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# Rescuing Dignitary Torts from the Constitution

*Cristina Carmody Tilley*<sup>†</sup>

## INTRODUCTION

Modern First Amendment doctrine is often celebrated for its unflinching protection of speakers—both institutional and individual—who are sued for injuries their words inflict. But the past fifty years of robust Speech and Press Clause jurisprudence threatens to eliminate the rights of individuals seeking recourse for dignitary injuries imposed by speakers. That result is normatively inconsistent with social values in even the earliest legal systems. It dismantles a socially agreed convention for peaceful resolution of interpersonal disputes, which is crucial to the prevention of violent self-help in American society and one of the key functions of intentional tort law. Most important, it is not mandated by the text of the Constitution itself.

This article begins by orienting the besieged dignitary torts—defamation, invasion of privacy, and intentional infliction of emotional distress (IIED)—within a theory of tort law that justifies the provision of a state-sanctioned forum for adjudication of private disputes. While loss-shifting and accident regulation theories have little to offer when evaluating the dignitary torts, which are by definition intentional and not mere accidents, a recent version of the corrective justice theory of torts—civil recourse—suggests that a tort forum is crucial for injuries to personality in a way that might not be true for injuries to property or body. The article then documents the threat to this forum posed by the Supreme Court’s imposition of a tort-diminishing theory of the First Amendment from 1964 to the present. The article suggests that if the Court’s free

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speech doctrine continues on its current trajectory, it will force the abolition of these torts, in practice if not in theory. However, interposition of the Ninth Amendment, which prohibits construction of the First Amendment to disparage rights “retained by the people,” gives the dignitary torts a foothold within the structure of the Constitution. If the dignitary torts have arguable parity with the First Amendment, then courts are not bound by the Constitutional text to vault speech rights over the right to sue for dignitary injuries and therefore must account for those dignitary rights when analyzing the scope of any First Amendment immunity from common-law liability. Various Ninth Amendment theories suggest that the set of rights “retained” by the people can be filled with natural rights, with rights that are a part of Western law “history and tradition,” with state rights recognized at the time of the American founding, or with state rights developed consistent with constitutional jurisprudence after the founding.

This article documents the historical development of the dignitary torts in order to evaluate whether they fit within any of the theories of “retained rights” under the Ninth Amendment. Defamation, invasion of privacy, and intentional infliction of emotional distress were recognized obliquely in Greek law and were recognized explicitly as a monolithic cause of action in Roman law. Indeed, the provision of a state-sponsored forum for vindicating the dignitary interests invaded by these wrongs coincided with the decline in violence in these societies. Even after the fall of Rome, independent sovereign states in Europe and their colonies in North America continued to recognize the dignitary torts, albeit more distinctly in some legal systems than in others. By the time of the American founding, defamation was explicitly embraced by the common law of the states. Moreover, protection of privacy and emotional tranquility interests were often smuggled into the pre-ratification common law in the guise of defamation actions. In addition, after ratification, these dignitary torts developed more fully into freestanding causes of action. At the turn of the century, invasion of privacy had begun to evolve into an acknowledged tort, and by the mid-twentieth century, courts began to embrace IIED. This created a full-bodied common law of dignitary torts well before the Court’s expansion of the First Amendment into the dignitary torts arena, starting in 1964. Thus, the article argues that defamation, invasion of privacy, and intentional infliction are entitled to constitutional respect and are protected by the Ninth Amendment from intraconstitutional diminishment. A

failure to reassert the dignitary torts within the constitutional framework, the article concludes, undervalues the prudential benefits derived from giving victims of dignitary injury a peaceful forum for seeking recourse. A return to self-help—whether in the form of extrinsic violence or suicide—is a distinct possibility if the dignitary torts continue to languish within the constitutional scheme. Placing these torts on firm constitutional footing is necessary to protecting “the whole man.”<sup>1</sup>

After discussing the significance of the dignitary torts in Part I and summarizing the history of the Court’s increasingly dismissive treatment of these causes of action in Part II, the article suggests in Part III that the torts can be rescued from irrelevance by applying the Ninth Amendment as a rule of construction that governs conflicts between enumerated rights and unenumerated but retained rights. This rule would only apply to the rights protected by the dignitary torts if they are reasonably described as “rights retained” whose constitutional status is provided for by the Ninth Amendment. The article outlines four Ninth Amendment theories for filling the “rights retained”—natural-law rights, rights enshrined in Western legal tradition, state-law rights existing at the time of ratification, and state-law rights developed post-ratification. What follows in Part IV is a brief history of the torts within Western law, from Rome through England and the colonial and modern American periods. This timeline serves as the basis for determining whether reputation, privacy, and emotional tranquility are properly described as rights retained. The article concludes that these rights were retained under any of the four theories and consequently do not automatically lose out to the enumerated free speech right when the two clash. Finally, Part V of the article proposes a test—borrowed from choice of law theory—that could guide courts when deciding which of the two conflicting rights, enumerated or unenumerated-but-retained, should take priority in a given circumstance. The “comparative impairment” test would examine the internal and external effects of the competing legal regimes—here, speech protection and dignity protection—and select the one whose external application would least impair the internal effect of its competitor. This test guarantees that the interests served by each law would be methodically evaluated within a given set of

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<sup>1</sup> Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 700 (1986) [hereinafter Post, *Defamation*] (quoting anthropologist John Davis).

facts, and that neither would be gratuitously disparaged in contravention of the Ninth Amendment's rule of construction.

## I. THE SIGNIFICANCE OF THE DIGNITARY TORTS

Though a mainstay of American law, scholars cannot seem to agree why we have torts.<sup>2</sup> Three theories of the purpose of tort are in the fore today: first, the theory that tort exists to provide compensation for accidental injuries; second, that it exists to manage and shift risk; and third, that it provides individual corrective justice. Without delving too deeply into any of these theories, it is easy to conclude that while the first two may be legitimate descriptions of the rationale for negligence law, which by definition involves inadequate care in response to risk, they do not explain why we allow victims of intentional torts to recover. As some torts experts have observed, intentional torts such as defamation and invasion of privacy have “nothing to do with” negligence law.<sup>3</sup> This article's concern is limited to the dignitary torts which are a subset of intentional torts. The only one of the current theories that takes adequate account of intentional torts is the corrective justice model. This may explain why the Supreme Court has undervalued the dignitary torts when weighed against speech. Throughout the 1900s, scholars grew disenchanted with the theory that tort was designed to dole out individual justice—a theory based on the view that the state had to monopolize violence in order to prevent private attacks when individuals felt their rights had been violated.<sup>4</sup>

The corrective justice theory of torts has experienced a renaissance in the past decade, with one gloss on the concept—civil recourse theory—taking a leading role. But whether the idea of corrective justice is in vogue or not, it is worth examining why scholars are so willing to discard as a rationale for torts, or at least for the intentional dignitary torts, an idea that they substitute for private vengeance. That theory seems uniquely suited, and indeed crucial, for the dignitary torts.

The modern disdain among some scholars for the “vengeance prevention” function of tort law seems to reflect

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<sup>2</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 923-28 (2010); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1772 (2009).

<sup>3</sup> Goldberg & Zipursky, *supra* note 2, at 977.

<sup>4</sup> See Solomon, *supra* note 2, at 1772.

contempt for the feudal societies that responded to private warfare with a state-sponsored alternative.<sup>5</sup> That function, they suggest, has little purchase in a contemporary society more concerned with allocating the cost of accidents than with preventing already diminishing interpersonal violence.<sup>6</sup>

This skepticism does not extend as obviously, however, to the intentional dignitary torts of defamation, invasion of privacy, and intentional infliction of emotional distress. The behavior underlying these torts does more than inflict property damage or even physical injury that the modern man is expected to rationally commodify. Instead, it invades an individual's sense of worth and dignity, important values in a relational society.<sup>7</sup> As one sociologist has said, each "individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts."<sup>8</sup> Thus, violations of the dignitary interest are the least susceptible to rational response and the most ripe for a state-sponsored diversion of vengeful impulses.

Scholars have taken up two camps in treating the relationship between defamation, invasion of privacy, and intentional infliction. Some insist that each of the torts serves different interests that dictate different substantive requirements and distinct legal treatment.<sup>9</sup> Others suggest that

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<sup>5</sup> See *id.* at 1781.

<sup>6</sup> See *id.*

<sup>7</sup> "[I]ndividual personality [is] constituted in significant aspects by the observance of rules of deference and demeanor . . . . Violation of these rules can thus damage a person by discrediting his identity and injuring his personality. Breaking the 'chain of ceremony' can deny an individual the capacity to become 'a complete man . . . .'" Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 963 (1989) [hereinafter Post, *Privacy*] (quoting Erving Goffman, *The Nature of Deference and Demeanor*, in INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR 47, 51 (1967) [hereinafter Goffman, *Deference*]). Post has observed that despite efforts to distinguish the elements of privacy and IIED torts, "the boundary between the two . . . is obscured . . . [because] the common law . . . is primarily interested in maintaining the forms of respect deemed essential for social life" regardless of what they are called. *Id.* at 971.

<sup>8</sup> *Id.* at 962-63 (citing Goffman, *supra* note 7, at 47).

<sup>9</sup> The "separatists" identify wholly distinct interests underlying the torts. For instance, Robert Post explains that the interest underlying defamation is protection of "reputation," whereas the interest underlying invasion of privacy is protection of "emotions." Post, *Privacy*, *supra* note 7, at 958; Post, *Defamation*, *supra* note 1, at 691-92. Meanwhile, another scholar defines the right underlying IIED as "the individual's interest in emotional tranquility," Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982), which sounds identical to the interest Post claims to be protected by the privacy tort. Further complicating this effort to neatly cleave the policy goals of the three torts is Post's view that "reputation" can be conceived of as "property," "honor," and "dignity," at least the latter two of which seem to occupy the same ground as "emotional tranquility." Post, *Defamation*, *supra* note 1, at 693.

all three stem from essentially the same social concerns and acknowledge substantial overlap among them.<sup>10</sup> Historically, the dignitary torts were treated as a unitary cause of action, protecting a key component of personal security—namely, interests in individual personality.<sup>11</sup> The fracturing of this interest into distinct torts has marginalized the underlying interest they protect. Further, it has incited plaintiffs to migrate strategically among the torts depending on which is most hospitable to a particular claim in light of increasing constitutional constraints. Tracing these branches of dignitary tort back to the single trunk they evolved from forces analysts to confront the broad scope and historical pedigree of the interest involved and the extent to which modern law diminishes it.

In short, defamation, invasion of privacy, and IIED are treated in American law as separate torts, and courts strive to treat them as doctrinally autonomous. But at the same time, they stem from the same basic underlying basket of social interests, best summarized as “personality” interests, but taking account of reputation, honor, dignity, and emotional tranquility.<sup>12</sup>

Encroachment on these personal interests continues as a major cause of violence in contemporary America. According to psychologist Steven Pinker, “most of what we call crime is, from the point of view of the perpetrator, the pursuit of justice.”<sup>13</sup> According to one well-known statistic, only about one-tenth of homicides in the United States are committed to

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<sup>10</sup> These scholars see the torts as more similar than distinct. As one has summarized, “[T]he torts of libel, invasion of privacy and intentional infliction of emotional distress overlap to a certain degree because all three are aimed either exclusively or in part at redressing mental suffering.” Robert E. Drechsel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339, 350 (1985). Early in the development of privacy and IIED law, one early scholar went so far as to suggest that the three should all be melded into a single tort “to constitute a single, integrated system of protecting plaintiff’s peace of mind against acts of the defendant intended to disturb it.” John W. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1125 (1962). This result would have replicated the approach of the Roman law from centuries ago, where all three torts—defamation, IIED, and invasion of privacy—were recognized and developed under the single heading of *iniuria*. See *infra* Part IV.A.2 for a discussion of Roman law and *iniuria* liability.

<sup>11</sup> See *infra* Part IV.A.

<sup>12</sup> Notably, Congress appeared to reach the conclusion that the three torts can in effect be interchangeable, defining “defamation” in its recently passed libel tourism bill to include “forms of speech [that] are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor or condemnation of any person.” Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, 28 U.S.C.A. § 4101(1) (West 2011).

<sup>13</sup> STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE* 83 (2011).

achieve a premeditated goal—such as killing a burglary victim or police officer in order to complete or hide a crime.<sup>14</sup> “The most common motives for homicide are moralistic: retaliation after an insult, escalation of a domestic quarrel, punishing an unfaithful or deserting romantic partner, and other acts of jealousy, revenge, and self-defense.”<sup>15</sup> Local cultures that draw a wider boundary around personal dignity also see more violence in response to affronts. For instance, according to Pinker, “the American South is marked by . . . a culture of honor[,] . . . [which only sanctions violence as] retaliation after an insult or other mistreatment.”<sup>16</sup>

Thus, torts whose essence is the affront to personal honor are more likely to incite vengeance. If so, the provision of a state-sponsored forum for resolution as a substitute for that violent self-help remains a legitimate purpose for tort law.<sup>17</sup>

The dignitary torts, then, are not just or even primarily a means to a money judgment. The availability of a forum for community adjudication of local norms of interpersonal

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 99; see also William L. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 46 (1956) [hereinafter Prosser, *Insult and Outrage*] (noting that Mississippi, Virginia, and West Virginia had historically sanctioned “antidueling codes” in an effort to tamp violence that arose from insult).

<sup>17</sup> To be sure, failure to provide a state-sponsored forum for vindicating dignitary interests may have other negative consequences, such as a reluctance to run for public office because of the constitutionally mandated forfeiture of self-protective legal recourse by candidates and public officials. On a smaller, but equally anti-democratic, scale, shrinking the dignitary torts may lead even private individuals to opt out of public or private speech that could result in incalculable injuries. For instance, a class of plaintiffs recently challenged Facebook’s practice of transforming pictures and comments of users who “liked” sponsored stories on specific products into “endorsement” ads for the products. Somini Sengupta, *So Much for Sharing His “Like,”* N.Y. TIMES, June 1, 2012, at A1. To avoid being featured in a potentially embarrassing endorsement, users had to refrain from “liking” a product. Notably, in response to the suit, Facebook initially argued that all such users were “public figures” to their friends. If so, then under the test for defamation liability set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), Facebook would not have been liable for any dignitary torts under current First Amendment law unless it acted with intent or reckless disregard—a complex standard to apply to ads generated by algorithm. Facebook has since settled and is modifying its endorsement practices. Somini Sengupta, *To Settle Lawsuit, Facebook Alters Policy for Its Like Button*, N.Y. TIMES, June 22, 2012, at B2, available at <http://www.nytimes.com/2012/06/22/technology/to-settle-suit-facebook-alters-policies-for-like-button.html>. The pre-modification result—discouraging Facebook users from speaking out in favor of a product or issue in order to avoid a dignitary invasion—is a net *reduction* in speech brought about by precisely the standards in current First Amendment law meant to increase speech. Justice White predicted just this turn of events in his dissent from the majority opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 400 (1974) (White, J., dissenting) (“It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems.”).



behavior, and the possibility of public opprobrium against the defendant who invaded the dignity of the plaintiff, is a substantial portion of the recourse provided by this area of law. This is true whether or not money is ultimately awarded. Indeed, one study revealed that many defamation plaintiffs would have accepted an apology from the defendants they eventually sued, and they would have sought money damages only when the defendants refused to express remorse for their actions.<sup>18</sup> The Court's erosion of these torts' potency, described below, therefore has a significant impact on both the legal treatment of individuals and community control of local norms in American law.

## II. DIGNITARY TORTS AND THE COURT

The past half century of First Amendment development is poised to vitiate the role of the dignitary torts in vindicating personality interests. In the latter half of the twentieth century, the Court handed down a series of opinions that essentially constricted the state common law of defamation in order to accommodate First Amendment speech goals. The first and most celebrated of these cases, *New York Times Co. v. Sullivan*,<sup>19</sup> devised a test to identify the common-law claims that fell under the canopy of First Amendment protection. According to the Court, if the plaintiff was a public official and the speaker published with less than "actual malice" . . . knowledge . . . or reckless disregard" of the likelihood the speech was false, defendant liability is unconstitutional.<sup>20</sup> Notably, in *Sullivan* and subsequent cases, the Court departed from its usual practice of simply invalidating a common-law precept or jury verdict and remanding for further development at the state court level.

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<sup>18</sup> THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 25 (Everette E. Dennis & Eli M. Noam eds., 1989).

<sup>19</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Sullivan* on its own did not necessarily spell the trivialization of dignitary interests or the proportionally greater likelihood of resort to self-help developed later in the article, as its scope was limited to suits by public officials. Public officials are among those least likely to batter their attackers. But Justice Scalia's arguably obscene gesture to a reporter in 2006 and the attack of Rep. Robert Etheridge (D-N.C.) on a camera-wielding protester in 2010 suggest that no class of would-be plaintiff is immune from vengeful impulses. See *Justice Scalia's Under-the-Chin Gesture*, NPR.ORG (Mar. 30, 2006), <http://www.npr.org/templates/story/story.php?storyId=5312065>; Jeff Zeleny, *Etheridge, Caught on Video, Apologizes*, N.Y. TIMES CAUCUS BLOG (June 14, 2010, 2:20 PM), <http://thecaucus.blogs.nytimes.com/2010/06/14/etheridge-caught-on-video-apologizes>. Still, *Sullivan* was the beachhead that led to the current situation.

<sup>20</sup> *Sullivan*, 376 U.S. at 279-88.

Instead, it repeatedly crafted tort rules of decision to be applied as a matter of constitutional law.<sup>21</sup> Thus, “after twenty-five years and twenty-seven [cases] . . . defamation law was effectively disabled, at least in the sphere of public affairs . . . .”<sup>22</sup> Specifically, from 1964 until 1991, the Court replaced a system wherein each of the fifty states was free to allow recovery for defamation under its own common law—allocating its own burdens of proof, standards of review, and the like—with a system in which the Constitution ostensibly requires that:

To recover for libel or slander, a public official must prove that the defendant acted with actual malice. Elected officials, candidates for public office, and appointed officials who have or appear to the public to have substantial responsibility for or control over governmental affairs must be treated as public officials. The same rules apply to public figures, and anyone who is involved in the resolution of important public questions, or who by reason of his or her fame shapes events in areas of concern to society, is treated as a public figure. To prove actual malice, the plaintiff must show that the defendant knew the defamatory statement was false, or had serious doubts about its truth. That must be shown by clear and convincing proof, and each reviewing court must subject a finding of actual malice to independent review instead of the normal clearly erroneous standard. Private persons who are not public figures but who are defamed in connection with matters of public concern must meet all the preceding requirements in order to recover presumed or punitive damages but may recover for actual injury by showing that the defendant was negligent. All of the preceding types of plaintiffs must bear the burden of proving that the defamatory statement is false. States may not permit recovery for rhetorical hyperbole, statements that cannot be reasonably interpreted as stating actual facts about the plaintiff, or deliberate misquotation that does not materially alter the meaning, and those determinations are to be made as a matter of law rather than left to juries.<sup>23</sup>

As a result of this constriction, defamation plaintiffs have migrated to other tort theories to vindicate their interests. One 1985 study observed a spike in intentional infliction claims against the media beginning in the 1970s, just as the Court’s drive to “disable” defamation law gained momentum.<sup>24</sup> Evidence suggests that, after *Sullivan*, claims for invasion of privacy also jumped.<sup>25</sup> The full-scale diversion of defamation to privacy torts

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<sup>21</sup> David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 784-87 (2004).

<sup>22</sup> *Id.* at 776.

<sup>23</sup> *Id.* at 787-88 (footnotes omitted).

<sup>24</sup> Drechsel, *supra* note 10, at 346.

<sup>25</sup> Anderson, *supra* note 21, at 776-77 (“[A]s long as other tort theories remain available, plaintiffs will try to shift their claims into those . . . categories . . . . A

may have been thwarted by a 1967 holding suggesting that *Sullivan* applied to privacy claims.<sup>26</sup>

The Court initiated its overhaul of the dignitary torts by recalibrating defamation, but the movement has gained momentum significantly in recent years as it has begun its assault on IIED. The Court now appears poised to shrink the refuge that IIED provides for dignitary injuries by diminishing the intentional infliction tort, again to accommodate a generous interpretation of First Amendment imperatives.

In *Hustler v. Falwell*,<sup>27</sup> the Court determined that public figure IIED plaintiffs cannot recover against defendants when injury is inflicted via publication unless they meet the *Sullivan* test by proving that something in the publication was false and that the defendant knew or recklessly disregarded the possibility of falsehood.<sup>28</sup> The Court explained that standards considered constitutionally uncontroversial throughout the balance of tort law, such as liability premised on the defendant's bad motive, had to give way in the intentional infliction tort in cases where the injury was inflicted against a public person via speech.<sup>29</sup>

In 2011, the Court expanded this reasoning. In *Snyder v. Phelps*,<sup>30</sup> it held that even private figures suing non-media speakers for IIED cannot prevail when the speaker inflicts injury with speech on public issues. Importantly, the Court failed to apply even the minimally tort-protective standard it had announced in *Falwell*, where the actual malice test was imported to IIED claims. *Snyder* appeared to snuff out any

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rash of claims for intrusion and related torts in the 1980s and 1990s was widely thought to be the result of the increasing difficulty of recovering for defamation.”); cf. CLARENCE JONES, WINNING WITH THE NEWS MEDIA 359 (2005).

<sup>26</sup> *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Though the *Sullivan* idea of balancing tort against speech may broadly apply to privacy claims, the use of culpable falsehood as a fulcrum is not an obvious fit for the privacy torts. Although the invasion of privacy in *Hill* took the form of a “false light” claim where misrepresentation was an element of the tort, accuracy is irrelevant to the three other privacy torts—public disclosure of private facts, right of publicity claims, and invasion of privacy. If falsehood is not an element of a dignitary tort, the speaker's culpability for circulating false speech has no utility to distinguish between protected and unprotected speech.

<sup>27</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). As in *Hill*, using the culpability for falsehood to distinguish between protected and unprotected speech in the IIED context is a clumsy tool. Although the speech in *Hustler* was untrue satire and thus susceptible to a *Sullivan* test, much IIED speech, such as creditor threats or disrespect of the dead, will be injurious but not necessarily false. In those cases, the test does not help distinguish between speech that merits First Amendment protection and speech that is unprotected.

<sup>28</sup> *Falwell*, 485 U.S. at 56.

<sup>29</sup> *Id.* at 53.

<sup>30</sup> *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

tort–speech balance by neglecting the actual malice test altogether. The speech at issue in *Snyder* was a funeral protest with picket signs that arguably suggested, among other things, that the deceased was a homosexual.<sup>31</sup> The protestors presumably circulated this false statement of fact knowingly or recklessly. The Court did not apply the *Sullivan* actual malice rule—which was adapted to IIED in *Falwell*—to permit recovery despite the fact that the protestors’ speech arguably contained knowing falsehoods about a private person.<sup>32</sup>

Justice Breyer, in his concurrence, described the case’s stark conceptual choice as a clash between First Amendment values and the state interest in protecting its citizens via common-law tort.<sup>33</sup> As Breyer summarized, the Court concluded that the speech interest in the case trumped the individual emotional interest without using the actual malice test.<sup>34</sup> The Court’s silence on actual malice in the *Snyder* case amounted to a facial decision that speech trumps tort regardless of the precise speech or activity involved—a decision that takes the Court even further down the anti-tort path it staked out in 1964.

Writing several years before *Snyder*, David Anderson predicted that if the First Amendment were interpreted to require that tort law impose absolutely no burdens on truthful speech touching a matter of public concern, the eventual result

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<sup>31</sup> *Id.* at 1225 (Alito, J., dissenting). Some of the other signs, held aloft near the church funeral for deceased soldier Matthew Snyder, read “God Hates You,” “You’re Going to Hell,” and “Thank God for Dead Soldiers.” Snyder’s father, the plaintiff, claimed that the signs and the consequent news coverage resulted in his depression and physical illness, and prevented him from recalling his son without thinking of the picketers. *Id.* at 1213-14 (majority opinion).

<sup>32</sup> To be sure, application of the actual malice rule in *Snyder* might have resulted in a finding that the speech interest was weightier than the dignitary interest represented by the tort. In fact, the outcome of the case is consistent with this reasoning. What is notable, however, is the Court’s neglect of the standard and its automatic assumption that speech trumped tort without any analytical consideration of the competing interests. *See Snyder*, 131 S. Ct. at 1219-20 (“What Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment, and that protection cannot be overcome by a jury finding that the [speech] was outrageous. . . . As a Nation we have chosen . . . to protect even hurtful speech on public issues . . .”).

<sup>33</sup> *Id.* at 1221-22 (Breyer, J., concurring).

<sup>34</sup> *Id.* at 1221; *see also* Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 490 (2011) (discussing the benefits of applying the actual malice test to both public and private figures suing for IIED inflicted via speech on matters of public concern, citing Eugene Volokh’s argument along these lines found, *inter alia*, at Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 304 (2010)).

would be abolition of “tort liability . . . arising from that category of speech.”<sup>35</sup> *Snyder* seems to make good on that prediction.

Comparing the status of state common-law torts prior to *Sullivan* and post-*Snyder* leads to one conclusion: the Court is steadily shrinking the province of tort law that protects dignitary interests and inversely expanding the reach of First Amendment speech protections.

### III. THE CONSTITUTIONAL BASIS FOR HONORING DIGNITARY TORTS

The First Amendment’s encroachment upon the dignitary torts is often justified by observing that, although the basket of dignitary interests is valuable as a matter of social policy, the Framers drafted a Constitution that vaults speech above those interests.<sup>36</sup>

The resolution of the dignity-versus-speech question may, however, require more than facile recourse to the First Amendment. The Framers constructed a preemptive textual counterweight to the First Amendment in the Ninth Amendment, which prohibits the denial or disparagement of “rights retained by the people” in favor of rights enumerated in the Constitution.<sup>37</sup> Several theories of the Ninth Amendment

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<sup>35</sup> Anderson, *supra* note 21, at 777.

<sup>36</sup> See, e.g., *Snyder*, 131 S. Ct. at 1220 (“[W]e cannot . . . punish[] . . . the speaker. As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.” (emphasis added)).

<sup>37</sup> U.S. CONST. amend. IX. The Ninth is the only explicit repository for these rights. But the document as a whole reinforces the view that the dignitary torts are not shut out of its scope. First, as many have observed, the Ninth and Tenth Amendments can be said to work in tandem, with the Ninth specifying that the people retained the set of unenumerated rights and the Tenth giving them the right to “confer powers upon their state governmental agents” in furtherance of those rights, among other ends. CALVIN MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* 107 (1995); see also *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (observing that the Ninth and Tenth Amendments together recognize the value of individual dignity and the role of the states in providing a forum for its vindication).

Second, both the original public understanding of the First Amendment and several normative theories of free expression suggest that the First Amendment, on its own terms, accounts for dignitary interests. For instance, many contemporaneous accounts of the adoption of the First Amendment suggest that its primary goal was to thwart central government efforts to restrain speech via criminal libel statutes or licensing schemes, see, e.g., Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1176 (1986), not to thwart individual citizens seeking recourse from other individuals whose words injured them, with a community cross-section of jurors setting intracommunity norms as to the reasonableness of particular types of speech. The existence of defamation actions at the time the First Amendment was adopted is often seen as “freezing” the balance between

suggest that the rights protected by the dignitary torts may be among those “retained by the people” and thus shielded from disparagement relative to those enumerated in the Constitution.

The Ninth Amendment is often derided as no more than a “punchline”<sup>38</sup> or an “inkblot,”<sup>39</sup> and the Supreme Court has not relied on it as the basis for any line of decisions.<sup>40</sup> Still, constitutional scholars seem convinced that it must stand for something, and they have focused for the past two decades on various theories that would give it meaning.<sup>41</sup> Most of these theories suggest that “rights retained” have status as independent constitutional rights, thus playing the same judicially enforceable “oversight” role with regard to state or federal law as do the enumerated constitutional rights.<sup>42</sup> If these theories are correct, the composition of “rights retained” is crucial and politically charged, since these rights could serve as the basis for striking down legislation. Perhaps because the stakes under these theories are so high, and because scholars of different political camps are wary of ceding policy ground, there

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speech and reputation as it stood at the time of ratification. *See id.* Moreover, even modern First Amendment theory suggests a place for the dignitary rights as a subset of expressive rights. For example, to the extent that the purpose of the First Amendment is to foster “self-realization,” via “individual choice and intellectual development,” that purpose is served by allowing individuals to vindicate privacy rights absent which they might not engage in particular intellectual endeavors. *See, e.g.,* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 5 (1984). The same protection for privacy can be derived from, among others, a “liberty model” of free speech, where expression is protected if it “defines, develops, or expresses the self.” *See id.* at 49 (internal quotation marks omitted) (discussing the work of Edwin Baker). As one writer has summarized, “the same principles that underlie freedom of expression also give rise to other rights, such as personal security, privacy [and] reputation.” Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1280 (1998). In short, the Ninth Amendment argument for acknowledging the rights represented by the dignitary torts is not a constitutional outlier, but in fact is consistent with the document read as a whole.

<sup>38</sup> Jeffrey Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking about Unenumerated Rights Inspired by Philip Bobbitt’s Constitutional Fate*, 75 MISS. L.J. 495, 496 n.1 (2006) [hereinafter Jackson, *Modalities*].

<sup>39</sup> Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 500 & n.1 (2011).

<sup>40</sup> Jackson, *Modalities*, *supra* note 38, at 496.

<sup>41</sup> *See* KURT LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 304-05 (2009) (explaining that Justice Reed suggested in *United Public Workers of America (CIO) v. Mitchell*, 330 U.S. 75 (1947), that the amendment merely reinforced the idea that the states retained all powers not enumerated in the Constitution, not that it identified independent rights that could be asserted to contest the exercise of a federal power). More recently, leading theorists have taken different views, such as Randy Barnett’s position that the amendment is a freestanding source of individual rights, and Kurt Lash’s contention that it is a limitation on federal government power to override “the people’s” right to local self-government. Williams, *supra* note 39, at 506-08 & n.41 (outlining these and other well-known theories).

<sup>42</sup> Williams, *supra* note 39, at 505-06.

has been little agreement as to the content of the “rights retained.”<sup>43</sup>

In recent years, a more modest theory of the Ninth Amendment has emerged. That theory holds that the provision is not an independent source of constitutional rights but rather a rule of construction that governs when unenumerated-but-retained rights clash with enumerated rights.<sup>44</sup> The retained rights are not judicially enforceable in the sense that they can be used to strike down popular legislation. Instead, the Ninth Amendment directs that retained rights cannot be assigned categorical second-class status when they conflict with enumerated rights. Courts need not “enforce” retained rights as they would enumerated rights, but their interpretation of enumerated rights must not automatically crowd out the rights retained.<sup>45</sup>

Although this theory does not create a new class of judicially enforceable constitutional rights, it still requires identification of the rights “retained” under the Amendment. The underlying proposals for filling out the set of “rights retained” are identical regardless of the structural role assigned to them under the different Ninth Amendment theories. Four such theories have been identified in Ninth Amendment literature: “natural-law” rights as originally publicly understood by the Framers; rights deemed “natural” by virtue of their deep roots in Western and American legal

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<sup>43</sup> *Id.* This development is not surprising, given that the revival in Ninth Amendment interest followed Justice Goldberg’s concurrence in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Justice Goldberg pointed to the Ninth Amendment as a source of judicial authority to enforce “fundamental” individual rights infringed by state laws, such as Connecticut’s ban on birth control.). Not only did Goldberg propose a potent role for the Ninth Amendment, but he did it in a case fraught with controversial policy implications. Among the general structural theories of the Ninth Amendment are those suggesting that it merely reaffirms the limitations on federal government powers by barring the implication that carving out individual rights in the Bill of Rights allowed expansion of federal power anywhere beyond the carve-out, *see, e.g.*, Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585, 587-88 (2004), and those reaching the opposite conclusion that the language reserves space for the expansion of individual constitutional rights protected from federal government reach, *see* Williams, *supra* note 39, at 505-06.

<sup>44</sup> Claus, *supra* note 43, at 592. Other rules of construction have also been suggested, including a rule that non-enumeration does not foreclose the position that a right may be within an enumerated right, *see, e.g.*, MASSEY, *supra* note 37, at 11 (summarizing the view of Laurence Tribe), or that retained rights are not elevated to a constitutional level, but keep the same status they had historically regardless of the fact that some other rights were enumerated within the Constitution, *see, e.g.*, Williams, *supra* note 39, at 530.

<sup>45</sup> Claus, *supra* note 43, at 617-18.

tradition; state-law rights at the time of ratification; and state-law rights post-ratification.

A. *Natural-Law Rights as Originally Publicly Understood by the Framers*

The “natural-law rights” theory of the Ninth Amendment suggests that any right understood at the time of ratification to belong to individuals, as distinct from rights derived from membership in a centrally governed society, was among those “rights retained’ by the people.”<sup>46</sup> The Ninth Amendment’s use of the phrase “rights retained” is “the language of Lockean social compact theory.”<sup>47</sup> Under Lockean theory, all human beings have rights in the state of nature, including the right to “ownership of one’s own body and the product of one’s labors, [as well as] . . . the right to use violence . . . [in retaliation when] others” violate those natural rights.<sup>48</sup> The delegates to the Constitutional Convention, in drawing a constitution, decided which “natural rights” to relinquish to a central government to achieve a “common good,” and which to retain.<sup>49</sup> Examples of such retained rights might be the right to travel, the right to pursue a job, the right to self-defense, or even, as some of the Framers joked during debates over ratifying the Bill of Rights, “the right to wear a hat, and to go to bed when one pleases.”<sup>50</sup> Notably, the founding generation viewed individual rights and government powers as mutually exclusive; that is, “rights began where powers ended, and

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<sup>46</sup> Jeffrey Jackson, *Blackstone’s Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 170-71 (2010) [hereinafter Jackson, *Blackstone*].

<sup>47</sup> Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009-2010 CATO SUP. CT. REV. 13, 15 (2010).

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.* at 15-16 (quoting Brutus, *On the Lack of a Bill of Rights*, in THE COMPLETE FEDERALIST AND ANTI-FEDERALIST PAPERS 749, 750 (2009), and explaining that some natural rights were relinquished to the central government, while others were retained by individuals).

<sup>50</sup> *Id.* at 17-18. Notably, some have suggested that the Ninth Amendment also protects the right of citizens to collectively adopt state and local policies. *Id.* at 17 n.17 (citing Kurt Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008)). This view of the Ninth Amendment is one reason it is often paired with the Tenth, which seems to protect the rights of “the people” as a collective entity. LASH, *supra* note 41, at 90. To the extent that dignitary torts are creatures of state statute or common law, they may also be considered within the protections offered by the Tenth Amendment as well as the Ninth. See, e.g., MASSEY, *supra* note 37, at 75 (explaining that both amendments stemmed from a single original proposal, which simultaneously shielded rights and limited federal government powers).



powers began where rights ended.”<sup>51</sup> The failure to grant government a power necessarily implied that the inverse individual right was retained, so that rights need not be explicitly enumerated in the constitutional text. But once enumeration of rights within the Bill of Rights became inevitable, it became obvious that the Framers could not enumerate *every* right they might wish individuals to retain. The Ninth Amendment is viewed by some as a solution to the necessarily incomplete enumeration given in the Bill of Rights, serving as a general placeholder for natural-law rights that the Framers did not intend to relinquish but had not thought specifically to enumerate.<sup>52</sup> Thus, if dignitary rights were among the natural-law rights designed to be “retained” by the Framers, they fit within the Ninth Amendment rule of construction and need not take a back seat to enumerated rights. The Framers looked to two primary sources to determine the scope of natural-law rights: the theories of John Locke and the English constitutional and common law as found within Blackstone’s *Commentaries*.<sup>53</sup> Those theories are discussed in the historical review of the dignitary torts given in Part IV.

### *B. Rights Embedded in Western Legal Tradition*

A broader and less well-developed version of the “natural-law” theory of rights retained contends that they are those within the “history and traditions of our national

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<sup>51</sup> MASSEY, *supra* note 37, at 67. This perspective is vastly different from the modern view, which tends to view rights as “trumping governmental powers.” *Id.* One reason that the values underlying dignitary torts have so withered may be that tort law evolved from a system designed to vindicate “rights” to one designed to manipulate “interests” to achieve efficient policy ends. Thus, tort law values were “rights” at the time of the founding, capable of exerting equal and opposite pressure on the enumerated “right” of free speech. By the time of *Sullivan*, however, tort law values were mere “interests” to be achieved by the use of state government power, which would be trumped by the free speech “right” inherent in the First Amendment. *See, e.g.*, Kenneth J. Vandavelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 456-62 (1990) (summarizing the struggle between two leading American torts scholars, Thomas Cooley and Oliver Wendell Holmes, where Cooley aligned with Blackstone in advocating that tort law was “a series of remedies for invasions of . . . rights,” while Holmes argued that tort liability is a function of “public policy, rather than subjective moral fault.”). Steven Heyman has observed that when the First Amendment was adopted, free speech rights were part of a natural-law fabric, and thus were considered “bounded by the rights of others,” so that government was obliged not just to protect speech but to “ensure that this liberty was not used to violate other fundamental rights.” Heyman, *supra* note 37, at 1279.

<sup>52</sup> MASSEY, *supra* note 37, at 70-74.

<sup>53</sup> Jackson, *Blackstone*, *supra* note 46, at 171.

experience.”<sup>54</sup> A “historical” view of retained rights does not depend on “the absence [or presence of positive law bearing upon a particular claimed right,” but instead requires a longitudinal examination of the “traditions from which [American law] developed as well as the traditions from which it broke,” and their ongoing evolution.<sup>55</sup> Part IV provides a detailed historical examination of the Western legal traditions from which American law developed, documenting their deep-seated roots and historical status, from Greek and Roman law through Anglo-Saxon and English common law.

### C. *State Rights—at Ratification and After Ratification*

The “state rights” theory of the Ninth Amendment suggests that the “rights retained” for Ninth Amendment purposes are the rights “derived from state law,” including state constitutions, statutes, and common law.<sup>56</sup> Some versions of the “state rights” view suggest that the relevant rights are those that were in existence at the time of ratification.<sup>57</sup> Others, in contrast, suggest that rights recognized or created by the states after ratification come within the “rights retained” umbrella so long as they were not unconstitutional when adopted.<sup>58</sup> As one article has summarized, under the “state rights” theory, “the ninth amendment . . . preserves rights existing under state laws already ‘on the books’ in 1791 plus those rights which the states would thereafter see fit to enact.”<sup>59</sup> The development of the American law of dignitary torts within state constitutions, statutes, and common law is traced in Part IV below.<sup>60</sup>

Under any of these plausible theories of the Ninth Amendment,<sup>61</sup> the evisceration of the dignitary torts becomes a

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<sup>54</sup> Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 100 (1992).

<sup>55</sup> *Id.* at 100-01.

<sup>56</sup> Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 259 (1983).

<sup>57</sup> *Id.* at 248; Claus, *supra* note 43, at 595, 620-21.

<sup>58</sup> Claus, *supra* note 43, at 595, 620-21.

<sup>59</sup> Caplan, *supra* note 56, at 248, 263.

<sup>60</sup> *See infra* Part IV.B.

<sup>61</sup> These models by no means exhaust the various approaches taken to define the “rights retained” by the people in the Ninth Amendment. Others include the residual rights theory, the collective rights model, and the federalism model. *See, e.g.*, Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 11-21 (2006) (summarizing theories). It is beyond the scope of this article to test the dignitary torts within each of these models; the point of the article is that recourse to the First

more complicated constitutional matter than mere application of the First Amendment. It requires an assessment of whether the rights protected by the dignitary torts—reputation, dignity, privacy, and emotional tranquility—can be identified as natural-law rights, as rights deeply rooted within Western legal history and tradition, or as state-created rights either in 1791 or at any time between the ratification and the Court's first assault on the dignitary torts in 1964.<sup>62</sup> If so, they must at least be accounted for in the constitutional calculus, even if the ultimate decision is to accord them less weight through a test that “optimal[ly] accommodat[es]” between dignitary and speech interests.<sup>63</sup> But if the dignitary interests are accounted for and then balanced, their normative appeal need not be discounted as constitutionally insignificant, which is a tendency that appears throughout the First Amendment cases involving speech torts.<sup>64</sup>

#### IV. THE HISTORIC PEDIGREE OF THE DIGNITARY TORTS— ANCIENT AND MODERN

Evaluating the status of the personality interests as “rights retained” under any of the foregoing theories requires placing them on a timeline. Only then can one determine whether they are natural rights as understood by the Founders at the time of ratification, rights developed through a longstanding tradition of Western legal culture from which American law developed, rights created by state law at the time of ratification, or rights created by state law post-ratification. This section briefly recounts the ancestry of each tort within the Western legal tradition underlying American

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Amendment is not sufficient to justify speech preference every time a speech right clashes with a dignitary right. That the dignitary rights have some constitutional heft within at least some theories of the Ninth Amendment undermines the mechanistic response of those who consistently choose speech by arguing that they have no other constitutional choice.

<sup>62</sup> Attempting to draw inviolate lines between these theories is futile, as even scholars in different camps often seem to acknowledge that the ideas overlap and have been used interchangeably. *See, e.g.*, Suzannah Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 216 (1992-93) (stating that Eighteenth and early Nineteenth Century American lawyers thought that state constitutions “merely reflect[ed] natural law”).

<sup>63</sup> Claus, *supra* note 43, at 618; *see infra* notes 193-97, 224 and accompanying text.

<sup>64</sup> *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369-72 (1974) (White, J., dissenting at length based on the view that the ongoing constitutionalization of defamation had wiped out the states' ability to protect reputational interests). For a discussion of *Snyder v. Phelps*, *see* Part II, *supra* notes 30-35 and accompanying text.

law. The canvass moves from Greek and Roman law, where the torts were originally viewed as a broad unitary cause of action; to Anglo-Saxon law, which also recognized personality interests generally; and finally to the Elizabethan and modern English systems, where more differential treatment was given to these interests, but where courts over time seemed willing to compensate for an infringement on each dignitary interest.

#### A. *Ancient Law*

Western tort law is a direct descendant of the law of delict conceived in ancient Greece and Rome.<sup>65</sup> The law of early Greece began to mature before the law of Rome, and the writing of Greek poets and philosophers summarizing Greek legal theory was well known in the Roman world, which developed a sophisticated legal system over several centuries.<sup>66</sup> The ancient Greek culture had a significant, if indirect, impact on the development of Western law.

##### 1. Greece

Prior to the written codification of law in Greece—commonly registered at 621 BC with the first Greek written legal code, the Code of Draco—evidence of the development of Greek law can be found in works of literature and philosophy, and later in unwritten customary law.<sup>67</sup> Even the earliest of these sources reveal that dignitary slights accomplished by speech and conduct were considered ripe for private civil adjudication in large part because they were likely to provoke violence. For instance, the poet Hesiod, who described the norms in existence in the seventh and sixth centuries BC, wrote that slander and libel were considered delicts: “A man owns no better treasure than a prudent tongue; . . . Bad words flung at others bounce back with double strength.”<sup>68</sup> Moreover,

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<sup>65</sup> M. Stuart Madden, *The Graeco-Roman Antecedents of Modern Tort Law*, 44 BRANDEIS L.J. 865, 909 (2006).

<sup>66</sup> *Id.* at 865. “[A]lthough laws and legal procedures were known in various forms in other parts of the world, the Greeks created something different. For the first time the law was made available to and was intended to be used by the entire citizenry.” MICHAEL GARAGIN, *EARLY GREEK LAW* 146 (1986).

<sup>67</sup> See RUSS VERSTEEG, *LAW IN THE ANCIENT WORLD* 189, 190 (2002); Madden, *supra* note 65, at 868-85.

<sup>68</sup> Madden, *supra* note 65, at 871 (quoting HESIOD, *Works and Days*, in THEOGONY, WORKS AND DAYS, SHIELD, II 370-72, at 74 (Apostolos N. Athanassakis trans., 2d ed. 2004)).

Hesiod's writing suggests that the Greek notion of slander and libel was not restricted to speech that diminished reputation but also covered speech that inflicted emotional injury, such as gossip: "[I]t is easy to get a bad reputation but hard to live with it and harder to shed it. What is said of you does not vanish, if many say it; such talk is a kind of god."<sup>69</sup>

Writing at about 350 BC, Aristotle specified certain wrongs that required an act of court to restore the status quo ante of equality between the injurer and the injured, and among these "violent" wrongs requiring correction were "abuse, [and] insult."<sup>70</sup>

The Code of Draco was the first written law promulgated in Athens, but there is little evidence today of its specific provisions.<sup>71</sup> What is known is that Draco's sometimes harsh penalties for prohibited conduct were designed "as a substitute for unrestrained self-help . . . to curb violent conduct, particularly revenge."<sup>72</sup>

The later and better-respected Code of Solon, which ameliorated much of the harshness associated with the Draconian code, reflected the value Greek law placed on dignitary interests. First, Solon's code set a specific penalty for libel, a portion of which went to the victim of the speech and a portion of which was paid to the state.<sup>73</sup> It barred "speaking ill of anyone while in a temple, in court at trial, in public offices, or while at festival contests."<sup>74</sup> Moreover, that code did not stop at protecting the reputations of citizens in the community. It also barred libeling the dead, "not on account of injury to the dead, but in respect to the quiet of families" and "the peace and honor of Athens."<sup>75</sup> This text suggests that Greek law did not set up artificial distinctions between the interrelated dignitary interests of reputation, privacy, and emotional tranquility. Instead, it recognized that speech could intrude on more than one of these interests simultaneously because the interests are virtually unitary.<sup>76</sup>

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<sup>69</sup> *Id.* at 871 n.19 (quoting HESIOD, *supra* note 68, II 760-64, at 83).

<sup>70</sup> *Id.* at 883 (quoting ARISTOTLE, NICOMACHEAN ETHICS, in INTRODUCTION TO ARISTOTLE, bk. V, ch. 2, at 402).

<sup>71</sup> VERSTEEG, *supra* note 67, at 194.

<sup>72</sup> *Id.* at 195.

<sup>73</sup> GARAGIN, *supra* note 66, at 65; VERSTEEG, *supra* note 67, at 254.

<sup>74</sup> VERSTEEG, *supra* note 67, at 254.

<sup>75</sup> Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433, 442-43 (2004) (quoting MARTIN L. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES 5-6 (1914)).

<sup>76</sup> Notably, Greek and Roman law were unique at the time in that they set a monetary value for incursions on dignitary interests in order to allow intra-community

Ultimately, Greek law is recognized for developing rigorous systems of thought about the relative rights of individuals and the state, and for establishing the philosophical underpinnings of tort law. But, despite the Solonian codification and the “Reinscription” of the laws of Solon and the homicide law of Draco at the close of the fifth century BC, ancient Greece is not celebrated for an elaboration of these analyses into a practical code applicable to a wide variety of disputes. This milestone was supplied by Rome.

## 2. Rome

Some say that Rome’s greatest legal legacy was the development of private law, a substantial portion of which dealt with delicts.<sup>77</sup> One of the three major delicts was *iniuria*, variously translated as insult or outrage.<sup>78</sup> The scope of iniurial liability is sometimes said to capture “injuries less than death to humans.”<sup>79</sup> Generally agreed to be found within Table VII of

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resolution without recourse to violence, rather than characterizing the behavior exclusively as a crime leading to state punishment. Greece did recognize the speech crime “hubris,” which included “abusive and humiliating public assaults.” This was considered difficult to prove because it required proving an “arrogant, self-righteous, irresponsible” state of mind. Lisby, *supra* note 75, at 441. In essence, Greek law served as a “bridge” between societies that treated similar offenses as crimes subject to state-sponsored punishment and the later law of Rome and its Western descendants, which largely treated dignitary affronts as private law matters. *Id.* For instance, the Babylonian Code of Hammurabi of 1770 BC barred insults to women and false accusations of capital crimes, but punished them by branding and death, respectively. *Id.* Unlike that system, Greece moved towards the private-law treatment of such offenses, and Rome conclusively treated intra-community injuries inflicted via speech as private law matters, while retaining a criminal response to public speech against civic leaders. Cristina Carmody Tilley, *Reviving Slander*, 2011 UTAH L. REV. 1025, 1032-40.

<sup>77</sup> KATHERINE FISCHER DREW, *THE LAWS OF THE SALIAN FRANKS* 12 (1991). It is no surprise that tectonic shifts in Roman society led to the creation of the first formal system of private law in Rome. Although kings held power at one time in ancient Rome, the aristocracy was dissatisfied with their rule and deposed them. In their stead, two offices of Consul were established to oversee administrative matters of the state. Plebians, who had been protected from the caprice of the patricians by the monarchy, now found themselves subject to application of the law as devised by those patricians without notice to the lower classes. In response to plebian demands, a committee was appointed to set out all the laws in writing. The result was the Twelve Tables. The tables were “a comprehensive collection or code of rules . . . consist[ing] for the most part of ancient Latin custom, but . . . [incorporating some] rules of Greek Law.” W.W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 2* (1921). *But see* ANDREW BORKOWSKI, *TEXTBOOK ON ROMAN LAW* 26 (1994) (questioning Greek connection).

<sup>78</sup> BORKOWSKI, *supra* note 77, at 303; W.W. BUCKLAND & ARNOLD McNAIR, *ROMAN LAW AND COMMON LAW* 295 (1936); BRUCE W. FRIER, *A CASEBOOK ON THE ROMAN LAW OF DELICT* 177 (1989).

<sup>79</sup> ALAN WATSON, *STUDIES IN ROMAN PRIVATE LAW* 253 (1991).

the Twelve Tables, the provision for iniuria may be translated as follows:

If a person has maimed another's limb, let there be retaliation in kind unless he makes agreement for composition with him. If he has broken or bruised freeman's bone with hand or club, he shall undergo penalty of 300 pieces; if slave's, 250. If he has done simple harm [to another], penalties shall be 25 pieces.<sup>80</sup>

Most scholars agree that when the Twelve Tables were adopted in the fifth century BC, the "simple harm" provision was aimed primarily at minor physical injuries. Rapidly, however, this "catch-all" provision of the iniuria delict was interpreted to include a raft of non-physical injuries to interests described in the literature as "dignity and personal well-being"<sup>81</sup> or freedom from "contempt of the personality."<sup>82</sup> As one scholar has summarized, "Iniuria . . . serves to protect the individual by creating a legally defensible perimeter for his or her personal life."<sup>83</sup>

Thus, one thousand years later, by the time the Emperor Justinian codified Roman law in the Corpus Juris Civilis, the delict of iniuria as expanded by juristic interpretations and various amendatory edicts was described as:

[I]nflicted not only by striking with the fist, a stick, or a whip, but also by vituperation for the purpose of collecting a crowd, or by taking possession of a man's effects on the ground that he was in one's debt; or by writing, composing, or publishing defamatory prose or verse, or contriving the doing of any of these things by some one else; or by constantly following a matron, or a young boy or girl below the age of puberty, or attempting anybody's chastity; and, in a word, by innumerable other acts.<sup>84</sup>

Examining the fact patterns that led to non-physical iniuriat liability, one sees that the category dealt neatly with the behavior underlying the IIED tort of the American system. Iniuria protected *corpus*, *dignitas*, and *fama*, roughly translated as body, dignity, and reputation. The following behavior was all considered iniuria because it violated the dignity interest: (1) behavior defiling dead bodies or estates, such as defacing

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<sup>80</sup> *Id.*

<sup>81</sup> FRIER, *supra* note 78, at 177.

<sup>82</sup> BUCKLAND, *supra* note 77, at 585; H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 171 (3d ed. 1972).

<sup>83</sup> FRIER, *supra* note 78, at 177.

<sup>84</sup> Francis L. Coolidge, Jr., Note, *Iniuria in the Corpus Juris Civilis*, 50 B.U. L. REV. 271, 272 (1970).

graves;<sup>85</sup> (2) harassment relating to one's financial affairs, such as restricting a person's access to his property or publicly calling him a debtor;<sup>86</sup> (3) overtures upon the chastity of a modest person, such as a public proposition;<sup>87</sup> (4) insulting or hurtful speech, including the use of epithets or the incitement of a mob; (5) invasion of privacy, such as interference with a person's *domus*, which, roughly translated, means the place where a person's daily affairs take place;<sup>88</sup> and, (6) defamation, which included publishing defamatory prose or verse.<sup>89</sup>

A short comparison with American tort law shows a remarkably similar cluster of behaviors leading to liability. Early surveys of cases coming under the heading of the "new tort" of intentional infliction of emotional distress in the United States identify the following as classic fact patterns: (1) "the mishandling of dead bodies, whether by mutilation, disinterment, interference with burial, or other forms of intentional disturbance;"<sup>90</sup> (2) the tactics of "collecting creditors,"<sup>91</sup> which include "violent cursing, abuse and accusations of dishonesty,"<sup>92</sup> threatening a lawsuit or arrest, and advertising the debt to family, neighbors, and employers; (3)

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<sup>85</sup> "[H]itting with stones the statue on the tomb of another's father, digging up and removing bones or a body buried by someone else not a relative, on one's land, burying a wealthy dead man without the appropriate expense, . . . [and] injury done to a corpse" were all considered iniuria. CHITTHARANJAN FELIX AMERASINGHE, DEFAMATION AND OTHER ASPECTS OF THE *ACTIO INIURIARUM* IN ROMAN-DUTCH LAW 330 (1968) (footnotes omitted).

<sup>86</sup> For instance, behavior casting doubt on a person's right to possess property, such as "prevent[ing] the removal of . . . property" or "sealing up the house of an absent debtor" as recourse for implied default, was considered an affront to dignity—an insult that amounted to iniuria. *Id.* at 327. So were "objecting to a judgment debtor's retaining any provisions or his bed," or "addressing a person as one's debtor when he was not." Finally, abuse of legal process was considered iniuria. *Id.* at 327-30.

<sup>87</sup> "[D]ebauching [or abducting] a boy under seventeen, . . . soliciting a woman or a girl . . . [for the purpose of sex], indecently accosting or following [a woman or a girl]," attempting to induce adultery, adultery itself and exposing of the genitals to a woman or a girl were all considered iniuria. *Id.* at 329 (footnotes omitted).

<sup>88</sup> Thus, a person need not possess his *domus* to have a cause of action for iniuria, and even if he did possess a large estate, interference with zones that include outbuildings or stables was not iniuria. Moreover, interference with business premises, if access to those premises was meant to be limited, could be iniuria. *Domus*-related iniuria seems to have as its "common factor . . . not . . . possession but some form of right to privacy understood in a rather elementary sense." *Id.* at 326-27.

<sup>89</sup> For instance, shouts, whether alone or in a group, directed at an individual, were considered iniuria. So was the deployment of "foul or obscene" language against an individual. *Id.* at 330.

<sup>90</sup> William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 885-86 (1939) (hereinafter Prosser, *Intentional Infliction*).

<sup>91</sup> *Id.* at 884.

<sup>92</sup> Prosser, *Insult and Outrage*, *supra* note 16, at 48.



public accusations of unchastity against teenage girls;<sup>93</sup> (4) the convening of crowds to raise a disturbance against an individual;<sup>94</sup> (5) actions of “[e]victing landlords” who “tear[] up the premises, smok[e] out the tenants, or throw[] the furniture about;” and (6) “oppressive and outrageous conduct, such as verbal or written abuse, vituperation, and threats.”<sup>95</sup> Notably, the five classic American IIED patterns align exactly with the Roman iniurial patterns: disrespect for the dead, harassment by creditors, allegations of unchastity, invasions of privacy, and abusive speech.<sup>96</sup>

The Roman law’s solicitude for these interests of “personality” reflected the momentum away from a tribal society and toward a more complex and civilized social order. The ever more vigilant protection of personality interests was a device to exchange money or public rehabilitation for violent vengeance in order to honor an “unremitting concern with public order.”<sup>97</sup> One torts expert has opined that the more sophisticated a society, the more developed will be “legal protection to nonmaterial interests of personality like self-respect, reputation, and privacy.”<sup>98</sup>

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<sup>93</sup> Prosser, *Intentional Infliction*, *supra* note 90, at 885.

<sup>94</sup> Prosser, *Insult and Outrage*, *supra* note 16, at 47, 49.

<sup>95</sup> Prosser, *Intentional Infliction*, *supra* note 90, at 881.

<sup>96</sup> Notably, some behavior that was considered a violation of *fama*, or reputational, interests, such as the raising of a clamor against a plaintiff or the use of insulting or offensive language, falls within the modern tort of defamation and is similar if not identical to the *dignitas* violations. Among these behaviors were: calling a person a slave, casting doubts on someone’s modesty, imputing of debt default, and holding a frugal funeral for a wealthy man. AMERASINGHE, *supra* note 85, at 332. And some speech was considered iniuria as a reputational violation even if it was not thought to assault a person’s dignity, placing it on all fours with the defamation tort. For instance, “composing, publishing or procuring the publication . . . of a defamatory writing,” or any conduct that “excit[ed] odium . . . against anyone,” was considered an incursion upon one’s reputation and therefore iniuria. *Id.* at 331-32. Similarly, many of the behaviors captured by iniuria, such as violating the *domus*, or physically shadowing a vulnerable person, would be captured by one of the privacy torts today. In short, Roman iniuria was a flexible cause of action, covering numerous overlapping “personality” interests without attempting to extricate them for distinct legal treatment.

<sup>97</sup> FRIER, *supra* note 78, at 177 (quoting J.G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 192 (1985)). See *id.* at 1 (“Delictual liability is thought to have originated, in archaic Roman law, as a substitute for immediate personal vengeance.”); BUCKLAND, *supra* note 77, at 571 (“It was in origin a legal substitute for self-help, which in this case meant revenge.”).

<sup>98</sup> FRIER, *supra* note 78, at 177; Cf. Solomon, *supra* note 2, at 1783-84 (observing that such a forum to avenge interpersonal wrongs may be seen as condoning uncivilized impulses).

## B. Modern Law

After the fall of Rome, many of the European countries that grew up in its stead took Roman civil law as their foundation. “[I]t is a commonplace with legal historians that Roman law was in course of time made, often in modified form, the basis of large parts of what we have come to call the Civil Law Systems,” observed one legal historian in 1969.<sup>99</sup> England, however, which developed a common-law system, did not explicitly incorporate principles of Roman law. Thus, while many civil-law systems in Europe retained the flexible approach to incursions upon dignity, honor, feelings, and reputation,<sup>100</sup> England initially peeled off all of the non-

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<sup>99</sup> THE ROMAN LAW READER 170 (F.H. Lawson ed., 1969).

<sup>100</sup> The fact that numerous European and civil-law countries matter-of-factly recognized the dignitary rights in their legal systems reinforces their place as “universal,” “civilized” rights for natural-law purposes, further supporting their Ninth Amendment status as “rights retained.” See, e.g., Sherry, *supra* note 62, at 204.

The iniuriarum action against outrage and insult largely survived in the civil-law countries that carried forward the Roman system. “[M]any civil code jurisdictions [including Argentina, Austria, Chile, France, Italy, Liberia, Spain, and West Germany], drawing from the Corpus Juris Civilis, have incorporated similar provisions concerning injury into their legal systems.” See Coolidge, *supra* note 84, at 284. For instance, Roman-Dutch law applied in South Africa and Ceylon “was also concerned with *dignitas* in general as an interest to be protected” even where reputation was not assailed. AMERASINGHE, *supra* note 85, at 276. Specifically, the Roman-Dutch cause of action *actio iniuriarum* considers breaches of contract, where humiliating, to be actionable, as are breaches of promise to marry; public use of abusive language or epithets, see *id.* at 290; interference with rights such as school access or public honors; wrongs against chastity; unjustified denials of credit; unjustified threats of lawsuit; and interference with tombs or burials. These causes of action correspond directly to Roman iniuria patterns, which also targeted abusive speech, creditor conduct, accusations of unchastity, and disrespect for the dead.

In fact, the accepted gulf between private law regulating individual relationships and public law regulating the interaction between the state and the individual emerged in European systems as a direct result of the Roman law example. See Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 255 (1989). Much of the vacuum left by the fall of the Roman Empire was filled by Germanic tribes. By 534, the Franks controlled most of what had been Roman Gaul. The ruler at that time, Clovis, took a distinctly Roman approach to governance. Predictably, within the Frankish codes, great emphasis is placed on dignity, both in terms of reputation and emotional well-being. The *Lex Salica* of the Franks contains, within the chapter “Concerning Abusive Terms,” seven distinct sections. DREW, *supra* note 77, at 94. These sections assign penalties for statements that diminish reputation, such as accusations of illicit behavior including pederasty, prostitution, “throwing down [the] shield,” and informing. *Id.* But they also assign sanctions to statements that reflect ill opinion of a would-be plaintiff and arguably invade the emotional sphere more than the reputational interest, such as claiming that someone “is covered in dung,” or is “a fox” or “a rabbit.” *Id.* Another chapter sanctions false imputations of indebtedness and baseless repossession. *Id.* at 115. Finally, as in Roman law, an entire chapter of Frankish law, with seven distinct sections, outlines causes of action for “Despoiling Dead Bodies.” *Id.* at 118-19.

pecuniary dignitary interests as incompensable. It interpreted reputation as a form of property and developed a complex system of defamation law. It ostensibly declined to recognize suits for outrage or insult. In practice, however, it often allowed compensation for these injuries when pleaded as defamation, and Anglo-American courts have recently reintegrated these interests into the common law as freestanding torts. This development is traced below.

### 1. Common Law and the English Experience

The history of the dignitary torts in English common law is far more circuitous than in neighboring civil-law countries.<sup>101</sup> England consciously declined to take Roman law as the basis for its system. “We have received Roman law,” explained one historian, “but we have received it in small homeopathic doses, at different periods, and as and when required. It has acted as a tonic to our native legal system, and not as a drug or a poison. When received it has never been continuously developed on Roman lines.”<sup>102</sup> Roman law is generally not a source of precedent in English courts.<sup>103</sup>

Despite this latter-day disavowal, early Anglo-Saxon law appears to have adopted the same broad, flexible approach found in Roman law. Arising from “customary or traditional material” in these cultures, codes promulgated by Anglo-Saxon

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Given these strong legal protections for dignitary interests encompassing reputation, honor, and emotional well-being, it is no surprise that modern German law is extremely protective of personality interests. Not only does the German Civil Code allow individuals to seek a remedy from “a person who ‘intentionally causes injury to another person in a manner contrary to good morals,’” Quint, *supra*, at 253, but the country’s 1949 Constitution, known as the Basic Law, recognizes the rights of individuals to “[h]uman dignity,” and “the free development of [their] personality,” often thought to include a right to privacy. *Id.* at 257, 299. In fact, the German Federal Constitutional Court, designed primarily to address constitutional questions, has wrestled with “the permanent state of tension” arising from the conflict between the cultural acceptance of the Civil Code and the occasionally conflicting dictates of the Basic Law. *Id.* at 290; *see also* Melius de Villiers, *The Roman Law of Defamation*, 34 L.Q. REV. 412, 418 (1918). A similar tension has been replicated in the European Convention on Human Rights, Article 10, which protects freedom of expression, and Article 8, which protects individual privacy. *See, e.g.*, Jessica Hodgson, *What Articles 8 and 10 of the European Convention on Human Rights Mean*, GUARDIAN (Mar. 27, 2002, 8:54 AM), <http://www.guardian.co.uk/media/2002/mar/27/pressandpublishing.privacy4>.

<sup>101</sup> *See supra* note 100.

<sup>102</sup> THE ROMAN LAW READER, *supra* note 99, at 206 (quoting W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW IV 293 (1924)).

<sup>103</sup> *Id.* at 215. *But see* BILL GRIFFITHS, AN INTRODUCTION TO EARLY ENGLISH LAW 31 (1995) (explaining that Anglo-Saxon law did incorporate Frankish law, which drew on Roman law).

kings set forth specific penalties for specific injuries just as in the Roman Twelve Tables.<sup>104</sup> One scholar has said that, in the Anglo-Saxon system, as in Rome, the predetermined penalties for specific wrongs were designed to minimize interpersonal violence. “[I]t illustrates how sensitive this society was to considerations of mere dignity, and how easily a trivial brawl could flare up into a feud unless damped down at once by some satisfaction . . . .”<sup>105</sup> One of the earliest Anglo-Saxon law codes, given by Aethelbert of Kent at the beginning of the seventh century, recognizes dignity as a touchstone and sets forth “seizing or pulling by the hair” as among the physical injuries requiring compensation.<sup>106</sup> This prohibition was not viewed as a species of assault but rather as a blot on the victim’s feelings or reputation. “The act is, of course, one of humiliation within a cultural tradition . . . [that] laid special emphasis on the status of hair length . . . .”<sup>107</sup> The code given by the subsequent kings, Hlothere and Eadric, broadened the prohibition and suggested that penalties must be made for words that damage reputation or dignity. According to the decrees, “If one man calls another a perjurer in a third man’s house, or accosts him abusively with insulting words, he shall pay one shilling to him who owns the house, 6 shillings to him he has accosted, and 12 shillings to the king.”<sup>108</sup> That the payment is made not just to the victim but to the property owner and to the king suggests that the violent effects likely to be produced by the words are a substantial portion of the rationale for the prohibition. The state has an interest in preempting the violence and thus fixes a price for the words, along with directing individual compensation.

The laws of King Alfred, dating from the 870s, developed the concept of slander with more specificity. Integrating Biblical commands, Alfred’s code advised in a preface against “giv[ing] credence to the word of a false

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<sup>104</sup> By the time the Anglo-Saxons settled there, England

had been to a degree cut off from its Roman contacts for some time . . . and had always been out on the fringes of Roman territory . . . [so] there was no need to retain Roman-law courts or Roman law in Germanic Britain and therefore Roman legal ideas . . . seem to have had little if any influence on Anglo-Saxon law.

DREW, *supra* note 77, at 25.

<sup>105</sup> GRIFFITHS, *supra* note 103, at 10 (quoting K.P. WITNEY, THE KINGDOM OF KENT 96 (1982)) (internal quotation marks omitted).

<sup>106</sup> *Id.* at 36 (emphasis omitted).

<sup>107</sup> *Id.* at 36 n.22 (citations omitted).

<sup>108</sup> F.L. ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 21 (1922) (footnote omitted).

man . . . [or] repeat[ing] any of his assertions."<sup>109</sup> It also advised against spreading rumors or gossip, and set a talion for slander—the defendant could have his tongue cut out or pay the plaintiff and keep his tongue.<sup>110</sup>

All of these early Anglo-Saxon laws were promulgated for use in a society comprising mainly insular local agrarian communities, and the laws emphasized popular participation.<sup>111</sup> This use of community assemblies to mediate community disputes about compromised honor became less practical after Alfred's death, when closed agrarian communities gave way to a more integrated society and a more centralized government.<sup>112</sup> In addition, the movement of more individuals into the servile class meant that fewer in the country could carry weapons, so that insults between lower class individuals were resolved more often by an exchange of money than by duels.<sup>113</sup> Men of status, in contrast, continued to defend their honor by duels.<sup>114</sup>

The early Anglo-Saxon law continued to treat all dignitary interests as compensable in private actions until the Norman conquest of England in 1066. Even then, however, defamation appears to have been peeled off from the actions for invasion of privacy and emotional injury more as a product of jurisdictional development than as the result of a considered analysis. Defamation came to be defined as charging another with a violation of canon law, and it was delegated to the ecclesiastical courts.<sup>115</sup> In contrast, local English or Norman assemblies retained jurisdiction over disputes involving insults that did not explicitly sully the victim as a canon law violator.<sup>116</sup> As the disintegration of the decentralized feudal structure diminished the manorial courts, however, "denial of a [common-law court] remedy at Westminster c[a]me to be denial of a right,"<sup>117</sup> and during the Elizabethan period, the common-law courts began hearing actions for defamation. Unlike their predecessors in the manorial courts, these actions were strictly

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<sup>109</sup> GRIFFITHS, *supra* note 103, at 52.

<sup>110</sup> *Id.* at 68.

<sup>111</sup> Anthony D'Amato & Stephen B. Presser, *Anglo-Saxon Law*, in GUIDE TO AMERICAN LAW: EVERYONE'S LEGAL ENCYCLOPEDIA 251, 252 (1985).

<sup>112</sup> GRIFFITHS, *supra* note 103, at 15.

<sup>113</sup> Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1053-54 (1962).

<sup>114</sup> *Id.* at 1053.

<sup>115</sup> *Id.* at 1054.

<sup>116</sup> *See id.* at 1054-55.

<sup>117</sup> Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 556 (1903).

limited to charges affecting reputation. Just as the ecclesiastical courts had offered a remedy only for charges of violating canon law, the common-law courts offered a remedy only for charges of committing a crime.<sup>118</sup> Thus, like the canon law, the common law “thereby exclud[ed] . . . merely violent or offensive language from its definition of defamation.”<sup>119</sup> Moreover, by 1593, the ecclesiastical courts ceded litigation over words that caused special damage or temporal loss to the common-law courts.<sup>120</sup> As a result of these developments, English law had serendipitously evolved so that “[t]he gist of the action on the case for words was the [monetary] damage caused to the plaintiff and not the insult itself.”<sup>121</sup>

In time, however, the English common law bent to accommodate claims for words that violated mental tranquility without diminishing reputation. This development brought English law back into line with longstanding Western traditions despite a departure of several hundred years. By 1897, the English common law specifically developed the tort of intentional infliction of nervous shock in *Wilkinson v. Downton*.<sup>122</sup> The court concluded that where a practical joker told a woman her husband had been “smashed up” just to see her reaction, the act was calculated “to infringe her legal right to personal safety” and thus was a good cause of action.<sup>123</sup> Intentional infliction of nervous shock, which turns on the foreseeability of some physical manifestation of shock, has been applied by English courts for more than a century to the same fact patterns seen in Roman and Anglo-Saxon law, such as spitting on a plaintiff, cutting her hair against her will, or “throwing a coin contemptuously on the plaintiff’s hospital bed.”<sup>124</sup> In all of these circumstances, the physical contact causes negligible pain, but the non-physical dignitary implications weigh heavily on the plaintiff’s emotional wellness. In fact, for the past several decades, English, Canadian, and Australian commentators have been urging the adoption of a tort for the intentional infliction of pure

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<sup>118</sup> Lovell, *supra* note 113, at 1063.

<sup>119</sup> *Id.*

<sup>120</sup> See R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 112 (1949).

<sup>121</sup> *Id.* at 115.

<sup>122</sup> 2 Q.B. 57, 58 (1897).

<sup>123</sup> *Id.* at 59; see also Denise G. Réaume, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 QUEEN’S L.J. 61, 66-67 (2002). The evolution of English law to provide some protection for non-economic injuries to emotional well-being coincided with the abolition of formalistic writs to more flexible models of pleading.

<sup>124</sup> Réaume, *supra* note 123, at 74.

emotional harm; some have even suggested extending the tort to a unitary claim for assault on dignity.<sup>125</sup>

In contrast, English courts have not aligned with the majority of Western countries in recognizing a freestanding right to sue in tort for invasions of personal privacy. Writing in 1962, one scholar stated “with some confidence that English law does not recognise what [American] Judge [Thomas] Cooley called ‘the right to be left alone.’”<sup>126</sup> But as with intentional infliction of emotional distress, there is some evidence that English courts occasionally tried to protect privacy interests by stretching other causes of action to cover them. Most famously, in *Prince Albert v. Strange*,<sup>127</sup> a man was prevented from exhibiting and selling copies of impressions he had procured of etchings made by Queen Victoria and Prince Albert. The case was not explicitly decided in terms of privacy, rather as a violation of the royals’ proprietary rights in the commercial uses of the etchings.<sup>128</sup> The court hazarded, however, that in the alternative, the proposed exhibition could have been enjoined on the basis of “breach of trust, confidence[,] or contract.”<sup>129</sup> That suggestion was the springboard for Warren and Brandeis’s seminal article, *The Right to Privacy*, proposing the development of an independent tort for privacy violations.<sup>130</sup> English scholars and legislatures supported the development of similar actions in English common law throughout the twentieth century, but to no avail.<sup>131</sup> Notably, at least one suggested that in the absence of a discrete privacy tort, courts could vindicate plaintiffs by invoking the intentional infliction of nervous shock tort announced in *Wilkinson*.<sup>132</sup> In sum, English courts have long recognized a tort of defamation and have reintegrated into their common law the idea of

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<sup>125</sup> *Id.* at 73 (citations omitted).

<sup>126</sup> Brian Neill, *The Protection of Privacy*, 25 MOD. L. REV. 393, 394 (1962) (quoting THOMAS COOLEY, TORTS 29 (2d ed. 1888)).

<sup>127</sup> 41 Eng. Rep. 1171 (1849).

<sup>128</sup> Neill, *supra* note 126, at 395. (In fact, this reasoning is similar to the “right of publicity” branch of American privacy torts.)

<sup>129</sup> *Id.* at 396.

<sup>130</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 203-05 (1890).

<sup>131</sup> See, e.g., Neill, *supra* note 126, at 400-02; Percy H. Winfield, *Privacy*, 47 L. Q. REV. 23 (1931).

<sup>132</sup> Neill, *supra* note 126, at 402. Today, English experts have suggested that the incorporation in the U.K. Human Rights Act of 1998 of the European Convention on Human Rights, Article 8, which guarantees a right of privacy, is leading to English acceptance of a common-law privacy right. Basil Markesinis et al., *Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133, 133-34 (2004).

vindicating emotional injuries, while they continue to award damages only covertly to plaintiffs whose privacy was invaded.

## 2. English Theory—Natural Law

As English courts were developing common-law doctrine on recourse for dignitary rights, English scholars were considering the same ideas from a more abstract perspective—one that informed the Framers’ thinking about the relationship between individuals and the state. Although many English philosophers and legal scholars developed theories of natural law, the two primary guides for the Framers were John Locke and William Blackstone.<sup>133</sup>

### *a. Locke*

Locke and other natural-law rights theorists of the Enlightenment developed the idea that the capacity for reason meant that all human beings were entitled to dignity, regardless of rank or social status.<sup>134</sup> Locke, in particular, contended that natural rights should be recognized with “a place . . . in governance.”<sup>135</sup> Among the natural rights Locke discussed was an “ownership interest in one’s own personhood,” a right which had “considerable reach” and was “inextricably tied up with the inherent dignity and liberty of the individual.”<sup>136</sup> Specifically, Locke observed that natural law prohibited speech that can injure a third party’s well-being:

[I]n customary intercourse among men and in communal life who is bound to hold a conversation about his neighbour and to meddle with other people’s affairs? No one, surely. Anyone can without harm either talk or be silent. But if perchance one wants to talk about another person, the law of nature undoubtedly enjoins that one’s talk be candid and friendly and that one should say things that do not harm that other person’s reputation and character.<sup>137</sup>

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<sup>133</sup> See, e.g., Caplan, *supra* note 56, at 260; Jackson, *Blackstone*, *supra* note 46, at 171.

<sup>134</sup> Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN’S L.J. 1, 9 (2008).

<sup>135</sup> *Id.*

<sup>136</sup> J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 284 (2010).

<sup>137</sup> JOHN LOCKE, *Essay 7, Is the Binding Force of the Law of Nature Perpetual and Universal? Yes*, in *ESSAYS ON THE LAW OF NATURE* 195-96 (Oxford Univ. Press 1989) (1954).



*b. Blackstone*

Blackstone's *Commentaries* are also considered a touchstone for interpreting constitutional language because they were a virtual hornbook for colonial lawyers and constitutional draftsman.<sup>138</sup> Notably, the "natural law" explicated by Blackstone had "roots running deep into the soil of ancient Greece and Rome."<sup>139</sup> Blackstone identified three "absolute rights, . . . vested in [men] by the immutable laws of nature."<sup>140</sup> These three were the right of "personal security," which consisted of a person's "uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"; "personal liberty," which consisted of "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct"; and "the right of . . . property, [which consisted] of the free use, enjoyment, and disposal of all [an individual's] acquisitions, without any control or diminution, save only by the laws of the land."<sup>141</sup> Blackstone also recognized among the "relative" rights necessary to effectuating these absolute rights an entitlement to "apply to the courts for speedy redress of injuries."<sup>142</sup>

Reputation is recognized textually among Blackstone's natural-law rights, and it is beyond dispute that it was considered one of the "Rights of Englishmen" incorporated into colonial law.<sup>143</sup> In addition, some adherents of Blackstone have suggested that privacy is among his fundamental rights, although it is not within the explicit text.<sup>144</sup> For instance, a

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<sup>138</sup> Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4-7 (1996). Not all who participated in drafting the Constitution were uncritical of Blackstone, who was not a supporter of the colonies. *Id.*

<sup>139</sup> *Id.* at 17 (quoting LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 249 (1991)). Blackstone's underlying Roman law orientation is not surprising, given that he sought and was denied an appointment to teach Roman law at Oxford. Rebuffed, he developed a specialty in English law. One wonders whether the received wisdom that English law took no notice of Roman law results from the fact that the leading mouthpiece for English law was denied recognition as a Roman law scholar. *See id.* at 4-5.

<sup>140</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*124.

<sup>141</sup> Michael B. Kent, Jr., Pavesich, *Property and Privacy: The Common Origins of Property Rights and Privacy Rights in Georgia*, 2 J. MARSHALL L.J. 1, 11-12 (2009) (quoting 1 BLACKSTONE, *supra* note 140, at \*138) (internal quotation marks omitted).

<sup>142</sup> Jackson, *Blackstone*, *supra* note 46, at 208.

<sup>143</sup> *Id.* at 207 (citing 1 BLACKSTONE, *supra* note 140, at \*129).

<sup>144</sup> To be clear, the concept of privacy relevant to this article is a tort concept, enforceable by one private individual by post-invasion suit against another private individual. The concept of a constitutional right to privacy from government intrusion, originally recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), is not the subject of this article. The distinction between privacy as tort and privacy as individual right

Georgia court that was among the first to embrace a tort right to privacy “cited Blackstone as additional support for [the recognition of a privacy tort], explicitly rooting the right of privacy in Blackstone’s conceptions of personal security and personal liberty.”<sup>145</sup> Privacy can also be found as a component of Blackstonian property rights, the court reasoned, because the property right of “quiet enjoyment” is violated when “the common scold” tramples on the individual’s right “to use, occupy, and enjoy the general functioning of . . . society in a quiet and peaceable manner.”<sup>146</sup> This right is protected by punishing “the scold” in tort.<sup>147</sup> Similarly, Blackstone’s reference to “health” as a component of personal security suggests that mental health (today recognized as a medical dimension of the emotional tranquility protected by IIED) is arguably among Blackstone’s natural rights. English scholars, this survey suggests, recognized all three interests—privacy, reputation, and emotional security—as natural-law rights, which in turn, influenced the American experience.

### 3. The American Experience

American law, in the form of state constitutions and state common law, strongly endorsed the right of individuals to protect their reputations via common-law tort suits at the time of ratification. Further, the evolution of the common law over the next 150 years shows that American courts gradually moved from informally recognizing privacy and emotional security rights to explicit adoption of tort causes of action for their invasion.

#### *a. State Constitutions*

A survey of state constitutions in effect at the time of ratification illustrates that the freedoms of speech and of the press were not contemporaneously considered to foreclose the private right to sue for defamation. Americans of the period tended to “assume[] that certain types of speech or press—including blasphemous, obscene, fraudulent, or defamatory

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against the government was noted by Justice Black in *Griswold*. See *id.* at 510 n.1 (Black, J., dissenting).

<sup>145</sup> Kent, *supra* note 141, at 12 (citing *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905)).

<sup>146</sup> *Id.* at 18-19.

<sup>147</sup> *Id.* at 18, 19 n.88.

words—lacked or should lack constitutional protection.”<sup>148</sup> In fact, a number of state constitutions specifically wrote in protection for the right to sue for defamatory statements. Pennsylvania’s 1790 constitution, for instance, “said that every citizen may freely speak, write, and print on any subject, *being responsible for the abuse of that liberty*.”<sup>149</sup> The Delaware, Massachusetts, and Kentucky Constitutions, which were also in effect during the ratification periods, followed suit.<sup>150</sup> The original public understanding of the internal limits on freedom of speech and press was not limited to defamatory statements alone. During the debate over the 1780 Massachusetts Constitution, one proposed speech and press clause barred restrictions on speech freedoms “unless in Cases where it is extended to the *abuse, or injury* of Private Characters.”<sup>151</sup> This trend towards state constitutional protection of the right to sue for libel<sup>152</sup> had expanded, not contracted, by the time the

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<sup>148</sup> Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 935 (1993). As recently as 2012, the Supreme Court reiterated that several categories of speech, including “advocacy intended, and likely, to incite imminent lawless action, . . . obscenity, . . . defamation, . . . speech integral to criminal conduct, . . . ‘fighting words,’ . . . child pornography, . . . fraud, . . . true threats, . . . and speech presenting some grave and imminent threat the government has the power to prevent” are not presumptively protected speech. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (citations omitted). The consistency of these categories, many of which involve personality interests long-protected in Western law, corroborates this initial view that the First Amendment can be applied with reference to other considerations.

<sup>149</sup> Hamburger, *supra* note 148, at 936 n.83 (citing PA. CONST. of 1790, art. IX, § 7) (emphasis added). Notably, this understanding has also informed First Amendment scrutiny of speech-restrictive statutes and regulations addressing obscenity, volume, and likelihood of inciting violence. *See, e.g.*, Heyman, *supra* note 37, at 1279 (noting that government restrictions on obscenity, perjury and the like are widely considered uncontroversial).

<sup>150</sup> Hamburger, *supra* note 148, at 936 n.83.

<sup>151</sup> *Id.* (emphasis added).

<sup>152</sup> To be clear, this article is concerned solely with the ability of *private individuals* to sue in tort for speech-inflicted injuries. The latitude of the *states* to provide for criminal prosecution of libel is an entirely different issue, although historically many states provided for both civil and criminal remedies for speech injuries. *See, e.g.*, Lisby, *supra* note 75, at 456-57. The criminal and the civil causes of action share one justification; both were initially designed to prevent violence. However, today, criminal libel actions are viewed more as a species of seditious libel, generally brought not because the words at issue are likely to cause violence requiring state oversight, but because the words criticize government or government officers. *See id.* at 473-74 (discussing the relationship between purely civil libel, criminal libel based on apolitical but incendiary speech, and criminal libel arising from criticism of government). Although the Court has long held that the provision of a state forum for resolution of private conflicts is a form of state action triggering the Fourteenth, and consequently the First, Amendments, the action of the state in passing a law *ex ante* prohibiting entire categories of anti-government speech is qualitatively different than the action of the state in establishing a mechanism whereby private individuals can

Fourteenth Amendment was ratified, which ultimately resulted in application of the First Amendment against not just the federal government, but state governments as well. In 1868, twenty-seven of the thirty-seven states' constitutions featured language "explicitly contemplat[ing] the bringing of at least some libel suits."<sup>153</sup>

*b. State Common Law*

At the founding, and for almost two centuries after, states offered their courts as a forum for the resolution of private disputes between individuals arising from incursions on dignity. Until the early 1900s, the only common-law cause of action permitting redress for dignitary harms was defamation (strictly cabined between slander and libel, at the time), so most dignitary harms were pleaded as defamation. However, some of the "defamation" cases appear to involve slights to interests other than reputation. The "defamation" category was used to smuggle in litigation over the broader basket of dignitary interests.<sup>154</sup> Eventually, in part because of the changing nature of newspapers and in part because of expansion of the common law to include actions for invasion of privacy and intentional infliction, some dignitary lawsuits that might have been awkwardly slotted as "defamation" entered into the privacy and intentional infliction channels of tort.

*i. Slander and Libel*

Coming as they did from England and its legal structure, the colonies' recognition of a common-law cause of action for defamation is not surprising. The use of libel and slander lawsuits was apparently seen as a safety valve to prevent the eruption of violence and conflict within what was

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peacefully settle dignitary conflicts ex post with the aid of juries that will determine and apply local community norms.

<sup>153</sup> Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 45-46 (2008).

<sup>154</sup> Of course, because these interests were not connected to any explicit cause of action, fewer of them were likely pleaded than might have been warranted. The point is that plaintiffs did successfully sue for injuries on the outer edge of the "reputation" interest that would have been more accurately described as dignitary interests in privacy or emotional tranquility had those causes of action been articulated at the time. See, e.g., *infra* notes 193-94, 203 and accompanying text.

still a community of pioneers.<sup>155</sup> Thus, in the typical civil defamation suit of the time, the plaintiff and defendant knew each other, and both were known to the jurors. “People almost always handled their own cases, and courts applied flexible rules that in many ways resembled the practices of local and church tribunals of medieval England more than the complicated doctrines and procedures of modern defamation law.”<sup>156</sup> Money damages were usually small and were often replaced or supplemented with public apologies or acknowledgment of wrongdoing.<sup>157</sup> The goal was “to minimize feelings of hostility and ‘to make a balance’ between the parties.”<sup>158</sup> Civil libel suits that resolved “small” conflicts between private individuals were valued by the colonists as a means of restoring the community norm of “harmony and cooperation,” much valued by people who had left England in part to opt out of “wrenching economic and social change” there.<sup>159</sup> For instance, one Merrill sued for slander a New Hampshire man who asked a neighbor: “What will Merrill do next? Kimball has had his barn burnt, and Hoit will have his burnt within a fortnight. We know persons about here bad enough to do this[.]”<sup>160</sup> This example shows that civil lawsuits were considered an appropriate means for community members to weigh in on the acceptable boundaries of gossip and speculation over local affairs among neighbors.

By the early 1800s, politicians began bringing civil libel suits.<sup>161</sup> Dramatic changes in the average newspaper also multiplied the number and types of speech injuries at issue in defamation cases:

[The so-called popular press] added corps of ambitious reporters to dig out stories of everyday tragedy and triumph, introduced regular sports columns to hold the attention of male readers, and added features on domestic life to attract a loyal corps of female customers. Newer technologies eventually allowed for inexpensive reproduction of photographs, an innovation that helped bring immigrants with few or no reading skills in English into the reading public. And new

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<sup>155</sup> NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 16 (1986).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 22-23.

<sup>160</sup> *Merrill v. Peaslee*, 17 N.H. 540, 540 (1845); *see also Chaddock v. Briggs*, 13 Mass. 248, 250-51 (1816) (remarking that a local minister had engaged in a “drunken frolic” was cause for a slander suit by the minister).

<sup>161</sup> ROSENBERG, *supra* note 155, at 121.

styles of story construction made newspaper reading easier for everyone. James Scripps, for example, believed that a good paper could be measured by the number of stories, preferably brief ones, that it contained; the more items that could be crammed into a single issue, the better the paper. Of course, this practice, by itself, increased the possibility for libel suits. The colorful content of popular journalism created more than the chance for greater numbers of libel suits; it also produced new types of defamation cases. By opening all kinds of areas of hitherto private life, including family affairs and sexual morality, to constant newspaper scrutiny, the popular press sought to expand the definition of what issues were in the public domain. Carried to its logical conclusion, popular journalism on the marketplace model implied that whatever appeared in the papers—and was purchased by the sovereign readers—was a public matter. But plaintiffs who were not public people in the traditional sense . . . did not always accept marketplace logic. If they . . . sued for libel, their suits could raise . . . tricky public-private distinctions . . .<sup>162</sup>

In fact, libel suits began to mushroom with the rise of the popular press. The *New York Herald*, for instance, completed a study in 1869, which found that the press had, “recent[ly],” been sued more than 700 times.<sup>163</sup> Predictably, several of these suits eventually reached the Supreme Court. Whether the Court ultimately ruled for or against the press, the fact that it did not hesitate to apply the state common law of defamation to the facts at hand implies that the common-law adjudication of libel and slander cases was not seen as inconsistent with the First Amendment Press Clause.<sup>164</sup> For instance, in *Washington Post Co. v. Chaloner*, the Court reversed and remanded a libel case against the Washington Post brought by a local socialite.<sup>165</sup> The paper reported that the plaintiff had a “nervous breakdown as a result of the tragedy at his home, Merry Mills, . . . when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at . . . Chaloner’s home.”<sup>166</sup> The Court found that the jury instructions were erroneous because they directed the jury that the report was libelous per se, rather than allowing the jury to weigh the meaning of the complained-of words in context.<sup>167</sup> Mention of any First Amendment protection from tort liability

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<sup>162</sup> *Id.* at 186-87.

<sup>163</sup> *Id.* at 197.

<sup>164</sup> *See, e.g.,* *Wash. Post Co. v. Chaloner*, 250 U.S. 290 (1919); *Peck v. Tribune Co.*, 214 U.S. 185 (1909).

<sup>165</sup> 250 U.S. at 291, 294.

<sup>166</sup> *Id.* at 291 (internal quotation marks omitted).

<sup>167</sup> *Id.* at 293.

for the newspaper is conspicuously absent. A similar analysis applies to *Peck v. Tribune Co.*, where the reversal in plaintiff's favor was premised on the finding that her reputation was compromised by an advertisement falsely stating that she endorsed whisky as a medicinal tool.<sup>168</sup> The Court focused entirely on the elements of the tort cause of action, without considering any role for the First Amendment.<sup>169</sup>

## ii. Invasion of Privacy

Colonial courts did not embrace a freestanding tort for invasion of privacy. Occasionally, however, they did protect privacy interests even without the benefit of a developed tort cause of action. Early New England courts allowed suits against defendants who “[bore tales] from house to house.”<sup>170</sup> As early as 1661, there is evidence of “antigossip” litigation in the Connecticut colony.<sup>171</sup> In 1668, a Plymouth litigant “succeeded in having the court admonish three persons ‘for opening a certaine box in his house, wherin were his writings.’”<sup>172</sup> In dicta, courts recognized the right to privacy as early as 1769, observing that “[every man] has certainly a right to judge whether he will make [his own sentiments] public.”<sup>173</sup> And, notably, it appears that colonists seeking to vindicate privacy interests in the absence of explicit torts for their invasion regularly turned to defamation as a vehicle.<sup>174</sup>

After the ratification, as the rise of the penny press led to a new news product, replete with photographs, “sob sister” columns, and sensational crime stories, more Americans found themselves the subject of news coverage.<sup>175</sup> The number of “defamation” cases that were filed based on unwanted exposure

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<sup>168</sup> 214 U.S. at 189-90.

<sup>169</sup> *Id.*

<sup>170</sup> DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 105 (1967) (internal quotation marks omitted).

<sup>171</sup> *Id.* at 105 n.60.

<sup>172</sup> *Id.* at 119.

<sup>173</sup> Warren & Brandeis, *supra* note 130, at 198 n.2.

<sup>174</sup> FLAHERTY, *supra* note 170, at 248. Some have ventured that “[p]rivacy as an all-encompassing constitutional right was . . . not a part of the legal tradition inherited from England by the colonies which would have been secured in either a state or federal bill of rights.” Caplan, *supra* note 56, at 267 (footnote omitted). But, of course, the fact that privacy may have been recognized as an individual right of less-than-constitutional weight does not disqualify it from status as a Ninth Amendment “right retained.”

<sup>175</sup> See ROSENBERG, *supra* note 155, at 186-87; see also *supra* notes 162-63 and accompanying text.

rather than a classic diminishment of reputation rose accordingly. Some examples of nonreputational fact patterns that led to findings of defamation beginning before the turn of the century include: stating that a man's "sister had been arrested for larceny," running an advertisement in which a known teetotaler was depicted as endorsing alcohol, running an advertisement in which an athlete was depicted as endorsing chocolate, or running a picture of a wrestler next to one "of a gorilla in an article on evolution."<sup>176</sup> Plaintiff victories suggest that in all of these cases the courts were responding to injuries that did not exactly diminish reputation—an athlete would not be reviled by the community for a food endorsement—but were nevertheless real—his identity was usurped by a third party for commercial purposes without his consent.<sup>177</sup>

An early response to the perceived overreaching of the modern press was a renowned law review article, *The Right to Privacy*, published in 1890 by Samuel Warren and Louis Brandeis.<sup>178</sup> On the heels of the groundbreaking proposal that courts should recognize privacy as a freestanding right belonging to individuals and redressable in tort, rather than as an offshoot of property or contract law, many common-law courts began to recognize various species of privacy torts.<sup>179</sup>

While the development of a distinct law of privacy solved the problem of these claims masquerading as defamation, it introduced the problem of defamation claims seeking refuge in the privacy torts.<sup>180</sup> That a given fact pattern may be just as reasonably classified as defamation as invasion of privacy follows from the fact that American law strives—likely because of its outgrowth from English law rather than civil law—to maintain the two torts as distinct when in fact they address

<sup>176</sup> Wade, *supra* note 10, at 1094-95 n.11 (citations omitted).

<sup>177</sup> See, e.g., Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1907 (1981).

<sup>178</sup> Warren & Brandeis, *supra* note 130.

<sup>179</sup> As the law developed, a "complex of four" privacy torts emerged: "intrusion upon . . . seclusion or . . . private affairs"; "public disclosure of embarrassing facts"; "false light"; and "[mis]appropriation of the plaintiff's name or likeness." Wade, *supra* note 10, at 1095 n.13 (quoting William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960)). Misappropriation of name or image has in recent years shifted from the common law to the statutory realm, with most statutes providing statutory damages for unconsented use of personality elements if the plaintiff cannot prove consequential damages. See, e.g., Aubrie Hicks, Note, *The Right to Publicity After Death: Postmortem Personality Rights in Washington in the Wake of Experience Hendrix v. Hendrixlicensing.org*, 36 SEATTLE U. L. REV. 275, 276 (2012). This evolution suggests that one branch of privacy law, at least, has reintegrated some elements of property and contract.

<sup>180</sup> Wade, *supra* note 10, at 1095.



similar defendant behavior and protect plaintiff interests that are so infinitesimally different as to be essentially inextricable.<sup>181</sup> Notably, the Court in *Peck v. Tribune Co.* did not foreclose the possibility of permitting the plaintiff to recover for the unconsented use of her photograph in a whisky advertisement, known in modern parlance as the right of publicity subset of the privacy tort.<sup>182</sup> The plaintiff had pleaded both causes, and the Court reversed the dismissal of her defamation count without holding that the privacy count was untenable as a matter of law.<sup>183</sup>

### iii. Intentional Infliction of Emotional Distress

Just as privacy interests evolved from covert to overt treatment in the American common law, scholars writing early in the twentieth century demonstrated that courts often evaded the confines of tort law to compensate egregiously inflicted mental anguish well before formally acknowledging these interests in a specific tort.

There is little documentation that courts vindicated claims of emotional distress through defamation or other avenues at the time of the ratification. However, by 1890, Warren and Brandeis reported matter-of-factly that “the legal value of ‘feelings’ is now generally recognized,” whether as damages parasitic to a physical injury, damages to a parent stemming from tort injuries to a child, or as a subset of defamation damages.<sup>184</sup> Despite discernible patterns among the cases where emotional injury was compensated, the injuries were not yet categorized as a separate tort because they were thought not to bear sufficiently “distinct and definite features of [their] own.”<sup>185</sup>

In the 1936 article often credited as the springboard for the American tort of intentional infliction of emotional distress,

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<sup>181</sup> For instance, truth is a defense to a complaint for defamation but not to most privacy causes of action. See, e.g., Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 958-59 (1968). Further, a defamatory statement must lower the plaintiff's reputation in the eyes of the community, whereas a privacy invasion turns on offense reasonably felt by the plaintiff himself. See *id.* Historically, defamation law treated written and spoken statements differently, see, e.g., Tilley, *supra* note 76, *passim*, whereas privacy law generally does not distinguish between statements based on the mechanics of communication.

<sup>182</sup> 214 U.S. 185, 190 (1909).

<sup>183</sup> *Id.* at 188, 190.

<sup>184</sup> Warren & Brandeis, *supra* note 130, at 197-98 n.1.

<sup>185</sup> Prosser, *Insult and Outrage*, *supra* note 16, at 40 (arguing that the cause had become sufficiently distinct to warrant independent treatment).

Calvert Magruder demonstrated that when necessary, courts compensated emotional injuries behind the fig leaf of other torts.<sup>186</sup> So, for instance, where a hospital patient had to wait eleven hours to be discharged because of an unpaid bill, the court called it false imprisonment and compensated him; where a railroad conductor failed to stop a drunken passenger from kissing a female passenger, the court found the company liable; where speech mortified plaintiffs even though hearers did not believe its contents, courts were known to call it defamation and give a verdict.<sup>187</sup>

Magruder, later joined by William Prosser, argued that courts should accord “independent legal protection” for “the interest in mental and emotional peace” via a new tort.<sup>188</sup> Magruder summarized the types of conduct that judges had been compensating sub rosa or wringing their hands and rejecting, proposing that these behavioral patterns should be the province of this new cause of action. The patterns included: publicly accusing a woman of unchastity;<sup>189</sup> insulting treatment of customers in public places of business such as shops, telegraph offices, or railway cars;<sup>190</sup> falsely circulating reports that a school child was illegitimate;<sup>191</sup> public posters identifying debtors;<sup>192</sup> unfounded attempts to sue and harassment in the course of bill collection;<sup>193</sup> and “mishandling of corpses.”<sup>194</sup>

Of course, these fact patterns are almost identical to those found in the Roman law of iniuria summarized in Part IV.A.2.<sup>195</sup> By 1948, the American Law Institute announced in a supplement to its first Restatement of Torts that an

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<sup>186</sup> See Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1034 (1936).

<sup>187</sup> *Id.* at 1034-35 & nn.5, 8 & 9.

<sup>188</sup> *Id.* at 1035.

<sup>189</sup> *Id.* at 1051.

<sup>190</sup> *Id.* at 1052-53.

<sup>191</sup> *Id.* at 1059.

<sup>192</sup> *Id.* at 1060.

<sup>193</sup> *Id.* at 1063.

<sup>194</sup> *Id.* at 1064; see also Zipursky, *supra* note 34, at 502-03 (summarizing classic cases via Prosser).

<sup>195</sup> Surprisingly, though Magruder acknowledges the “deep human feelings involved” in many of these circumstances, he did not indicate any historical basis for the creation of the “new” tort. See Magruder, *supra* note 187, at 1066-67. Nor did Prosser or any other law professors advocating for the tort credit its Roman law forerunner. It is unclear why these scholars, steeped in tort history and theory, did not acknowledge the debt owed to Roman law. One turn-of-the century survey of American law schools summarized that “Roman law [has] almost disappeared from the law school curriculum, even as an educational and academic subject,” which may explain the silence. THE ROMAN LAW READER, *supra* note 99, at 222.

independent tort of intentional infliction of emotional distress had been fully enough developed to merit recognition.<sup>196</sup>

In sum, all the dignitary rights and the corollary rights to sue for their invasion have a deep, nearly atavistic lineage within Western legal culture. As one scholar has summarized their history:

We have interests in mental tranquility, in reputation, in privacy. . . . The recognition of all these things as interests presumably took place over millennia. They are now part of our evolved selves. . . . Gradually, recognized interests undergo a metamorphosis into a recognition of rights. . . . As society evolves, it establishes various instruments through which these rights are announced and sometimes advertised. One of these, a constantly developing repository of rights, is the common law.<sup>197</sup>

#### V. THE STATUS OF DIGNITARY TORTS AS NINTH AMENDMENT “RIGHTS RETAINED”

Under the modest Ninth Amendment “rule of construction” theory, enumerated rights do not automatically trump retained rights when the two clash merely because the former are enumerated. Instead, courts interpreting the reach of enumerated rights must attempt to calibrate their reading of the enumerated right to avoid crowding out the right retained. Applying this theory, this section considers how well each of the dignitary torts—defamation, intentional infliction, and invasion of privacy—fits within each of the “rights retained” models—Framers’ original public understanding of natural-law rights, “Western-legal-tradition” rights, 1791 state-law rights, and post-1791 state-law rights. It concludes that defamation indisputably fits within all four models; invasion of privacy fits within at least the Western-legal-tradition and post-1791 models, and possibly the natural-law and 1791 models; and intentional infliction also clearly fits within at least the Western-legal-tradition and post-1791 models, and possibly the natural-law model.

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<sup>196</sup> RESTATEMENT (FIRST) OF TORTS § 46 (Supp. 1948). State courts throughout the country shifted from an implicit to an explicit recognition of the IIED tort over the forty-year period from 1939 through 1979. *See, e.g.*, Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 135-36 (2010) (describing history of IIED adoption in American courts and the tort’s current status as the “majority rule”).

<sup>197</sup> MARSHALL SHAPO, AN INJURY LAW CONSTITUTION 37-38 (2012).

A. *Dignitary Interests as “Natural-Law” Rights as Understood by the Framers*

1. Defamation

The status of a right to reputation as a natural-law right is virtually indisputable. Even applying the most restrictive Ninth Amendment definition of natural-law rights, those identified by Locke and Blackstone, one sees uniform textual agreement that men have a right to protect their reputations against incursions by private parties. As outlined in Part IV.B.2, Locke explicitly wrote that natural law prohibited individuals from speech that would harm “[an]other person’s reputation.”<sup>198</sup> Blackstone’s *Commentaries*, too, explicitly state that man’s absolute right to personal security included an “uninterrupted enjoyment of his . . . reputation.”<sup>199</sup>

2. Privacy

There is less support within Blackstone and Locke for the proposition that privacy is among the individual rights retained under the Ninth Amendment, though the concepts do appear. Locke’s view that men have an “ownership interest” in their own “personhood”<sup>200</sup> presages the work of Warren and Brandeis describing longstanding judicial intuition that the law should protect a party’s name and image from third-party co-opting without consent, whether as an element of property law or, eventually, as a freestanding tort. Locke’s admonition against “meddl[ing] with other people’s affairs”<sup>201</sup> further reflects a recognition of an individual zone that should be free from scrutiny. Similarly, Blackstone’s identification of “personal security” and “personal liberty” as absolute rights has been interpreted by some courts as approval of private tort actions for invasions of privacy.<sup>202</sup>

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<sup>198</sup> LOCKE, *supra* note 137, at 196.

<sup>199</sup> See 1 BLACKSTONE, *supra* note 140, at \*138 (discussed in Kent, *supra* note 141).

<sup>200</sup> Wilkinson, *supra* note 136, at 284.

<sup>201</sup> See LOCKE, *supra* note 137, at 195-96.

<sup>202</sup> Kent, *supra* note 141, at 12 (citing *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905)).

### 3. Intentional Infliction of Emotional Distress

Although neither Blackstone nor Locke make explicit textual reference to a private-law right of emotional tranquility, which is today protected by the IIED tort, their works clearly imply that this interest is a dimension of the natural-law rights of man. First, Locke focused on the “inherent dignity” of the individual and suggested that this right cast a long legal shadow. Thus, it is no surprise that he determined that natural law governed “intercourse among men and in communal life” and barred speech that would inflict harm not just on a person’s reputation—a version of self used in external exchanges—but also on his “character,” a more private version of self that encompasses emotion, self-image, and self-worth derived not internally but from external social assessments.<sup>203</sup> Similarly, Blackstone’s references to “personal security” and “personal liberty” have also been interpreted to extend a right to enjoy “the general functioning of society in a quiet and peaceable manner,” which arguably encompasses the right to be free from emotional harassment inflicted via social interactions.

#### B. *Dignitary Interests as Natural-Law “Western-Legal-Tradition” Rights*

##### 1. Defamation

The fact that Greece, Rome, and England all recognized a right to reputation enforceable against private parties fortifies the conclusion that reputation is among the “rights retained” under the individual rights theory.<sup>204</sup>

##### 2. Privacy

Privacy, too, has been protected as a private right throughout Western legal traditions, albeit less assertively. The most well-developed privacy tort is found in Rome, where *iniuria* explicitly allowed private actions for invasions of privacy. There is less evidence of privacy protection in the ancient law of Greece and the early regimes in the civil-law

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<sup>203</sup> See Post, *Privacy*, *supra* note 7, at 962-63 (quoting Goffman on the theory that violations of social deference rules can injure the personality and inhibit “the complete man”).

<sup>204</sup> See *supra* Part IV.

countries. In England, privacy has not been recognized as a right protected by a common-law cause of action. Of the three dignitary torts, privacy has the weakest claim to natural-law status under the historical theory of natural-law rights.

### 3. Intentional Infliction of Emotional Distress

The protection of emotional well-being against onslaught from private actors is entrenched in centuries of Western legal tradition. In ancient Greece, Aristotle wrote that abuse and insult should be the subject of civil litigation rather than interpersonal violence,<sup>205</sup> and the Code of Solon barred the use of harsh words in places of solace and the incitement of families by speaking ill of the dead.<sup>206</sup> Rome's law of intentional infliction was even more developed, allowing actions for defiling dead bodies or graves, harassment of debtors, sexual aggression, and the use of abusive language.<sup>207</sup> Early Anglo-Saxon law was consistent with its continental counterparts, recognizing causes of action for words and gestures that led to "humiliation."<sup>208</sup> Later, emotional well-being as a private-law right was orphaned when England transitioned from manorial and ecclesiastical courts to a system of common-law writs. This development does not significantly alter the place of the interest within the Western legal scheme, however, for two reasons. First, it was the result of historical accident<sup>209</sup> rather than considered analysis. Second, the tort has reemerged in English common law this century, demonstrating that it represents persistent and deep-seated Western legal values.

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<sup>205</sup> Madden, *supra* note 65, at 883 (quoting ARISTOTLE, *supra* note 70, at 402).

<sup>206</sup> See VERSTEEG, *supra* note 67, at 254; Lisby, *supra* note 75, at 442-43.

<sup>207</sup> See *supra* notes 85-90 and accompanying text.

<sup>208</sup> See GRIFFITHS, *supra* note 103, at 36 n.22. To be sure, English law formally departed from this tenet of Western law for a time. As the common-law courts developed during the Elizabethan period, they took jurisdiction over defamation and the protection of reputation, leaving "insult" cases to the local manorial courts. Those courts fell into disuse as England evolved from an agrarian to an industrial society. However, by 1897, the English courts began to reintegrate emotional injury into the tort scheme. See Réaume, *supra* note 123, at 66-67.

<sup>209</sup> See *supra* notes 118-24.

### C. *Dignitary Interests as State Rights in 1791*

#### 1. Defamation

Colonial courts recognized private lawsuits for slander and libel, and colonists seeking to resolve disputes that interfered with community harmony frequently pursued them.<sup>210</sup> The right to reputation was recognized in the laws of the people of the states at the time of ratification and often was explicitly called for in state constitutions.<sup>211</sup> In short, “On any plausible reading of the Ninth Amendment, the right to reputation falls among the ‘others retained by the people’” under 1791 state law.<sup>212</sup>

#### 2. Privacy

Tort actions for invasion of privacy were not explicitly found in the statutes or constitutions of the states at the time of ratification. Nor did the common law overtly recognize privacy causes of action. There is evidence, however, that colonists asserted privacy causes of actions in the seventeenth century.<sup>213</sup> For example, some colonies entertained “antigossip” cases, while others censured defendants who opened containers in order to read writings not meant to be public.<sup>214</sup> And in the eighteenth century, courts were known to observe in dicta the intuition that individuals were in sole control of how far they wished to thrust themselves into the public eye.<sup>215</sup> Further, litigants protesting speech that unwillingly exposed them to neighbors took refuge in the established torts of slander and libel.<sup>216</sup> Privacy has a strong claim of recognition under state law of 1791.

#### 3. Intentional Infliction of Emotional Distress

Historical evidence suggests that neither colonial courts nor state statutory or common law at the time of the ratification recognized a distinct tort for outrage or intentional

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<sup>210</sup> See *supra* notes 158-60.

<sup>211</sup> See Claus, *supra* note 43, at 617 n.101; Tilley, *supra* note 76, at 1054 n.251; see also *supra* notes 151-53.

<sup>212</sup> See Claus, *supra* note 43, at 617.

<sup>213</sup> See *supra* notes 172-75 and accompanying text.

<sup>214</sup> See *supra* notes 172-73.

<sup>215</sup> See Warren & Brandeis, *supra* note 130, at 198 n.2; *supra* note 175.

<sup>216</sup> See *supra* note 176.

infliction of emotional distress. Of course, given the interrelationship between reputation, dignity, and emotional tranquility, there is a possibility that courts adjudicating common-law slander and libel claims at the time used that vehicle to account for emotional injury. But there is little documentation that courts were vindicating emotional distress claims. Notably, the substantial early twentieth century scholarship supporting the initiation of the IIED cause of action found just this “gaming” of the available torts in its surveys of common law.<sup>217</sup> The earliest of those cases are traced back only to the mid-nineteenth century, however, well after ratification. Whether writers did not research back through the late 1700s, or whether they did so and unearthed no examples of “hidden” emotional distress claims is not clear. At any rate, intentional infliction does not appear to have Ninth Amendment status as a right protected by the common law in 1791.

*D. Dignitary Interests as State Rights Between 1791 and 1964*

1. Defamation

As outlined above, tort causes of action to protect reputation were well-recognized at the time of ratification. In the years between ratification and the adoption of the Fourteenth Amendment, the majority of states drafted explicit protection for some type of libel in their constitutions. These tort causes of action continued to thrive for the two centuries until the Court constitutionalized the tort in *New York Times Co. v. Sullivan*.<sup>218</sup>

2. Privacy

Some colonies appeared to protect privacy interests without explicitly recognizing privacy torts. By 1890, however, the proliferation of cameras and the rise of the penny press, with its emphasis on sensational coverage of average individuals, led to a push for privacy torts.<sup>219</sup> Warren and Brandeis’s renowned article, *The Right to Privacy*, urged courts to develop tort causes of action for invasion of privacy, rather than bend the defamation tort or property-law concepts to

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<sup>217</sup> See, e.g., Magruder, *supra* note 187, at 1034-35.

<sup>218</sup> 376 U.S. 254 (1964).

<sup>219</sup> See *supra* notes 180-81.



protect this dignitary interest.<sup>220</sup> By 1964, the privacy torts had been described as having been “well established in the United States for a number of years now.”<sup>221</sup>

### 3. Intentional Infliction of Emotional Distress

The development of the intentional infliction tort followed a pattern remarkably similar to the privacy torts. In fact, in their piece advocating privacy torts, Warren and Brandeis noted that despite technical restrictions on tort recovery for emotional harm, “the legal value of ‘feelings’” was generally recognized by 1890. Just as courts wishing to protect privacy interests before the advent of the privacy torts used defamation as a vehicle, courts wishing to protect emotional tranquility interests used the same tool, along with the concept of parasitic damages and bystander damages, to allow recovery for non-physical injuries that were linked (however tenuously) to a physical harm.<sup>222</sup> In 1936, the first of a series of law review articles urged overt recognition of a tort for intentional infliction of emotional distress, and by 1948, the American Law Institute in a supplement to the Restatement of Torts, had complied. A number of state courts had already recognized the tort, and they continued to do so over the next several decades.<sup>223</sup> Consequently, the tort was widely, though not uniformly, accepted throughout the states as part of the common law prior to 1964.

#### *E. Summary of Dignitary Tort Status Under Ninth Amendment Theories*

Surveying the history of the dignitary torts from ancient Western-law regimes through the colonial period, the ratification, and up through the mid-twentieth century, it appears that each of these torts succeeds under at least one of the theories for filling the Ninth Amendment set of “rights retained.” Respect for the right to reputation, limits on exposure to the public world, and emotional tranquility are

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<sup>220</sup> Warren & Brandeis, *supra* note 130, at 203-05.

<sup>221</sup> Wade, *supra* note 10, at 1094. Not surprisingly, given the unitary dignitary interest from which the privacy and defamation torts arose, courts that had protected privacy by application of defamation law now began to protect reputation by application of the privacy torts when the particular requirements of defamation would have left a plaintiff unprotected. *Id.* at 1095.

<sup>222</sup> See *supra* notes 186-87.

<sup>223</sup> Givelber, *supra* note 11, at 43 nn.8-9.

consistent hallmarks of Western legal systems, from ancient Roman and Greek law, through civil law in Europe and early Anglo-Saxon law. English common law inadvertently suppressed legal vindication of these rights in the medieval and Elizabethan eras, but their eventual reemergence in the modern era shows that the cultural value attached to these rights is deep-seated within Western law. American law, too, has long honored the reputational interest and, after vindicating privacy and emotional tranquility rights via defamation for decades, has returned to the system established by Roman law to allow compensation for all three interests. This history supports the argument that privacy and emotional tranquility may be identified among the rights retained by the Ninth Amendment under an individual rights theory. Under the natural-law theory of “rights retained,” it is indisputable that the right to vindicate reputation via defamation is a right retained. Further, Locke’s and Blackstone’s writings suggest—certainly less overtly—a recognition of individual rights to emotional tranquility and some measure of control over exposure to the outside world.

Under a 1791 state-rights theory, it is again indisputable that the right to reputation vindicated via the defamation torts is a right retained. Slander and libel were well-recognized common-law causes of action at the time of ratification and were often acknowledged in state constitutions. Less certain, but not beyond question, is the argument that privacy may have been among the rights recognized by the common law in 1791. Although no explicit privacy cause of action existed in tort until the twentieth century, there is ample evidence that colonial courts, and those after the ratification, strove to protect privacy through the torts available at the time, primarily defamation. In contrast, there is very little evidence that colonial courts or those at the time of ratification viewed emotional tranquility as a right meriting overt or even covert protection in tort. In fact, emotional harm was considered too speculative to support damages in tort. Thus, under the originalist state-rights theory of the Ninth Amendment, it is unlikely that the right to emotional well-being is among the “rights retained.”<sup>224</sup>

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<sup>224</sup> The disconnect between the “natural-law” status of intentional infliction and the 1791 status of intentional infliction can be chalked up to historical accident. The cause of action had been recognized for centuries, was peeled off from defamation during intramural jurisdictional battles in England as the legal system there cycled

Under an “evolving” state-rights theory, including among “rights retained” those adopted by state statute or common law after the ratification, all three dignitary torts would have constitutional status under the Ninth Amendment. Defamation, of course, had longstanding roots within English and American law. By the early twentieth century, state courts had followed the lead of Warren and Brandeis and developed extensive tort theories to protect privacy. And shortly thereafter, courts began to embrace the tort of intentional infliction of emotional distress to allow money damages for purely non-physical emotional harms. These two latter-day American torts were well-established throughout the country by 1964, when the Court initially began to apply the First Amendment to cabin the dignitary tort of defamation.

This article is agnostic as to which of these theories should fill the empty set of “rights retained,” in part because the theories seem to be different in formulation but nearly identical in result. In fact, concepts of “natural law,” “common law,” and “history and tradition” often seem interchangeable. As a matter of theory, there may be principled distinctions between the different sets of law, but for purposes of finding a constitutional foothold for the dignitary torts, any or all of them will suffice.

Indeed, this has been a faint but consistent suggestion from the time of ratification through the modern era of the First Amendment. One of the first drafts of what eventually became the Ninth Amendment, crafted by Roger Sherman of Connecticut, states that:

The people have certain natural rights which are retained by them when they enter Society, Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments *with decency* and freedom . . . . Of these rights therefore they Shall not be deprived by the Government of the united States.<sup>225</sup>

That one of the primary contributors of the Ninth Amendment specifically noted—in a draft of the precise amendment that, this article argues, governs construction of

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through ecclesiastical, manorial, and common-law courts, and eventually made its way back into both English common law and American common law. That it was “out of vogue” in 1791 should not alter its Ninth Amendment status when it fits under the other two theories for filling the “rights retained” set. *See, e.g., supra* notes 113-25 and accompanying text.

<sup>225</sup> THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT app. A, at 351 (Randy Barnett ed., 1989) (emphasis added).

the speech right when it clashes with dignitary interests—an internal limitation on the speech rights conferred by the government suggests that the Ninth Amendment has always provided a structural foothold for the dignitary torts within the constitutional scheme.

This view was reasserted as recently as 1965, when the Court was just beginning the constitutionalization of the defamation tort. In *Rosenblatt v. Baer*, where the Court held that the government-employed operator of a municipal recreation area was subject to the scrutiny provided for public officials in *Sullivan*, Justice Stewart’s concurrence pointed to the Ninth Amendment as a structural counterweight to the First when speech and dignitary interests clash:

It is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. . . . The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . . [T]his does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.<sup>226</sup>

The dignitary torts are—under more than one theory of Ninth Amendment rights retained—entitled to some consideration within the constitutional scheme. In short, they cannot mechanistically be subordinated to the First Amendment simply because they are inflicted via speech.

## VI. A NINTH AMENDMENT “COMPARATIVE IMPAIRMENT” TEST

A faithful application of the Ninth Amendment requires that changes to the scope of the dignitary torts achieved via application of the First Amendment must be the product of constitutional balancing, and at least some consideration of the social values they serve. Given the ambiguous scope of the Ninth Amendment—prohibiting both “denial” of a right retained via application of another enumerated right and “disparagement” of a right retained—the amendment’s text does not dictate the balancing test that should be applied to resolve clashes of enumerated versus retained rights. Laurence

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<sup>226</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

Claus has suggested that the text points to a “hard” version of the Ninth Amendment that places identifiable limits on the exercise of constitutional rights, and a “soft” version that sets up a “balancing [i]nquiry” between the retained right and the constitutional right.<sup>227</sup> A “hard” Ninth Amendment, which would prohibit the application of any constitutional right to invalidate a contrary retained right—at least under a state-rights model—essentially amounts to reverse preemption.<sup>228</sup> This result seems impractical and inconsistent with the intent of the Framers. A “soft” Ninth Amendment, however, is far easier to conceive and apply. In the contest of rights versus rights, where categorical hierarchy of enumerated rights is barred by the Ninth Amendment, some other tumbler must be used to sort the competing interests and determine which right prevails. This process—comparing the contrary commands given by two sources of law absent any textual guidance—is remarkably similar to the exercise undertaken by courts conducting choice of law inquiries. This article proposes that a relatively modern choice of law analysis—comparative impairment—supplies a neat test for prioritizing among competing enumerated and unenumerated-but-retained rights. Not coincidentally, one delegate suggested modifying the Ninth Amendment by replacing the word “disparage” with the word “impair,” which he claimed was a clearer indication of the Framers’ intent.<sup>229</sup> Although the proposal was rejected, it provides some insight into the underlying concerns of the Framers for purposes of devising a Ninth Amendment balancing test.

Comparative impairment, a member of the “interest analysis” family of choice of law systems, proposes that every law has two effects—one internal and one external. When the laws of two states conflict, its author suggests, a court should identify the internal and external effects of the two laws.<sup>230</sup> Courts adjudicating a case with multistate elements and conflicting state laws should choose whichever one will, when applied, least impair the internal effectiveness of the competing law. So, for instance, in the classic example given by proponent William Baxter, State *X* has a usury statute protecting a

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<sup>227</sup> Claus, *supra* note 43, at 618-20.

<sup>228</sup> See, e.g., Calvin Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1232 (1990).

<sup>229</sup> Williams, *supra* note 39, at 517-18.

<sup>230</sup> William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17-18 (1963).

particular class of borrowers and State *Y* does not.<sup>231</sup> In a case where a protected *X* borrower gets a loan from a *Y* lender, *X* law should apply. Why?

[Applying *Y* law] would give maximum scope to *Y*'s policies but would seriously impair those of *X*. The protection *X* has afforded its borrowers probably has several consequences. Local lenders may make loans to the better risks within the class at the maximum legal rate, a rate somewhat lower than otherwise would have been afforded them, rather than forego entirely that segment of business. But another part of the protected class is denied local loans and therefore has an incentive to borrow outside the state. If [*Y* law is applied], . . . the purpose of the *X* lawmakers will be substantially impaired by the emergence of a flock of lenders just across the state line. . . . [Applying *X* law] affords maximum implementation of the policies of both states. . . . [T]he objectives of *X*, the borrower's state, would be shielded from wholesale evasion: the nature of the transaction assures that prior to extending credit the lender will discover in most cases the borrower's residence and in many cases other characteristics of membership in the protected class [and would decline the loan application without incurring any injury].<sup>232</sup>

Importing this “comparative impairment” test to the Ninth Amendment context would achieve similar results. The objectives of neither the dignitary torts nor the Speech and Press Clauses would be categorically wiped out if the Court were to decide which took priority by examining the relative impairment on the other and choose the one that worked the lesser impairment in the particular circumstance.<sup>233</sup>

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<sup>231</sup> *Id.* at 14.

<sup>232</sup> *Id.* at 14-15.

<sup>233</sup> Granted, this approach would not give speakers bright-line guidance in every case *ex ante*. However, because the dignitary interests are treated via private, tort causes of action rather than via criminal statute, the speech at interest is not categorically prohibited. The speakers would be free to circulate their statements, but would be at risk of being ordered to internalize via monetary payment the externalities imposed by their speech if it injured a third party. Absent application of the First Amendment to this segment of tort law, the speaker and the injured would be in the same relative position as the rancher and the farmer in Coase's notorious *The Problem of Social Cost*. R.H. Coase, *The Problem of Social Cost*, reprinted in *LAW, ECONOMICS AND PHILOSOPHY: A CRITICAL INTRODUCTION WITH APPLICATION FOR THE LAW OF TORTS* (Mark Kuperberg & Charles Beitz eds., 1983); see also Justin Desautels-Stein, *The Market as a Legal Concept*, 60 *BUFF. L. REV.* 387, 450-54 (2012). Coase's Theorem applies just as well to the speaker-injured scenario as it does to the rancher-farmer: left to their own devices (assuming the existence of dignitary torts to stand in for physical vengeance but removing the constitutional insulation from liability for the speaker, a tenable assumption given that Coase does not see the common law as state action, but as a predicate for bargaining, whereas application of First Amendment restrictions to the common law is more akin to state action), the two parties would bargain toward an economically efficient outcome. In the speech scenario, the likely outcome is the provision of insurance for speakers whose words might injure. In fact, defamation insurance existed at the time *Sullivan* was decided, although the Court did not

For example, in *Sullivan*, if the Court applied comparative impairment, it would have found that the internal effect of Alabama's defamation law was to protect the reputations of its citizens from false statements. The external effect of the state law was to permit heavy damage awards against publishers, including out-of-state papers such as the *Times*, which was considered by many in the state an "outside agitator."<sup>234</sup> The internal effect of the First Amendment is to protect speakers from state regulation of their speech. The external effect of the First Amendment is to permit speech even when it could harm an individual's reputation. Applying Alabama's defamation law as interpreted by the state court, rather than applying the First Amendment in the case, would have achieved the law's internal goal—protecting the reputation of Commissioner L.B. Sullivan<sup>235</sup>—but would have significantly impaired the right of the *New York Times* to speak free from state regulation. In contrast, applying the First Amendment to protect the *Times*' ability to run an advertisement criticizing government officials fully realizes the internal goals of the enumerated right. It does *not*, however, significantly impair the internal effect of Alabama's defamation law. While that law was designed to protect individual reputations, several of its elements were apparently not satisfied in the *Sullivan* case, the jury's verdict notwithstanding.<sup>236</sup> Thus, a comparative impairment analysis points to a preference for the enumerated right in this case.

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consider whether the market was already providing efficient protection for injurious speakers. Notably, defamation insurance policies continue to be sold today, primarily to media companies (although increasingly as riders to homeowner policies for poorly capitalized bloggers). This dynamic raises the interesting possibility that between the Constitution and the market, speech is overinsured and thus, speakers are incentivized to produce more injurious speech. This is a particularly dangerous problem when cross-referenced with the diminishment of the dignitary tort recourse.

<sup>234</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 294 (1964).

<sup>235</sup> *Id.* at 256.

<sup>236</sup> For example, it is debatable whether Sullivan was actually "identified" in the advertisement. *See, e.g., id.* at 288-89 (expressing the Court's view that the jury erred in finding that the ad, in which "[t]here was no reference to respondent . . . either by name or official position" was "of and concerning him" as required by Alabama law). In addition, the falsehoods in the advertisement were arguably immaterial, including a mistake regarding the song that activists sang during a university protest and a characterization of the police as having "rung" the campus when, in fact, they were not standing in an unbroken ring. *See id.* at 258-59. Further, a cynic might wonder whether the average member of the (white) community in Montgomery actually held Sullivan in lower esteem for taking a hard line against the civil rights activists whose efforts were not supported by most city residents. The Court suggested as much. *See id.* at 260.

The same comparative impairment analysis yields a different result in *Snyder*. There, the internal effect of the Maryland intentional infliction law was to protect individuals from emotional anguish inflicted by those who speak abusively of or disrespect the dead. The external effect of the law is to extract monetary payment from speakers whose words injure and thereby potentially chill injurious speech.<sup>237</sup> Again, the internal effect of the First Amendment is to protect speakers from state regulation of their speech, while the external effect of the amendment is to permit speech even when it can inflict emotional anguish. Here, application of the Maryland intentional infliction law would have achieved its internal effect by vindicating the plaintiff-father for slurs about his deceased son that were circulating on the day of his son's funeral and in perpetuity thereafter on the Internet. The external effect of its application would have been to require the funeral protesters to compensate the father for the injury their chosen method of protest inflicted. However, barring them *ex ante* from protesting as they wished would *not* be an effect of applying the Maryland law, so there is little impairment of the internal effect of the First Amendment. Had they wished to avoid the *ex post* compensation ordered by the jury, they could have vigorously discussed their views on the American military and homosexuality generally without circulating false and demeaning information about the plaintiff's son, a private individual. In contrast, applying the First Amendment as the Court did achieved the First Amendment internal effect of protecting the protesters' speech, but significantly impaired the father's right to be made whole for the injuries the protesters inflicted. Thus, because application of the First Amendment more impairs the internal working of the IIED right retained than application of the right retained impairs the right to speech, the right retained is preferred under a "comparative impairment" Ninth Amendment analysis.

One could argue that the Court's requirement in *Sullivan* that public figures prove a speaker's "actual malice" before recovering in defamation is sufficient to balance free speech interests against dignitary tort interests.<sup>238</sup> Why, then, is

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<sup>237</sup> See, e.g., *supra* notes 30-35 and accompanying text (discussing the speech at issue in *Snyder* and the externalities of that speech imposed on the plaintiff-father).

<sup>238</sup> Claus, for one, has stated that a "soft" version of the Ninth Amendment would require, in a defamation case, that "the interest underlying defamation law must be accorded its appropriate weight." Claus, *supra* note 43, at 618-19. In *Sullivan*, the Court did not wipe out the Alabama cause of action for defamation altogether, and did



it inadequate to satisfy the demands of the Ninth Amendment? Most important, it fails because current speech–tort jurisprudence is not conducted within an acknowledged Ninth Amendment framework, meaning that balancing the rights of the individual and state to legal recourse for dignitary injuries against the rights of speakers is not a mandatory step in the analysis. *Snyder*, in which the Court indicated that it had no choice but to protect the injurious speech, illustrates the fact that absent a Ninth Amendment requirement to acknowledge and balance the “right retained,” the constitutional right can automatically occupy the field.<sup>239</sup> Second, the “actual malice” test has been so embroidered by corollary principles that it no longer functions as a neutral test for sifting through the facts and interests represented by a particular case.<sup>240</sup> Finally, because tort suits are brought by individual plaintiffs, and because the actual malice test inquires only into the status of the plaintiff and the actions of the defendant, the interests of the *state* in permitting common-law recovery for dignitary torts are not fully accounted for.<sup>241</sup> The Ninth Amendment mandates a mechanism by which dignitary rights are weighed in such cases, and “actual malice” in its existing incarnation fails because it is optional and arguably constitutionalizes an undervaluation of the dignitary interests. Comparative impairment, in contrast, would be a mandatory test compelled by the Ninth Amendment rule of construction when enumerated rights clash with unenumerated-but-retained rights. In addition, it requires articulation of the intended effects of the dignitary and speech laws and calculation

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not wipe out the *New York Times*’ speech rights altogether. Instead, it “narrowed the . . . reach of state defamation law” and employed a “limiting construction of the constitutional right to freedom of speech” by permitting private individuals to sue for defamation without the application of First Amendment guard rails, and permitting public figures to recover only in limited circumstances where the speaker had abused its free speech rights by knowingly or recklessly publishing untruths that blemished reputation. *Id.* One could interpret this as a “soft” test under which the interests served by Alabama defamation law were considered and assigned an “optimal” weight in relation to the speech rights involved.

<sup>239</sup> See *supra* note 32 and accompanying text; see also *Snyder v. Phelps*, 131 S. Ct. 1207, 1219-20 (2011).

<sup>240</sup> In particular, constitutional rules that carve wide latitude for speech about “public figures” who have no influence on public affairs but are merely of some interest to the public, allowing “rhetorical hyperbole,” permitting deliberate non-material misquotation, shifting the burden of proof on key issues from the defendant to the plaintiff, taking consideration of key elements from the jury and imposing a standard of *de novo* rather than clearly erroneous review on appeal leave virtually no room to consider the dignitary rights of the plaintiff or the state’s interest in allowing peaceful recourse for dignitary injuries. See Anderson, *supra* note 21, at 787.

<sup>241</sup> See *id.* at 771-74.

of the impairment that would result for each if the others were applied. This is a methodical approach that guarantees some valuation of dignitary interests regardless of where the speech–dignity line is ultimately drawn in a particular case.

## CONCLUSION

Current First Amendment theory consistently undervalues the role of the dignitary torts.<sup>242</sup> If the Constitution incorporates a preference for speech over the right to protect dignitary interest, it compels this result. But if dignitary interests have some constitutional parity with speech rights, speech will not always automatically trump dignity. This article suggests that under the “right-versus-right” rule of construction theory of the Ninth Amendment, dignitary rights are protected from the diminishment that necessarily follows from an expansive reading of the First Amendment. Freed from constitutional compulsion to shrink dignitary torts, courts may take into account the social value of those torts and reassert them accordingly within the constitutional scheme.

Tort law serves a crucial social goal. First and foremost, it offers a peaceful means of resolving private disputes. Human nature responds to perceived wrongs with vengeance. “Tort law promotes the law’s civilizing function.”<sup>243</sup> Thus, “an imbalance [between tort law and speech law] could lead to . . . extralegal and socially dangerous self-help.”<sup>244</sup> Indeed, news accounts suggest that those who are hamstrung in asserting their dignity interests against speech, particularly children and teens, may resort to self-help in the form of suicide or interpersonal violence.<sup>245</sup>

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<sup>242</sup> Not coincidentally, perhaps, this erosion has coincided with what some torts advocates describe as a certain scholarly contempt for the entire field of tort law. “Torts seems often to be conceived as a course that teaches students how common law allocates the costs of accidents,” and as a result, is viewed as “ad hoc and esoteric.” Goldberg & Zipursky, *supra* note 2, at 918.

<sup>243</sup> Deana Pollard Sacks, *Snyder v. Phelps, The Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193, 199 (2010) (internal quotation marks omitted).

<sup>244</sup> *Id.* at 194.

<sup>245</sup> See, e.g., Robert D. Richards, *Sex, Lies and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMEND. L. REV. 176, 179-80 (2009) (documenting instances in which the inability to assert reputational interests in the face of demeaning speech led to self-help); see also A.G. Sulzberger, *In Small Towns, Gossip Moves to Web, and Turns Vicious*, N.Y. TIMES, Sept. 20, 2011, at A1 (reporting that comments on Topix news sites in rural areas had “provoked fights and caused divorces”). In many of these high-profile cases, the injured could not assert dignity rights against the speaker

These insights apply with unique force in the subset of torts that compensate for lost dignity, honor, reputation, or well-being. Unlike other torts, where loss allocation is arguably the foremost goal, a money verdict is often more symbolic than compensatory in the dignitary torts.<sup>246</sup> The mere fact of a verdict in the plaintiff's favor, regardless of the dollar amount, can serve to restore the plaintiff and the defendant to the equal status they occupied prior to the dignity-injuring speech, thus valuing both speech and the interests it can harm.<sup>247</sup> To the extent that American society values lower rates of interpersonal violence, courts and policymakers should reevaluate a constitutional scheme that has over the past decades significantly undermined the availability of the dignitary torts to peacefully vindicate these interests.

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because the speaker was anonymous. However, the impulse to self-help arguably arises regardless of the reason the injured is thwarted in a quest for vindication, whether it be inability to identify him or a legal doctrine that tells him his well-being is less important than the speech that harmed him. *See* PINKER, *supra* note 13, at 99 (explaining that "retaliation after an insult" is one of the triggers for violence that leads to homicide).

<sup>246</sup> *See, e.g.*, Walter V. Schaefer, *Defamation and the First Amendment*, 52 U. COLO. L. REV. 1, 15 (1980) ("[C]oncentration upon a money judgment as the appropriate remedy for defamation is a defect that has plagued the common law since it first undertook to substitute a legal remedy for private vengeance."); *see also* THE COST OF LIBEL, *supra* note 18, at 25 (documenting that a substantial number of plaintiffs would have forgone tort suits if they had been offered an apology for the complained-of speech).

<sup>247</sup> *See, e.g.*, Solomon, *supra* note 2, at 1784 n.105 (outlining theories that tort law establishes expectations that injurer and injured are equals).