RIVACY IS VERY MUCH in the news these days, from Facebook’s recent privacy settlement with the FTC to the sad case of Tyler Clementi, the Rutgers college student who committed suicide after his sexual activities were secretly recorded and shared using social media. Privacy is a big part of our national conversation, and privacy bills are currently pending before Congress. Unfortunately, we aren’t always sure what privacy means. We lack the vocabulary and the tools to understand what is at stake in this fast-moving and often bewildering area of the law.

When lawyers think of invasion of privacy, they typically think of the “disclosure tort,” which prohibits the widespread publication of true but embarrassing personal facts. The tort is the legacy of Samuel Warren and Louis Brandeis’s famous 1890 law review article, “The Right to Privacy,” which helped establish the idea of privacy in American law. That article was prompted by a privacy crisis of its own time, the publication of true facts about the social engagements of the rich and famous by the Boston press. In their article, Warren and Brandeis argued that the common law should protect delicate sensibilities from unwanted media attention. Warren and Brandeis greatly influenced our understandings of what privacy is and how we should protect it, but this has led us to a dead end.

On the one hand, the disclosure tort view of privacy is largely unconstitutional. The disclosure tort is designed as a cause of action against the press for publishing true things that people want to read. Unsurprisingly, this has brought the tort into sharp conflict with the First Amendment, which protects our ability to speak the truth, including truths that other people might not like. The disclosure tort also rests on fine (and unsustainable) distinctions by courts about whether individual facts are “public” or “private.” The problems of the disclosure tort were bad enough in the age of mass media, when only large media entities could spread the news. But in our rapidly evolving age of social media, each of us is potentially a publisher with a global audience. Tort lawsuits against millions of speakers would be both constitutionally suspect and practically impossible.

So what should we do? As a first step, we should stop thinking of privacy as primarily a protection against embarrassing disclosures. We should instead look to stop the collection of certain kinds of “private” information in the first place, whether by legislation, common law rules, or the design of the computer systems we use to collect and distribute information. Embarrassing information that is not collected in the first place can’t be disclosed.

More fundamentally, we should ask what we mean by “privacy”—what values it serves, what it does for us, and when we actually want publicity (or “sharing,” to use the term that Facebook has popularized) instead. Sometimes privacy protects our civil liberties, other times it protects our economic interests, and we need to be more specific about what is at stake.

Yet we don’t need to give up on privacy altogether. The First Amendment limits on privacy aren’t absolute. While they limit tort lawsuits, they don’t place a great burden on the regulation of the vast trade in consumer information. Disclosure privacy is a poor tool for protecting against hurtful speech and disclosures of information, but other legal tools can be both more specific and more effective. Confidentiality law, anti-stalking and anti-threat laws, consumer protection law, and more nuanced use of other privacy torts can all play a role in regulating the excesses of speech and the trade in personal information in the digital environment. Preserving both free speech and privacy requires us to define both carefully, but we can have meaningful protection of our personal information without sacrificing our commitment to free speech.

The Internet has revolutionized our society in many ways, challenging us to figure out how we can take advantage of the benefits of our new digital technologies at the same time as preserving the values we cherish, including privacy and free expression. This is as true for the general public in their daily lives as it is for lawyers in their everyday practices. I believe that we can have both meaningful privacy and meaningful freedom of speech in our networked, digital world. But it will require us to place our dated conception of disclosure privacy to one side. It will also require us to use our imaginations to think up alternative ways to preserve the kind of society we cherish in this time of rapid technological change.

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