BACKGROUND

In the United States, both constitutional law and tort law recognize people’s right to privacy: a legal entitlement to an intimate life of one’s own free from undue interference by the state and others. For lesbian, gay, bisexual, and transgender (LGBT) people seeking to protect that right, the constitutional arena has brought a modicum of well-known success. In 2003, for example, two cases suggested that LGBT people had come a long way in having their right to privacy protected under constitutional law. In Lawrence v. Texas, the Supreme Court struck down laws criminalizing consensual sexual acts between same-sex adults, and in Goodridge v. Dep’t of Pub. Health, the Massachusetts Supreme Court recognized the right to same-sex marriage.

In the U.S. tort arena – in which people can sue under civil law for personal wrongs that were allegedly done to them – LGBT plaintiffs have accused employers, colleagues, publishers and others of prying, spying, insulting or harassing them, or disclosing their birth sex, sexual orientation, or medical information without authorization. But according to a new paper by Anita Allen, a professor of law and philosophy at the University of Pennsylvania Law School, the theoretically promising invasion of privacy torts often have been practical disappointments for LGBT plaintiffs seeking relief in cases related to their sexual orientations or identities.

In the paper, “Privacy Torts: Unreliable Remedies for LGBT Plaintiffs” (California Law Review 2010), Allen analyzes post-1960 appellate cases in which LGBT plaintiffs have alleged privacy
tort offenses on facts that expressly involved their sexual orientations or gender identities, invoking one or more of the four privacy torts William L. Prosser distinguished and enshrined 50 years ago in the Second Restatement of Torts – that is, intrusion, public disclosure of private facts, false light publication, and commercial appropriation.

Allen's analysis is two-fold: she both evaluates the integrity of Prosser's privacy tort framework, which has governed decisions on the invasion of privacy torts in U.S. courts for the past half century; and examines the efficacy of privacy tort remedies for LGBT people alleging wrongs tied to sexual orientation or gender identity, concluding that the invasion of privacy torts have not been especially useful to LGBT plaintiffs.

Despite some victories in constitutional law, and to a lesser degree, tort law, Allen asserts that the intimate lives of LGBT Americans are still subject to unwarranted invasion – as evidenced by the recent suicide of a college freshman after his roommate and another student used hidden webcams to stream over the Internet live images of him having sex with a male partner in a supposedly private dorm room. Allen cautions courts deciding LGBT privacy cases against adopting overly optimistic assumptions about the privacy needs of LGBT people.

FINDINGS
Prosser's categorization of privacy torts into four legal claims – intrusion, appropriation, publication of private fact, and false light publication – has had a major impact on the subsequent doctrinal development of the invasion of privacy tort in the courts. To contribute to the understanding of Prosser's legacy, Allen organizes her analysis to mirror the structure of Prosser's historic 1960 article setting forth his categorization framework, devoting a separate section to each of the four privacy sub-torts.

Intrusion
Allen finds that Prosser's intrusion tort, which includes physical trespass as well as intrusive acts such as wiretapping and harassing debt collection phone calls, is of minimal practical utility to LGBT plaintiffs. Whether alleging surveillance, prying, insult, disparagement, or publicly revealing partly hidden aspects of private life, even seemingly strong intrusion cases by LGBT plaintiffs have failed in the courts.

The case of Plaxico v. Michael, decided by the Mississippi Supreme Court in 1999, is illustrative. Plaintiff Plaxico's case did not survive a motion to dismiss despite the fact that defendant Michael, after learning that his ex-wife was involved in a lesbian relationship with Plaxico, drove his truck to his ex-wife's secluded cabin, crept up to a window, peered inside, and watched the couple having sex – and then returned to his vehicle, retrieved a camera, photographed Plaxico half-naked on the bed, and used the surreptitiously snapped photos to gain advantage during a child custody trial. Perhaps surprisingly, the appeals court affirmed the dismissal, holding that Plaxico failed to prove that Michael's actions were "highly offensive to the ordinary person" because the court found secret, illegal surveillance of suspected homosexual activity justified due to the suspected activity's illicit and possibly illegal character. Based on Plaxico and the other LGBT intrusion cases, the intrusion tort has not been, and does not promise to be, a useful remedy for LGBT plaintiffs, Allen notes.

Publication of Private Fact
On its face, Prosser's publication of private fact tort – a doctrine of civil liability for disclosure
of private facts – could deter and redress unwanted revelations and “outings” of LGBT people. But LGBT plaintiffs have had mixed success with the tort.

LGBT plaintiffs have invoked the publication of private fact tort to protect their “selective disclosure rights” – that is, the right to disclose in some contexts but not others their sexual orientation, same sex relationship, and birth sex in cases of transgender individuals. Yet Allen finds that courts often take a simplistic “once out, always out” point of view, failing to address important questions implicit in LGBT publication of private fact cases such as: Is there a right to maintain secrecy with respect to sexual orientation in some contexts, despite freely disclosing sexual orientation in other contexts? Should there be a legal right to be “out” for some purposes and “in” for others? What are the psychological, social, and political dimensions of LGBT Americans’ need to control the flow of information about sexual orientation?

Allen concludes that if tort doctrine currently demands courts’ simplistic “once out, always out” point of view, then the doctrine and the tort require redesigning and redesign to accommodate the reasonable privacy preferences of some members of the LGBT population.

**False Light in the Public Eye**

Prosser’s false light tort requires that the defendant has published words or images that depict the plaintiff in a false or misleading light and includes inaccurate attribution cases, misleading use of photographs cases, and imputation of criminality cases. Notably, plaintiffs alleging they are not LGBT, but that they have been publicly described as such, appear to have an easier time with the tort than plaintiffs who are LGBT alleging that their lives and identities have been wrongfully distorted due to prejudice and intolerance.

Allen notes that like other plaintiffs, LGBT plaintiffs claiming false light need not be prepared to characterize defendants as liars. Yet courts struggle with how to distinguish false light actions from defamation actions, suggesting a possible failure of Prosser’s privacy tort classifications.

**Commercial Appropriation**

A plaintiff’s lawsuit for appropriation typically alleges a nonconsensual use of the name, moniker, or photographic likeness of the plaintiff in an advertisement or in connection with a business or commercial product such as a book, magazine, newspaper, or film. Appropriation claims by those portrayed as homosexual are occasionally successful and sometimes not.

LGBT plaintiffs’ cases may fail for doctrinal reasons unrelated to sexual orientation, gender, or birth sex, as tort doctrines afford remarkable freedom to those who make unauthorized use of photographs in “newsworthy” and other publications. The case law illustrates, however, that implications of this doctrinal latitude are especially serious for LGBT people, Allen writes.

**Prosser’s Privacy Torts Framework**

The LGBT privacy tort cases that Allen analyzes reveal a gap between the formalities of pleading and the actual experiences of LGBT plaintiffs. LGBT plaintiffs, Allen finds, often allege that defendants in a single action violated two, three, or all four of Prosser’s privacy sub-torts, plus the defamation and emotional distress torts. This allegation of multiple torts, she concedes, is an undisputable fact of modern pleading.
But as Prosser’s critics note, the four torts have in common a singular foundation of respect for human dignity and inviolate personhood. Stressing the severability of the privacy tort into four discrete categories can obscure this unifying fact. Moreover, while the privacy torts have been additive and duplicative, this does not appear to have made a difference in the justice of the outcomes in the LGBT cases.

IMPLICATIONS
Limitations of Prosser’s Framework
LGBT plaintiffs’ routine pleading of violations of multiple privacy sub-torts and additional torts exposes the limitations of Prosser’s framework of privacy tort categories. Despite the enduring legacy of the framework, the cases suggest that Prosser missed or oversimplified cases or categories that ought to have been included in his purportedly comprehensive analysis of privacy case law.

Privacy Torts as a Remedy for LGBT Plaintiffs
In principle, LGBT individuals, like everyone else, can recover for highly offensive wrongful acts of intrusion, publication, or appropriation. But the cases demonstrate that LGBT plaintiffs have not been as successful as some would have predicted when relying on tort law to protect their right to privacy. In particular, the invasion of privacy torts have not reliably protected LGBT people’s rights in cases where the “reasonable person” and the “reasonable LGBT person” diverge (for example, cases involving selective disclosure of sexual orientation or identity). To provide real, consistent remedies for LGBT plaintiffs, Allen asserts that courts must refashion their understandings of how critical elements of privacy torts can be met and withstand defenses.

Allen cautions that recent success in the LGBT population’s quest for equality and inclusion potentially undercuts the already tenuous practical utility of the invasion of privacy torts. While American society seems to be moving toward a more socially tolerant future, she writes that it is premature to declare that LGBT people have achieved sufficient equality. As long as intolerance and discrimination against LGBT individuals exist, the need for seclusion, secrecy, and selective self-disclosure will remain – and so will the need for legal remedies to protect LGBT people’s right to privacy.

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A copy of the research brief can be found at:
http://www.law.upenn.edu/cf/faculty/aallen/lgbttorts.pdf

The full paper is available for download at:

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