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Privacy's Double Standards

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PRIVACY'S DOUBLE STANDARDS

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Abstract: Where the right to privacy exists, it should be available to all people. If not universally available, then privacy rights should be particularly accessible to marginalized individuals who are subject to greater surveillance and are less able to absorb the social costs of privacy violations. But in practice, there is evidence that people of privilege tend to fare better when they bring privacy tort claims than do non-privileged individuals. This disparity occurs despite doctrine suggesting that those who occupy prominent and public social positions are entitled to diminished privacy tort protections.

This Article unearths disparate outcomes in public disclosure tort cases and uses the unequal results as a lens to expand our understanding of how constitutional equality principles might be used to rejuvenate beleaguered privacy tort law. Scholars and the U.S. Supreme Court have long recognized that the First Amendment applies to the substance of tort law, under a theory that state action is implicated by private tort lawsuits because judges (state actors) make the substantive rule of decision and enforce the law. Under this theory, the First Amendment has been used to limit the scope of privacy and defamation torts as infringing on the privacy invader's speech rights. But, as this Article argues, if state action applies to tort law, other constitutional provisions should also bear on the substance of common law torts.

This Article highlights the selective application of constitutional law to tort law. It uses the unequal effects of prevailing public disclosure tort doctrine to explore whether constitutional equality principles can be used to reform, or nudge, the currently weak protections provided by blackletter privacy tort law. By so doing, this Article also foregrounds a doctrinally-sound basis for a broader discussion of how constitutional liberty, due process, and equality norms might influence tort law across a variety of substantive contexts.

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INTRODUCTION

If a right exists, bedrock principles of American law generally demand that the right be equally available to all.[1] A plaintiff who is black should have the same substantive law applied to her claim as a plaintiff who is

1. So unassailable is this tenet that the U.S. Supreme Court etched the phrase, "Equal Justice Under Law," on the front of the court building in the 1930s. *Visitor's Guide to the Court*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/visiting/visitorsguide-supremecourt.aspx [https://perma.cc/45N5-H346]; *see also* Caldwell v. Texas, 137 U.S. 692, 697 (1891) ("[N]o [s]tate can deprive particular persons or classes of persons of equal and impartial justice under the law. . . . And due process is so secured by laws operating on all alike . . . .").

white, with similar results for similar claims.[2] And although concrete evidence of systematic, unequal judicial results is hard to uncover,[3] it is widely acknowledged that in many contexts the law does not, in fact, operate with an even hand.[4] The white plaintiff prevails where the black plaintiff fails. Can equality, as a principle of American law, become more than hortatory? How can the law be adjusted to operate more equally, and how can those adjustments be doctrinally justified and grounded? This Article seeks to answer these questions in a particular legal context—the tort of public disclosure of private facts—and to draw lessons from those results for privacy tort reform and the constitutionalization of tort law more broadly. "Constitutionalization of tort law" refers to the injection of constitutional principles, such as equal protection, into the substance of common law causes of action.[5]

This Article's systematic review of public disclosure tort cases over the past decade reveals that, instead of being applied equally and universally,[6]

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2. *See* Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1023 (2014) (describing the ideal that the law must apply equally as "a fundamental demand of legal morality").

3. But it is not impossible. There are examples of detailed research documenting inequity within different judicial contexts and several task forces have been set up to research bias within the judicial system. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 293–96 (1987) (discussing empirical evidence that Georgia's death penalty was being applied in a racially disproportionate manner); *Gender and Racial Fairness: State Links*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/State-Links.aspx?cat=Racial Fairness Task Forces and Reports [https://perma.cc/8538-SE9N] (collecting reports documenting unfairness within various state judicial systems).

4. *See, e.g.*, MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 46 (Debbie Gershenowitz ed., 2010) (explaining that while "[g]ender and race may have vanished from the face of tort law," they play an outsized role in determining whether a plaintiff's injury will be recognized and valued); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 154–55 (2016) (outlining how the U.S. Supreme Court has interpreted the Equal Protection Clause more favorably in claims brought by same-sex couples compared to race or gender discrimination claims).

5. *See* Thomas B. Colby, *The Constitutionalization of Torts?*, 65 DEPAUL L. REV. 357, 357–58 (2016) (discussing the U.S. Supreme Court's use of constitutional due process principles to limit punitive damages).

6. A chart cataloging each of the cases is available at: https://www.law.uw.edu/wlr/online-edition/scott-skinner-thompson. For a detailed discussion of the research methodology used to locate, analyze, and code public disclosure tort cases and the limitations to that methodology, see *infra* Appendix A. By providing a detailed research methodology, this Article attempts to pick up the mantle of important critiques regarding the lack of systematic rigor and transparency in legal scholarship attempting to make claims about trends within doctrine. *See, e.g.*, William Baude, Adam S. Chilton, & Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37, 40 (2017) (stating that it is "suboptimal" that the norm of citation in legal academia does not include conducting any type of systematic review); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 63 (2008) ("[D]espite . . . innovative efforts to study legal doctrines and institutions through different lenses, legal scholars have yet to identify their own unique *empirical* methodology.").

the public disclosure tort has at times been used to great effect by people of privilege and has been largely ineffective for those in precarious social positions.[7] For example, despite doctrine suggesting that public figures surrender privacy protections because they have exposed themselves to the public,[8] publicity-hungry celebrities, such as former professional wrestler, Hulk Hogan, have succeeded in their privacy claims where others,[9] such as outed gay men and female victims of revenge porn, have frequently failed.[10]

But why use the public disclosure tort and privacy law as a means of examining whether the common law can be made more equal in practice? The public disclosure of private facts tort provides fertile ground for investigating whether the common law benefits the privileged at the expense of the marginalized because the tort, by its terms, is supposed to *disfavor* privileged plaintiffs.[11] As noted, under blackletter privacy tort law, celebrities and public figures are purportedly entitled to diminished

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7. "Privilege" can exist in many forms and people may be privileged in certain contexts, but not others. Similarly, people can be made vulnerable or marginalized in multiple, intersecting ways, but be privileged in other spaces. As used throughout, the concepts of privilege and marginalization are dynamic and may not align perfectly with the relatively narrow categories of protected classes recognized under traditional equal protection analysis. While that lack of alignment with traditional equal protection categories arguably weakens the Article's doctrinal suggestion that equal protection principles can be used to influence private tort law, that disconnect between divergent privacy tort outcomes and equal protection categories serves to underscore and shine a critical light on a weak point of equal protection doctrine generally. *Cf.* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (explaining how people may be multiply-burdened by intersecting forms of marginalization and that "the intersectional experience is greater than the sum of racism and sexism"); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2–6 (2008) (outlining the impoverished concept of equality in American law and proposing a more substantive approach that considers how vulnerability is a constant of the human condition and a product of more than the rigid identity-based typologies of equal protection law).

8. RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (AM. LAW INST. 1977).

9. Nick Madigan & Ravi Somaiya, *Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker*, N.Y. TIMES (Mar. 18, 2016), http://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html (last visited Dec. 13, 2018) (documenting that a jury awarded Hogan damages equaling $115 million in his privacy suit against Gawker: $55 million for economic harm and $60 million for emotional distress); Nick Madigan, *Jury Tacks on $25 Million to Gawker's Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), http://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html (last visited Dec. 13, 2018) [hereinafter Madigan, *Jury Tacks on $25 Million*] (noting that an additional $25 million in punitive damages was awarded to Hogan).

10. *See, e.g.*, Doe v. Peterson, 784 F. Supp. 2d 831, 834, 843 (E.D. Mich. 2011) (dismissing invasion of privacy claims in revenge porn case because pictures at issue had already been posted on another website); Bilbrey v. Myers, 91 So. 3d 887, 892 (Fla. Dist. Ct. App. 2012) (dismissing public disclosure claim by outed, allegedly-gay man because of insufficient publicity).

11. RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (AM. LAW INST. 1977).

privacy rights because of the newsworthiness of their lives—meaning that the First Amendment right to free speech protects efforts to disclose information about such privileged individuals.[12] Therefore, any disparity in results between privileged and marginalized plaintiffs is all the more suggestive that the common law—on the ground—is not operating equally.

Moreover, on a normative level, privacy law is a uniquely appropriate area for examining inequality because privacy rights are particularly important for marginalized communities. Marginalized communities are disproportionately surveilled and subject to privacy violations.[13] To the extent persons from marginalized groups experience privacy violations, they may be less able to absorb the social and economic costs that flow from the exposure of their sensitive information.[14] And privacy can serve as a liminal or transitional right until such communities gain both formal anti-discrimination protections and lived equality.[15] For example, the right to privacy over one's minority sexual orientation may be key until such time as queer identity becomes more broadly protected.[16] Privacy over intimate images shared with a lover-turned-vindictive-ex may serve important gender-equality principles.[17] But privacy law cannot begin to achieve anti-subordination goals if it is not operating equally in practice.

Beyond revealing concrete evidence of disparate outcomes, which, by itself, is important to document, this Article's results suggest that certain doctrinal reforms are necessary for privacy tort law to provide meaningful protections for all—including marginalized people. And this Article

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12. DAVID A. ELDER, PRIVACY TORTS § 3.16 (2016); *cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (concluding that the First Amendment protects speech regarding issues of public concern, including speech regarding public officials).

13. Mary A. Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 441 (2017) ("The surveillance of marginalized populations has a long and troubling history. Race, class, and gender have all helped determine who is watched in society, and the right to privacy has been unequally distributed according to the same factors."); Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1738 (2017) (documenting the different ways various marginalized populations are surveilled).

14. Michele E. Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1403–04 (2012) (describing the myriad harms that can result from privacy invasions in impoverished communities).

15. *See, e.g.*, Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 176 (2015) (arguing that informational privacy's value "is particularly significant for communities in transition").

16. Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1764 (2010) ("As long as intolerance and discrimination against LGBT individuals remain, the need for seclusion, secrecy, and selective self-disclosure will remain as well.").

17. *See* DANIELLE K. CITRON, HATE CRIMES IN CYBERSPACE 13–17 (2014) (explaining that cyber harassment, including the non-consensual disclosure of intimate images or "revenge porn," disproportionately impacts women).

represents one of the few examples of an emerging field taking a critical approach to tort theory and tort law, which is often dominated by economic approaches.[18]

Specifically, the cases explored in this Article demonstrate that two of the public disclosure tort's requirements—the complete secrecy requirement and the widespread disclosure requirement—combine to create what I call the "secrecy double standard."[19] This double standard—requiring plaintiffs to keep their information totally secret prior to bringing a claim but, at the same time, not permitting claims unless the defendant disclosed the information to a significant number of people—greatly limits public disclosure tort claims. And, in practice, there is reason to believe that the tandem effect of these two requirements disproportionately impacts marginalized communities who are forced to live in situations where they are unable to keep information private *ex ante*.[20] Moreover, the standard itself is unequally applied, with those in privileged positions (often celebrities) being permitted more leeway with their privacy claims—notwithstanding that under established doctrine, public figures are, at least in theory, entitled to less privacy.[21] In this way, the tort's unequal application among plaintiffs operates as a second double standard. Documenting these trends will be central to the deconstruction of the secrecy double standard and will aid efforts to revitalize privacy tort law.

In particular, as one of this Article's critical contributions, unearthing evidence that tort law is operating with unequal results suggests that there may be a place for constitutional equality principles to influence the shape

18. *See* CHAMALLAS & WRIGGINS, *supra* note 4, at 16 (explaining that critical legal theory has rarely been applied to tort law and that this "invisibility from tort theory creates the misimpression that left-leaning theories and discourses have no value for tort law"); *id.* at 40 ("[This] body of critical torts scholarship is still quite small . . . .").

19. *See infra* Part I. Arguably, holding plaintiffs and defendants to different standards with regard to the protection of plaintiffs' information is less of a double standard and more of a paradox, but the double standard frame helps foreground that widely divergent burdens and duties are being imposed on different parties' obligations to keep information secret.

20. *See* Neal K. Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1129 (2002) ("Privacy in America today is a luxury good that the poor often lack the resources to secure. Privacy is about controlling the boundaries of one's exposure, and if a person can be attacked by others, or if her property can be invaded, it is a fundamental violation of these boundaries."); Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 852 (2015) (documenting the lack of privacy available to those living in federal housing projects).

21. *See* ELDER, *supra* note 12, § 3.16 (describing the decreased amount of privacy protections for public figures).

and direction of common law doctrine.[22] For over fifty years,[23] the U.S. Supreme Court has accepted that tort law—even though it involves suits between *private* parties—implicates *state* action, because governments (judges) both enforce the law and separately make the common law; they establish the rules of the game.[24] Accordingly, the First Amendment applies to efforts to limit speech through tort law. Thus far, as it relates to the substantive contours of a given tort, courts and scholars have focused on the First Amendment's grant of free speech to cabin tort law efforts to regulate and penalize those who spread secrets or falsehoods.[25] But if state action attaches to tort law and the First Amendment therefore applies, other constitutional provisions ought to apply too, including equal protection principles. This Article suggests one way that constitutional equality principles could be used to invigorate the substance of privacy tort law and, more broadly, open the door to a more capacious understanding of how constitutional law and norms can influence substantive tort doctrine.[26] In other words, this Article moves beyond a

22. As will be discussed in more detail but important to emphasize at the outset, I do not envision actual lawsuits challenging the constitutionality of privacy tort law, but instead suggest that there is a doctrinal foundation for the use of constitutional norms as substantive guideposts when judges craft the common law of privacy torts, and common law torts writ large.

23. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (holding that the Constitution applies even in "a civil lawsuit between private parties" because in adjudicating the suit, "the Alabama courts have applied a state rule of law," and "[i]t matters not that that law has been applied in a civil action [or] that it is common law only"); Am. Fed'n of Labor v. Swing, 312 U.S. 321, 326 (1941) (applying constitutional guarantees of free speech to a common law regulation of speech, and holding that the Fourteenth Amendment reaches state laws even if those laws are defined by "the judicial organ of the state").

24. *See* David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 768–69 (2004) (explaining that the U.S. Supreme Court has applied the Constitution to tort law both because states create the "rule of law" and because the court applies or enforces the law, but that sometimes the Court does not distinguish between these two separate theories of state action).

25. *See, e.g.*, Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357, 365 (2011) ("Although the disclosure tort has been adopted in most states and influenced a variety of other kinds of privacy protections, it has always remained under something of a cloud because of its inherent tension with the free speech protections of the First Amendment."); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1123 (2000) (discussing how tort restrictions on the disclosure of someone's personal information could be unconstitutional under the First Amendment).

26. As discussed in Part III, courts and scholars have separately focused on the ability of constitutional due process rules to influence some of the procedural and remedial aspects of tort law—principally, whether there are due process limitations on the size of punitive damages that can be awarded in a tort suit. *See, e.g.*, Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 18–19 (1991) (suggesting that punitive damages are reviewable for their constitutionality but finding no violation under the facts of the particular case). But application of the Constitution to such procedural or remedial rules is distinct from the use of constitutional law to craft the substantive rules or causes of action, a phenomenon that so far has occurred predominately in the relatively narrow context of the First

mere normative call for "equal justice under law," by connecting the documented inequality with a doctrinally-based theory for adjusting tort law to operate more equitably.

This Article proceeds in four parts. Part I briefly outlines the blackletter requirements of the public disclosure tort, explaining how the tort's rigid requirements operate, and situating the Article within existing critiques of the public disclosure tort. Importantly, thus far academic critiques of the public disclosure tort's flimsy protections have lacked a doctrinal foothold to justify reforming the blackletter, which is where this Article intervenes.

Part II systematically reviews a decade of public disclosure tort cases, demonstrating the significant role the secrecy double standard plays in limiting tort claims, while including examples of unequal results that highlight how privileged people tend to be treated more leniently under the applicable standards when they bring public disclosure lawsuits. Many of the public disclosure tort cases demonstrate that privacy law is often applied in a way that has disparate negative impacts on certain marginalized populations and, in some instances, evidence of disparate treatment also exists.[27] This disparity creates a second double standard.

Part III uses the evidence of inequality to suggest doctrinal reforms that could help privacy torts better achieve their goals. Here, I muster evidence of disparate treatment and impact to suggest that while certain constitutional principles, such as the First Amendment, have been used to limit privacy torts,[28] other constitutional principles are also implicated and could be used to expand privacy tort protections. This study demonstrates that courts have been unprincipled and selective in which constitutional provisions they apply to the common law. This Article suggests one way for constitutional equality principles to shape privacy tort law by promoting a more nuanced, contextual approach to determining whether information was sufficiently safeguarded and whether the dissemination was sufficiently public to cause injury.[29] This approach would bear in mind the plaintiff's unique social position. For example, equal application

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Amendment and so-called speech torts (e.g., privacy, defamation, and intentional infliction of emotional distress torts).

27. *See infra* Part II.

28. *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524, 538, 541 (1989) (holding that imposing civil liability against newspaper that published name of rape victim it obtained from a publicly-released police report was inconsistent with the First Amendment); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496–97 (1975) (holding that it is unconstitutional under the First Amendment to impose civil liability on a broadcaster for publishing the name of a rape victim, which he obtained from the public record of a judicial proceeding).

29. *See generally* HELEN F. NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, PRIVACY, AND THE INTEGRITY OF SOCIAL LIFE 2–4 (2010) (discussing the importance of social context to determining whether a privacy violation has occurred).

of the widespread disclosure or publicity requirement could include consideration of the fact that non-privileged, non-famous people are less likely to have their information disclosed to the press or to the world precisely because they are not famous. But disclosure within limited confines may be no less damaging.

Finally, Part IV addresses limitations to this Article's approach, including: federalism concerns, barriers of proof associated with demonstrating unequal doctrinal treatment, and whether the constitutionalization of torts may be shortsighted or ahistorical.

I. THE SECRECY DOUBLE STANDARD

This Part provides a brief overview of the public disclosure tort's blackletter requirements, details the built-in substantive inequality of the tort, and situates this Article's analysis within existing critiques that highlight how the tort's rigid requirements prevent it from fulfilling its goals. Although existing critiques are sometimes followed by suggestions for reforming the public disclosure tort, often the reforms are not buttressed by or grounded in a doctrinal defense—that is, other than pointing to a desire for more privacy, it is unclear how desired and suggested common law reforms will overcome existing blackletter tort law. In Parts II and III, this Article goes further by providing concrete evidence that the blackletter is not providing privacy protection and by using that evidence to bolster a doctrinal, constitutional justification for adapting the common law—namely, that just as First Amendment principles have been used to limit the tort, so too can equality principles be used to bolster it.

A. The Blackletter's Built-in Inequality

The public disclosure of private information tort is one of four so-called "privacy" torts included in the Restatement of Torts.[30] Its early origins are credited to the famous law review article written by Samuel Warren and Louis Brandeis.[31] The disclosure tort, along with the other three privacy

30. RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977).

31. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–207, 213–16 (1890).

torts,[32] was further refined by William Prosser.[33] Prosser, who served as the chief reporter for the Second Restatement of Torts, included his privacy tort taxonomy in the Restatement, and it has been adopted by a majority of states.[34]

Today, the Restatement provides in Section 652D that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of [their] privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[35]

Distilled, the tort includes four elements. To succeed, a plaintiff must demonstrate that the defendant (1) gave "publicity" to (e.g., widely disseminated), (2) completely private/secret information, (3) that was "highly offensive," and (4) not of legitimate public concern.

Importantly, as the Restatement clarifies, the publicity requirement "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[36] This

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32. The other three "privacy" torts are (1) intrusion upon seclusion, (2) appropriation of name or likeness, and (3) false light. Intrusion upon seclusion creates liability against those who make highly offensive invasions into one's solitude by, for example, peering into someone's bedroom with binoculars. Appropriation occurs, for example, when the defendant uses an image of the plaintiff in an advertisement without the plaintiff's permission. The tort of false light occurs when a defendant gives publicity to information about the plaintiff so that it portrays the plaintiff in a false light and does so with knowledge that it would paint the plaintiff in such a light, similar to the tort of defamation. RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977).

33. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389–407 (1960); *see also* ELDER, *supra* note 12, § 1.1 (noting Prosser's influence on the privacy tort taxonomy). Interestingly, while not the focus of this Article, in other contexts highlighted by Eugene Volokh, tort law's reliance on the reasonable person standard of care in order to avoid negligence claims has encouraged the invasion of individual privacy through what Volokh identifies as "privacy-implicating precautions." *See* Eugene Volokh, *Tort Law vs. Privacy*, 114 COLUM. L. REV. 879, 886 (2014).

34. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487–88 (1975) (noting the impact of both the article by Warren and Brandeis and Prosser's contribution to the development of privacy tort law); AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS 29–32 (2015) (discussing Prosser's role in shaping privacy tort doctrine); Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1889–90 (2010) (noting that while he "did not create tort privacy," Prosser provided it "order and visibility" and that "[c]ourts readily embraced Prosser's formulation of privacy tort law").

35. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977) (gendered language removed).

36. *Id.* § 652D cmt. a; *see* ELDER, *supra* note 21, § 3.3 (2018) (collecting several cases where the publicity requirement has been interpreted narrowly and describing application of the rule as often "knee-jerk"); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 987 (1989) (describing the consequences of the publicity requirement as "undoubtedly harsh").

requirement is in direct contrast to the less onerous "publication" requirement of the defamation tort targeting dissemination of false (as opposed to true) information, which requires only "that the defamatory matter be communicated to someone other than the person defamed."[37] In other words, to be liable for the tort of public disclosure, the dissemination of the information must be fairly broad and widespread.

Conversely, with regard to the "private information" requirement, the Restatement provides that "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record . . . ."[38] Similarly, "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."[39] As demonstrated by this Article's survey of public disclosure tort cases outlined in Part II, this requirement is often interpreted to bar a plaintiff's claim even if the plaintiff previously shared the information at issue within extremely limited confines.[40] This requirement for complete secrecy is, at least in part, an outgrowth of the First Amendment's application to the substance of the privacy torts—the Restatement cites to the U.S. Supreme Court's decision in *Cox Broadcasting Co. v. Cohn*,[41] as requiring that "under the First Amendment there can be no recovery for disclosure of and publicity to facts that are a matter of public record."[42]

Together, these first two requirements work to form what I refer to as the "secrecy double standard." To have a claim, plaintiffs must essentially keep the information at issue totally private, whereas defendants, to be liable, need to so widely distribute the information that it becomes truly public information—known to many.[43]

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37. RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (AM. LAW INST. 1977); Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 437 (1996) (noting the different levels of publicity required for the public disclosure privacy tort and defamation, and that a small number of courts are more forgiving to plaintiffs in terms of how widespread the disclosure must be to state a claim).

38. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. LAW INST. 1977).

39. *Id.*

40. *See infra* section II.C.

41. 420 U.S. 469 (1975).

42. RESTATEMENT (SECOND) OF TORTS § 652D, Special Note on Relation of § 652D to the First Amendment to the Constitution (AM. LAW INST. 1977) (citing *Cox Broadcasting*, 420 U.S. at 496–97).

43. Mintz, *supra* note 37, at 441 ("[D]efendants may disclose a private fact about a plaintiff to two persons without invading that plaintiff's privacy at all, but plaintiffs who expose the same fact to the same two persons 'in public' have destroyed their privacy interest in that fact entirely.").

As to the highly offensive requirement, the Restatement provides that offensiveness is to be judged relative "to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens."[44] Somewhat ironically given its requirement for complete secrecy under the "private information" requirement, the Restatement notes that "[c]omplete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part."[45] The Restatement further emphasizes that, "[t]hus [plaintiffs] must expect the more or less casual observation of [their] neighbors as to what [they do], and that [the] comings and goings and [their] ordinary daily activities, will be described in the press as a matter of casual interest to others."[46] So, while the Restatement recognizes that complete secrecy is impossible, it nevertheless imposes Herculean secrecy requirements on plaintiffs.[47]

Finally, even if the information is highly offensive, a plaintiff cannot prevail if it is a matter of legitimate public concern.[48] Here, the Restatement provides a circular definition of the scope of public concern: noting that "news" items are of legitimate public concern, and that "[t]o a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm."[49] As to the "legitimate public concern" and the "private information" requirements, the Restatement largely provides that public figures are entitled to greatly diminished

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44. RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (AM. LAW INST. 1977).

45. *Id.*

46. *Id.*

47. *Cf.* Andrew E. Taslitz, *Privacy as Struggle*, 44 SAN DIEGO L. REV. 501, 505 (2007) (critiquing privacy jurisprudence in the Fourth Amendment context because "the Court's requirement of superhuman individual efforts to attain secrecy, that is, totally veiling one's activities from the state's prying eyes as an essential prerequisite to the existence of privacy").

48. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (AM. LAW INST. 1977).

49. *Id.* § 652D cmt. g; *see also* GAJDA, *supra* note 34, at 226 ("News, at least as it currently stands in a legal sense, is what newspeople say it is . . . ."); Patrick J. McNulty, *The Public Disclosure of Private Facts: There Is Life After Florida Star*, 50 DRAKE L. REV. 93, 158 (2001) ("Courts have been loathe . . . to second-guess the media's judgment on what constitutes news."); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1343 (2010) ("American courts have tended to defer to the judgment of the press about what constitutes information in which there is a legitimate public interest."); Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA. L. REV. 289, 302 (2002) ("[T]he mere fact that the material *has* appeared in a media publication often seems to go a long way, if not all the way, in establishing that the material is newsworthy."); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren & Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 303 (1983) (explaining that many courts "have ultimately deferred to the media's judgment of what is and is not newsworthy" which has had "the practical effect of demolishing the tort" in some jurisdictions).

privacy. Those "who voluntarily place[] [themselves] in the public eye," including "by engaging in public activities, or by assuming a prominent role in institutions or activities having general . . . public interest, or by submitting [themselves or their] work for public judgment, cannot complain when [they are] given publicity that [they have] sought, even though it may be unfavorable."[50]

B. Existing Critiques Fail to Justify Privacy Tort Reform

Other scholars have also observed that privacy tort law suffers from major shortcomings. Indeed, some have suggested that the public disclosure tort is more or less dead.[51] Another group, while less pessimistic in their analysis, has nevertheless documented the tort's limited vitality.[52] While these critiques sometimes accompany suggestions for reforming privacy tort law, thus far, the suggestions have been largely result-oriented and have neglected to provide a rationale based in existing law for those modifications.[53] While I share their normative impulse that more robust privacy tort protections are useful and

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50. RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (AM. LAW INST. 1977) (gendered language removed).

51. *See, e.g.*, Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171, 172 (2010) ("[F]or all intents and purposes, the public disclosure of private facts tort . . . is generally regarded as 'dead.'"); Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 328 (1966) (arguing that the public disclosure tort should not be resuscitated because it is petty and lacks doctrinal coherence); McNulty, *supra* note 49, at 129 (noting that the U.S. Supreme Court's *Florida Star* decision "seems to sound the death knell for the public disclosure tort"); Mintz, *supra* note 37, at 426 ("Whether with dire warning, hand-wringing lament, or righteous affirmation, one third of the Supreme Court and most of privacy academia have pronounced dead the more than century-old tort of public disclosure of private facts."); Zimmerman, *supra* note 49, at 363–65 (suggesting that efforts to revive the public disclosure tort be laid to rest and, instead, effort be focused on developing statutory protections against electronic eavesdropping and the development of information data banks, among other initiatives).

52. Allen, *supra* note 16, at 1711 ("[T]he theoretically promising invasion of privacy torts have too often been practical disappointments for LGBT plaintiffs . . . ." (emphasis omitted)); Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 657 (2007) ("Tort law and statutes must do a better job of providing for liability for those who reveal deeply personal information about individuals."); Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029, 2043 (2001) (arguing that while it is "an overstatement to say that the common law is incapable of change," it is nonetheless "becoming increasingly clear that the common law invasion of privacy torts will not help to contain the destruction of informational privacy"); Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437, 451 (1992) ("[I]t is not true that . . . legal remedies for the publication of true information about individuals are almost nonexistent and probably unconstitutional."); Smolla, *supra* note 49, at 296 (noting that while the publication tort is the quintessential privacy tort, it has been severely weakened); Richards, *supra* note 25, at 365 ("Although liability in privacy cases appears to be rare, . . . the four privacy torts remain alive . . . .").

53. *See infra* notes 55–70.

important,[54] in order for the common law to actually adapt, courts must be pointed toward a doctrinal basis for doing so.

For example, Daniel Solove and Neil Richards have argued that privacy tort law has been severely limited by Prosser's formulation, and that we must move beyond his conception of privacy torts.[55] In particular, they lament that the rigid four categories of privacy torts prevent tort law from adapting "to new privacy problems such as the extensive collection, use, and disclosure of personal information by businesses," and that privacy torts "have struggled in recognizing more nuanced understandings of privacy in terms of levels of accessibility of information."[56] Among other suggestions for improving privacy tort law, Solove and Richards rightly recommend that tort law better appreciate the "gradations between purely public and purely private."[57] Relatedly, Lior Strahilevitz has persuasively suggested that social networks theory could be used to reorient the disclosure tort away from the prevailing vague and inconsistent reasonable expectation of privacy inquiry towards an empirical one centered on whether "the defendant's actions materially affect[ed] the extent of subsequent disclosure."[58] In other words, if there was a pre-existing *ex ante* likelihood that the information at issue would be spread beyond the plaintiff's existing social network when the plaintiff first disclosed the information, then the defendant's disclosure of the information beyond that network would be less likely to be actionable.[59]

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54. In contrast to the several scholars who have noted the limited viability of the public disclosure tort, Amy Gajda has recently argued that "courts are showing a new willingness to limit public disclosure of truthful information." GAJDA, *supra* note 34, at 3. Gajda goes so far as to suggest that privacy rights are threatening the First Amendment's guarantee of freedom of the press. *Id.* at 4. As this Article suggests, Gajda's claim may hold true for plaintiffs in privileged positions, but it is less clear that that the public disclosure tort is operating with great effect generally.

55. Richards & Solove, *supra* note 34, at 1891.

56. *Id.* at 1918, 1920; *see also* Allen, *supra* note 16, at 1749 (observing how the narrowly constructed "publication" and "private fact" requirements have often stymied LGBT plaintiffs, and that if the tort is to provide robust protection for LGBT people, courts will need to rethink the degree to which they penalize plaintiffs who selectively disclose their minority sexual orientation or transgender status); Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1590 (1995) (arguing that, as currently constructed, the public disclosure tort provides little refuge to those who are victims of "outings" of their minority sexual orientation and, as part of her solution, suggesting courts recognize that private information "embraces much more than pure secrecy" and that a "contrary view actually perpetuates the closet as the proper milieu for lesbians and gay men").

57. Richards & Solove, *supra* note 34, at 1922.

58. Lior J. Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 975 (2005).

59. *Id.*

Danielle Citron has also astutely observed that, in its current form, privacy tort law is ill-suited to deal with today's modern technologies.[60] Specifically, she has argued that privacy torts could be reinvigorated, in part, with a returned focus to Warren and Brandeis's concept of the "right to be left alone"—that is, she advocates a more expansive understanding of the harms at stake in privacy violations.[61] And while Citron does a laudable job of mustering real-world evidence to show how technology magnifies the harm of privacy disclosures,[62] we still lack a doctrinal, authoritative justification for a broader conception of harm, other than the Warren and Brandeis article.[63]

Jonathan Mintz, too, has noted that courts have imposed severe limitations on the public disclosure tort, but suggests that the tort will remain viable so long as the information at issue has resided in "a zone of fair intimate disclosure" and that people ought to be able to transmit information within this zone "without losing their right to protect that information's private status."[64] But Mintz defines the protected zone he advocates with reference to the Fourth Amendment reasonable expectation of privacy test,[65] which itself remains a very weak and subjective tool for privacy protection and is still beholden to the

60. Danielle K. Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1809 (2010); *see also* Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1291 (2000) (observing that the privacy torts are too narrow to cope with modern data privacy concerns).

61. Citron, *supra* note 60, at 1851 ("Perhaps courts could avoid rewriting the standard of proof required for privacy torts by considering the Internet's magnifying and distorting impact . . . . Moreover, courts could apply the four privacy torts to privacy harms caused by newer technologies with an eye toward the goals sought by Warren and Brandeis.").

62. *Id.* at 1811–18.

63. Citron also raises the possibility that "mainstream" torts (that is, non-privacy torts) might be used to protect privacy. For example, she suggests that the tort of enablement of criminal conduct might be used to encourage website operators to remove content that might put individuals in danger, but she recognizes that application of the tort may run into barriers, such as section 230(c)(1) of the Communications Decency Act, which immunizes website operators from liability for the posts put up on their websites by third parties. *Id.* at 1837–42.

64. Mintz, *supra* note 37, at 461.

65. *Id.* at 461 n.232.

paralyzing third-party doctrine,[66] as Fourth Amendment jurisprudence lays bare.[67]

Finally, a number of scholars have argued that if plaintiffs are able to somehow link their disclosure claim to an intrusion claim and show that improper collection followed by improper dissemination occurred, they are more likely to succeed.[68] For example, Rodney Smolla has suggested that if plaintiffs are able to show that both intrusion and disclosure interests are implicated, their privacy claims will be stronger.[69] And, indeed, the Restatement itself seems to recognize that many privacy invasions will involve both intrusion upon seclusion and dissemination.[70]

These critiques—and others[71]—are all on point. They help us understand how privacy doctrine has failed to keep up with technological

66. The third-party doctrine provides that, generally, no reasonable expectation of privacy exists in information voluntarily turned over to a third-party. United States v. Miller, 425 U.S. 435 (1976). While the U.S. Supreme Court recently imposed a modest limitation on the doctrine, concluding that a person's cell-site location information was not voluntarily shared and therefore subject to collection without a warrant, the doctrine is far from being a dead letter. Carpenter v. United States, 585 U.S. __, 138 S. Ct. 2206 (2018).

67. *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

68. *See* Allen, *supra* note 16, at 1715 (arguing that in the context of LGBT plaintiffs, many plaintiffs assert more than one of the four privacy torts, which challenges the integrity and usefulness of maintaining formal categories); Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet*, 49 SANTA CLARA L. REV. 313, 314–15 (2009) (proposing a tort that combines elements of the disclosure and intrusion torts to combat recording of public activity); Richards, *The Limits of Tort Privacy*, *supra* note 25, at 383–84 (suggesting that a hybrid intrusion/disclosure tort may help resolve some of the First Amendment problems with the disclosure tort).

69. *See* Smolla, *supra* note 49, at 321–22. Relatedly, Jane Bambauer has discussed how the intrusion upon seclusion tort has failed to live up to its promise, but argued that, by focusing on improper observation of data, it could be retooled to provide meaningful privacy protections against information collection without unduly burdening innovation. Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 209 (2012); *see also* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1537 (2000) (discussing the intrusion tort's limitations).

70. *See* RESTATEMENT (SECOND) OF TORTS § 652A cmt. d, illus. 1 (AM. LAW INST. 1977); ELDER, *supra* note 21, § 1.1 (2018) ("The Restatement (Second) of Torts recognizes that it is not uncommon for two or more of the subdivisions to concurrently come into play in a fact scenario and provides an example . . . ."); *cf.* Lior J. Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2008 (2010) (explaining that, as conceived by Warren and Brandeis, the intrusion and disclosure torts were not separate and arguing that they ought to be recombined).

71. Feminist scholars have also observed the potential for privacy law, including privacy torts, to reinforce stereotypical conceptions of female modesty that work to subjugate sexual freedom and autonomy. *See, e.g.*, Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 459 (1990) ("Women appear in the Warren and Brandeis article as seduced wives and daughters."); Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1284–90 (2003) (critiquing privacy norms that operate to exclude women from certain jobs notwithstanding Title VII's prohibition on sex discrimination); Catherine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281, 1286 (1991) (observing some of the

changes and help us appreciate the importance of robust tort privacy protections, while suggesting some useful doctrinal reforms. In the next two sections, this Article enhances these critiques by providing meaningful evidence of the current doctrinal shortcomings, efficiently framing those shortcomings in terms of the "secrecy double standard," and then pointing to a doctrinal basis for altering the current blackletter law: constitutional equality principles.

II. THE PUBLIC DISCLOSURE TORT IN PRACTICE: A SECOND DOUBLE STANDARD

In practice, the requirement that plaintiffs keep information at issue completely secret and that defendants widely disseminate the information (together, the "secrecy double standard") are sometimes applied differently to different classes of plaintiffs and also have a disparate impact on certain marginalized communities.[72] In other words, there is evidence that the secrecy double standard itself is enforced inconsistently among different kinds of plaintiffs, creating a second double standard. This Part discusses the results of a systematic review of public disclosure tort cases over a decade-long period. This review suggests that the tort's requirements are, at times, applied inconsistently to different kinds of plaintiffs, with plaintiffs in privileged social positions receiving preferential treatment and outcomes compared to those in non-privileged positions.

A. Overview of Systematic Review

For starters, it is important to understand how unlikely plaintiffs are to succeed in public disclosure tort lawsuits and how limiting the widespread disclosure and complete secrecy requirements are in practice.[73] A national

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ways in which privacy can veil domestic abuse of women). As discussed in Part III, it is my hope that importing constitutional equality principles can help rebuff some of the stereotyped norms Anita Allen and others document.

72. Others have documented privacy double standards in other contexts. *See, e.g.*, Teneille R. Brown, *Double Helix, Double Standards: Private Matters and Public People*, 11 J. HEALTH CARE L. & POL'Y 295, 298–99 (2008) (observing that while several statutes demand intensive medical data from potential federal employees, the privacy of presidential candidates' health information is largely safeguarded, with the public relying largely on anecdotal data to judge candidates' health).

73. It is necessary to underscore the importance of documenting how the public disclosure tort is operating on the ground. As Amy Gajda has pointed out, "despite an often Supreme Court-centric focus to First Amendment-related jurisprudence [and, I would add, most jurisprudence], it is also important to recognize what is happening below, where even trial courts can have a significant impact" on doctrine and the trajectory of a case given the incentive to settle after an unfavorable decision. GAJDA, *supra* note 34, at 51.

review of both state and federal public disclosure tort cases over a roughly decade-long period from 2006 to 2016 highlights the rigor of the current tort requirements.[74] In total, decisions relating to dispositive motions (or those that functioned as effectively dispositive motions) occurred in 155 public disclosure tort cases, with 157 separate case outcomes.[75] In 129 of those instances, a judgment was entered against the party bringing the public disclosure claim.[76] In other words, a privacy claim only survived twenty-eight times, or roughly 18%.[77] As the below chart illustrates, the two principal reasons courts rejected privacy claims were (1) the information at issue was not disclosed widely enough by the defendant and (2) the plaintiff had not kept the information sufficiently secret in advance. More important than the specific figures (which are subject to some variation based on how one categorized borderline cases) is the general theme that the secrecy double standard operated to bar the lion's share of the public disclosure cases. The chart below includes the reasons for decision in each of these 155 cases.[78]

Table 1:
Public Disclosure Tort Decisions—2006–2016

Reason for Judgment	No. of Judgments	Percent of Case Dismissals	Percent of All Case Outcomes
Not Widely Disclosed	39	30%	25%
Already Public/Not Completely Secret	37	29%	24%
Newsworthy	23	18%	15%
Not Offensive	15	12%	10%

74. As noted previously, the methodology for locating, analyzing, and coding these cases is outlined in Appendix A, *infra*. The cases themselves are catalogued in a chart, available at: https://www.law.uw.edu/wlr/online-edition/scott-skinner-thompson. The most recent decade preceding the date of the search (Summer 2016) was chosen to give a contemporary understanding of how the tort was operating and, at the same time, provide a relatively broad window of time into the tort's functioning, capturing a meaningful number of cases.

75. In two cases, there were different outcomes as to different parties, bringing the total number of case outcomes to 157.

76. Occasionally, the public disclosure claim was brought by the defendant as a counterclaim.

77. Of course, this does not mean the privacy claimant ultimately prevailed, only that they survived the dispositive motion with the ultimate merits of their claim to be determined at subsequent stages of the litigation.

78. Note that the total number of reasons for judgment accounted for in Table 1 amounts to more than the 157 outcomes because, in several cases, the court gave two or more justifications for granting judgment against the privacy claimant.

Pleading/Insufficient Facts	26	20%	17%
Litigation Privilege	8	6%	5%
Other	21	16%	13%
Survived Motion	28	N/A	18%
Total Case Outcomes	157	N/A	100%

A closer, qualitative examination of the cases further highlights the limiting role of both the widespread publication and complete secrecy requirements and the degree to which they are applied unequally among different kinds of plaintiffs.[79]

B. The Widespread Disclosure Requirement Prevents Claims by the Marginalized[80]

The widespread disclosure requirement has sometimes been employed in a draconian (and arbitrary) fashion against plaintiffs from various marginalized communities, stopping claims that raise serious privacy concerns. For example, in *Bilbrey v. Myers*,[81] a Florida appellate court (with little explanation) affirmed dismissal for insufficient publicity where the defendant, plaintiff's former pastor, allegedly broadcast that plaintiff was gay to plaintiff's church, including to plaintiff's fiancée's father.[82] The defendant also allegedly told the plaintiff's new pastor that the plaintiff was gay after the plaintiff had moved away and called off his wedding.[83]

Similarly, in *Beyene v. Hilton Hotels Corp.*,[84] summary judgment was granted against plaintiff, a room service food server and native of Ethiopia, where it was alleged that his employer, Hilton Hotels, had disclosed to two or three of plaintiff's coworkers that the plaintiff had

79. Often, the court decisions did not discuss plaintiffs' and defendants' demographic information (e.g., their race, age, etc.). The lack of discussion regarding demographic factors prevents statistically-based claims (for example, that white plaintiffs tended to fare better than people of color). But, as will be highlighted, qualitative comparative evidence suggests that people of privilege—broadly defined—tend to fare better in public disclosure suits.

80. Importantly, the descriptions of the cases that follow are taken from the court opinions (with the occasional media report), which often evaluate mere allegations, rather than established evidence. The author, of course, is not suggesting that any of the allegations discussed are, in fact, true.

81. 91 So. 3d 887 (Fla. Dist. Ct. App. 2012).

82. *Id.* at 892.

83. *Id.* at 888–89. A defamation claim, presumably based on the same conduct, was not dismissed, highlighting the more onerous standard imposed in public disclosure cases. *Id.* at 892.

84. 815 F. Supp. 2d 235 (D.D.C. 2011).

received medical injections from a particular doctor.[85] The court ruled that the disclosure was not widespread enough to survive summary judgment.[86] Likewise, in *Williams v. Wicomico County Board of Education*,[87] the court dismissed a public disclosure claim brought by an African-American special education teacher against his former employers because the disclosure was not made to the public, but instead, only to various individuals at plaintiff's prospective places of employment.[88] The information disclosed related to an altercation plaintiff had with a student. The plaintiff was acquitted of wrongdoing and the criminal charge ordered expunged.[89] Notwithstanding that the disclosures by defendants were allegedly preventing plaintiff from obtaining new employment,[90] the claim was dismissed for lack of sufficient publicity. And in *DeBlasio v. Pignoli*,[91] a Pennsylvania appeals court held that there was inadequate disclosure to state a claim where surveillance cameras of a town's holding cells allegedly broadcast video of the cells into the mayor's home, where the mayor could monitor the detainees.

There are several other examples of the widespread publication requirement being imposed strictly against individuals in precarious social positions.[92] The widespread disclosure requirement is strictly imposed

85. *Id.* at 254.

86. *Id.*

87. 836 F. Supp. 2d 387 (D. Md. 2011).

88. *Id.* at 396–98.

89. *Id.* at 390.

90. *Id.*

91. 918 A.2d 822, 824 n.3 (Pa. Commw. Ct. 2007).

92. *See, e.g.*, Edwards v. Nat'l Vision, Inc., 946 F. Supp. 2d 1153, 1179 (N.D. Ala. 2013), *aff'd*, 568 Fed. App'x 854 (11th Cir. 2014) (finding insufficient publicity where information that plaintiff, who was black, allegedly took anger management classes was not spread outside of employment confines); Opperman v. Path, 87 F. Supp. 3d 1018, 1062 (N.D. Cal. 2014) (finding allegation that defendants transmitted plaintiffs' cell phone address books in unencrypted manner over public WiFi making it available to third parties and service providers insufficient to satisfy publicity requirement); Armstrong v. Thompson, 80 A.3d 177, 189 (D.C. 2013) (holding that publicity element was not satisfied where defendant sent a "handful of letters [six] to a handful of employees at a single agency" informing the agency that plaintiff was under internal investigation, preventing plaintiff from obtaining employment at the agency); Galaria v. Nationwide Mut. Ins., 998 F. Supp. 2d 646, 662 (S.D. Ohio 2014), *rev'd on other grounds*, 663 Fed. App'x 384 (6th Cir. 2016) (finding allegation that defendant permitted hackers to obtain plaintiff's personal identifying information insufficient to satisfy publicity requirement because disclosure was not made to the general public); Gonnering v. Blue Cross & Blue Shield, 420 F. Supp. 2d 660, 667 (W.D. Tex. 2006) (finding that alleged disclosure of plaintiff's gay sexual orientation between recruiter and potential employer was insufficiently widespread to state a claim for invasion of privacy); Purcell v. Am. Legion, 44 F. Supp. 3d 1051, 1061 (E.D. Wash. 2014) (finding disclosure of plaintiff's health information to two unprivileged co-workers insufficient to satisfy publicity requirement); Mayor & City Council of Richmond Hill v. Maia, 336 Ga. App. 555, 567–68 (2016), *rev'd on other grounds*, City of Richmond Hill v. Maia, 800

against these unprivileged persons notwithstanding the fact that if the person is not a public figure, his or her information is less likely to be of public interest and therefore disseminated to "the world." Nonetheless, disclosure of that information within certain confines (for example, a person's church, a person's place of employment, or someone else's home), may be no less damaging to the individual plaintiff who may lack the structural safeguards of privileged public figures to deal with and cope from the fallout from the disclosure.

C. The Complete Secrecy Requirement Prevents Claims by the Marginalized

Likewise, the requirement that the information publicized be completely secret has also been routinely enforced, even in egregious situations.[93] For example, in *Doe v. Peterson*,[94] plaintiff sued operators of a nude photograph website, where nude photos of plaintiff taken when she was a teenager and sent privately to her then-boyfriend were posted. The court dismissed plaintiff's public disclosure claim, reasoning that because

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S.E.2d 573 (Ga. 2017) (alleged disclosure by police officer of photographs documenting injuries sustained by teenage girl who attempted suicide to his own daughter, who attended school with the teen who had attempted suicide, deemed insufficient publicity notwithstanding that there was evidence suggesting that the photos were subsequently further shown among students at the school); Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 397 (S.C. Ct. App. 2008) (holding that alleged disclosure of plaintiff's hepatitis to two individuals did not constitute "publicity" because the medical condition was not distributed to the "public at large"); Sorensen v. Barbuto, 143 P.3d 295, 301 (Utah Ct. App. 2006), *aff'd and remanded*, 177 P.3d 614 (Utah 2008) (affirming dismissal of privacy suit against plaintiff's former doctor who allegedly disclosed information regarding plaintiff's medical condition because disclosure was to a limited number of people, but permitting duty of confidentiality claim to proceed); *cf.* Cordts v. Chi. Tribune Co., 860 N.E.2d 444, 453 (Ill. App. Ct. 2006) (affirming dismissal of public disclosure tort where the disability claim evaluator of plaintiff's employer disclosed plaintiff's mental health information to plaintiff's ex-wife on theory that ex-wife had "natural and proper interest" in the information given its potential relevance to plaintiff's ability to pay support for their children as required by marital settlement agreement). *But see* Hudson v. Dr. Michael J. O'Connell's Pain Care Ctr., Inc., 822 F. Supp. 2d 84, 97 (D.N.H. 2011) (finding sufficient evidence of public disclosure to deny motion to dismiss where defendant employers allegedly made plaintiff's medical information, including information regarding her herpes infection, available to fellow colleagues at medical center where plaintiff was also a patient, and colleagues talked about her infection).

93. Of course, that is not to say that the complete secrecy requirement has always been strictly applied, even as to plaintiffs from marginalized communities. As Lior Strahilevitz documented over a decade ago in older cases, there are examples of marginalized people prevailing in their disclosure claims notwithstanding that the information at issue had been disclosed in limited circles prior to the defendant's further dissemination. Strahilevitz, *supra* note 58, at 921 n.4 (discussing *Multimedia WMAZ, Inc. v. Kubach*, 443 SE.2d 491, 494 (Ga. Ct. App. 1994), which held that plaintiff's previous disclosure of his HIV to allegedly sixty people did not render the information public as a matter of law, foreclosing his tort claim).

94. 784 F. Supp. 2d 831, 834–35 (E.D. Mich. 2011).

the photos had been previously posted by a different website, they were not private facts.[95] Similarly, in *Lentz v. City of Cleveland*,[96] the court held that the plaintiff police officer could not successfully bring a public disclosure claim pertaining to publication of his mental health history when, during the lawsuit, evidence was unearthed indicating that four years prior to the publication, the plaintiff's mental health information had been discussed at a public Civil Service Commission hearing. More precisely, the disclosure was excused because, after the alleged disclosure, evidence was found indicating that the information had previously been disclosed.[97] These examples, too, are part of a long list.[98]

95. *Id.* at 842.

96. No. 1:04CV0669, 2006 WL 1489379, at *4 (N.D. Ohio May 22, 2006).

97. *Id.* at *3.

98. *See* Adamski v. Johnson, No. 7824 CV 2005, 2006 WL 4129308, at *77 (Pa. Com. Pl. Mar. 2, 2006) (dismissing privacy claim because plaintiff told some of her coworkers about medical surgery she claimed was private and that her employer also allegedly disclosed); Holloway v. Am. Media, Inc., 947 F. Supp. 2d 1252, 1269 (N.D. Ala. 2013) (finding no tort violation where tabloid purported to describe death/burial of child where mother had previously contacted media to put pressure on authorities to find her missing child); Buzayan v. City of Davis, 927 F. Supp. 2d 893, 902–06 (E.D. Cal. 2013) (finding no privacy violation where defendant prosecutor disclosed audiotape interview with Muslim teenager to newspaper after charges against the teen had been dropped because the teen's family had also disclosed information about the incident to the media, including copies of the audiotape); Purzel Video GmbH v. Smoak, 11 F. Supp. 3d 1020, 1028 (D. Colo. 2014) (finding information about files shared through BitTorrent file sharing protocol are not protected by privacy tort because the files were shared and therefore public); Budik v. Howard Univ. Hosp., 986 F. Supp. 2d 1, 12 (D.D.C. 2013) (finding no privacy violation where defendant allegedly disclosed photograph of plaintiff because, as a doctor at a university hospital, the information was purportedly already public); McMann v. Doe, 460 F. Supp. 2d 259, 268–69 (D. Mass. 2006) (no privacy violation when picture of plaintiff was allegedly used on surreptitiously created website whose domain name was plaintiff's name and website said that plaintiff "turned lives upside down," among other comments); Barnhart v. Paisano Publ'ns, LLC, 457 F. Supp. 2d 590, 593 (D. Md. 2006) (granting summary judgment in favor of defendant magazine publisher that published photo of plaintiff, a retail clerk, taken when she briefly exposed her torso at a public pig roast, notwithstanding that she allegedly lifted her shirt within a group of about only ten people who she knew and trusted); Brown v. CVS Pharmacy, L.L.C., 982 F. Supp. 2d 793, 807–08 (M.D. Tenn. 2013) (barring suit against pharmacy for disclosing to patients that physician was under investigation because physician filed suit challenging the investigation, making it public); Moreno v. Hanford Sentinel, Inc., 172 Cal. App. 4th 1125, 1130 (2009) (finding no privacy violation where high school principal allegedly submitted MySpace posting of a college student to the town newspaper, which republished the posting with the student's full name, because student posted the writing on her public MySpace page for six days); Dumas v. Koebel, 841 N.W.2d 319, 325–26 (Wis. Ct. App. 2013) (finding no privacy violation where TV station disclosed on air that plaintiff bus driver had a nearly decade old conviction for sex work because information was in the public record); Keller v. Patterson, 819 N.W.2d 841, 846 (Wis. Ct. App. 2012) (finding no privacy violation where defendant posted fliers indicating that sex offender was living at particular house because information was already in public record). There are also examples where marginalized individuals' intrusion upon seclusion claims have been dismissed pursuant to stringent understandings of that tort's requirements. *See, e.g.*, Horgan v. Simmons, 704 F. Supp. 2d 814, 821–22 (N.D. Ill. 2010) (finding that employer's repeated insistence that plaintiff

Indeed, they arguably represent an even stricter application of the complete secrecy requirement than that imposed in one of the most highly criticized public disclosure cases—the case of Oliver Sipple.[99] Sipple had intervened to help prevent a would-be assassin from shooting then-President Gerald Ford.[100] In the aftermath of the attempted assassination, a newspaper reporting on the event suggested that Sipple was gay, and that assertion was further reported by other newspapers.[101] Sipple sued for public disclosure of private facts, but the Court of Appeal of California affirmed the grant of summary judgment in the defendants' favor. The court concluded that even though Sipple's family members learned of his sexual orientation for the first time because of the publication, his orientation was known to "hundreds" of others through, among other activities, his participation in gay parades, because he "spent a lot of time in [the] 'Tenderloin' and [the] 'Castro,'" and because of "his friendship with Harvey Milk, another prominent gay."[102] The *Sipple* decision, while ignoring that information such as one's minority sexual orientation can be extremely sensitive and damaging depending on the context in which it is shared, is in one sense less drastic than the cases discussed above because Sipple's orientation was, purportedly, known to "hundreds."[103]

These examples also underscore that for many living at the margins of society who are subjected to high levels of government and private surveillance and transparent living quarters, keeping any information—much less sensitive information—completely secret as the tort purports to require is a practical impossibility.[104] Indeed, sharing the stigmatized

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disclose that he was ill, resulting in disclosure of plaintiff's HIV positive status, was insufficient prying to constitute an intrusion upon seclusion).

99. *See generally* Sipple v. Chronicle Publ'g Co., 154 Cal. App. 3d 1040 (1984).

100. *Id.* at 1043.

101. *Id.* at 1044.

102. *Id.* at 1044, 1047.

103. *Id.* at 1047.

104. *See, e.g.*, United States v. Pineda-Morena, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting) (observing that people who are impoverished live in conditions where they are less able to construct physical barriers to maintain privacy); KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 87 (2017) (describing extensive policing of the poor); JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 30 (William M. O'Barr & John M. Conley eds., 2001) (documenting the widespread and sophisticated administrative welfare surveillance that permits the state to have a deep and broad view of the lives of those receiving state assistance); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 122–23 (2011) (documenting the "devastating absence of privacy" for "marginalized, indigent women who must turn to the state for assistance if they are to achieve healthy pregnancies and infants" and arguing that "wealth is the condition of possibility for the exercise and enjoyment of the right" to privacy); Franks, *supra* note 13, at 428 (observing that surveillance of African-Americans, women, and the poor is widespread); Gilman, *supra* note 14, at 1403–04 (outlining privacy violations of

information within limited confines may be necessary to mental health, identity exploration/play, and existence, as even the U.S. Supreme Court has recognized.[105] Yet, the complete secrecy requirement punishes those who do share their intimate information within limited confines.

D. The Privileged Prevail

In contrast to these cases stand those like Hulk Hogan's suit against Gawker. In the Hogan suit, former professional wrestler Hulk Hogan, whose real name is Terry Bollea, sued Gawker Media seeking damages from Gawker's posting of excerpts of a sex tape between Bollea and a woman named Heather Clem with whom he had an affair in 2006, and an injunction barring Gawker from further publishing the video and related report.[106] Excerpts of the video were posted by Gawker in October 2012, though media reports regarding the tape's existence, some including still shots from the tape, pre-dated Gawker's disclosure.[107] Bollea filed suit against Gawker later that month in federal court, but after his request for an injunction was denied, he voluntarily dismissed the federal suit and sued in Florida state court.[108] There, trial court Judge Pamela Campbell initially granted Bollea's injunction request, but the court of appeals reversed the imposition of an injunction.[109] On remand, Judge Campbell denied a motion to dismiss the case and the case proceeded to trial[110] where a jury awarded Bollea a total of $140 million in damages, consisting

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impoverished communities); Kami Simmons & Karen E.C. Levy, *The Contexts of Control: Information, Power, and Truck-Driving Work*, 31 INFO. SOC. 160 (2015) (documenting industry surveillance of blue-collar truck drivers); Christopher Slobogin, *The Poverty Exception to The Fourth Amendment*, 55 FLA. L. REV. 391, 400 (2003) ("Several Court decisions define expectations of privacy in a way that makes people who are less well-off more likely to experience warrantless, suspicionless government intrusions."); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267 (1999) ("[P]rivacy can be bought, so that people who have money have more of it than people who don't."); Swan, *supra* note 20, at 828, 853 (highlighting privacy incursions authorized by "home rule ordinances" that impose vicarious liability on household members for the actions of others, which in turn encourage third-party surveillance and monitoring of people's behavior).

105. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that criminalizing same-sex sexual conduct demeaned the "existence" of homosexuals, implicitly rejecting a distinction between one's identity as homosexual and acting on that sexuality).

106. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1198 (Fla. Dist. Ct. App. 2014) (describing allegations).

107. *Id.* at 1201.

108. *Id.* at 1199 (outlining procedural history).

109. *Id.* at 1204.

110. Bollea v. Gawker Media, LLC, No. 12012447-CI-011, 2016 WL 1270387, at *1 (Fla. Cir. Ct. Jan. 28, 2016).

of $55 million in compensatory damages, $60 million for emotional distress, and $25 million in punitive damages.[111] Gawker appealed, and the case ultimately settled for $31 million.[112]

If the public disclosure tort's requirement that the information at issue be completely secret had been applied as it was in the above cases involving "ordinary" people, there seems little question that Bollea's suit should have been dismissed. Bollea built his career as an ostentatious public persona and he had not infrequently discussed his sex life with media outlets, including openly discussing another affair in his 2009 autobiography.[113] Bollea and his family also had their own reality television show from 2005 to 2007.[114] Beyond being generally cavalier about his personal life, Bollea had specifically discussed an encounter with Clem on The Howard Stern Show and TMZ.[115]

Moreover, stills from the video were not originally posted by Gawker, but were evidently published by other media outlets prior to Gawker's posting in October 2012.[116] Indeed, in reversing the grant of the initial injunction by Judge Campbell, the Florida Court of Appeals specifically noted that, based on Bollea's own conduct, it was "hard-pressed to believe that Mr. Bollea truly desired the affair and Sex Tape to remain private or to otherwise be 'swept under the rug.'"[117] Nevertheless, on remand, Judge Campbell permitted the case to go to trial and the jury found in favor of Bollea.[118]

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111. *See* Madigan, *Jury Tacks on $25 Million*, *supra* note 9. Note that the damages awarded may not have been attributable solely to the public disclosure claim, because other claims including an intrusion upon seclusion claim, were submitted to the jury. Jury Instructions, Bollea v. Gawker Media, LLC, No. 12012447CI-001 (Fla. Cir. Ct. Mar. 17, 2016), https://www.scribd.com/doc/305234461/Hulk-Hogan-vs-Gawker-civil-trial-jury-instructions [https://perma.cc/JPU9-EJX9].

112. Sydney Ember, *Gawker and Hulk Hogan Reach $31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), http://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html?_r=0 (last visited Dec. 13, 2018). Interestingly, Bollea's lawsuit was funded by Silicon Valley magnate, Peter Thiel, who Gawker publicly outed as gay in 2007. Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, FORBES (June 21, 2016, 1:22 PM), https://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#246c06e851c5 [https://perma.cc/3P5A-F6FH].

113. *Gawker Media*, 129 So. 3d at 1200–01.

114. *Id.* at 1200.

115. *Id.* at 1201 n.5.

116. *Id.* at 1201.

117. *Id.* at 1201 n.5.

118. Bollea v. Gawker Media, LLC, No. 12012447-CI-011, 2016 WL 1270387, at *1 (Fla. Cir. Ct. Jan. 28, 2016).

The size of the award to Bollea also highlights how the public disclosure tort operates unevenly. Even where non-privileged plaintiffs have prevailed in privacy-related suits, the awards they receive often pale in comparison to those of privilege. As point of contrast, while not strictly involving a public disclosure claim (and instead misappropriation of image and related causes of action), in *Coton v. Televised Visual*,[119] plaintiff was awarded roughly $129,000 where plaintiff alleged that the defendant was using a self-portrait photograph taken of the plaintiff when she was fourteen years old to market pornographic videos without plaintiff's permission. The defendants in *Coton* did not even defend the claim and a default judgment was entered.[120] Notably, this case, like Bollea's, was brought in Florida under Florida law, and yet the plaintiff's damages were much more limited than Bollea's.

Perhaps even more glaring, in *Cotto v. City of Middletown*,[121] plaintiff, who was of Puerto Rican descent and mildly intellectually disabled, was awarded only $1,000 in nominal damages and $32,500 in punitive damages when he was subjected to a strip search of his genitals and buttocks in full view of vehicular traffic that slowed down to watch the search. And in a revenge porn case involving egregious facts where the defendant uploaded secretly recorded sexual videos of a Muslim female teenager to the internet, the plaintiff was awarded $200,000 in damages for public disclosure and $145,000 for intrusion upon seclusion.[122]

Bollea's case is not the only example of privileged, and famous, people faring relatively well in privacy-related suits. For example, the mother of murdered model and professional wrestler Nancy Benoit brought a right of publicity suit against the publishers of Hustler for publishing twenty-year-old nude images of Nancy taken well before she was murdered by her husband, another professional wrestler named Chris Benoit. While the case involved the intellectual property right to publicity claim, as opposed to a public disclosure privacy claim, the court ruled that the photos were not newsworthy because they bore no relation to the newsworthy event—Nancy's tragic death.[123] As the court reasoned, "someone's notorious

119. 740 F. Supp. 2d 1299, 1303 (M.D. Fla. 2010). Because this case did not strictly involve a public disclosure tort claim, it is not included in the systematic review or the case chart.

120. *Id.*

121. Cotto v. City of Middletown, 158 F. Supp. 3d 67, 75, 90 (D. Conn. 2016). Significantly, this award covered plaintiff's invasion of privacy claim and other, related claims. In *Walgreen Co. v. Hinchy*, 21 N.E.3d 99, 113–14 (Ind. Ct. App. 2014), involving a pharmacy disclosure of plaintiff's pharmacy records to the plaintiff's ex-boyfriend, the plaintiff was awarded $1.44 million in damages for invasion of privacy and related claims.

122. Patel v. Hussain, 485 S.W.3d 153, 171–72 (Tex. App. 2016).

123. Toffoloni v. LFB Publ'g Grp., LLC, 572 F.3d 1201, 1211 (11th Cir. 2009).

death [does not] constitute[] a carte blanche for the publication of any and all images of that person during his or her life. . . ."[124] To be clear, I am not suggesting that the outcome in this case is wrong. Just the opposite—it would be desirable if the court's pragmatic analysis that takes into account the everyday expectations of privacy was emulated in cases not involving privileged members of society.

In another case involving a high-profile celebrity, professional football player and New York Giant Jason Pierre-Paul brought a public disclosure lawsuit against ESPN and one of its reporters after the reporter tweeted images of Pierre-Paul's medical records indicating that Pierre-Paul had to have a finger amputated.[125] The tweet occurred on July 8, 2015 in the midst of preexisting reporting and widespread public discussion regarding Pierre-Paul's involvement in a Fourth of July fireworks accident that injured his hand, requiring hospitalization.[126] While Pierre-Paul acknowledged that the amputation of his finger was a matter of legitimate public concern, he argued that the image of the chart itself was not.[127] The District Court agreed and denied ESPN's motion to dismiss, concluding that disclosure of the image of the chart (as opposed to the fact of amputation itself), may have exceeded appropriate limits and not been a matter of public concern.[128] In other words, here again, when the disclosure concerns information about a high-profile, privileged person *and* concerns information (a medical injury) that bears directly on why that person is in the public eye (their ability to play football), the court nevertheless seems to interpret the tort in favor of the privileged plaintiff.[129] As Amy Gajda has observed, "there are cases suggesting a

124. *Id.* at 1210. For a contrasting decision involving a non-famous plaintiff in a public disclosure tort case, see *Anderson v. Suiters*, 499 F.3d 1228, 1236–37 (10th Cir. 2008) (affirming grant of summary judgment in favor of media defendants who published limited portions of video of plaintiff allegedly being raped while unconscious by her husband after plaintiff provided the tape to law enforcement on the condition that it not be shared, because the tape was relevant to the prosecution of plaintiff's husband for sexual assault, including assault on other victims, and therefore newsworthy).

125. Pierre-Paul v. ESPN, Inc., No. 1:16-cv-21156, 2016 U.S. Dist. LEXIS 119597, at *2 (S.D. Fla. Aug. 29, 2016). Because this case was decided just outside the decade-long period used for the systematic review, it is not included in the case chart.

126. Def. ESPN, Inc.'s Mot. to Dismiss, Pierre-Paul v. ESPN, Inc., No. 1:16-cv-21156 (S.D. Fla. Apr. 7, 2016) 2016 U.S. Dist. LEXIS 119597.

127. *Pierre-Paul*, 2016 U.S. Dist. LEXIS 119597, at *2–3.

128. *Id.* at *3.

129. The case settled for an undisclosed amount in February 2017. *See* Marissa Payne, *Jason Pierre-Paul and ESPN Reach Settlement in Invasion-of-Privacy Lawsuit*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/02/03/jason-pierre-paul-and-espn-reach-settlement-in-invasion-of-privacy-lawsuit/?utm_term=.23a65243ed8f [https://perma.cc/HL34-35W8].

stiffening resolve to draw a line on reporting on public officials . . . and public figures," protecting their privacy notwithstanding their public status.[130]

Similarly, in an older case outside of the last decade, actress Pamela Anderson Lee and Poison musician Bret Michaels successfully enjoined an adult entertainment distributor from publishing a sex tape of Anderson Lee and Michaels.[131] The court interpreted the public disclosure tort in favor of the celebrities.[132] For example, the court rejected defendant's arguments that because Anderson Lee had professionally "appeared nude in magazines, movies and publicly distributed videotapes" and because a separate sex tape between her and her husband Tommy Lee had already been widely distributed, the sex tape between her and Michaels was no longer private.[133] The court correctly concluded that just because your body is exposed in one context, different images of your body did not become forever available to the public. Likewise, the court rejected the defendant's argument that because a 148-second portion of the tape had been published online, the right to privacy had been extinguished.[134] So, once more, the public disclosure's strictures are relaxed and interpreted in favor of a privileged set of plaintiffs.[135]

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130. GAJDA, *supra* note 34, at 177. Sportscaster Erin Andrews also rightly prevailed in her privacy lawsuit against a stalker who videotaped her undressing in her hotel room and the owner of the hotel that permitted him to obtain the room next to hers. However, the Andrews verdict does not necessarily suggest that the public disclosure tort's standards are being applied in a more favorable manner towards celebrities because there was no real dispute that the information about Andrews was obtained surreptitiously (in other words, the information was completely secret beforehand and not exposed to anyone) and the stalker posted the information online, widely disseminating it. *See generally* Verdict Form, Andrews v. West End Hotel Partners, LLC, No. 11C4831, 2016 WL 915534 (Tenn. Cir. Ct. Mar. 8, 2016).

131. Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998).

132. *Id.* at 843.

133. *Id.* at 840.

134. *Id.* at 841; *see also* Benz v. Wash. Newspaper Publ'g Co., No. 05-1760, 2006 U.S. Dist. LEXIS 71827, at *26 (D.C. Cir. Sept. 29, 2006) (in public disclosure suit by CNN producer, the fact that plaintiff producer's contact information was publicly available elsewhere did not defeat her disclosure suit for further publication by defendant); Times Picayune Publ'g Corp. v. United States, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) (denying FOIA request for mugshot of the owner of the San Francisco Forty-Niners because, although his conviction was already public knowledge, that mere fact did not defeat his privacy interest in the mugshot).

135. In subsequent proceedings in the *Michaels* case, the court granted summary judgment in favor of a separate defendant, Paramount, that had published small portions of the tape when reporting on the adult entertainment company's impending release of the tape. Michaels v. Internet Entm't Grp., Inc., No. 98-cv-0583 DDP, 1998 U.S. Dist. LEXIS 20786, at *2 (C.D. Cal. Sept. 10, 1998). The court again rejected the notion that because Lee's sex life and body had been publicized previously, she was not entitled to privacy. *Id.* at *22–23. However, in evaluating the newsworthiness prong of the public disclosure tort, the court concluded that the news report at issue was not sufficiently intrusive to outweigh Paramount's First Amendment interest in discussing the tape because the clips it showed

Given its origins in elite New England society,[136] perhaps it is no great surprise that the public disclosure tort is being used to greater effect by people of privilege and celebrity. Privilege permeates our law and, as Anita Allen and Erin Mack have noted, privacy torts were "the brainchild of nineteenth-century men of privilege"—Warren and Brandeis.[137] According to Allen and Mack, "the privacy tort bears the unmistakable mark of an era of male hegemony."[138] Principally, as originally conceived, the tort was built off gendered notions of female modesty that suggested women were vulnerable and in need of protection.[139] As Allen and Mack argued several decades ago, issues of gender—and I would add privilege more generally—have often been overlooked in discussions of privacy torts.[140] Despite their misgivings about the sexist norms underlying the development of privacy tort law, Allen and Mack believe that privacy law—including privacy torts—have an important role to play in advancing women's rights and provide examples of how privacy torts can be pursued to fight, for example, sexual harassment without relying on gendered claims of female virtue and modesty.[141]

"were brief and revealed little in the way of nudity or explicit sexual acts." *Id.* at *28–29. Conversely, in the lawsuit by Pamela Anderson Lee and her husband Tommy Lee against Penthouse for publication of intimate still photographs of the couple, Penthouse was granted summary judgment because the photos at issue had been previously published in three other publications. Lee v. Penthouse Int'l, No. 96-cv-7069 SVW, 1997 U.S. Dist. LEXIS 23893, at *18 (C.D. Cal. Mar. 18, 1997).

136. *See generally* Amy Gajda, *What If Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy"*, 2008 MICH. ST. L. REV. 35 (suggesting that press coverage of Samuel Warren's wedding to a senator's daughter contributed to his interest in privacy protections); Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128 (2016) (carefully documenting that Samuel Warren may have been motivated by a desire to protect the privacy of his gay brother, Ned).

137. Allen & Mack, *supra* note 71, at 441; *see also id.* at 456 ("[T]he Warren and Brandeis article was a lofty defense of values of affluence and gentility.").

138. *Id.* at 442.

139. *Id.* at 453 ("[W]omen were deemed to be creatures of special modesty."); *see also* Barbas, *supra* note 51, at 187–88 (noting that privacy tort cases from the early twentieth century reflected that and "codes of public performance were highly gendered" and that "unauthorized public display of women's photographs" was deemed "particularly reprehensible [by courts]"); *cf.* CITRON, *supra* note 17, at 146 ("[S]ociety has a poor track record addressing harms primarily suffered by women and girls.").

140. Allen & Mack, *supra* note 71, at 469 ("Privacy tort scholars have consistently overlooked concern about women's privacy as a force in the development of the privacy tort."). Certainly, more recently, Danielle Keats Citron and Mary Anne Franks have been doing an incredible job of filling that gap, advocating that tort law can be used to combat revenge pornography, an act that often involves the online publication of women's intimate photographs without their consent. *See, e.g.*, Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 39 WAKE FOREST L. REV. 345, 357–59 (2014) (arguing that privacy torts are a potentially viable but insufficient means of combatting nonconsensual pornography).

141. Allen & Mack, *supra* note 71, at 477.

But is it possible to limit the degree to which privilege colors the substantive application of privacy tort law, and tort law more broadly? The next Part explores whether evidence of disparate treatment and/or disparate impact in the application of tort law provides an impetus for the injection of constitutional equality principles into the substance of common law.

III. INJECTING EQUALITY INTO THE COMMON LAW

One of the major payoffs or implications for detailing the disparate application and impact of the current blackletter law on marginalized communities is that it provides evidence for importing constitutional equality principles into the common law doctrine. If the Constitution, namely the First Amendment, applies to the common law and limits how courts interpret and shape the substance of private tort law because the common law is a form of state action, then other provisions of the Constitution ought to also apply to that state action. This Part highlights how common law could be susceptible to influence from equal protection disparate treatment and impact doctrine, justifying (and arguably necessitating) modification of the substance and application of tort law. Equality principles can make the common law more sensitive to social context and the reality that many people may still be impacted by limited disclosures and find it nearly impossible to keep information totally secret *ex ante*. This Part first analyzes existing doctrine and scholarship finding state action in the creation and enforcement of the common law and shows how that doctrine suggests that tort law should also be guided by equal protection principles. It then demonstrates how those equality principles could alter tort privacy doctrine to benefit marginalized people.

A. The Constitution and the Common Law

Both scholarship and U.S. Supreme Court doctrine analyzing when state action (and therefore the Constitution) is implicated by the substantive application of common law have focused largely on the First Amendment.[142] This narrow focus is unwarranted and unmoored from any textual foundation.[143] Based on existing jurisprudence governing the state

142. Colby, *supra* note 5, at 358 nn.7 & 9 (2016) (observing that "the imposition of constitutional limits on the substantive content of a particular branch of tort law" is a "much more narrow phenomenon," but documenting the use of constitutional principles to limit the imposition of punitive damages across a range of torts).

143. Frank I. Michelman, *The Bill of Rights, the Common Law, and the Freedom-Friendly State*, 58 U. MIAMI L. REV. 401, 404 (2003) (observing that *New York Times v. Sullivan*, 376 U.S. 254

action doctrine, the contours of tort law ought to also be guided by other constitutional provisions, such as the equality and liberty principles of the Fourteenth Amendment.

The delineations of the so-called "state action" doctrine have long been murky, and both the U.S. Supreme Court and scholars have struggled to create bright lines separating state action from purely private action.[144] Generally speaking, the Court has found state action notwithstanding the presence of private action when there is so-called entanglement—that is, where "the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution."[145]

In one of the earliest decisions addressing the scope of state action, *Shelley v. Kraemer*,[146] the U.S. Supreme Court held that judicial enforcement of a racially restrictive housing covenant (a form of contract), whereby residents of a neighborhood agreed to only sell their property to white people, implicated state action.[147] Therefore, the Constitution applied, and the Fourteenth Amendment's prohibitions on racial discrimination prevented the court from enforcing the discriminatory contract.[148]

But, as may seem obvious, if judicial enforcement of a contract were always sufficient to constitute state action, the Constitution would apply to all attempts at private ordering, including all contract law. As Erwin

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(1964), which used the First Amendment to limit the scope of a defamation tort, "does throw the doors open, and there is no way logically—conceptually—to push them shut").

144. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 535 (5th ed. 2015) ("Cases concerning [state action] exceptions have been called a 'conceptual disaster area' and even the Supreme Court has admitted that the cases deciding when private action might be deemed that of the state have not been a model of consistency." (internal quotation marks omitted)); Martha Minow, *Alternative to State Action in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 145 (2017) (observing that the state action doctrine is "notoriously confusing, if not incoherent"); *cf.* Michael C. Dorf, *Incidental Burdens and the Nature of Judicial Review*, 83 U. CHI. L. REV. ONLINE 97, 98 (2016) (noting that when something is a law, and therefore subject to constitutional restriction, is a difficult and undertheorized question).

145. CHEMERINSKY, *supra* note 144, at 527. State action may be found in other circumstances as well, such if a private entity is fulfilling a traditional public function. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 507–08 (1946) (holding that company-owned town was subject to the First and Fourteenth Amendments and could not criminally punish distribution of religious literature).

146. 334 U.S. 1 (1948).

147. *Id.* at 19 ("We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. . . . It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.").

148. *Id.* at 20.

Chemerinsky has explained, "[t]he Court, of course, never has taken *Shelley* this far, but nor has it articulated any clear limiting principles."[149]

1. The First Amendment's Application to the Substance of Torts

Instead, at least in the tort context (as opposed to contract or property law),[150] the Court has suggested, post-*Shelley*, that the Constitution applies to tort law, not just because courts are called upon to enforce tort law, but also because judges *create* the common law—they create the rule of decision.[151] For example, in *New York Times Co. v. Sullivan*,[152] the U.S. Supreme Court held that a civil libel action brought under Alabama law was subject to constitutional restraints imposed by the First Amendment.[153] The Court concluded that "[a]lthough 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 press."[154] The Court elaborated, "[i]t matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form,

149. CHEMERINSKY, *supra* note 144, at 553; *see also* Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 898, 917 (1991) (suggesting that if the Due Process Clause limits punitive damages in civil suits, then it has the potential, if taken to its logical conclusion, to change "the whole face of tort law," and arguing that constitutionalization of damages law would be a "clumsy, inappropriate way to achieve" reform).

150. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) (finding no state action where privately-owned shopping center prohibited distribution of handbills on its property); Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (holding that property owner's exercise of right of exclusion in private shopping center did not implicate First Amendment).

151. Given that judicially created canons of construction dictate how private contracts are to be interpreted, and therefore that courts do play a sizeable role in creating contract law, query whether the distinction between tort law and contract law for purposes of the state action doctrine is entirely consistent. *See* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1655–56 (2009) (observing that there is a "significant contradiction at the heart of First Amendment Law" because "when private parties sue in tort to remedy injuries resulting from speech, the First Amendment unquestionably provides robust protection" but that "when private parties use contract or property law to restrict speech, the First Amendment provides little to no scrutiny"); *cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 671–72 (1991) (holding that First Amendment applied and state action was present where promissory estoppel law imposed liability on a newspaper who failed to keep confidentiality pledge to plaintiff, but because law was one of general applicability that did not impose special obligation and parties themselves determined the scope of their obligations through their promises, no violation of the First Amendment freedom of the press occurred). Interestingly, while the Court found state action in a promissory estoppel case, it has not been relied upon by the Court to inform state action analysis since.

152. 376 U.S. 254 (1964).

153. *Id.* at 265.

154. *Id.*

whether such power has in fact been exercised."[155] Thus, the Court reasoned that judge-made law that was judicially enforced was subject to constitutional limits and that, in order for a public official to bring a defamation claim consistent with the First Amendment, the official must show that the defendant acted with actual malice.[156]

The U.S. Supreme Court has reaffirmed the First Amendment's ability to "reshape the common-law landscape" of defamation law on multiple occasions.[157] For example, in *Philadelphia Newspapers, Inc. v. Heppes*,[158] the Court recognized that, while private tort suits were quite different than laws or rules passed by the legislature, the First Amendment still applied to a defamation suit.[159] The Court noted that "[i]t is not immediately apparent from the text of the First Amendment, which by its terms applies only to governmental action, that [such limitations] should obtain here: a suit by a private party is obviously quite different from the government's direct enforcement of its own laws."[160] Nevertheless, the Court reasoned that defamation suits could unconstitutionally chill expression if the plaintiff—even if a mere private figure themselves—did not bear the burden of proving that a statement regarding a matter of public concern was false.[161]

And, in *NAACP v. Claiborne Hardware Co.*,[162] the Court held that the First Amendment's protections for free speech and association extended to invalidate an attempt to impose tort liability for malicious interference with a business against civil rights activists who peacefully boycotted

155. *Id.*; *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (describing two part test whereby for conduct to be considered state action the "right or privilege" at issue must be "created by the State or by a rule of conduct imposed by the State" and the party enforcing the law "must be a person who may fairly be said to be a state actor"); Am. Mfrs. Mut. Ins. v. Sullivan, 526 U.S. 40, 50 (1999) (also invoking two-part test).

156. *New York Times Co.*, 376 U.S. at 283. Similarly, while it involved a statutory cause of action, in *Time, Inc. v. Hill*, the Court held that the First Amendment required that a jury be instructed they could impose liability for a false light invasion of privacy claim centered on matters of public interest only where there was proof that the defendant published the information with knowledge of its falsity or with reckless disregard of the truth. Time, Inc. v. Hill, 385 U.S. 374, 387–88, 394–97 (1967); *see also* CITRON, *supra* note 17, at 207 ("Generally speaking, the First Amendment rules for tort remedies and criminal prosecutions are the same.").

157. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (applying the First Amendment to defamation tort law).

158. 475 U.S. 767 (1986).

159. *Id.* at 777.

160. *Id.*

161. *Id.*

162. 458 U.S. 886 (1982).

segregated businesses in Mississippi.[163] Relying on *New York Times Co.*, the Court held that "[a]lthough this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."[164]

The Court's application of First Amendment law to tort law has also been extended to shape the substance of privacy torts.[165] Most prominently, in *Cox Broadcasting Corp. v. Cohn*, the Court held that it would be inconsistent with the First Amendment for the states to enforce the public disclosure tort when it would sanction "the publication of truthful information contained in official court records open to public inspection."[166] Put differently, the complete secrecy requirement (part of the secrecy double standard) is, itself, a product of the First Amendment's application to the substance of privacy torts. At this point, it seems taken for granted by the Court and scholars that the First Amendment applies to shape the substance of common law speech torts, such as defamation and privacy torts.[167]

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163. *Id.* at 933–34.

164. *Id.* at 916 n.51. The Court has also applied the First Amendment to the substance of intentional infliction of emotional distress. *See*, *e.g.*, Snyder v. Phelps, 562 U.S. 443, 459–60 (2011) (finding that First Amendment prevented imposition of liability for intentional infliction of emotional distress and intrusion upon seclusion against Westboro Baptist Church members who protested funeral of fallen soldier); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56–57 (1988) (finding Hustler to be protected from intentional infliction of emotional distress suit by First Amendment for its parody of Jerry Falwell).

165. *See* Erwin Chemerinsky, *Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts*, 11 CHAP. L. REV. 423, 426–30 (2008) (describing the First Amendment limitations on privacy torts, but suggesting that the method for determining whether the information is of legitimate public concern remains unclear).

166. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975); *see also* Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) (holding that the imposition of civil liability for publication of rape victim's name that had previously been contained in public police report was inconsistent with the First Amendment); *cf.* Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (holding that imposition of civil liability on media outlet that lawfully obtained information of public concern, even though the information had been unlawfully obtained by someone else initially, was inconsistent with First Amendment).

167. Solove & Richards, *Rethinking Free Speech*, *supra* note 151, at 1651–52 (noting that "the well-settled rule is that the First Amendment provides full protection" for tort "harms caused by speech"). *But see* Erwin Chemerinsky, *In Defense of Truth*, 41 CASE. W. RES. L. REV. 745, 753 (1991) ("It is not inherently inconsistent with the first amendment to create liability for disseminating truth.").

2. *Other Constitutional Provisions' Application to Civil Action Procedures*

At the same time, the Court has also suggested that the First Amendment is not the only constitutional provision that applies to private action entangled with government action. Nor would such a limitation be principled or textually grounded. But outside of the First Amendment context, the application of constitutional principles to tort actions has centered more on the procedures or remedial aspects of litigating a particular civil action, rather than on the elements of the cause of action itself.

For example, in *Edmonson v. Leesville Concrete Co.*,[168] the U.S. Supreme Court considered whether the equal protection guarantees of the Fifth Amendment's Due Process Clause prevented a defendant in a civil negligence suit from using its preemptory challenges to exclude jurors on account of their race.[169] The Court first observed that the "Constitution's protections of individual liberty and equal protection apply in general only to action by the government," but concluded that constitutional prohibitions on racial discrimination did extend to a private party's exercise of a peremptory challenge.[170] According to the Court, because such challenges were created by statute and because without overt participation of the courts in the peremptory challenge system, that system would not exist at all, state action was present and the Constitution adhered.[171]

Similarly, in *Lugar v. Edmondson Oil Co.*,[172] the Court held that where state law created a legal right to prejudgment attachment of a defendant's

168. 500 U.S. 614 (1991).

169. *Id.* at 616.

170. *Id.* at 619.

171. *Id.* at 622. Relatedly, Senior District Judge Jack B. Weinstein of the Eastern District of New York has been at the vanguard of subjecting damages calculations that rely on race-based actuarial calculations to equal protection scrutiny. G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 159 (E.D.N.Y. 2015) (holding that "ethnic characteristics of an injured person cannot be used to reduce damages" in a tort case); McMillan v. City of New York, 253 F.R.D. 247, 248 (E.D.N.Y. 2008) (holding that "'[r]acially' based life expectancy and related data may not be utilized to find a reduced life expectancy for a claimant in computing damages based on predictions of life expectancy"); *see also* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 105–07 (1994) (arguing that there is state action implicating equal protection when courts admit into evidence and rely on race-based and gender-based data in determining damages); Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325 (2018).

172. 457 U.S. 922 (1982).

property in a civil lawsuit, and where a state officer—a sheriff—affects that attachment, state action existed such that the statute authorizing the attachment could be challenged as violating the Fourteenth Amendment's due process guarantees.[173]

The U.S. Supreme Court has also relied on constitutional due process principles to limit the imposition of punitive damages in civil suits. For instance, in *BMW of North America, Inc. v. Gore*,[174] the Court relied on the Due Process Clause of the Fourteenth Amendment to strike down an award of punitive damages that was 500 times the actual damage suffered by the plaintiff, who sued an automobile manufacturer for failing to disclose that the car he bought required minor repairs before being purchased as "new."[175] Likewise, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[176] the Court again relied on the Due Process Clause to limit the punitive damages imposed on State Farm for fraud and intentional infliction of emotional distress arising out of its scheme to cap payouts on claims.[177] Interestingly, when discussing the application of the Due Process Clause to punitive damages imposed in civil lawsuits, the Court seems not even to analyze or discuss whether state action is implicated.[178]

As such, ample authorities suggest that the creation and enforcement of tort law implicates state action, and therefore the Constitution applies. As the above discussion highlights, the First Amendment has so far been the principal constitutional provision used to shape the substantive contours of tort law generally,[179] and as to privacy tort law it has been

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173. *Id.* at 940–41. *But see* Am. Mfrs. Mut. Ins. v. Sullivan, 526 U.S. 40, 53 (1999) (holding that mere state creation of a remedy is insufficient to attribute action of private actor to the state).

174. 517 U.S. 559 (1996).

175. *Id.* at 582–83.

176. 538 U.S. 408 (2003).

177. *Id.* at 415, 429.

178. *See generally* Phillips Morris USA v. Williams, 549 U.S. 346 (2007) (applying due process limitations on punitive damages awarded in negligence suit without analysis of whether state action exists). Perhaps paradoxically, while federal due process protections have been successfully used to limit the size of punitive damages, state constitutional provisions have been used to challenge legislative "tort reform" efforts to *ex ante* limit punitive damages, pain and suffering damages, and other forms of liability. *See* John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1165 (2005) (documenting state constitutional challenges to tort reform legislation).

179. That said, as Mark Geistfeld has pointed out, although due process principles have so far largely been applied only to limit punitive damages or other procedural aspects of litigation (as opposed to shape the substantive requirements of a particular tort), to the extent those decisions have relied on notions of fairness and fair notice, there is the potential for due process to also shape the substantive rules of tort liability by, for example, requiring that the rule of liability not be vague. Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1119 (2005).

more or less the exclusive constitutional provision invoked.[180] But as the above cases also make clear, nothing forecloses application of other constitutional provisions—such as the guarantees of equal protection—to tort law. Indeed, both *Leesville Concrete Co.* and *Edmondson Oil Co.*, centered on the application of equal protection and due process protections to the procedures (use of peremptory challenges and attachment, respectively) used to enforce civil lawsuits, including, in the case of *Leesville*, a common law tort lawsuit. Integrating these two strands of authority (First Amendment application to substance of tort with equal protection/due process application to procedures surrounding tort suits) indicates what has been largely overlooked—equal protection principles could also influence the substance of tort law.

3. Lessons from State Constitutions

Significantly, great potential also exists for the equality guarantees of state constitutions to influence the substance of privacy torts.[181] Supplementing the protections of the federal Constitution, which serve as a floor with regard to individual rights states must respect,[182] many state constitutions contain their own equality provisions. Not infrequently, these provisions are interpreted to provide more expansive and robust protections than their federal counterpart.

State equal protection clauses are more expansive in at least two senses relevant here. First, they are sometimes interpreted to provide protections for classes not afforded protection under the federal Constitution. For instance, early advances toward the recognition of same-sex relationships were first recognized under state equality guarantees.[183] Second, they

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180. In his wonderful analysis of First Amendment limits on tort law, David Anderson has documented some of the peculiarities that come with applying the Constitution to the common law. In particular, it requires the court to both justify the state interest behind the tort law regulation (normally, when a statute is challenged, the state government defends the law) and, at the same time, pass on the legitimacy of the law. Anderson, *supra* note 24, at 770. Anderson has also documented how in cases involving the application of the Constitution to tort law, the U.S. Supreme Court has acted with a freer hand in proscribing solutions or remedies, whereas with statutes, the Court generally lets the legislature recraft the statute. *Id.* at 787.

181. CAL. CONST. art. I, § 7; IOWA CONST. art. I, § 1; N.Y. CONST. art. I, § 11; VT. CONST. art. I.

182. *See, e.g.*, State v. Morales, 657 A.2d 585, 590 (Conn. 1995) ("It is beyond debate that 'federal constitutional and statutory law establishes a *minimum* national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights.'" (quoting State v. Barton, 594 A.2d 917, 927 (Conn. 1991))).

183. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008) (finding Connecticut's ban on same-sex marriage violated equal protection provisions of state constitution); Varnum v. Brien, 763 N.W.2d 862, 904 (Iowa 2009) (finding Iowa's "equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the

often explicitly apply not just to state action, but also apply to limit discrimination by private actors.[184] As one example, New York's equal protection clause provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof," which tracks the federal corollary, but then it goes on to stipulate that "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."[185]

But in addition to instances where state constitutions directly permit constitutional causes of action against private actors, there is also evidence that state constitutional provisions indirectly influence the substance of common law causes of actions. Common law torts are, after all, a creature of state law.[186] And, as Helen Hershkoff has explained, even though state constitutions do not "explicitly subject common law decision making to state constitutional . . . regulation,"[187] there is non-trivial practice of state courts permitting state constitutional norms to influence the common law, thereby indirectly applying constitutional rules to private parties.[188] Hershkoff isolates several examples of how constitutional values are infused into the common law through "private law portals."[189] Of particular pertinence here, Hershkoff points to examples where state courts have relied on constitutional equality provisions to hold private employers accountable for employment

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statute"); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003) (excluding same-sex couples from the right to civil marriage is incompatible with "equality under law").

184. Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS 151, 151 (James A. Gardner & Jim Rossi eds., 2010) ("State courts are not required to apply the federal state action doctrine; moreover, not all state constitutions contain a state action limitation."); Minow, *supra* note 144, at 165 (suggesting that state constitutional law, which in certain states extends to private action, may be a way to achieve the realization of constitutional values without having to satisfy the federal state action requirements).

185. N.Y. CONST. art. I, § 11.

186. Colby, *supra* note 5, at 357 ("Tort law is, generally speaking, state law.").

187. Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1525, 1528 (2010).

188. Hershkoff, *supra* note 184, at 152–53 (explaining that "[s]tate courts—more explicitly than federal courts—draw from diverse sources of authority in their common law decision making" and documenting how "state courts in a surprising range of cases effectively resolve private disputes in light of constitutional norms although these norms do not always give rise to a direct cause of action in private relations").

189. *Id.* at 152.

discrimination, even where those employers were exempt from state statutory antidiscrimination provisions.[190]

Interestingly, while the federal jurisprudence discussed above illustrates that the First Amendment has often been used to limit plaintiffs' ability to recover damages for defamation or privacy torts after state action is determined to attach to the enforcement of the tort, at other times state courts have used free speech values to justify modifying the substance of the common law without a finding of state action. In other words, rather than reaching an ultimate constitutional issue *after* determining that state action exists in tort law, First Amendment values are used to modify the substance of common law even without a finding of state action. For example, in construing the scope of a shopping mall owner's property right to eject guests who are gathering petition signatures, the Oregon Supreme Court decided on a "subconstitutional level" that the public interest in protecting political speech, one of "society's most precious rights," limited the shopping mall owner's entitlement to equitable relief.[191] This decision was reached notwithstanding U.S. Supreme Court law concluding that shopping malls are private property and therefore the First Amendment does not directly apply to them and their efforts to eject invitees.[192]

As such, there is reason to believe that both state and federal constitutional equality provisions could influence the substantive direction of privacy tort law, with this Article's critical analysis of prevailing federal state action doctrine exposing how the federal Constitution, much like state constitutions, could apply to the common law. Having doctrinally justified the link between constitutional equality principles and tort law, in the following subsection, I analyze how federal

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190. *Id.* at 157–58 (discussing *Roberts v. Dudley*, 140 Wash. 2d 58, 77–78, 993 P.2d 901, 911 (2000), where the Washington State Supreme Court held that the public policy against pregnancy discrimination was enforceable through common law wrongful discharge tort, with the concurrence relying explicitly on the constitutional guarantee of sex equality rights); s*ee also* Phillips v. St. Mary Reg'l Med. Ctr., 116 Cal. Rptr. 2d. 770, 778–81 (Cal. Ct. App. 2002) (relying on the constitutional prohibition on sex and race discrimination as evidence of public policy supporting a wrongful termination claim wherein a religious employer exempt from statutory provisions allegedly retaliated against a plaintiff based on his complaint of race and sex discrimination).

191. Lloyd Corp. v. Whiffen, 773 P.2d 1294, 1297, 1299 (Or. 1989). *But see* Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 88 (1980) (concluding that, under California's free speech clause, students gathering signatures for a petition could not be ejected from privately-owned shopping mall).

192. Hudgens v. NLRB, 424 U.S. 507, 520–21 (1980). Perhaps even more provocative than these more mainstream examples of the integration of constitutional law into the common law, in subsequent work Hershkoff argues that even the limited positive constitutional rights provided in some state constitutions (for example, a right to education) should influence the direction of the common law. Hershkoff, *supra* note 187, at 1528.

equal protection principles could be used to shape the *substance* of privacy tort law and remedy the problems of the secrecy double standard's disparate impact and application identified in Parts I and II.

B. Injecting Equality into Privacy Law

To determine how constitutional equality principles could influence the substance of privacy torts, it is necessary to understand what the Constitution does and does not require in terms of equality. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[193] The Fifth Amendment's due process guarantee,[194] while not explicitly containing an equal protection promise, has been interpreted to apply equal protection principles to the federal government.[195] These precepts regulate and limit government discrimination based on certain classifications. Pursuant to longstanding U.S. Supreme Court jurisprudence, the Equal Protection Clause requires race-based classifications to satisfy strict scrutiny[196] and sex-based classifications to satisfy intermediate scrutiny.[197] While the Court has not explicitly held that classifications based on sexual orientation are subject to either strict or intermediate scrutiny, in recent years the Court has rigorously analyzed and overturned both federal and state laws that limited the ability of

193. U.S. CONST. amend. XIV, § 1.

194. *Id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

195. Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (recognizing that while the Fifth Amendment does not contain an equal protection clause, the guarantee of due process includes a guarantee of equal protection, and concluding that it would be "unthinkable" that the Constitution would apply lesser duties of equality on the federal government than the states); *see also* CHEMERINSKY, *supra* note 144, at 697 ("It is now well settled that the requirements of equal protection are the same whether the challenge is to the federal government under the Fifth Amendment or to state and local actions under the Fourteenth Amendment.").

196. Strict scrutiny requires that the classification or discrimination is necessary to achieve a compelling government interest. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (applying strict scrutiny where a court divested a divorced parent of custody of their child because the parent's new spouse was a different race); *cf.* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (suggesting that discrimination against "discrete and insular minorities" may require "more searching judicial inquiry").

197. Intermediate scrutiny requires that the classification be substantially related to an important government purpose. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (requiring Virginia's differential treatment of men and women be justified by "important governmental objectives" and that the means employed be "substantially related" to achieving those objectives); Scott Skinner-Thompson et al., *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 148 (2016) (explaining that constitutional protections for reproductive freedom are rooted, in part, in equality principles).

people to marry those of the same sex.[198] Other classifications, including disability and economic class, are subject to rational basis review.[199]

Generally speaking, the existence of a suspect classification exists where (1) the law facially draws a distinction based on a protected characteristic, or (2) the law is facially neutral but has a discriminatory impact on members of a protected class AND the law was motivated by a discriminatory purpose.[200]

In addition to protecting against discrimination based on a particular demographic characteristic, the Equal Protection Clause also guards against so-called "class of one" discrimination even where "the plaintiff did not allege membership in a class or group."[201] According to the U.S. Supreme Court, when a person is subject to arbitrary government treatment and treated differently from others similarly situated, that person may bring a class-of-one equal protection claim, reviewed under the rational basis standard.[202]

As Part I highlights, blackletter public disclosure tort law does not, on its face, draw any distinctions based on gender, race, sexual orientation, or any other protected class. However, as suggested by the survey of public disclosure cases analyzed in Part II, the law is being applied in disparate and arbitrary ways and with disparate impacts. If courts interpreting privacy tort law are doing so in a way that treats similarly situated plaintiffs differently, is equal protection implicated? Separate and apart from any disparate treatment of similarly situated individuals, does the disparate impact theory of discrimination offer a way to revise the public disclosure tort? Even if a formal equal protection claim could not be successfully brought, would the evidence of inequality provide courts a doctrinally-based reason or impetus to reshape the substantive requirements of the public disclosure tort? This subsection addresses these questions.

First, I will address disparate treatment of similarly situated individuals. As noted, at first glance public disclosure tort law purports to

198. Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584, 2591 (2015) (striking down state bans on same-sex marriage as a violation of equal protection); United States v. Windsor, 570 U.S. 744, 775 (2013) (declaring unconstitutional the Defense of Marriage Act's requirement that the federal government refuse to recognize same-sex marriages granted by states); *see also* Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881 (2018) (discussing the *Obergefell* and *Windsor* decisions and the limitations of equal protection jurisprudence as a frame for LGBTQ rights).

199. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (subjecting classification based on mental disability only to rational basis review).

200. CHEMERINSKY, *supra* note 144, at 698.

201. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

202. *Id.*

treat all plaintiffs the same (that is, it is not facially discriminatory). However, in practice there is evidence that similarly situated plaintiffs are treated differently under the law, as outlined in Part II.[203] Under prevailing jurisprudence, if the law or state officials disparately treat individuals who are similarly situated in relevant respects other than in a protected characteristic (race, gender, etc.), an inference of discrimination is raised implicating constitutional equal protection guarantees.[204] As explained by Giovanna Shay in her thorough analysis of the "similarly situated" test, in equal protection "cases that do not involve express categorizations," plaintiffs "must first demonstrate that other 'similarly situated' individuals were treated differently."[205]

Importantly, in cases such as *Yick Wo v. Hopkins*,[206] the Court has emphasized that when a facially neutral law is applied or enforced in a way that causes disparate results, the law may violate equal protection guarantees.[207] In *Yick Wo*, the Court addressed whether equal protection had been violated when a licensing regime for laundries, while facially neutral, had been applied so as to deny permission to more than 200 people of Chinese ancestry, but was granted to eighty non-Chinese people.[208] The Court held that equal protection was violated because

> [W]hatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws.[209]

Separate and apart from any disparate treatment that might exist, if a law both has a disparate impact on a particular racial group or gender and

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203. *Supra* Part II.

204. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005) (holding that defendant may rely on "all relevant circumstances" to raise inference of discrimination in jury selection, including "side-by-side" comparisons of how venire members were treated); Ctr. for Bio-Ethical Reform, Inc., v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011) ("To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." (internal quotations omitted) (citing Club Italia Soccer & Sports Org., Inc. v. Charter Twp. Shelby, 470 F.3d 286, 299 (6th Cir. 2006))).

205. Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 587–88 (2011); *see also* United States v. Armstrong, 517 U.S. 456, 465 (1996) (suggesting that "ordinary equal protection standards" involve comparing similarly situated individuals to determine whether discrimination occurred (quoting Wayte v. United States, 470 U.S. 598, 608 (1985))).

206. 118 U.S. 356 (1886).

207. *See id.* at 373–74.

208. *See id.* at 374.

209. *Id.* at 373.

is motivated by a discriminatory purpose, the law may be impermissible under federal constitutional law.[210] That said, the U.S. Supreme Court has rarely found a disparate impact violation and has held that disparate impact without discriminatory purpose is not enough to subject the law to heightened scrutiny.[211] Indeed, in the much-maligned[212] case of *McCleskey v. Kemp*,[213] the Court was confronted with strong empirical evidence that Georgia's death penalty was being applied with a disproportionate impact on black individuals, but concluded that evidence was insufficient to overturn the death sentence of the individual petitioner because the evidence did not, in the Court's view, necessarily suggest that any of the particular decisions in the case at hand were motivated by race.[214]

Yet, the Court has never foreclosed disparate impact as a means of demonstrating an equal protection violation and has repeatedly acknowledged its theoretical viability.[215] According to the Court, when the disparate impact is so severe that discriminatory purpose can be inferred, the dual impact and purpose requirements are, in effect, blurred.[216] Put differently by the U.S. Supreme Court in *Washington v.*

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210. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982) (concluding that an at-large voting system in county with large black population operated with a disparate impact excluding black elected officials and was motivated by a discriminatory purpose).

211. *Cf.* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 194–95 (2003) (reaffirming that proof of discriminatory purpose is required under the Equal Protection Clause); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484 (1982) (similar); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (same).

212. *See, e.g.*, Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 250–53 (2010) (explaining that attempts to remedy disparate impacts play a role in ensuring that people are treated based on merit, not on "unexamined yet entrenched . . . patterns of subordination," and, therefore, disparate impact theory need not necessarily feed conservative fears that it will lead to rigid zero-sum, parceling out of opportunities, but instead optimizes social welfare at the same time that it results in anti-subordination); Mario Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 993 (2010) (documenting the narrowness of disparate impact theory under prevailing equal protection analysis).

213. 481 U.S. 279 (1987).

214. *Id.* at 293–96.

215. Indeed, as Russell Robinson has highlighted, the Court sometimes does take a contextual approach to identifying and sussing out discrimination. But, as detailed by Robinson, the Court is itself unequal in doing so, favoring claims based on sexual orientation over claims based on race or gender. Russell Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 180–81 (2016). Moreover, in recent terms, the Court has continued to uphold the viability of disparate impact claims under certain statutory anti-discrimination protections. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Cmtys. Project, Inc., 576 U.S. __, 135 S. Ct. 2507, 2521 (2015) (upholding validity of disparate impact theory under Fair Housing Act).

216. Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960); *cf. Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2522–24.

Davis,[217] "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination."[218]

For example, in a leading equal protection disparate impact case, *Arlington Heights v. Metropolitan Housing Development Corp.*,[219] the Court reaffirmed its earlier holding in *Washington v. Davis* that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[220] However, at the same time that it required evidence of discriminatory purpose, the Court also clarified that nothing required a plaintiff "to prove that the challenged action rested *solely* on racially discriminatory purposes."[221] As the Court reasoned, rarely could it be demonstrated that a governing body acted with a single concern or that a particular purpose was even the primary one.[222]

Moreover, the Court emphasized that purpose could be gleaned from "circumstantial and direct evidence" and required a "sensitive inquiry."[223] It described evidence of a disparate impact as "an important starting point" for determining the existence of an improper purpose.[224] Indeed, the Court noted that where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action," the "evidentiary inquiry is . . . relatively easy."[225] The Court has also explicitly stated that when the relevant pattern is "stark" then disparate impact may be "determinative" of discriminatory purpose.[226] As the Court sensibly recognized in *Reno v. Bossier Parish School Board*,[227] "[t]he impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of

217. 426 U.S. 229 (1976).

218. *Id.* at 242 (refusing to apply strict scrutiny to facially neutral employment test notwithstanding disproportionate impact).

219. 429 U.S. 252 (1977).

220. *Id.* at 264–65.

221. *Id.* at 265 (emphasis added).

222. *Id.*

223. *Id.* at 266; *see also* Batson v. Kentucky, 476 U.S. 79, 93 (1986) (reiterating that circumstantial evidence, such as a disproportionate impact, may be relied on to demonstrate invidious intent in equal protection challenge to prosecutor's use of peremptory challenges).

224. *Arlington Heights*, 429 U.S. at 266.

225. *Id.*; *see also* Washington v. Davis, 426 U.S. 229, 242 (1976) ("It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.").

226. *Arlington Heights*, 429 U.S. at 266.

227. 520 U.S. 471 (1997).

their actions."[228] Moreover, certain states have interpreted their constitutional equality provisions as permitting disparate impact claims even without evidence of discriminatory purpose.[229]

The U.S. Supreme Court has explained that leaving room for disparate impact as a means of proving discriminatory purpose is crucial because otherwise discriminatory laws could be "cloaked" in neutrality with the equality guarantees of the Constitution "manipulated out of existence."[230] The importance of looking beyond apples-to-apples comparisons has also been emphasized by critical and feminist critiques of formal equality legal theories. They argue in favor of a "deeper substantive equality inquiry" because, even if you are able to find the occasional "like" case impacting a non-marginalized group member, the similarly-situated analysis may mask whether an injury more likely to be suffered by a marginalized group has been neglected by the law.[231]

In addition to the guideposts offered by formal disparate treatment and impact claims, cases where the U.S. Supreme Court has subjected punitive damage awards to due process limitations evince the constitutional importance of treating like-cases alike. For example, in *BMW of North America, Inc.*, discussed above, in determining whether an award of punitive damages implicated due process concerns, the Court emphasized the importance that like misconduct be treated alike[232]—this principle has clear implications for the substance of privacy tort law.[233] Just as like defendants should be treated similarly in terms of the punitive damages imposed, so too should plaintiffs and defendants involved in public

228. *Id.* at 487 (applying the *Arlington Heights* framework in a section 5 Voting Rights Act case).

229. *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1257–58 (2005) (discussing state law examples where discriminatory purpose was not required to bring a disparate impact claim).

230. Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960) (quoting Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 594 (1926) (quotations omitted) (an equal protection violation claim was stated where it was alleged that redrawn city boundaries removed all but four or five of a city's 400 black voters and did not remove a single white voter); *cf.* Hunter v. Underwood, 471 U.S. 222, 228 (1985) (recognizing that "[p]roving the motivation behind official action is often a problematic [and difficult] undertaking").

231. CHAMALLAS & WRIGGINS, *supra* note 4, at 46.

232. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 584 (1996) (comparing the size of the punitive damage award to statutory sanctions for similar conduct).

233. *See* State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 428 (2003) (evaluating the "disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases" (internal quotations omitted) (quoting *BMW of N. Am.*, 517 U.S. at 575)); *cf.* Phillip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (reiterating comparability requirement).

disclosure tort cases have a uniform set of legal standards imposed.[234] Indeed, while the *BMW* line of cases has been criticized because they employ concepts of equality in order to benefit the privileged (large corporate defendants subject to large punitive damage awards),[235] the approach advocated here re-appropriates those cases for truly, substantively equitable purposes—helping ensure fair results for marginalized groups in civil privacy lawsuits (and potentially other contexts).

Therefore, under either a disparate treatment or disparate impact theory, or based on due process principles of comparability,[236] there is reason to believe that public disclosure tort doctrine currently operates in such a way that it implicates constitutional equality principles.[237] As we saw, this Article's survey of public disclosure tort law over the past decade indicates that the complete secrecy and widespread disclosure requirements are not applied consistently by courts or, at the very least, limit the availability of the tort to marginalized communities who live in conditions where their information is more difficult to keep private and/or where they share information as a form of bonding, identity exploration, or resistance.

As such, to better comply with constitutional equality principles, the substance of privacy tort law must be relaxed so as to ensure that individuals in marginalized communities are able to bring claims on the

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234. *Cf.* Colby, *supra* note 5, at 379 (discussing the potential for due process guarantees against "individualized unfairness" to play a role in policing civil damage awards, even awards for compensatory—as opposed to punitive—damages).

235. *See, e.g.*, Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in* State Farm, 56 BUFF. L. REV. 1035, 1043–44 (2008) (explaining how the Court equates protection of upper-class interests with fairness and equality in its due process punitive damages cases and polices use of discretion when used to impose severe damages, but lauds discretion in cases, like *McCleskey*, challenging sentencing disparities); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000) (documenting that, perversely, the U.S. Supreme Court seems more open to striking down punitive damages as disproportionate in comparison to striking down criminal punishments as disproportionate).

236. It is also worth noting that the First Amendment itself, which as discussed is already applied to the substance of privacy torts, is closely linked with equality principles. For example, as Carlos Ball details, First Amendment speech protections often advance equality aims. The First Amendment served an important incubating function for the articulation of equality and privacy arguments in favor of LGBTQ individuals at the same time that it also created space for greater visibility of queer people in American society. *See generally* CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY (Harvard Univ. Press ed. 2017).

237. *Cf.* Richard M. Re, *"Equal Right to the Poor"*, 84 U. CHI. L. REV. 1149 (2017) (arguing that the federal judicial oath requiring judges to "do equal right to the poor and to the rich" might empower judges to consider whether their decisions are sensitive to substantive economic equality).

same terms as privileged individuals.[238] One clear way to do so would be through the relaxation of the "secrecy double standard," which appears not to be rigorously enforced in cases involving privileged plaintiffs (e.g., Bollea, Pierre-Paul, Anderson Lee). Consistent with those cases, *all* plaintiffs should be able to bring public disclosure claims even if they have shared the information at issue (for example, their HIV status, sexual orientation, or intimate photographs) within certain confines.[239]

Similarly, marginalized plaintiffs should be able to state a claim even if the defendant does not publicize to the world the information at issue. Recall the case involving the purportedly gay parishioner whose pastor allegedly informed the church that the plaintiff was gay, but the case was dismissed for insufficient publicity.[240] The harm to the plaintiff in that case was no less real (and probably more so) than the harm to Bollea. But, of course, if a person is not a public persona their private information is not likely to be of interest to those outside their community, and therefore is likely not to be broadcast "widely" in the first instance. As such, for it to operate in such a way that the tort is still available to non-privileged members of society (who at least *in theory* are entitled to more privacy than privileged celebrities), it only makes sense for the widespread publicity requirement to be contextually applied so as to not require universal, worldwide publication in order to bring a claim.[241] Moreover, it would seem that the extent of disclosure could be considered at the damages phase, rather than as a substantive requirement.

This Article's theory of equal protection privacy torts builds off the critical torts scholarship of Marta Chamallas and Jennifer Wriggins who

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238. *Cf.* CHAMALLAS & WRIGGINS, *supra* note 4, at 46 (arguing that "courts in tort cases should be sensitive to context and should place a high priority on protecting plaintiffs' sexual, reproductive, and intimate familial relationships against negligent injury, analogous to their protection as fundamental interests under the U.S. Constitution").

239. For models of such a contextual approach, see Peterson v. Moldofsky, No. 07-2603-EFM, 2009 WL 3126229, at *5 (D. Kan. Sept. 29, 2009) (holding that defendant's disclosure of intimate sexual photographs of plaintiff to only five people did not defeat plaintiff's publication of privacy facts claim as a matter of law and, instead, whether the publication requirement had been satisfied should be determined by examining "the context of the communication—e.g., its medium and content"); M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 511 (Cal. Ct. App. 2001) (distinguishing secrecy from privacy when determining whether the issue was already public and holding that "[i]nformation disclosed to a few people may remain private"); Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994) (holding that plaintiff could still bring a disclosure claim notwithstanding that he had shared his HIV positive status with family and friends).

240. Bilbrey v. Myers, 91 So. 3d 887, 892 (Fla. Dist. Ct. App. 2012).

241. *Cf.* NISSENBAUM, *supra* note 29, at 148–50 (emphasizing the importance of social context in determining whether a privacy norm has been implicated).

highlight the unequal impacts of certain precepts of tort law.[242] As they explain, while "formal doctrine is neutral on its face and rights and liabilities are stated in universal terms, considerations of race and gender [and, I would add, privilege more broadly] most often work their way into tort law in complex, subtle ways."[243] In particular, Chamallas and Wriggins highlight how limitations on emotional damages, while seemingly facially neutral, were used to devalue harms suffered by women.[244] That is, the law disfavors the type of claims or injuries that are more likely to be suffered by women.[245]

This Article's analysis unearths another context where tort law has operated unequally—privacy law. But in addition to embellishing Chamallas and Wriggins' descriptive critique, by shining a light on how the Constitution has been unevenly applied to the substance of tort law with the First Amendment receiving near exclusive attention thus far, I chart a principled and doctrinally-based course for incorporating equality principles into common law doctrine through the Equal Protection Clause.[246] That is, this Article connects the dots between Chamallas and Wriggins' normative prescription "for a more thorough integration of civil rights and equality norms into the mainstream of torts" by foregrounding a constitutional basis for doing just that.[247]

Additionally, this Article extends the critique offered by Danielle Citron who has powerfully argued that both criminal and tort law regulating internet behavior should be viewed through a civil rights lens and laws should be used to "protect the equality of opportunity in the information age."[248] As Citron explains, traditional civil remedies, such as tort law, must be supplemented by civil rights remedies because tort

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242. *See generally* CHAMALLAS & WRIGGINS, *supra* note 4.

243. *Id.* at 1.

244. *Id.* at 2 (explaining that "certain injuries—often related to reproduction and motherhood—have been socially constructed as 'emotional,' rather than 'physical,' with significant implications for the prospects of recovery"); *id.* at 36 (documenting that "[g]ender and race may have vanished from the face of tort law, but considerations of gender and race remained relevant to the recognition and valuation of injury").

245. *Id.* at 3; *see also id.* at 92 ("To be clear, the gender dynamic in these cases is not that of favoring individual male plaintiffs over individual female plaintiffs. Rather, gender disadvantage flows from disfavoring the type of claim that women plaintiffs are likely to bring [for example, tort claims related to reproductive injuries], thus placing them—and any male plaintiffs who bring similar claims—at a structural disadvantage.").

246. While undoubtedly suggesting important reforms, as Chamallas and Wriggins acknowledge, at times their suggestions that considerations of civil rights be imported into tort law are pitched at a relatively "higher level of generality." *Id.* at 7.

247. *Id.* at 34.

248. CITRON, *supra* note 17, at 25.

law (as traditionally conceived), does "not respond to the stigmatization and humiliation endured when victims are targeted . . . due to their gender, race, national origin, or sexual orientation."[249]

By demonstrating that constitutional equality principles should (and do) implicate tort law, this Article offers a doctrinal foundation for incorporating civil rights principles directly into tort law, separate and apart from any statutory equality protections that may or may not be passed by legislative bodies. Again, as discussed more in Part IV, this is not necessarily to say that a privacy tort plaintiff will be able to successfully bring an equal protection challenge to the way the public disclosure tort is operating, given that the Equal Protection Clause only protects certain classes and because of the strictures of disparate impact theory—but the evidence of inequality coupled with the existence of state action nevertheless provides litigants and courts a constitutionally-grounded basis for reforming the contours of current blackletter tort law.

IV. DRAWBACKS TO THE CONSTITUTIONALIZATION OF TORTS?

While there is great potential for the constitutionalization of torts as a pathway for injecting equality and justice concerns into the substance of privacy tort law, and tort law more broadly, there are potential barriers to this approach in terms of doctrine and drawbacks should the approach be adopted. Here, I address some of those concerns.

A. Barriers of Proof

Even assuming there is a firm, doctrinally-sound basis for injecting constitutional equal protection principles into the substance of privacy torts because such torts implicate state action,[250] meaningful hurdles must still be overcome in terms of demonstrating that a particular privacy tort is being applied unequally or operating with unequal results. To state a formal equal protection disparate treatment claim, a plaintiff would need to amass significant evidence that a particular state's tort law was being applied differently to different protected classes of people.[251] And gathering evidence to support a disparate impact claim and threading the

249. *Id.* at 126; *cf.* CHAMALLAS & WRIGGINS, *supra* note 4, at 188 (calling for the increase and acceleration of "civil rights principles and norms into tort law in a self-conscious effort to weave gender and race equality into basic tort law principles").

250. *See supra* section III.A.

251. *See supra* section III.B.

narrow doctrinal needle of the U.S. Supreme Court's disparate impact jurisprudence would be even more daunting.

Indeed, as this Article's modest descriptive results attest,[252] locating evidence of disparate treatment/outcomes is a meaningful, resource-intensive undertaking. Even with non-trivial resources, the data available remains limited. As barriers in access to justice prevent many people from bringing suits in the first instance,[253] suits that are brought often settle,[254] and even those that go to jury verdicts may not be reported in standard research databases such as Lexis or Westlaw. As a result, the available data from trial court decisions on motions to dismiss, motions for summary judgment, and appeals is a small portion of the claims implicating a given tort. Moreover, demographic data regarding identity characteristics of plaintiffs and defendants may not even be mentioned in a given decision. Finally, the disparities that are uncovered may not run neatly along recognized suspect classifications, as highlighted by this Article's comparison of famous, socially and economically privileged individuals to various kinds of marginalized individuals.

The reality of these barriers provides an opportunity to reiterate exactly what I mean when I suggest that equal protection principles can, with doctrinal justification, be called upon by judges to alter the contours of tort law. I am not necessarily suggesting or envisioning formal equal protection challenges to the current operation of the public disclosure tort, but rather am suggesting that courts have a doctrinally justified basis for paying mind to equality concerns when shaping and applying the tort law, much like certain state courts have done with state constitutional law.[255]

B. Federalism Concerns

One may also be concerned that incorporating federal constitutional law as a substantive guidepost for state tort law would infringe on states' ability to create their own law. This concern is real but overstated.

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252. *Supra* Part II.

253. *Cf.* Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. POVERTY L. & POL'Y 473, 476–77 (2015) (collecting studies documenting differences in outcomes between represented and unrepresented people in different areas of the law); Lynsi Burton, *King County Couple Awarded $8.9 Million Revenge Porn Verdict*, SEATTLE P.I. (May 9, 2017, 6:20 PM), http://www.seattlepi.com/local/crime/article/King-County-couple-awarded-8-9M-revenge-porn-11133330.php (last visited Dec. 13, 2018) (documenting record verdict for non-celebrity in revenge porn lawsuit, where represented by major international law firm pro bono).

254. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (2005) (discussing the decline of civil trials).

255. *See supra* section III.A (discussing Helen Hershkoff's work analyzing the injection of state constitutional norms into common law).

First, as important as states may be in their role as laboratories, it is an equally unassailable precept that federal constitutional law governs supreme.[256] If courts are going to apply the First Amendment as a limit on state common law, courts must be consistent and consider other constitutional provisions. Moreover, to the extent that the Fourteenth Amendment's equal protection guarantees are directly applicable to the states[257]—in contrast to the First Amendment and other provisions of the Bill of Rights that had to be selectively incorporated or applied to the states through the Due Process Clause of the Fourteenth Amendment[258]—there is, in some sense, a stronger textual basis for applying equal protection law to tort law than to the First Amendment.

Second, as highlighted in the above discussion on the barriers of proof, inviting the incorporation of equality principles into the common law will not lead to a flood of challenges or dramatic reshaping of privacy torts.[259] Instead, it has the potential to influence the edges of the law, making it more equitable in its application, but poses no real risk of leading to the introduction of a federal general common law or the erosion of *Erie Railroad v. Tompkins*.[260]

Third, in an integrated American economy, there remains equal opportunity for state tort law to disrupt federalism principles if such law is left unchecked by federal constitutional law. The litigation surrounding due process limits on punitive damages elucidates this point. If a particular state's imposition of punitive damages is left unregulated by due process limitations, that state has potential to alter corporate behavior by imposing large damages on particular tortfeasors and, in effect, create a uniform, nationwide regulatory regime.[261] This is particularly true with the

256. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

257. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

258. *See* Gitlow v. People of New York, 268 U.S. 652, 666 (1925) (applying the First Amendment's speech protections, which by its terms only applies to "Congress," to a state through the Due Process Clause of the Fourteenth Amendment).

259. *Supra* section IV.A.

260. 304 U.S. 64, 78 (1938) (holding that there is no "federal general common law" and that the law to be applied in a suit in federal court on diversity jurisdiction shall be the governing state law). And, to some extent, the U.S. Supreme Court has already found other, indirect ways of influencing common law torts through, among other mechanisms, statutory preemption in certain fields. John C. P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 435 (2016) (outlining several mechanisms used by the Supreme Court to influence tort doctrine).

261. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996) (overturning large punitive damage award imposed by Alabama court on BMW and noting that BMW's "status as an active participant

expansion of specific personal jurisdiction.[262] But using the Constitution as a shield to limit the scope of punitive damages permits states more practical latitude in creating different common law regulatory structures. In other words, depending on the context, constitutionalization can actually preserve different states' interests. Opening tort law more broadly to constitutional influences does not mean that state interests will evaporate.

C. Private Ordering

Related to the federalism concern is a concern that subjecting the common law to constitutional influence might infringe on private ordering by, for example, subjecting contract law to constitutional scrutiny.[263] While that concern would ring true if, for example, contract law was subjected to intensive constitutional scrutiny, tort law is (in theory) already a product of the community as expressed through judicial lawmaking. Moreover, tort law is generally designed to regulate and step into disorder—when accidents occur and the unanticipated comes to fruition. Therefore, using constitutional law to make the default common law rules more equitable would not prevent parties from separately arranging their affairs. Of course, even if it did, addressing inequality and uneven bargaining power within contracting dynamics may not be the worst of outcomes.[264]

D. A Shortsighted Solution?

Finally, one could argue that subjecting the common law to constitutional policing is, in some respects, shortsighted and loses track of the fact that the Constitution generally, and the Bill of Rights itself, are fluid and political. Does constitutionalizing tort law now, when equality

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in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce . . . [as] each State has ample power to protect its own consumers, [but] none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation").

262. *See generally* Daimler AG v. Bauman, 571 U.S. 117 (2014) (detailing the history of personal jurisdiction jurisprudence and noting that specific personal jurisdiction has moved away from the strict territorial approach).

263. *Cf.* Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 343 (2016) (suggesting that courts should be cautious before applying the Second Amendment to attempts to privately order the use of guns).

264. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (finding that a gross inequality of bargaining power can render a contract unconscionable).

protections are arguably near their historical zenith, risk subsequent contraction of common law's egalitarian purpose should the prevailing interpretation of the Constitution also contract?[265]

Maybe; but this view, itself, is somewhat ahistorical. As the discussion of equal protection doctrine in Part III suggests, while equality norms pervade constitutional discourse, to successfully bring an equal protection challenge is difficult—that is, in some ways current equal protection doctrine is quite narrow, quite conservative. Consequently, the risk that constitutionalization of tort law might lead to restrictions in tort law's ability to promote equality and liberty seems small.

CONCLUSION

This Article's systematic review of public disclosure tort cases suggests that while privacy torts are not dead yet, they are on life support. However, that same review suggests a method by which the public disclosure tort could be revitalized, disabling the secrecy double standard and enabling a more nuanced, contextual approach to determine whether the plaintiff has kept the information sufficiently out of public view and whether information has been sufficiently publicized to warrant damages. By demonstrating that the secrecy double standard is being applied to different kinds of plaintiffs in divergent ways and with disparate results, the Article lends weight to the principled, doctrinally-based injection of constitutional equality tenets into privacy tort law, justifying a softening of the secrecy double standard that limits so many privacy suits, particularly by those at the margins of society. More broadly, the Article's analysis of the relationship between tort law and constitutional law helps chart a path forward toward common law equality.

265. *See* Michelman, *supra* note 143, at 422–30 (raising the specter that constitutionalization of tort law could result in conservative judicial forces prevailing over more progressive legislative values).

APPENDIX A: RESEARCH METHODOLOGY

To locate and analyze public disclosure tort cases, the following research steps were utilized.

STEP 1: APPLICATION OF SEARCH FILTERS

To isolate likely relevant cases involving the public disclosure tort, the following filters were applied in Westlaw:

- Database: Cases (all federal and state)
- Search Terms: tort /p priva! /p (disclos! or public! or disseminat! or 652D)
- Reported Cases: ONLY
- Date Filter: 1/1/2006 to 5/24/2016 (inclusive)

This yielded 1,526 decisions that were then subject to review pursuant to Step 2. NB: The Date Filter was applied AFTER the other search parameters were run and Westlaw's algorithm had identified the 10,000 most substantively relevant search results without date limitation (Westlaw only permits a maximum of 10,000 search results). If the Date Filter was applied simultaneously with the substantive search terms through the "Advanced" search interface, the search yielded roughly twice as many results, ~3,135 decisions. These additional 1,609 decisions were not reviewed, relying on the assumption that because they were not identified as within the top 10,000 substantively relevant results without date filtration, the likelihood that they would contain a meaningful number of public disclosure tort cases was small. In this sense, the research relied in part on the accuracy of the Westlaw search algorithm. Relatedly, it is important to note that Westlaw alters its algorithm over time, so the same search run today, might yield a slightly different number of cases than when it was run for this Article in May 2016. Moreover, as recent research has revealed, the major research database algorithms often yield different results, meaning that Westlaw's results may be incomplete.[266]

STEP 2: REVIEW & CODING BY RESEARCH ASSISTANTS

The 1,526 decisions were then divided among three research assistants who read each case to determine if it was a public disclosure tort case, or

266. *See* Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBRARY J. 387, 412–16 (2017) (empirically detailing divergent search results across major databases, including Westlaw and Lexis Advance).

closely related claim, and, if so, to code the case in excel spreadsheets across a variety of factors. These coded factors included:

- Case Name
- Citation
- Court/Jurisdiction
- Decision Date
- Plaintiff's Gender/Sex
- Plaintiff's Occupation
- Plaintiff's Race
- Plaintiff's Age
- Plaintiff's Sexual Orientation
- Individual, State, or Corporate Defendant
- Defendant's Sex/Gender
- Defendant's Occupation
- Defendant's Race
- Defendant's Age
- Defendant's Sexual Orientation
- Nature of Privacy Disclosure (E.g., sexual conduct, intimate body parts, sexual orientation/gender identity, medical/disability, social security number, criminal record, racial information, other)
- Procedural Posture
- Outcome (E.g., motion for summary judgment granted/denied, etc.)
- Court's Reasoning (E.g., Not Widely Disclosed, Already Public, Newsworthy, Not Offensive, Other (specify), etc.)
- Size of Award (if any)
- Use of Stereotypical Language by Court
- Legal Claim Not Strictly Disclosure Tort? If So, What was Claim?
- Egregious/Unfair Outcome? If So, Why?

In many instances, meaningful demographic data on plaintiffs' and defendants' identities (e.g., their race, age, etc.) was not available in the decision itself and further research into the parties' identities beyond the decision itself was not conducted. The lack of discussion regarding certain demographic factors prevents broad or statistically based claims suggesting that, for example, white plaintiffs tended to fare better than people of color, though, as discussed in Part II, there is qualitative comparative evidence suggesting that people of privilege—broadly defined—tended fare better in their public disclosure suits.

In total, the research assistants isolated and coded 306 decisions dealing with public disclosure torts or potential analogs (e.g., constitutional informational privacy claims, intrusion claims involving an elements of disclosure). These decisions were also KeyCited to capture any subsequent history that may have been relevant for inclusion. Throughout the research assistant review process, the assistants and the author had periodic check-ins to discuss questions regarding the review process and to help ensure uniformity in review methodology.

STEP 3: QUALITY CONTROL REVIEW

After the research assistants completed review and coding, the author re-reviewed their coding decisions on multiple occasions with particular attention to two factors: whether the case strictly involved a public disclosure case, or merely a related claim, and confirmed the courts' reasons for decision. After quality control review, 155 "pure" public disclosure cases remained. Of course, even the author's review involved close judgment calls about what to classify as a public disclosure tort case (e.g., for example, generally, cases from states without "common law" public disclosure tort cases but that had close statutory disclosure tort regimes, like New York, were often included). And, in some instances, there were close calls on how to classify the reason for judgment. Put differently, it is of course possible that human error and human subjectivity influenced the coding decisions at the margins. The numerical breakdown of the outcomes and reasoning in these 155 cases is detailed in Part II, Table 1, with more detailed analysis included in the case chart available at https://www.law.uw.edu/wlr/online-edition/scott-skinner-thompson with further qualitative comparison among certain cases also discussed in Part II.[267] While the Step 2 review attempted to catalogue the cases along a variety of demographic factors, because that information was not regularly available, the case chart collapses the relevant demographic data into a single column.

267. All told, the legal research methods employed here, and disclosure of those methods, appear robust compared to what is generally utilized and disclosed in legal academic literature and are consistent with more systematic methods recently advocated. *See* Baude et al., *supra* note 6; Hall & Wright, *supra* note 6.