

RECASTING PRIVACY TORTS IN A SPACELESS WORLD

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I. INTRODUCTION

SOME THIRTY INCHES FROM MY NOSE
THE FRONTIER OF MY PERSON GOES,
AND ALL THE UNTILLED AIR BETWEEN
IS PRIVATE *PAGUS* OR DEMESNE.
STRANGER, UNLESS WITH BEDROOM EYES
I BECKON YOU TO FRATERNIZE,
BEWARE OF RUDELY CROSSING IT:
I HAVE NO GUN, BUT I CAN SPIT.¹

Consider the following three scenarios: First, James, an otherwise upstanding citizen, got uncharacteristically drunk at an office party. His drunken behavior, witnessed by all, quickly became fuel for the office rumor mill. Second, imagine that, instead of at the office party, James got very drunk with total strangers at a foreign airport bar and later confessed his drunken shenanigans to Pete, a loose-lipped friend. Upon Pete's disclosure, stories of James's rowdy night soon spread. Finally, imagine that after a hard day, James drank heavily while alone in his bedroom. His neighbor, Sandra, observed his activities through the window of her home and then publicized his solitary intoxication to the world.

Each of these hypotheticals evokes a clear sense of its requisite privacy entitlement. Although James's behavior (getting drunk) is unchanged, the degree to which privacy is socially and legally ascribed to each situation is quite different. As these scenarios suggest, privacy is usually a function of the physical space in which the purportedly private activity occurred, its subject matter, whether it was veiled in secrecy, and whether others were present.

Now imagine that James told his best friends of his drinking via a private message on an online social networking ("OSN") or video-sharing website like MySpace,² Facebook,³ or YouTube.⁴ What if he posted pictures or a video documenting his drunkenness on his "private" page, to which only his close friends had access, and the incriminating material still ended up in the hands of potential employers or other unintended audiences?⁵ What if James divulged this informa-

1. W.H. AUDEN, *Prologue: The Birth of Architecture*, in ABOUT THE HOUSE 3 (1965).

2. MySpace, <http://www.myspace.com> (last visited Dec. 1, 2007).

3. Facebook, <http://www.facebook.com> (last visited Dec. 1, 2007).

4. YouTube, <http://www.youtube.com> (last visited Dec. 1, 2007).

5. See, e.g., Alan Finder, *When a Risky Online Persona Undermines a Chance for a Job*, N.Y. TIMES, June 11, 2006, § 1, at 1, 30, available at <http://www.nytimes.com/2006/06/11/us/11recruit.html> (noting that job recruiters are increasingly screening applicants by searching OSNs, only to find "risky . . . photographs and provocative comments about drinking, recreational drug use and sexual exploits in what some mistakenly believe is relative privacy").

tion on a web page or blog to which members of the general public had access?⁶ What if someone else maliciously posted the information?⁷ What if a photographer took a picture of James stumbling out of a bar and published it online for all to search and see?

This second set of hypotheticals raises further questions: What is privacy today? Can privacy exist where there is no physical space or inherently private subject matter, secrecy, or seclusion? More specifically, does the half-century-old conception of the tort of public disclosure of private facts in the Restatement of Torts⁸ apply in social cyberspace today? This Article posits that the public disclosure tort and OSNs are strange yet productive bedfellows. Attempts to apply traditional public disclosure jurisprudence to online social networking demonstrate the incoherence of this jurisprudence and can inform a new conception of the tort that transcends technology and physical space.

Traditionally, privacy has been inextricably linked to physical space. In turn, space often defines our notions of personhood and identity. Consider, for example, the social stature ascribed to sitting in a corner office. Spatial concepts are interrelated with cultural norms prescribing social organization and human behavior, interaction, and expectations. The classic conceptions of privacy rely on spatial experiences, such as a room of one's own⁹ or a secluded hermitage. Henry David Thoreau, as famous for his isolation as for the works of literature that the isolation inspired, exalted the relationship between physical space, seclusion, and personal freedom in *Walden*, writing: "Individuals, like nations, must have suitable broad and natural boundaries, even a considerable neutral ground, between them."¹⁰

Researchers in the field of proxemics, the study of personal space, examine these "suitable broad and natural boundaries" and their close association to human behavior.¹¹ Based on extensive studies of the behavior and expectations of American subjects, Edward T. Hall, the

6. See, e.g., Matthew D. LaPlante, *Dr. Laura Son Linked to Lurid Web Page*, SALT LAKE TRIB., May 19, 2007, available at http://www.sltrib.com/ci_5934072 (alluding to reputational harm a public figure suffered because of her son's obscene MySpace page).

7. See, e.g., Emily Nussbaum, *Say Everything*, N.Y. MAG., Feb. 12, 2007, at 24, available at <http://www.nymag.com/news/features/27341> (discussing retaliatory posting on OSNs).

8. RESTATEMENT (SECOND) OF TORTS § 652D (1977). Hereinafter, I will refer to the tort of public disclosure of private facts as the public disclosure tort.

9. Virginia Woolf's *A Room of One's Own* famously analogizes physical area to personal rights and outlets for individuality and self-expression. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (Hogarth Press 1967) (1929).

10. HENRY DAVID THOREAU, *WALDEN* 141 (J. Lyndon Shanley ed., Princeton Univ. Press 1971) (1854).

11. See, e.g., EDWARD T. HALL, *THE HIDDEN DIMENSION* (Anchor Books ed., 1990) (1966). "[V]irtually everything that man is and does is associated with the experience of space." *Id.* at 181.

discipline's founder, categorized an individual's spatial needs, including the needs associated with social propriety, comfort, intimacy, and privacy, based on distance from the body.¹² Proxemics reveals the circular relationship between humans and space, and indicates that human expectations define space as much as physical space defines human expectations. Thus, behavioral science has succeeded in distilling and gauging the highly variable and relative nature of the human perception of spatial needs.¹³

While the behavioral sciences have enjoyed great success in characterizing the use of space and its relationship to different expectations, the law has struggled to definitively articulate human expectations of privacy. In particular, the tort law of privacy is a convoluted area of law.¹⁴ Its incoherent and haphazard methodology has engendered confusion and sparked extensive debate.¹⁵ The Restatement (Second) of Torts,¹⁶ which reflects the general state of privacy tort law in the United States,¹⁷ has been a poor guide and is now outdated.¹⁸ As a result, there is no systematic framework for untangling the public disclosure tort in American courts.

In the absence of clear and relevant guidance, courts have resorted to intellectual shortcuts in their use of concepts of space, subject matter, secrecy, and seclusion as necessary benchmarks for privacy protection.¹⁹ What were once mere indicators of privacy have become, in some instances, the extent of judicial inquiry. Problematically, these entrenched constructs are all related in one form or another to a pervasive consciousness of physical space, a concept that is no longer relevant in analyzing many modern online privacy harms.²⁰

12. For example, intimate distance (0.5 to 1.5 feet from the body), personal distance (1.5 to 4 feet from the body), social distance (4 to 12 feet from the body), and public distance (more than 12 feet from the body). *Id.* at 113–29.

13. *See id.*

14. Although the concept of privacy affects many other areas of law, this Article focuses on the tort laws of privacy.

15. *See, e.g.*, Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 482 (2006) (“Privacy problems are frequently misconstrued or inconsistently recognized in the law. The concept of ‘privacy’ is far too vague to guide adjudication and lawmaking.”); Lior J. Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 921 (2005) (noting the need for a more rigorous and objective notion of “privacy” for the purposes of privacy torts).

16. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

17. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 851 (5th ed. 1984).

18. Exemplifying its antiquated nature, the Restatement cites “inclusion on a handbill distributed to many people” as an example of a method of giving publicity to private information. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

19. *See infra* Part IV.

20. *See, e.g.*, ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967) (identifying four “basic states of individual privacy”: (1) solitude; (2) intimacy; (3) anonymity; and (4) reserve, which is “the creation of a psychological barrier against unwanted intrusion”); Ruth Gavi-

Because of their reliance on physical space, these constructs will be referred to as the spatial linchpins of public disclosure torts. Despite judicial attempts to find a universal conceptual hook on which to hang the public disclosure tort, there is simply no such common denominator in legal privacy analysis.²¹

Against the already tangled backdrop of privacy law, the Internet age — with its chat rooms, webcasting, blogs, e-mail, instant messaging, text messaging, camera phones, and OSNs — has further complicated the definition of privacy. New technologies have enabled novel social situations that generate privacy harms and concerns that were unforeseeable by the Restatement's authors. For example, OSNs such as MySpace and Facebook host billions of interactions a day and facilitate the dissemination of personal information via combinations of audio, video, and text. Uninhibited users of these social technologies, sometimes referred to as digital natives²² or the MySpace generation, routinely post online titillating videos and photographs, disclose their personal information (and that of others), and document their daily lives and thoughts.

Much of the legal debate about privacy on the Internet has previously centered on personally identifiable data, like a person's address, social security number, spending habits, and financial information.²³ Interestingly, although the unwarranted acquisition or dissemination of this data can result in tangible injuries like identity theft, fraud, or sexual predation, most of these personal "facts" have been held to be public matters, the disclosure of which is not embarrassing or offensive enough to sue in tort.²⁴ This Article focuses on truthful, but nonetheless embarrassing, disclosures that are endemic to OSNs; such disclosures may include one's innermost thoughts, visual material not meant for public audiences, and details about one's sexual history. Without the ability to easily conceptualize location, boundaries, or even norms in cyberspace,²⁵ the traditional legal boundary between

son, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 425–40 (1980) (defining privacy as a variable gradient in three dimensions: secrecy, anonymity, and solitude).

21. See, e.g., Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002) (concluding that attempts to identify a single characteristic shared by all "privacy" breaches have uniformly failed).

22. John G. Palfrey, Jr., *HBR Case Commentary: We Googled You*, HARV. BUS. REV., June 2007, at 37, 42 (distinguishing "digital natives," who grew up online, from "digital immigrants," who did not).

23. See generally Chris Jay Hoofnagle, *Identity Theft: Making the Known Unknowns Known*, 21 HARV. J.L. & TECH. 97 (2007).

24. See, e.g., *Busse v. Motorola, Inc.*, 813 N.E.2d 1013, 1018 (Ill. App. Ct. 2004) (holding that disclosure of social security numbers, names, addresses, and particulars of cell phone use was not an invasion of privacy).

25. See David G. Post & David R. Johnson, "Chaos Prevailing on Every Continent": *Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHL-KENT L. REV. 1055, 1057–58 (1998) ("[C]yberspace . . . is creating a realm of human inter-

“public” and “private” have become blurred. As a result, expectations of privacy are unstable and harder than ever to ascertain.

Somewhat surprisingly, extensive research reveals virtually no public disclosure cases involving harms on OSNs. This may reflect the tort’s inapplicability or obsolescence in this context. After all, courts have generally held that anything capable of being viewed from a “public place” does not fall within the privacy torts’ protective umbrella.²⁶ Another possibility is that the privacy loss predicted by some early Internet commentators has occurred.²⁷ A third view is that the unrealistic privacy expectations of those individuals exposing the information are to blame for any ensuing harm.

Rejecting these arguments as pessimistic, extreme, and detrimental to the development of future technologies and applicable law, this Article argues that applying the public disclosure tort in the context of OSNs can help transition the tort to the next stage of the tort’s jurisprudential existence. This spaceless context exposes weaknesses of the traditional conception of the tort and the law’s reliance on spatial linchpins. By reconceptualizing the tort without reference to space, this Article aims to articulate and support a practicable, factor-driven approach to the public disclosure tort that is capable of withstanding the tests of time and technology.

Some scholars have identified the need for a precise, factor-based approach to the public disclosure tort as the solution to the present ambiguity; however, to date, no specific solution has been proposed.²⁸ This Article provides a factor-based approach, which avoids the traditional absolutism endemic to this complex area of torts and moves

action in which those constraints [of distance and geography] are disappearing entirely, in which physical location and physical space are becoming both indeterminate and functionally irrelevant.”).

26. See *infra* Part IV.

27. See, e.g., CHARLES J. SYKES, *THE END OF PRIVACY* 246 (1999) (arguing that we should restore a culture that respects privacy by “creating a presumption of privacy as the default setting of the Information Age”); REG WHITACKER, *THE END OF PRIVACY* 137–38 (1999) (concluding that cyberspace “is exciting, but it can also be a threatening terrain, where dark towers of data brood on the horizon, haunted by shadow distortions of ourselves that menace or ridicule us in our daily lives.”).

28. See Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 908 (2006) (arguing that more precise privacy standards may be “the only way to shield privacy protection from successful constitutional challenges” and that “[r]edefining the indefinite public disclosure tort with lists of specific factors addressing questions like what is ‘private’ and what is ‘newsworthy’ could overcome many of the objections to the tort”). [hereinafter McClurg, *Kiss and Tell*]. In 1995, Professor McClurg offered a factor-based approach aimed at updating the related tort of intrusion upon seclusion. This new approach would allow recovery for invasions of privacy in public places. See Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989 (1995) [hereinafter McClurg, *Out of the Closet*].

towards a reasoned analysis based on location, information breached, and the relational and contractual bonds between the parties.

This Article begins by asking whether the public disclosure tort is applicable and relevant in the face of recent technological developments, such as OSNs. Part II provides a logical starting point for this inquiry by briefly reviewing the evolution of the tort. Part III provides an overview of the mechanics of popular OSNs and a description of some of the new privacy concerns they have created. Using examples based on OSNs, this Article reveals privacy torts' unsound reliance on spatial linchpins — space, subject matter, seclusion, and secrecy — to be its Achilles' heel. Part IV illustrates that what was once a semi-workable privacy model in physical space is now outdated; this Part exposes the jurisprudence's conceptual weaknesses in the translation of the tort across technologies. In Part V, this Article articulates a factor-based analytical framework that organizes and accommodates the tort in a spaceless world. Each factor is illustrated by a hypothetical case set in the OSN context. Part VI concludes that this approach, while formulated as a response to the challenge posed by OSNs, ultimately strengthens the public disclosure tort.

II. PUBLIC DISCLOSURE, PRIVATE FACTS, AND PERSONAL SPACE

“I know it when I see it.”²⁹ Justice Stewart's famed definition of pornography could equally well describe the law's fundamental difficulty in defining privacy.³⁰ While some legal theorists define privacy as a function of the accessibility of a person,³¹ others have defined the inquiry in terms of control over information.³² Still others have de-

29. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

30. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting) (identifying privacy as a “broad, abstract, and ambiguous concept”); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993) (defining privacy as “a mysterious but deep fact about human personality”); Solove, *supra* note 15, at 477 (“Privacy is a concept in disarray. Nobody can articulate what it means.”); J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 5:55 (2d ed. 2005) (“The simple word ‘privacy’ has taken on so many different meanings in so many different corners of the law that it has largely ceased to convey any single coherent concept.”).

31. *See, e.g.*, ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 15 (1988) (“[P]ersonal privacy is a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others.”); Gavison, *supra* note 20, at 428 (“[A]n individual enjoys perfect privacy when he is completely inaccessible to others.”).

32. *See, e.g.*, Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 482 (1968) (“Privacy is . . . the control we have over information about ourselves.”); WESTIN, *supra* note 20, at 7 (“Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”). Westin lists sev-

efined privacy in terms of personhood, intimacy, and secrecy.³³ However philosophically defined, the concept of privacy as a tort has its roots in a concept first articulated by Samuel Warren and Lewis Brandeis in an 1890 *Harvard Law Review* article entitled “The Right to Privacy.”³⁴ This seminal article advocated creation of a new right protecting an individual’s personal space from unnecessary and unsanctioned public disclosure.³⁵ The primary aim of the authors’ proposal was to provide redress to those who had suffered intrusions into areas that are socially designated spaces of refuge from society.³⁶ In this view, privacy protects personhood and human dignity against unwarranted intrusion and disclosure.

The Warren-Brandeis formulation of privacy also had a distinct communitarian goal: to protect “the forms of respect that we owe to each other as members of a common community.”³⁷ Although privacy is commonly referred to as the “right to be let alone,”³⁸ scholars since Warren and Brandeis have argued that privacy tort law enforces socially-accepted codes of civility between members of a community³⁹ and safeguards intimacy and social ties.⁴⁰

Seventy years after Warren and Brandeis set the conceptual stage for privacy torts, Dean Prosser cemented the concept’s place in American jurisprudence. Prosser’s influential article categorized, synthesized, and formalized privacy law into four distinct torts.⁴¹ Two of these torts deal with embarrassment or disgrace: invasion of privacy by intrusion⁴² and public disclosure of private facts.⁴³ The other two

eral levels of privacy and discusses the crucial role of individual control and decision-making at each level. *Id.* at 31–32.

33. See, e.g., Solove, *supra* note 21, at 1094 (“Although the extensive scholarly and judicial writing on privacy has produced a horde of different conceptions of privacy, I believe that they can be discussed under six headings: (1) the right to be let alone; (2) limited access to the self; (3) secrecy; (4) control of personal information; (5) personhood; and (6) intimacy.”).

34. Samuel D. Warren & Lewis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

35. See *id.*

36. See *id.* at 220.

37. Robert C. Post, *Rereading Warren & Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647, 650–51 (1991).

38. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888).

39. See, e.g., Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

40. See CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 142 (1970) (“Intimacy is the sharing of information about one’s actions, beliefs or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.”).

41. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

42. *Id.* at 389–92. This tort is interchangeably referred to as intrusion and intrusion upon seclusion.

torts have a close relationship to publicity and property rights: false light privacy and invasion of privacy by appropriation.⁴⁴ Prosser's classifications are now incorporated into the Restatement of Torts⁴⁵ and form the foundation of privacy law in virtually every jurisdiction in the United States.⁴⁶

This Article exclusively addresses the tort of public disclosure as manifested in the shameful, embarrassing, or otherwise harmful disclosure of personal information. The public disclosure tort applies when highly offensive and private facts are publicly disclosed in an unsanctioned manner.⁴⁷ Such behavior was long believed to have inspired Warren and Brandeis to write their groundbreaking law review article and create a new cause of action.⁴⁸

According to the Restatement, the public disclosure tort requires the plaintiff to show that the defendant (1) gave publicity, (2) to a private fact, (3) that is not of legitimate concern to the public, where (4) such disclosure is highly offensive to a reasonable person.⁴⁹ Ultimately, the Restatement's elements have evolved into the following ambiguous, four-part analysis:

- (1) Was the fact disclosed private or public?
- (2) If private, was the information otherwise protected by the First Amendment?
- (3) If private and not constitutionally protected, was the information disclosed to a large number of people by the defendant's affirmative action?
- (4) Finally, would such a widely disseminated disclosure have highly offended a reasonable person?⁵⁰

Although degree of harm, causation, and intent are not explicitly included in the elements, they are implicit in the analysis. Some courts

43. *Id.* at 392–98.

44. *Id.* at 397–407.

45. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

46. KEETON ET AL., *supra* note 17 at 851.

47. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

48. According to legal legend, Samuel Warren decided to write the article after unwarranted and highly intrusive press coverage of his daughter's wedding. Prosser, *Privacy*, *supra* note 41, at 383. The wedding myth crumbled in the 1970s, however, when studies of the contemporary *Boston Saturday Evening Gazette* revealed that it did not unfairly or excessively report the wedding and that the social privacy of the Warrens was not unduly violated. J. THOMAS MCCARTHY, *supra* note 30, at 19 (citing James Barron, *Warren & Brandeis, The Right to Privacy: Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 903–07 (1979)).

49. RESTATEMENT (SECOND) OF TORTS § 652D (1977). Intrusion upon seclusion, the other uniquely dignitary tort, requires the plaintiff to show that the defendant (1) intentionally intruded, physically or otherwise (2) upon the solitude or seclusion of another or on his private affairs or concerns (3) in a manner highly offensive to a reasonable person. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

50. KEETON ET AL., *supra* note 17, at 173.

have, in fact, incorporated them into their analyses, resulting in sometimes baffling jurisprudence.⁵¹

The Restatement's analysis calls for highly normative and subjective determinations, including the elusive boundaries of concepts like privacy, public concern, and offensiveness. This analysis forces judges to rely on their perception of social norms, rather than more traditional legal methods. Thus, judges become "armchair sociologists [attempting] to assess cultural expectations of privacy,"⁵² an expansive and complex role.

It is not surprising then that development of public disclosure doctrine has been scattershot at best. The relative lack of case law in this area suggests that public disclosure suits rarely proceed to trial. Since a public disclosure suit usually requires introduction of the shameful facts into the public record and admission of the truth of those facts,⁵³ it seems likely that risk of increased embarrassment may deter potential plaintiffs. A privacy tort case, like any other, requires damages substantial enough to make the costly legal process worthwhile. As a result, defendants are usually deep-pocketed media outlets rather than individuals. Indeed, privacy tort claims are often dismissed before the judge or jury can reach the merits, suggesting courts frequently misunderstand such claims.⁵⁴

Legal scholars have argued that the potential silencing effect of the public disclosure tort is unconstitutional.⁵⁵ According to the Restatement, an open question remains regarding "whether liability can constitutionally be imposed for . . . private facts [other than public records] that would be highly offensive to a reasonable person and that are not of legitimate [public] concern."⁵⁶ In order to address First Amendment concerns, the Supreme Court limited the public disclo-

51. McClurg, *Kiss and Tell*, *supra* note 28, at 907 (recognizing that the Restatement has "functioned inadequately and fared poorly in the courts"). While several theorists have proposed approaches to privacy torts, it may be realistically impossible to strip this inherently subjective analysis of its reliance on normative social conventions. Post, *supra* note 39, at 969 (suggesting that the common law rests on a normative concept of privacy); *see also* Gavison, *supra* note 20, at 428–29 (defining privacy as objectively ascertainable along three gradients: solitude, anonymity, and secrecy); Strahilevitz, *supra* note 15 (arguing for a scientifically ascertainable conclusion using social networks theory).

52. Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 8 n.12 (1983) (discussing privacy in the Fourth Amendment context).

53. If the shameful facts were false, the aggrieved would be suing for defamation, false light privacy, or libel.

54. McClurg, *Out of the Closet*, *supra* note 28, at 1000–01 (noting that plaintiffs often lose privacy claims without the opportunity to present their cases to juries).

55. *See, e.g.*, Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1122 (2000); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983).

56. RESTATEMENT (SECOND) OF TORTS § 652D, Spec. Note on Relation of § 652D to the First Amendment to the Constitution (1977).

sure tort by imposing a broad “public concern” test. In *Florida Star v. B.J.F.*,⁵⁷ the Court held that in order to constitute an actionable tort under the public concern test, the information at issue had to be a matter of public significance or newsworthiness,⁵⁸ and its protection had to “further a state interest of the highest order.”⁵⁹ The Court interpreted “public significance” very broadly, focusing on the general subject matter of the story, in this case violent crime, rather than on the nature of the information, which was the defendant’s name.⁶⁰ Some scholars have suggested that the stringent requirements imposed on plaintiffs by *Florida Star* were the death knell of the public disclosure tort.⁶¹ The constant trickle of public disclosure cases since *Florida Star*, however, suggests that plaintiffs have remained undaunted and that, at least in some form, the tort is alive.

Finally, further clouding the incoherent development of Prosser’s privacy torts is the fact that privacy expectations and norms are constantly challenged by technology. As technology evolves, social behavior and ensuing privacy harms, as well as people’s tolerance of these harms, change.⁶² Warren and Brandeis found inspiration for their new tort theory in the “numerous mechanical devices” that “threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”⁶³ They argued that, armed with the then-recent innovation of “instantaneous photographs” and under the influence of new “business methods,” the press was “overstepping in every direction the obvious bounds of propriety and of decency.”⁶⁴

Almost 120 years later, history is repeating itself. This time, the threats to privacy come from cyberspace. While privacy’s philosophi-

57. 491 U.S. 524 (1989). In *Florida Star*, a rape victim sued a Florida newspaper that disclosed her name in the context of reporting the rape. This disclosure contravened a Florida statute that made it unlawful to publish the names of rape victims. The trial court directed a verdict in favor of the plaintiff and awarded her damages. The Supreme Court reversed, holding that the award was inconsistent with the First Amendment. *Id.* at 526–29.

58. *See, e.g.*, *Vassiliades v. Garfinckel’s, Brooks Bros.*, 492 A.2d 580, 590 (D.C. 1985) (concluding that a plaintiff had a privacy claim against a doctor who disclosed that she had undergone plastic surgery); *Diaz v. Oakland Tribune*, 188 Cal. Rptr. 762 (Cal. Ct. App. 1983) (holding that a newspaper’s revelation of the transsexuality of a candidate for student body president was nonnewsworthy because it bore “little if any connection between the information disclosed and [the student’s] fitness for office”).

59. *Florida Star*, 491 U.S. at 533 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

60. *Florida Star*, 491 U.S. at 536–37.

61. McClurg, *Out of the Closet*, *supra* note 28, at 1002 (arguing that the tort of public disclosure is “for most practical purposes dead” after *Florida Star*).

62. It should be noted that while technology has the ability to threaten privacy and change societal conceptions of it, it can also enhance or protect it (e.g., cryptography, firewalls, etc.).

63. *Id.* at 195.

64. *Id.* at 195–96.

cal essence has been debated, the concept has consistently been a function of physical space, location, and spatial concepts.⁶⁵ As this Article sets forth below, both tort and constitutional privacy law have traditionally relied on physical space as a fixed reference of human expectations. In part, this may be because physical space offers tangible boundaries that serve to delineate socially acknowledged private spaces, such as a toilet stall⁶⁶ or a marital bedroom.⁶⁷ The hidden or visible quality of physical space allows demarcation of the private from the public. This conventional view of privacy is inapplicable and misplaced in cyberspace, where there are no physical spaces or clear boundaries delineating behavior and propriety.

Within cyberspace, OSNs provide a particularly interesting environment in which to consider the public disclosure tort. This is partly because OSNs are self-contained universes, free from traditional notions of physical space. To date, their success has hinged on their capacity to encourage identity-building, community, and intimacy.⁶⁸ Adolescents and young adults appear drawn to OSNs to “hang out,” communicate, chat, network, recreate themselves, and meet new friends — all in a non-physical environment.⁶⁹ How can a territorial notion of privacy translate into cyberspace?

Despite the incongruity of OSNs with physical spaces, we should not shy away from the privacy challenges they pose. OSNs dramatically expose the flaws of the Restatement’s approach and the privacy linchpins upon which courts have relied. Moreover, OSNs present us with the opportunity to analyze, learn from, and enhance the public disclosure tort in a spaceless world. This Article’s factor-based approach applies the public disclosure tort to a spaceless world, which will allow for the logical evolution of the tort.

III. MYSPACE AS AN EXPERIMENT IN PUBLIC DISCLOSURE

The OSN phenomenon is the perfect forum in which to test the viability of the public disclosure tort. After all, OSNs and legal protection of privacy stand for the same fundamental principles of intimacy, community, and identity-building through selective disclosure.

65. Solove, *supra* note 21, at 1131 (noting that “it is difficult to talk about privacy without invoking some notion of space,” but concluding that spatial imagery significantly limits the privacy analysis).

66. *State v. Berber*, 740 P.2d 863, 867 (Wash. Ct. App. 1987) (holding that a toilet stall is “properly characterized as ‘private’”).

67. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (establishing that “marital bedrooms” are “sacred precincts” into which intrusion would be plainly offensive).

68. Danah Boyd, *Identity Production in a Networked Culture: Why Youth Heart MySpace* (Feb. 17, 2006), transcript available at <http://www.danah.org/papers/AAAS2006.html>.

69. LARRY MAGID & ANNE COLLIER, *MYSPACE UNRAVELED* 3 (2007).

The following Section examines OSNs' history, mechanics, culture, and privacy challenges, with the ultimate purpose of asking whether the Restatement's conception of the public disclosure tort adequately handles this show-and-tell social world.

A. The History and Mechanics of OSNs

In the past five years, OSNs have exploded in popularity.⁷⁰ Although the term "social networking" can describe many frameworks, the term usually refers to websites whose main purpose is to act as a connector between users.⁷¹ The primary species of this cyber-genus is websites that facilitate communication via user-generated Web profiles that can include personal information, music, pictures, links, video clips, real-time transcripts of conversations, and often-colorful self-musings.⁷² These 24/7 virtual hangouts include extremely popular websites like MySpace, Facebook, and Friendster.⁷³ MySpace, the OSN industry leader, is one of the most visited websites in the United States.⁷⁴ Launched in 2003, it boasts over 100 million accounts worldwide and is reportedly growing at a rate of 230,000 accounts per day.⁷⁵ This growth is fueled primarily by users in their teens and twenties.⁷⁶ A recent poll by the Pew Internet Project found that 55% of youths ages 12 to 17 who use the Internet have profiles on OSNs.⁷⁷

For OSN participants, a web page or online profile constitutes their identity in cyberspace. Anyone with a valid e-mail address can create a profile. The profile usually includes the user's name, country, zip code, gender, and date of birth.⁷⁸ Profiles also commonly include a list of friends (with their respective default photos), a list of groups to

70. See, e.g., *id.* at 9.

71. *Id.* at 2 (noting that "[t]rying to define social networking is very much like trying to pin down a moving target").

72. Other species in the OSN genus are social websites that cater primarily to dating and personality tests (eHarmony, Tickle), party planning (Evite, Gather), classifieds (Craigslis), blogs (Livejournal, Xanga, Quare), and video-sharing (YouTube).

73. Friendster, <http://www.friendster.com> (last visited Dec. 1, 2007).

74. See, e.g., *Jane Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007).

75. Patricia Sellers, *MySpace Cowboys*, FORTUNE, Sept. 4, 2006, at 66, available at http://money.cnn.com/magazines/fortune/fortune_archive/2006/09/4/8384727/index.htm (providing data current as of August 2006).

76. See Press Release, ComScore, More than Half of MySpace Visitors Are Now Age 35 or Older, as the Site's Demographic Composition Continues to Shift (Oct. 5, 2006), <http://www.comscore.com/press/release.asp?press=1019> (finding that approximately 10% of participants on MySpace are over the age of 55, and close to 50% are under 35).

77. AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS, PRIVACY & ONLINE SOCIAL NETWORKS, at ii (2007), available at http://www.pewinternet.org/pdfs/PIP_Teens_Privacy_SNS_Report_Final.pdf.

78. See MAGID & COLLIER, *supra* note 69, at 28 (describing what users are asked for when creating a MySpace account).

which the owner belongs,⁷⁹ blogs, bulletins, interests, personal photos, favorite artwork, music, or video clips.⁸⁰ The profile format also invites the disclosure of specific personal details, like marital status, physical appearance, income, and sexual orientation.⁸¹ As part of their profile registration, members often upload a photograph, usually of themselves, which becomes their profile's default image and is displayed on the profile's main page, as well as next to any blog entry or comment posted.⁸² This picture may also appear on their friends' profiles as a display of their friendship.⁸³ Some MySpace users also post their telephone numbers, physical addresses, and last names, despite the explicit prohibition of these details by MySpace's Terms & Conditions.⁸⁴ Although similarly prohibited, provocative photos and racy language are often present, adding to the web page's color and distinctiveness. In this environment, OSN members craft highly detailed digital identities that are displayed for all expected, as well as some unexpected, audiences.

After creating a profile, users can choose their intended audience. If a user enables the privacy setting, only his friends have access to the information. If a profile is public, the site's default option, the user's first name, picture, and profile information will accompany all of the user's posts within the website. Any information posted on a profile is searchable by anyone — regardless of MySpace membership.⁸⁵ If the profile is public, anyone on the Internet can see the re-

79. An online group is much like any other social, political, or religious group, except for the fact that its members never have to physically meet to communicate. MySpace groups are created by users who use them to meet other MySpace users that share their interests or characteristics. Current MySpace groups include, "President Bush is an Asshole," "dollars-for-darfur," "Entrepreneurs," "BoysMakeOut," "The Christian Teens of MySpace," and "Save a Chinchilla."

80. See MySpace User Profiles, <http://browseusers.myspace.com/browse/browse.aspx> (last visited Dec. 1, 2007); see also MAGID & COLLIER, *supra* note 69, at 37.

81. Each MySpace user's profile contains two standard sections: "About Me" and "Who I'd Like To Meet." MySpace, <http://www.myspace.com> (last visited Dec. 1, 2007).

82. See MySpace User Profiles, <http://browseusers.myspace.com/browse/browse.aspx> (last visited Dec. 1, 2007); see also MAGID & COLLIER, *supra* note 69, at 79–80.

83. The user affirmatively chooses friends to which his profile is linked. See MAGID & COLLIER, *supra* note 69, at 76.

84. MySpace, Terms & Conditions, <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx> (last visited Dec. 1, 2007) ("MySpace.com reserves the right, in its sole discretion, to reject, refuse to post or remove any posting (including private messages) by you, or to restrict, suspend, or terminate your access to all or any part of the MySpace Services at any time, for any or no reason, with or without prior notice, and without liability."). A casual perusal of the website reveals that there is little to no apparent enforcement of these terms.

85. To facilitate searching for and finding friends and acquaintances already on MySpace, MySpace allows users to search for other members using first and last name, e-mail address, and schools or companies where users may have attended or worked. Users' full names are never directly revealed to other members.

sults of the search but if the profile is private, such information will only be available to the user's friends.

Members rely on OSNs to communicate with friends and meet new people.⁸⁶ OSNs allow members to leave messages for others in internal mailboxes.⁸⁷ Some OSNs also have instant messaging systems, which allow members to chat with each other. OSNs are usually designed to mirror the nonverbal nuances of human interaction. Friends can "wink," "poke," or even give "e-kudos" to friends.⁸⁸ Presumably, these technological features aim to simulate intimacy in cyberspace.

B. The MySpace Generation

MySpace, along with the roughly 200 other OSNs,⁸⁹ has revolutionized the way people of an entire generation self-identify, socialize, and communicate online and offline. Unlike earlier online communities where anonymous members came together to discuss topics of common interest,⁹⁰ today's OSN users create multimedia showcases of themselves to interact with others. What results is a digital combination of a billboard and a scrapbook; a résumé and a diary; a tabloid magazine and a family photo album; and a reality television show and a family video all rolled into one. As one commentator has described it:

If you can imagine having a club, a social club, where everybody walked around with a big sandwich board on the front of them saying everything about themselves, if you take that concept and take it to the Internet, something that's happening electronically across the world, not just in one little building, that's kind of what social networking does right now on the Internet.⁹¹

86. See generally Boyd, *supra* note 68.

87. MAGID & COLLIER, *supra* note 69, at 71.

88. See Boyd, *supra* note 68; MAGID & COLLIER, *supra* note 69, at 3.

89. Other OSNs include Tribe Networks, Flickr, MyYearbook, Windows Live Spaces, Orkut, LinkedIn, Yahoo! 360°, Piczo, Bebo, Lavalife, and Spark Networks. In addition to these English-language websites, there are OSNs in other languages. For example, skyblog.com (French), vostu.com, and migente.com (Spanish) have gained popularity. See Madeline Marr, 'Online Party' Helps Latins Stay Connected, MIAMI HERALD, Apr. 9, 2007, at A1.

90. See Robert Plant, *Online Communities*, 26 TECH. IN SOC'Y 51, 53–54 (2004).

91. The News Hour with Jim Lehrer: Youth, Advertisers Flock to Networking Websites (Sept. 27, 2006) (transcript of PBS television broadcast), available at http://www.pbs.org/newshour/bb/media/july-dec06/facebook_09-27.html (quoting Kevin Maney, USA Today).

Much has been written about the narcissism endemic to the MySpace Generation.⁹² In this view, the collective goal of this generation has been to acquire public attention through broad exposure — OSNs have quickly evolved into the stage, facilitating users' self-tribute. The result has been called the "democratization of fame."⁹³ A casual glimpse of the names of OSN websites, such as MySpace or YouTube, reveals the inherent self-centeredness of this phenomenon. YouTube's motto, after all, is "Broadcast Yourself."⁹⁴

In that vein, it is not uncommon for OSN members to blog "every sordid detail of [their] personal lives so as to . . . add 200 new 'friends' a day to [their] MySpace page."⁹⁵ It is also common for users to post announcements on their profiles regarding their whereabouts during the day ("I'm going to English class now"), their state of mind ("I'm in a bad mood today"), and their opinions ("I can't stand Republicans"). The nature and ubiquity of these posts have blurred the line between trivial and consequential and between private and public.

Drawing on work by Professor John Palfrey, this Article classifies users as either "digital natives," those who grew up with the Internet, or "digital immigrants," those of the older generation that has practically (but not always philosophically) emigrated to it.⁹⁶ While digital immigrants may view the Internet as a tool for mass dissemination, digital natives use the Internet as a tool for communication that is essential to the development of strong community, interpersonal relationships, and identity.⁹⁷ The self-importance of the young, careless, and wired combined with the searchability and permanence of digital information has led some digital immigrants to predict digital natives' self-destruction via digital dossier.⁹⁸ Meanwhile, the younger generation expresses shock and a sense of intrusion when unintended audiences (e.g., digital immigrant parents and employers) have accessed their online personae.⁹⁹ Labeled the greatest generation gap since the

92. See, e.g., Jean M. Twenge, *GENERATION ME: WHY TODAY'S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED — AND MORE MISERABLE THAN EVER BEFORE* (2006).

93. Lakshmi Chaudhry, *Mirror, Mirror on the Web*, THE NATION, Jan. 29, 2007, at 19, <http://www.thenation.com/doc/20070129/chaudry>.

94. YouTube, <http://www.youtube.com> (last visited Dec. 1, 2007).

95. Chaudry, *supra* note 93, at 19.

96. Palfrey, *supra* note 22, at 5. This grouping inevitably results in generalizations, as there are certainly cyber-savvy octogenarians as well as teenagers who have never been online. However, for the purposes of this Article, Professor Palfrey's generation-based distinction helps to designate those in each camp.

97. See Boyd, *supra* note 68; see also Nussbaum, *supra* note 7, at 24, 102.

98. Boyd, *supra* note 68; Palfrey, *supra* note 22.

99. See, e.g., Michelle Slatalla, *Cyberfamilies: 'OMG My Mom Joined Facebook!!'*, N.Y. TIMES, June 7, 2007, at G1, available at <http://www.nytimes.com/2007/06/07/fashion/07Cyber.html> (noting that children are often aghast at the thought of a parent joining OSNs); Dan Gibbard, *Social Sites Can Aid Parents: Kids May Vent Issues Online*, CHI.

early days of rock and roll,¹⁰⁰ some commentators have suggested that the cut-off age for digital natives is about thirty.¹⁰¹ The average age of U.S. federal judges at appointment is around fifty,¹⁰² and the average age of justices on the U.S. Supreme Court is sixty-seven.¹⁰³ Unsurprisingly, the gap between expectations of privacy between digital natives and the law often mirrors this corresponding gap in ages.

IV. PRIVACY TORTS' SPATIAL LINCHPINS

To their detriment, privacy torts have traditionally relied on the core philosophical concepts of space, subject matter, secrecy, and seclusion. These concepts have been the proxies for the elusive legal definition of privacy. Under the current privacy doctrine, anything occurring in a space designated as “private” is protected.¹⁰⁴ The current privacy doctrine also protects certain subject matter that is normatively recognized as private, like sexual details and intimate communications. Unfortunately, this system does not deal well with contextual nuances. If someone voluntarily secludes himself, all of his actions while in isolation will likely be protected. Short of seclusion, however, the contours of privacy for the rest of us are unclear. The following Section maps this muddled doctrine, showing how its application has diluted the protections offered by the public disclosure tort. This Section then analyzes how the current doctrine applies in cyberspace, specifically on OSNs.

A. Physical Space

According to scholars, privacy is a function of location.¹⁰⁵ According to this theory, location in space determines how people should

TRIB., Mar. 14, 2007 (quoting a MySpace member’s reaction upon learning her parents accessed her profile: “It’s not like it’s something that I don’t want them to see, it’s like . . . it’s like, it’s my space . . . It’s just private.”).

100. See Nussbaum, *supra* note 7, at 24, 102.

101. See *id.*

102. See Karen Swenson, *Promotion of District Court Judges to the U.S. Courts of Appeals*, 27 JUST. SYS. J. 208 (2006) (citing S. GOLDMAN, PICKING FEDERAL COURT JUDGES (1997)).

103. Biographies of Current Members of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Dec. 1, 2007).

104. This sentiment has seeped into society’s collective consciousness, with such advertising slogans as “What happens in Vegas, stays in Vegas.” Unfortunately for its disciples, this philosophy does not necessarily translate into privacy law.

105. See, e.g., Beate Rössler, *Privacies: An Overview*, in PRIVACIES: PHILOSOPHICAL EVALUATIONS 6 (Beate Rössler ed., 2004) (describing privacy using an “onion” model: the most intimate domain is the body, which is located at the onion’s core, the most public arena of the state is the onion’s outer skin, and the layers in between symbolize different

behave and react to certain gestures, subject matter, and information. Thus, actions within a bedroom are more private than the same actions would be in the town square.

In deciding privacy tort claims, courts are charged with determining whether there was a reasonable expectation of privacy in the space in question.¹⁰⁶ This retrospective inquiry considers the physical location of the disclosure of information in order to assess the reasonableness of a privacy claim. The tort of intrusion upon seclusion, for example, typically applies to Peeping Tom-type invasions into private spaces.¹⁰⁷ Under the Restatement, an individual cannot have a reasonable expectation of privacy in any public place.¹⁰⁸ More formally, any activity that is visible to the public eye — whether that eye is human or mechanical — is not actionable under the public disclosure tort. For example, courts have found that there is no reasonable expectation of privacy in a restaurant,¹⁰⁹ in a church service,¹¹⁰ or at a county fair.¹¹¹ Activities within certain public places, however, are considered private and protected.¹¹²

degrees of privacy); *see also* HALL, *supra* note 11, at 100–01 (describing anthropological models).

106. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977).

107. *See, e.g.*, *Dietmann v. Time, Inc.*, 284 F. Supp. 925 (C.D. Cal. 1968) (intrusion into a home); *Newcomb Hotel Co. v. Corbett*, 108 S.E. 309 (Ga. Ct. App. 1921) (intrusion into a hotel); *Sabrina W. v. Willman*, 540 N.W.2d 364 (Neb. Ct. App. 1995) (intrusion into a tanning booth); *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W. Va. 1959) (intrusion into a shopping bag). The tort also applies to instances in which the private space intruded upon is physical but not territorial, like a bank account or a published photograph. *See, e.g.*, *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504, 511–12 (Cal. Ct. App. 2001) (finding that Little League players and coaches had a reasonable expectation of privacy in their team photo, after *Sports Illustrated* published the photo in a story about the team manager’s molestation of several team members).

108. *See* RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (“Thus, the plaintiff cannot normally complain when his or her photograph is taken while he or she is walking down the public street and is published in the defendant’s newspaper. Nor is the plaintiff’s privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public.”).

109. *See, e.g.*, *Wilkins v. NBC*, 84 Cal. Rptr. 2d 329 (Cal. Ct. App. 1999) (holding that because plaintiff agreed to attend a meeting at a public restaurant, no invasion of privacy occurred when the plaintiff was secretly audio and video taped).

110. *See, e.g.*, *Creel v. I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276 (Ind. Ct. App. 2002).

111. *See, e.g.*, *Daily Times Democrat v. Graham*, 162 So. 2d 474, 476 (Ala. 1964) (noting that there was no expectation of privacy at a fair but permitting a tort suit by a woman who was photographed at a county fair with her skirt blown up over her head, relying in part on the fact that the photographer was lying in wait to catch the woman in an embarrassing situation). This oft-cited case is curiously analogous to the recent phenomenon of up-skirt voyeurism using camera phones. *See generally* Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZO ARTS & ENT. L.J. 469 (2000) (examining the phenomenon of video voyeurism and attempts to control it).

112. *See Johnson v. Allen*, 613 S.E.2d 657 (Ga. Ct. App. 2005) (holding that surveillance in a public restroom constituted an invasion of privacy). *But see* *Daly v. Viacom, Inc.*, 238

An individual's reasonable expectations have traditionally been reliable indicators of privacy entitlement in instances when social norms are well-accepted and the space in question is defined. OSNs pose an interesting challenge to privacy torts because they operate in a world of rapidly evolving notions of privacy and spacelessness. In this regard, they are the latest in a string of developments — following binoculars, telephones, infrared scopes, and parabolic microphones, — that have challenged our socially constructed conceptions of space and privacy. Unlike previous technological developments, some of which are mere mechanisms for breaching privacy, OSNs are also the space within which the private acts occur. An accurate contextual understanding of OSNs is necessary to determine whether expectations of privacy are reasonable. Two challenges prevent us from developing this understanding.

The first challenge is creating a legal definition of online space. Should the law treat MySpace — as its name implies — like a social space akin to a community gathering or rather as merely a vehicle for communication, akin to telephone or e-mail? At this point, it is unclear how courts will resolve this question,¹¹³ but determining the appropriate legal definition of cyberspace has been the subject of robust academic discourse. Some legal theorists argue that a conception of cyberspace based in analogy to physical space is appropriate,¹¹⁴ while others reject all legal constructs bound in traditional physicality.¹¹⁵

F. Supp. 2d 1118 (N.D. Cal. 2002) (finding no expectation of privacy with respect to kissing in a bathroom stall when the couple also kissed on a street corner).

113. While several cases have struggled with the concept of location in cyberspace, there is no definitive judicial construction of space and place in cyberspace. *See, e.g.*, *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232, 1236 (11th Cir. 2001) (concluding that the operation of an adult entertainment website did not constitute an impermissible public offering of adult entertainment for the purposes of a city's zoning code); *Layshock v. Hermitage Sch. Dist.*, F. Supp. 2d 587, 595–604 (W.D. Pa. 2007) (discussing whether punishing a student for his activities on MySpace on his home computer during non-school hours constituted a violation of his First Amendment rights).

114. *See, e.g.*, LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 219 (1996) (applying physical property analogies to intellectual property in cyberspace); Lawrence Lessig, *The Architecture of Privacy*, 1 VAND. J. ENT. L. & PRAC. 56, 59–60 (1999) (treating cyberspace as an extension of physical space).

115. *See, e.g.*, Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 475 (2003) (arguing that analogizing cyberspace to physical space may lead to fencing off and privatization); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 523 (2003) (arguing that using physical space as a metaphor for cyberspace is incorrect); Post & Johnson, *supra* note 25, at 1057 (arguing that a physical space metaphor for cyberspace is inappropriate given cyberspace's indeterminate nature); David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (arguing that cyberspace's lack of borders renders a physical space metaphor inappropriate); David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 158 (1996) (arguing that physical borders cannot be made operative in cyberspace).

The second challenge faced by OSNs in the tort context is whether they should be characterized as public or private. Unlike physical space, where public places are easily defined, the architecture of cyberspace has no territory, physical boundaries, or public common areas to facilitate the analogy. As such, the architecture blurs the line between public and private. At first glance, most would instinctively say the Internet is public because it is accessible by millions. By its own architecture, however, cyberspace lacks a public sphere, as it is composed of “a mosaic of private allotments,”¹¹⁶ or websites.

To overcome these spatial challenges, courts must extract the concept of physical space from the application of privacy torts online. Otherwise, courts will lack a precise definition of online space and a reliable indicator of privacy expectations — possibly debilitating both the public disclosure tort and the ability of OSNs to foster intimacy and community. As the problems with OSNs and the traditional paradigm suggest, we must realign the analysis of the public disclosure tort along a non-spatial axis.

B. Subject Matter

In judging privacy claims, courts often rely on the subject matter of the information disclosed to gauge their worthiness of protection.¹¹⁷ Courts look at subject matter to determine whether the information is characterized as private or public and whether a reasonable person has a right to be highly offended. These factors are two elements of the Restatement’s construction of the public disclosure tort.¹¹⁸ Although privacy tort jurisprudence offers little indication as to what information is inherently private,¹¹⁹ the Restatement offers some guidance as to what is properly labeled as such:

116. Daniel Benoliel, *Law, Geography, and Cyberspace: The Case of On-line Territorial Privacy*, 23 *CARDOZO ARTS & ENT. L.J.* 125, 126 (2005).

117. Unlike the other spatial linchpins, subject matter is not directly related to an experience of physical space. Instead, it is related to a sphere of individual action or emotional sanctum. Even the Supreme Court, when formulating the concept of privacy in relation to governmental intrusion, has referred to a “zone of privacy,” as if it could be delineated in physical terms. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 487 (1975) (“[P]owerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press . . .”).

118. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b, c (1977).

119. In contrast, in the area of substantive due process, the Supreme Court has specifically recognized “marriage” and “the decision [of] whether to bear and beget a child” as fundamental rights, entitled to privacy protection. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *see also Griswold*, 381 U.S. at 485–86 (discussing the notion of privacy surrounding the “marriage relationship”).

Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.¹²⁰

Years after the Restatement's commentary, case law seems wed to this list. In *Goerdts v. Tribune Entertainment Co.*,¹²¹ the Seventh Circuit concluded that disclosure of the plaintiff's police record on national television was not offensive to a reasonable person.¹²² The court reasoned that such public disclosure was "not a bringing to light of shameful private facts involving nudity, sex, or serious, but hidden physical or psychiatric problems." Therefore, the court reasoned it was not the sort of disclosure that would be "'highly offensive' to the average person."¹²³ The conclusion that the Restatement's static list is exhaustive and courts' refusal to entertain other shameful matters not listed has significantly limited the public disclosure tort's application.

Even those courts that look beyond the Restatement's list encounter difficulty determining whether information is private. Lacking a consistent and contextual framework for analyzing privacy, judges are forced to make an unorganized and highly normative qualitative leap to determine whether such things as a mastectomy,¹²⁴ plastic surgery,¹²⁵ a person's romantic life,¹²⁶ and sexual orientation¹²⁷ are private and highly offensive if disclosed. These questions are virtually impossible to definitively resolve in a single decision, as they are highly dependent on historical moment, class, culture, education, and other moving sociological targets.

Indeed, no subject has always been invariably private or universally offensive. One could conjure a mental list of subjects that are customarily identified as "private": death, bodily functions, sex, and nudity, for example. Yet none of these matters are absolutely private. For example, images of death and dying are generally deemed to be

120. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977).

121. 106 F.3d 215 (7th Cir. 1997).

122. *Id.* at 220.

123. *Id.*

124. See *Miller v. Motorola, Inc.*, 560 N.E.2d 900 (Ill. App. Ct. 1990).

125. See *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 590 (D.C. 1985).

126. See *Benz v. Wash. Newspaper Publ'g Co.*, No. 05-1760, 2006 U.S. Dist. LEXIS 71827, at *25 (D.D.C. Sept. 29, 2006) ("The Court is persuaded that it is unlikely that an unmarried, professional woman in her 30s would want her private life about whom she had dated and had sexual relations revealed in the gossip column of a widely distributed newspaper . . .").

127. See *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (1984) (holding that disclosure of plaintiff's sexual orientation was not offensive).

private in the United States, as evidenced by the 2001 legal battle over NASCAR legend Dale Earnhardt's autopsy pictures,¹²⁸ which culminated in legislation exempting autopsy photographs from the Florida Open Public Records Law.¹²⁹ In contrast, it is common to pay homage to Chairman Mao Zedong's embalmed corpse when visiting China; it is on display for several hours a day in Tiananmen Square and welcomes thousands of tourists a year.¹³⁰ Bodily functions, often a source of shame and disgust today, were celebrated and formally sanctioned in ancient Roman times.¹³¹ As Anita Allen has noted, the "law and social practices in the United States reflect norms of concealment for the human body that transcend European standards."¹³² As recently as 2004, Professor Allen observed that "[i]n Berlin, adult men sunbathe naked in the Tiergarten on summer Sunday afternoons. Similar behavior shocks Americans, who would expect police to promptly arrest naked men in New York City's Central Park."¹³³ These examples demonstrate the highly contextual nature of privacy; thus, courts cannot define privacy through isolated decisions or by a static list of objectively "private matters," but must analyze it in relation to the applicable social norms and historical moment.

The advent of OSNs and their "look-at-me" culture is the public disclosure tort's latest challenge. OSNs beg the question of whether physical space norms that signal shame apply equally to the online space. Subject matter that the Restatement declared "normally entirely private" is no longer necessarily the source of either tangible or dignitary harm on OSNs. As one commentator observed, the prized public attention sought by many digital natives "doesn't have to be positive," as demonstrated by the case of a man who bit the head off a mouse for a YouTube video and another who "farted to the tune of 'Jingle Bells'"¹³⁴ to gain net notoriety. Consider also the many cases involv-

128. *Campus Commc'ns, Inc. v. Teresa Earnhardt*, 821 So. 2d 388 (Fla. Dist. Ct. App. 2002).

129. See FLA. STAT. ANN. § 406.135(4)(a) (West 2003) ("The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate.").

130. See *The Mao Zedong Mausoleum*, <http://www.beijingmadeeasy.com/beijing-attractions/the-mao-zedong-mausoleum> (last visited Dec. 1, 2007).

131. See C. Suetonius Tranquillus, *The Lives of the Twelve Caesars: The Life of Claudius* 64–65 (1914). According to Suetonius, the Roman emperor Claudius formalized flatulence and induced vomiting after a large meal as legal rights under Roman law. "He is even said to have thought of an edict allowing the privilege of breaking wind quietly or noisily at table, having learned of a man who ran some risk by restraining himself through modesty." *Id.*

132. Anita L. Allen, *Privacy in American Law*, in *PRIVACIES: PHILOSOPHICAL EVALUATIONS*, *supra* note 105, at 28.

133. *Id.*

134. *Id.*

ing sex tapes on the Internet. Although humiliating and shameful to many, the Internet disclosure of homemade sex videos has increased the fame of several celebrities. As the *New York Times* put it, “gone are the days when a sex tape — which might seem the most embarrassing of disclosures — automatically destroys a celebrity’s career.”¹³⁵ As such, in the culture of cyberspace, no matter how private a topic is traditionally considered, there may be no such thing as unequivocally private subject matter. This seeming evolution in privacy norms evidences the difficulty of the Restatement’s reliance on classifying certain subjects as per se private. While the public disclosure of these personal topics might have carried a presumption of harm at the moment in which the Restatement was written, the OSN context reveals that this is no longer the case. For this reason, it is necessary to divorce the privacy analysis from its dependence on subject matter.

C. Secrecy

Secrecy has long been a tenet of privacy and privacy tort law. Professor Daniel Solove has argued that privacy law is over-reliant on secrecy, a condition he terms the “secrecy paradigm.”¹³⁶ The paradigm, as Professor Solove observes, is that “privacy is tantamount to complete secrecy, and a privacy violation occurs when concealed data is revealed to others. If the information is not previously hidden, then no privacy interest is implicated by the collection or dissemination of the information.”¹³⁷ As some commentators have noted, interpreting privacy as dependent on complete secrecy is “too narrow”¹³⁸ and “much too cramped for a society of social beings.”¹³⁹ After all, should only hermits and recluses be entitled to privacy? Nevertheless, the secrecy paradigm has informed the development of privacy tort law. Significantly, the secrecy requirement raises the question: at what point does the disclosure of information to *someone, somewhere*, mean that it can be gathered and disclosed to *everyone, everywhere*? This Section will discuss what is required for information to be completely secret and the paradigm’s application in related torts.

Courts routinely reason that once a person communicates a fact or story about herself to anyone — including a friend, intimate circle, or

135. Lola Ogunnaiké, *Sex, Lawsuits, and Celebrities Caught on Tape*, N.Y. TIMES, Mar. 19, 2006, § 9, at 1, available at <http://www.nytimes.com/2006/03/19/fashion/sundaystyles/19tapes.html>.

136. Solove, *supra* note 15, at 497.

137. *Id.*

138. Solove, *supra* note 21, at 1109.

139. Stahilevitz, *supra* note 15, at 923 (referring to the Supreme Court’s discussion of privacy in U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763–64, 770 (1989)).

other intended audience — that information is no longer protectable as a matter of law. The reasoning in *Wilson v. Harvey*,¹⁴⁰ exemplifies the secrecy paradigm. In *Wilson*, a humiliated university student sued three fellow students for posting a flyer around Case Western Reserve University that included his picture, e-mail address, and phone number and falsely depicted him as a gay man seeking a partner. The court concluded that the fact that his contact information and picture were accessible to all students and faculty via the university's website — and, therefore, were not concealed or veiled in complete secrecy — was fatal to his privacy claim.¹⁴¹

A New York court in *Nader v. General Motors Corp.*,¹⁴² one of the most frequently cited privacy tort cases, also concluded that information must be completely secret to sustain a claim. The suit arose out of General Motors' alleged efforts to discredit and embarrass the plaintiff, a well-known consumers' rights activist, in retaliation for his outspoken criticism of GM's safety record.¹⁴³ To uncover potentially harmful information about the plaintiff, GM's agents allegedly interviewed his acquaintances about his racial and religious views, his sexual proclivities, his personal habits, and his political beliefs.¹⁴⁴ The plaintiff then sued GM for invasion of privacy.¹⁴⁵ The court refused to grant Nader relief because the information, although obtained in a deceptive manner by GM and *private*, was not completely *secret*; Nader had presumably disclosed the information.¹⁴⁶ The court reasoned that:

Although those inquiries may have uncovered information of a personal nature, it is difficult to see how they may be said to have invaded the plaintiff's privacy. Information about the plaintiff which was already known to others could hardly be regarded as private to the plaintiff. Presumably, the plaintiff had previously revealed the information to such other persons, and he would necessarily assume the risk

140. 842 N.E.2d 83 (Ohio Ct. App. 2005).

141. *Id.* at 91.

142. 255 N.E.2d 765 (N.Y. 1970); *see also* *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) (holding that further publicizing the plaintiff's sexuality was not actionable when plaintiff did not conceal sexuality).

143. *See Nader*, 255 N.E.2d at 767 (summarizing allegations contained in the complaint).

144. *Id.*

145. *Id.*

146. *Id.* at 770.

that a friend or acquaintance in whom he had confided might breach the confidence.¹⁴⁷

In cyberspace, the complete secrecy requirement of privacy torts is difficult, if not impossible, to satisfy. Total secrecy is difficult offline; this difficulty is magnified online. No information placed on OSNs is completely secret, even if a profile is set to private. For example, consider the situation where a person reveals a fact on her profile, which is accessible to her entire network of friends. If courts apply the secrecy rationale used in physical space, this information would not be protected. Secrecy is destroyed even if a person reveals the fact via an OSN's private messaging function because it is not the medium of the revelation, but the revelation itself that is dispositive. Any information posted on OSNs — even if never actually transmitted to another — is not completely secret. This is because anything posted on OSNs is accessible to a third party — the OSNs themselves.¹⁴⁸

D. Solitude and Seclusion

Privacy has been famously described as the right “to be let alone.”¹⁴⁹ Philosophers and legal theorists have frequently defined privacy in terms consistent with this phrase.¹⁵⁰ Accordingly, solitude and seclusion, both qualities associated with being alone, play prominent roles in the assessment of privacy. In public disclosure cases, courts seem willing to reward only those who have successfully secluded themselves.

The law's requirement of total seclusion is evident in the wealth of public disclosure cases in which courts deny privacy protection in public places or places visible from public locales.¹⁵¹ One case illus-

147. *Id.*

148. OSNs' privacy policies explicitly note this. *See, e.g.*, MySpace — Privacy Policy, <http://www.myspace.com/index.cfm?fuseaction=misc.privacy> (last visited Dec. 1, 2007).

149. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888); *see also* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 429 (enlarged ed. 1968) (defining “the need for privacy” as the “insulation of actions and thoughts from surveillance by others”); WESTIN, *supra* note 20, at 31 (identifying solitude as one of four “basic states of individual privacy”); Gavison, *supra* note 20, at 428 (describing privacy as solitude, secrecy, and anonymity).

150. *See, e.g.*, WESTIN, *supra* note 20, at 31 (explaining that privacy is “freed[om] from the observation of other persons”); *see also* JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 41–42 (1992) (“Someone experiences privacy only to the degree she is left alone or separated from the senses of others.”).

151. *See, e.g.*, *Reeves v. Fox Television Network*, 983 F. Supp. 703, 709 (N.D. Ohio 1997) (holding that a man filmed while being escorted by the police to a squad car had no expectation of privacy in such footage since the scene was visible from the street); *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 444–45 (Cal. 1953) (holding that a couple photographed at

trating the requirement of total seclusion is that of a Colombian judge who moved to Detroit after the indictment of drug lord Pablo Escobar in her court put her at risk in her home country.¹⁵² After *The Detroit News* disclosed her identity, she sued for invasion of privacy by public disclosure.¹⁵³ The court denied remuneration, however, on the basis that her actions while in the United States rendered her identity “open to the public eye.”¹⁵⁴ Because she had dined at restaurants and shopped in local stores using her real name, the court held that the information disclosed was not private.¹⁵⁵

Whether an expectation of privacy is reasonable may depend on the extent to which a plaintiff is secluded from the public. The Iowa Supreme Court found that a plaintiff sufficiently stated a claim for invasion of privacy that arose out of her being filmed while dining in a restaurant.¹⁵⁶ The district court dismissed the plaintiff’s claim because “[s]he was in a business building open to the public. Anyone and everyone was free to walk in and see her eating there.”¹⁵⁷ On appeal, the Iowa Supreme Court reversed. In evaluating the plaintiff’s expectation of privacy, the Court did not rely on the public nature of the locale but, instead, on her degree of seclusion.¹⁵⁸ The Court reasoned that “it is not inconceivable that [the plaintiff] was seated in the sort of private dining room offered by many restaurants. To film a person in a private dining room might conceivably be highly intrusive.”¹⁵⁹ As this example suggests, some courts have gone beyond the question of whether a locale is public or private. Instead some courts have focused on the degree of the plaintiff’s seclusion or visibility when evaluating privacy protection.¹⁶⁰

a farmer’s market has no cause of action against the photograph’s publisher); *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901, 905 (Tex. App. 1991) (holding that a high school athlete whose genitalia were shown in a soccer match photograph published in a newspaper had no privacy cause of action); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (referencing “the limited privacy interest of persons on the public streets”); *Cook v. WHDH-TV, Inc.*, No. 941269, 1999 WL 1327222, at *5 (Mass. Super. Ct. Mar. 4, 1999) (noting that “causes of action for intrusions on one’s right to privacy . . . are ordinarily foreclosed when the invasion occurs in a public place”); Lance E. Rothenberg, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U. L. REV. 1127, 1146–55 (2000).

152. *Duran v. Detroit News, Inc.*, 504 N.W.2d 715, 718 (Mich. Ct. App. 1993).

153. *Id.*

154. *Id.* at 718–20.

155. See *id.* at 718, 720.

156. *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685 (Iowa 1987).

157. *Id.* at 687.

158. See *id.*

159. See *id.*

160. See, e.g., *Huskey v. NBC*, 632 F. Supp. 1282, 1286–92 (N.D. Ill. 1986) (explaining that degree of visibility is relevant in determining whether activity is private); *Cox*

Even when an OSN member is alone at her computer, she is only alone in the spatial, physical sense. The fundamental purpose of OSNs is to provide community and a means of communication to OSNs' constituencies. Members of OSNs enjoy having online friends or networking contacts and often seek to acquire more. Collecting friends on OSNs can compensate for social insecurities. A typical OSN user may express the sentiment: "even if I'm not super-popular in my high school [sic], I have, you know, 1,000 people who want to talk to me, so I can't be that bad."¹⁶¹ If the seclusion requirement that courts currently apply to physical spaces is applied to cyberspace, any hope of privacy is rendered obsolete. Anyone wanting any guarantee of privacy would have to log off, pull down the shades,¹⁶² and communicate with no one.

V. THE NEW PRIVACY: A FACTOR-BASED APPROACH TO THE PUBLIC DISCLOSURE TORT

Academics have criticized privacy law's lack of a "conceptual focus" or "distinct moral interest."¹⁶³ What coherence privacy law arguably has relies on its spatial linchpins of space, subject matter, secrecy, and solitude. Analyzing OSNs amplifies the weaknesses of the public disclosure tort doctrine. In order to remedy these weaknesses, we must excise the spatial linchpins from the privacy inquiry.

To that end, courts must engage in a multi-factored and contextual analysis of the information disclosed, the disclosure itself, and the response of the harmed party. The categories, and the factors within them, that comprise this Article's framework are not new, but instead have been derived from the analysis of privacy law by courts and scholars.¹⁶⁴ In contrast to the current doctrine, the proposed analysis provides a clearer framework for determining whether a disclosure of

Comme'ns, Inc. v. Lowe, 328 S.E.2d 384, 385 (Ga. App. 1985) (explaining that activity in public view is not private).

161. *The NewsHour with Jim Lehrer: Youth, Advertisers Flock to Networking Websites* (Sept. 27, 2006) (transcript of PBS television broadcast), available at http://www.pbs.org/newshour/bb/media/july-dec06/facebook_09-27.html (quoting Jane Buckingham, President, the Intelligence Group).

162. Anything visible from a public place is also rendered public. *See Wehling v. CBS*, 721 F.2d 506, 509 (5th Cir. 1983) (dismissing an action for invasion of privacy arising from the showing of the plaintiffs' home on a telecast, since the broadcast presented the public with "nothing more than could have been seen from a public street").

163. INNESS, *supra* note 150, at 117.

164. In the words of one California court, the analysis considers "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Wilkins v. NBC*, 84 Cal. Rptr. 2d 329, 334 (Cal. Ct. App. 1999) (quoting *Miller v. NBC*, 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986)).

private facts should be legally protected. As with any privacy question, ultimate determinations will necessarily be fact-specific.

This new approach does not rely on the spatial linchpins of traditional privacy law doctrine. Replacing the spatial linchpins with these factors allows for a consistent application of privacy law to cyberspace, as well as physical space. Ideally, the public disclosure tort analysis should incorporate the following inquiry.

To determine whether a disclosure of information is legally protected, the following factors should be considered:

First, courts should define the information disclosed:

- (1) Is the information protected by the First Amendment?
- (2) What was the overall accessibility of the information when it was disclosed?

Second, courts should look at the disclosure itself:

- (1) Did the defendant have malicious intent or motive? (i.e., did she breach the plaintiff's privacy through wrongful or improper means?)
- (2) Was the plaintiff harmed?

Third, courts should examine the actions of the one harmed:

- (1) Did the victim expressly protect the information via technology, contract, or otherwise?
- (2) Was the information originally disclosed in the context of a confidential relationship?

The following subsections discuss each of the three categories and their respective factors. Each factor is illustrated by a hypothetical case set in the OSN context. While OSNs are the impetus for this factor-based approach, these considerations can be applied to other contexts to strengthen the public disclosure analysis.

A. The Information Disclosed

Any reasoned analysis of privacy harms must first examine the disclosed information's newsworthiness and social relevance to avoid unduly chilling speakers making true statements and thereby encroaching upon the First Amendment. Once it is established that there are no significant First Amendment concerns, the information must meet a second requirement: it must be private. As one court stated, "[w]ithout private facts, the other three elements of the [disclosure] tort need not be reached. Because the analysis begins with the predicate, private facts, it also ends there if no private facts are involved."¹⁶⁵

165. *Busse v. Motorola, Inc.*, 813 N.E.2d 1013, 1017 (Ill. App. Ct. 2004).

1. Is the Information Protected by the First Amendment?

The First Amendment generally prohibits the government from silencing expression of truthful information either by direct regulation or indirectly through the authorization of private lawsuits.¹⁶⁶ Courts have limited the scope of the public disclosure tort where it potentially conflicts with the First Amendment.¹⁶⁷ For this reason, an analysis of the First Amendment implications of granting privacy protection is essential. Unlike the other factors, which should be balanced against each other, a potential First Amendment conflict is the end of the road for a plaintiff's public disclosure claim. Three questions lend precision to this important analysis:

- (1) Is the subject matter of legitimate public concern, socially valuable, or newsworthy?
- (2) If so, is the scope of the disclosure properly defined so as to exclude information that is not of legitimate public concern, socially valuable, or newsworthy?
- (3) Does the medium by which the information was transmitted disclose additional details that are beyond the protection of the First Amendment?

First, courts should examine whether the information is of legitimate public concern, socially valuable, or newsworthy. Courts have awkwardly grappled with judgments on the legitimacy and value of information. OSNs, which have democratized fame and publishing, pose an unprecedented challenge to the First Amendment analysis. As noted columnist and author Thomas L. Friedman has observed,

When everyone has a blog, a MySpace page or Facebook entry, everyone is a publisher. When everyone has a cell phone with a camera in it, everyone is a paparazzo. When everyone can upload video on YouTube, everyone is filmmaker [sic]. When everyone is a publisher, paparazzo or filmmaker, everyone else is a public figure. We're all public figures now.¹⁶⁸

166. *Cf.* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (holding that the First Amendment applies to "allegedly libelous statements" made in "editorial advertisements" for which "the Times was paid").

167. *See, e.g.,* *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988) (declaring that the tort of invasion of privacy by publication of private facts would not be recognized in North Carolina because it threatened expression protected by the First Amendment).

168. Thomas Friedman, Op-Ed., *The World Is Watching*, N.Y. TIMES, June 27, 2007, at A23, available at <http://select.nytimes.com/2007/06/27/opinion/27friedman.html>.

If we truly are public figures now, does that mean anyone can talk about us or reveal our private facts online without our consent?

While an expansive reading of the First Amendment might yield an affirmative answer to this question, this Article posits that such response is not correct. Discerning the plaintiff's public or private status requires a closer study of his willingness to be in the limelight.

For example, celebrities Pamela Anderson and Bret Michaels brought a public disclosure claim in federal district court when a Dutch website posted a video depicting the two having sex.¹⁶⁹ The defendants argued that due to the plaintiffs' fame, the video was sufficiently newsworthy.¹⁷⁰ The court set forth the following definition of newsworthiness, relying in part on the Restatement:

Newsworthiness is defined broadly to include not only matters of public policy, but any matter of public concern, including the accomplishments, everyday lives, and romantic involvements of famous people. The privilege to report newsworthy information is not without limit.

Where the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake, it serves no legitimate public interest and is not deserving of protection.¹⁷¹

The court noted that the two defendants had voluntarily ascended to fame, that Anderson had willingly released other sex tapes to the public, and that her fame arose from roles based on sex, nudity, and sex appeal.¹⁷² Citing to the plaintiffs' fame, the court determined that the romantic involvement of the plaintiffs, the existence of the tape, and the ongoing legal disputes pertaining to it were newsworthy.¹⁷³ The court held, however, that the sex tape itself was not sufficiently newsworthy to be protected by the First Amendment.¹⁷⁴

Second, courts should define the subject matter protected by the First Amendment with precision. Since *Florida Star v. B.J.F.*, the proper breadth of newsworthiness and public significance has been highly contested. By casting the net too widely, plaintiffs may not be adequately protected from harmful disclosures that serve no legitimate

169. *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

170. *Id.* at 840.

171. *Id.* at 839–40.

172. *Id.* at 842.

173. *Id.*

174. *Id.*

public interest. By casting the net too narrowly, courts risk creating an undue chilling of true expression.

Case law illustrates the dangers of the pendulum swinging to the extremes. In a California case, for example, plaintiffs were involved in a near-fatal car accident.¹⁷⁵ A camera crew filmed the extraction of the plaintiffs from the car, their transport to the hospital in the helicopter, and the flight nurse's conversations with one of the injured plaintiffs.¹⁷⁶ This videotape and soundtrack were then broadcast on a documentary television show without the plaintiffs' consent.¹⁷⁷ Determining whether the filming and subsequent disclosure was an infringement on the plaintiffs' privacy rights, the California Supreme Court concluded that the broadcast was of legitimate public concern and that the plaintiffs' appearance in it bore a "logical relationship to the newsworthy subject of the broadcast."¹⁷⁸ The court thus allowed the nonconsensual dissemination of the plaintiffs' identities, details regarding their personal health information, and images of the injured plaintiffs under a broad definition of newsworthiness and public concern.

Was it necessary to divulge the conversation between the flight nurse and the injured plaintiff in order to inform the public of the dangers of traffic accidents? This Article argues that it was not. The fact of the accident and the ensuing emergency response, while legitimately protectable as newsworthy events of public concern, must be parsed from the personal minutia that lend neither credibility nor relevance to the broadcast.¹⁷⁹ On the other hand, is a person's criminal record, even if it was in the distant past, legitimately relevant to society? As Professor Volokh has elegantly argued, this information would certainly be relevant, as it would justifiably inform opinions about dealings with the felon.¹⁸⁰

Finally, courts must examine the form in which the information is disclosed to determine whether the particular medium reveals additional information beyond the scope of the First Amendment. In our multimedia world, it makes sense for courts to recognize that a picture says a thousand words, or perhaps more. This fact has important implications for privacy law. For example, as some commentators have noted, it is no secret that most people have sex and everyone goes to

175. *Shulman v. Group W Prods. Inc.*, 955 P.2d 469, 475–77 (Cal. 1998).

176. *Id.*

177. *Id.*

178. *Id.* at 478.

179. *But cf. Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1221 (10th Cir. 2007) (noting that courts have not defined the tort of public disclosure "in a way that would obligate a publisher to parse out connectedly public interest information . . . from allegedly private facts").

180. *See Volokh, supra* note 55, at 1091–92.

the bathroom.¹⁸¹ These facts, while perhaps embarrassing, could presumably be of legitimate public concern under the right circumstances. However, photographs of someone in these unbecoming contexts should be analyzed separately from the fact of their occurrence. In the Pamela Anderson case set forth above, the court concluded that while general information regarding the tape and its existence was newsworthy, the “visual and aural details of [the plaintiffs’] sexual relations” were beyond the scope of First Amendment protection.¹⁸² Thus, the district court distinguished the factual information from the aural and visual medium through which it was disclosed, and determined whether the First Amendment protected each component.

These three determinations are particularly salient in the OSN context. Courts should focus the inquiry narrowly, asking whether the plaintiff was voluntarily in the limelight and considering the characteristics of the medium through which the information was presented.

Illustration 1: Negative Association — Alba is a high school math teacher. While teaching, two of her students secretly filmed her. The students edited the footage, adding graphics and music with suggestive lyrics. The video consisted of footage zooming in on the teacher’s buttocks and images of a student thrusting his pelvis behind her as she taught the class. The students posted the video publicly on YouTube. The video garnered instant cyber-fame.¹⁸³

A court could conceivably determine that the subject matter of the tape was broadly a parody of the public school teacher — a social issue in which the community at large has a legitimate interest. A court reaching this conclusion would hold that the material is protected by the First Amendment, leaving Alba without recourse. However, this broad holding is incorrect. As discussed above, a reasoned analysis should take into account the nature of the disclosure and the medium itself to make sure that information is neither over- nor under-protected. A similarly skewed result could occur if a court did not take into account a plaintiff’s public or non-public persona. Evidence that Alba did not seek or consent to the video’s posting is important, regardless of whether she garnered instant cyber-fame by its posting.

181. Volokh, *supra* note 55, at 1094 (“Everybody knows that I go to the bathroom; printing a picture of me on the toilet would embarrass me not because it reveals something new about me, but because it shows me in a pose that by cultural convention is seen as ridiculous or undignified.”).

182. *Michaels v. Internet Entm’t Group, Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998).

183. This hypothetical is based on the facts in *Requa v. Kent School District No. 415*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007) (suit brought by student alleging violation of free speech rights after being suspended for posting a video).

2. What Was the Overall Accessibility of the Information?

Instead of basing a privacy assessment on its complete seclusion or secrecy, courts should analyze the overall accessibility of the information in question. As Professor Michael Froomkin has noted, “[i]t may be ‘that three can keep a secret — if two of them are dead,’ but in the world of the living, we must find kinder, gentler solutions.”¹⁸⁴ In this vein, courts should ask questions like: Was the information publicly readable, visible, or audible? How easily was it obtained? Was the OSN profile set to private or public? Was the information password-protected? Was the information in clear view to the casual observer; or did the observer have to put forth significant effort to gain access?

Mere visibility in a public space should not vitiate privacy rights.¹⁸⁵ For example, an inmate at a federal penitentiary sued NBC for invasion of privacy after the network filmed him exercising in only gym shorts without his consent.¹⁸⁶ Although filmed in the prison’s designated exercise cage, a public place, he claimed to believe that “the only ones able to see him would be persons ‘to whom he might be exposed as a necessary result of his incarceration’ [such as guards and other inmates.]”¹⁸⁷ In this instance, the district court rejected the argument that objective visibility or seclusion alone was the ultimate demarcation of privacy, stating:

Huskey’s visibility to some people does not strip him of the right to remain secluded from others. Persons are exposed to family members and invited guests in their own homes, but that does not mean they have opened the door to television cameras. Prisons are largely closed systems, within which prisoners may become understandably inured to the gaze of staff and other prisoners, while at the same time feeling justifiably secluded from the outside world (at least in certain areas not normally visited by outsiders).¹⁸⁸

184. A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1464 (2000) (quoting BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (1735), reprinted in THE OXFORD DICTIONARY OF QUOTATIONS 211 (2d ed. 1959)) (noting that the only way to keep data secret is to never submit it online at all, which is an impractical and unrealistic conclusion).

185. See, e.g., *Sanders v. ABC*, 978 P.2d 67, 72 (Cal. 1999) (“The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.”).

186. *Huskey v. NBC*, 632 F. Supp. 1282, 1282 (N.D. Ill. 1986).

187. *Id.* at 1285.

188. *Id.* at 1288.

The court concluded that the success of the claim would have to await further development of the factual record regarding actual customs and usages of the exercise cage.¹⁸⁹ Customs and usages of a space, and not the “objective” facts of a space, should define the territory in which one could legally claim a right to privacy. Thus, proxemics could be useful guide in defining privacy rights.

Two recent court decisions have correctly, though implicitly, applied this nuanced reasoning in analyzing MySpace postings. In an Ohio child custody case, a child’s mother was discredited via MySpace postings she authored. The postings contained numerous references to her drug use, for example that she was “on a hiatus from using illicit drugs during the pendency of [the child custody] proceedings, but that she planned on using drugs on the future.”¹⁹⁰ Not only were her thoughts visible, but more importantly, they also were accessible by her own design. Given this public accessibility, the court concluded that she could “hardly claim an expectation of privacy regarding these writings.”¹⁹¹

In another case, a student filed suit against a school superintendent to recover damages arising from alleged sexual abuse by a basketball coach. The superintendent argued that the student’s anonymous pseudonym (Jane Doe) should be set aside because she had voluntarily publicized the details of the case on her MySpace blog.¹⁹² After analyzing the blog, the court determined that since the public could not readily identify the blogger as the young woman involved in the lawsuit, she was entitled to retain her anonymous moniker.¹⁹³ Although the information pertaining to the lawsuit was accessible on MySpace, her identity was not. Thus, the court refused to conclude that the disclosure of her anonymous feelings and thoughts online was tantamount to her relinquishment of privacy in other spaces.

Illustration 2: Mass Disclosure of the Already Disclosed — At a popular bar, Bryan meets Candace. Taken by her charms, he develops an immediate attraction to her. The two end up kissing passionately in the bar’s bathroom. Bryan then uploads pictures of his passionate night with Candace on his public OSN page and blog. Weeks later, Bryan is enraged when he learns that images of him and Candace

189. *Id.* at 1288–89.

190. *Dexter v. Dexter*, No. 2006-P-0051, 2007 Ohio App. LEXIS 2388, at *18 (Ohio Ct. App. May 25, 2007).

191. *Id.* at *19 n.4.

192. *Doe v. Firm*, No. CV065001087S, 2006 Conn. Super. LEXIS 2860, at *3–4 (Conn. Super. Ct. Sept. 22, 2006).

193. *Id.* at *14.

kissing appear prominently on a billboard in Times Square advertising a reality show in which Candace is participating.¹⁹⁴

Bryan's rage is rooted in a concept of privacy best described as control over information. Unfortunately for Bryan, his own actions made both the fact and the images of their sexual encounter public and accessible, thereby relinquishing control over their subsequent use. As such, he should not have a valid public disclosure claim.

The more difficult question arises if we assume that Bryan did not widely publicize his dalliance with Candace, but instead only discussed it with a limited group of intimates on a private OSN profile. Under the traditional public disclosure analysis, Bryan would not be successful if he brought suit. Since he had disclosed his behavior to some people, a court would find that the information was not sufficiently veiled in secrecy to merit protection.¹⁹⁵ Thus, his disclosure to some would likely justify its publication to a much wider audience. Looking instead to overall accessibility of the information rather than requiring complete secrecy or seclusion leads to a more logical conclusion. If Bryan's OSN profile was private and password protected, custom and usage dictate that he should retain an expectation of privacy despite the information's accessibility to some people.

Courts struggling with privacy issues have required high levels of secrecy or seclusion before finding privacy protection. The use of secrecy and seclusion as proxies for privacy is misguided, as isolation is the antithesis of intimacy and community. The very privacy goals that theorists have lauded as socially beneficial would only be available to hermits if secrecy and seclusion were the necessary precursors to privacy protection. Privacy should not be bound to the spatiality or absolutism that the secrecy and seclusion paradigms necessarily entail. By focusing on the degree of accessibility instead, the public disclosure tort analysis can accommodate the nuances of modern technology and communication.

B. The Disclosure

A well-reasoned analysis must examine not only the information disclosed but also the disclosure itself. The Restatement focuses pri-

194. This illustration is loosely based on *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118 (N.D. Cal. 2002). In *Daly*, a reality show participant and a woman were videotaped kissing in a public bathroom stall. The scene was aired on the show, and photographs of the incident were used to advertise the show.

195. See, e.g., *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040 (Cal. Ct. App. 1984) (holding that disclosure of plaintiff's sexual orientation to the general public was not actionable given that plaintiff had disclosed his sexual preference to other members of the gay community).

marily on the defendant's activity, but it does not clearly enumerate the determinants of a privacy breach. Courts should look to the intent of the defendant, the means used to breach the plaintiff's privacy and the ensuing harm caused by the unwarranted disclosure.

1. Was the Defendant's Conduct Extreme and Outrageous? Did She Have Malicious Intent or Motive? Did She Breach the Plaintiff's Privacy Through Wrongful or Improper Means?

Although not explicitly articulated in the elements of the Restatement, the defendant's intent and the means through which the information was disclosed should be part of a thorough and logical public disclosure tort analysis. Evidence of outrageous, intentional, and systematic campaigns to harass, discredit, or embarrass have been widely held to indicate invasions of privacy.¹⁹⁶ In an Alabama case, a rural housewife was secretly photographed at a county fair as her skirt unexpectedly blew up over her head.¹⁹⁷ The revealing picture was then published on the front page of the local newspaper.¹⁹⁸ Despite the court's enunciation that "there can be no privacy in that which is already public,"¹⁹⁹ the woman prevailed based in part on the fact that the photographer was lying in wait to catch her in an embarrassing situation. In other cases, vengeful motives have been considered highly probative in the privacy analysis.²⁰⁰ Evidence that such conduct was fueled by an extreme desire to exact revenge, to harass, or to publicly shame should be considered when determining if an actionable privacy breach occurred.

Even in the absence of a clearly nefarious motive or intent, some courts have correctly looked to the means used to intrude or obtain information, holding that improper conduct like physical trespass, prying, or eavesdropping constituted an unwarranted intrusion.²⁰¹ Ad-

196. *See, e.g.*, *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970) (dismissing allegations that defendant conducted a campaign of intimidation against plaintiff in order to suppress plaintiff's criticism and disclosure of information about its products); *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956) (holding that wrongful invasion of privacy occurred when creditor initiated a campaign to harass and torment debtor by continuously telephoning her at her home and workplace and informing her superiors about her debt).

197. *Daily Times Democrat v. Graham*, 162 So. 2d 476 (Ala. 1964).

198. *Id.* at 476.

199. *Id.* at 477.

200. *See, e.g.*, *Benz v. Wash. Newspaper Publ'g Co.*, No. 05-1760, 2006 U.S. Dist. LEXIS 71827 (D.D.C. Sept. 29, 2006) (considering former lover's motive — shaming his ex on the Internet — in finding that an invasion of privacy occurred).

201. *Cf. Ghassomians v. Ashland Indep. Sch. Dist.*, 55 F. Supp. 2d 675, 693 (E.D. Ky. 1998) (finding no substantial intrusion upon seclusion when defendant read plaintiff's diary but had not come into possession of diary through wrongful conduct); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964) (allowing an intrusion claim where defendant installed a surveillance device on plaintiff's bedroom).

ditionally, malicious intent may also be found in the aggregation of information designed to harass or harm the plaintiff. The malicious amalgamation of information can be unwarranted, even if the information is available in bits and pieces elsewhere.

The tort of intentional infliction of emotional distress provides meaningful guidance as to the level of intent and types of behavior that should properly be considered actionable. According to the Restatement:

The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.²⁰²

By adding this prong to the analysis, the public disclosure tort is fortified and better equipped to address First Amendment concerns.

Illustration 3: Retaliatory Disclosure — Daniela recently broke up with her boyfriend, Eddie. In retaliation, Eddie posted a secret sex tape (in which Daniela had voluntarily participated) on his public MySpace page and e-mailed a link to it to hundreds of people, including her parents and friends. He included "credits" at the end with her real name, work schedule, address, and phone numbers.

Under current privacy jurisprudence, Daniela would not be likely to recover for any harm caused by Eddie's malicious actions. For example, as evidenced by *Wilson v. Harvey*, aggregation of otherwise publicly-available information (such as an address in a phone book, for example) would not result in liability because the information was not closely held or per se secret.²⁰³ In our modern technological environment, this is not a logical conclusion. The digital media facilitate permanent and wide dissemination of information without the restraint of editorial oversight or the potential for liability. The law must

202. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

203. See *Wilson v. Harvey*, 842 N.E.2d 83, 91 (Ohio Ct. App. 2005).

begin to recognize the many ways that such dissemination can harm by allowing victims redress against those that make such disclosures maliciously.

2. Was the Plaintiff Harmed by Public Disclosure of the Information?

A public disclosure analysis must consider the degree of harm suffered by the plaintiff. The ensuing harm should be a substantive element of the tort, rather than just a part of the damage calculus. Plaintiffs should not be able to recover for trivial insults, unkind words, or rough language.²⁰⁴ As the Court of Appeals of New York wrote:

Quite obviously, some intrusions into one's private sphere are inevitable concomitants of life in an industrial and densely populated society, which the law does not seek to proscribe even if it were possible to do so. "The law does not provide a remedy for every annoyance that occurs in everyday life."²⁰⁵

It has become necessary to adopt a clear framework for determining whether an unwelcome disclosure amounts to a legally actionable harm. Traditionally, courts have gauged the harm from a disclosure of private facts by looking to the size of the disclosure's audience and the degree of shamefulness normatively attributed to its subject matter. Evolving technology and societal norms are no longer compatible with these outdated indicators.

When dissemination occurs online, the size of the audience may be impossible to assess. Courts should determine the harm resulting from a public disclosure by examining the specific audience exposed to the information instead of merely quantifying the audience. For example, if someone sends a nude photograph of a professor to her students, the damage to the professor's professional reputation and career will be much more palpable than if that person sends it to everyone in a country where the professor has never been and knows no one. As such, privacy interests would be better served by identifying the audience. Looking solely at the size of the audience, rather than

204. In this area, the Restatement's description of the tort of intentional infliction of emotional distress is particularly instructive. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) ("There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.")

205. *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 768 (N.Y. 1970) (quoting *Kelley v. Post Publ'g Co.*, 98 N.E.2d 286, 287 (Mass. 1951)).

considering the identities and characteristics of the audience — no matter how few — is tantamount to ignoring the fact that privacy is contextual.

When analyzing the nature of the disclosure, courts should note whether the disclosure harmed the individual — either emotionally or tangibly. By focusing on the harm, rather than a normative analysis of what information is per se private, courts can better assess privacy claims without making judgments on what should properly be the subject of shame.

The Restatement's treatment of this issue assumes a heterogeneous and unitary community with a single set of norms. This assumption is problematic because it does not consider the situational forces that may cause shame. One example where the Restatement's model fails is in the case of a janitor who found a sack containing \$240,000 and returned it to its owner.²⁰⁶ He sued the publishing company that printed a story about his honesty in a textbook because, following the publication, he was branded "the world's greatest boob" by the public and, furthermore, he and his family were publicly taunted and ridiculed in their community.²⁰⁷ Ignoring the harm suffered, the court concluded that since the subject matter disclosed was not derogatory, there was no public disclosure claim.²⁰⁸ The court viewed the disclosure as laudatory, and thus was blind to the highly contextual nature of honor, shame, and privacy.²⁰⁹

Relativism aside, there is no one formulation of the reasonable person — especially not in the online context. Although digital natives have a "devil-may-care attitude toward things that other people would probably consider highly private,"²¹⁰ digital immigrants scoff at such sophomoric online exposures. Therefore, there is no universally accepted and objectively ascertainable private matter or space. Context and personal preference have always determined when an individual would find a disclosure offensive. The information services provided by the Internet — dissemination, indexing, and linking information — has put a new spin on what has traditionally been a straightforward analysis.

Illustration 4: Intrusive Disclosure — Fiona is gay but has not told her co-workers or professional acquaintances. George, one of Fiona's co-workers, secretly obtains her MySpace password so as to snoop around her profile. On her profile, he finds information that

206. *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880 (Cal. Ct. App. 1974).

207. *Id.* at 883.

208. *See id.*

209. *See id.*

210. Palfrey, *supra* note 22, at 42.

leads him to believe that she is leading a gay lifestyle. George instantly divulges this information to the rest of the office staff. As a result, Fiona suffers a great amount of stress and is ostracized by some of her colleagues. Her work and her career are subsequently jeopardized.

Fiona could not successfully seek redress under the traditional public disclosure analysis. Since she had disclosed her sexuality to some people, a court would conclude that the information was not sufficiently veiled in secrecy to merit protection. Moreover, Fiona's sexuality may not be viewed as shameful subject matter. The defendants could argue that Fiona herself was not ashamed by her sexuality in most circumstances and only sought to conceal it from her professional acquaintances in a certain context — her professional life.

What may signal shame in one space may be a badge of honor in another. The legitimacy of Fiona's legal action would be at the mercy of the subjective worldview of a judge. The fact that she suffered intense shame and repercussions from the disclosure may not be enough to merit privacy protection in the face of the fact that she was not ashamed of the information's disclosure in other contexts and was not hiding the information from everyone in her life.

Thus, since it is impossible to assess whether a disclosure is shameful without a volatile and unpredictable analysis, courts should focus on the harm caused by the disclosure, rather than strictly focus on the Restatement's stale list of shameful subject matter or, even worse, try to impose their own personal beliefs. To that end, courts must consider contextual norms and circumstances and the harm arising from the unwarranted disclosure.

C. The Aggrieved

The Restatement's privacy analysis implicitly calls for an investigation into the plaintiff's behavior. Under current law, if the plaintiff does not protect the information, neither will the law. This rationale has driven some courts to issue blanket statements, broadly construing what constitutes a public space.

This Section posits the question: are only hermits, recluses, and misanthropes entitled to privacy protection? The answer to this perhaps absurd and exaggerated question may be that voluntary withdrawal from social contact, accessibility, or visibility is perhaps the easiest way to signal that one wants privacy. In reality, communicating one's wishes of privacy is much more nuanced and complex. Expectations of privacy can arise from contractual or relational bonds, and the law should recognize this. Moreover, in cyberspace, users

express their expectations by adjusting their security settings. Expressions of privacy expectations have become dynamic.

Now, in light of this new reality's technological, contractual, and relational indicators of confidentiality, this Section flips the inquiry and analyzes whether there is a reasonable expectation of *audience*?

1. Did the Aggrieved Expressly Protect the Information via Technology, Contract, or Otherwise?

Accepting the assertion that no information is absolutely private, it becomes necessary to examine the context of the initial disclosure to determine if a legal remedy is warranted. This examination asks whether the initial disclosure of the information was voluntary or involuntary and whether its subsequent disclosure was reasonably foreseeable under the circumstances. Abandoning physical space as an indicator of circumstances, this analysis must include the explicit understanding of the parties and technological architecture.

An initial disclosure is properly characterized as involuntary when not authorized by the subject. An involuntary disclosure should weigh in favor of finding a privacy breach. Even when a disclosure is voluntary, an individual should not be automatically precluded from receiving privacy protection. If the plaintiff's original disclosure was voluntary, a court should then ask: What kind of privacy settings were contemporaneously available on the OSN? Was there an explicit understanding of confidentiality between the parties involved? Was the disclosure shared in the context of an intimate relationship?

A number of scholars have advocated for the protection of privacy through confidentiality agreements.²¹¹ This option gives the disclosing party latitude to share valuable personal information while explicitly memorializing his desire that it does not spread. Confidentiality agreements demonstrate an expectation of privacy.

Courts have repeatedly looked to plaintiffs' outward manifestations and behavior to determine whether they had true and reasonable expectations of privacy.²¹² In a Missouri case, plaintiffs sued after a local television station disclosed their participation in a fertility pro-

211. See generally McClurg, *Out of the Closet*, *supra* note 28 (advocating for implied contracts of confidentiality between intimate parties as a proxy for the public disclosure tort); Volokh, *supra* note 55 (arguing that the only constitutionally permissible means for enforcing personal information privacy is contract law).

212. See, e.g., *Coulter v. Bank of Am.*, 33 Cal. Rptr. 2d 766, 770 (Cal. Ct. App. 1994) (noting that "the test for confidentiality is objective . . . subjective intent is irrelevant"); *Creel v. I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276, 1281 (Ind. Ct. App. 2002) (noting that "[t]here were no signs posted indicating that only church members or invitees could attend the services or stating that services could not be videotaped or could only be videotaped with church permission").

gram and used their identifiable images.²¹³ The couple, who had kept their method of conception hidden from their disapproving church congregation and friends, encountered the television cameras at a party in honor of the fertility clinic that helped them get pregnant.²¹⁴ The defendant argued that by virtue of attending the party, the plaintiffs had waived any reasonable expectation of privacy. The Missouri court rejected this argument, relying in part on the fact that the plaintiffs had clearly refused to be interviewed and “made every reasonable effort to avoid being filmed.”²¹⁵ Thus, the court allowed the plaintiffs to explicitly set the boundaries of their privacy expectations without having to maintain total isolation to be protected.

Determining the strength of a case requires analyzing the understanding between the aggrieved and the discloser. Evidence of an explicit understanding to conceal the unethical conduct, such as signs on the wall that read, “use of filming or photographic devices is strictly prohibited,” would weigh in favor of protecting the privacy of the plaintiffs. Without such explicit *ex ante* indicia of the plaintiffs’ expectations, any public disclosure protection should be significantly weakened.

Illustration 5: Situational Personality — One morning, after a wild night, Holly uploads a video of herself onto YouTube for her social friends to see. The video depicts Holly, barely clothed and inebriated, dancing suggestively on top of a table at a party. The video is accessed and enjoyed by Holly’s close friends who interpret it as evidence of Holly’s fun-loving nature. However, Holly’s parents, prospective employers, and future in-laws, who disapprove of her uninhibited behavior, also have easy access to the video.

Lacking classic indicia of confidentiality — like heightened privacy settings or confidentiality agreements — privacy law should not shield a voluntary online disclosure. In this illustration, Holly could contend that she had a reasonable expectation of privacy. In this view, those most likely to be offended — parents, employers, and educators — should not browse such websites. Another equally unpersuasive argument is that her posting was like a drop in the ocean: the louder the chatter online, the less likely anyone will be focusing on one person. While Holly may have had a personal expectation of privacy, her expectation was not objectively reasonable. Even though chances are slim, unwanted eyes may encounter information because the information is publicly available and not protected.

213. *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488 (Mo. Ct. App. 1990).

214. *Id.* at 492.

215. *Id.* at 501.

Online, Holly could not have availed herself of the traditional privacy-preserving mechanisms of physical space — a locked door or a hushed voice — to protect her information. However, she failed to protect her privacy interests as best technology allowed; her profile did not have the highest level of privacy protection and her information was not protected with a password.

Information should not be considered public or universally available solely because it is on the Internet. After all, one of the unique elements of the Internet is its transfigurative nature. OSN privacy technology has evolved democratically, as websites like MySpace and Facebook have consistently and expeditiously reacted to public outcries with changes to their privacy controls, features, and settings. With responsive OSNs and malleable technologies, OSN users can delineate the boundaries of their online personae. Protecting some form of privacy online is socially desirable.

2. Was the Information Disclosed in the Context of a Confidential Relationship?

Next, we must analyze the relationship between the parties to see if it was special and demanded confidentiality. The law commonly protects information based on the relationship of the parties sharing it.²¹⁶ One California court stated that “[i]n determining the reasonable expectations of the parties, we look to the circumstances of the communication,” and such circumstances necessarily include “the relationship between the parties.”²¹⁷

Other courts have similarly analyzed the relationship of the parties in determining whether the information was protected. A Georgia court engaged in this analysis to determine whether an HIV positive man who told his family, friends, and health care providers about his condition had a valid cause of action against a local television station that identified him as HIV positive.²¹⁸ The station failed to properly pixelate the plaintiff’s face in an interview in which he was discussing his condition. In defense, the station argued that the plaintiff had waived his expectation of privacy by disclosing his condition to “family member, friends, medical personnel and members of his AIDS

216. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (discussing attorney-client privilege in a corporation); *Ind. Nat’l Bank v. Chapman*, 482 N.E.2d 474, 482 (Ind. Ct. App. 1985) (holding that a bank has a duty not to disclose customer information unless it is to someone with a legitimate public interest).

217. *Flanagan v. Flanagan*, 91 Cal. Rptr. 2d 422, 429 (Cal. Ct. App. 1999), review granted 996 P.2d 27 (Cal. 2000), *aff’d in relevant part* 41 P.3d 575 (Cal. 2002) (“We note first the father-son relationship and the fact that the conversations took place on the telephone. These circumstances certainly militate in favor of a finding of confidentiality.”).

218. *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994).

support group.”²¹⁹ The court rejected this argument and recognized a privacy shield around the plaintiff’s intimate circle of support. Despite the fact that the plaintiff had not explicitly directed his inner circle to keep his HIV status secret, the court determined that he did not waive his expectation of privacy in the information by disclosing it to a limited number of people who cared about him or shared in his experiences.²²⁰ This court found that the bonds of intimacy between the plaintiff and his audience were key components in determining whether information was protected.

Illustration 6: Disclosure in Confidence— Isaac’s private MySpace profile includes a list of the groups to which he belongs, including the Living with HIV/AIDS Support Group. Isaac is, in fact, HIV positive but has not told his family or friends. His membership in the Living with HIV/AIDS Support Group has been a source of comfort, strength, and courage. When a local journalist goes undercover, he reveals Isaac’s identity in connection with his HIV/AIDS positive status. In court, the journalist’s news organization argues that Isaac’s initial revelation to his online friends precluded him from asserting that the matter was private, as he had already discussed his health information with dozens or hundreds of similarly situated people online.

Isaac divulged his HIV status to a group of strangers in cyberspace who he had never met. Yet, the circumstances surrounding this disclosure should support privacy protection. Participants should be entitled to privacy protection by virtue of the mutual disclosure of shared circumstances and support, regardless of the fact that they were strangers in physical space.

OSNs and privacy law share the goals of building identity, intimacy, and community. Sharing personal information about oneself forges intimate relationships, builds identity by allowing individuals to explore interests, helps parties unburden themselves by confessing to others, and disseminates advice. Accordingly, one could argue that OSNs have changed their members’ conception of intimacy. By divorcing intimacy from the concept of space, neither physical proximity nor contact is necessary to participate in a close relationship. Thus, the context of the disclosure and the intimacy between the disclosing party and his audience its intended audience should be a factor in deciding whether the aggrieved voluntarily made the information public.

219. *Id.* at 494.

220. *Id.* (also noting that “there was also testimony that [the intimates] understood that plaintiff’s condition was not something they would discuss indiscriminately”).

VI. CONCEPTUALIZING THE TORT OF PUBLIC DISCLOSURE BEYOND OSNS

As this Article has shown, the public disclosure tort and OSNs are not an incongruous pairing. OSNs continue to be an illustrative Petri dish for the analysis and revitalization of the public disclosure tort.

OSNs have revealed that privacy torts mistakenly rely on spatial linchpins — resulting in misplaced absolutism. In modern social science and specifically in the discipline of proxemics, space has always been a quantifiable and qualifiable indicator of human behavior and expectations. The law, however, does not have to follow suit. It is necessary to formulate a new analytical scheme that abandons the spatial linchpins that have derailed privacy torts and lost them in translation from physical space: the multi-factored approach.

Whatever the context of the offending disclosure, a factor-based analysis of the public disclosure tort is desirable and practicable. This proposed gestalt approach deemphasizes reliance on a single philosophical conception of privacy and thus facilitates a retreat from the tort's traditional spatial linchpins. In our new, wired world, the law must evolve to interpret these concepts as possible manifestations of privacy, but not its necessary prerequisites. An organized analytical framework will provide reasoned guidance and promote uniformity, allowing for more coherent and robust application — thus, producing a healthier jurisprudence that can meet technology's current and future tests while protecting the dignity of the harmed.

Unhinging privacy tort from its spatial linchpins allows discovery of more reliable and translatable determinants of privacy and individuals' expectations thereof. OSNs show that revitalizing the public disclosure tort for the spaceless world requires:

(1) Adjusting the First Amendment analysis to ensure that any speech deterred is only the most embarrassing, harmful, and utterly devoid of any social purpose.

(2) Examining the technological vehicle of the information in order to avoid over-breadth in First Amendment protection.

(3) Establishing harm as a substantive requirement of the tort. This harm may either be solely dignitary or tangible.

(4) Performing an analysis of the plaintiff's conduct in a manner reminiscent of contributory negligence. Looking to the plaintiff's conduct will allow for a reasonable assessment of his contextual expectations of privacy. More importantly, it will affirmatively place the burden of protecting the information on the plaintiff.

(5) Focusing on the multiple architectures surrounding the disclosure to assist the determination of its deserved legal protection. In this vein, the analysis must incorporate: (i) the format and privacy functions of the technological architecture within which the harmful in-

formation was first disclosed, (ii) the implicit and explicit agreements and understandings between the parties, and (iii) the nature of the relationship as mandating or meriting confidentiality.

VII. CONCLUSION

CYBERSPACE CONSISTS OF TRANSACTIONS, RELATIONSHIPS, AND THOUGHT ITSELF, ARRAYED LIKE A STANDING WAVE IN THE WEB OF OUR COMMUNICATIONS. OURS IS A WORLD THAT IS BOTH EVERYWHERE AND NOWHERE, BUT IT IS NOT WHERE BODIES LIVE. . . . YOUR LEGAL CONCEPTS OF PROPERTY, EXPRESSION, IDENTITY, MOVEMENT, AND CONTEXT DO NOT APPLY TO US. THEY ARE ALL BASED ON MATTER, AND THERE IS NO MATTER HERE.²²¹

MAN'S FEELING ABOUT BEING PROPERLY ORIENTED IN SPACE RUNS DEEP. SUCH KNOWLEDGE IS ULTIMATELY LINKED TO SURVIVAL AND SANITY. TO BE DISORIENTED IN SPACE IS TO BE PSYCHOTIC.²²²

Technology has always threatened privacy, thereby forcing the redefinition of its philosophical and legal underpinnings. In fact, this very angst was the impetus for the Warren-Brandeis conception of the public disclosure tort. Years later, it was Brandeis again who recognized the need for concepts of privacy to evolve in tandem with technology. In *Olmstead v. United States*,²²³ the Supreme Court faced the question of whether government use of the then-revolutionary technology of wiretapping violated the Fourth Amendment. The Court held that the Fourth Amendment protected only against a physical form of trespass. Wiretapping, was not protected because it did not violate physical space. Justice Brandeis, however, did not agree. Brandeis argued that telephone technology changed the way that private life was conducted over wires, the societal conception of privacy, and, therefore, the notion of "trespass." To protect privacy, Brandeis reasoned that it was necessary to protect more than a space-bound conception of trespass.²²⁴

Today, OSNs have led the public disclosure tort to a similar crossroads. The advent of social networking has arrived at a time when the public disclosure tort is at its weakest. The Restatement's classifications and its interpretive case law are ambiguous, broad, and outmoded. In the absence of strong guidance from the Restatement, courts in privacy disputes have relied on the multifarious definitions

221. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Feb. 8, 1996, <http://homes.eff.org/~barlow/Declaration-Final.html>.

222. HALL, *supra* note 11, at 105.

223. 277 U.S. 438 (1928).

224. Brandeis was validated when the Supreme Court overruled *Olmstead* in *Katz v. United States*, 389 U.S. 347, 353 (1967) (rejecting *Olmstead*'s conception of privacy when examining privacy expectations in context of electronic surveillance).

of privacy that are grounded in notions of physical space. As a result, the sparse analytic framework has been wed to the jurisprudence's mantric and absolutist statements to the effect that "there can be no privacy in a public place" or that certain activities are (or should be) always, by definition, private. Over reliance on these absolutes has severely limited the application of the public disclosure tort.

We can either lament the final blow to the public disclosure tort at the metaphorical hands of OSNs or, inspired by Justice Brandeis's avant-garde reasoning in *Olmstead*, we can redefine the tort. Opting for the latter, this Article proposed a factor-based privacy tort framework capable of analyzing privacy issues on OSNs and beyond.

So, can privacy exist where there is no physical space and no inherently private subject matter, secrecy, or seclusion? Yes: it can and it should. Instead of physical space, we should think in terms of walls of confidentiality built by technical architecture, agreements, and relational bonds. Instead of categorizing certain subject matter as *per se* private, we should focus on a contextual analysis of the harm that ensued from the information's disclosure. Instead of obsessing on whether the information was completely secret or secluded, we should think in terms of its overall accessibility. These indicators are more coherent and significant than brick walls or deadbolt locks. More importantly, they transcend technology.