

A Lost Search for a Generic Tort Action Protecting “Peace of Mind”

G. Edward White

I

I plan to spend most of my time today setting forth the details of an episode in the mid twentieth-century history of American tort law, from which I intend to draw some observations on the place of history in tort law, or, put more precisely, the relationship between tort law and its surrounding cultural contexts, which amount to, when one has some distance from those contexts, its history. But before getting to that episode, I want to state, in general terms, what I take the relationship of tort law to its history to be.

I don't think tort law is any different from any other field of law, private or public, in its relationship to history. I've completed two books in a series called *Law in American History*, and am in the process of writing a third. The coverage of those works ranges from the colonial years through the twentieth century, and I take up fields in both public and private law, including torts. Throughout the books my theory of the relationship of law to its “history”—its surrounding contexts—is that the relationship is reciprocal. Law, at any point in time, is both affected by developments in the larger culture and affects them.

In describing the relationship of law to its history as reciprocal, I am rejecting two other theories of that relationship. One characterizes law as a “mirror of society,” an entity that reflects and responds to attitudes and events in the world surrounding it. Another characterizes law as a mainly autonomous profession, insulated from its social context by its distinct professional training, language, modes of analysis, and rules and doctrines. In the former of those alternative theories the arrows of causation flow in one direction, from outside the legal system into it. In the latter view, the causal arrows flow in the other direction, with legal doctrines having an impact on society at large while primarily originating internally, from the special needs and characteristics of a profession whose central concern is with a body of authoritative rules guiding human conduct.

I think there are apparent difficulties with both of the two alternative theories. One will be obvious to anyone who has studied legal doctrines over a span of time: those doctrines change their content, and the changes can be matched up to changing attitudes in the larger culture. One need only look at successive interpretations of the Equal Protection Clause over the course of the twentieth and early twenty-first centuries to see how particular sorts of legislative classifications and discriminations have been treated as raising, or not raising, equal protection concerns, and compare those interpretations with changing attitudes in American culture toward discrimination on the basis of race, gender, or

sexual preference. It is clear, from even a cursory glance, that the meaning of legal terms such as “equal protection of the laws” is not frozen in time, but reflects attitudes in society as a whole.

So the theory that legal rules and doctrines are largely insulated from their surrounding contexts doesn't hold up. But several commentators, over the years, have been tempted to press the logic of the proposition that “the life of the law” has been “the felt necessities of the times” to the point where contemporary political, social, or economic attitudes are seen as invariably driving the formulation of legal rules and doctrines. That logic has been particularly attractive to scholars without legal training who choose to analyze legal decisions. But anyone who has spent time teaching or writing about the intricacies of legal doctrine quickly realizes that the logic has severe limitations.

When a court decides a case which may have been pressed upon it by events and attitudes in the larger culture, judges do not simply ask “how do we currently feel about the issues raised in the case?” They consider the case within a doctrinal framework that they treat as controlling the disposition of particular legal issues. That framework is not rigid, or frozen in time, but it is important in the decision of the case, because it implicitly emphasizes some doctrinal approaches to the analysis of the issues the case presents and discourages others. When, for example, there is no doctrinal legacy of classifications based on gender being given

heightened scrutiny under the Equal Protection Clause, a court considering a gender discrimination case will be constrained in applying heightened scrutiny. It may resolve to do so, but it will need to construct arguments for doing so which extend beyond the parameters of received doctrine. And this will be the case even if attitudes in the larger culture have reached a point where a majority of Americans regard classifications based on gender as presumptively suspect, or even if a majority of the judges deciding a particular gender discrimination case hold that view as well. In short, cases are never decided wholly on a “first impression,” because courts need to work within the doctrinal frameworks in which they are perceived to be set. Further, once a court makes a decision based on criteria deemed to be important in a particular doctrinal analysis, it helps shape future cases by adding to a doctrinal framework. It thus does not make sense to think of legal decisions as fully the products of their social context. They are also the products of law’s distinctive professional discourse.

II

Turning now to tort law, I want to sketch out an episode involving American tort scholars’ response to the emergence, in the early and mid-twentieth century, of two sets of tort actions they regarded as “new.” One set included actions in which plaintiffs were seeking redress for various invasions of their “privacy,” invasions

in which they had not been defamed, but rather offended, humiliated, or embarrassed. The other set consisted of actions for intentional infliction of emotional distress without any accompanying physical injury.

By the late 1930s commentators such as Calvert Magruder, Fowler Harper, and William Prosser had begun to write about both sets of actions, and by the first edition of Prosser's torts treatise in 1941, Prosser had come to see the two sets as being connected. The new action of intentional infliction of "mental disturbance," Prosser felt, would over time expand to absorb the various privacy torts, because both actions were about protection for "peace of mind."

When Prosser made that statement he had compiled three decades of "privacy" actions in which many of the cases sounded in what today would be called disclosure or non-commercial appropriation. They were cases such as *Pasevich v. New England Insurance Co.*,¹ *Foster-Milburn Co. v. Chinn*,² or *Sinclair v. Postal Telegraph & Cable Co.*,³ where plaintiffs objected to their being represented as endorsing a commercial product or to having their names or photographs associated with statements likely to convey misleading impressions of

¹ 50 S.E. 68 (1905).

² 134 Ky. 424 (1909).

³ 72 N.Y. S. 841 (1935).

them. In those cases the gist of the action was not necessarily that others would think less of the plaintiff; it was that a reasonable person would find the conduct of the defendant offensive to a person of ordinary sensibilities. It did not seem necessary, in such actions, that plaintiffs demonstrate the statements to be factually false, merely that a jury could find that the defendant's actions were such that they would cause an ordinary person mental distress. To Prosser those "privacy" actions looked similar to the actions for intentional infliction of emotional distress in that they had upset the plaintiffs' feelings in a particularly acute fashion.

One can readily identify historical reasons why actions for particular versions of invasion of privacy and for intentional infliction of emotional distress emerged in the first three decades of the twentieth century. Developments in mass transportation and communication meant that Americans were able to be in greater contact with numbers of people, increasing the number of opportunities for persons to be exposed to public traffic and scrutiny. Commercial products came to be distributed more widely and commercial advertising became a regular feature of mass marketing, increasing the likelihood that companies might want to use the names or likenesses of persons in their sales promotions. Newspapers proliferated and began to use photographs widely in their editions, making it more likely that ordinary people would be reported about or photographed in the public press. And the emergence of the social and behavioral sciences in academic fields resulted in

“mental disturbance” coming to be treated as less ephemeral and more capable of being observed and diagnosed. When one adds to this the persistence of traditional “class” attitudes about the social undesirability of having “private” information about persons disclosed in commercial settings or the press, one can see how grievances connected to the invasion of privacy or to the infliction of emotional distress might have increased.

There were, however, other reasons more closely connected to the state of legal doctrine. Privacy actions often contained an element that would have disqualified them as actions in defamation: they were true, whereas a showing of falsity was required to make out an action in libel or slander. In addition, some actions sounding in privacy did not rest on a claim that the plaintiff’s reputation had been lowered, as where a company used a person’s name or endorsement in their advertising without the person’s permission, or a magazine article revealed facts about its subject that would not necessarily cause anyone to think less of the person, but which the subject wanted to keep from public view. Finally, actions for intentional infliction of emotional distress required proof that the distress had actually occurred, which typically required testimony from a mental health professional whose “expertise” in diagnosing emotional injury was acknowledged. Without a cadre of such experts, actions in IIED could not have gone forward.

By the early 1960s privacy actions had proliferated, and Prosser's catalog of them in a 1960 article⁴ indicated that he had abandoned the idea that the privacy torts and intentional infliction of emotional distress could be amalgamated in a generic action for "peace of mind." More actions had surfaced in which celebrities were seeking to capture the commercial value of their names or likenesses, so "appropriation" privacy suits took on more of that character. As Prosser recognized, commercial appropriation suits were hardly instances in which the plaintiffs were complaining about public exposure: they simply wanted to get paid for it. In addition, "intrusion" privacy suits had increased, and in most of those plaintiffs were not complaining about something about them being disclosed or exploited: instead they were objecting to someone else's violating their "private space." Sometimes the invaders were searching for "private" information to reveal publicly, but in many instances intrusion actions resembled suits for intentional infliction of emotional distress: defendants were charged with upsetting plaintiffs by invading their private lives.

Prosser thus concluded, in his 1960 article and the 3rd edition of his treatise in 1964, that privacy was a "composite" of four different types of actions that had

⁴ William L. Prosser, "Privacy," 48 Calif. L. Rev. 383 (1960).

little in common with one another.⁵ What had happened, in the two decades since Prosser's first edition, is that the tort of "privacy" had become a kind of default action, where the facts giving rise to a complaint suggested that actions in defamation or intentional infliction of emotional distress were not available, but the plaintiff had been offended, humiliated, disturbed, or embarrassed, or the plaintiff had chosen to control the terms on which he or she wanted to make "private" information public. Prosser's catalog of "privacy" actions thus had the effect of suggesting that the tort was driven less by a common search for "peace of mind" than by the particular forms various privacy suits took.

While Prosser was treating privacy in that fashion in the early 1960s, two other scholars were continuing to consider the prospect of several tort actions in which damages were not based on physical injury being combined in a generic action. For John Wade, writing in 1962,⁶ the actions of privacy, defamation, and intentional infliction of emotional distress could be combined in an action for "peace of mind." This would permit some of the arcane technicalities of the law of defamation, which Wade saw as a barrier to suits for loss of reputation, to be bypassed, since Wade believed most privacy suits were about reputational

⁵ See *id.* at 407.

⁶ John W. Wade, "Defamation and the Right of Privacy," 15 *Vand. L. Rev.* 1093 (1962).

concerns that engendered “mental disturbance.” And for Edward Bloustein, writing two years later,⁷ “privacy” actions were better understood as actions implicating human dignity.

Bloustein went through the four categories of privacy torts Prosser had identified, arguing that each could be better understood as violations of dignity. Intrusions violated dignity because they interfered with “personal isolation and control over the circumstances of its abandonment” which was “the very essence of personal freedom and dignity.”⁸ Disclosure cases were not about inaccurate revelations of information, but about the revelation itself: claimants thought it a violation of their dignity. Prosser’s interpretation of appropriation cases failed to recognize that many of them were about the “undignified” public use of someone’s name or likeness. And “false light” cases, Prosser’s remaining category, were just different versions of appropriation cases: plaintiffs were finding it “undignified” to be portrayed inaccurately.⁹

⁷ Edward J. Bloustein, “Privacy as an Aspect of Human Dignity,” 39 N.Y. U. L. Rev. 962 (1964).

⁸ Id. at 973-974.

⁹ Id. at 992.

Although Prosser differed from Wade and Bloustein on the prospects for integrating a series of torts seeking redress for nonphysical harm into a generic action for “mental suffering” or “peace of mind,” all of the commentaries suggested that by the early 1960s the actions were in an expansive phase, and likely to continue to expand. But instead of proliferating from the 1970s onward, actions in defamation, privacy, and intentional infliction of emotional distress shrank. Here again the relationship of history to legal doctrine was multifaceted.

In their discussions of privacy torts both Prosser and Wade had noticed two additional features about them. One was that many of the activities which generated privacy actions were expressive activities, such as the publication of articles, photographs, and commercial advertisements. The other was that the existence of that dimension of many privacy cases triggered free speech and freedom of the press concerns: the citizenry at large arguably had a “right to know” about the lives of persons connected to public events and issues.¹⁰ But neither Prosser nor Wade suggested that the expressive dimensions of conduct which generated some privacy actions amounted to constitutional privileges. Instead they treated them as possibly raising common law privileges, such as “fair comment” on matters of public concern, and as part of the process by which courts could balance

¹⁰ See Prosser, *supra* note 4, at 401; Wade, *supra* note 6, at 1122.

the newsworthiness of conduct against its offensiveness in deciding whether particular expressive activities were actionable.¹¹

The principal reason why Prosser and Wade, although recognizing the expressive dimensions of some conduct made the basis of privacy actions, did not believe that those dimensions yielded a constitutional privilege was that until 1964 the Supreme Court had concluded that the mere fact that common law privacy actions were brought in courts did not amount to “state action” for constitutional purposes. Since conduct giving rise to privacy actions, whatever its expressive components, was being evaluated in law suits involving private parties, the government was not sufficiently implicated in the suits to raise constitutional issues.¹²

All that was to change in 1964, when the Supreme Court decided *New York Times v. Sullivan*,¹³ and along the way held that although that case involved a civil suit between private parties, it involved the application of a state rule of law in state courts, and thus contained the requisite “state action” to raise constitutional

¹¹ See Prosser, “Privacy,” supra note 4, at 401, Wade, supra note 6, at 1122.

¹² Daniel J. Solove and Neil M. Richards, “Rethinking Free Speech and Civil Liability,” 109 Colum. L. Rev. 1650, 1658 (2009).

¹³ 376 U.S. 254 (1964).

issues. Having surmounted the “state action” hurdle, the Court then went on to construct a constitutional privilege, in defamation suits involving public officials, that could only be defeated by a showing that a defendant, in making false, reputation-lowering statements about a plaintiff, had acted with “constitutional malice,” defined as knowing falsity or reckless disregard to whether the statement was true or false.

Over the next two decades the Court constitutionalized not only the common law of defamation but that of false light privacy, disclosure privacy, and intentional infliction of emotional distress.¹⁴ Whatever momentum may have been building for an expansion of the torts of privacy and IIED before *New York Times* and its progeny, that momentum was sharply checked by the Court’s creation of constitutional privileges affecting each of those actions. The result has been, in late twentieth- and twenty-first century torts scholarship, the disappearance of any efforts to construct the creation of a generic tort for interference with “peace of mind,” “dignity,” or “mental suffering.” Instead of the scope of actions in privacy and intentional infliction of emotional distress widening, it has noticeably

¹⁴ See *Time v. Hill*, 385 U.S. 374 (1967) (false light); *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

narrowed as constitutional privileges have been attached to some activities generating those actions.

III

To what extent can one conclude that the constitutionalization of a series of torts seeking redress for largely emotional harm was a product of “history,” and to what extent a product of the doctrinal frameworks in which defamation, privacy, and IIED cases were set?

New York Times was clearly a product of the civil rights movement of the 1960s. The defamation action which spawned it was based on an advertisement protesting against the actions of persons resisting racial integration in southern states, including Alabama. A police commissioner in Montgomery, Alabama had claimed to be libeled because the advertisement, in describing the conduct of that city’s police and “Southern violators,” contained some inaccuracies. The plaintiff in *New York Times* had recovered substantial compensatory and punitive damages in the Alabama courts, and other defamation suits had been brought in those courts by persons who had claimed to be the subjects of the ad. One of the central points made by the majority opinion in *New York Times* was that a constitutional privilege was necessary to prevent the common law of defamation’s being used as a basis for punishing less than impeccably accurate speech which criticized public officials and which local juries disliked. In such cases the effect of the common

law of defamation was to chill speech arguably at the heart of the First Amendment.

Had *New York Times* not dramatized both the expressive dimensions of defamation actions and their capacity to chill speech criticizing public officials in a highly visible and contested setting, it is possible that the Court would have been inclined to continue to treat defamation suits as “private” and thus not subject to constitutional constraints at all. Today some restrictions on expressive activities, such as disclosure requirements in the securities industry, continue to be treated as raising no constitutional issues. So history surely mattered in the Court’s constitutionalization of the common law of defamation, and history very likely drove the Court to take the quite radical doctrinal step it took in *New York Times*, creating a constitutional privilege for persons defaming public officials that went well beyond, in its scope and its evidentiary requirements, any existing common law privileges in defamation cases.

But once *New York Times* was handed down, it had an obvious effect on the short-term future of not only defamation law, but the law of other torts based on the conduct of persons engaged in expressive activities. Constitutional protection for statements defaming “public officials” was shortly extended to statements defaming “public figures”: indeed the “public figure” category came to be treated as decisive in defamation cases, encompassing most public officials and

distinguishing, for the purpose of defining constitutional privileges, “public figure” and “private citizen” plaintiffs. From there the Court considered the extension of *New York Times* privileges to defamatory statements made about private citizens on matters of public concern, and then, having initially taken that step, reversed itself and created a less demanding burden of overcoming a constitutional privilege for private citizen plaintiffs in such cases.

Meanwhile the Court began to consider the implications of its constitutionalization of the law of defamation for other torts seeking redress for emotional harm arising out of expressive conduct. Its first candidate was a false light privacy case where a family objected to an article describing its ordeal as the hostages of escaped criminals as misleading, although not necessarily destructive of the reputations of family members. The Court analogized the constitutional issues in that case to *New York Times* and extended the privilege to false light cases. Because its defamation cases distinguishing “public figure” from “private citizen” plaintiffs had not yet been decided, it attached no significance to the status of the hostage family. Subsequently the Court constitutionalized disclosure privacy, holding that true statements in public records were entirely privileged, and when states sought to prevent the disclosure of certain information, such as the names of rape victims, they had to demonstrate a compelling interest supporting the restriction and their having employed the least restrictive means to further that

interest. In addition, the Court indicated that constitutional privileges could affect intrusion privacy, holding that “private” information, such as a telephone conversation, could be disclosed by a third party if it had been lawfully obtained, even if the party disclosing it had intruded to secure it.

The analogies to *New York Times* continued in a case where a “public figure,” ridiculed by a advertisement parody in a magazine, sued for intentional infliction of emotional distress. The Court concluded that even though the “extreme and outrageous” standard of conduct to trigger an IIED action had likely been met, the defendant had a constitutional privilege to make fun of the plaintiff because the plaintiff was a public figure. By the 1990s all of the torts seeking redress for emotional harm save appropriation privacy had been constitutionalized by the Court, and in that last area lower courts had suggested that appropriations of celebrities’s names or likenesses might be protected if they took a form which suggested some “creative modification” of the names or likenesses.¹⁵

What shall we conclude about the process in which all the tort actions which commentators, at one point, thought might be gathered together in one robust generic action for “peace of mind” or “mental suffering,” had their potential impact significantly reduced by the imposition of constitutional privileges? As noted, that

¹⁵ See, e.g., *Winter v. D.C. Comics*, 30 Cal. 4th 881 (2003).

process very likely began not through any doctrinal developments in the law of defamation: in fact some of the arcane features of that law, such as a standard of strict liability for defamation actions, were noted by the Court in its attempts to show that defamation actions had a strong potential to “chill” unpopular speech. It likely began because of the civil rights context of *New York Times*. As an ordinary defamation suit, *New York Times v. Sullivan* bordered on the preposterous: the “false statements” in the ad were trivial, and substantially accurate; the advertisement, which named “the police” and “Southern violators,” did not refer to the plaintiff by name nor describe any conduct in which he had engaged; and the Court would eventually conclude that the ad could not have reasonably been understood as referring to him.

So the process I have just described began far more because of developments in American culture in the early 1960s than because of any doctrinal changes in defamation cases in the courts. But once underway, the decision in *New York Times* shaped the future course in which tort actions were constitutionalized in a quite significant fashion. By associating the *Times* privilege to make false statements about public officials with protection for criticism of the government, it emphasized the “public” dimensions of defamation cases, and, as the Court began to consider cases not involving public officials, spawned what came to be a pivotal distinction between “public” and “private” cases, to the point where, in 1985, the

Court acknowledged a limited category of “private”/“private” cases—cases where a private citizen plaintiff was defamed on a matter not of public concern—in which no constitutional privileges existed.¹⁶

Meanwhile the other major conceptual contribution of *New York Times*, that tort actions involving expressive activities could have constitutional dimensions, radiated through decisions involving privacy and IIED cases. And as the Court began to set forth constitutional privileges in those cases, its decisions tracked the categories of *New York Times*, so that “public figure” plaintiffs in IIED cases bore the same burden of surmounting the *Times* privilege as plaintiffs in defamation or false light privacy suits, but the status of “private citizen” plaintiffs in IIED cases remained uncertain.

While this doctrinal development was going on, there was no particular change in what might be called the cultural dimensions of privacy or IIED cases. From *New York Times* through the 1980s no social developments galvanized the common law of privacy or IIED to the extent that the civil rights movement had galvanized defamation suits in the 1960s. The constitutionalization of privacy and IIED was largely driven by doctrine: doctrinal analogies, doctrinal conceptualizations of activity, doctrinal concerns with “balancing” constitutional

¹⁶ *Dun & Bradstreet v. Greenmoss Builders*. 472 U.S. 749 (1985).

privileges against recovery for emotional harm. At some inchoate level, one might sense an increased sensitivity on the part of late twentieth-century Americans toward actions that impose emotional harm on others. One might be inclined to suspect that emotional harm was taken more seriously, and treated more generously, in those decades than in preceding ones. But there is little evidence that after *New York Times* the constitutionalization of privacy and IIED was significantly affected by cultural attitudes toward emotional harm itself. It was primarily affected by the doctrinal framework that affected the constitutionalization of those areas after *New York Times*.

So what we see, in the episode just recounted, is a continuing interaction between “history” and “law” in the emergence of, and treatment of, actions in privacy and IIED in the twentieth century. “History,” by which I mean the aggregate of events and ideas present at any period in the existence of a nation, was responsible, in important part, for the emergence of the tort actions of privacy and intentional infliction of emotional distress in the early twentieth century. But once they emerged, those torts took on the characteristics of common law actions in America, which is to say they were affected by the residue of doctrine surrounding them and the particular doctrinal frameworks in which they were situated.

As the actions expanded and expanded, over the course of the century, they continued to be affected by doctrinal residues and frameworks, but they were also given momentum by changes in the culture at large. Actions for “peace of mind” had an increased cultural resonance in the middle years of the twentieth century because “privacy” became a more cherished value as it became more difficult to secure, and actions seeking redress for intentional inflictions of emotional harm also became more resonant as emotional harm came to be taken seriously and viewed as quantifiable in the courts. By the third edition of Prosser’s treatise in 1964 both sets of actions had proliferated, and some commentators had come to see them as parts of a larger generic action for protection against mental suffering.

It might be fair to say that between the first and third editions of Prosser’s treatise, 1941 to 1964, the development of privacy and IIED was largely driven by doctrinal factors, although the growing number of cases in both areas was primarily a product of historical factors. After 1964, however, the number and scope of actions in both areas receded, driven, I have suggested, first by history and then by pathways of doctrine emanating from the germinal decision in *New York Times*, which was itself largely a historical phenomenon. Consequently the expectations of commentators writing just before *Times* was decided—that privacy and IIED would continue to flourish in the 1960s and beyond, and possibly become integrated, because those actions had common roots in the cherished

values of “peace of mind” and “dignity”—were not realized. It became harder to bring successful actions in both areas, and consequently easier to engage in expressive activities that caused others emotional harm.

The episode suggests that American tort law has been inextricably bound up in history, but in a distinctive fashion. Tort law, like American law in general, is neither fully driven by history nor largely resistant to it. It is simultaneously a body of professional learning and discourse and a cultural phenomenon. And the key to understanding the place of tort law at any point in its history lies in a precise unearthing of the reciprocal relationship it had with its cultural contexts.