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## An Integrative Alternative For America's Privacy Torts

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## COMMENT

# AN INTEGRATIVE ALTERNATIVE FOR AMERICA'S PRIVACY TORTS

### INTRODUCTION

In 1991 a Colorado federal court dismissed a woman's invasion-of-privacy claim against her former employer.<sup>1</sup> In her privacy claim, Hieu Smith relied on the Colorado Supreme Court's recognition of the invasion-of-privacy tort a quarter-century earlier in *Rugg v. McCarthy*,<sup>2</sup> which stated, "We do not attempt to comprehensively define the right of privacy, nor to categorize the character of all invasions which may constitute a violation of such right. We merely observe that considerable precedent exists in the area of oppressive conduct by a creditor in connection with his effort to collect from his debtor."<sup>3</sup> In dismissing Hieu Smith's privacy claim, the federal court in *Smith v. Colo. Interstate Gas Co.* did categorize the character of actionable invasions by holding that the right to privacy is invaded by (a) unreasonable intrusion upon the

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<sup>1</sup> *Smith v. Colo. Interstate Gas Co.*, 777 F. Supp. 854, 856 (D. Colo. 1991). Smith's complaint also asserted that her firing by the defendant, which she alleged was an act of gender and ethnic discrimination, was a violation of her civil rights. The privacy count alleged that the defendant violated her right to privacy by contacting her new temporary employer to disclose that she had filed a complaint for retaliatory firing, by suggesting that the temporary employer check the accuracy of the information on her employment application, and by subsequently confirming that the statement on Smith's application that she had been laid off by the defendant was not accurate. As a result Smith was dismissed from her temporary position and denied a permanent position.

<sup>2</sup> *Rugg v. McCarty*, 476 P.2d 753, 754 (Colo. 1970). Rugg alleged that a debt collector invaded her privacy through numerous telephone calls, letters demanding payment, and a letter to her employer indicating she was not fulfilling her expectations and inquiring how many garnishments would be tolerated. The trial court dismissed the privacy claim, but it was unclear if the decision was based upon non-recognition of the privacy tort, the inability of the complaint to meet the requirements of the tort, or both. The Colorado Supreme Court reinstated the privacy claim and remanded the case.

<sup>3</sup> *Id.* at 755.

seclusion of another, (b) appropriation of the other's name or likeness, (c) unreasonable publicity given to the other's private life, or (d) publicity that unreasonably places the other in a false light before the public.<sup>4</sup> Over Smith's unsupported assertion that the privacy tort encompasses all affronts to one's dignity, the privacy cause of action was dismissed because it did not fit any of those four invasions.<sup>5</sup>

*Rugg* and *Smith* encapsulate a transition between two approaches to tort protection of privacy.<sup>6</sup> *Rugg* reflects the unitary-tort theory, which recognizes a single tort and seeks only to determine if the plaintiff's interest in privacy has been breached by the defendant's behavior.<sup>7</sup> *Smith* reflects the multiple-tort approach that recognizes four torts, encompassing four ways in which privacy is breached, that have in common only an interference with a loosely defined understanding of privacy.<sup>8</sup> This understanding of the privacy tort was lifted from the Restatement (Second) of Torts (1977), which adopted a construct first proffered by Dean William Prosser in a 1960 law review article.<sup>9</sup> Beyond the mechanical issue of whether one or multiple torts are recognized, the fundamental question is whether either approach facilitates the identification of a single value that is protected by the tort. The unitary-tort approach treats privacy itself as that value, while the multiple-tort theory, reflected in the Prosser article and the Restatement,

<sup>4</sup> *Smith*, 777 F. Supp. at 857.

<sup>5</sup> *Id.*

<sup>6</sup> Classification of legal concepts has long been an exercise fraught with peril. In 1782, Jeremy Bentham noted, "there is no neutral term which can be applied in common to the ideas denoted by the words general and particular, so as to bring to view the one without putting an exclusion upon the other. [This] ... is a sort of verbal contradiction which however it seemed impossible to avoid." JEREMY BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* 161 n.1 (Charles Warren Everett ed., Greenwood Press 1970). Bentham fortunately used "particular" and "general" rather than his preferred "atomoprosetic" and "eidoprosetic." *Id.* Almost two centuries later, Professor Ruth Gavison, distinguishing between types of laws that protect rights, classified protections as falling into the "adjustment," "piecemeal," "general remedy," or "declaration of right" approach. See Ruth Gavison, *Should We Have a "General Right to Privacy" in Israel?*, 12 *ISR. L. REV.* 155, 158-59 (1977). Another approach focuses on the character of the tort at issue and distinguishes between the "Prosser Four-Part Analysis," the "Unified Tort Theory," and the "Unneeded Tort Theory." Jacqueline Hanson Dee, *The Absence of False Light From the Wisconsin Privacy Statute*, 66 *MARQ. L. REV.* 99, 104-08 (1982). The "unitary" and "multiple tort" labels used here are adapted from the classifications used by Dee.

<sup>7</sup> See *Rugg*, 476 P.2d at 753. See also Dee, *supra* note 6, at 105-07.

<sup>8</sup> *Smith*, 777 F. Supp. at 857. Dee refers to this approach as the "Prosser Four Tort Analysis." Dee, *supra* note 6, at 105-07. In adopting this classification for use here, I refer more generally to a multiple-tort theory to focus on the aspect of the approach that envisions multiple torts for multiple invasions of privacy, thus holding out the possibility of additional torts for additional invasions of privacy, as envisioned by *RESTATEMENT (SECOND) OF TORTS* § 652A (1977).

<sup>9</sup> *RESTATEMENT (SECOND) OF TORTS* § 652A (1977); see also William L. Prosser, *Privacy*, 48 *CAL. L. REV.* 383, 389 (1960).

views the single value in privacy as an illusory umbrella that embraces four loosely linked, independent concerns.<sup>10</sup>

The multiple-tort approach has been dominant in the United States over the last four decades, and the proponents of the unitary-tort approach have become a minority voice.<sup>11</sup> The Restatement, however, envisioned that the further development of the privacy tort would see additional invasions of privacy incorporated into Prosser's four-tort structure.<sup>12</sup> This has not occurred, and additional privacy torts have generally been created by statute to respond to specific threats.<sup>13</sup> In the absence of the flexibility envisioned by the Restatement, the debate over the privacy tort has generally been oriented around the two approaches manifested in *Rugg* and *Smith*. Adherents of the unitary-tort theory view the four-tort approach as a corruption of what the privacy tort was intended to be.<sup>14</sup> Those supporting the multiple-tort theory, however, believe that the four-tort approach clarifies the conceptual confusion created by the privacy tort's unitary theory origins.<sup>15</sup> Its ascendance notwithstanding, the Restatement's four-tort structure, has stunted the development of both approaches' ability to evolve and adapt to emerging threats.<sup>16</sup>

This Comment argues that the flexibility envisioned by the Restatement can best be achieved through an alternative offered by the Government of Ireland in the summer of 2006.<sup>17</sup> The Irish proposal recognizes a single tort for invasion of privacy, defining the degree of privacy that an individual may expect as that which is reasonable under all the circumstances.<sup>18</sup> It lists a series of factors to consider when evaluating all the circumstances, as well as defenses and recognized violations.<sup>19</sup> The Irish integrative approach seeks to incorporate the elasticity of the unitary-tort approach with the clarity of the multiple-tort approach in a single statute. Adoption of the Irish approach would allow American jurisdictions to more clearly articulate the privacy tort and to

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<sup>10</sup> See *infra* notes 29-60 and accompanying text. Unless otherwise indicated, references to the "Restatement" refer to the RESTATEMENT (SECOND) OF TORTS § (1977).

<sup>11</sup> See *infra* notes 61-80 and accompanying text.

<sup>12</sup> See *infra* notes 124-126 and accompanying text.

<sup>13</sup> See *infra* notes 127-136 and accompanying text.

<sup>14</sup> See *infra* notes 29-48 and accompanying text.

<sup>15</sup> See *infra* notes 49-60 and accompanying text.

<sup>16</sup> See *infra* notes 81-124 and accompanying text.

<sup>17</sup> See GOV'T OF IRELAND, REPORT OF WORKING GROUP ON PRIVACY (2006) (available from Department of Justice, Equality and Law Reform website) at <http://www.justice.ie/en/JELR/WkgGrpPrivacy.pdf/Files/WkgGrpPrivacy.pdf>.

<sup>18</sup> *Id.* ¶ 7.13-14, app. § 3(1).

<sup>19</sup> *Id.* ¶ 7.13, app. § 3(2); ¶ 7.22, app. § 6(1)(a-d); ¶ 7.17, app. § 4(1)(a-d).

better channel the adaptive powers of American common law.<sup>20</sup> Part I of this Comment explains that modern American privacy-tort law is the result of the tension between two conflicting viewpoints on invasion-of-privacy torts.<sup>21</sup> Part II shows how the widespread acceptance of the four-tort structure in the United States has stunted the development of the privacy tort.<sup>22</sup> Part III surveys the provisions of the Irish proposal, while Part IV analyzes the benefits offered by the Irish integrative approach.<sup>23</sup> Part V explores how an American jurisdiction can utilize a structure like that in the Irish bill to take advantage of these benefits.<sup>24</sup> Finally, Part VI concludes that the Irish proposal offers an opportunity for American privacy-tort jurisprudence to embrace the adaptive and evolutionary power of the common law.<sup>25</sup>

## I. DEVELOPMENT OF THE MODERN AMERICAN PRIVACY TORT

The American privacy tort has changed significantly from its origins as a broadly drawn protection and has been transmuted into a compartmentalized four-tort structure that prevails today.<sup>26</sup> This has had the practical effect, as seen in *Smith*, of limiting privacy-tort protections to acts that fall within the parameters established by the four torts, and excluding those that fall outside that structure.<sup>27</sup> The ascendance of the four-tort framework has fundamentally reordered both the form and the scope of the invasion-of-privacy torts, to the point that subsequent deviations from it have been tentative and isolated.<sup>28</sup>

### A. THE WARREN-BRANDEIS FRAMEWORK

Perhaps the most famous law review article in history, *The Right to Privacy* by Samuel Warren and Louis Brandeis, proposed the idea that privacy is the right to be left alone.<sup>29</sup> It asserted that recognition of the right and a corresponding tort was required to ensure the individual's

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<sup>20</sup> See *infra* notes 125-170 and accompanying text.

<sup>21</sup> See *infra* notes 26-80 and accompanying text.

<sup>22</sup> See *infra* notes 81-124 and accompanying text.

<sup>23</sup> See *infra* notes 125-170 and 171-207 and accompanying text.

<sup>24</sup> See *infra* notes 208-250 and accompanying text.

<sup>25</sup> See *infra* notes 251-255 and accompanying text.

<sup>26</sup> See *infra* notes 29-60 and accompanying text.

<sup>27</sup> See *supra* notes 1-6 and accompanying text.

<sup>28</sup> See *infra* notes 49-56, 61-80 and accompanying text.

<sup>29</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); see also *Wheaton v. Peters*, 33 U.S. 591, 635 (1834), (“defendant asks to be left alone...”); THOMAS L. COOLEY, COOLEY ON TORTS 29 (1888) (coining phrase “right to be left alone”).

“full protection in person and property.”<sup>30</sup> The common law, therefore, had to “meet the new demands of society” stemming from “instantaneous photographs and newspaper enterprises” that invaded “the sacred precincts of private and domestic life” and from “numerous mechanical devices” that threatened to make the private public.<sup>31</sup> The authors asserted that modern enterprise had, through invasion of the individual’s privacy, “subjected him to mental pain and distress far greater than could be inflicted by mere bodily injury.”<sup>32</sup> Warren and Brandeis extended existing protections<sup>33</sup> in the common law to create a “general right to the immunity of the person” that bore a “superficial resemblance” to an action for defamation, but unlike with defamation, the invasion was a legal injury in itself.<sup>34</sup> This new right was intended to protect an individual’s “inviolable personality.”<sup>35</sup>

Warren and Brandeis’s understanding of “inviolable personality” was not clarified further,<sup>36</sup> but since 1890 legions of scholars have attempted to bring greater clarity to the concept of privacy. Some have approached this as a definitional challenge and determined that privacy is the right to control information about oneself,<sup>37</sup> a form of anti-totalitarianism,<sup>38</sup> or a right to exclusion.<sup>39</sup> Others have viewed privacy as the embodiment of a value such as personhood<sup>40</sup> or autonomy.<sup>41</sup> Another approach has

<sup>30</sup> *Id.* at 193.

<sup>31</sup> *Id.* at 193-195.

<sup>32</sup> *Id.* at 196.

<sup>33</sup> These included, e.g., extension of the property rights in manuscripts and works of art to embrace “the peace of mind or the relief afforded by the ability to prevent any publication at all” and the logic behind injunctions against publication on the basis of breach of contract and breach of trust to circumstances where there was no contract or relationship as akin to the implication of a term or relationship required to prevent “an intolerable abuse.” Warren & Brandeis, *supra* note 29, at 199-203, 210.

<sup>34</sup> *Id.* at 207, 197, 213.

<sup>35</sup> *Id.* at 205.

<sup>36</sup> Brandeis appeared to attempt to offer some clarification on this matter in his famous dissent in *Olmstead v. United States*: “The makers of our Constitution...[r]ecognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.” *Olmstead v. United States*, 277 U.S. 438, at 478-79 (1928) (Brandeis, J., dissenting).

<sup>37</sup> ARTHUR R. MILLER, *ASSAULT ON PRIVACY* 25 (1971); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967); Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 477-78 (1968).

<sup>38</sup> Jed Rubenfeld, *The Right of Privacy*, 102 *HARV. L. REV.* 737, 784 (1989).

<sup>39</sup> Russell Brown, *Rethinking Privacy: Exclusivity, Private Relation and Tort Law*, 43 *ALBERTA L. REV.* 589, 591 (2006).

<sup>40</sup> Daniel R. Ortiz, *Privacy, Autonomy, and Consent*, 12 *HARV. J.L. & PUB. POL’Y* 91, 92 (1989); Tom Gerety, *Redefining Privacy*, 12 *HARV. C.R.-C.L. L. REV.* 233, 236 (1977); Jeffrey Reiman, *Privacy, Intimacy and Personhood*, 6 *PHIL. & PUB. AFF.* 26, 33 (1976); Edward Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional*

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reduced privacy to a few essential components such as “secrecy, anonymity, and solitude”<sup>42</sup> or “repose, sanctuary, and intimate decision.”<sup>43</sup> In the tort context, defining privacy is a narrower aspect of this inquiry, concerned with determining what must be breached to give rise to a civil wrong for which the law offers a remedy.<sup>44</sup>

By 1939, the notion that the right to privacy could be protected by a single integrative form of action had received significant acceptance.<sup>45</sup> That year, the First Restatement of Torts recognized that “[a] person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”<sup>46</sup> A hallmark early case, *Pavesich v. New England Life Insurance Co.*,<sup>47</sup> stated that “the right to withdraw from the public gaze at such times as a person sees fit . . . is also embraced within the right of personal liberty.”<sup>48</sup> This embrace of privacy as a single, unitary concept was indicative of Warren and Brandeis’s success in integrating the strands of the cases they analyzed into a new, unified legal tort protection.

## B. PROSSER AND THE RESHAPING OF PRIVACY

This new tort protection was significantly reshaped by another well-known law review article. The Restatement (Second) of Torts, in recognizing the familiar four-tort structure, accepted a construct first posited in Dean William Prosser’s 1960 article entitled simply *Privacy*.<sup>49</sup>

as *Well?*, 46 TEX. L. REV. 611, 619 (1968).

<sup>41</sup> Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974); Joel Feinberg, *Autonomy, Sovereignty and Privacy: Moral Ideas in the Constitution?*, 58 NOTRE DAME L. REV. 445, 467-77 (1983).

<sup>42</sup> Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 433 (1980).

<sup>43</sup> Gary L. Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447, 1451 (1976).

<sup>44</sup> See BLACK’S LAW DICTIONARY 1496 (7th ed. 1999) (defining a tort as “a civil wrong for which a remedy may be obtained, usu. in the form of damages”).

<sup>45</sup> As early as 1902, when the New York Court of Appeals held in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902), that there was no common-law right to privacy, the public outcry was so strong that one of the majority judges felt compelled to defend the opinion in a law review article. See Dennis O’Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 437-38 (1902). For a history of privacy from 1890 to 1990, see Ken Gormley, *100 Years of Privacy*, 1992 WIS. L. REV. 1335 (1992).

<sup>46</sup> RESTATEMENT OF TORTS § 867 (1939).

<sup>47</sup> *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) (recognizing a breach of an artist’s right to privacy when an insurance company published his picture next to that of an obviously sick man in an endorsement).

<sup>48</sup> *Id.*

<sup>49</sup> Prosser, *supra* note 9, at 383; see also RESTATEMENT (SECOND) OF TORTS § 652A (1977).

Prosser sought to “inquire what interest we are protecting, and against what conduct,” and his conclusions were based upon “something over three hundred cases in the books.”<sup>50</sup> He argued that what had emerged was not one tort, but a complex of four, protecting against “four distinct kinds of invasions 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 . . . ‘to be let alone.’”<sup>51</sup> Prosser viewed the confusion about Warren and Brandeis’s invocation of inviolate personality as requiring the separating and distinguishing of the four torts that he identified.<sup>52</sup> With the Restatement’s incorporation of the Prosser view, the ascendance of the torts of intrusion,<sup>53</sup> false-light publicity,<sup>54</sup> disclosure of private facts,<sup>55</sup> and appropriation,<sup>56</sup> and the required elements for each, became institutionalized into the American legal landscape.

The impact of Prosser’s framework is both wide and deep. Almost every one of America’s fifty-four jurisdictions has accepted at least one of the four torts.<sup>57</sup> Prosser’s formulation has been the starting point for

<sup>50</sup> Prosser, *supra* note 9, at 388-89.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 407.

<sup>53</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977) (“One who intentionally intrudes, physically or otherwise, upon the solitude of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”).

<sup>54</sup> RESTATEMENT (SECOND) OF TORTS § 652E (1977) (“One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”).

<sup>55</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977) (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”).

<sup>56</sup> RESTATEMENT (SECOND) OF TORTS § 652C (1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”).

<sup>57</sup> The fifty-four jurisdictions are the fifty states, the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands. Only North Dakota has declined to recognize any of the four torts. South Dakota, Guam, and Puerto Rico have neither recognized nor declined to recognize any of the four. Wyoming has declined to recognize the misappropriation tort and has neither recognized nor declined to adopt the other three. All four torts have been recognized in twenty-nine jurisdictions, with fourteen accepting three of the torts, two accepting two of the torts, and three accepting one of them. The intrusion-against-seclusion tort has been recognized by forty-six jurisdictions, the misappropriation tort by forty-five, the private-facts tort by forty-two, and the false-light tort by thirty-two. MEDIA LAW RESOURCE CENTER, MEDIA PRIVACY AND RELATED LAW 2006-07 1647-55 (2006).



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the consideration of privacy-tort law in decades' worth of judicial decisions.<sup>58</sup> The Supreme Court of Connecticut, for example, recognized the four torts while summarily adopting the Prosser statement that the privacy tort did not develop as a single tort, but a complex of four.<sup>59</sup> This pattern, taken to its logical conclusion, has resulted in courts deciding privacy cases on whether the facts fit one of the recognized torts, not on whether the interest breached is one for which society seeks to provide a remedy.<sup>60</sup>

## C. MODERN DEVIATION FROM THE MULTIPLE-TORT THEORY

The ascendance of the multiple-tort approach appears also to have constrained the employment of other mechanisms to create forms that deviate from it. Both the recognition of a right to privacy in a state constitution and the enactment of a state privacy statute offer the opportunity for a legislature to deviate from the multiple-tort approach. Only one state, however, has employed those mechanisms to move beyond the four-tort approach.<sup>61</sup>

Ten states have incorporated declarations of a right to privacy into their state constitutions.<sup>62</sup> In all but one, though, this declaration has no impact on tort law.<sup>63</sup> Only in California does the constitutional

<sup>58</sup> See, e.g., *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 896 (Colo. 2002) (declining to recognize the false-light-publicity tort because it overlaps with defamation); *Hougum v. Valley Mem'l Hospital*, 574 N.W.2d 812, 816 (N.D. 1998) (declining to recognize any of the four torts); *Pontbriand v. Sundlun*, 699 A.2d 856, 862 n.12 (R.I. 1997) (noting that Rhode Island recognizes only a statutory right to privacy); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234-36 (Minn. 1988) (recognizing all but the false-light tort); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 410 (N.C. 1984) (declining to recognize the false-light-publicity tort). *But see Anderson v. Fisher Broad. Co.*, 712 P.2d 803, 808 (Or. 1986) ("The exact formulations of the Restatement are not necessarily authoritative statements of the law of this state....").

<sup>59</sup> *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317, 1329 (Conn. 1982) (quoting Prosser, *supra* note 9, at 383).

<sup>60</sup> See *Smith v. Colo. Interstate Gas Co.*, 777 F. Supp. 854, 857 (D. Colo. 1991); *Dwyer v. American Express Corp.*, 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995) (dismissing a misappropriation claim against a credit card company for selling lists of consumers classified into demographic groups because the information lacked intrinsic value). See also BLACK'S LAW DICTIONARY 1496 (7th ed. 1999) (defining a tort as "a civil wrong for which a remedy may be obtained, usu. [sic] in the form of damages").

<sup>61</sup> See *infra* notes 64-75 and accompanying text.

<sup>62</sup> Four explicitly declare a right to privacy: Ala. Const. art. I, § 22; Cal. Const. art. I, § 1; Haw. Const. art. I, § 6; Mont. Const. art. II, § 10. Three provide that the individual shall be secure against invasions of privacy: Ill. Const. art. I, § 6; La. Const. art. 1, § 5; S. C. Const. art. I, § 10. Two declare that no person shall be disturbed in his private affairs: Ariz. Const. art. II, § 8; Wash. Const. art. I, § 7; Florida's Constitution provides that "every natural person has the right to be let alone and free from governmental intrusion into the person's private life." Fla. Const. art. I, § 23.

<sup>63</sup> See, e.g., *Resha v. Tucker*, 670 So. 2d 56, 57 (Fla. 1996); *Cape Pub., Inc. v. Hitchner*, 549

recognition of a right to privacy support a corresponding tort cause of action.<sup>64</sup> A declaration of a right to privacy was incorporated into the California Constitution through a voter initiative in 1972.<sup>65</sup> In 1975, the California Supreme Court ruled that the constitutional provision provided a cause of action in tort available to all Californians.<sup>66</sup> The court's decision was based upon the text of a brochure from supporters of the initiative stating that the provision would create a legally enforceable right to privacy.<sup>67</sup>

Just as state constitutional protections have done little to upset the ascendance of the four-tort approach, state privacy statutes creating tort causes of action have shown little deviation from the Restatement architecture. Nineteen states have enacted tort protections against invasions of privacy.<sup>68</sup> In ten of these states the statutes protect only property-like interests in name or likeness through authorizing tort recovery for misappropriation or breach of the right to publicity.<sup>69</sup> Five

So. 2d 1374, 1377 (Fla. 1989); *Forsberg v. Housing Auth.*, 455 So. 2d 373, 374 (Fla. 1984) (Overton, J., concurring); *see also Reid v. Pierce County*, 961 P.2d 333, 342-43 (Wash. 1998) (declining to recognize a civil cause of action based upon the constitutional protection).

<sup>64</sup> *See* Cal. Const. art. 1, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”).

<sup>65</sup> *White v. Davis*, 533 P.2d 222, 233-34 (Cal. 1975).

<sup>66</sup> *Id.* at 775.

<sup>67</sup> The brochure stated, “At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.” *Id.* at 774. California courts had long used such material to clarify the intent behind measures adopted by initiative. *See, e.g., Carter v. Comm’n on Qualifications of Judicial Appointments*, 93 P.2d 140, 144 (Cal. 1939); *Beneficial Loan Soc’y Ltd. v. Haight*, 11 P.2d 857, 860 (Cal. 1932); *Story v. Richardson*, 198 P. 1057, 1059 (Cal. 1921).

<sup>68</sup> California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin.

<sup>69</sup> Florida, Fla. Stat. Ann. §§ 540.08 (West, Westlaw through 2007 Special ‘A’ Sess.); Illinois, 765 Ill. Comp. Stat. Ann. § 1075 (West, Westlaw through 2006 Sess.); Indiana, Ind. Code Ann. §§ 32-13-1-1 to 32-13-1-20 (West, Westlaw through 2006 Sess.); Kentucky, 1 Ky. Rev. Stat. Ann. §§ 391.170 (West, Westlaw through 2006 Reg. Sess. and First Extraordinary Sess.); Nevada, Nev. Rev. Stat. Ann. §§ 597.770 to 597.810 (West, Westlaw through 2005 Sess.); New York, N.Y. Civ. Rights Law §§ 50-51 (McKinney, Westlaw through L.2007, ch. 2); Ohio, Ohio Rev. Code Ann. §§ 2741.01 to 2741.09 (West, Westlaw through 2006 Sess.); Oklahoma, Okla. Stat. Ann. tit. 21, §§ 839.1 to 839.4, 1448-1449 (West, Westlaw through 2006 Second Extraordinary Sess.); Pennsylvania, 46 Pa. CONS. STAT. ANN. §§ 8316 (West, Westlaw through 2006 Act 151); Tennessee, TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (West, Westlaw through 2006 Second Reg. Sess.); Texas, TEX. PROP. CODE §§ 26.001 to 26.015 (Vernon, Westlaw through 2006 3rd Called Sess.); Utah, UTAH CODE ANN. §§ 45-3-1 to 45-3-6 (West, Westlaw through 2006 legislation); Virginia, VA. CODE ANN. § 8.01-40 (West, Westlaw through 2006 Special Sess. I); Washington, WASH. REV. CODE ANN. §§ 63.60.010 to 63.60.080 (West, Westlaw through 2007 Reg. Sess. Ch. 2). The misappropriation tort is one of the four torts identified by Prosser and recognized in the Restatement. *See supra* notes 68-73 and accompanying text. The right of publicity was created in an effort to

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states' statutes move beyond misappropriation and publicity, with all four Prosser torts codified in the Nebraska and Rhode Island statutes, while the Wisconsin statute codifies three and the California statute codifies two.<sup>70</sup>

Massachusetts, the fifth state to move beyond misappropriation and publicity, is different. In addition to codifying a misappropriation protection, the commonwealth has a statutory tort protection of privacy apparently untouched by Prosser and the Restatement.<sup>71</sup> It provides, "A person shall have a right against unreasonable, substantial, or serious interference with his privacy."<sup>72</sup> While the Massachusetts courts have also recognized the general substance of the private-facts and intrusion torts, but not the false-light tort, they have done so without extending explicit recognition of a common-law privacy protection.<sup>73</sup> Instead, they

distinguish one's ability to exclusively control the commercial use of name, likeness, or other distinct characteristic from the misappropriation tort. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). The breach of the right of publicity tort is generally applicable only to plaintiffs who have achieved some fame or notoriety. *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992); *Matthews v. Wozencraft*, 15 F.3d 432, 437-38 (5th Cir. 1994); *Ali v. Playgirl*, 447 F. Supp. 723, 725 (S.D.N.Y. 1978). Despite its origins in an effort to distinguish it from the privacy torts, it is frequently treated as an aspect of privacy, owing to its close relationship to the misappropriation tort. *See* VICTOR E. SCHWARTZ, KATHRYN KELLY, DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS, 11TH ED. XVIII, 939-984 (2005); JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS IX, 724-749 (2001).

<sup>70</sup> NEB. REV. STAT. §§ 20-201 to 20-211, 25-840.01 (West, Westlaw through 2006 Second Reg. Sess.). R.I. GEN. LAWS §§ 9-1-28 to 9-1-28.1 (West, Westlaw through 2006 legislation). Wisconsin foregoes the false light tort. WIS. STAT. ANN. § 995.50 (West, Westlaw current through 2005 Act 491). California codifies an intrusion, misappropriation, and publicity tort. CAL CIV. CODE §§ 1708.8, 3344, 3344.1 (West, Westlaw through 2006 legislation).

<sup>71</sup> *See* MASS. GEN. LAWS ch. 214, § 3A (West, Westlaw current through Ch. 417 of 2006 2nd Annual Sess.) (codifying the misappropriation cause of action).

<sup>72</sup> MASS. GEN. LAWS ch. 214, § 1B (West, Westlaw current through Ch. 417 of 2006 2nd Annual Sess.).

<sup>73</sup> For recognition of the private-facts tort, see *Bratt v. IBM*, 467 N.E.2d 126, 134 (Mass. 1984) (interpreting § 1B as prohibiting "disclosure of facts...of a highly personal or intimate nature when there is no countervailing interest."); *Haggerty v. Globe Newspaper*, 419 N.E. 2d 844, 845 (Mass. 1981) (holding that allegation of publication of decade-old investigative materials "just barely succeeds" in stating claim). For recognition of the intrusion tort, see *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 N.E.2d 912, 916 (Mass. 1991) (addressing intrusion theory for the first time under § 1B and holding that infrequent telephone solicitations are not a privacy violation); *Cort v. Bristol Myers Co.*, 431 N.E.2d 908, 913-14 (Mass. 1982) (recognizing the intrusion tort and holding that an employer's questionnaire did not violate employee's right to privacy). The Supreme Judicial Court of Massachusetts declined to recognize the false-light tort in *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 682 n.16 (Mass. 2005), cert. denied, 126 S. Ct. 397 (2005), and *Elm Med. Lab., Inc. v. RKO Gen., Inc.*, 532 N.E.2d 675, 681 (Mass. 1989) ("The only invasion...the plaintiffs assert is... 'false light.' This court has not recognized that tort and does not choose to do so now."). While the Supreme Judicial Court has devoted significant effort to defining the contours of the statutory protection, it has declined to address whether there are corresponding non-statutory protections. *See Tower v. Hirschhorn*, 492 N.E.2d 728, 732 (Mass.

have grounded their judgments in the two statutes, which thus provide a right of recovery independent of the four-tort construct.<sup>74</sup> The Massachusetts statutes, coupled with this decisional law,<sup>75</sup> have had the practical effect of melding the Prosser torts of private facts, intrusion, and misappropriation with a unitary-tort theory cause of action.

The deviations in California and Massachusetts are isolated, and there is little, if any, indication that these approaches might be duplicated elsewhere. They do suggest that assessment of the privacy tort is a more dynamic consideration than the Restatement suggests, but not by much. Privacy torts have come to be viewed through intellectual shorthand in which “Warren and Brandeis” equal the right to be left alone, “Prosser” equals four torts, and California and Massachusetts do not bear mentioning.<sup>76</sup> This shorthand suggests a strictly linear view in which Prosser’s work is a refinement of Warren and Brandeis’s.<sup>77</sup> Another

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1986) (“We have declined to determine whether there is a comparable non-statutory claim in tort for invasion of privacy.”).

<sup>74</sup> See *Schlesinger*, 567 N.E.2d at 916; *Cort*, 431 N.E.2d at 438 n.9.

<sup>75</sup> See *supra* note 73.

<sup>76</sup> See JOHN L. DIAMOND, *CASES AND MATERIALS ON TORTS IX*, 724-749 (2001). VICTOR E. SCHWARTZ, KATHRYN KELLY, DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ’S *TORTS*, 11<sup>TH</sup> ED. XVIII, 939-84 (2005). In both texts, the chapters dealing with privacy torts initially introduce the Warren and Brandeis concept and then are organized according to the Prosser taxonomy. The California and Massachusetts approaches are not mentioned.

<sup>77</sup> A strictly linear approach that assumes that what follows is a refinement and improvement of what preceded fails to allow for any pragmatism in the development of the law. In 1887, Harvard Law School Dean Christopher Columbus Langdell stated that “law is a science, and that all the available materials of that science are contained in printed books.” C.C. Langdell, *Address at the “Quarter-Millennial” Celebration of Harvard University (Nov. 5, 1887)*, 3 *LAW Q. REV.* 118, 124 (1887). Included in this analogy of the law to science was an understanding that the point of science was to uncover truth, which was immutable. Such an approach, thus, sees the law as the product of neatly interlocking logical propositions. Grant Gilmore, *The Age of Antiquarius: Our Legal History in a Time of Trouble*, 39 *U. CHI. L. REV.* 475, 479 (1972). Oliver Wendell Holmes’s maxim that “The life of the law has not been logic, it has been experience” is largely perceived as a broadside against Langdell’s viewpoint. O.W. HOLMES, *THE COMMON LAW* 5 (M. Howe ed. 1963); see, e.g., Gilmore at 480; Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 *MINN. L. REV.* 377, 378-79 (1998). Decades after Holmes, Professor Grant Gilmore would view Langdell’s approach as reflective of a “historicist” viewpoint that professes that the past can be arranged in a meaningful sequence that will not only explain the present but predict the future. Gilmore at 480. Gilmore responds to the historicists: “Let us all become historians; let us not become historicists.” *Id.* at 484. Holmes, as Professor Gilmore explains, insisted that rules of law reflect social conditions and must change as those conditions change. *Id.* at 480. A strictly linear approach forgoes such a possibility because it assumes that what has been supplanted must be discarded, while the life of the law in experience includes the possibility that what has been supplanted may be what is again necessary to meet the prevailing social conditions. As Thomas S. Kuhn has noted, in reference to science, but in terms equally applicable to any field in which theories are developed and tested, “the textbook tendency to make the development of science linear hides a process that lies at the heart of the most significant episodes of scientific development.” THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 140 (2nd ed. enlarged, 1970).

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approach, though, views the modern arrangement as the result of the ongoing tension between the unitary- and multiple-tort theories.<sup>78</sup> The implication of this second perspective is that an ascendant form is subject to challenge by the non-dominant form.<sup>79</sup> This, in turn, raises the possibility of the non-dominant form becoming the dominant form, or of an accommodation between the two.<sup>80</sup>

## II. THE STUNTED COMMON LAW TORT

Beyond the separation and clarification that Prosser envisioned, the multiple-tort approach has also restrained the growth of privacy as a common law tort doctrine.<sup>81</sup> Not surprisingly, since the ascendance of

<sup>78</sup> The now familiar dynamic, explained by Dr. Kuhn, of the paradigm shift involves a fundamental change in the basic understanding of how a given field operates. See Kuhn, *supra* note 77 at 77-173. Kuhn, embodying his traditional science perspective, described a paradigm as “some accepted examples of actual scientific practice—examples which include law, theory, application, and instrumentation together—provide models from which spring particular coherent traditions of scientific research.” *Id.* at 10. A paradigm shift occurs when a new theory explains inconsistencies between the old theory and observed conditions. *Id.* at 111-159. Such a shift occurs when a new theory is selected as the fittest way to practice in a field in the future. *Id.* at 172. While the development of legal doctrines does not rely on observation and empiricism to the extent that traditional science does, Kuhn’s explanation of the process is no less illuminating in the legal arena than in the scientific arena. Because legal doctrines do not develop through the same processes of observation and testing as do scientific doctrines, the shift from the unitary- to multiple-tort approach to privacy, which may appear to be a paradigm shift, may actually be just part of the process of testing competing approaches.

<sup>79</sup> As Kuhn envisioned it, a paradigm shift in one of the traditional sciences, once it occurs, must so profoundly resolve inconsistencies and change the nature of understanding that it is, essentially, irrevocable. Kuhn, *supra* note 77 at 144-60. Outside traditional sciences, the expectation is not quite as profound. Kuhn recognized that in the humanities there are always competing solutions that arise. *Id.* at 164-65. In a field like the law, where competing solutions are expected and are essential to the vitality of the system, the re-emergence of a previously discarded approach need not give rise to a theoretical crisis. Even when it does, though, it can easily be concluded, as in traditional science, that a paradigm shift has not occurred. Indeed, this Comment implicitly suggests that a paradigm shift with respect to privacy torts cannot have occurred through the ascendance of the multiple-tort theory, because that theory has not resolved the inconsistencies and problems attendant to its primacy.

<sup>80</sup> Kuhn’s analysis suggests that true paradigm shifts do not occur in the law all that often. There is a democratic aspect to the law that Kuhn’s scientific theory is not equipped to deal with. Each jurisdiction is empowered to make its own decision about how its tort laws will operate, and the notion that a given area of the law might be the object of a majority approach, a minority approach, and any number of other variations is unsurprising. This dynamic, seen through the prism of Kuhn’s work, suggests that each area of the law is constantly engaged in the search for a new paradigm that only is validated when all, or at least most, jurisdictions adopt the same answers to the same questions. That there might be cycles of ascendance among theories in a given area, and attempts to accommodate between them, is evidence of the vitality with which these searches take place.

<sup>81</sup> Common law, as used here refers to the “body of law derived from judicial decisions, rather than from statutes or constitutions.” BLACK’S LAW DICTIONARY 270 (7<sup>th</sup> ed. 1999). It also

the Prosser argument in the 1960s and its validation in the Restatement in the 1970s, the common law has devoted scant attention to identifying the central value at the core of the unitary-tort approach to privacy.<sup>82</sup> Somewhat surprisingly, though, the primacy of the multiple-tort theory appears also to have constrained the development of the multiple-tort approach to privacy envisioned by the Restatement.<sup>83</sup>

America's common-law system, based upon judges' reliance on previous decisions, is supposed to yield a legal system that adapts to changes in society.<sup>84</sup> This requires evaluating the context in which conduct occurs and determining whether it conforms to developed norms.<sup>85</sup> As Professor Arthur Hogue stated, "[t]he survival of the [English] common law has depended in large part on the ability of its practitioners to adapt the legal system to new conditions . . . ."<sup>86</sup> Since 1960, this adaptability with respect to privacy has been restrained by the prevalence of the four-tort structure.<sup>87</sup> The common law of privacy has scarcely adapted to new conditions and deviations from the multiple-tort theory embodied in the four torts have been tentative at best.<sup>88</sup>

#### A. RETARDING THE UNITARY-TORT APPROACH

Not surprisingly, the ascendance of the multiple-tort approach of the Restatement has crowded out consideration of the central value underlying the right to privacy.<sup>89</sup> Prosser and the Restatement view the

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refers to the method by which judges create that body of law through reliance on previous decisions. ARTHUR L. CORBIN, *WHAT IS THE COMMON LAW?* 75 (1954). See also Prosser, *supra* note 9, at 407, for Prosser's description of the purpose of his article.

<sup>82</sup> See *infra* notes 89-124 and accompanying text.

<sup>83</sup> See *infra* notes 104-124 and accompanying text.

<sup>84</sup> See, e.g., *Harrison v. Montgomery County Bd. of Educ.*, 456 A.2d 894, 903 (Md. 1983) ("The common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.") (cited in M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L. REV. 555, 555 (1996)); see also PATRICK DEVLIN, *THE JUDGE* 177 (1979) ("They looked for the reason, which had made him decide the case the way he did, the *ratio decidendi* as it came to be called. Thus it was the principle of the case, not the words, which went into the common law.").

<sup>85</sup> Madden, *supra* note 84, at 561.

<sup>86</sup> ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 231 (1966) (quoted in Madden, *supra* note 84, at 593).

<sup>87</sup> See *infra* notes 89-124 and accompanying text.

<sup>88</sup> See *infra* notes 61-80, 89-124 and accompanying text.

<sup>89</sup> In South Dakota, for example, a privacy tort consistent with RESTATEMENT OF TORTS § 867 (1939) was recognized in 1963 by the state supreme court in *Truxes v. Kenco Enters., Inc.*, 119 N.W.2d 914, 917 (S.D. 1963). In so doing, the court stated, "The common law of this state...is flexible and capable of adaptation to the needs and demands of changing times." *Id.* at 916. In 1979, however, the court cited the RESTATEMENT (SECOND) OF TORTS § 652A-E (1977) four-tort

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four torts as sharing little more than an ill-defined privacy label.<sup>90</sup> The unitary-tort approach, by contrast, is grounded in the existence of a core privacy value.<sup>91</sup> The broad ascendance of the multiple-tort approach has largely relegated consideration of that central core to the work of academics.<sup>92</sup>

Edward Bloustein expressed the unitary-tort position most starkly, stating that the consequence of Prosser's view "is that Warren and Brandeis were wrong and their analysis of the tort of privacy a mistake."<sup>93</sup> He continued, "[i]nstead of a relatively new, basic and independent legal right protecting a unique, fundamental and relatively neglected interest, we find a mere application in novel circumstances of traditional legal rights designed to protect well-identified and established social values."<sup>94</sup> Bloustein, thereby, concluded that Warren and Brandeis did indeed create a single right to privacy shielding the interest in preserving individual dignity, and that "the tort cases involving privacy are of one piece and involve a single tort."<sup>95</sup>

Bloustein conceded that Warren and Brandeis "went very little beyond giving their right and their interest a name and distinguishing it from other rights or interests," but argued also that Warren and Brandeis did indicate the interest they sought to protect in their invocation of inviolate personality.<sup>96</sup> Bloustein took this to mean one's "independence, dignity and integrity; it defines man's essence as a unique and self determining being."<sup>97</sup> This view focuses on the moral right of the individual to define his or her own human existence and the transgression of that right that occurs when another party seeks to do so without consent.<sup>98</sup>

The problem with the focus on individual dignity is that the concept is so metaphysical that even proponents of the unitary-tort approach have questioned its utility.<sup>99</sup> Other commentators have taken the same

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structure in defining what gave rise to a right to recover for invasion of privacy. *Montgomery Ward v. Shope*, 286 N.W.2d 806, 809 n.2 (S.D. 1979).

<sup>90</sup> See *supra* notes 49-60 and accompanying text.

<sup>91</sup> See *supra* notes 29-48 and accompanying text.

<sup>92</sup> See *supra* notes 36-43, *infra* notes 100-103, and accompanying text.

<sup>93</sup> Edward J. Bloustein, *Privacy as an Answer of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 965 (1964).

<sup>94</sup> *Id.* at 965-966.

<sup>95</sup> *Id.* at 986, 1000.

<sup>96</sup> *Id.* at 970-71 (quoting Warren and Brandeis, *supra* note 29, at 205).

<sup>97</sup> *Id.* at 971.

<sup>98</sup> Sheldon W. Halpern, *Rethinking the Right to Privacy: Dignity, Decency, and the Law's Limitations*, 43 RUTGERS L. REV. 539, 544-49 (1991).

<sup>99</sup> See, e.g., Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 438 (1980)

approach as Bloustein and found different core principles. Some have found that the unifying principle is the autonomy to engage in one's own thoughts and to make one's own decisions.<sup>100</sup> Another perspective is that privacy is the right to decide when, how, and what information about them is communicated to others.<sup>101</sup> Still another expresses Warren and Brandeis's original concept as the right to be left alone, with respect to the acquisition and dissemination of information concerning the person, particularly through unauthorized publication, photography, or media.<sup>102</sup> Within this diversity, there is accord on the conclusion that a common thread exists.<sup>103</sup> The ascendance of the four torts has, however, largely relegated this discussion to the halls of law schools and the pages of law journals.

## B. RETARDING THE MULTIPLE-TORT APPROACH

Prosser's four-tort structure was the result of his effort to "separate and distinguish" the common law of privacy up to 1960.<sup>104</sup> The Restatement contemplated development of its privacy-tort structure beyond that offered by Prosser, by recognizing that further court decisions and other references might recognize expansion of the four forms or establishment of new forms.<sup>105</sup> This view is consistent with the general concept of the common law discussed above.<sup>106</sup>

Adaptation has occurred to a certain extent through piecemeal creation of causes to cover additional invasions of privacy.<sup>107</sup> Congress has adopted a number of statutes prohibiting certain breaches of privacy and authorizing civil actions against alleged perpetrators, thus creating a number of mini-torts. These have included actions against those who

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("[T]here are ways to offend dignity and personality that have nothing to do with privacy."); Halpern, *supra* note 98, at 563 ("The law is probably not the appropriate vehicle for the furtherance of the 'inviolate personality.'").

<sup>100</sup> See Joel Feinberg, *Autonomy, Sovereignty, and Privacy*, 58 NOTRE DAME L. REV. 445, 467-77 (1983); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974); Daniel R. Ortiz, *Privacy, Autonomy, and Consent*, 12 HARV. J.L. & PUB. POL'Y 91, 92 (1989).

<sup>101</sup> See Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1978); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35 (1967).

<sup>102</sup> Gormley, *supra* note 45, at 1357.

<sup>103</sup> See *supra* notes 99-102 and accompanying text.

<sup>104</sup> Prosser, *supra* note 9, at 407.

<sup>105</sup> RESTATEMENT (SECOND) OF TORTS § 652A note c (1977) ("further court decisions and other references may give rise to the expansion of the four forms of tort liability for invasion of privacy listed in this Section or the establishment of new forms. Nothing in this chapter is intended to exclude the possibility of future developments in the law of privacy.").

<sup>106</sup> See *supra* notes 84-86 and accompanying text.

<sup>107</sup> Ruth Gavison, *supra* note 6, at 158.



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intercept electronic communications,<sup>108</sup> disclose stored communications,<sup>109</sup> and willfully violate Fair Credit Reporting Act privacy protections.<sup>110</sup> This dynamic has been repeated in most states. California, for instance, authorizes civil actions by consumers suffering damages arising from unauthorized disclosure or use of credit information by credit reporting and investigative agencies,<sup>111</sup> unauthorized disclosure or use of personal medical information,<sup>112</sup> disclosure of consumer information arising from a business's failure to destroy business records,<sup>113</sup> and prohibited debt collection practices such as disclosure of the debt to a debtor's employer.<sup>114</sup> Other states have authorized civil actions and damages for a range of privacy intrusions.<sup>115</sup> Inherent in these protections is a judgment that a need for protection is not met by the existing torts. That they were adopted by statute and did not arise from the common law suggests that courts were either unwilling or unable to fashion protections against these privacy infringements.

Rather than adapting to new threats to privacy, the common-law consideration of privacy torts has been confined to concerns that fall within the four-tort structure. In *Joe Dickerson & Associates, LLC v. Dittmar*, for instance, the Colorado Supreme Court formally recognized the appropriation-of-name-or-likeness tort and invalidated a jury instruction requiring that a plaintiff prove his or her name or likeness had value in order to recover personal damages.<sup>116</sup> With respect to the public-disclosure-of-private-facts tort, there has been considerable case law on the conditions under which an individual becomes a public figure

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<sup>108</sup> 18 U.S.C.A. § 2520(a) (Westlaw 2007).

<sup>109</sup> 18 U.S.C.A. § 2708 (Westlaw 2007).

<sup>110</sup> 15 U.S.C.A. § 1681(n) (Westlaw 2007).

<sup>111</sup> CAL. CIV. CODE §§ 1785.31, 1786.50 (West, Westlaw through 2006 legislation); *see also* Consumer Credit Reporting Agencies Act, CAL. CIV. CODE §§ 1785-1785.36 (West, Westlaw through 2006 legislation); Investigative Consumer Reporting Agencies Act, CAL. CIV. CODE §§ 1786-1786.60 (West, Westlaw through 2006 legislation).

<sup>112</sup> CAL. CIV. CODE §§ 56.35-36 (West, Westlaw through 2006 legislation); *see also* CAL. CIV. CODE §§ 56-56.37 (West, Westlaw through 2006 legislation).

<sup>113</sup> CAL. CIV. CODE § 1798.84 (b)-(e) (West, Westlaw through 2006 legislation); *see also* CAL. CIV. CODE §§ 1798.80-84 (West, Westlaw through 2006 legislation).

<sup>114</sup> CAL. CIV. CODE §§ 1788.30-33 (West, Westlaw through 2006 legislation); *see also* CAL. CIV. CODE § 1788.12.

<sup>115</sup> *See, e.g.*, Indiana P.L.115-2005 Vol. 3, § 1 (authorizing civil action and damages up to \$100,000 for unauthorized installation of spyware); Delaware Session Laws Vol. 75: 61, § 1 2005 (authorizing civil action and treble damages for failure to provide notification of unauthorized acquisition of personal information).

<sup>116</sup> *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 999 (Colo. 2001); *see also* CJI-Civ. 4th 28:4 (2000).

to whom the tort is unavailable.<sup>117</sup> Further energy has been devoted to what is required to fulfill the publication requirement for the publicity and false-light torts.<sup>118</sup> Additionally, regarding the public-disclosure tort, there has been considerable litigation on the impact of the First Amendment.<sup>119</sup> The well-known case of *Time, Inc. v. Hill* laid down the Constitutional requirement that a false-light plaintiff prove that the defendant knew the statements published were false or acted with reckless disregard as to falsity.<sup>120</sup> While the Constitutional cases necessarily impact the scope of the protection, they are reflective of concerns raised by the Constitution, not by the ongoing development of the common law.

Similarly, the development of privacy-tort law has been devoid of doctrinal adjustments that would allow courts to respond to new conditions. The development of comparative fault, the abandonment of the rule against spouses suing one another, the establishment of a

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<sup>117</sup> See *Cohen v. Marx*, 211 P.2d 320, 331 (Cal. Ct. App. 1949) (prize fighter was public figure); *Koussevitzky v. Allen, Towne & Heath, Inc.*, 68 N.Y.S.2d 779, 782 (N.Y. Sup. Ct. 1947), *aff'd*, 69 N.Y.S.2d 432 (N.Y. App. Div. 1947) (symphony conductor was public figure); *Martin v. Dorton*, 50 So.2d 391, 396 (Miss. 1951) (sheriff was public figure). In a similar line of cases, otherwise private figures were held to have been drawn into public events and to have become public figures in relation to those events. See *Jones v. Herald Post Co.*, 18 S.W.2d 972, 977 (Ky. 1929) (plaintiff's husband murdered in front of her); *Berg v. Minnesota Star & Tribune Co.*, 79 F. Supp. 957, 962 (D. Minn. 1948) (plaintiff was in midst of divorce litigation); *Stryker v. Republic Pictures Corp.* 238 P.2d 670, 672 (Cal. Ct. App. 1951) (war hero); *Elmhurst v. Pearson*, 153 F.2d 467, 470 (D.C. Cir. 1946) (defendant in sedition trial).

<sup>118</sup> See *Grigorenko v. Pauls*, 297 F. Supp. 2d 446, 448-49 (D. Conn. 2003) (disclosure of plagiarism allegation to nine persons at university and three persons outside university insufficient for false-light claim); *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 554 (Minn. 2003) (holding that dissemination of names and social security numbers of 204 employees to sixteen freight-terminal managers in six states did not constitute publicity necessary to support a publication-of-private-facts claim); *Mayer v. Huesner*, 107 P.3d 152, 156 (Wash. Ct. App. 2005) (circulation of medical report within company insufficient publicity to support private-facts claim); *Myers v. Levy*, 805 N.E.2d 442, 446-47 (Ind. Ct. App. 2004) (affirming that a statement by a union official to a trade-show official that a business owner was picketing the union's booth was not sufficient publicity to support the business owner's false-light-publicity claim against the union official); *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 967 (Ind. Ct. App. 2001) (holding release of former employee's credit information by store security manager to two employees did not fulfill publicity requirement for private-facts action).

<sup>119</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 520 (2001) (holding that public disclosure of telephone conversations about public issues was protected by First Amendment, even though those conversations had been illegally intercepted by third parties); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) ("[w]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order..."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) ("Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.").

<sup>120</sup> 385 U.S. 374, 380 (1967).

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therapist's duty to "protect third parties from a threat of serious harm posed by a patient under his care," the creation of the "negligent infliction of emotional distress" tort, and the allocation of the spousal testimonial privilege to the spouse-witness all are common-law adjustments, the dynamism of which has not been duplicated by the privacy torts.<sup>121</sup> One might anticipate, for example, that a court might adjust the publication requirement to allow recovery when even limited dissemination, as with personal information, has caused or could cause significant damage. This has not occurred.

Measured by the standards inherent in its creation, the multiple-tort approach has failed to meet its adaptive aspirations.<sup>122</sup> Its central shortcoming is not simply the inability to generate a fifth privacy tort; it is that the four-tort structure has imposed an elemental approach to privacy torts in which the central consideration is whether the required elements of a specific tort are met, rather than whether the interest to be protected has been breached.<sup>123</sup> When these elements preclude consideration of the central value to be protected, as Hieu Smith discovered, the efficacy of the common-law doctrine, and its ability to adapt and evolve, becomes questionable.<sup>124</sup>

### III. THE INTEGRATIVE APPROACH OF THE IRISH PRIVACY BILL

The Irish privacy bill, constructed by a Working Group on Privacy, essentially seeks to integrate the unitary- and multiple-tort approaches into one statute.<sup>125</sup> It is built on a structure first utilized by the Privacy Acts of the Canadian provinces of British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan, which recognizes a general right to a degree of privacy that is reasonable under the circumstances.<sup>126</sup> The Irish proposal joins this understanding to factors to consider in determining whether a breach has occurred, as well as recognition of specific types of intrusions, and a list of defenses to create a tort intended to be both clear and more flexible.<sup>127</sup> Not only does the

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<sup>121</sup> See Madden, *supra* note 84, at 593-604.

<sup>122</sup> See *supra* notes 105-121 and accompanying text.

<sup>123</sup> The elemental approach is exemplified by the formulations of the privacy torts laid out in the RESTATEMENT (SECOND) OF TORTS § 652B-E (1977). See *supra* notes 53-56.

<sup>124</sup> See *supra* notes 1-6 and accompanying text.

<sup>125</sup> GOV'T OF IRELAND, *supra* note 17, at app.

<sup>126</sup> Privacy Act, R.S.B.C. 1996 Ch. 373; Privacy Act, R.S.M. 1987 Ch. P125; Privacy Act, NFLD. R. S. 1990 Ch. P22; Privacy Act, S.S. 1978 Ch. P-24.

<sup>127</sup> See *infra* notes 148-170 and accompanying text; see also GOV'T OF IRELAND, *supra* note 17, at ¶ 6.04(v).

proposal integrate the unitary-and multiple-tort approaches, it does this in a privacy environment bearing similarities to the American context and with the intent to resolve some of the same issues confronting American jurisdictions.

#### A. THE CONTEXT FOR THE IRISH PRIVACY BILL

As in the United States, the protection of privacy in the Irish Constitution is not explicit. It requires the state to guarantee in its laws to defend and vindicate the personal rights of the citizen.<sup>128</sup> In 1973, the Irish Supreme Court held that this included rights not enumerated in the Constitution, including a right to marital privacy.<sup>129</sup> Following dictum in a 1984 Supreme Court judgment, Ireland's High Court in 1987 declared the existence of a general right to privacy.<sup>130</sup> In 1998 the Supreme Court held that a plaintiff in a tort action enjoyed a constitutional right to privacy.<sup>131</sup> Thus, while a tort action under the national constitution is not available in the United States, it is in Ireland.<sup>132</sup>

An additional layer of concern stems from a provision in the European Convention on Human Rights stating that, "Everyone has the right to respect for his family and private life, his home, and his correspondence."<sup>133</sup> Ireland's European Convention on Human Rights Act, 2003, requires that Irish statutes be interpreted to give effect to the Convention and that Irish judges take judicial notice of decisions of the European Court of Human Rights.<sup>134</sup> The Act requires a state organ to

<sup>128</sup> IR. CONST., 1937, art. 40(3)(1).

<sup>129</sup> *McGee v Attorney General*, [1974] I.R. 284 (Ir.) (invoking the right to marital privacy to invalidate a ban on importation of contraceptive preparations).

<sup>130</sup> *Norris v. Attorney General*, [1984] I.R. 36 (Ir.) ("It is argued that two personal rights are infringed, the right to privacy and the right to bodily integrity. That there are such rights has been established. The extent of these rights has still to be ascertained and will vary according to circumstances."(citations omitted)); *Kennedy & Arnold v. Ireland*, [1987] I.R. 587 (H. Ct.) (Ir.) ("Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State."). Note that the High Court functions as an intermediate court of appeal in civil matters. See IR. CONST., 1937, art. 34(3-4).

<sup>131</sup> *Haughey v. Moriarty*, [1999] 3 I.R. 1 (Ir.) ("There is no doubt but that the plaintiffs enjoy a constitutional right to privacy.").

<sup>132</sup> GOV'T OF IRELAND, *supra* note 17, at ¶ 2.38. The Irish Constitution, unlike its American counterpart, imposes obligations upon its citizens. *Id.* See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928-29 (1982) (holding that invocation of the privacy protections of the federal constitution requires that an individual be affected by state action); *United States v. Stanley*, 109 U.S. 3, 11 (1883) (stating that the 14th Amendment does not apply to individual invasion of individual rights).

<sup>133</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8.1, Nov. 4, 1950, C.E.T.S. No. 5 (hereinafter European Human Rights Convention).

<sup>134</sup> European Convention on Human Rights Act, 2003 (Act No. 20/2003) (Ir.), art. 2-4.

“perform its functions in a manner compatible with the State’s obligations under the Convention’s provisions”<sup>135</sup> and permits, when no remedy is otherwise available, a suit for damages for anyone who suffers injury, loss, or damage as a result of the state’s failure to act in accord with the Convention.<sup>136</sup> In 2005, the European Court of Human Rights ruled in *Von Hannover v. Germany* that the obligations of a state under the Convention “may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”<sup>137</sup> The Working Group read *Von Hannover* as strongly suggesting that states have a general obligation to introduce measures to protect privacy.<sup>138</sup> The problem for Ireland is that such protections would be derived from the constitutional guarantees, which are themselves unclear.<sup>139</sup>

Ireland thus faces a challenge familiar to American states: how to create legal structures that make viable a broadly and amorphously defined right. Because Ireland’s courts have recognized that a plaintiff in a tort action enjoys a constitutional right to privacy,<sup>140</sup> and because the integration of the European Convention on Human Rights into Ireland’s national law appears to demand considerably more of Ireland than the concept of a right to privacy demands of American states,<sup>141</sup> the analogy breaks down upon close scrutiny. Notwithstanding this distinction, in both countries the challenge of translating the concept of privacy into forms that will facilitate meaningful litigation persists. The Working Group observed a number of uncertainties in Ireland, including whether causes of action are confined to intentional interferences with the constitutional right, and the extent of defenses available.<sup>142</sup> Partly stemming from these uncertainties, no case has recognized the constitutional protection as supporting a remedy beyond an injunction.<sup>143</sup> This led the Working Group to conclude that the constitutional protection does not “provide a reliable guide by . . . which citizens can predict . . . whether their action will be found in breach of the law.”<sup>144</sup>

Ireland, only fairly recently willing to recognize a common-law

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<sup>135</sup> *Id.* at art. 3, ¶1

<sup>136</sup> *Id.* at art. 3 ¶.2

<sup>137</sup> *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 294..

<sup>138</sup> GOV’T OF IRELAND, *supra* note 17, at ¶ 3.39.

<sup>139</sup> *Id.* at ¶ 3.40.

<sup>140</sup> *Haughey v Moriarty*, [1999] 3 I.R. 1 (Ir.).

<sup>141</sup> *See supra* notes 164-170 and accompanying text.

<sup>142</sup> GOV’T OF IRELAND, *supra* note 17, at ¶ 2.37.

<sup>143</sup> *Id.* at ¶ 2.39.

<sup>144</sup> *Id.* at ¶ 2.42.

right to privacy, has, like the United States, attempted to protect privacy through ad hoc legislation.<sup>145</sup> These statutes, unlike some of their American counterparts,<sup>146</sup> do not include provisions authorizing damages. As the Irish Working Group report states, such protections are piecemeal and do not posit a cause of action for those whose privacy has been interfered with.<sup>147</sup> Recognizing the inadequacy of this approach, the Irish government has attempted to create the comprehensive cause of action that it currently lacks.

#### B. A NEW FRAMEWORK FOR AN OLD TORT

The Irish Working Group adopted a description of privacy similar to the one adopted by the Restatement: “The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.”<sup>148</sup> Unlike the Restatement, the Irish bill recognizes a single tort for invasion of privacy.<sup>149</sup> More importantly, though, it envisions a single value that is breached: the reasonable expectation of privacy.<sup>150</sup>

The Irish proposal provides that “the nature and degree of privacy to which an individual is reasonably entitled to expect [sic] is that which is reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public morality, and the common good.”<sup>151</sup> The Working Group concluded that this definition of the scope of privacy was a simple, objective test that could be tailored to individual situations.<sup>152</sup> The requirement of regard for the rights of others, public order, public morality, and the common good incorporates limitations raised by the High Court in *Cogley v. Radio Telefis Éireann*.<sup>153</sup> *Cogley* requires that the right to privacy be analyzed in light of these other considerations; thus, the privacy tort requires a court to perform a balancing test in determining whether a plaintiff can recover for invasion

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<sup>145</sup> See, e.g., Adoption Act, 1976 (Act No. 29/1976) (Ir.) (restricting the publication of public records); Broadcasting Authority (Amendment) Act 1976 (Act No. 37/1976) (Ir.) (requiring state broadcasters to not encroach unreasonably on an individual’s privacy); Data Protection Act 1988 (Act No. 25/1988) (Ir.) (restricting the maintenance and dissemination of personal data by public and private entities); see also GOV’T OF IRELAND, *supra* note 24, at ¶ 2.19.

<sup>146</sup> See *supra* notes 128-136 and accompanying text.

<sup>147</sup> GOV’T OF IRELAND, *supra* note 17, at ¶ 2.18.

<sup>148</sup> GOV’T OF IRELAND, *supra* note 17, at ¶ 1.05.

<sup>149</sup> *Id.* at ¶ 7.05, app. § 2(1).

<sup>150</sup> *Id.* at ¶ 7.13, app. § 3(1).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at ¶ 7.14.

<sup>153</sup> [2005] IEHC 180 (H. Ct.) (Ir.).

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of privacy.<sup>154</sup> In performing this test, a court is required to consider the nature of the conduct and the relevant circumstances.<sup>155</sup>

While the tort is actionable without proof of damages, it is limited by the requirement that the conduct be willful and without lawful authority or reasonable excuse, as well as its unavailability to corporate bodies or to the deceased.<sup>156</sup> The willfulness requirement reflects a decision by the Working Group not to extend the tort to negligent or inadvertent actions, and the requirement of the absence of lawful authority or reasonable excuse accommodates the defenses recognized in the bill.<sup>157</sup>

The recognized defenses serve as a further limitation on the applicability of the tort. These include protection for persons engaged in the lawful defense of person or property, those acting with authorization of a statute or pursuant to a court order, and police and public officials who reasonably believe their acts are within the scope of their official duties.<sup>158</sup> The bill also recognizes a newsgathering defense as well as a public-interest defense.<sup>159</sup> The newsgathering defense is intended to prevent the privacy tort from encroaching on the freedom of the press required by the European Convention on Human Rights, while the public-interest defense is intended to prevent the tort from inhibiting “legitimate disclosure of wrongdoing.”<sup>160</sup> A notable element running through the police/public-official, newsgathering, and public-interest

<sup>154</sup> *Id.*

<sup>155</sup> GOV'T OF IRELAND, *supra* note 17, at ¶ 7.13, app. § 3(2). The relevant circumstances include the place where the conduct occurred, the object and occasion of the conduct, the status or function of the person alleging a breach of privacy, and the purpose for which any material obtained was intended to be used or was actually used. *Id.* The conceptual basis for such a balancing test was explained by Jeremy Bentham in the early nineteenth century. Jeremy Bentham, *THEORY OF LEGISLATION* 93 (Etienne Dumont ed. 1802, translated by R. Hildreth, Trubner & Co., London 1864). (“[T]he law cannot grant a benefit to one without imposing, at the same time, some burden upon another; or in other words, it is not possible to create a right in favour of one, except by creating a corresponding obligation imposed upon another....The legislator....[o]ught never to impose a burden except for the purpose of conferring a benefit of a clearly greater value.”).

<sup>156</sup> GOV'T OF IRELAND, *supra* note 17, at ¶¶ 7.05, 7.07, app. §§ 2(1), 2(3), 12.

<sup>157</sup> *Id.* at ¶¶ 7.08, 7.10.

<sup>158</sup> *Id.* at ¶ 7.22, app. §§ (1)(a), 6(1)(b-c).

<sup>159</sup> *Id.* at ¶ 7.22, app. § 6(1)(d) (requiring that the conduct be performed by a person gathering news for a newspaper or broadcaster and that such conduct is reasonable and is necessary for or incidental to newsgathering activities related to a matter of public interest or fair and reasonable comment on a matter of public interest); *Id.* at ¶ 7.25, app. § 7 (protecting disclosures of material that is in the public interest or is fair and reasonable comment on a matter of public interest).

<sup>160</sup> GOV'T OF IRELAND, *supra* note 17, at ¶ 7.21. *See also* European Human Rights Convention, art. 10.1, (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.”).

defenses is that the conduct must have been reasonable under the circumstances.<sup>161</sup>

The Irish proposal further clarifies the extent of the protection by incorporating certain recognized breaches of privacy into the statute. The bill provides that the following, proved by preponderance of the evidence, are breaches of privacy: surveillance, regardless of the means employed or whether accomplished by trespass; disclosure of information obtained through surveillance or harassment; unauthorized exploitation of the name, likeness, or voice of an identified or identifiable individual; and the use of letters, diaries, or other personal documents of an individual.<sup>162</sup> The bill clarifies that this section does not prejudice the generality of the bill's definition of privacy.<sup>163</sup>

The draft bill seeks to enhance clarity and certainty in an area of the law in which current protections are, as in the United States, a miscellaneous patchwork.<sup>164</sup> This was motivated in part by a desire to comply with the requirements of the European Convention on Human Rights and to better define how citizens might vindicate their constitutional right to privacy.<sup>165</sup> The Working Group was also concerned, though, with the ability of the case law to respond to advances in technology.<sup>166</sup> The Group viewed a statutorily created general remedy as the best way to counter the use of technology to invade privacy, stating that “[s]ectoral legislation dealing with the different and myriad forms of abuse of technology cannot be constantly renewed by the legislature to keep up with advances in the technology.”<sup>167</sup> The Working Group rejected the argument that courts should be allowed to organically develop the breach-of-privacy tort, instead opting for a statutory cause of action that would clarify the law and ensure comprehension by lay persons, and that courts could apply in specific situations.<sup>168</sup>

The United States and Ireland are, in many respects, very different countries. The United States has over 300 million citizens while Ireland

<sup>161</sup> See *supra* notes 159-160.

<sup>162</sup> GOV'T OF IRELAND, *supra* note 17, at ¶ 7.17, app. § 4(1)(a-d).

<sup>163</sup> *Id.* at ¶ 7.17, app. § 4(1)(a).

<sup>164</sup> *Id.* at ¶ 6.04(iii, vi). See also the discussion on American patchwork protections *supra*, notes 107 to 115 and accompanying text.

<sup>165</sup> *Id.* at ¶ 6.04 (vii) (explaining desire to comply with European Convention on Human Rights); *Id.* at ¶ 6.04 (ii) (explaining to desire to clarify how citizens may protect their privacy rights).

<sup>166</sup> *Id.* at ¶ 6.04 (ii).

<sup>167</sup> GOV'T OF IRELAND, *supra* note 17, at ¶ 6.04.

<sup>168</sup> GOV'T OF IRELAND, *supra* note 17, at ¶ 6.04(v).



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has slightly more than four million.<sup>169</sup> While both are democracies, Ireland lacks structures analogous to American state governments.<sup>170</sup> At the same time, in both countries the extent of tort law's protection of privacy is uncertain and is defined by a collection of common-law doctrines and statutory provisions. The Irish proposal seeks to give greater definition and clarity to this collection and to provide guidance for a court's application of the privacy tort to circumstances not previously encountered. For this reason, and because it was developed free of the heavy influence of the multiple-tort theory, its benefits are worthy of consideration in the American context.

## IV. BENEFITS OF THE IRISH INTEGRATIVE APPROACH

The benefits offered by the Irish proposal can be divided into two categories. The first set of benefits is organizational.<sup>171</sup> These are related to the ability of the proposed statute to embrace a number of disparate elements and to organize them in a coherent manner. The second set of benefits is substantive and reflects the ability of the proposal to clarify the value underlying privacy torts in a manner that will channel the adaptive power of American common law.<sup>172</sup>

## A. CLARIFYING AND SIMPLIFYING THE PRIVACY TORT

Professor Ruth Gavison argued that legislation should create laws that are as clear, simple, elegant, and suggestive as possible.<sup>173</sup> Elegance may be more than one can hope for, but a degree of clarity and simplicity, and perhaps even suggestiveness, seems a reasonable expectation from a statute. Whatever combination of these factors might be possible, Gavison argued that they are necessary for the law to perform its function of guiding behavior, providing a basis for

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<sup>169</sup> See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2006, 583-86 (2006) (outlining American government and society); see also *id.* at 274-77 (doing the same for Irish government and society).

<sup>170</sup> Although Ireland is subdivided into twenty-nine counties and five city councils with similar powers, their powers do not begin to approach those of American states. Local government was not constitutionally recognized until the Twentieth Amendment to the Irish Constitution in 1999. See IR. CONST., 1937, art. 28a. Additionally, while county and city councils do conduct their own elections, they occur pursuant to regulations promulgated by a national government minister, and their powers are largely determined by acts of the national legislature. See, e.g., Local Government Act, 2001 (Act No. 37/2001) (Ir.) § 27.

<sup>171</sup> See *infra* notes 173-186 and accompanying text.

<sup>172</sup> See *infra* notes 187-207 and accompanying text.

<sup>173</sup> See Gavison, *supra* note 6, at 158.

evaluating conduct, and educating by serving as a means to internalize the values of the system.<sup>174</sup>

The most obvious way in which the organizational structure of the Irish proposal advances these principles is by bringing the various strands of privacy-tort law under the same statutory roof.<sup>175</sup> This establishes one place where citizens may discover what their rights are when they feel their privacy has been invaded.<sup>176</sup> As the Working Group report states, “the encapsulation of a statutory cause of action . . . will allow the legislature to calibrate the tort in a manner that protects the citizen’s rights, while at the same time accommodating countervailing considerations.”<sup>177</sup> It also simplifies judicial decisionmaking by streamlining the sources to which a judge must turn.<sup>178</sup> Additionally, once a legislature has enacted a privacy-tort statute, it then has a readily available and easily accessible vehicle for future adjustments.

The reunification of the privacy tort would reverse what Edward Bloustein viewed as one of the fundamental problems with the four-tort structure: its violation of what he saw as a general principle of science as applied to the development of the law.<sup>179</sup> He argued that the four-tort structure “offends the primary canon of all science that a single general principle of explanation is to be preferred over congeries of discrete rules.”<sup>180</sup> He added that,

To the degree that relief in the law courts can be explained by a common rule or principle, to that degree the law has achieved greater unity and has become a more satisfying and useful tool of understanding. Conceptual unity is not only fulfilling in itself, however, it is also an instrument of legal development.<sup>181</sup>

In fulfilling this principle, the Irish structure affords a legislature the

<sup>174</sup> *Id.*

<sup>175</sup> *I.e.*, definition, principles for determining breach, defenses, recognized defenses.

<sup>176</sup> See GOV’T OF IRELAND, *supra* note 17, at ¶ 6.04(iii).

<sup>177</sup> GOV’T OF IRELAND, *supra* note 17, at ¶ 6.04(v).

<sup>178</sup> A statutory cause of action allows a judge to look to the statute and then the cases construing and applying it when ruling on a case that falls within the statute’s parameters, rather than having to extrapolate the relevant law from the common law. The efficiency of the Supreme Court of California’s decisionmaking in determining the extent of the state constitution’s privacy protection is a good example of the efficiency that is possible when judges can begin with something other than the common law. Although not a statute, the constitutional provision was adopted by referendum and thus bore at least the same deliberative legitimacy that a statute does. See *supra* notes 64-67 and accompanying text and *infra* notes 192-94 and accompanying text.

<sup>179</sup> Bloustein, *supra* note 93, at 963.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1004.

opportunity to make decisions about what will and will not be incorporated under the statute. Any of the existing four torts might be incorporated as exemplars of transgressions or left out. When Wisconsin, for example, enacted its privacy statute in 1977, its legislature declined to include the false-light tort.<sup>182</sup> The Wisconsin Senate deleted a false-light provision when it passed the privacy statute and declined to reinstate it on two subsequent occasions, in part due to opposition from the state's communications media.<sup>183</sup> A jurisdiction that finds that the false-light-publicity tort is too similar to defamation is free to exclude it, as is a jurisdiction that finds that an independent tort for misappropriation protects property interests better than the invasion-of-privacy tort.<sup>184</sup> This would reflect an approach suggested by the establishment in the Third Restatement of the Law of Unfair Competition of breach of the right to publicity as a separate tort, independent of its moorings in privacy.<sup>185</sup>

The tort protection of privacy in both the United States and Ireland is a disparate collection of common-law doctrines and statutory provisions.<sup>186</sup> A statute of the type proposed in Ireland may not be elegant, but it does require a legislature to consider and make decisions

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<sup>182</sup> Right of Privacy Act, ch. 176 § 5, 1977 Wis. Laws 756 (codified at WIS. STAT. § 895.50 (1979)). For the legislative history of the statute see Judith Endjean, *The Tort of Misappropriation of Name or Likeness Under Wisconsin's New Privacy Law*, 1978 WIS. L. REV. 1029, 1037-40 (1978).

<sup>183</sup> S. Amend. 9 to Wis. A.B. 216 (1977) (discussed in Jacqueline Hanson Dee, *The Absence of False Light From the Wisconsin Privacy Statute*, 66 MARQ. L. REV. 99, 101 (1983)); Right of Privacy Act, ch. 176 § 5, 1977 Wis. Laws 756 (codified at WIS. STAT. § 895.50 (1979)). For the two failed attempts to reinstate the false-light tort, see Wis. A.B. 1224 (1979); and Wis. A.B. 40 (1981). See also Dee, *supra* note 6, at 101, for a discussion of the politics behind the debates on the false-light provision.

<sup>184</sup> See *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 894 (Colo. 2002) (“[W]e now decline to recognize the tort, concluding that it is highly duplicative of defamation...”); *Lake v. Wal-Mart Stores*, 582 N.W.2d 231, 236 (Minn. 1998) (“[W]e are not persuaded that a new cause of action should be recognized if little additional protection is afforded plaintiffs.”); *Cain v. Hearst Corp.*, 878 S.W.2d 577, 582 (Tex. 1994) (rejecting false-light invasion of privacy); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 410 (N.C. 1984); J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY 2006*, § 5.12(C) (2006) (“[C]ourts have yet to draw a clear and distinct line between this category of ‘privacy’ and that of defamation law.”). The misappropriation tort’s protection of a property-like interest has long been grounds for criticism. Harry Kalven argued that the appropriation aspect of Warren and Brandeis’s 1890 article was “petty.” *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 330 (1966). Others have criticized the linking of misappropriation to a property, rather than an “inviolable personality” or “dignity,” interest. See Bloustein, *supra* note 109, at 971; Andrew J. McClurg, *A Thousand Words are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 111 (2003).

<sup>185</sup> RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION § 46 (1995).

<sup>186</sup> See *supra* notes 26-80, 107-116, 128-147 and accompanying text.

that will bring some order and clarity that the current arrangements cannot provide. This, in turn, will allow citizens to better understand what the tort does and does not protect. By clarifying, in particular, the extent to which the current common-law torts are subsumed into the newly unified tort, a legislature can clarify the privacy landscape in a manner that allows a jurisdiction to avail itself of the proposal's substantive benefits.

#### B. LINKING THE RE-FORMED TORT TO A CENTRAL VALUE

The process by which the Irish proposal will achieve its intended end is necessarily a political process.<sup>187</sup> It requires a legislature to confront fundamental questions related to the protection of privacy, including what the term "privacy" is to mean, what kind of defenses will be permitted, and what acknowledged transgressions will be integrated into the statute.<sup>188</sup> While this necessarily involves concern about the impact of special interests, it also raises the possibility of expanding the base of parties who contribute to defining the contours of the tort.<sup>189</sup> Case law develops in response to the facts of individual cases, which depend in large part upon those who can afford to bring or defend claims.<sup>190</sup> Legislators, however, are responsible to constituents, both as individuals and as members of special-interest groups.<sup>191</sup> As a result, the statutory route offers the possibility of a privacy tort supported by greater

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<sup>187</sup> As in the United States, for the Privacy Bill to be enacted into law it must be passed by majorities of both houses of the legislature and signed by the President. IR. CONST., 1937, art. 25(1). Although the Irish President is generally apolitical and does not have a veto power, the very nature of parliamentary government, especially when the government holds power by virtue of a coalition agreement, is inherently political. See IR. CONST., 1937, art. 13(3)(2); *infra* note 197. This is exemplified by the absence of any activity on the Privacy Bill after its initial introduction in the legislature. See *infra* notes 195-197 and accompanying text.

<sup>188</sup> The Working Group Report addresses all these concerns. See GOV'T OF IRELAND, *supra* note 17, at ¶ 7.05-27. A legislature undertaking to develop a statute based upon the report must necessarily make judgments on the conclusions the report reaches in each of these areas.

<sup>189</sup> *Id.* at ¶ 6.04(iii).

<sup>190</sup> *Id.* at ¶ 6.04(iii) (quoting GOV'T OF IRELAND, LAW REFORM COMMISSION REPORT ON PRIVACY (LRC 57-1998) ¶1.31).

<sup>191</sup> See THE FEDERALIST NO. 57, at 367 (James Madison) (Robert Scigliano ed., 2001) ("[T]hey will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it."); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 858 (1992) ("Congress is a bureaucratic organization...generating legislation through complicated, but organized, processes of interaction with other institutions and groups, including executive branch departments, labor unions, business organizations, and public interest groups.").

legitimacy and acceptance.

Beyond greater legitimacy, the Irish statute offers the potential to anchor privacy to a reasonably well-articulated value. When the Supreme Court of California was confronted with the issue of whether the state constitution's privacy protection provided a tort cause of action in *White v. Davis*, it turned, as noted earlier, to a brochure distributed on behalf of the initiative through which the language was adopted.<sup>192</sup> Finding language in the brochure indicating intent to create a tort cause of action to protect citizens against invasions of their privacy, the court recognized the constitutional privacy tort.<sup>193</sup> The court's analysis was simplified because the brochure effectively functioned as the initiative's legislative history.<sup>194</sup> With a statute, the citizenry and eventually the legislature will presumably set out a more extensive legislative history than the brochure analyzed in *White*. This process has already begun in Ireland, where there has been considerable public debate about the efficacy of the government proposal. The Irish Journalists Union leapt to protest, arguing that the proposed tort was too onerous with respect to their work and that it would serve as an unexpected curb on free speech.<sup>195</sup> Others raised the concern that the tort was only about the protection of politicians and the famous.<sup>196</sup> The question whether the government can convince the public that the codification of the invasion-of-privacy tort benefits the ordinary Irish citizen will ultimately be answered in Ireland's Oireachtas (legislature).<sup>197</sup>

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<sup>192</sup> *White v. Davis*, 533 P.2d 222, 233-34 (Cal. 1975). See also *supra* notes 64-67 and accompanying text.

<sup>193</sup> *White*, 533 P.2d at 234.

<sup>194</sup> *Id.* .

<sup>195</sup> See Deaglan de Breadun, *Legislation Premature and Poorly Drafted, Seminar Told*, IRISH TIMES (Dublin), September 18, 2006, at 5.

<sup>196</sup> See Editorial, *Privacy and the Public Interest*, IRISH TIMES (Dublin), September 19, 2006, at 19.

<sup>197</sup> The proposed statute was introduced in Ireland's Seanad (Senate) on July 7, 2006. Privacy Bill 2006 (Bill 44/2006) (Ir.). On April 29, 2007, the Irish President dissolved the 29th Dáil (lower house of the legislature) and the 22nd Seanad and called a general election for May 24, 2007. Press Release, Houses of the Oireachtas, Dáil General Election: 24 May 2007; 30th Dail to meet on 14 June 2007 (April 30, 2007) (available from Houses of the Oireachtas website) at <http://www.oireachtas.ie/viewdoc.asp?DocID=7705&&CatID=36>. That election saw the Fianna Fáil party of Taoiseach (prime minister) Bertie Ahern, whose government introduced the Privacy Bill, gain the largest share of seats, though not a majority, in the 30th Dáil. Stephen Collins, *Outcome Far Closer Than Most Had Predicted*, IRISH TIMES (Dublin), May 28, 2007, at 2. When the 30th Dáil convened on June 14, 2007, Fianna Fáil, formed a coalition with the Green Party and the Progressive Democrats party that represents a majority of the seats in the Dáil. As a result, Bertie Ahern was reelected Taoiseach. Stephen Collins and Mark Hennessey, *Ahern Gives Greens Two Top Ministries in Cabinet*, IRISH TIMES (Dublin), June 15, 2007, at 1. In a uniquely Irish quirk, voting for the Seanad does not occur concurrently with voting for the Dáil, but within ninety days of

While *White* and the initial public debate in Ireland illuminate some of the benefits of a unitary-tort approach, problems can arise when guidance to courts is ill-developed. *Hill v. National Collegiate Athletic Association*, which also derived from California's constitutional tort, involved a challenge by Stanford University athletes to the legality of the NCAA's drug-testing program.<sup>198</sup> In an effort to clarify the constitutional cause of action, the Supreme Court of California, left with no guidance from the referendum campaign, instead turned to a tortured analysis of California and federal cases, as well as the literature on the right of privacy going back to Warren and Brandeis.<sup>199</sup> In response, the court developed a two-tiered framework of analysis. If a case involves the obvious invasion of a fundamental interest, such as freedom from involuntary sterilization or freedom to pursue consensual family relationships, a compelling interest is required to overcome the vital privacy interest.<sup>200</sup> If the privacy interest is less central, or in bona fide dispute, a general balancing test is used.<sup>201</sup> In an opinion that included, among other things, a discussion of the configuration of urinals in a men's bathroom, the court upheld the NCAA's drug-testing program, in part because fair competition was a legitimate interest and because there was a diminished expectation of privacy on the part of the Stanford athletes.<sup>202</sup> This holding was rebuked in a dissent by Justice Stanley Mosk.<sup>203</sup> In addition to offering further musings on the reasonable expectation of privacy in a locker-room bathroom, he challenged the two-tiered analysis as unsupported by the text of the state constitution and the history of the referendum that yielded the amendment.<sup>204</sup> Setting aside the issue of the wisdom behind the decision, it shows that a vaguely

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the dissolution of the lower house. IR. CONST., 1937, art. 18(8). Voting for the Seanad took place on July 23-24, 2007, and the new Seanad convened on September 13, 2007. See Press Release, Department of the Environment, Heritage, & Local Government, Seanad General Election (May 5, 2007) (available from the Department of Environment, Heritage, & Local Government website) at <http://www.environ.ie/en/LocalGovernment/Voting/News/MainBody,5131,en.htm>; 187 Seanad Deb. Proclamation Summoning Seanad Éireann (September 13, 2007) (available from the Houses of the Oireachtas website) at <http://debates.oireachtas.ie/Xml/30/SEN20070913.PDF>. See also Michael O'Regan, *Seanad Poll Count Begins Today*, IRISH TIMES (Dublin), July 23, 2007, at 7; Jimmy Walsh, *Ross Stresses Need for Reform as New Cathaoirleach Elected*, IRISH TIMES (Dublin), September 14, 2007, at 13. To date, the Privacy Bill has not been re-introduced in either house of the legislature and the new coalition government has given no indication whether it will be.

<sup>198</sup> *Hill v. National Collegiate Athletic Association*, 865 P.2d 633, 641 (Cal. 1994).

<sup>199</sup> *Id.* at 646-657.

<sup>200</sup> *Id.* at 653.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 655-56.

<sup>203</sup> *Hill*, 865 P.2d at 679-81.

<sup>204</sup> *Id.*

drawn privacy tort cedes to a court considerable interpretive latitude.

The legislation proposed by the Irish Government offers the opportunity to embrace the more clarifying aspects of the California experience while dispensing with some of the more confusing aspects manifested in *Hill*. The proposed statute establishes a privacy tort and clarifies the requirements for such a cause of action, thus avoiding the tortured discourse of the *Hill* decision.<sup>205</sup> In addition, the sections that spell out obvious breaches of privacy and clarify the available defenses afford opportunities for further delineation of what is and is not actionable.<sup>206</sup> Most importantly, legislative debate requires identification of what is at stake, with hopefully greater specificity than seen in California.<sup>207</sup> Here again, though, actual adoption of a statutory tort will establish the act itself as a primary source of authority, with the record of the debates a secondary source only where the text of the act is silent or unclear.

## V. RECONSTRUCTING THE AMERICAN PRIVACY TORT

The employment of a statute resembling the Irish proposal is much more than an effort to codify the unifying principle claimed to be nonexistent by Prosser but acknowledged by Bloustein and others.<sup>208</sup> It would also embrace the development of privacy-tort law that has occurred in the last four decades. In so doing, a jurisdiction could reorient its privacy litigation away from an overly elemental approach toward one based upon a broader consideration of what society is prepared to protect under the banner of privacy.

### A. STATUTORY UNIFICATION AND CLARIFICATION OF THE SCOPE OF PROTECTION

The Irish proposal is an exercise in both the general and the specific. The right protected is articulated broadly, but the proposal provides greater specificity regarding defenses and the list of recognized transgressions.<sup>209</sup> The inevitable temptation with such a structure would be to announce a general cause of action for invasion of privacy and then include in a list of acknowledged transgressions the existing four torts,

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<sup>205</sup> See *supra* notes 148-163 and accompanying text.

<sup>206</sup> See *supra* notes 158-163 and accompanying text.

<sup>207</sup> See *supra* notes 64-67, 192-204, and accompanying text.

<sup>208</sup> See *supra* notes 49-56, 93-98 and accompanying text.

<sup>209</sup> See *supra* notes 148-163 and accompanying text.

and perhaps some of the mini-torts discussed above.<sup>210</sup> This might very well amount to an exercise hardly worth the effort required. This is not, however, what the Irish proposal does.

First, with respect to the list of violations, two of the acknowledged violations—disclosure of information and use of name, likeness or voice—sound very much like the Restatement torts of public disclosure of private facts and misappropriation.<sup>211</sup> The other two acknowledged violations, though, represent two considerations—surveillance and the use of letters, diaries, and other personal documents—that do not fit conveniently into the Prosser typology.<sup>212</sup> In an American context, the temptation to include Prosser torts in such a section would likely be irresistible. On the other hand, misappropriation, for instance, might be set off on its own, or false-light publicity might be spun off of the privacy branch of tort law to live as an aspect of defamation.<sup>213</sup> Looking forward, a jurisdiction might include the unauthorized dissemination of private personal information and unleash the privacy tort on those who traffic in personal information.<sup>214</sup> Similarly, the incorporation of some of the statutorily created tort actions would further define the contours of the privacy protection.<sup>215</sup> The enumeration of acknowledged transgressions offers an opportunity both to integrate existing torts into the broader structure envisioned by the statute and to address methods that are obvious violations. While this structure also offers a ready-made format for the incorporation of future privacy intrusions into the tort,<sup>216</sup> it also runs the risk of being so extensively used that it winds up being simply a slightly better organized version of the existing structure or a glorified Restatement blessed with the imprimatur of legislative approval.

The avoidance of such an outcome rests in the feature that makes the proposal worthwhile: its definition of privacy. The articulated cause of action simply states that it is a tort to willfully violate the privacy of another.<sup>217</sup> It then provides that the “nature and degree of privacy to

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<sup>210</sup> See *supra* notes 107-115 and accompanying text.

<sup>211</sup> See GOV'T OF IRELAND, *supra* note 17, at ¶ 7.17, app. § 4(1)(a-b). See also *supra* notes 66-67.

<sup>212</sup> *Id.* ¶ 7.17, app. §§ 4(1)(a), 4(1)(d).

<sup>213</sup> See *supra* note 184-185.

<sup>214</sup> The willfulness requirement would act as a limitation on such employment of the statute, making it applicable to those who knowingly disseminate personal information, not those who do so negligently.

<sup>215</sup> *E.g.*, incorporation into the statute of the tort action for intercepting wireless communications.

<sup>216</sup> GOVERNMENT OF IRELAND, *supra* note 17, at ¶ 6.04(iv).

<sup>217</sup> A jurisdiction might be tempted to delete the willfulness requirement to make it more



which an individual is reasonably entitled to expect [sic] is that which is reasonable in all the circumstances. . . ."<sup>218</sup> The statute also includes factors to consider in determining what is reasonable.<sup>219</sup> The most important element of the definition, though, so much so that it appears twice within nine words, is the element of reasonability.<sup>220</sup>

## B. ORIENTING PRIVACY AROUND THE REASONABLE EXPECTATION

Objective elements in general, and the element of reasonability in particular, are not absent in American privacy-tort law. An objectively reasonable expectation of privacy is a prerequisite for the intrusion-upon-seclusion tort.<sup>221</sup> The public-disclosure-of-private-facts tort does not expressly require a reasonable expectation of privacy, but it does require that the disclosure be offensive.<sup>222</sup> One might argue that all the elements of each of the four torts are geared toward determining the reasonable expectation of privacy, but the elements of the four torts make clear that they are generally geared toward fulfillment of required elements, not a consideration of the totality of the circumstances. Indeed, Prosser denies the existence of a unifying concept of privacy, so it is logical that there would not be a coherent definition.<sup>223</sup> Privacy is different in the misappropriation context than in the intrusion-upon-seclusion context.<sup>224</sup> This suggests that privacy litigation has become almost an exercise in code pleading in which the focus is on the fulfillment of specific technical requirements rather than on the vindication of an established and recognized right.

The Irish proposal decouples privacy from such a method of litigation by positing a one-to-one correspondence between concept and

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useful against, e.g., information traffickers. The problem with this is that it would thereby transform the invasion-of-privacy tort into a negligence cause of action.

<sup>218</sup> GOV'T OF IRELAND, *supra* note 17, at ¶ 7.13, app. § 3(1).

<sup>219</sup> *Id.* at ¶ 7.13, app. § 3(2).

<sup>220</sup> *Id.* ¶ 7.13, app. § 3(1). ("...the nature and degree of privacy to which an individual is reasonably entitled to expect [sic] is that which is reasonable in all the circumstances" (emphasis added)).

<sup>221</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

<sup>222</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>223</sup> See *supra* notes 49-52 and accompanying text.

<sup>224</sup> Compare *supra* notes 53 and 56. By their very terms, the intrusion tort is a breach of one's seclusion while the misappropriation tort protects a breach of one's ability to use or benefit from one's name or likeness. Compare also *supra* notes 53 with notes 54 and 55. The act giving rise to the intrusion tort is complete upon the breach of another's solitude while the false-light-publicity and the disclosure-of-private-facts torts require publicity of a private matter before the tort is complete.

cause of action.<sup>225</sup> This construct by itself, though, is merely a manifestation of form. The substance stems from the linkage to the reasonable expectation of privacy, which places that consideration at the core of privacy litigation; moreover, that determination is placed in the hands of a judge or jury. Including an act among the enumerated violation, therefore, must reflect a judgment that the act breaches a reasonable expectation of privacy. This means, for instance, that the listing of misappropriation among the acknowledged violations, as in the Irish proposal,<sup>226</sup> clarifies that what is breached in that act is privacy, and not a vague conception of a property interest. The structure of the proposal makes clear that consideration of the reasonable expectation of privacy is paramount.

The use of such a standard with respect to privacy is not without its inherent limitations. The Irish proposal contains a number of defenses that will bar recovery regardless of whether a reasonable expectation was breached.<sup>227</sup> An American jurisdiction need not accept these defenses summarily, but they do mirror defenses that have been invoked in the United States.<sup>228</sup> Additionally, no amount of statutory craftsmanship can avoid the impact of the United States Supreme Court's First Amendment jurisprudence.<sup>229</sup> While a well-constructed statute cannot overcome the First Amendment, a state can statutorily create more privacy rights in those areas that fall within its powers, which Massachusetts and California did by broadening the cause of action.<sup>230</sup>

In addition to these limitations, cases from the Canadian provinces

<sup>225</sup> The Irish proposal is grounded in the notion that it is the responsibility of the legislature to craft causes of actions to be enjoyed by citizens. GOV'T OF IRELAND, *supra* note 17, at ¶ 6.04(i). The Working Group Report perceived that a dedicated cause of action to protect the constitutionally protected right to privacy did not exist, and so it recommended that the legislature create one. *Id.* at ¶ 6.05.

<sup>226</sup> *Id.* at ¶ 7.17, app. § 4(1)(c).

<sup>227</sup> These defenses include acts required by law or court order, acts performed by a police officer or officer of the state reasonably perceived to be within the scope of the officer's official duties, acts of reasonable newsgathering on a matter of public interest, and acts of fair and reasonable comment on a matter of public interest. *Id.* ¶ 7.22, app. § 6(1)(a-d).

<sup>228</sup> One who is required to publish matter is absolutely privileged to publish it when it represents an invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 592A (1977). A public officer acting within the scope of his duties is generally immune from tort liability. RESTATEMENT (SECOND) OF TORTS § 895D (1979). The publication of matter reporting on a public meeting is privileged if it is accurate and complete or a fair abridgment. RESTATEMENT (SECOND) OF TORTS § 611 (1977). The contours of America's newsworthiness privilege are murky and vary from state to state. *See, e.g.*, Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980); McCabe v. Village Voice, Inc., 550 F. Supp. 525, 530 (E.D. Pa. 1982); J.C. v. WALA-TV Inc., 675 So.2d 360, 362 (Ala. 1996); *see also supra* notes 119-120 and accompanying text.

<sup>229</sup> *See supra* notes 119-120 and accompanying text.

<sup>230</sup> *See supra* notes 62-67, 71-75 and accompanying text.

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employing statutes similar to the one proposed in Ireland strongly suggest that the balancing of the interests of the plaintiff against those of the defendant erects a fairly high bar for a claim to clear.<sup>231</sup> The interest of a defendant in broadcasting information of public interest, the health of employees, and the interest in retrieving documents from a company computer all have been sufficient to overcome a plaintiff's interest in privacy.<sup>232</sup> The provincial courts have also tended to construe narrowly a plaintiff's expectation of privacy in public acts, as well as the definition of "willful."<sup>233</sup> These cases suggest that a jurisdiction seeking to tip the scales in favor of plaintiffs would have to take steps to do so, such as by including surveillance among the listed violations or by making explicit statements about the scope of the protection it seeks to provide.

The Canadian cases also reveal a method of deciding cases that is free of the strictures of the multiple-tort approach. In *Genetjanc v. Brentwood College Association*, a high school student whose headmaster entered his home was awarded \$2,500 in general damages in a decision that balanced the student's significant interest in the privacy of his home against the headmaster's insufficient interest in determining whether the plaintiff and other students were present.<sup>234</sup> In *Rideout v. Health Labrador Corp.*, by certifying a class action that included privacy claims based on the allegedly improper release of medical information, the court simply analyzed the plaintiffs' and defendant's interests, and whether the alleged act was willful.<sup>235</sup> In both cases the core analysis was a

<sup>231</sup> See *supra* notes 153-155 and accompanying text.

<sup>232</sup> The broadcasting of information of public interest overcame a plaintiff's right to privacy in *Hollinsworth v. BCTV*, [1999] 6 W.W.R. 54 (dismissing plaintiff's privacy claim and holding that broadcast of plaintiff undergoing surgery to correct baldness was in public interest); and *Doe v. Canadian Broad. Corp.*, [1994] 86 B.C.L.R.2d 216 (declining to bar broadcast of interview tapes because plaintiff's interest in protecting private facts did not outweigh public interest in integrity of newsgathering process). The need to protect the health of employees overcame a plaintiff's right to privacy in *Peters-Brown v. Regina District Health Board* [1996] 1 W.W.R. 337, *aff'd on other grounds* [1997] 1 W.W.R. 638 (holding that hospital was entitled to inform staff that plaintiff patient previously suffered from hepatitis by publishing list in laboratories and emergency department to which general public did not have access). In *Pacific Northwest Herb Corp. v. Thompson*, [1999] B.C.J. No. 2272, the right to access private documents was sufficient to forestall an injunction to enjoin an employee from accessing personal documents on a company-owned computer used by defendant in his home.

<sup>233</sup> See *Druken v. R.G. Fewer & Assocs. Inc.*, [1998] Nfld. & P.E.I.R. 312 (holding video surveillance of plaintiff and child in yard readily visible to passersby did not violate Privacy Act); *Silber v. British Columbia Television Broad. Co.*, [1985] 25 D.L.R.4th 345 (dismissing breach of privacy action arising from videotaping of events occurring in parking lot visible to passers by); see also *Peters-Brown*, *supra* note 232 (holding that "willful" requires more than intentional behavior; it requires an intent to violate the plaintiff's privacy).

<sup>234</sup> *Genetjanc v. Brentwood Coll. Assn.*, [2001] B.C.S.C. 822, ¶¶ 17-26.

<sup>235</sup> *Rideout v. Health Labrador Corp.*, [2005] 2005 NLTD 116, ¶¶ 50-65.

balancing of the parties' interests, leading to damages and certification of a class to pursue a claim that would likely be outside the American four tort structure.<sup>236</sup> Such an approach would free privacy tort from the elemental constraints of the four torts and allow application of the privacy tort to circumstances not generally permitted by the Restatement elements.<sup>237</sup>

This orientation of privacy litigation to the reasonable expectation of privacy offers the possibility of simplifying privacy litigation. It does not change, however, the fundamental requirement of proving one's case by a preponderance of the evidence.<sup>238</sup> A plaintiff would still need to convince a judge or jury that he or she had an expectation of privacy society regards as reasonable that had been breached.<sup>239</sup> Similar approaches have been seen with respect to negligence<sup>240</sup> and Fourth Amendment search-and-seizure privacy.<sup>241</sup> To the extent that the change

<sup>236</sup> *Rideout*, [2005] 2005 NLTD 116, ¶¶ 57-63, 140; *Genetjanc*, [2001] B.C.S.C. 822, ¶¶ 22-26, 36.

<sup>237</sup> Andrew McClurg suggests, *e.g.*, that one of the chief obstacles to the application of the appropriation tort to consumer data profiling is the limitation of the tort to appropriation of name or likeness only. McClurg, *supra* note 229, at 141. The Irish statute suggests, however, that the central inquiry should be the consumer's reasonable expectation of privacy in the information balanced against the interests of the defendant in his action. GOV'T OF IRELAND, *supra* note 22, at app. § 3(1). While the recognized violation in the Irish statute is limited to appropriation of name, likeness, or voice, these provisions are without prejudice to the statute's broad definition of privacy. *Id.* at ¶ 7.17, app. § 4(1).

<sup>238</sup> See *supra* note 162 and accompanying text.

<sup>239</sup> See *supra* notes 151-154 and accompanying text.

<sup>240</sup> *Trimarco v. Klein*, 56 N.Y.2d 98, 105 (N.Y. 1982) ("It must bear on what is reasonable conduct under all the circumstances, the quintessential test of negligence."); *Freeman v. Adams*, 218 P. 600, 601 (Cal. Ct. App. 1923) ("In determining what a reasonable and prudent man would do under the circumstances you will remember that presumably a jury is composed of such reasonable and prudent persons..."); *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (C.P.) ("[w]e ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."); *Hall v. Brooklands Auto Racing Club* (1933) 1 K.B. 205 (Eng.) ("The reasonable man has been described as... 'the man in the street' or 'the man in the Clapham omnibus,' or...the man who takes the magazines at home, and in the evening pushes the lawnmower in his shirt sleeves."); RESTATEMENT (SECOND) OF TORTS, § 283 (1964) ("Unless the actor is a child, the standard of conduct to which he must conform... is that of a reasonable man under the circumstances.").

<sup>241</sup> See *United States v. Leon*, 468 U.S. 897, 926 (1984) (declining to apply the exclusionary rule to evidence seized in objectively reasonable reliance on an invalid search warrant); *Katz v. United States*, 389 U.S. 347, 351 (1967) (Harlan, J., concurring) (Fourth Amendment protection requires "that the expectation [of privacy] be one that society is prepared to recognize as 'reasonable.'"); *United States v. Tibolt*, 72 F.3d 965, 969 (1st. Cir. 1995) ("Probable cause will be found to have been present if the officers... possessed reasonably trustworthy information sufficient to warrant a prudent policeman in believing that a criminal offense had been or was being committed."); *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990) (defining probable cause as "reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.").

contemplated would compel litigants to make a connection between their position and what society expects, privacy-tort law may more efficiently and more fairly fulfill the goals of tort law to vindicate individual rights and to deter socially unacceptable behavior.<sup>242</sup>

If the privacy tort were tied to a more elastic understanding of the protection it offers, courts would be better able to apply the tort to a range of circumstances beyond those contemplated by the four torts. The idea of privacy, tort or otherwise, has always been conditioned by the challenges posed by changes in society, including the development of technology,<sup>243</sup> but it is unreasonable to expect privacy-tort jurisprudence to continue to meet challenges with a rigid, almost five-decade-old structure.

The impact of technology on privacy is not a new concern. Warren and Brandeis in 1890 decried the impact of “instantaneous photographs” and “numerous mechanical devices” that threatened to make private matters public.<sup>244</sup> Over eight decades later, in 1971, Professor Arthur R. Miller contemplated the impact of computer technology on privacy.<sup>245</sup> More recently, Miller considered the implications of cookies, electronic commerce, and the collection and dissemination of personal information.<sup>246</sup> In the not-too-distant future he might reasonably contemplate the widespread availability of imagery from high-resolution satellite cameras in real time in addition to a range of threats that are as beyond our imagination now as identity theft was a generation ago.

The ability of the common law to respond to such threats is unclear. Matthew Keck argued that his proposed information-privacy tort was an extension of the common law, but its narrow applicability to internet privacy quickly begins to bear a striking resemblance to the piecemeal protections discussed earlier.<sup>247</sup> Professor Jessica Litman, looking to the invasion-of-privacy tort to protect personal information, concluded that it

<sup>242</sup> See RESTATEMENT (SECOND) OF TORTS, § 901(c) (1979).

<sup>243</sup> See Gormley, *supra* note 45, at 1434, 1440

<sup>244</sup> Warren & Brandeis, *supra* note 29, at 213.

<sup>245</sup> ARTHUR R. MILLER, ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS 10-16 (1971).

<sup>246</sup> Alison Bass, *Miller's Privacy Warning*, CIO MAGAZINE, November 2001, available at <http://www.cio.com/archive/110101/miller.html>.

<sup>247</sup> Matthew Keck, *Cookies, the Constitution, and the Common Law: A Framework for the Right of Privacy on the Internet*, 13 ALB. L.J. SCI. & TECH. 83, 107-116 (2002). Considerations relevant to Keck's proposed tort are the reasonable expectation of privacy, the purpose of the transfer of information, the nature of the information, and the seriousness of the violation. *Id.* at 116. See also *supra* notes 107-115 and accompanying text for a discussion of American piecemeal protections.

was too narrowly defined to serve its purpose.<sup>248</sup> The ongoing march of technology and society seems likely to render the existing structure less effective. If the real-time satellite imagery scenario contemplated above comes to pass, rather than having the success of a privacy-tort claim hinge on whether a plaintiff files an intrusion or a private-facts claim, the reasonable-expectation construct would allow a court to evaluate the facts against what society may reasonably be expected to protect and then rule accordingly. This application of established norms to emerging contexts is the core of the development of the common law.<sup>249</sup> It is what Hieu Smith expected of that federal court in Colorado in 1990, and it is what the privacy tort created by the Irish proposal offers.<sup>250</sup> Because of this, the Irish proposal portends the possibility of a more resilient privacy tort than that which is currently available.

## VI. CONCLUSION

Legislation may seem an odd method for strengthening a common-law tort. The impact of the Restatement, though, has stunted the ability of the common law to do this with respect to privacy.<sup>251</sup> If the drafters of the Restatement intended that their work would facilitate an ongoing engagement that would serve to further develop tort protections of privacy, this aspiration remains unfulfilled. Rather than defining the current core of privacy-tort law, the four torts have come to largely define its parameters.

The four-tort structure has, therefore, become a self-fulfilling prophecy. By denying a central value to the invasion-of-privacy tort and conceiving of it as a loose federation of four torts, the framework has necessitated the creation of new torts for breaches of privacy that fall outside the four-tort structure.<sup>252</sup> Each new tort, in turn, furthers the notion that tort protection of privacy can only be accomplished by a series of piecemeal protections. As this occurs, though, it undermines the viability of privacy as an independent concept by diffusing the

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<sup>248</sup> Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1302-04 (2000); see also Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1634 (1999) (arguing that common-law limitations render state tort laws a weak response to electronic threats to information privacy); Robert Gellman, *Does Privacy Law Work?*, in TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 193, 209-212 (Phillip E. Agre & Marc Rotenberg eds., 1997) (concluding tort remedies do not adequately address privacy concerns with respect to computer technology).

<sup>249</sup> See *supra* notes 84-86 and accompanying text.

<sup>250</sup> See *supra* notes 148-160 and accompanying text.

<sup>251</sup> See *supra* notes 81-127 and accompanying text.

<sup>252</sup> See *supra* notes 49-56, 107-115 and accompanying text.

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protections the law provides across an increasing number of torts. This, in turn, necessitates a dependence on legislatures to keep up with new invasions of privacy through the enactment of new torts to cover them.<sup>253</sup>

The Irish proposal offers a framework that strengthens the identity of privacy as an independent, relevant tort concept by establishing a single privacy tort and defining it according to reasonable expectations under prevailing circumstances.<sup>254</sup> This anchors privacy-tort law to an understanding similar to that to which constitutional search-and-seizure privacy law is grounded, or to another legislatively determined value.<sup>255</sup> Additionally, by allowing for integration of developments of the common law into the statute, the Irish proposal creates a ready-made framework for the confrontation of new privacy invasions by allowing a cause of action to be based on whether the new invasion breaches a reasonable expectation of privacy.<sup>256</sup> This relieves legislatures of the need to keep up with new challenges to privacy. The Irish statute offers courts a unified, clear articulation of the invasion-of-privacy tort that is elastic enough to incorporate the common law and channel its tort protection of privacy to a more effective future.

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<sup>253</sup> See *supra* notes 107-115 and accompanying text.

<sup>254</sup> See *supra* notes 148-155 and accompanying text.

<sup>255</sup> See *supra* notes 100-102, 240 and accompanying text.

<sup>256</sup> See *supra* notes 148-155 and accompanying text.

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