

THE PUZZLE OF THE DIGNITARY TORTS

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In recent years, there has been much greater legal attention paid to aspects of dignity that have previously been ignored or treated with actual hostility, especially in constitutional law and public law generally. But private law also plays an important role. In particular, certain forms of tort liability are imposed in order to protect individual dignity of various sorts and compensate for invasions of individual dignity. Defamation, invasion of privacy, intentional infliction of emotional distress, and even false imprisonment fall into this category. Despite the growing importance of dignity, this value has received very little self-conscious or express attention in tort cases or torts scholarship. The absence of a robustly-articulated conception of the interest in dignity that tort law protects is puzzling. Why have notions of dignity and dignitary torts been little more than labels, reflecting a value that has gone unanalyzed and undebated, despite its obvious and growing importance? The answers to these questions lie in the structure of the common law of torts, the history of twentieth-century tort law scholarship, the jurisprudence of doctrinal boundaries, and—perhaps, surprisingly—developments in constitutional law during the last four decades of the twentieth century. In the first analysis of the dignitary torts as a whole in half a century, this Article explores the puzzle of the dignitary torts. It argues that these torts have been under-theorized because of the very nature of the common law system, which poses a powerful obstacle to any doctrinal re-orientation of tort law toward the understanding or creation of a unified species of dignitary torts. The law of torts may be fully capable of protecting the forms of dignity that our world increasingly recognizes and honors, but it turns out that it must do so in the same manner that it has always protected the interests that are central to our values—cause-of-action by cause-of-action.

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INTRODUCTION

During much of the history of the United States, the notion that every individual is entitled to the requisites of human dignity has been honored more in the abstract than in legal action. Over time, there has been progress toward according all people legal rights to the dignity they deserve, but there can be no dispute that the steps we have taken toward that ideal have been incomplete and imperfect. Nonetheless, much greater legal attention has been paid in recent years to aspects of dignity that previously have been ignored or treated with actual hostility. We need look no further than the recognition of same-sex marriage and the enhanced rights of LGBT individuals to see that the overall trajectory of legal protections for individual dignity is trending upward.¹ This upward trajectory extends to other settings as well, including protection of the dignitary interests of the elderly² and the disabled,³ among others.⁴

Legal protection of individual dignity, however, is not only the province of constitutional law or public law more generally. Private law also plays an important role. In particular, tort law provides a good deal of protection for individual dignity. Tort liability is imposed not only to protect against and compensate for bodily injury, damage to property, emotional distress, and economic loss, but also to protect individual dignity of various sorts and compensate for invasions of individual dignity. Despite the growing importance of dignity, this value has received very little self-conscious or express attention in tort cases or torts scholarship. Although there are frequent, passing references to the “dignitary torts,” these references are often made

¹ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

² See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2018).

³ See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2018).

⁴ For example, there have been periodic proposals for conceptualizing such disparate problems as fraud and liability for tainted food as involving human dignity. See, e.g., Roger Brownsword, *An Interest in Human Dignity as the Basis for Genomic Torts*, 42 WASHBURN L.J. 413, 427 (2003) (discussing the support that human dignity would offer genetic torts if human dignity became a protectable tort interest); L. Camille Hébert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75 OHIO ST. L.J. 1345, 1349 (2014) (proposing that sexual harassment be conceptualized as a dignitary tort); Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1, 6–11 (1989) (encouraging courts to recognize fraud as a dignitary tort that justifies the award of emotional distress damages); Melissa Mortazavi, *Tainted: Food, Identity, and the Search for Dignitary Redress*, 81 BROOK. L. REV. 1463, 1486 (2016) (arguing that dignitary torts may provide the best redress for individuals against offensive food taint). However, none of those sources contain a sustained analysis of the concept of dignity.

without further explanation.⁵ The term “dignity,” as it is used in passages referring to an unspecified set of torts, appears to us to be a placeholder for an inchoate but unarticulated idea.⁶ This is the notion that some tort actions are available when a person has been offended, embarrassed, ridiculed, or misportrayed by the words or actions of another in a way that does not respect that person’s intrinsic worth. There has been virtually no analysis, however, of the nature or scope of this interest in dignity or the ways that the often-unnamed dignitary torts protect this interest.

The absence of a robustly articulated conception of the interest in dignity that tort law protects poses a puzzle. If dignity is one of the handful of important interests that figure in the imposition of tort liability, why has there been so little analysis of the constitutive elements of that interest? Why have the notions of dignity and dignitary torts been little more than labels, reflecting a value that has gone unanalyzed and undebated, despite its obvious and growing importance?

The answers to these questions lie in the structure of the common law of torts, the history of twentieth-century tort law scholarship, the jurisprudence of doctrinal boundaries, and—perhaps surprisingly—developments in constitutional law dur-

⁵ We surveyed articles and comments using the terms “dignity,” “dignitary,” and “dignitary torts” between 1986 and 2017. The survey produced thirty-five articles in which the terms “dignity” and “dignitary” were applied to tort law. Most of the articles argued that particular actions, such as interference with the “right to die,” redress for the commercial dissemination of personal information, fraud, sexual harassment in the workplace, violations of informed consent in medical malpractice cases, intrusive genetic testing, and redress for the supplying of food to prisoners who objected to its content on religious grounds amounted to dignitary torts.

Of those articles, only three made a sustained effort to analyze what interests might be protected in the concept of dignity: Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213 (1999); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989); Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65 (2012). The bulk of the articles simply took for granted that there was a category of “dignitary” torts that sought to redress “emotional,” rather than physical or economic harm and then argued that various tort actions should emphasize the “dignitary harm” plaintiffs had suffered.

⁶ In DAN B. DOBBS & ELLEN M. BUBLICK, *CASES AND MATERIALS ON ADVANCED TORTS: ECONOMIC AND DIGNITARY TORTS* 1–3 (2006), to take a prominent example, there is an introduction entitled “What are Economic and Dignitary Torts?” The closest the authors come to explaining what interests “dignitary torts” might protect is one sentence in which they describe a “dignitary loss” as “a damage to one’s rights of personality.” *Id.* at 1. We refer to such unanalyzed references to dignity as “placeholders,” because we suspect that those making the references have a sense of what “dignity” might entail but are disinclined to articulate it more precisely.

ing the last four decades of the twentieth century. These answers reveal insights about the nature of the dignitary interests that tort law protects and the continuing influence of the ancient common law “forms of action” on modern legal development. The great historian of the common law, Frederic William Maitland, famously said that although we have buried the forms of action, “they still rule us from their graves.”⁷ More than a century after Maitland wrote, this is still strikingly true as far as the dignitary torts are concerned. In addition, new torts have followed the model of the ancient approach. When common law forms of action protecting important aspects of dignity have not had modern counterparts, the law of torts has found it necessary to invent what amounts to new forms of action.⁸ Moreover, we contend it could not be otherwise.

This Article seeks to explain the puzzle of the dignitary torts. Part I provides a philosophical and historical overview of the concept of dignity. The meaning of dignity has changed a good deal over the centuries, and it was only in the twentieth century that our current thinking about dignity fully crystallized. We suggest that the modern concept of dignity involves respecting the worth of each individual. There is a gulf, however, between the majesty of that concept and its translation into concrete legal rights. As a prelude to our analysis of the role that the concept of dignity has played in U.S. tort law, we then briefly document the way that European law has handled this difficulty through the development of a right of “personality” protected by tort law.

Part II then identifies and describes the American common law torts that fall generally within the “dignitary” category and uncovers a period in the history of American tort law when prominent scholars recognized the potential for a somewhat unified cause of action protecting dignitary and emotional interests. In our view, this episode was part of a broader inclination on the part of torts scholars during that period to distance tort law from the restrictions of the common law forms of action and the modern doctrinal categories that were their successors. But the effort to shake off the bounds of common law formalism and take advantage of the potential for “unification”

⁷ F. W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 2 (A.H. Chaytor & W.J. Whittaker eds., 1st ed. 1909).

⁸ Examples include invasion of privacy and intentional infliction of emotional distress. For further discussion, see *infra* notes 101–23 and accompanying text.

did not result in the creation of anything like a generic set of “dignitary torts.”

Far from embracing the idea that several torts allowing redress for non-physical harm share a unitary concern with protecting dignity or emotional interests, neither tort liability nor tort theory ever developed very far in that direction. It turned out that the concept of dignity was not sufficiently specific to ground the very different protections that would be encompassed within a unified cause of action for invasion of dignity. This is because, as we show, the interests protected by the torts that can be considered “dignitary”—offensive battery, false imprisonment, defamation, intentional infliction of emotional distress, and invasion of privacy—are very different from each other and reflect very different dimensions of individual dignity.

Part III continues this examination by identifying a second major reason for unification’s failure to develop. Toward the end of the period in question, the U.S. Supreme Court began, for the first time, to impose First Amendment restrictions on the scope of liability for the very torts that had only recently been recognized as protecting dignitary interests. This unprecedented constitutional intervention into state tort law truncated further development of these torts and directed scholarly focus away from the possibility of unification and toward the constitutional dimensions of the torts, occupying a considerable quotient of scholarly attention over a period of decades.

Finally, Part IV explains why a unified conception of the dignitary torts was never really a possibility. It is fashionable these days for historians to identify contingencies in the development of the law, suggesting that often things might have developed otherwise.⁹ In the area of the dignitary torts, in contrast, we think that the condition in which the law finds itself lies nearer to the “inevitability” than to the “contingency” side of the spectrum of explanation. Doctrinal development in American tort law is not simply a function of changing attitudes towards the interests potentially being protected in tort suits. If that were the case, there are cultural reasons why a series of torts now grouped under disparate doctrinal categories might have readily been understood as essentially concerned with the protection of individual dignity. But the forms of action historically associated with the common law of torts separately specified the distinctive elements of each form of

⁹ Two notable examples are JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* 21 (2004), and RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 13–15 (2007).

action and thereby determined the structure of tort liability, even after abolition of the forms. The resulting substantive and structural separation of the dignitary torts from each other rendered unification an impossibility.

We conclude that the current doctrinal boundaries within the dignitary torts are not merely a product of a contingent-path dependency, but something that is inevitably endemic to a common law system and amounts to a powerful obstacle to any doctrinal reorientation of tort law toward the creation of a unified species of dignitary torts. The law of torts may be fully capable of protecting the forms of dignity that our world increasingly recognizes and honors, but it turns out that it must do so in the same manner that it has always protected the interests that are central to our values—cause-of-action by cause-of-action.

I

THE CONCEPT OF DIGNITY

Two strains of the concept of dignity can be discerned in the period when the common law of torts was developing. The first involved rank; the second involved the worth of the individual. Even the latter conception, however, has never been sufficiently concrete to serve alone as the foundation for private rights.

A. Dignity as Rank or Station

The original conception centered on the dignity associated with social status.¹⁰ When the English common law began to develop after the Norman conquest there was no writ available

¹⁰ Early legal regimes reflected some limited concern with dignity. In Greece and Rome, there was a concept of what came to be called in Roman law “iniurial” liability, liability for insult or outrage. The concept encompassed actions that would now be termed batteries, resulting in physical injury, but also included nonphysical harms. In the *Corpus Juris Civilis*, codified by the Emperor Justinian between 529 and 534 A.D., “iniuria” was associated not only with “striking with the fist, a stick, or a whip” but with “vituperation for the purpose of collecting a crowd,” “taking possession of a man’s effects on the ground that he was in one’s debt,” “writing, composing, or publishing defamatory prose or verse,” “constantly following a matron, or a young boy or girl below the age of puberty,” and “attempting anybody’s chastity.” Francis L. Coolidge, Jr., *Iniuria in the Corpus Juris Civilis*, 50 B.U. L. REV. 271, 271–72 (1970); see also ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 303 (1994) (describing the early Roman system of formalized personal revenge for wrongs committed against an individual). For more details on ancient Greek law, see generally MICHAEL GARGIN, EARLY GREEK LAW (1986) and RUSS VER-STEEL, LAW IN THE ANCIENT WORLD §§ 7.01–9.08 (2002). See also M. Stuart Madden, *The Greco-Roman Antecedents of Modern Tort Law*, 44 BRANDEIS L.J. 865, 868–87 (2006) (tracing the law of early Greece and Rome from their respective origins in

to redress infringement of dignity.¹¹ This should not suggest, however, that there was no recognized concept of dignity in English culture at the time. In fact, the concept of dignity was pervasive because it was associated with social rank and status in a society in which those phenomena were widely regarded as the most relevant indicators of a person's place in his or her world.¹² Status rituals, such as lower-status members of the population doffing their hats, curtsying, or touching their forelocks when high-status members encountered them in public, and the high-status members' acknowledging that treatment with attenuated bows, were a ubiquitous feature of social interchange.¹³

Such rituals reflected the "dignity" of station, or, on occasion, the dignity of office. Kings, nobles, "gentlemen," and "ladies" were treated as if their social rank itself was deserving of respect.¹⁴ With the possession of a certain social rank came a certain "dignity," meaning that the status itself was expected to trigger some public acknowledgment, in the form of one or another ritual of obeisance, of the superiority of the individual holding it.¹⁵ Accompanying the gestures of obeisance were ges-

myth and legend through their initial written legal recordations and their later comprehensive codifications).

¹¹ See generally R.C. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 177-90* (1959).

¹² See JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 30-33 (2012).

¹³ See Penelope Jane Corfield, *From Hat Honour to the Handshake: Changing Styles of Communication in the Eighteenth Century*, in *HATS OFF, GENTLEMEN! CHANGING ARTS OF COMMUNICATION IN THE EIGHTEENTH CENTURY* 7 (P.J. Corfield & L. Hannan eds., 2017).

¹⁴ See WALDRON, *supra* note 12, at 30-33.

¹⁵ For example, in his writings, the nineteenth-century English essayist Thomas de Quincey repeated a story told to him by another essayist, William Hazlitt, about a walk taken by Ernest Augustus, the second Duke of Cumberland (and the fifth son of George III), in London. The story captures the two ways in which dignity as rank was understood in early nineteenth century England by showing the subtly different ways in which the Duke acknowledged, and was acknowledged by, individuals he encountered on his walk. The Duke's walk began at St. James palace, where he was staying, and proceeded onto the street of Pall-Mall, a busy main thoroughfare:

On this occasion all the men who met the prince took off their hats, the prince acknowledging every such obeisance by a separate bow. Pall-Mall being finished, and its whole host of royal salutations gathered in, next the Duke came to Cockspur Street. But here, and taking a station close to the crossing, which daily he beautified and polished with his broom, stood a negro sweep.

The Duke drew out his purse and tossed a coin, possibly a half a crown, to the sweep, while at the same time keeping "his hat rigidly settled on his head" and making no bow. It would have seemed undignified, in one sense, for Ernest to ignore the sweep altogether, especially since the sweep was "beautify[ing] and polish[ing] with his broom" the area where Pall-Mall intersected with Cockspur Street,

tures of acknowledgment from the higher-status persons, such as the discreet bows that confirmed their recognition of the gestures, and their recognition not only of the status differences that had prompted them but of the persons who had doffed their caps or touched their forelocks.¹⁶ The gestures of acknowledgment were designed to convey another version of “dignity,” the civility with which high-status persons were expected to greet others of lower status.¹⁷

B. Dignity as Individual Worth

An alternative conception of dignity, as being associated with the sentient capacities of humans, was at first linked to man’s being made in the image of God and thus being capable of appreciating God in a manner that non-human species could not.¹⁸ By the late eighteenth century this capacity of humans to reason and exercise free will had been secularized, most notably in the writings of Immanuel Kant.¹⁹ Kant did not often expressly refer to dignity, and there is some debate about whether the German term he employed (*wurde*, roughly equivalent to “worth”) should be understood as the equivalent of dignity.²⁰ Most scholarship on Kant associates him with two claims about dignity: that human worth should be understood in itself and not simply as a means to glorify God, and that human worth is centered in autonomy—the capacity of people to choose and reason for themselves.²¹ This conception of dignity is centered on the intrinsic qualities of human individuals rather than in rank or status.

Coexisting with Kant’s treatment, in the late eighteenth and early nineteenth centuries, were writings that associated dignity with various efforts at social leveling: republicanism in France and America emphasized the extension of privileges previously accorded only to aristocrats to all citizens and the connection between dignity and the natural rights of man,²²

and Ernest was to cross. Yet at the same time it seemed undignified for Ernest, a member of royalty, to go so far as to condescend to a black sweep with a measured bow.

THOMAS DE QUINCEY, *THE COLLECTED WRITINGS OF THOMAS DE QUINCEY*, 348–49 (David Masson ed., 1890).

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 16–18 (2012).

¹⁹ See *id.* at 19.

²⁰ See *id.* at 19–21.

²¹ See *id.* at 30–31.

²² See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUROPEAN J. INT’L L.* 655, 660 (2008) (discussing the use of

while anti-slavery literature of the mid-nineteenth century asserted that slavery was incompatible with human dignity.²³ Some European philosophers, however, did challenge Kant's concept of dignity itself. In 1837, Arthur Schopenhauer declared Kant's version of "human dignity" to "lack . . . any basis at all which was possessed of an intelligible meaning."²⁴ In 1847, Karl Marx called appeals to human dignity "a refuge from history in morality."²⁵ And in 1872, Friedrich Nietzsche declared that "the 'dignity of man'" and "the 'dignity of labour'" were illusory phrases, since "every human being," with his total activity, "only has dignity in so far as he is a tool of the genius, consciously or unconsciously."²⁶

Nonetheless, the conception of dignity as reflecting the worth of all individuals, rather than merely being an offshoot of social rank, gained momentum in the twentieth century. Between 1917 and 1940, provisions referring to the "dignity of man," and prohibiting violations of that dignity, appeared in the constitutions of Mexico, Germany under the Weimar Republic, Finland, Portugal, Ireland, and Cuba.²⁷ Although these countries followed different ideologies—republicanism, socialism, and humanistic versions of Catholicism—each of their constitutions incorporated concerns regarding individual dignity.²⁸ "Dignity" was associated with natural rights, which included a right to something like "decent treatment," with access to basic human needs, such as food, clothing, and shelter; it was a right to be treated equally and with a religious-based obligation to care for less fortunate members of society.²⁹

Then, in the wake of World War II, dignity became even more firmly associated with intrinsic human rights. Three na-

"dignity" in the 1789 Declaration of the Rights of Man in France, in Thomas Paine's 1791 pamphlet, *The Rights of Man*, and in Mary Wollstonecraft's *Vindication of the Rights of Man* (1790) and *Vindication of the Rights of Women* (1796)).

²³ The most prominent example was the April 27, 1848 decree abolishing slavery in France, which described slavery as "an assault upon human dignity" and thus "a flagrant violation of the republican creed." For more detail, see generally Rebecca J. Scott, *Dignité/Dignidade: Organizing Against Threats to Dignity in Societies After Slavery*, in UNDERSTANDING HUMAN DIGNITY 61-77 (Christopher McCrudden ed., 2013).

²⁴ See McCrudden, *supra* note 22, at 661.

²⁵ *Id.*

²⁶ *Id.* at 661-62.

²⁷ See *id.* at 664.

²⁸ See *id.*

²⁹ See, e.g., *id.* at 694 (quoting an opinion from the Constitutional Court of South Africa in which the judge compared the concept of dignity to various socio-economic rights).

tions on the losing side of the war adopted postwar constitutions declaring dignity to be a fundamental human right: Japan in 1946, Italy in 1948, and West Germany in 1949.³⁰ By incorporating dignity into their constitutions, those nations signaled that they were repudiating the horrifying practices engaged in by the totalitarian regimes that had preceded them, such as the persecution of ethnic minorities, torture, mass exterminations, the brutal treatment of prisoners of war, and the utter neglect of the health and well-being of some members of their populations. In those nations' postwar constitutions, "dignity" was primarily associated with access to the basic needs of human existence and the protection of the individual from being subjected to degrading or humiliating practices.³¹

In the same period, what came to be called international declarations of human rights gained significant attention. In connection with the creation of the United Nations, a body designed in part to prevent worldwide conflicts and to identify and sanction human rights violations, several groups and nations drafted proposed declarations, sometimes as suggestions for the United Nations charter.³² They included the American Jewish Committee, Uruguay, Cuba, the American Federation of Labor, and, in 1947, both the United States and the United Kingdom.³³ A common feature of those declarations were stipulations, either in their prefaces or in the form of articles positioned early in the documents, of the value of "human dignity" or the "dignity of the individual human being."³⁴

Sometimes the documents associated "dignity" with equality, sometimes with freedom, and sometimes with protection from "indignity."³⁵ Thus, the American Jewish Committee referred to "the dignity and inviolability of the person, of his sacred right to live and to develop,"³⁶ the American Federation of Labor to the right of every human being to "pursue his or her work . . . in conditions of freedom and dignity,"³⁷ and the United States government to the freedom of "any person" from being subjected to "torture, or to cruel or inhuman punishment, or to cruel or inhuman indignity."³⁸

³⁰ See *id.* at 664.

³¹ See *id.* at 666.

³² See *id.* at 665–66.

³³ See *id.*

³⁴ See *id.* at 666.

³⁵ See *id.*

³⁶ *Id.* at 665.

³⁷ *Id.* at 666.

³⁸ *Id.*

Those various strands came together in the Universal Declaration of Human Rights, promulgated in 1948 after the creation of the United Nations with its accompanying charter.³⁹ The preamble to the Universal Declaration referred to the "inherent dignity . . . of all members of the human family" and the "dignity and worth of the human person."⁴⁰

The fullest understanding of what was meant by "dignity," in its principal post-World War II formulation, came in the 1949 Geneva Convention, which summarized rules for the treatment of prisoners of war, and subsequent Protocols in 1977.⁴¹ The wartime treatment of prisoners and enemies readily summoned up associations of the concept of dignity with the protection of captured, injured, or dead soldiers from torture, neglect, or having their bodies defiled. The preamble to the 1949 Geneva Convention, after declaring that "[r]espect for the personality and dignity of human beings constitutes a universal principle which is binding [on nations and individuals] even in the absence of any contractual undertaking" stated that "in time of war . . . all those placed 'hors de combat' by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succored and tended."⁴²

Article 3 of the 1949 Convention prohibited "outrages upon personal dignity, in particular humiliating and degrading treatment."⁴³ And the first and second 1977 Protocols particularized that prohibition, singling out "enforced prostitution," "any form of indecent assault," "rape," and enforced "racial discrimination," such as "apartheid."⁴⁴

Since the 1970s, the incorporation of the concept of dignity into multiple human rights charters has become ubiquitous.⁴⁵ Such charters routinely refer to the "inherent dignity and worth" of humans, and prospective violations of dignity have been associated not only with torture and other "outrages" of

³⁹ See *id.*

⁴⁰ *Id.* at 667. Article I spoke of "[a]ll human beings" being "born free and equal in dignity" and "endowed with reason and conscience." Article 22 stated that "[e]veryone, as a member of society," was "entitled to realization . . . of the economic, social, and cultural rights indispensable for his dignity." Article 23 noted that "[e]veryone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity." *Id.*

⁴¹ See *id.*

⁴² *Id.*

⁴³ *Id.* at 668.

⁴⁴ *Id.*

⁴⁵ See *id.*

the sort proscribed by the Geneva Convention and its protocols, but also with the treatment of children, migrant workers, indigenous peoples, disabled persons, and persons in extreme poverty or lacking in basic food supplies.⁴⁶ Violations of dignity have also been linked, in international human rights documents, with the conditions under which criminal suspects are detained, educational practices, welfare programs, medical practices, biomedical experiments, and the control of and access to personal data.⁴⁷

In short, worldwide reaction to the horrors of World War II served to elevate the idea of dignity to a universal condition of all humans unaffected by rank or status. In the attempted reconstitution of the “civilized” world order that was undertaken after the war’s end, dignity migrated from being a concept only partially associated with inherent and universal human capacities to one primarily associated with those capacities. The dignity of humans gave them “rights,” which modern states and their fellow citizens needed to respect.

C. The Core Meaning of Dignity

Metamorphosis of the concept, however, did not produce much clarity as to what “dignity,” as a social and legal concept, consists. It might seem that once the concept of dignity migrated from its original association with social rank to an association with inherent human capacities, the concept might be able to take on a legal, as well as a social, meaning. That was clearly the intent of the international human rights documents that employed the term “dignity” in their preambles or provisions. Individuals possessed an inherent dignity: this meant that humans, and the state, needed to respect the dignity humans possessed, and that gave humans some “rights” against the abuse of their dignity by other humans and the state.⁴⁸ But after declarations of the inherent dignity of humans and provisions stating that humans should be allowed to live under dignified conditions, or not have their dignity humiliated or degraded, the international human rights documents, in seeking to particularize offenses against dignity, resorted to opaque generalities. Violations of dignity were

⁴⁶ See *id.* at 667–71.

⁴⁷ See *id.* at 669–71.

⁴⁸ See *id.* at 677. Upon being questioned about the use of the term “human dignity” in the Universal Declaration of Human Rights, Eleanor Roosevelt is reported to have argued that the term’s purpose was to “emphasize that every human being is worthy of respect . . . it was meant to explain why human beings have rights to begin with.” *Id.*

associated with “cruel,” “inhumane,” “indecent,” or “outrageous” practices, but those terms were not spelled out.⁴⁹ In short, post-World War II conceptions of dignity firmly equated it with universal human characteristics, potentially spawning legal rights, but, with the exception of the protection of war prisoners and enemies from treatments embargoed by the Geneva Convention and its Protocols, it was hard to know to what those human rights amounted.⁵⁰

Among other scholars,⁵¹ Christopher McCrudden has taken these notions and attempted to identify what might be called a “core” meaning of dignity, composed of three elements.⁵² The first element is “that every human being possesses an intrinsic worth, merely by being human.”⁵³ Here we see the recalibrated version of dignity in place, the “inner transcendental kernel” inherent in human existence.⁵⁴ The next element of dignity is “that this intrinsic worth should be recognized and respected by others.”⁵⁵ It follows from this proposition that “some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth.”⁵⁶ The third element of dignity is the “claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa.”⁵⁷ The content of this third element, “the detailed implications . . . for the role of the state vis-à-vis the

⁴⁹ See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 545–46 (2006). Clapham has identified “four aspects” of the “concern for [human] dignity:” “the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another”; “the assurance of the possibility for individual choice and the conditions for ‘each individual’s self-fulfillment,’ autonomy, or self-realization”; “the recognition that the protection of group identity and culture may be necessary for the protection of personal dignity”; and “the creation of the necessary conditions for each individual to have [his or her] essential needs satisfied.” It is hard to imagine how a “non-state actor,” interested in implementing such “aspects,” might define his or her “obligations.” *Id.* (footnotes omitted).

⁵⁰ See Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (providing more detail on the protections offered to prisoners under the Third Geneva Convention).

⁵¹ Other scholars who have written on dignity include, in addition to ROSEN, *supra* note 18, Wai Chee Dimock, Don Herzog, and Jeremy Waldron, in JEREMY WALDRON, DIGNITY RANK AND RIGHTS (2012).

⁵² See McCrudden, *supra* note 22, at 679.

⁵³ *Id.* at 680.

⁵⁴ See Michael Rosen, *Dignity: The Case Against*, in UNDERSTANDING HUMAN DIGNITY 146–54 (Christopher McCrudden ed., 2013).

⁵⁵ See McCrudden, *supra* note 22, at 679.

⁵⁶ *Id.*

⁵⁷ *Id.*

individual” of accepting the first two elements of dignity’s core meaning, remains uncertain.⁵⁸

Thus, just what individual dignity consists of remains elusive. Dignity exists and is deserving of respect. However, being respectful of it apparently not only requires individual members of the public to forego some treatment of others and mandatorily engage in other treatment, but also for the state to respect the dignity of individuals as well by simultaneously refraining from some treatments, and enforcing other treatments. But the concept of dignity in this form remains burdened with philosophical objections to its coherence or usefulness.⁵⁹

Two common objections to this conception of dignity have been posed: first, if the “inner transcendental kernel” of human dignity is equated with morality, we are still no closer to a concrete understanding of the concept because “moral” conduct among humans is not self-evident; second, that even if that objection could be surmounted, equating human dignity with morality fails to provide guidance for situations in which moral principles seem to point in opposing directions, as in the case of assisted suicide.⁶⁰

Thus, we seem to have arrived at something of a conundrum in contemplating the present state of the concept of dignity. On the one hand, its invocation, largely as an abstraction, has been growing in international and domestic legal documents⁶¹ and will continue to grow as the connections between dignity, autonomy, equality, and respect for the rights of others come to resonate.⁶² On the other hand, dignity has had severe difficulties establishing what might be called its substantive content, and for that reason it has been criticized as lacking philosophical integrity—perhaps serving as a placeholder or

⁵⁸ *Id.* at 680.

⁵⁹ See Rosen, *supra* note 54, at 143–54 (summarizing six objections to the usefulness of dignity as a descriptive or normative idea, only two of which are discussed in this Article).

⁶⁰ *Id.* at 147–51.

⁶¹ Examples of United States Supreme Court majority opinions affirming the principle of “dignity” are *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 542 (1949), *Rochin v. California*, 342 U.S. 165, 172 (1952), *Trop v. Dulles*, 356 U.S. 86, 100 (1958), *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002), and *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). Earlier references to “dignity” can be found in Justice Frank Murphy’s dissents in *In re Yamashita*, 327 U.S. 1, 29 (1946) and *Homma v. Patterson*, 327 U.S. 759, 760 (1946) (*per curiam*). For an examination of the different senses in which the Court has used the notion of dignity, see Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Penn. L. Rev. 169 (2011).

⁶² See McCrudden, *supra* note 22, at 685–94.

facade for other less resonant values.⁶³ Like other majestic concepts such as liberty and equality, the notion of dignity does not have any operational legal content. It does not in itself confer concrete rights and cannot decide cases. The puzzle is how to employ a concept whose precise legal understandings and consequences seem highly uncertain.

D. European Tort Law's Reaction

The source of tort law in the countries of continental Europe is in each instance a legislatively-enacted civil code, rather than (as in England and the United States) the common law.⁶⁴ In tort cases, European courts apply civil code provisions that are sometimes very general.⁶⁵ Tort law thus comes from the top-down, rather than from the bottom-up, as in the case-by-case approach of the common law.⁶⁶ Consequently, the civil law approach has the potential to begin with a concept such as dignity and generate "unified" dignitary torts rights and liabilities from this starting point.

It turns out that the starting points for civil law are even more general than this, and the top-down unification that has occurred under the concept of dignity has proceeded from very broad principles. For example, the core provision of the French Civil Code that bears on tort liability provides only that an act "which causes damage to another, obliges the one by whose fault it occurred, to compensate it."⁶⁷ In 1970, a separate provision addressing rights of privacy was added, stating that "[e]veryone has the right to respect for his private life."⁶⁸ Because privacy rights had previously been protected pursuant to the more general provision, this was regarded merely as a codification rather than as an expansion.⁶⁹ Similarly, although the German Civil Code is more detailed in many respects, the core

⁶³ See Rosen, *supra* note 54, at 143–54.

⁶⁴ See *The World Factbook: Legal System*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> [https://perma.cc/MVV2-LFDX] (last visited Aug. 28, 2018).

⁶⁵ See Vivienne O'Connor, *Practitioner's Guide: Common Law and Civil Law Traditions*, INT'L NETWORK TO PROMOTE THE RULE OF L. 1, 11, 13–14 (Mar. 2012), <https://www.fjc.gov/sites/default/files/2015/Common%20and%20Civil%20Law%20Traditions.pdf> [https://perma.cc/ZS3K-LU6Y].

⁶⁶ See *id.* at 13.

⁶⁷ CODE CIVIL [C. CIV.] [CIVIL CODE], art. 1382 (Fr.), <http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf> [https://perma.cc/YX8P-KEYP] (English translation).

⁶⁸ *Id.* at art. 9, <http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf> [https://perma.cc/YX8P-KEYP] (English translation).

⁶⁹ See CEES VAN DAM, *EUROPEAN TORT LAW* 187 (2d ed. 2013).

provision on which decisions protecting the rights associated with dignitary torts is very general: "A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this."⁷⁰

Another unifying force in Europe is the tendency of civil law commentators to classify and categorize features of tort law in ways that only partially overlap with common law tort thinking.⁷¹ Such scholars play a more important role in law identification for European courts than common law scholars in their countries.⁷² Scholarly contributions have resulted in a more explicit and separate treatment of the interests protected by different torts in European treatises on tort liability.⁷³ Nothing quite equivalent or analogous can be found in U.S. torts treatises, which are more likely to simply mention the interest a particular tort protects when addressing that tort.⁷⁴ The common law proceeds from case-to-case until a unifying principle is recognized or simply emerges.⁷⁵ In contrast, the civil law approach tends toward unification by beginning with the effort to identify categories of interests that different torts protect.⁷⁶

This tendency has resulted in France and Germany paying more attention than the United States to the concept of dignity. Thus, in discussing the category of protected interests, commentators on French, German, and other European tort law refer to a right of "personality" that is protected by liability for

⁷⁰ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823(1), *translated at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3484 [<https://perma.cc/LV9W-LRBj>] (Ger.).

⁷¹ See generally VAN DAM, *supra* note 69.

⁷² See John Henry Merryman & Rogelio Perez-Perdomo, *German Legal Science: Legal Scholars*, in *THE CIVIL LAW* 510–11 (1969) (discussing the role legal scholars have had in contributing to German civil law); John Henry Merryman, *On the Convergence (and Divergence) of the Civil and the Common Law*, 17 *STAN. J. INT'L L.* 357, 375–79 (1981) (describing the role of "general principles of law" in determining the degrees of convergence and divergence of civil and common law systems).

⁷³ See, e.g., VAN DAM, *supra* note 69, at 167–222 (discussing how various rights, such as the right to life, the right to physical integrity, the right to physical health, and the right to mental health are treated in various European countries).

⁷⁴ See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 299, 308 (5th ed. 2017) (discussing the interests protected by the tort of invasion of privacy); see also DAN B. DOBBS, *THE LAW OF TORTS* 1117, 1197–98 (2000) (discussing interests protected by invasion of privacy torts).

⁷⁵ See FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 104 (2009).

⁷⁶ *Id.* at 107.

such wrongs as invasion of privacy and defamation.⁷⁷ The German high court, or “BGH,” has expressly recognized a general personality right as being protected by the above-quoted provision,⁷⁸ referring to Article 1 of the Basic Law (in effect, the German constitution), which provides that “[h]uman dignity shall be inviolable[.]” and Article 2, which refers to the “right to free development of [the] personality.”⁷⁹ The right of personality accordingly serves as the express rubric under which European courts consider the relevant tort rights.

Although these developments of the dignity theme are more advanced than those that have occurred in the U.S., the potential unifying effect of this approach is yet to be fully realized, even in Europe. European courts have not fully elaborated all the components of a right of personality protected by tort liability. For example, the prominent French cases all seem to involve privacy rights and are characterized as such,⁸⁰ although in one privacy case, the French high court, or *Cour de Cassation*, referred to the freedom of the press as subject to “[r]espect de la dignité de la personne humaine” (“respect for the dignity of the human person”).⁸¹ And one of the early German decisions that made express reference to a right of personality (“*Persönlichkeitsrecht*”) recognized that in privacy cases, the concept cannot decide outcomes deductively:

Admittedly, however, the notion of a general *Persönlichkeitsrecht* has the breadth of a general clause and is ill-defined. Just as the dynamic nature of personality cannot be kept within fixed limits, in the same way the substance of the general *Persönlichkeitsrecht* eludes definitive determination. The right of the person to respect for his dignity and the free development of his personality is . . . a “source right” which gives rise to the concrete shapes which it takes in relation to the manifold personality values of the individual, his vital interests, and relations with his environment. . . . The extended protection of personality will continue to derive its support precisely from . . . the principles laid down in the case law for their application.⁸²

⁷⁷ See, e.g., VAN DAM, *supra* note 69, at 184 (explaining the concept of personality rights).

⁷⁸ See *id.*

⁷⁹ See GRUNDGESETZ [GG] [BASIC LAW], art. 1, cl. 1 (Ger.), translated at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026 [<https://perma.cc/G2WP-7QTK>].

⁸⁰ See WALTER VAN GERVEN ET AL., TORT LAW 152–59 (2000).

⁸¹ Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Nov. 4, 2004, Bull. civ. II, No. 486 (Fr.).

⁸² VAN GERVEN, *supra* note 80, at 144–45.

In short, the experiences of France and Germany suggest that in civil law systems, once a “personality” or “dignitary” tort is perceived as something of a unified entity, the unity first occurs at a high level of generality. The backing and filling that must take place to specify the discrete aspects of the “right of personality” may take considerable time to fully occur.

II

THE DIGNITARY TORTS IN AMERICA: THE SEARCH FOR UNIFICATION

It is no surprise that during the same period that the modern concept of dignity was crystallizing and being employed in public discourse across the globe, American legal scholars began to discern a role for dignity in tort law. During this period, the modern concept of dignity had come into its own. Preoccupation within western tort law with dignity, peace of mind, and personality resonated with these broader developments.

In this Part, we recount modern American torts scholars’ interest in dignity and show why their flirtation with “unification” of the dignity torts never proceeded very far. We first identify and describe the dignitary torts. We then examine the efforts of William Prosser and some of his contemporaries to understand the commonalities among these torts. Finally, we identify one of the reasons their project eventually terminated, largely unsuccessfully: the interests that dignitary torts protect are simply too different to warrant treating them all under the same rubric.

A. Identifying the Dignitary Tort

The corpus of dignitary torts in American common law has never been terribly precise, at least in part because courts and scholars have tended to classify and then analyze torts based on the applicable standard of care (intent, negligence, or strict liability), and to a lesser extent, based on the kind of injury (physical, emotional, or economic) that a tortious act causes. Classification based on the interest that a set of torts protects, such as dignity, cuts across these more frequently employed and more conventional tort categories.

In this section, we identify and specify the characteristic features of the torts that have sometimes been identified as dignitary. These include battery, defamation, intentional infliction of emotional distress (IIED), and the various forms of invasion of privacy. We think that, although false imprisonment is

almost never included in the catalogue of dignitary torts,⁸³ it belongs there too.

1. *Offensive Battery*

Battery is an ancient tort with roots in the common law writ of trespass *vi et armis*.⁸⁴ Battery constitutes making, or causing, intentional contact with the body of another person.⁸⁵ Many batteries cause physical harm, and in such instances this is the principal injury.⁸⁶ Even when there has been no physical injury, however, intentionally making physical contact with another person without express or implied consent is offensive and therefore actionable.⁸⁷

2. *False Imprisonment*

False imprisonment is also a linear descendant of the old action of trespass.⁸⁸ False imprisonment is the intentional and wrongful restriction of an individual's freedom of movement.⁸⁹ Confining an individual in a closed room or space or detaining an individual in a retail store on suspicion of shoplifting, for example, may constitute false imprisonment. Like offensive battery, false imprisonment is actionable even when confinement has not caused the plaintiff physical harm.⁹⁰ Rather, confinement itself is a discrete form of interference with bodily autonomy.⁹¹

⁸³ But see Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1005-07 (1964) (providing the only known example of an author classifying false imprisonment as a dignitary tort).

⁸⁴ See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 402-03 (4th ed. 2002).

⁸⁵ See ABRAHAM, *supra* note 74, at 25.

⁸⁶ See *id.* at 26.

⁸⁷ See *id.* at 25-26.

⁸⁸ See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 68 (1941); see also PAGE KEETON & ROBERT E. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS 46-47 (1971).

⁸⁹ See 32 AM. JUR. 2D *False Imprisonment* § 7 (2007).

⁹⁰ See William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 880 (1939) ("Virtually from the beginning mental suffering has been a recognized element of damages in . . . false imprisonment. . . . Very often in such actions the mental distress has been the only substantial damage sustained.").

⁹¹ See PROSSER, *supra* note 88, at 69 ("[T]he tort is complete with even a brief restraint of the plaintiff's freedom"); see, e.g., *Gadsden Gen. Hosp. v. Hamilton*, 103 So. 553, 554-55 (Ala. 1925) (awarding plaintiff damages because, despite no physical harm, plaintiff was denied bodily autonomy—she was not free to leave).

3. *Defamation*

Actions for defamation—slander (oral) or libel (written)—were originally subject to the jurisdiction of the English ecclesiastical courts, but by the seventeenth century they had become lodged in the common law courts.⁹² Common law defamation amounts to strict liability for publication (communication to a third-party or parties) of false information that is damaging to a person's reputation.⁹³ Liability for defamation protects against the harm that results from having one's good name, one's reputation, diminished.⁹⁴ Sometimes this harm is purely economic, but sometimes it is emotional.⁹⁵ The defendant is held liable because in the absence of privilege (as discussed below), the common law seems to accord no particular value to a statement that is damaging to another's reputation.⁹⁶ Truth may be a defense,⁹⁷ but *prima facie* the defendant speaks or writes at his peril.

Liability for defamation, however, is subject to a conditional privilege if the defendant and the third party have a common interest and the communicated information furthers that interest.⁹⁸ This privilege is overcome by a showing that the statement about the plaintiff was made with malice—i.e., with a desire to harm the plaintiff's reputation and thereby to harm the plaintiff.⁹⁹ In some jurisdictions it is sufficient to overcome the privilege if the defendant knows the defamatory statement is false or recklessly disregards whether it is true or false.¹⁰⁰

4. *Intentional Infliction of Emotional Distress*

In contrast to the much older actions for battery, false imprisonment, and defamation, a cause of action for intentional infliction of emotional distress (IIED) was not expressly recognized until the 1930s.¹⁰¹ IIED is actionable when the

⁹² See Baker, *supra* note 84, at 436–46.

⁹³ See PROSSER, *supra* note 88, at 816–17.

⁹⁴ DOBBS, *supra* note 74, at 1117; see BAKER, *supra* note 84, at 443–44; PROSSER, *supra* note 88, at 810.

⁹⁵ See BAKER, *supra* note 84, at 443–44; see also ABRAHAM, *supra* note 74, at 299 (noting that defamation can have an impact on finances, honor, and dignity).

⁹⁶ See PROSSER, *supra* note 88, at 821–23.

⁹⁷ See ABRAHAM, *supra* note 74, at 300–01.

⁹⁸ See PROSSER, *supra* note 88, at 821–23, 837.

⁹⁹ See *id.* at 849.

¹⁰⁰ See Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 820 (1964).

¹⁰¹ See Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035–41 (1936); see also Prosser, *supra* note 90, at

defendant "by extreme and outrageous conduct intentionally . . . causes severe emotional distress."¹⁰² One view of the interest IIED protects sees it as the emotional analog to the physical interest that battery protects.¹⁰³ Just as every person has a right not to be intentionally touched without consent, every person has a right not to be intentionally subjected to emotional distress.¹⁰⁴ On this view, the requirements that the conduct causing distress be extreme and outrageous and the resulting distress be severe merely reflect pragmatic concerns regarding the risk of fraudulent claims and excessive litigation.

A slightly different view is that the interest in emotional tranquility is not as important or worthy of protection as physical security until the defendant's conduct and the plaintiff's suffering both rise to the level required by the elements of IIED.¹⁰⁵ Only at that point do the two types of interests become of equivalent significance.

5. *Invasion of Privacy*

The four causes of action for invasion of privacy are also of recent vintage.¹⁰⁶ The composite category of invasion of privacy is Prosser's doing.¹⁰⁷ Over a twenty-year period, he took the original Warren and Brandeis contention that there should be a cause of action for unwanted publicity,¹⁰⁸ identified a number of subsequently-decided cases, and on the basis of these cases extended the notion to include three other categories as well: intrusion on solitude, false light, and commercial appropriation.¹⁰⁹ Prosser called all four causes of action invasion of "privacy," and the category has stuck. Just as privacy

879–87 (noting a number of cases from the 1930s that openly acknowledged and based decisions on intentional infliction of emotional distress, moving away from the previous rationales of false promises in contractual settings or of trespass).

¹⁰² RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

¹⁰³ See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 105 (expanded ed. 2003).

¹⁰⁴ See *id.*

¹⁰⁵ See Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426, 430–33 (1938).

¹⁰⁶ See John W. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1093 (1962).

¹⁰⁷ See Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27, 58 (2013).

¹⁰⁸ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214–15 (1890).

¹⁰⁹ See Abraham & White, *supra* note 107, at 58–61.

itself is composed of very different elements,¹¹⁰ the privacy torts involve different kinds of conduct, and therefore, must be separately treated.

a. *Intrusion*

Intrusion on a private space or conversation is actionable when the intrusion is “highly offensive to a reasonable person.”¹¹¹ The paradigmatic cases involve eavesdropping and peeping toms.¹¹² Although some cases have held that actually accessing the information obtained by the invasion is not required,¹¹³ clearly the core interest this tort protects is the right to keep others from witnessing, hearing, or viewing what is private.

The requirement that the intrusion be highly offensive might in theory sometimes turn on the method of intrusion but instead almost always actually turns on the character of what the intrusion reveals to the defendant.¹¹⁴ There is a difference between spying on a family at its kitchen table and recording what goes on in the bedroom. Nonetheless, an intrusion may be offensive not because the information revealed is embarrassing, but simply because it is confidential—a bank transaction, for example.¹¹⁵

b. *Public Disclosure*

Disclosure of facts concerning another person’s private life is actionable if it would be “highly offensive to a reasonable person” to have the matter publicized and the matter is not of “legitimate concern to the public.”¹¹⁶ As a practical matter, the two prongs of this test will often be related because the disclosure of private information is most likely to be highly offensive when it has no legitimate news value.¹¹⁷

¹¹⁰ See ALAN WESTIN, *PRIVACY AND FREEDOM* ch. 2–3 (1967); see also Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 440–56 (1980); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477, 482–83 (2006).

¹¹¹ RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

¹¹² See, e.g., *Koeppl v. Speirs*, 808 N.W.2d 177, 178 (Iowa 2011) (considering a video camera installed in a bathroom); *Hamberger v. Eastman*, 206 A.2d 239, 241 (N.H. 1964) (considering the bugging of a tenant’s apartment by landlord).

¹¹³ See *Keoppel*, 808 N.W.2d at 178–82.

¹¹⁴ See, e.g., *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 768–69 (N.Y. 1970) (“Privacy is invaded only if the information sought is of confidential nature and the defendant’s conduct was unreasonably intrusive.”).

¹¹⁵ See *id.* at 769–71.

¹¹⁶ RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

¹¹⁷ See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228–30 (7th Cir. 1993).

c. *False Light*

This tort is actionable when the defendant publicizes a matter that places the plaintiff in a false light that would be highly offensive to the reasonable person and the defendant knows of the false light or recklessly disregarded it.¹¹⁸ In many cases, there is little, if any, daylight between false light and defamation, or between false light and IIED, although there may be occasional instances in which only false light will be actionable. In *Cantrell v. Forest City Publishing Co.*, for example, the claim was for portraying the poverty and stoic attitude of the plaintiff after the death of her husband.¹¹⁹ This may not quite have been defamation or IIED, but the claim for false light was actionable.¹²⁰

d. *Commercial Appropriation*

The use of the plaintiff's name or likeness for commercial purposes without consent is actionable.¹²¹ For the most part, this tort protects commercial and economic, rather than intangible, interests.¹²² But in some instances, especially in the early cases addressing the issue,¹²³ the interest the plaintiff asserted was the right not to be associated with the defendant's business or be portrayed in a manner that was embarrassing or humiliating. The plaintiff in such cases is concerned about a false impression that reflects poorly on him or her—the impression that there was consent to the use of his or her name or likeness. In these situations, the appropriation tort thus protects against the presumed or anticipated diminution of respect for the plaintiff that results from being perceived to have voluntarily associated with the defendant's commercial activity.

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

¹¹⁹ See *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 247–48 (1974).

¹²⁰ See *id.* at 246.

¹²¹ See ABRAHAM, *supra* note 74, at 308; PROSSER, *supra* note 88, at 1056–57.

¹²² See *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 197 (Cal. Dist. Ct. App. 1955); see also ABRAHAM, *supra* note 74, at 308; PROSSER, *supra* note 88, at 1056 (“Although the protection of his personal feelings is still highly important in such a case, the right invaded has also a commercial value.” (footnote omitted)).

¹²³ See, e.g., *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905) (“[I]t cannot be that the mere fact that a man aspires to public office or holds public office subjects him to the humiliation and mortification of having his picture displayed in places where he would never go to be gazed upon . . .”).

B. Mid-Twentieth Century Flirtations with Unification

The most prominent torts scholars of the middle of the twentieth century, varied though they may have been in other respects, impliedly shared two related points of view. The first was that nineteenth-century legal formalism was inadequate for the needs of the twentieth century.¹²⁴ The second was that such formalism artificially limited tort liability, which required expansion.¹²⁵ These scholars focused much of their attention on liability for accidental bodily injury.¹²⁶ Doctrinal limitations on liability for negligence, whether for bodily injury or for other forms of loss, contributed heavily to their dissatisfaction.¹²⁷

The cause of action for negligence had emerged out of two ancient forms of action: trespass and case.¹²⁸ But even by the mid-twentieth century, there was no general cause of action for loss caused by negligence.¹²⁹ Negligence was a cause of action mainly for bodily injury and property damage, and even that cause of action had strong limitations, mostly in the form of no-duty and limited-duty constraints on the imposition of liability.¹³⁰ There was limited liability for bodily injury arising out of negligently maintained premises,¹³¹ limited liability for negligently manufactured products,¹³² limited liability for negligently inflicted emotional distress,¹³³ limited liability for “wrongful birth,”¹³⁴ and virtually no liability for negligently-caused economic loss,¹³⁵ to name just a few such doctrinal limitations.

By the mid-1960s, some of these limitations on liability were being dismantled and many torts scholars foresaw the same fate for others. They certainly envisioned the development of a more general cause of action for negligence and many thought that this would eventually evolve into strict liability for

¹²⁴ See WHITE, *supra* note 103, at 12–15, 104–10.

¹²⁵ See *id.* at 106–12.

¹²⁶ See *id.* at 104–10.

¹²⁷ See *id.* at 146; see also Albert Ehrenzweig, Note, *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case*, 8 U. CHI. L. REV. 729, 729–30 (1941); Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 549–51 (1948).

¹²⁸ See WHITE, *supra* note 103, at 14–15.

¹²⁹ See *id.* at 104–05.

¹³⁰ See ABRAHAM, *supra* note 74, at 259–79.

¹³¹ See *id.* at 266–69.

¹³² See *id.* at 219–21.

¹³³ See *id.* at 269–76.

¹³⁴ See, e.g., *Emerson v. Magendantz*, 689 A.2d 409, 415–16 (R.I. 1997) (providing an example of how courts handle an action for “wrongful birth”).

¹³⁵ See ABRAHAM, *supra* note 74, at 276–79.

bodily injury and property damage.¹³⁶ This model of movement toward unification through what was happening in the field of negligence liability—which some tort theorists believed would continue—may be what the scholars had in mind, in a vague and general way, when some of them also began to identify a series of different torts redressing emotional harm and others identified torts that protected dignity.

We call this recognition of commonalities among different torts, and the possibility that different torts would eventually be treated as functionally falling under the same umbrella, the idea of “unification.” Just as mid-twentieth century tort scholars thought they were seeing the unification of negligence liability, as limitations on negligence liability faded away, they seemed to be envisioning an analogous unified future for liability for dignitary and emotional loss. Their inchoate visions, which we describe below, are tantalizing evidence of the tort law future they were picturing.

1. *The 1930s to the 1950s: Initial Recognitions*

William Prosser was arguably the most prominent torts scholar of the twentieth century.¹³⁷ He was the author of the leading mid-century treatise on the law of torts and he was the Chief Reporter for the *Restatement (Second) of Torts*.¹³⁸ In the first edition of his treatise, published in 1941, Prosser identified two sets of tort actions that, although not entirely novel, were quite new in the case law and for which there was only limited, if growing, support.¹³⁹ He included them in different places in his book, which was organized by chapters divided into sections.¹⁴⁰ One set of tort actions, which Prosser described as “Words and Acts Causing Mental Disturbance,” was placed in a section on “Intentional Interference with the Person,” which also included sections on assault, battery, and false imprisonment.¹⁴¹ The other set of tort actions was placed in a chapter entitled “Miscellaneous Torts,” and was described as “Right of Privacy.”¹⁴² Over time, the first set of actions

¹³⁶ See generally ROBERT E. KEETON, COMPENSATION SYSTEMS: THE SEARCH FOR A VIABLE ALTERNATIVE TO NEGLIGENCE LAW (1969) (providing a summary of this attitude).

¹³⁷ See Abraham & White, *supra* note 107, at 28.

¹³⁸ See *id.*

¹³⁹ See PROSSER, *supra* note 88, at 2–4.

¹⁴⁰ See *id.* at ix–xiii.

¹⁴¹ See *id.* at 2.

¹⁴² See *id.* at 1050.

would be relabeled “intentional infliction of emotional distress” (IIED), and the second set “privacy.”

Prosser’s early treatment of intentional infliction of mental suffering and privacy actions suggested that he was interested in their common features, with a view to folding them into a generic action protecting something like the right of “personality” that we described above as having a place in European tort law.¹⁴³ In introducing the “mental disturbance” action, Prosser stated that “[i]n recent years the courts have tended to recognize the intentional causing of mental or emotional [damage] as a tort.”¹⁴⁴ Later in the section, after citing comparatively few cases, most of which involved actions brought against common carriers for breach of a contract of safe passage, Prosser stated that “[s]o far as it is possible to generalize from the cases, the rule which seems to be emerging is that there is liability only for conduct exceeding all bounds usually tolerated by society, of a nature which is especially calculated to cause and does cause mental damage of a very serious kind.”¹⁴⁵

He picked up the same theme later. In introducing the “Right of Privacy” section, Prosser stated that “[t]he majority of the courts which have considered the question have recognized the existence of a right of ‘privacy,’ which will be protected against interferences which are serious, and outrageous, or beyond the limits of common ideas of decent conduct.”¹⁴⁶ Then, after subdividing “privacy” actions into those intruding on a person’s solitude, publicly disclosing “private” information, and commercially appropriating elements of an individual’s personality, Prosser declared that the “privacy” torts were essentially about “protection of the plaintiff’s peace of mind against unreasonable disturbance.”¹⁴⁷ As such, he predicted, “the great majority” of privacy torts seemed likely to be “absorbed” into “the ‘new tort’ of intentional infliction of mental suffering” once it “receives general recognition.”¹⁴⁸

¹⁴³ See *supra* Part II.

¹⁴⁴ PROSSER, *supra* note 88, at 54.

¹⁴⁵ *Id.* at 65.

¹⁴⁶ *Id.* at 1050.

¹⁴⁷ *Id.* at 1053–54.

¹⁴⁸ *Id.* at 1054. Prosser was accurate with respect to the comparatively small number of cases that had allowed recovery for intentional acts causing “mental disturbance” without accompanying physical injury or involving conduct that qualified for assault, battery, or false imprisonment. He was also accurate about the growing number of cases, in the first three decades of the twentieth century, allowing recovery for acts that did not necessarily lower the complainant’s reputation but subjected him or her to public embarrassment, degradation, or humiliation. These included cases stating that the plaintiff endorsed a product or had

Prosser's intuition that "privacy" cases might be best understood as a subcategory of cases allowing recovery for emotional harm was shared by a number of other American commentators in the 1930s and 1940s. As they became aware that the courts were tending to award recovery in two sorts of cases, those in which plaintiffs had suffered emotional harm without any accompanying physical injury and those in which plaintiffs had complained of being humiliated, degraded, or embarrassed without any consequent loss of reputation, commentators began to search for the common features linking those cases.

In 1938, Fowler V. Harper and Mary Coate McNeely attempted to approach emotional harm cases by identifying the "interests" at stake in them.¹⁴⁹ They began by noting that the common interest invaded in such cases was thought to be "the plaintiff's interest in peace of mind, emotional tranquility, or freedom from emotional disturbances[,] but to describe the cases in that fashion was conclusory, because it equated an "interest" with "its invasion," so a more precise analysis was necessary.¹⁵⁰

given consent to having his or her picture taken or to be interviewed. *See, e.g.,* *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 197-98 (Cal. Dist. Ct. App. 1955); *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 79 (Ga. 1905); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 366 (Ky. 1909); *Munden v. Harris*, 134 S.W. 1076, 1077 (Mo. Ct. App. 1911); *Goldberg v. Ideal Publ'g Corp.*, 210 N.Y.S.2d 928, 929-30 (N.Y. Sup. Ct. 1960); *Flake v. Greensboro News Co.*, 195 S.E. 55, 61, 64 (N.C. 1938). They also included the use of a picture in a context likely to mislead audiences about its subject. *See, e.g.,* *Peay v. Curtis Publ'g Co.*, 78 F. Supp. 305, 307, 309 (D.D.C. 1948); *Martin v. Johnson Publ'g Co.*, 157 N.Y.S.2d 409, 411 (N.Y. Sup. Ct. 1956); *Metzger v. Dell Publ'g Co.*, 136 N.Y.S.2d 888, 890-91 (N.Y. Sup. Ct. 1955). And they included the association of the plaintiff's name or likeness with statements likely to give a misleading impression of the plaintiff. *See, e.g.,* *Leverton v. Curtis Publ'g Co.*, 192 F.2d 974, 977-78 (3rd Cir. 1951); *Gill v. Curtis Publ'g Co.*, 239 P.2d 630, 634-35 (Cal. 1952) (en banc); *Russell v. Books*, 183 N.Y.S.2d 8, 31-32 (N.Y. Sup. Ct. 1959); *Sinclair v. Postal Tel. & Cable Co.*, 72 N.Y.S.2d 841, 842 (N.Y. Sup. Ct. 1935). In those cases, the gist of the action was not invariably that others would think less of the plaintiff; it was that a reasonable person would find the defendant's conduct offensive to a person of ordinary sensibilities. It did not seem to be necessary, to maintain an action, that a plaintiff demonstrate that the statements or conduct of the defendant were factually false; the question was simply whether a jury would find the conduct such that it would cause an ordinary person mental distress.

¹⁴⁹ *See* Harper & McNeely, *supra* note 105, at 426-27; *see also* Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 239 (1932) (similarly emphasizing the "interests" at stake in emotional harm cases, and concluding that many cases described as "privacy" actions were actually attempts to protect an interest in "personality").

¹⁵⁰ *See* Harper & McNeely, *supra* note 105, at 426-27.

Harper and McNeely then produced a catalogue of “interests” being protected in emotional harm cases.¹⁵¹ Those interests included “bodily security,” “courteous service and decent treatment from public utilities,” “the body of the dead,” “the memory of the dead,” “the life of the unborn,” and “domestic relations.”¹⁵² The awkward language used to describe some of those interests reflected the fact that they more accurately captured the factual settings in which courts had allowed recovery for emotional harm than doctrinal categories capable of being employed across a range of cases. They also defined the privacy torts so as to emphasize that at bottom they were connected to the maintenance of “emotional and mental tranquility.”¹⁵³

The most notable feature of Harper’s and McNeely’s catalogue of “privacy” interests was their identification of an “interest in personal dignity and self-respect.”¹⁵⁴ They described that interest as being “offended by insulting and abusive language, by proposals that offend the sense of decency and by the creation of situations which expose the person to ridicule or embarrassment.”¹⁵⁵ The “dignity” cases they surveyed had two characteristics. One was the judicial employment of fictions, such as the existence of a property interest or an interest in reputation, or a technical physical touching, to allow recovery where the gist of the action clearly lay in the emotional distress triggered by the defendant’s conduct.¹⁵⁶ The other was that virtually all of the cases Harper and McNeely cited involved incidents that occurred in public, a fact that contributed to the plaintiff’s distress.¹⁵⁷ Included were cases in which plaintiffs were accused of shoplifting; ordered out of an amusement park, office, or theater; or wrongfully evicted from their homes.¹⁵⁸

Prosser’s treatise and Harper and McNeely’s article were the most extended early treatments of the common features of, or the common interests protected by, actions for emotional harm, with a view toward formulating a generic tort. But there were others. In 1954, for instance, Harry Kalven referred to

¹⁵¹ See *id.* at 427–45.

¹⁵² *Id.* at 427–445.

¹⁵³ See *id.* at 463–64.

¹⁵⁴ *Id.* at 451.

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at 452–58.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 453.

“emotional dignitary torts,”¹⁵⁹ and in 1959, the first edition of Kalven’s and Charles Gregory’s new torts casebook noted that “the law protects emotional tranquility and personal dignity from intentional invasion under many specific categories” of torts.¹⁶⁰

We should emphasize that it was never very clear exactly what doctrinal structure Prosser and his contemporaries had in mind when they wrote about the commonalities among the dignitary torts. They were not naïve enough to think that there could be complete unification of the various causes of action.¹⁶¹ Exactly what they had in mind, or where they thought the law governing these torts was headed, short of unification, they never indicated. Perhaps they were simply trying to identify dignity as a common value underlying those various torts, without fully realizing that the concept of dignity is a composite. Or perhaps, as we noted earlier, they were distracted, or even misled, by the unification they were contemporaneously seeing and hoping to see develop further with another general tort concept, negligence.

Prosser, never a deep theorist, did not subsequently push the unification theme any further. As he worked on subsequent editions of his treatise in the 1950s and 1960s, courts continued to decide more cases involving the intentional infliction of emotional distress and privacy.¹⁶² In successive editions of his treatise, Prosser would expand the distinct and separate coverage of both of those torts.¹⁶³ By 1960, Prosser had published an article in which he sought to solidify the tort of privacy as being composed of four distinct actions, cite additional cases in which the courts were entertaining those actions, point out that the elements of the actions were quite different, and argue that the failure to recognize their differences had resulted in apparent “confusion” in the courts.¹⁶⁴

¹⁵⁹ Harry Kalven, Jr., *Recent Books*, 32 TEX. L. REV. 629, 629 (1954) (reviewing CLARENCE MORRIS, *MORRIS ON TORTS* (1953)).

¹⁶⁰ CHARLES O. GREGORY & HARRY KALVEN, JR., *CASES AND MATERIALS ON TORTS* 848 (1959).

¹⁶¹ See WHITE, *supra* note 103, at 104–13.

¹⁶² See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 808–18 (4th ed. 1971) (citing numerous cases decided in the 1950s and 1960s); see also WILLIAM L. PROSSER ET AL., *TORTS CASES AND MATERIALS* 1002–52 (Victor E. Schwartz et al. eds., 13th ed. 2015) (“Dean Prosser made a profound contribution to the law in synthesizing and categorizing the case law discerning that the law falls into four distinct rubrics that are exemplified by the following principal cases in this chapter.”).

¹⁶³ See Abraham & White, *supra* note 107, at 56–58.

¹⁶⁴ See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

Prosser had come to believe that the torts he had once thought of as variations of a generic action for “peace of mind” did not have as much in common as he had suspected.¹⁶⁵ The privacy torts had not been absorbed into a general tort of interference with “peace of mind,” and in fact, those torts seemed to have divergent elements and to be protecting different interests.¹⁶⁶ As Prosser put it:

Taking [the privacy torts] in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend on publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant’s advantage, which is not true of the rest.¹⁶⁷

In contrast, the term “peace of mind” could cover an almost limitless number of human reactions to the words or actions of others, and it was clear that not all such reactions were actionable in tort.¹⁶⁸ In addition, invasion of “privacy” seemed an inadequate way of describing some of the actions Prosser included in that category.¹⁶⁹ Meanwhile, the courts continued to use the “privacy” rubric to decide a number of tort cases.¹⁷⁰ But once it became apparent, after the emergence of more such cases, that “privacy” cases were seemingly not being absorbed into the category of intentional infliction of emotional distress cases; the common elements ostensibly connecting those ac-

¹⁶⁵ See *id.* at 389.

¹⁶⁶ See *id.*

¹⁶⁷ *Id.* at 407.

¹⁶⁸ See ABRAHAM, *supra* note 74, at 269–76.

¹⁶⁹ By the fourth edition of his treatise, which appeared in 1971, Prosser was prepared to declare that “as yet no decided case allowing recovery” in privacy had appeared “which does not fall fairly within one of the four categories.” PROSSER, *supra* note 162, at 816.

But in disclosure cases, the complainants were not typically concerned with the fact that information about them had been disclosed; often they had voluntarily participated in interviews. They were typically concerned with the disclosure of information that they found embarrassing or humiliating, such as the fact that they had once committed a robbery, been a prostitute, been a child prodigy, or engaged in behavior that might appear coarse or eccentric. In some appropriation cases, plaintiffs were not seeking to avoid publicity about their names or likenesses. They were simply seeking to capture the value of that publicity for themselves. And in false light cases, plaintiffs were not complaining about being portrayed before the public at all but at being portrayed inaccurately. In short, “privacy,” as generally understood, did not seem to be what was principally at stake in some of the cases Prosser grouped in that category.

¹⁷⁰ *E.g.*, *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469 (Cal. 1998).

tions—that they sought to redress emotional injuries for conduct thought of as going beyond the bounds of ordinary civil conduct in intentionally disturbing “peace of mind”—were insufficiently precise to explain the several torts; and the “privacy” torts appeared to be a collection of quite diverse actions, doctrinal clarity was lost in both intentional infliction of emotional distress and privacy cases.

Prosser’s misgivings, however, were not always shared. In the next decade, two other prominent scholars took up the unification theme.

2. *The 1960s: John Wade and Alfred Bloustein on Peace of Mind and Dignity*

At that point, commentators began to search for a more promising way to integrate “privacy” cases with others in which recovery was primarily being sought for emotional harm. In the early 1960s, two such commentators launched their searches in reaction to Prosser’s “Privacy” article. John Wade was Dean of the Vanderbilt Law School, co-author (with Prosser) of the leading torts casebook of the time, and a member of the Board of Advisors of the *Restatement (Second) of Torts*.¹⁷¹ Wade sought to revive Prosser’s 1941 suggestion that privacy actions amounted to a subcategory of actions seeking recovery for “mental disturbance” and would eventually be absorbed into a generic action for damages based on emotional harm.¹⁷² Wade went further: he attempted to integrate actions for defamation in that generic tort, hoping that by doing so, some of the archaic, technical elements of defamation actions might be eliminated.¹⁷³

Wade agreed with a court’s statement that the interest protected in privacy cases was “peace of mind” and in defamation cases the interest was “reputation,” but felt that the two areas had enough in common to merit “a careful study” of their relationship.¹⁷⁴ Most of his analysis of privacy cases was designed to show that a large number of them, whether falling into Prosser’s categories of true disclosure, false light, or appropriation, were about creating a “false impression” of the plaintiff,

¹⁷¹ Ronald J. Rychlak, *John Wade: Teacher, Lawyer, Scholar*, 65 Miss. L.J. 1, 1 (1995).

¹⁷² See Wade, *supra* note 106, at 1094.

¹⁷³ See *id.* at 1109–20.

¹⁷⁴ *Id.* at 1095–96.

whether that impression lowered the plaintiff's reputation, and whether statements made about the plaintiff were true.¹⁷⁵

Wade then suggested that if most privacy cases were "false impression" cases, the overlap between the torts of invasion of privacy and defamation was considerable.¹⁷⁶ This meant that "the great majority of defamation actions can now be brought for invasion of the right of privacy," and consequently, "many of the restrictions and limitations of libel and slander can be avoided."¹⁷⁷ It also meant that "[a]s lawyers come to realize this, the action for invasion of the right of privacy may come to supplant the action for defamation."¹⁷⁸ Wade noted that Prosser had recognized this possibility and expressed some concerns about it, stating that "the numerous restrictions and limitations which have hedged defamation about for many years" had served the interests of "freedom of the press and the discouragement of trivial and extortionate claims[.]" and should not be "circumvented in so casual and cavalier a fashion" by efforts to bring defamation actions as privacy actions.¹⁷⁹

Wade, however, took a different view. He noted that judges and legal writers over the years had condemned the "anomalies and absurdities" of the common law of defamation and that "the numerous detailed rules, which have resisted synthesis into broad principles or standards" had hampered efforts to reform defamation law through judicial decisions while "legislative reform" had been "generally ineffective" because it required "a complete revision of the whole system" of defamation law and legislatures were not willing "to undertake a statutory code covering the whole subject."¹⁸⁰

Wade believed that "[t]he penetration of the law of privacy into [the] field [of defamation] affords a splendid opportunity for reform of the traditional law regarding the actionability of language which harms an individual's peace of mind or his reputation."¹⁸¹ The reform could "take the customary common law method of gradual judicial development."¹⁸²

"If the law of privacy then absorbs the law of defamation," Wade believed:

¹⁷⁵ See *id.* at 1098.

¹⁷⁶ See *id.* at 1095.

¹⁷⁷ *Id.* at 1121.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (quoting Prosser, *supra* note 164, at 401).

¹⁸⁰ Wade, *supra* note 106, at 1121-22.

¹⁸¹ *Id.* at 1122.

¹⁸² *Id.*

[I]t will merely afford a complete "unfolding" of the idea or principle behind that law. Indeed, there is real reason to conclude that the principle behind the law of privacy is much broader than the idea of privacy itself, and that the whole law of privacy will become a part of the larger tort of intentional infliction of mental suffering. That tort would then absorb established torts like assault and defamation and invasion of the right of privacy and join them together with other innominate torts to constitute a single, integrated system of protecting plaintiff's peace of mind against acts of the defendant intended to disturb it.¹⁸³

Two years after Wade's article appeared, Edward Bloustein of N.Y.U. School of Law embarked upon a similar search, seeking to ground a generic action for emotional harm on the protection of "dignity."¹⁸⁴ Bloustein argued that the actions Prosser had identified as protecting "privacy" were only concerned with that interest in a secondary sense: the core interest they protected was rooted in the individuality of private lives.¹⁸⁵ It was an interest in what Bloustein called "the individual[']s independence, dignity and integrity."¹⁸⁶

Bloustein attempted to show that none of the "interests" Prosser's formulation saw privacy actions as protecting were what Warren and Brandeis had associated with "the right of privacy."¹⁸⁷ Rather, another interest lay at the base of the privacy action. Bloustein analyzed each of the privacy actions Prosser had catalogued in an effort to show that they were, at bottom, actions designed to vindicate and protect human dignity.¹⁸⁸ He concluded that "our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity."¹⁸⁹ Such intrusions "may be the occasion and cause of distress and embarrassment but . . . [t]hey are wrongful because they are demeaning of individuality . . . whether or not they cause emotional trauma."¹⁹⁰

Bloustein next turned to public disclosure cases, concluding that Prosser's characterization of the interest in reputation

¹⁸³ *Id.* at 1124-25.

¹⁸⁴ *See* Bloustein, *supra* note 83, at 971.

¹⁸⁵ *See id.* at 971-72.

¹⁸⁶ *Id.* at 971.

¹⁸⁷ *Id.* at 970.

¹⁸⁸ *See id.* at 972-92.

¹⁸⁹ *Id.* at 973.

¹⁹⁰ *Id.* at 974.

supposedly being protected in those cases was not only “completely at odds with that of Warren and Brandeis” but also “at odds with the cases.”¹⁹¹ Warren and Brandeis had maintained that the right to privacy was “radically different” from defamation because it existed not only “to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.”¹⁹²

Bloustein also addressed the “name or likeness” cases, now commonly referred to as appropriation cases.¹⁹³ His discussion was largely directed at demonstrating that Prosser’s characterization of such cases as invasions of a “proprietary” interest, akin to an interest in property, was mistaken.¹⁹⁴ Bloustein argued that these cases were at least partly about protecting against “assault[s] on individual personality and dignity.”¹⁹⁵

Bloustein thereby made a powerful argument that the four species of torts that Prosser had grouped under the rubric of privacy could be better understood as dignitary torts. His formulation explained why some of those torts, at first glance, did not seem to be protecting privacy at all and why some appeared

¹⁹¹ *Id.* at 978.

¹⁹² *Id.* at 978.

¹⁹³ *See id.* at 985–91.

¹⁹⁴ *See id.* at 986. Although some cases involved “special circumstances” where, because the plaintiff was “a public figure, the use of his likeness or name for commercial purposes involves the appropriation of a thing of value,” the gravamen of the action, Bloustein believed, was that “the very commercialization of a name or photograph [] does injury to the sense of personal dignity.” *Id.* at 988–89.

¹⁹⁵ *Id.* Bloustein noted two California cases, based on the same episode, in which a married couple was photographed embracing in their place of business. The photograph was then published in two different articles on the subject of love. One article attached a caption to the photograph which stated that it was an example of “the wrong kind of love,” consisting “wholly of sexual attraction and nothing else.” The other article merely included the photograph without comment. The plaintiffs sued both publishers. *Gill v. Hearst Publ’g Co.*, 40 Cal. 2d. 224 (Cal. 1953); *Gill v. Curtis Publ’g Co.*, 38 Cal. 2d. 273 (Cal. 1952). In the case with the caption, the court upheld an action in false light privacy; in the other case, the complaint was dismissed on the ground that by embracing in public the plaintiffs implicitly consented to having their photograph taken. Bloustein argued that in the first case, publication of the photograph, combined with the caption, “turn[ed] the otherwise inoffensive publication into one which is an undue and reasonable insult to personality.” The “false and stigmatic comment on character” that accompanied the photograph “constitute[d] the actionable wrong.” Bloustein felt that publication of the photograph with the misleading caption “serve[d] the same function” as an unconsented “use of [a] photograph for advertising purposes.” In that respect, false light cases were protecting the same interest as name and likeness cases. “Once it is recognized that the user of a name for advertising reasons is wrongful because it is an affront to personal dignity,” Bloustein maintained, “the underlying similarity between the advertising and ‘false light’ cases becomes apparent. The ‘false light’ and the advertising use are merely two different means of publishing a person’s name or likeness so as to offend his dignity as an individual.” Bloustein, *supra* note 83, at 992.

to have little in common with others. In addition, his analysis provided an explanation of the reason that Prosser, and subsequently Wade, had contemplated the possibility that the privacy torts, together with defamation and perhaps other torts such as false imprisonment, assault, and nonphysical battery, might eventually be subsumed in a general action for intentional infliction of mental suffering, representing what Wade called "a single, integrated system of protecting . . . peace of mind."¹⁹⁶ And although Bloustein was not very specific about what the interest in "dignity" was actually composed of, the possibility that "peace of mind"—a combination of respect for the privacy, individuality, and feelings of human beings—flowed from the attribution of an intrinsic dignity in all persons seemed intuitively plausible.

Thus, unpacking the "interest" in dignity seemed to be a promising way for commentators and courts to surmount some of the analytical confusion associated with the expansion of privacy actions in torts. Before Bloustein's article, other scholars, including Prosser, had described some torts as protecting an interest in "dignity." The first edition of Prosser's handbook had noted that in battery actions, "[t]he element of personal indignity involved always has been given considerable weight,"¹⁹⁷ and he had maintained, in the *Restatement (Second) of Torts*, that the standard for whether a non-harmful touching of another's body constituted a battery was whether it offended "a reasonable sense of personal dignity."¹⁹⁸ As we noted earlier, in 1954, Harry Kalven had referred to "emotional dignitary torts,"¹⁹⁹ and the 1959 edition of Kalven's and Charles Gregory's torts casebook noted that "the law protects emotional tranquility and personal dignity from intentional invasion under many specific categories" of torts.²⁰⁰ Descriptions of a series of actions for emotional harm as "dignitary torts" have continued to appear in commentary since the 1970s.²⁰¹ And we have previously noted the growing number of articles associating actions for emotional harm with the protection of human dignity.²⁰²

¹⁹⁶ Wade, *supra* note 106, at 1125.

¹⁹⁷ PROSSER, *supra* note 88, at 44-45.

¹⁹⁸ RESTATEMENT (SECOND) OF TORTS § 19 (AM. LAW INST. 1965).

¹⁹⁹ See Kalven, Jr., *supra* note 159, at 629.

²⁰⁰ GREGORY & KALVEN, JR., *supra* note 160, at 848.

²⁰¹ Beginning with DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 509-39 (1974).

²⁰² See sources cited, *supra* note 5.

By the mid-1960s, Prosser, Wade, Gregory, and Kalven were at the peak of their influence.²⁰³ Bloustein was younger, but a faculty member at a major law school (N.Y.U.).²⁰⁴ Although he soon became President of Bennington College and then Rutgers University, he still published in law reviews from time to time.²⁰⁵ Had these scholars continued to explore the commonalities among the torts redressing intangible loss, and especially the nature of the dignitary interests many of these torts protect, torts scholarship and tort law's doctrinal structure might have moved in a different direction. The puzzle is why this did not happen.

C. The Diversity of Interests Protected

Part of the solution to this puzzle is that, as we showed earlier, dignity is a concept associated with values that cluster around the worth of the individual. The interests the dignitary torts protect reflect these values. When the focus turns to individual torts, however, there has been a move from the general concept of dignity to specific, and different, values connected to the concept, which tort law seeks to preserve or uphold.²⁰⁶ Prosser and contemporaries never seemed to have clearly recognized this point, although Prosser (as we noted) began to have second thoughts about the issue when writing about privacy in the 1960s.

To reveal the challenge for unification that this phenomenon generates, it is necessary to tease out the different values connected to the concept of dignity. Doing so involves a considerable amount of interpretation on our part, both because the courts often have no need to address the precise interest that the tort under consideration protects and the courts have had no reason at all to examine what the different actions grouped under the category of "dignitary torts" may or may not have in common.

²⁰³ See Abraham & White, *supra* note 107, at 35–40 (recounting Prosser's career in the 1960s); Vincent Blasi, *Harry Kalven, Jr.*, 61 J. LEGAL EDUC. 301, 302–03 (2011) (discussing Kalven's career and referencing his "most important law review article," which was published in 1964); Hardy C. Dillard, *A Tribute to Charles O. Gregory: Foreword*, 53 VA. L. REV. 759, 760 (1967) (discussing Gregory's influence in the wake of his death); Rychlak, *supra* note 171, at 1–13 (discussing Wade's professional career).

²⁰⁴ See Thomas J. Frusciano, *Leadership on the Banks: Rutgers' Presidents, 1766–1991*, 53 J. RUTGERS U. LIBR. 1, 36 (1991).

²⁰⁵ See *id.*; see, e.g., Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611 (1968).

²⁰⁶ See *supra* Part II.

Each of the dignitary torts protects a core interest, although they sometimes also protect secondary interests. But the different torts do not protect the same core interest.²⁰⁷ We have discerned three distinct core interests that the dignitary torts protect. At the core are protections against interferences with liberty and personal autonomy; protections against speech or conduct that embarrasses, humiliates, or shows blatant disrespect; and protections against communications that diminish the regard that others have for the plaintiff.

1. *Liberty and Autonomy*

Certain features of a person's individuality are so central to being human that liberty and autonomy require that they be off-limits to others without consent.²⁰⁸ At the heart of individual liberty and autonomy is control over one's own body.²⁰⁹ "It is my body" is a sufficient answer to the question why others may not touch you without your consent.²¹⁰ Battery protects this interest: even a touching that causes no physical harm is actionable in battery if it "offends a reasonable sense of personal dignity."²¹¹ Spitting on the face of the plaintiff, for example, is an offensive battery.²¹² False imprisonment redresses a similar interest.²¹³ Confining a person against his or her will interferes with personal autonomy.

In the modern world, the secrecy and solitude of one's intimate affairs are also essential to individual liberty and autonomy. The form of invasion of privacy often termed "intrusion"

²⁰⁷ See *id.*

²⁰⁸ See, e.g., TEX. PENAL CODE ANN. § 22.06 (West 2011) (establishing consent defense to assaultive conduct).

²⁰⁹ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992) ("We conclude, however, that urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to [reach this outcome].")

²¹⁰ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.")).

²¹¹ RESTATEMENT (SECOND) OF TORTS § 19 (AM. LAW INST. 1965).

²¹² See, e.g., *Alcorn v. Mitchell*, 63 Ill. 553, 554 (Ill. 1872) (noting that spitting in a person's face is an act of indignity); *Draper v. Baker*, 21 N.W. 527, 530 (Wis. 1884) (holding that a jury verdict rendered against a defendant who spat in a woman's face was not excessive).

²¹³ See, e.g., *Fermino v. Fedco, Inc.*, 872 P.2d 559, 571 (Cal. 1994) (en banc) ("[T]he law of false imprisonment protects 'interests in personality closely akin to those protected by the law of assault and battery.'").

protects this interest.²¹⁴ As a practical matter, the more intimate the space or setting, the more offensive an intrusion on it is likely to be. Although some cases have held that actually accessing the information obtained by the invasion is not required,²¹⁵ clearly the core interest this tort protects is the right to keep others from witnessing, hearing, or viewing what is private and intimate.

Finally, the interest in controlling use of one's name or likeness has an affinity with the interests in controlling one's body and intimate space. One's name and how one looks are an essential part of an individual's identity.²¹⁶ Using part of that identity without consent infringes on the individual's liberty and autonomy. The tort of commercial appropriation often protects only the economic interest associated with unauthorized use.²¹⁷ But there are also appropriation cases in which the interest protected is the right to not have one's name or likeness involved in commerce at all, or only involved in a manner that is in keeping with one's conception of oneself.²¹⁸ These cases protect liberty and autonomy.

There is no doubt that, although the torts of battery, false imprisonment, intrusion, and appropriation primarily protect liberty and autonomy, those four torts sometimes simultane-

²¹⁴ See RESTATEMENT (SECOND) OF TORTS § 652B (AM LAW INST. 1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

²¹⁵ See, e.g., *Koeppel v. Speirs*, 808 N.W.2d 177, 186 (Iowa 2011) (holding that recording equipment did not have to be functional for the intrusion to be actionable).

²¹⁶ See Rebecca Adams, *It's Not Just Girls. Boys Struggle with Body Image, Too.*, HUFFINGTON POST, (Sep. 17, 2014, 1:10 PM), https://www.huffingtonpost.com/2014/09/17/body-image-boys_n_5637975.html [<https://perma.cc/5T2K-TRC2>]; Michael Hedrick, *How Our Names Shape Our Identity*, WEEK, (Sep. 15, 2013) <http://theweek.com/articles/460056/how-names-shape-identity> [<https://perma.cc/8XLH-PA76>].

²¹⁷ See RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (AM. LAW INST. 1977) ("No one has the right to object merely because his name or appearance is brought before the public. . . . It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or likeness that the right of privacy is invaded.").

²¹⁸ A classic case from the earliest years of the privacy action is *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905). For modern examples, see *Faegre & Benson, LLP v. Purdy*, 447 F.Supp.2d 1008 (D. Minn. 2006) (anti-abortion activist registered domain names incorporating the names of his opponents); *Felsher v. Univ. of Evansville*, 755 N.E.2d 589 (Ind. 2001) (professor created noncommercial websites and email accounts employing the names of his former colleagues, then sent emails to a number of universities nominating those persons for academic positions and directing readers to the websites, which contained critical posts about the nominated individuals).

ously, though secondarily, protect other interests. For example, what often makes an offensive battery offensive, even in the absence of physical harm, is the defendant's intentional disregard of the plaintiff's right not to be touched.²¹⁹ The disregard itself demeans the plaintiff, sending the message that the defendant does not regard him or her as worthy of bodily protection. Liability for battery protects against, or redresses, such disrespect. Similarly, an intrusion on private space may produce emotional distress or embarrassment by virtue of what the intruder has witnessed—for example, being seen naked by all but one's intimates is embarrassing for most people. Liability for intrusion protects against such embarrassment. And unauthorized use of one's name or likeness in certain circumstances may be embarrassing because of the inaccurate implication such use entails.

But these protections are secondary, and the torts are actionable, whether or not these secondary interests are involved, as long as liberty and autonomy have been invaded.²²⁰ However, there is little, if anything, in the other dignitary torts—defamation, false light, IIED, or even in public disclosure—that is directed as strongly at this interest in liberty and autonomy.

2. *Embarrassment, Humiliation, and Disrespect*

Two of the other dignitary torts are directed primarily at protecting against embarrassment, humiliation, and disrespect. First, the form of invasion of privacy called public disclosure applies when matters concerning another person's private life are made public.²²¹ Usually, it is offensive to make the information public because it is embarrassing or humiliating.²²²

Second, the tort of IIED is actionable because intentionally inflicting emotional distress on the plaintiff is most demeaning, contemptuous, or disrespectful when the defendant's conduct is extreme and outrageous.²²³ In a sense, the fact that this

²¹⁹ See, e.g., *Commonwealth v. Burke*, 457 N.E.2d 622, 624 (Mass. 1983) ("But an offensive touching is so only because of lack of consent. The affront to the victim's personal integrity is what makes the touching offensive.").

²²⁰ See *Ashcraft v. King*, 278 Cal. Rptr. 900, 913 (Cal. Ct. App. 1991) (allowing battery action against doctor for blood transfusion where doctor exceeded the terms of patient's consent).

²²¹ See, e.g., *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998) (enumerating the elements of the tort of public disclosure).

²²² See, e.g., *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931) (finding cause of action where a film disclosed plaintiff's former life as a prostitute).

²²³ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965) ("Liability has been found only where the conduct has been so outrageous in character, and

conduct is extreme and outrageous is what makes the conduct demeaning, contemptuous, or disrespectful.²²⁴ IIED also often protects not only against disrespect, but also against the embarrassment and humiliation that typically accompany it, although the tort is actionable without them—for example, when the distress plaintiff suffers constitutes or results from fear or extreme irritation.²²⁵

In contrast, the other dignitary torts have much less to do with embarrassment, humiliation, and disrespect. Offensive battery and intrusion may sometimes involve these interests, since an unconsented-to touching or an intrusion into intimate matters may produce such emotions. But these torts mainly protect the liberty and autonomy interests we described above. Defamation, false light, and commercial appropriation are also at most concerned only secondarily with embarrassment and humiliation. Those torts focus on the defendant's portrayal of the plaintiff and the resulting way in which others perceive the plaintiff. Embarrassment, humiliation, and disrespect may or may not be consequences of such a portrayal, but protecting against their occurrence is not the central object of the torts.

so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”)

²²⁴ There are a number of early IIED cases in which conductors on trains spoke harshly to female passengers in ways that, under the circumstances of that time, would have been considered extreme and outrageous. In one such case, in the female plaintiff's presence, a drunken conductor said to another passenger, “She is a damn good-looking old girl, and I would like to meet her when she gets off.” *Knoxville Traction Co. v. Lane*, 53 S.W. 557, 558 (Tenn. 1899). Often the defendants in those common carrier and similar cases were in a position of authority or at least control, thereby aggravating the demeaning character of their statements or conduct. *See, e.g., Johnson v. Sampson*, 208 N.W. 814, 816 (Minn. 1926) (holding that school officials who accused a female high school student of unchastity and threatened her with imprisonment are subject to liability). For a collection of the early cases, see Prosser, *supra* note 88, at 57–62. The modern cases involve various forms of ridicule, harassment, and repeated efforts at debt collection, among other things. *See, e.g., Slocum v. Food Fair Stores*, 100 So.2d 396, 397 (Fla. 1958) (saying to a customer, “you stink to me”); *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996) (faculty member referring to plaintiff in “sexist and condescending manner”); *Harris v. Jones*, 380 A.2d 611, 612 (Md. 1977) (ridiculing plaintiff's stuttering); *Samms v. Eccles*, 358 P.2d 344, 345 (Utah 1961) (detailing how debt collector placed late night telephone calls soliciting sexual relations over a six month period and engaged in indecent exposure); *Womack v. Eldridge*, 210 S.E.2d 145, 146–47 (Va. 1974) (taking plaintiff's photograph under false pretense and then misleadingly using it at a trial to imply that he may have committed a crime).

²²⁵ *See, e.g., Womack v. Eldridge*, 210 S.E.2d 145, 147 (fear of being accused of a crime); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 284 (Cal. 1952) (fear of being physically harmed); *Russo v. White*, 400 S.E.2d 160, 163 (Va. 1991) (extreme irritation resulting from 340 hang-up calls by a disappointed suitor).

3. *Diminished Regard of Others*

Another important feature of one's individuality, and therefore dignity in the broad sense, turns on the regard of others. Humans are relational beings; our welfare depends heavily on the regard that others do or do not have for us.²²⁶ As the Supreme Court has said of defamation, "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being.'"²²⁷ Defamation, false light, and commercial appropriation (in certain of the cases involving noneconomic loss) centrally protect this interest. The consequence of such interference may sometimes be embarrassment, humiliation, or disrespect, and damages awarded may consist of compensation for this kind of suffering. The principal indignity involved in these torts, however, is that a person has not been portrayed as he or she truly is; the wrong lies in the misrepresentation of something important about oneself.

It is obvious that this is not the core interest protected by the other torts—battery, false imprisonment, intrusion, disclosure, or IIED. Those torts are not concerned with inaccurate portrayal of, or misrepresentation about, the plaintiff. For intrusion and disclosure, the interest at stake is not accuracy at all, but others gaining access to or publicizing something that is in existence and is in fact accurate, or may be. And for IIED, accuracy has little bearing one way or the other. Emotional distress can be intentionally created by asserting something true, something false, or by words or conduct that having nothing to do with what is true or false. And of course, neither battery itself nor offensive battery are concerned in any way with the regard that others have for the plaintiff.

4. *Taking Stock: The Consequences of the Incomplete Coincidence of Interests*

In describing the interests that the dignitary torts protect, we teased out a number of different concepts that surface in that analysis: liberty, autonomy, respect, humiliation, embarrassment, and the regard of others. It is no stretch to describe all these terms and the concepts they represent as involving dignity or infringement of dignity. Each has something to do

²²⁶ See Christopher von Rueden, *How Social Status Affects Your Health*, N.Y. TIMES (Dec. 12, 2014), <https://www.nytimes.com/2014/12/14/opinion/sunday/how-social-status-affects-your-health.html> [<https://perma.cc/L8H2-AAC6>].

²²⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)).

with the worth of the individual. In this sense, the practice of referring to the torts in question as dignitary is accurate and unobjectionable, and, to some extent, assists in understanding what they have in common. Given this common thread among the torts, it is no surprise that so many scholarly references to the “dignitary” torts seem to presuppose that what makes a tort dignitary can go without saying.

Our analysis, however, reveals two difficulties that are entailed in attempting to go beyond this form of simple labeling. First, even setting aside exactly what constitutes dignity and an infringement on dignity, in at least some instances, most of the putative dignitary torts also are actionable to redress non-dignitary interests. Thus, battery can cause physical harm; it may also be offensive to be physically harmed by an intentional contact, but the principal concern in such cases is the harm rather than the offense. Dignity is a secondary interest in most such cases. Defamation may cause economic harm without infringing dignity, as when someone is incorrectly said to have died or no longer to be practicing medicine. In the privacy torts, there is a similar division. Intrusion may infringe dignity, but it may instead simply be objectionable, as when a third party views someone’s bank transaction. The same is sometimes true of false light, and it is obviously true of commercial appropriation, which is most often about something other than dignity. For this reason, calling these torts dignitary is a partially inaccurate description. Sometimes this term just does not fit.

Second, as we have seen, dignity is a complex concept, comprised of a series of interests. But not all the dignitary torts protect all those interests. And even when the torts protect a combination of core and sometimes-secondary interests they are often different combinations. Offensive battery, intrusion, and certain cases of commercial appropriation are centrally concerned with liberty and autonomy, whereas the other torts are not. Intrusion and IIED are centrally concerned with embarrassment, humiliation, or disrespect, whereas the other torts are not. And defamation, false light, and certain cases of commercial appropriation are centrally concerned with the regard of others for the plaintiff, whereas the other torts are not.

This incomplete coincidence of protected interests goes a long way toward explaining why so little analysis or elaboration of what makes these causes of action dignitary torts exists. They are in fact “dignitary” torts, but they protect different forms of dignity. It is these different forms of dignitary protec-

tion—we have contended that there are three such forms—that underwrite the torts, and not the more general concept of dignity. Because of the variety of interests involved, it is difficult for the concept of dignity to bear any operational weight or do any doctrinal work. Dignity is a general and complex concept from which it would be difficult to deduce rules that would decide individual cases. That is a large part of the explanation for the failure of the concept of dignity to ever be developed in the tort literature or case law addressing these dignitary torts.

This has had three important consequences. First, it is often not necessary for the courts to make very extended or deep references to the interests that a particular tort protects. For example, that battery and especially offensive battery at its core protects liberty and bodily autonomy usually can go without saying. Similarly, public disclosure at its core protects the privacy of intimate or confidential information about oneself. Only when a fact situation poses issues at the periphery, rather than at the core of those and the other dignitary torts, is there occasion for a court to drill-down into the granular details of the interest that a cause of action protects.²²⁸ This phenomenon naturally impedes the development of self-conscious articulations of the nature of the interests that a particular tort protects.

Second, because different torts protect different core interests but sometimes secondarily protect interests at the core of other torts, there is complicated and varied overlapping of the interests protected. The whole messy picture discourages efforts to tease out and identify what interests which torts protect. The mere potential for greater descriptive insight without any corresponding doctrinal or operative impact appears, therefore, to be insufficient to tempt the courts to make the effort.

For these reasons, there has been virtually no examination or analysis of what makes the dignitary torts “dignitary,” or the particular interests that the different dignitary torts sometimes protect in common. A reflexive tendency to label them “dignitary” frequently manifests itself, but without any analytical or theoretical follow-up.²²⁹ Our analysis has suggested that such follow-up would have revealed that the torts are related, and

²²⁸ See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1233–34 (7th Cir. 1993) (holding that the depiction of plaintiff as a man who drank heavily, neglected his children, and was pathetically amorous when drunk was not highly offensive).

²²⁹ See the discussion of articles on “dignitary torts,” *supra* note 5.

some of them closely related, but not all are related in the same way.

This has led to a third consequence, which implicates the process by which common law tort actions emerge and develop in the United States. Although common law torts may protect multiple and overlapping interests, the theory governing the bringing of tort actions in American courts is that each tort is a discrete entity, with its own doctrinal requirements. In that respect, actions in defamation, in one or another form of privacy, and in IIED, although they might each be efforts to redress a loss of “dignity,” are treated as separate from one another. Courts and commentators have devoted a good deal of attention to demonstrating why an action based on a set of facts might fail if brought in defamation but succeed if brought in disclosure or in false light privacy.²³⁰ These efforts reflect the fact that protecting “dignity” is not easily reduced to the vindication of a single interest or, seemingly, to the vindication of any interest that lies unprotected in other torts. Thus, there may well be an inherent incompatibility between the American common law system and the development of any generic tort action designed to protect dignity. We will return to this general point in Part IV.

In summary, we believe that all these consequences of the incomplete coincidence of protected interests in the concept of dignity provide reasons for why the project of creating a unified, generic “dignity” tort action never got off the ground. And there was another reason, which the following Part takes up.

III

THE CONSTITUTIONALIZATION OF THE SPEECH-BASED DIGNITARY TORTS

A very different reason for the stunted development of unification lies outside the law of torts. This was the decision of the Supreme Court of the United States, beginning in 1964, that it was necessary to recognize a new dimension of defamation, and eventually privacy and IIED, cases.²³¹ When those

²³⁰ See, e.g., LAWRENCE McNAMARA, REPUTATION AND DEFAMATION 162–89 (2007); John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 76–79 (1950).

²³¹ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (barring plaintiffs’ recovery for intentional infliction of emotional distress in the absence of actual malice); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (denying liability in privacy tort where information on private individual was already a matter of public record); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283–91 (1964) (requiring actual knowledge of falsehood or reckless disregard as to veracity to

actions were based on conduct by defendants that constituted forms of speech, defendants had a First Amendment privilege that could serve as a bar to some of them.²³² This process of constitutionalizing speech-based dignitary torts did more than just restrict the scope of liability for many dignitary invasions. In some ways, the process, along with the developments in the world at large that accompanied it, also worked a transformation of the nature of dignity itself.

A. Prelude: The Role of Speech-Related Values in Tort Actions Prior to Constitutionalization

Both Prosser and Wade recognized that a number of invasions of privacy were produced by speech, activities of the press, or other expressive activities.²³³ This suggested that determining whether particular conduct by a defendant was actionable as a privacy tort sometimes required a balancing of the interests protected by that tort against an interest in "newsworthiness," the "public's right to know," or "matters of public concern." In his article *Privacy*, Prosser noted that the common law of defamation had developed privileges, such as fair comment on matters of public concern and the fair and accurate reporting of official proceedings, which were designed to prevent actions in slander and libel from unduly restricting the freedoms of speech and the press, and wondered whether there was any tendency to impose comparable restrictions in privacy cases.²³⁴

Wade had suggested that in privacy cases, "the courts should be . . . doubly careful[] to preserve the interests in freedom of speech and of the press, which are to some extent safeguarded by some of the rigid rules of the law of defamation."²³⁵ Wade believed that there was "much more consideration given to the public interests of freedom of speech in the recent right-of-privacy than in most of the defamation cases[,]""²³⁶ citing several cases decided since 1937 discussing "the conflicting interests" of privacy and free speech.²³⁷ He thought, however, that the "reasonable man" standard of liabil-

impose liability on newspaper for publishing defamatory falsehoods about public official).

²³² See, e.g., *Falwell*, 485 U.S. at 56.

²³³ See Prosser, *supra* note 164, at 384-86, 400-01; see Wade, *supra* note 106, at 1113-17.

²³⁴ See Prosser, *supra* note 164, at 401, 422-24.

²³⁵ Wade, *supra* note 106, at 1122.

²³⁶ *Id.*

²³⁷ *Id.* at 1122 n.162.

ity that had emerged in privacy cases provided a vehicle for balancing, among other things, the “measure of offensive character of the statement, its truth or falsity, and the nature and extent of [its] dissemination” against “the extent to which the statement promotes the dissemination of newsworthy, cultural, or educational information, ideas, or opinions.”²³⁸

Prosser’s and Wade’s discussions of a public “interest” in having access to “newsworthy” information or ideas, which was balanced, in privacy cases, against the “right” of individuals to not have that information disclosed or portrayed in a “false light,” were predicated on an assumption. This assumption was that no *constitutional* questions were raised by the fact that actions giving rise to privacy suits might involve speech, the press, or the public’s interest in learning about information or ideas. That assumption was in keeping with the standard treatment of freedom of speech and press issues in tort cases prior to the mid-1960s. Tort cases were regarded as “private” for the purposes of the “state action” requirement for raising constitutional issues; consequently, the First or Fourteenth Amendments did not apply to tort actions.²³⁹

This did not mean, as we have seen, that non-constitutional values associated with freedom of expression, or the public’s access to information or ideas, played no role in tort cases involving speech. Rather, those interests simply figured in the common law balancing process in which courts determined whether the conduct, including the verbal conduct, of a defendant was “offensive to a person of ordinary sensibilities.”²⁴⁰ That is, by taking expression-related interests into account, the elements of several causes of action, including defamation, public disclosure privacy, and IIED, already helped define each tort’s own limitations on the scope of liability. But those were common law limitations, subject to variation among the states and to common law doctrinal evolution.

B. The Constitutional Tidal Wave

In 1964, this all began to change. In that year, the Supreme Court decided a case that dramatically altered the constitutional dimensions of defamation cases, setting off a decades-long chain of decisions in which the Court identified First Amendment privileges in defamation, false light privacy,

²³⁸ *Id.* at 1123 n.162a.

²³⁹ See Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1658 (2009).

²⁴⁰ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975).

disclosure privacy, and intentional infliction of emotional distress cases.²⁴¹

The seminal case was *New York Times v. Sullivan*,²⁴² which revealed the Court's decision that, after nearly two centuries, the common law of defamation would be affected by First Amendment considerations.²⁴³ The decision abandoned the longstanding treatment of defamation cases as not raising constitutional issues because they involved "purely private" actions.²⁴⁴ Justice Brennan's opinion for the Court peremptorily disposed of that characterization in *New York Times*:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and the press. It matters not that that law has been applied in a civil action and that it is common law only . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.²⁴⁵

Because the case involved a suit in Alabama against civil rights advocates, it was directly connected to the Court's perception that some of the traditional rules of defamation law could be manipulated by state courts to punish persons whose expressive activities were highly unpopular in their states. *New York Times* heightened the standard of liability in defamation suits by public officials, requiring them to prove "actual malice" by the defendant: knowledge that the allegedly defamatory statement was false, or reckless disregard of whether the statement was true or false.²⁴⁶ In addition, *New York Times* imposed more demanding requirements of proof, applicable to both the standard of liability and damages in cases involving public officials, all in order to protect freedom of speech and

²⁴¹ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (providing an example of intentional infliction of emotional distress); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (providing an example of disclosure privacy); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283-91 (1964) (providing an example of defamation).

²⁴² 376 U.S. 254 (1964).

²⁴³ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990) ("In 1964, we decided in *New York Times Co. v. Sullivan*, that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation." (citations omitted)).

²⁴⁴ See *N.Y. Times*, 376 U.S. at 301-02 (Black, J., concurring).

²⁴⁵ *Id.* at 265.

²⁴⁶ See *id.* at 279-80.

thereby to make it much more difficult for public officials to recover in defamation actions.²⁴⁷

The decision undermined the established theory that constitutional considerations were not present in defamation cases because they were private civil actions. Previously, the only function, in those and other tort cases, of the freedom of speech and press protections in the First and Fourteenth Amendments was to reflect other common law interests that could be balanced against those of privacy or reputation.²⁴⁸ But such balancing was not constitutionally required.²⁴⁹ The states, in fashioning tort liabilities, had been free to choose whether, and to what extent, to take those interests into account.²⁵⁰

Now, however, constitutional law had not only invaded defamation cases with speech or press dimensions, it threatened to significantly break the momentum of expanding actions in privacy and intentional infliction of emotional distress, at least where the sources of harm in those cases came from expressive activities.

This prospect was realized in a series of decisions following *New York Times*. First, the Court expanded the category of defamation plaintiffs for whom recovery necessitated a showing of actual malice, proved by clear and convincing evidence.²⁵¹ That category came to include “public figures,” persons whose general visibility or close connections to a noteworthy public event or controversy made comments about them subjects of widespread public interest or concern.²⁵² It also applied the

²⁴⁷ See *id.* at 283.

²⁴⁸ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (noting that “libelous” and “insulting” language had “never been thought to raise any Constitutional problem” since “such utterances are . . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”).

²⁴⁹ See *id.*

²⁵⁰ See *Beauharnais v. Illinois*, 343 U.S. 250, 254–58, 267 (1952) (holding that the Court “cannot deny to a State power to punish [libelous utterances] directed at a defined group, unless we can say that this is a will[ful] and purposeless restriction unrelated to the peace and well-being of the State” and declining to strike down criminal libel conviction).

²⁵¹ See *Rosenblatt v. Barr*, 383 U.S. 75, 85 (1966) (noting that “[n]o precise lines need to be drawn” to outline the category of public official who may be a defamation plaintiff).

²⁵² See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154, 164 (1967). It also came, temporarily, to include private citizens defamed on matters of public concern. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971). The Court subsequently reversed itself on the applicability of the *New York Times* requirements to private citizens defamed on matters of public concern, holding, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), that defamatory statements directed at that class of persons needed only to be negligently made to permit recovery.

actual malice and clear and convincing evidence standards to “false light” privacy cases in *Time, Inc. v. Hill*,²⁵³ involving an article in *Life Magazine* about a play based on the ordeal of a family taken hostage by escaped convicts.²⁵⁴

And in the 1975 case of *Cox Broadcasting Corp. v. Cohn*,²⁵⁵ the Court considered the constitutionality of a Georgia statute making it a misdemeanor to broadcast the name of a rape victim.²⁵⁶ The Court held that when true information was available in public records, the press had an absolute privilege to publish it, whether or not disclosing that information might have invaded the privacy of someone in other circumstances.²⁵⁷ It was clear after *Cox Broadcasting* that a very large number of disclosure actions would run up against the “true information in public records” privilege.²⁵⁸

Some years later, the Court continued its application of constitutional privileges to curtail the impact of common law actions designed to secure redress for emotional harm. In *Hustler Magazine v. Falwell*,²⁵⁹ a 1988 decision, Jerry Falwell, a well-known evangelist minister and self-described leader of “the moral majority,” sued *Hustler Magazine* for intentional infliction of emotional distress arising from an advertisement in the magazine that satirized Falwell and his mother.²⁶⁰ The Court held that the Constitution precluded recovery by a public official or public figure for IIED without proof that a statement about the plaintiff was false and made with “actual malice” as defined by *New York Times*.²⁶¹ After *Falwell*, it was not clear whether the “outrageousness” standard for IIED, being “inherently subjective,” was surmountable to allow a successful action for intentional infliction of emotional distress when that action was based on speech or a publication in the media.²⁶² Finally, in *Snyder v. Phelps*, the Court held that the picketing of a funeral by the defendant church members was “speech on a

²⁵³ 385 U.S. 374 (1967).

²⁵⁴ See *id.* at 376–77.

²⁵⁵ 420 U.S. 469 (1975).

²⁵⁶ See *id.* at 471–72.

²⁵⁷ See *id.* at 491.

²⁵⁸ See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (discussing the publication of a rape victim’s name); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 98 (1979) (discussing the newspaper publication of an alleged juvenile offender’s name); *Oklahoma Publ’g Co. v. Oklahoma Cty. Dist. Ct.*, 430 U.S. 308, 308 (1977) (discussing the publication of the name of a minor connected to a juvenile proceeding).

²⁵⁹ 485 U.S. 46 (1988).

²⁶⁰ See *id.* at 47–48.

²⁶¹ See *id.* at 49–50, 56.

²⁶² See *id.* at 55.

matter of public concern,” in a “public forum” (a site near a public street for which they had secured a permit), and was thus protected by the First Amendment in an action for IIED by members of the deceased’s family.²⁶³

C. The Diminished Dignitary Torts

It is clear that the Court’s line of decisions from *New York Times* through *Hill*, *Cox Broadcasting*, *Falwell*, and *Phelps* has resulted in First Amendment privileges cutting deeply into actions for defamation, false light and disclosure privacy, and IIED. The Court’s intervention began right at the time when each of those torts was thought to be in an expansive phase and commentators had begun to consider the doctrinal connections between them and the possibility that they might merge into a generic action imposing liability for dignitary invasions or mental suffering.²⁶⁴

Not only had the expansion of the dignitary torts been significantly checked by the constitutionalization of defamation, disclosure, false light privacy, and IIED, but in addition, in the years in which constitutional privileges seemed to be overwhelming those actions, no commentator, even those employing the term dignity, followed Prosser and his contemporaries by attempting a systematic analysis of the concept of dignity. A reconstruction of privacy torts, along with the torts of defamation and intentional infliction of emotional distress, to show how at bottom those actions could be understood as protecting dignity interests might have alleviated some of the dampening effects of the Supreme Court decisions on the prospective emergence of a generic tort action protecting dignity or mental suffering. Such a reconstruction might have been able to supply a powerful, and increasingly resonant, rationale for using tort law to provide redress for persons who found themselves offended, embarrassed, or humiliated by the purposive conduct of others. But no such reconstruction of the torts as “dignitary” actions took place. The expansive phase of a set of torts that might have been understood as protecting various aspects of individual dignity ended.

²⁶³ 562 U.S. 443, 455 (2011).

²⁶⁴ See, e.g., PROSSER, *supra* note 88, at 1053–54 (discussing the connections between privacy-related torts); Bloustein, *supra* note 83, at 1000–01 (discussing a generic action for privacy related torts and the “common thread” connecting these torts); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327–28 (1966) (discussing the growth of the tort for invasion of the right to privacy); Wade, *supra* note 106, at 1126–27 (discussing a generic action for dignitary invasions).

Indeed, virtually all the scholars we have mentioned either shifted their focus or dropped the issue entirely. *New York Times* and *Hill* were each decided between the appearance of the third and fourth editions of Prosser's treatise on torts. Prosser took advantage of those cases, which suggested that the Supreme Court shared his apprehensiveness about the impact of defamation and privacy law on the freedom of speech and the press, to add a chapter in his fourth edition, following the chapter on privacy, entitled "Constitutional Privilege."²⁶⁵ In that chapter he discussed *New York Times* at length²⁶⁶ and *Hill* in a more attenuated fashion.²⁶⁷ He suggested that the latter decision might portend an application of constitutional privileges to other areas of privacy as law as well (*Cox Broadcasting* having not yet been decided).²⁶⁸ In discussing the free speech dimensions of common law privacy cases, Prosser noted that a common law privilege for disclosing information, or treating someone in a false light, had found its way into some common law cases under the rubrics of "newsworthiness" or the characterization of a plaintiff as a public figure, but that those privileges had now been "taken over under the [Constitution]"²⁶⁹ and one could expect that they might place more severe limitations on defamation and the expanding privacy torts than common law privileges.²⁷⁰

265 See PROSSER, *supra* note 88, at 810-33.

266 See *id.* at 823-27.

267 See *id.* at 827.

268 See *id.* at 825-29.

269 *Id.* at 827.

270 See *id.* at 827-29. Prosser's position was not surprising. He had been having doubts even before the Supreme Court's entry into the field. By the publication of the fourth edition of Prosser's handbook, he occupied a somewhat ironic position in the twentieth-century emergence of a series of torts designed to redress various forms of emotional harm. Along with Calvert Magruder, Fowler Harper, and Mary Coate McNeely, Prosser had been one of the pioneers in identifying actions for IIED and privacy, and in suggesting, along with John Wade, that the former of those actions might "absorb" the latter, as well as defamation, in a generic tort for relief from intentionally caused mental suffering. But between 1941 and 1955, the years in which the first and second editions of his Torts handbook were published, Prosser's assiduous cataloguing of cases in which courts had entertained one or another actions for "privacy" had resulted in his recognizing that the legal concept of privacy had different dimensions, not all of which harmonized with one another. The courts had been using "privacy" to describe actions in which the plaintiff's interest was not always synonymous with a "right to be left alone," as Warren and Brandeis had suggested, but with reputation or the right to control the use of one's name or likeness. Only in intrusion cases, Prosser suggested, were plaintiffs truly asking to be let alone.

By the time Prosser published his article on privacy in 1960, his thinking had evolved a step further. He now thought that the quite different interests being protected in privacy cases, and the different elements of the various privacy torts, had created confusion in the courts, and the situation was accentuated by the

After the Court decided *New York Times*, the reaction of other commentators for the next two decades was generally to predict the severe contraction, if not the demise, of tort actions designed to redress emotional harm, at least where it had been caused by speech or other expressive activities. The first prominent torts scholar to recognize the implications of the Court's discovery of constitutional privileges in tort cases was Harry Kalven, who, we have seen, had been attracted in the 1950s to the idea that several tort actions protected an interest in dignity.²⁷¹

In 1966, Kalven wrote an article in which he argued that the growth of the action for disclosure privacy had been a mistake because it was unclear what the elements of the action were.²⁷² In addition, in his view, the action invited trivial suits and would likely not be used by persons who were genuinely affected by the disclosure of facts about themselves or their families, since doing so would tend to increase their distress.²⁷³ Kalven also noted the appearance of *New York Times* and suggested that after that decision, constitutional privileges might be "so overpowering as virtually to swallow the tort" of privacy.²⁷⁴

Kalven went on to suggest that there were problems with each of the privacy torts Prosser had identified.²⁷⁵ Kalven's comments regarding Prosser's role in contributing to what he took to be the state of the privacy tort were noteworthy. On the one hand, Prosser's survey of privacy cases as composing a "complex" of four different actions had created the impression that the tort was multiplying and growing; Kalven noted that a number of courts had used the formulation Prosser had presented in his *Privacy* article, and nearly every one of the American states had created a common law action for privacy.²⁷⁶ If one traced the origins of the privacy tort to Warren's

expanded use of the "privacy" rubric. He expressed apprehension at those developments, wondering about the effects on freedom of speech and the press of liability standards such as "offensive to community mores," and suggesting that some comparatively trivial harms, such as "laudatory falsehoods," might be made actionable. His skepticism about the future of privacy, and his classification of the tort itself, provoked Bloustein to redescribe the privacy torts as invasions of human dignity, and then to revive Prosser's initial notion of a generic tort redressing mental suffering.

²⁷¹ See GREGORY & KALVEN, JR., *supra* note 160, at 883–99.

²⁷² See Kalven, *supra* note 264, at 326–27, 330–31.

²⁷³ See *id.* at 338–39.

²⁷⁴ *Id.* at 336.

²⁷⁵ See *id.* at 331–33.

²⁷⁶ See *id.* at 327.

and Brandeis's article, which Kalven suggested had associated violations of privacy only with unauthorized disclosure of personal information, Prosser's synthesis, bringing other actions within the "privacy" umbrella, amounted to, "[o]n a very small scale . . . a Copernican revolution."²⁷⁷ On the other hand, Prosser's definition of "privacy" had arguably undermined "the whole spirit, dignity, and deep rationale for the tort," substituting for "the grand underlying principle of inviolate personality and individual dignity . . . four *ad hoc* categories" that bore little analytical commonality with one another.²⁷⁸ The "deadening common sense" of Prosser's approach, Kalven felt, had "cut[] the tort loose from the philosophic moorings Warren and Brandeis gave it."²⁷⁹

All in all, Kalven's analysis of the state of privacy law at the moment when constitutional privileges were about to affect it was far from upbeat. Not only did he conclude that disclosure privacy was fraught with analytical difficulties and had the potential to spawn trivial lawsuits. He also predicted that the growing attention of courts to "newsworthiness" privileges was likely to be accentuated by the Supreme Court's conclusion that constitutional privileges affected the tort was as well, threatening to obliterate it.²⁸⁰ Those future problems for the disclosure tort, Kalven felt, might result in its original core virtually disappearing.²⁸¹

This was a sobering assessment, coming only two years after Bloustein's effort to repackage "privacy" actions as efforts to redress one or another assault on human dignity, and only four years after Wade's projection that the expansion of privacy actions might absorb defamation actions, reducing the technical barriers to recovery existing in the common law of defamation and themselves be absorbed in a vast generic tort action of intentional infliction of mental suffering.²⁸² Prosser, who had himself been strongly identified with that suggestion in 1941, by 1966, appeared as the cold-eyed analyst who had reduced privacy law to *ad hoc* categories, stripping it of its origins in the recognition of human personality and dignity.

Although Bloustein wrote a rejoinder to Kalven²⁸³ and continued to identify emotional harm torts with the protection of

²⁷⁷ *Id.* at 332.

²⁷⁸ *Id.* at 332-33.

²⁷⁹ *Id.* at 333.

²⁸⁰ *See id.* at 333-38.

²⁸¹ *See id.* at 336.

²⁸² *See* Bloustein, *supra* note 83, at 974; Wade, *supra* note 106, at 1124-25.

²⁸³ Bloustein, *supra* note 205, at 611.

interests sounding in dignity, he was bucking the scholarly tide over the next two decades. As early as 1964, Mark Franklin had concluded that the “newsworthiness” privilege in privacy cases had roots in the First Amendment.²⁸⁴ And after *Hill, Cox Broadcasting*, and a subsequent case, *Florida Star v. B.J.F.*, in which the Court concluded that the publication of true information lawfully obtained on a matter of public interest could not be restricted absent a showing of a state interest of the highest order,²⁸⁵ many commentators, writing between the mid-1960s and the 1990s, pronounced the virtual end of disclosure privacy.²⁸⁶

Academic interests are the product of a variety of influences. But we believe that the entry of the Supreme Court into the field of dignitary torts not only affected these torts directly, but also influenced the decline in scholarly writing about them. Prosser died in 1972;²⁸⁷ Wade shifted his interest to products liability and comparative fault.²⁸⁸ Casebooks began to feature the Supreme Court opinions, necessarily giving shorter shrift to the substantive nuances of the liability that remained.²⁸⁹

284 See Franklin, *supra* note 100, at 822.

285 491 U.S. 524, 541 (1989).

286 For an overview, see Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 294 (1983), who argues that the tort of privacy as constructed by Warren and Brandeis has serious constitutional issues.

287 Abraham & White, *supra* note 107, at 40.

288 Wade's work after the 1970s was influential in both fields. His “risk-utility test” for a defective product in products liability was eventually adopted in the RESTATEMENT (THIRD) OF TORTS § 2, cmt. a (AM. LAW INST. 1977) after Wade had first articulated it in *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973). Between that year and his death, he wrote several additional articles on products liability. In addition, he was the author of the Uniform Comparative Fault Act, 12 U.L.A. 43 (West Supp. 1995), and between 1974 and 1984 published several articles on comparative fault and its effect on multiple parties. For more detail on Wade's torts scholarship, see Gary Myers, *Dean John Wade and the Law of Torts*, 65 MISS. L.J. 29 (1995).

289 We surveyed successive editions of three prominent Torts casebooks from the 1970s to the present. The casebooks were MARK FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES (1st ed. 1971–10th ed. 2016); CHARLES O. GREGORY, HARRY KALVEN, JR. & RICHARD E. EPSTEIN, CASES AND MATERIALS ON TORTS (3d ed. 1977–11th ed. 2016), and WILLIAM L. PROSSER & JOHN WADE, CASES AND MATERIALS ON TORTS (5th ed. 1971–13th ed. 2015). The casebook editors changed to some extent during that time interval, but at least one editor remained constant on all the successive editions. The survey revealed, first, a dramatic increase in the use of Supreme Court opinions constitutionalizing defamation and privacy as principal cases in the coverage of those areas between 1971 and 1979, an interval in which *Gertz* and *Cox Broadcasting* were decided; second, the consistent employment of such opinions as principal cases in the coverage of defamation and privacy between 1979 and 2005, the casebooks devoting, in that time interval, between 22% and 60% of their coverage of defamation and privacy to constitutional decisions by the Court affecting those areas; and third, a slight fall off both

And younger scholars, partly following the lead of what the casebooks emphasized, began to focus on the intersection of tort and the First Amendment, de-emphasizing the common law features of the torts.²⁹⁰

D. The Law's Influence on the Nature of Dignity Itself

Beginning in 1964, there was a final, less tangible and therefore harder to isolate, consequence of the constitutionalization of the dignitary torts. The gravamen of Warren's and Brandeis's "privacy" tort was the public disclosure of information that a person chose to keep private simply because its being made public was considered embarrassing, humiliating, or otherwise "unseemly." The emergence of First Amendment privileges in actions whose gist was that they were invasions of a plaintiff's "dignity" made it much more likely that those invasions would be constitutionally protected against tort liability. This meant, for example, that unauthorized photographs of individuals could appear in print, books with potentially embarrassing true facts about the lives of persons could be published with impunity, awkward dimensions of a subject's past could be revealed, and true information available in public records could not be made the basis of a disclosure action. Moreover, offensive or false comments about public figures and even private citizens were much less likely to be actionable in

in the number of Supreme Court decisions used as principal cases, and the percentage of those cases compared to the total number of principal cases in the coverage of defamation and privacy, in successive editions between 2005 and the present. The fall off was so slight as to not be statistically significant but it may reflect the fact that the Court has not decided a case raising the issue of constitutional privileges in defamation or privacy since *Barnicki v. Vopper*, 532 U.S. 514 (2001).

With respect to IIED, the only constitutional decision used as a principal case was *Hustler*, which appeared in the fifth edition of GREGORY, KALVEN & EPSTEIN (1990) and all editions of FRANKLIN & RABIN since the fifth edition in 1992. *Snyder v. Phelps*, 562 U.S. 443 (2011), has yet to appear as a principal case, and no constitutional decisions affecting IIED have been treated as principal cases in the coverage of that tort in editions of PROSSER & WADE or in any editions of GREGORY, KALVEN & EPSTEIN save the fifth edition. We are not inclined to attach any significance to that data because the number of principal cases employed in the coverage of IIED has been very small in all the editions we surveyed, ranging from one to six cases and averaging around two cases.

For a spreadsheet covering successive editions of the casebooks surveyed, see Kent C. Olson, *Supreme Court Cases in Torts Casebooks* (Nov. 14, 2017) (unpublished document) (on file with the authors).

²⁹⁰ See, e.g., Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 401 (2008) (discussing privacy torts and intellectual property with an emphasis on the First Amendment, rather than common law).

defamation or IIED if they were associated with matters of public concern.²⁹¹

In light of the constitutional privileges limiting the potential success of all these tort actions, the opportunities for protecting “dignity” interests—freedom from embarrassment, humiliation, ridicule, inaccurate characterization, interference with “peace of mind”—have been reduced. More people have correspondingly been exposed to the risk of having their dignity violated in more ways.²⁹² It is possible, therefore, that as the dignity of Americans is increasingly violated because those potential defendants are constitutionally privileged, something like a deadening of the interests in dignity itself has resulted.²⁹³ Thus, constitutional privileges are not merely “balanced” against the interests ostensibly protected by dignitary torts, they serve to reduce the cultural and personal significance of those interests. If previously “unseemly” public portrayals of individuals are increasingly the norm, it becomes harder to ascertain what conduct a society treats as unseemly. Dignitary torts may be harder to conceptualize now simply because constitutionalization has reduced the space for, and therefore the very meaning of, dignity.

Cultural and technological developments, usually more powerful than law alone, have of course both reflected and reinforced this phenomenon. Once presidential candidates have willingly answered questions about their underwear,²⁹⁴ and images of individuals in a variety of awkward, humorous,

²⁹¹ See Warren & Brandeis, *supra* note 108, at 199, 202 n.1, 218; see, e.g., *Snyder v. Phelps*, 562 U.S. 443, 458–59 (2011) (holding that the First Amendment protected an offensive protest of a private individual’s funeral because the deceased’s military background introduced an element of public concern); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229–30 (7th Cir. 1993) (holding that the First Amendment protects a person who publishes unflattering facts about the lives of others); *Gill v. Hearst Publ’g Co.*, 40 Cal. 2d. 224, 228–30 (Cal. 1953) (holding that the First Amendment would protect the publication of an unauthorized photograph of individuals on public ground provided that the picture was unaccompanied by text).

²⁹² See Tilley, *supra* note 5, at 65.

²⁹³ For some evidence consistent with that suggestion, see Irina Raicu, *Are Attitudes About Privacy Changing?*, MARKKULA CTR. FOR APPLIED ETHICS (June 1, 2012), <https://www.scu.edu/ethics/privacy/are-attitudes-about-privacy-changing/> [https://perma.cc/5BEW-ZY7P]; Lee Rainie & Janna Anderson, *The Future of Privacy*, PEW RES. CTR. (Dec. 18, 2014), <http://www.pewinternet.org/2014/12/18/future-of-privacy/> [https://perma.cc/8FE8-3AR3].

²⁹⁴ While a candidate for president, Bill Clinton answered the question, “boxers or briefs?” by saying, “usually briefs.” Richard Lei, *The Commander in Briefs*, WASH. POST (Apr. 29, 1994), https://www.washingtonpost.com/archive/lifestyle/1994/04/20/the-commander-in-briefs/04219ef3-aa61-4f28-8869-6217476c1b47/?utm_term=.1307ce1f0ba4 [https://perma.cc/ZM73-EMCB].

or salacious poses are commonly posted on social media,²⁹⁵ what counts as an “undignified” or “extreme and outrageous” portrayal becomes increasingly difficult to determine. The importance of dignity itself comes into question and the practical strength of the torts that protect dignitary invasions possibly wanes as a result.

IV

THE INEVITABLE STRUCTURE OF THE DIGNITARY TORTS

For the reasons we have discussed, then, whatever momentum might have been building in the 1940s and 1950s toward a generic tort action for redress from mental suffering, possibly grounded on the growing resonance of the concept of human dignity, had ceased by the mid-1960s. Two decades later, the Supreme Court’s recognition of the impact of constitutional privileges on defamation, privacy, and IIED have effectuated severe limits on any future expansion of those torts, and it is possible that those privileges have had a deadening effect on the concept of dignity itself.

The diversity of interests that the different dignitary torts protect, and the imposition of constitutional limits on the permissible scope of liability for these torts, probably would have been sufficient, on their own, to preclude the development of a unified theory of liability for interference with dignity, and certainly sufficient to preclude a general cause of action of this sort. There is another, arguably even more fundamental reason, however, that such a theory and cause of action never did, and never could, develop: the fundamental character of the common law of torts.

A. The Once and Future Forms of Action

From early on, tort liability was grounded in a series of different forms of action, each of which had its particular, and often technical, requirements.²⁹⁶ These were, roughly speaking, different causes of action in tort. Perhaps the most well-known example to modern readers is trespass *vi et armis*, which was a form of action available only when a defendant

²⁹⁵ See Lee Rainie & Janna Anderson, *Above-and-Beyond Responses: Part 2*, PEW RES. CTR. (Dec. 18, 2014), <http://www.pewinternet.org/2014/12/18/above-and-beyond-responses-part-2-2/> [<https://perma.cc/QF86-28L7>] (explaining that “[b]y 2025, you will be considered a non-person if you do not have embarrassing photos or videos online”).

²⁹⁶ See Baker, *supra* note 84, at 401–03; MAITLAND, *supra* note 7, at 2–5.

had injured the plaintiff directly and by force or violence.²⁹⁷ This form of action is the precursor of the modern tort of battery.²⁹⁸ But each form of action had its own limits, as Maitland observed,

[T]o a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents . . . [the plaintiff] may find that plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.²⁹⁹

The distinctions between different forms of action lay, among other things, in what we would now call the applicable standard of care, the kind of conduct in which the defendant had engaged, and the nature of the injury resulting from the defendant's conduct. When the writ system on which the forms of action were based was abolished in the middle of the nineteenth century, the procedural and pleading systems that supported them disappeared.³⁰⁰ But the substantive distinctions that characterized the different forms of action did not disappear.³⁰¹ What remained were a series of different causes of action in tort, each with their own separate substantive elements.³⁰² The standard of care applicable in battery (an intent to make contact with the plaintiff's body), for example, was different from the standard of care applicable in defamation (intentional or negligent publication of material that defames the plaintiff).³⁰³

These substantive differences, with their roots in the forms of action at common law, have come down to us today as they are reflected in the differences between different torts, including the dignitary torts. These torts have different elements. It would be impossible to unify them completely in a cause of action for infringement of dignity without adopting more nearly

297 See BAKER, *supra* note 84, at 402–05.

298 See *id.*

299 MAITLAND, *supra* note 7, at 4–5.

300 See *id.* at 5–7.

301 See ABRAHAM, *supra* note 74, at 299, 308–10 (discussing some of the different causes of action for privacy-related torts).

302 See *id.*

303 See RESTATEMENT (SECOND) OF TORTS § 13 (AM. LAW INST. 1977) (discussing the standard of care applicable to battery); see also PROSSER, *supra* note 88, at 810 (discussing the standard of care applicable to defamation).

uniform elements. Doing so, however, would eliminate differences that are not only the remnants of the old forms of action, but also demarcate important normative distinctions.

In contrast to the top-down structure of the civil law, the bottom-up structure of the common law means that both the courts and scholars are virtually compelled to think in terms of causes of action. And because of the bottom-up, case-by-case approach of the common law, new causes of action also are often under-theorized. The principles that lie behind them must be inferred from individual decisions. Undertaking this task, the U.S. tort scholars we discussed had once started to recognize that many of the cases were based on the protection of "peace of mind" or "dignity." But this process of recognition never led, and never could have led, as it did in Europe, to the discovery of broad protection for a right of "personality" or "dignity" in torts cases.³⁰⁴

Rather, previously unrecognized liabilities, for such wrongs as invasion of privacy or IIED, were understood as new, particularized causes of action.³⁰⁵ Like existing torts, structurally these new torts are composed of their own separate and distinctive elements, some of which may, but are not necessarily required, to overlap with the elements of already existing causes of action. For example, battery is actionable when a touching is "offensive" and without regard to the reaction of the plaintiff (though the plaintiff's reaction may affect the amount of damages suffered).³⁰⁶ In contrast, IIED is actionable only when the defendant's conduct is "extreme and outrageous" and the plaintiff suffers "severe emotional distress."³⁰⁷

These differences reflect the complicated relationship between the comparative importance of bodily and emotional security, on the one hand, and the ways in which ordinary interactions between individuals occur. People expect to be touched, if at all, only in non-offensive, expressly or impliedly consented-to ways. But it is to be expected that people may inflict emotional distress on others. Sometimes people are sarcastic, ridicule others, or build up their own self-esteem at others' expense. This kind of conduct may not be admired, and it may be criticized, but it is not regarded as beyond the bounds

³⁰⁴ See discussion *supra* subpart II.B.

³⁰⁵ See Merritt, *supra* note 4, at 27 (discussing the "new" tort of IIED); see also Wade, *supra* note 106, at 1093-95 (discussing the development of the invasion of privacy tort).

³⁰⁶ See discussion *supra* section II.A.1.

³⁰⁷ See discussion *supra* section II.A.4.

of what is socially acceptable. It does not deeply call into question the worth—the dignity—of the individual in question, and therefore is not actionable as IIED.

Analogous normative differences are reflected in the elements of the other dignitary torts. When a defamatory statement does not concern a matter of public interest, it is effectively actionable on a strict liability basis.³⁰⁸ On the other hand, there certainly is no strict liability for invasion of private solitude and probably no liability for negligent invasion of private solitude. The defendant must intend the invasion.³⁰⁹ These differences, debatable though their wisdom may be in marginal cases, reflect normative differences between the two kinds of conduct. Making defamatory statements about others without the kind of justification supplied by a privilege is regarded as inappropriate, whereas accidental invasion of someone's privacy may produce embarrassment, but it is excusable.

B. Consequences and Implications

It is no surprise that Prosser's conclusion that his early efforts to conceptualize a cause of action that unified invasion of privacy and infliction of emotional distress had been unsuccessful. He saw that the developing case law did not support him.³¹⁰ Plaintiffs did not bring suit for invasion of privacy but instead for intrusion, disclosure, false light, or commercial appropriation. There was not even a unified cause of action for invasion of privacy, let alone one for interference with dignity.³¹¹

If there had instead been a unified cause of action for redress of an interference with one of these very different forms of dignitary invasion, one of two things would have happened. Either liability would have been imposed in some situations in which it would have been normatively unattractive or the supposedly-eliminated distinctions between the elements of the different dignitary causes of actions would have been smuggled back into the calculus, probably by way of application of the concept of a dignitary invasion to different fact situations. Little would have been accomplished substantively; old wine would simply have been poured into new bottles.

³⁰⁸ See ABRAHAM, *supra* note 74, at 300.

³⁰⁹ See RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

³¹⁰ See Prosser, *supra* note 164, at 389–98, 422.

³¹¹ See *id.* at 389; see also GREGORY & KALVEN, JR., *supra* note 160, at 883–84 (mentioning Prosser's assertion that most privacy torts would be absorbed into the IIED tort); Bloustein, *supra* note 83, at 971–72 (discussing Prosser's opinion that there is no single privacy tort).

To take that approach, and create a unified cause of action for interference with dignity, would be to reject the common law approach and instead to adopt the top-down approach of the codified civil law systems. Just as the various European laws of torts protect the right of "personality" in the way we described earlier, the American law of torts would have protected a right to dignity, but left the content of the right to be filled in over time, through the development of different rules governing the protection of different interests.

This is fundamentally because the character of the law governing the dignitary torts is not simply the path-dependent legacy of the *particular* forms of action that evolved into the modern dignitary torts, but a reflection of the deep structure of the common law of torts itself. Given that, under this structure, each tort is composed of its own separate elements, it is hard to imagine the state of affairs we have just described being otherwise. After all, the causes of action for IIED and invasion of privacy did not exist at all even late in the age of the forms of action.³¹² Nonetheless, their development followed the approach of the old forms of action, with different elements being slowly identified until each separate cause of action could be discernable from the case law.³¹³ IIED and invasion of privacy were simply new forms of action.³¹⁴

In addition, one of the consequences of the common law process of developing all these causes of action has been to erect boundaries between them that have prevented cross-pollination across torts that protect the same kind of interest. Not only have these boundaries necessarily prevented unification, they have unnecessarily prevented inter-doctrinal enrichment. The forms of action may have long ago disappeared, but their legacy continues to influence the nature of common law reasoning in tort law. For example, the courts simply have no occasion to observe or rely on the fact that offensive battery and intrusion on solitude each protect a liberty/autonomy interest, or that public disclosure and IIED often protect the same or a very similar interest in avoiding embarrassment or humiliation. The principles that develop in each tort to protect these interests therefore remain separate. There is no synergy

³¹² See PROSSER, *supra* note 88, at 45; see also WHITE, *supra* note 103, at 104; Warren & Brandeis, *supra* note 108, at 195-98.

³¹³ See RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977); RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965); ABRAHAM, *supra* note 74, at 308-10; Merritt, *supra* note 4, at 15-16, 21.

³¹⁴ See PROSSER, *supra* note 88, at 45; see also Prosser, *supra* note 164, at 389; Warren & Brandeis, *supra* note 108, at 195-98; WHITE, *supra* note 103, at 104.

among these separate torts, and no mutual influence. There certainly is no recognition that different torts protect a like interest, aside from the occasional use of the label “dignitary” to describe them.

The imposition of constitutional limits on the permissible scope of some but not all the dignitary torts that we discussed earlier has been yet another obstacle to even partial conceptual unification or cross-pollination of them. The scope of offensive battery, false imprisonment, and intrusion on solitude are unaffected by any such constitutional considerations because they are not accomplished through speech or expression. Each of the other torts, however, is subject to at least some constitutional constraint. “Actual malice” in the constitutional sense has come to be a required element in public disclosure, false light, and IIED when public issues are involved, and the First Amendment concern for protecting artistic creativity constrains at least some liability for commercial appropriation.³¹⁵ The resulting gulf between the elements of the torts that involve speech and those that do not has rendered unification or cross-pollination even more difficult and unlikely. The already inevitable divisions between the torts were reinforced by a constitutionally mandated set of separations.

CONCLUSION

We have sought to achieve three goals in this article. One was to gain a deeper and more nuanced understanding of dignity as a cultural and legal concept by exploring its evolution in western thought and unraveling the different social and legal interests that it might be thought to protect. A second has been to identify why, since the conclusion of the Second World War, there has been a recurrent interest, in both Europe and America, in attempting to use law, particularly tort law, as a means of vindicating and protecting dignitary interests. The third has been to explain why, in the United States, that interest has not only failed to produce any expansion of the protection of various forms of “dignity” in the law of torts, but failed to result in any systematic analysis of what the legal concept of dignity actually consists of.

We began our inquiry with a puzzle—why, in the face of the growing resonance afforded human dignity and its protection in the international community, has the concept not increased its legal bite or even been unpacked in a satisfactory manner—

³¹⁵ See, e.g., *Winter v. D.C. Comics*, 69 P.3d 473, 476 (Cal. 2003).

and end it with the conclusion that there are formidable difficulties to accomplishing the first of those possibilities. The difficulties, however, are instructive. Confronting them results in the recognition that dignity, as a legal concept, is extremely complicated, and it is a concept unlikely to become integrated into any area of American law, such as tort law, that has a common law heritage.