# Privacy for the Privileged Few

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Scott Skinner-Thompson, *Privacy's Double Standards*, 93 **Wash. L. Rev.**, (forthcoming), available on SSRN

In an age of growing income inequality and daily reminders of the privileged lives led by the rich and famous, it should come as no surprise that tort law might come to mimic the glaring disparities in the larger culture. The thesis of Scott Skinner-Thompson's new article is that the courts have done just that in adjudicating privacy claims for the tort of public disclosure of private facts. Specifically, Skinner-Thompson argues that in applying the black letter law, courts have systematically favored privileged plaintiffs (often celebrities) without showing a similar regard for ordinary individuals, particularly plaintiffs from marginalized communities.

The article is rich in examples of disparate results linked to the identity of the plaintiff. There is the case of the gay man who loses his public disclosure lawsuit, despite being "outed" by the pastor of his church to other church members and a future in-law. Yet Hulk Hogan, the professional wrestler and reality show star, known for boasting about his sex life, wins a multi-million judgment when Gawker posts a sex tape of one of his sexual encounters. No recovery for a teenage victim of revenge porn when a website publishes a nude photo of the plaintiff she had privately sent to her boyfriend, but a sizable recovery for professional football player resulting from a tweet of his medical records indicating that he had to have a finger amputated. And on and on.

Skinner-Thompson's impression of a double standard favoring the privileged and the famous is backed up by his persuasive empirical study of published public disclosure cases decided in the last decade (2006-2016). (P. 15.) His study of dispositive motions in 150 such cases reveals that a plaintiff's privacy claim survived only 31 times (or roughly 20%), a notable statistic that demonstrates that "while privacy torts are not dead yet, they are on life support." (P. 47.) Against this unfavorable backdrop, Skinner-Thompson concludes that "privacy doctrine often is applied in such a way that it is having a disparate negative impact on certain marginalized populations, and, in some instances, there is also evidence of disparate treatment." (P. 6.)

Most significantly for purposes of his doctrinal analysis, Skinner-Thompson finds that most of the dismissals (61%) are traceable to two black letter requirements which he argues amount to a double standard in the operation of this tort: (1) proof that the defendant widely publicized the private information and (2) proof that the plaintiff held the information completely private or secret. As he reads the cases, courts are willing to relax the requirements in cases involving prominent people and celebrities, but apply them stringently in cases involving ordinary or marginalized plaintiffs. Thus, the outed gay man loses his case because the pastor's disclosure is too limited to constitute "publicity" and the revenge porn victim's claim fails because she shared her nude image with her boyfriend and did not keep it completely secret. However, in Hulk Hogan's case, the court allows the claim to go to the jury, even though the plaintiff publicly revealed details about his sexual exploits and "stills" from the offending video had already been posted by a third party.

In addition to unearthing compelling stories from the cases and tracing the negative effects of the two requirements, Skinner-Thompson makes a normative and structural argument for providing more

privacy protection for marginalized plaintiffs whose cases get swept away in the non-privileged pile unlikely to go to trial. Drawing on part of his prior work, he argues that "privacy rights are particularly important for marginalized communities," who are disproportionately the object of surveillance and who are often unable to "absorb the social and economic costs that flow from the exposure of sensitive information." (P. 3.) He also views privacy rights as serving as a "liminal or transitional right" until such time as the group, for example LGBT plaintiffs, "gain both formal anti-discrimination protection and lived equality." Finally, Skinner-Thompson observes that for many living on the margins of society, keeping information completely secret may be a "practical impossibility," given that sharing stigmatized information (such as medical information or sexual orientation) may be "necessary to mental health and identity exploration/play." (P. 20.) For Skinner-Thompson, the teenage revenge porn plaintiff should have the right to expect her ex-boyfriend not to post compromising pictures of her in order to allow teenage girls to explore their sexuality without being publicly exposed.

Quite rightly, Skinner-Thompson criticizes the disparate pattern of recovery in public disclosure cases as contrary to what we should expect to see in this area of the law in which celebrities and public figures are supposed to receive fewer privacy rights because of the newsworthiness of their lives and their greater capacity to fight back in the press and other channels. He then uses the courts' disparate application of the two requirements to make a broader theoretical point. He maintains that the courts' uneven application of privacy rights is unsupportable because it violates a fundamental tenet of a body of common law, such as tort law, i.e., that like cases should be treated alike and that purportedly universal principles should apply to everyone.

To rectify what he sees as the "built-in inequality" in the requirements of the public disclosure tort, Skinner-Thompson urges the courts to take a page from constitutional law, particularly the equality guarantee of the equal protection clause. When Skinner-Thompson argues for importing constitutional principles into tort law, he makes it clear that he is not suggesting that plaintiffs mount a constitutional attack on the disclosure tort, similar to the successful cut back on defamation and privacy claims made in the name of the First Amendment since *New York Times v. Sullivan*. Instead, what he has in mind is using constitutional equality norms as "substantive guideposts as judges craft the common law of privacy torts." (P. 4.) Using constitutional equality norms to shape tort law, he argues, will provide the "doctrinal foothold justifying reform" and offer courts a solid reason for expanding the "flimsy protections" of the disclosure tort.

Although Skinner-Thompson's call for infusing constitutional principles into tort law is not novel, his analysis of the possible sources courts may look to for guidance is the most thorough I have encountered in the literature. He begins his argument by noting that courts have already allowed the federal constitution to shape the contours of tort law in a number of contexts. His argument re-positions *New York Times v. Sullivan* and its progeny as cases that actively reshaped the common law doctrine of privacy and defamation law, not simply as First Amendment attacks on state law. More importantly, Skinner-Thompson sees no warrant for limiting importation of constitutional principles to the First Amendment, citing the punitive damages cases that have relied on the due process clause to re-shape the remedial law of torts.

In a novel and creative part of the article, Skinner-Thompson argues that courts should look to the equality guarantees of state constitutions to influence the substance of privacy torts. He notes that many state equal protection clauses are more expansive than the federal constitutional guarantee, providing explicit protection to additional protected classes and dispensing with the state action requirement. Influenced by Helen Hirshkoff's work on state common law, Skinner-Thompson asserts that there is evidence that state constitutional provisions "indirectly influence the substance of common law causes of action." (P. 33.) In this way, constitutional norms, including equality norms, are "infused into the common law through 'private law portals,'" as evidenced by cases in which state courts have held

private employers accountable for employment discrimination, even when the employers were exempt from state statutory anti-discrimination provisions. (P. 34.) His analysis suggests that by grounding reforms in state constitutional norms and principles, common law courts can go beyond vague and open-ended appeals to "public policy." This interplay between state constitutional norms and tort law seems natural and appropriate to Skinner-Thompson because "common law torts, after all, are a creature of state law." (P. 33.)

In the end, Skinner-Thompson advocates for a contextual approach to the disclosure tort that would comply with constitutional equality principles by ensuring that "individuals in marginalized communities are able to bring claims on the same terms as privileged individuals." (P. 41.) His solution is to "level up" by relaxing the widespread publicity and complete secrecy requirements for all plaintiffs, not just for the privileged few. Once the strict requirements are relaxed, he hopes that judges will be freed up to consider the specific facts of the case, such as the degree of harm caused by even a limited disclosure of sensitive information and the reasonableness of a plaintiff's failure to keep the information completely secret. Presumably, such a reform would have the effect of taking the disclosure tort off life support by sending more cases to the jury.

*Privacy's Double Standards* is the kind of article that speaks to torts scholars of different stripes. For the more doctrinal, Restatement-type scholars, Skinner-Thompson's empirical study of the public disclosure tort is highly informative, indicating that the tort is under pressure and has taken a perverse turn, no longer serving its function of ensuring the privacy of intimate and sensitive matters except in cases in which disclosure is warranted by the newsworthiness of the plaintiff or the information. For critical torts scholars who hope to see tort law used to promote social equality and social justice, Skinner-Thompson's article takes us in a new direction. He searches not only for gender, race, and other identity-based biases in the deep structures of the common law, but also for indications that the law as it operates on the ground offers redress mainly to the privileged, even if the black letter doctrine is stated in neutral and universal terms.

To be sure, many will not agree with Skinner-Thompson's proposals for reform. Unless you share the normative view that privacy is good for everyone and particularly precious for marginalized people, you may just use the results of Skinner-Thompson's empirical study to argue that courts should "level down" and apply the stringent requirements in every case without exception. At a minimum, however, his article should stimulate a re-examination of the value of the disclosure tort and prevent it from withering away without anybody noticing.

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