussion about the concept of privacy, see Symposium, *Privacy*, 31 LAW & CONTEMP. PROBS. 251–435 (1966), as did a 1971 collection of essays in *Nomos*, see NOMOS XII: PRIVACY (J. Ronald Pennock & John W. Chapman eds., 1971). Two of the most influential books about privacy—Alan Westin's *Privacy and Freedom* and Arthur Miller's *The Assault on Privacy*—appeared in 1967 and 1971, respectively. *See* ARTHUR R. MILLER, THE ASSAULT ON PRIVACY (1971); ALAN F. WESTIN, PRIVACY AND FREEDOM (1967).

158. Warren & Brandeis, *supra* note 1, at 205.

159. *Id.*

160. For a critique of the "right to be let alone" formulation, see SOLOVE, UNDERSTANDING PRIVACY, *supra* note 128, at 15–18; *see also* ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 7 (1988) ("If privacy simply meant 'being let alone,' any form of offensive or harmful conduct directed toward another person could be characterized as a violation of personal privacy. A punch in the nose would be a privacy invasion as much as a peep in the bedroom.").

four different kinds of invasion but which had virtually nothing in common.[161] Prosser's characterization of the privacy torts detached them from their foundational principle of the "right to be let alone" and reconceptualized them as four discrete kinds of injury. Under Prosser's taxonomy, the privacy torts did not have any coherence or any reason to be linked together other than the historical contingency that they were inspired by Warren and Brandeis's article.[162]

The most significant early response to Prosser's approach was a conceptual critique by legal scholar Edward Bloustein. Bloustein argued that Prosser's understanding of privacy was splintered and incoherent. He contended that Prosser transformed assaults on privacy "into a species of defamation, infliction of mental distress and misappropriation. If Dean Prosser is correct, there is no 'new tort' of invasion of privacy, there are rather only new ways of committing 'old torts.'"[163] Bloustein suggested that privacy invasions were not four distinct interests with little in common, for they all shared a similar trait: They were "demeaning to individuality"[164] and "an affront to personal dignity."[165]

In a response to Bloustein, Prosser noted in his treatise that some "have occasionally contended that the 'right to privacy' represents a considerably broader principle than is encompassed by the four types of invasion set forth in the last four cases."[166] He responded by concluding that all of the privacy cases fit squarely into his four categories. "This is not to say that there will not be other kinds of invasion of privacy, recognized under the Constitution or at common law," he wrote, "[b]ut what they will be, if they come, remains thus far a matter of the personal penchants of professors rather than court recognition."[167] Prosser thus held steadfastly to his view that his four torts protected a group of totally unrelated interests.

Prosser's view that the privacy torts were unrelated can certainly be justified. "Dignity" and "individuality" are broad and vague, not much narrower than Warren and Brandeis's "right to be let alone" and "inviolate personality." There are countless things that assail individuality, dignity, or personality, and these conceptions of privacy suffer from overinclusiveness.

Although Prosser may have wisely avoided basing his theory of privacy on such broad conceptions, he was perhaps too quick to conclude that the privacy torts were entirely unrelated. As one of us has argued, privacy should not be understood as one thing; it is a pluralistic concept involving protections

161. Prosser, *Privacy*, *supra* note 6, at 389.
162. Prosser was himself explicit on this point. *See id.* at 422.
163. Bloustein, *supra* note 5, at 996.
164. *Id.* at 973.
165. *Id.*
166. PROSSER, TORTS FOURTH EDITION, *supra* note 94, at 943.
167. *Id.*

against many different kinds of problems.[168] These problems are distinct, but they are nevertheless related, even if they lack an overarching and driving principle. Although there may be no way to reduce privacy to a common denominator, the alternative need not be a chaos of discrepant things. As Ludwig Wittgenstein observed, some things may be related via "family resemblances"—"a complicated network of similarities overlapping and criss-crossing."[169] Prosser's view of his categories as having "nothing in common" too quickly dismisses the privacy torts as an uncontrolled and incoherent growth.

Because he rejected looking for any connections between the different privacy torts and refused any attempt to give them more conceptual coherence, Prosser provided no direction for the further development of the law besides the continued entrenchment of the four categories he identified. Before Prosser, courts looked to Warren and Brandeis's article and examined whether particular harms fell under the very broad principle of the "right to be let alone." After Prosser, courts looked to whether a particular harm fit into one of Prosser's four categories. Since Prosser eschewed any sense of connection or coherence for his categories, he left courts no conceptual guidance to assist in creating new categories or in shaping the torts in new directions.

It is not surprising that Prosser failed to devote more time toward conceptualizing what privacy was and where it might be going because he was openly skeptical about privacy. In the concluding pages of his 1960 article, he criticized the law of privacy as having "expanded by slow degrees to invade, overlap, and encroach upon a number of other fields."[170] After warning of the "dangers" of the expansion of privacy law, Prosser stated:

> This is not to say that the developments in the law of privacy are wrong. Undoubtedly they have been supported by genuine public demand and lively public feeling, and made necessary by real abuses on the part of defendants who have brought it all upon themselves. It is to say rather that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.[171]

Prosser crafted his taxonomy with an eye to halting the development of privacy, which he felt was growing too rapidly and too wildly. His comments at the end of *Privacy* suggest that he wanted to limit privacy's future development. In this he succeeded. For all its flaws, Warren and Brandeis's principle of the "right to be let alone" was at least coherent and capable of inspiring a wide body of legal development. Prosser's characterization of

168. *See* SOLOVE, UNDERSTANDING PRIVACY, *supra* note 128.

169. *See id*. at 42 (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 65–67 (G.E.M. Anscombe trans., 1958)).

170. Prosser, *Privacy*, *supra* note 6, at 422.

171. *Id.* at 423.

privacy as consisting of four categories of tort with no connections and no coherence provided little guidance for future growth. If privacy was as Prosser conceptualized it, then it had no direction. It was entirely empty, with no theory about what kinds of wrongs should be redressed by tort law.

Prosser's view of privacy as an empty and dangerous concept affected not just which torts he recognized as privacy torts but also how he defined them. Consider, for example, the appropriation tort. Prosser characterized the injury protected by the appropriation tort as "not so much a mental [one] as a proprietary one."[172] Such a characterization severs any link between the tort and Warren and Brandeis's article, which emphatically stressed that privacy was a mental injury and that property rights were inadequate to address the harm. The early cases involving the tort of appropriation understood it as protecting individuals from being exploited when their identities were used by others without their consent. In *Pavesich*,[173] for example, the Georgia Supreme Court recognized a privacy action when a company used the plaintiff's photograph without permission in a life insurance advertisement. Central to the court's conclusion was its belief that:

> [t]he right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty.[174]

The court also reasoned that the harm to the plaintiff consisted of the taking away of his "liberty" and that "he is for the time being under the control of another."[175] Such an understanding of the tort shows how it emerged from Warren and Brandeis's article even though it was not primarily the tort they had in mind. In contrast, Prosser's view of the tort has no connection to Warren or Brandeis's and has no apparent relationship to the other privacy torts.[176]

Prosser's characterization of appropriation had a dramatic effect on the tort. According to Jonathan Kahn, the "early association of appropriation claims with such intangible, non-commensurable attributes of the self as dignity and the integrity of one's persona seems to have been lost, or at least misplaced, as property-based conceptions of the legal status of identity have

172. *Id.* at 406.

173. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

174. *Id.* at 70.

175. *Id.* at 80.

176. As Robert Post argues, "The descriptive privacy employed by the second *Restatement*'s definition of appropriation is consistent with a property conception of the tort, but incompatible with a remedial focus on indignity and mental distress." Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 674 (1991).

come to the fore."[177]

One can never know what privacy law might have become had Prosser thought and wrote differently about privacy. Compared to the vitality and creativity of Warren and Brandeis, Prosser's concept of privacy was far less visionary. It was backward-looking rather than forward-looking.

Of course, Prosser was not the sole cause of this dramatic change in privacy law. It was the product of the numerous courts that adopted his taxonomy and stopped engaging in the dynamic creative activity that had preceded it. There is no way to know if the courts were persuaded by Prosser's view that the privacy torts lacked any meaningful relationship with each other. Most likely, courts turned to his approach because his taxonomy was a useful tool in such a burgeoning and complex area of law, he was so prominent and authoritative on tort law, and he took such vigorous efforts to have courts adopt his legal formulations. Regardless of the reason, the result was that courts embraced Prosser's account of the torts, which was not nearly as generative as Warren and Brandeis's principle of the "right to be let alone."

III.
THE FUTURE OF TORT PRIVACY

A. The Limits of the Privacy Torts

The story of Prosser's privacy torts is thus oddly one of both great success and stunning failure. Nearly every state recognizes at least one form of the privacy torts by common law or statute.[178] As the U.S. Supreme Court declared in 1975, "the century has experienced a strong tide running in favor of the so-called right of privacy."[179] Citing Prosser's torts treatise, the Court noted that the privacy torts were firmly and widely established,[180] and it proclaimed that the "right of privacy" has "impressive credentials."[181] In this regard, the privacy torts are quite a success. Sprouting from a law review article, they developed within a century into a well-established body of nationally-

177. Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 223 (1999). A new tort, known as the "right of publicity," has emerged to redress violations of property rights in one's name or likeness. *See, e.g.*, Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C. L. REV. 709 (1996); Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853 (1995); MCCARTHY, *supra* note 125; Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954). According to Thomas McCarthy, "Simplistically put, while the appropriation branch of the right of privacy is invaded by an injury to the psyche, the right of publicity is infringed by an injury to the pocket book." MCCARTHY, *supra* note 125, at § 5:61.

178. *See, e.g.*, O'NEIL, *supra* note 104, at 77.

179. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 488 (1975).

180. *Id.*

181. *Id.* at 489.

recognized law. Prosser played an important role in moving this process along.

But the tale of these torts is also one of disappointment. Tort law has not emerged as the leading protector of privacy. According to Rodney Smolla, "If privacy law were a stock, its performance over the last century would not be deemed impressive. It has been a consistently poor achiever, barely keeping up with inflation."[182] Privacy tort cases have proven quite difficult for plaintiffs to win, and the torts have not kept pace with contemporary privacy problems. Just as he has had a large share in the privacy torts' successes, Prosser bears much of the blame for their failure.

The privacy torts have proven disappointing in at least two ways. First, they have not provided the kind of protection against the media that Warren and Brandeis envisioned. Second, they have not adapted to new privacy problems such as the extensive collection, use, and disclosure of personal information by businesses.

Regarding the applicability of the torts to the media, the predominant tort addressing the disclosure of information by the media is the tort of public disclosure of private facts. The disclosure tort is severely limited in many respects, particularly by requiring that the disclosure give "publicity" to information that is not newsworthy. In cases involving media giving publicity to personal information, the newsworthiness element results in many cases being dismissed. According to Jonathan Mintz, "plaintiffs' privacy rights rarely prevail over the public's interests, rendering the limitation on the scope of the public interest essentially theoretical and leaving plaintiffs with rare success."[183] A number of courts are very deferential to the media on newsworthiness, essentially concluding that if the media chooses to publish a story, then this is the most viable evidence of its newsworthiness.[184] In the words of one court, "what is newsworthy is primarily a function of the publisher, not the courts."[185] Such an approach virtually nullifies the tort in the media context.[186]

These problems are becoming more acute as more individuals disseminate information through blogging and social networking technologies. Today, anybody has the power to broadcast information to a worldwide audience, creating new issues for privacy law to confront. Warren and Brandeis worried about an overly-sensational press, but the press in 1890 was relatively confined

182. Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 289–90 (2002).

183. Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 446 (1996) (citation omitted).

184. *See* Wagner v. Fawcett Publ'n., 307 F.2d 409, 410 (7th Cir. 1962); Jenkins v. Dell Publ'g. Co., 251 F.2d 447, 451–52 (3d Cir. 1958); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 960–61 (D. Minn. 1948).

185. Heath v. Playboy Enters., Inc., 732 F. Supp. 1145, 1149 n.9 (S.D. Fla. 1990).

186. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1000–08 (2003).

to a select group of entities. Today, in comparison, the "media" consists not only of the mainstream press (as well as television and radio) but also of the hundreds of millions of people around the world who can disseminate text, images, and video from their mobile phones and personal computers. The privacy torts have not been able to deal with the traditional media, and this burgeoning new media is raising the stakes and posing even greater challenges.

Beyond problems addressing the media, the privacy torts have struggled to address the collection, use, and dissemination of personal information in computer databases. As Julie Cohen aptly observed, "[I]t is becoming increasingly clear that the common law invasion of privacy torts will not help to contain the destruction of informational privacy."[187]

The tort of intrusion, the most likely candidate to regulate the collection of information, faces several hurdles. Much of the compilation of data occurs from information that is in the public domain, and courts have concluded that collecting such data is not an invasion into a person's "solitude" or "seclusion."[188]

Several privacy torts—public disclosure, intrusion, and false light—require that the privacy invasion be "highly offensive to a reasonable person."[189] Much of the information that is gathered, used, and disseminated by businesses is done so in bits and pieces. Moreover, it often involves relatively innocuous information that fails to be offensive enough in each instance to rise to the level of "highly offensive." Gathering information such as a person's unlisted phone number, for example, is not sufficient to give rise to an action for intrusion.[190] In *Shibley v. Time, Inc.*,[191] a magazine publisher sold its customer subscription list to advertisers. The court concluded that the sale of the lists did not "cause mental suffering, shame or humiliation to a person of ordinary sensibilities."[192]

The tort of appropriation has also failed to address the collection, use, and dissemination of personal data. In *Dwyer v. American Express Co.*,[193] the court concluded that plaintiffs lacked an appropriation claim against American Express for selling their names to merchants because "an individual name has value only when it is associated with one of defendants' lists. Defendants create value by categorizing and aggregating these names. Furthermore, defendants' practices do not deprive any of the cardholders of any value their individual

187. Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029, 2043 (2001).

188. *See* Muratore v. M/S Scotia Prince, 656 F. Supp. 471, 482–83 (D. Me. 1987) (no intrusion action when photographers harassed and insulted plaintiff in a public place).

189. RESTATEMENT (SECOND) OF TORTS, § 652 (1977).

190. Shibley v. Time, Inc., 341 N.E.2d 337 (Ct. App. Ohio 1975).

191. *Id.*

192. *Id.* at 339.

193. 652 N.E.2d 1351 (Ill. App. 1995).

names may possess."[194]

A broader reason why the privacy torts have failed to address contemporary problems stems from the way courts conceptualize privacy. With regard to the public disclosure tort and the intrusion upon seclusion tort, courts have relied upon antiquated and narrow understandings of privacy. Many courts have viewed privacy as non-existent if the information in question has already been exposed to the public or to others.[195] As one court has put it, "There can be no privacy in that which is already public."[196] The problem with this view of privacy is that information is only rarely completely public or completely private. The disclosure tort lacks an intermediate stage between the poles of "public" and "private." People expose information with varying expectations of the extent and nature of its future exposure. When they go about their daily activities, most people expect not to have the information about them recorded, compiled, or widely disseminated. In urban settings, people expect to be seen and heard by others, but they expect anonymity—that those perceiving them will not care or remember. Even in a smaller town, people might expect particular activities to be known by particular people, but this information would be splintered among various individuals. People likely do not expect it to be aggregated together into a comprehensive dossier.

The current privacy torts have struggled in recognizing more nuanced understandings of privacy in terms of levels of accessibility of information. Combining disparate data together or taking inaccessible information and disseminating it much more widely are both significant incursions on privacy. Nevertheless, with the simplistic conception of privacy that many courts still adopt, privacy becomes an all-or-nothing affair, something that makes privacy virtually impossible in today's world where it is increasingly difficult (if not impossible) to keep much information completely hidden away.

Another way in which current tort-based conceptions of privacy are limited is in their failure to recognize confidentiality. As we have argued extensively elsewhere, American law has been slow to recognize confidentiality.[197] As one court famously declared, if a person shares a secret with another person, "he would necessarily assume the risk that a friend or acquaintance in whom he had confided might breach the confidence."[198]

Indeed, Lior Strahilevitz suggests that even sharing a secret with a large group of people should not spell doom to one's claim of privacy.[199] He argues that information contained within one's social network still remains

194. *Id*. at 1356.

195. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 162–70 (2007) [hereinafter SOLOVE, FUTURE OF REPUTATION].

196. Gill v. Hearst Publ'g. Co., 253 P.2d 441 (Cal. 1953) (quotation omitted).

197. Richards & Solove, *Privacy's Other Path*, *supra* note 2, at 148–58.

198. Nader v. General Motors, Co., 225 N.E.2d 765, 770 (N.Y. 1970).

199. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

functionally private because it is not likely to spread beyond those boundaries.[200] But information is frequently shared with a few trusted confidantes—doctors and lawyers, and also spouses, lovers, and friends—under legitimate expectations that these secrets should not be shared with all the world. And we believe that confidentiality's focus on trust and relationships has the potential to provide better solutions to these problems.[201] Courts, however, continue to struggle with the issue and have failed to provide any coherent approach for dealing with these questions.[202]

These are just a few examples of the ways in which judicial conceptions of privacy have hamstrung the effectiveness of the privacy torts. New technologies and methods for collecting and disseminating information have changed how people can modulate their privacy, but courts appear stuck with notions of privacy more appropriate for the first half of the twentieth century. The failure of the privacy torts to adapt to contemporary privacy problems is due, in part, to their lack of dynamism. In many ways, the privacy torts are like relics from the mid-twentieth century. The existing torts stopped being malleable and remain too rigid to serve as a good fit for today's Information Age. And no new privacy torts have arisen to address the burgeoning problems caused by new technologies.

B. Reigniting Tort Privacy

Is tort law malleable and flexible enough to grow to meet the demands of protecting privacy in the twenty-first century? Although tort law certainly has many limits and cannot be the sole protector of privacy, it can be strengthened significantly. Tort law has the seeds within it to grow to respond to many contemporary privacy problems caused by the collection, use, and dissemination of personal data. Several scholars have proposed expansions of the privacy torts to address contemporary privacy problems. For example, Danielle Citron proposes strict liability for companies that leak data.[203] Sarah Ludington argues for the creation of a common law tort based on the Fair Information Practices.[204] Jessica Litman suggests a breach of trust tort when companies misuse information.[205]

Such innovations in tort law have not occurred. The lack of growth and development in tort law—both common law and statutory—cannot be attributed entirely to Prosser. Nevertheless, prior to Prosser, the landscape of

200. *Id.*

201. Richards & Solove, *Privacy's Other Path*, *supra* note 2, at 181–82.

202. SOLOVE, FUTURE OF REPUTATION, *supra* note 195, at 176–82.

203. Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241, 265–66, 278 (2007).

204. Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140, 172–73 (2006).

205. *See* Jessica Litman, *Information Privacy / Information Property*, 52 STAN. L. REV. 1283, 1304–13 (2000).

the tort law of privacy was one of vigorous growth and experimentation; after Prosser, tort privacy became rigid and static.

How should tort law evolve to address current privacy problems? We offer a few suggestions. First, tort law must rethink antiquated understandings of privacy. As discussed above, the law must abandon the binary, all-or-nothing approach toward privacy in favor of a more modern and nuanced understanding of the gradations between purely public and purely private.

Tort law should take into account the social contexts in which information is shared between individuals, and the expectations (reasonable or not) that the individuals have about the shared information. To do so, tort law should expand upon the breach of confidence tort, making it more robust like its English counterpart.[206] This process is already underway, but the confidentiality tort has been held back in part because it was left out of the spotlight given to the other privacy torts. Little recognized and hardly known, the tort languished in obscurity until quite recently. It did not appear in many privacy cases in which it might have applied probably because so few knew much about it.[207] But confidentiality has a great deal of promise. For instance, because it is inherently about the limited entrustment of information to others, it is better able to cope with the reality that information is only rarely completely "public" or "private." This is just one example of the ways in which Prosser's narrow conception of tort law continues to affect the current state of the law.

Second, tort law must come to a more sophisticated conception of harm. In the opening pages of their article, Warren and Brandeis argued that the law had long been developing a broader recognition of harm. They noted that while the law originally protected against more tangible and physical kinds of harms, in more modern times, the law was evolving to recognize harms of a more intangible nature—harms to one's psyche and emotions.[208]

Today, courts still view emotional harms "with suspicion" because of "concerns over genuineness, reliability, and the specter of unlimited liability for trivial losses."[209] Courts often are dismissive of privacy harms because they lack a physical component. For example, courts have struggled to recognize harm from leaked or improperly disseminated data.[210] Courts can readily understand the harm caused by the disclosure of a naked photograph of a person, but they struggle in locating a harm when non-embarrassing data is disclosed or leaked. A broader understanding of harm is needed in order for the

206. Richards & Solove, *Privacy's Other Path*, *supra* note 2, at 166.

207. *Id.* at 156–57, 176.

208. Warren & Brandeis, *supra* note 1, at 193–94.

209. JAMES M. FISCHER, UNDERSTANDING REMEDIES 124 (1999).

210. *See, e.g.*, Doe v. Chao, 306 F.3d 170, 180–82 (4th Cir. 2002) (rejecting plaintiff's claim of actual damages because he failed to produce "any evidence of tangible consequences stemming from his alleged angst over the disclosure of his SSN. He claimed no medical or psychological treatment, no purchase of medications (prescription or over-the-counter), no impact on his behavior, and no physical consequences.").

privacy torts to apply to the extensive gathering, dissemination, and use of information by various businesses and organizations.[211]

Third, courts must develop a better understanding of the relationship between free speech and tort-based privacy remedies. Partly due to Prosser's influence, many modern courts consider privacy and free speech to be always in direct conflict.[212] While tort actions against the press based upon emotional injury or hurt feelings raise important First Amendment issues, these are but a subset of the cases in which tort privacy can apply. Unlike actions against the press, actions in the database context raise far fewer First Amendment issues.[213] And as we have argued recently, the breach of confidence tort only rarely clashes with the First Amendment.[214]

Fourth, courts must recognize new duties and new sources of duties in tort law. One relatively recent case suggests a more robust role for tort law in addressing the problems caused by computer databases. In *Remsburg v. Docusearch, Inc.*,[215] a man named Liam Youens obtained data about Amy Lynn Boyer from a database company called Docusearch, which supplied him with her Social Security number and work address. Youens then went to Boyer's workplace and murdered her. Boyer's estate sued Docusearch, claiming it was negligent in giving Youens Boyer's personal information. The court held that although ordinarily private parties have "no general duty to protect others from the criminal attacks of third parties," when "the defendant's conduct has created an unreasonable risk of criminal misconduct, a duty is owed to those foreseeably endangered."[216] A private investigator "owes a duty to exercise reasonable care not to subject the third person to an unreasonable risk of harm."[217] Therefore, "threats posed by stalking and identity theft lead us to conclude that the risk of criminal misconduct is sufficiently foreseeable so that an investigator has a duty to exercise reasonable care in disclosing a third person's personal information to a client."[218]

Remsburg is an important step forward in recognizing and remedying modern information privacy harms, yet it has not led to a revolution in tort law. Hardly any other cases have reached a conclusion similar to that in *Remsburg.* Although the case raises many questions that need further development, such as how broadly the duty recognized in *Remsburg* ought to apply, there have been scant attempts in tort law to explore the path that *Remsburg* has sketched out.

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211. For a discussion of a broader understanding of privacy harms, see SOLOVE, UNDERSTANDING PRIVACY, *supra* note 128, at 174–83.

212. *See* Richards, *The Puzzle of Brandeis*, *supra* note 31, at ms. 1–2 (collecting examples).

213. Richards, *Reconciling Data Privacy and the First Amendment*, *supra* note 93, at 1150–51.

214. Solove & Richards, *Rethinking Free Speech*, *supra* note 85, at 1685–1707.

215. 816 A.2d 1001 (N.H. 2003).

216. *Id*. at 1006–07.

217. *Id*. at 1007.

218. *Id*. at 1008.

Warren and Brandeis's article was a bold recognition of a group of harms against which the law did not offer adequate protection in the late nineteenth century. They argued that the common law afforded a right against these harms and urged courts to find ways to remedy them. And courts responded to their call in the traditional common law spirit.

That spirit has been lost in privacy tort law. Instead of examining the harms and developing tort remedies to respond, the law merely attempts to fit cases into the four boxes that Prosser defined. If a harm does not fit into these boxes, it goes unremedied. It is time for the tort law of privacy to regain the creative spirit it once possessed. It must do so if it is to remain relevant to protect privacy in today's Information Age.

CONCLUSION

Prosser's legacy of privacy law is a mixed one. On one hand, he helped infuse it with legitimacy and recognition, solidifying the privacy torts among the pantheon of other tort actions. But on the other hand, whether intentionally or not, Prosser had a stultifying effect on the privacy torts. Unlike the bold and generative spirit of the Warren and Brandeis article, Prosser's account of privacy was rigid and ossifying. He expressed skepticism about the torts and urged caution.

Like a deer caught in the headlights, the privacy torts froze after Prosser's beam focused upon them. Prosser codified the torts in the *Second Restatement of Torts*, effectively locking them into their current form. The result is that the privacy torts are woefully inadequate to address the privacy problems we face today.

The precise extent to which the development of the privacy torts owes its trajectory to Prosser can never be scientifically proven. We surmise that Prosser had a rather dramatic influence given his stature and the fact that privacy law developed in such a different way before, as opposed to after, his article.

The great irony in the story is that Prosser's article represented the coronation of the privacy torts—their recognition by the greatest torts scholar of his generation—but also the beginning of their decaying relevance in addressing the privacy problems to come. Prosser thus helped and hindered the development of the privacy torts. If the tort law of privacy is to survive in the twenty-first century, it must finally emerge from Prosser's shadow and regain some of Warren and Brandeis's dynamism.