THE LIFE, DEATH, AND REVIVAL OF IMPLIED CONFIDENTIALITY

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The concept of implied confidentiality has deep legal roots, but it is has been largely ignored by the law in the digital era. A closer look reveals that implied confidentiality has not been developed enough to be consistently applied in environments that often lack obvious physical or contextual cues of confidence, such as the Internet. This absence is significant because implied confidentiality could be one of the missing pieces that help users, courts, and lawmakers meaningfully address the vexing privacy problems inherent in the use of the social web.

This article explores the curious diminishment of implied confidentiality and proposes a revitalization of the concept based on a thorough analysis of its former, offline life. This article demonstrates that courts regularly consider numerous factors in deciding claims for implied confidentiality; they have simply failed to organize or canonize them. To that end, this article proposes a unifying and technology-neutral decision-making framework to help courts ascertain the two most common and important traditional judicial considerations in implied obligations of confidentiality – party perception and party inequality. This framework is offered to demonstrate that the Internet need not spell the end of implied agreements and relationships of trust.

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INTRODUCTION

The law has long recognized the value in implied confidential relationships and agreements.[1] Confidentiality often permeates contexts to such an extent that the obligations of the parties need not be verbalized or written down. In many instances, the articulation of specific confidentiality obligations could erode a relationship or impede its growth.[2] It would stand to reason, then, that given the abundance of intimate information and complex relationships online, implied confidentiality would play at least a slightly significant role in modern privacy law.

Surprisingly, this is not the case. At best, the concept of implied confidentiality plays a negligible role in the developing doctrine surrounding online privacy disputes.[3] So what accounts for the disappearance of implied confidentiality in the digital era? Empirical evidence and logic do not support the contention that the only understandings of confidentiality between parties in online relationships are explicit.[4] Rather, a closer look at the doctrine reveals that implied confidentiality has not been refined enough to be a workable concept in online disputes. This article demonstrates that courts regularly consider numerous factors in deciding claims for implied confidentiality; they have simply failed to organize or canonize them.

This developmental failure has resulted in the practical death of implied confidentiality online. "Offline" confidentiality has the advantage

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[1] *See, e.g.,* Keene v. Wheatley, 4 Phila. 157, 14 F. Cas. 180 (E.D. Pa. 1861); Neil Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 124 (2007).

[2] *See, e.g.,* G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2385 (1992).

[3] Of course, the broader concept of confidentiality is not completely absent from online disputes. Explicit confidentiality agreements have an undeniable presence in online privacy disputes in the form of claims for violations of privacy policies and the reliance on terms of use to justify refusals to disclose information about Internet users. But these agreements do not define the entire boundaries and expectations inherent in all online relationships. Indeed, given that virtually no one reads or understands online boilerplate, these agreements likely do not even scratch the surface the true expectations and perceptions of Internet users.

[4] *See, e.g.,* Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887 (2006); Patricia Sánchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 77 (2007).

of traditional notions of readily perceptible context. Those seeking to disclose in confidence in face-to-face relationships can close doors, speak in hushed tones, and rely on other signals to convey a trust in the recipient that has not been explicitly articulated. Yet, online relationships are frequently perceived by courts as missing the same implicit cues of confidentiality that are present in face-to-face relationships. The neglected state of online implied confidentiality is a problem because courts are tasked with ascertaining the actual agreement or relationship between Internet users.

The purpose of this article is to confront the curious diminishment of implied confidentiality in the digital era with a proposed revitalization of the concept based on its "offline" life. The main thesis of this article is that the concept of implied confidentiality has not been developed enough to be consistently applied in environments that often lack obvious physical or linguistic cues of confidence, such as the Internet. This article argues that implied confidentiality must be refined to apply to online relationships in the same way as face-to-face relationships. Courts simply need to advance the analysis employed in traditional implied confidentiality cases to allow for a more nuanced recognition of technological signals and a better understanding of online relationships. To that end, this article uses Helen Nissenbaum's theory of privacy as contextual integrity as a lens to analyze implied confidentiality doctrine and help create a decision-making framework for courts.

This technology-neutral framework is based on the two most historically common and important judicial considerations regarding whether a confidence was implied – party perception and party inequality. A more nuanced framework will better enable the application of implied confidentiality in online disputes than the currently vague articulation of the concept and could be one of the missing pieces that help users, courts, and lawmakers meaningfully address the vexing privacy problems inherent in the use of the social web.

Part I of this article explores the diminished role of implied confidentiality in Internet-related legal disputes. Part I also explores the need for an established role for implied confidentiality in the unsatisfying body of online privacy case law. Part II examines the rich history of implied confidentiality in largely face-to-face relationships in an attempt

to extract the most important factors for judges in determining whether an implied obligation of confidentiality existed. Based on these factors, Part III proposes a technology-neutral decision-making framework for courts in order to revive the concept on implied confidentiality on the Internet and beyond. This article concludes that the law of implied obligations of confidentiality must be nimble, organized and clear in order to effectuate the intentions of parties operating in rapidly changing online contexts.

I. THE DEATH OF IMPLIED CONFIDENTIALITY (WHERE WE NEED IT MOST)

In many ways, modern privacy law is a mess. The law inadequately or inconsistently protects individuals in a variety of contexts. Much of this problem is attributable to the fact that the most likely publisher of personal information in the Internet age is the person herself.[5] The pervasiveness of electronically-mediated communication, such as social media, has transformed many Internet users into their own worst enemies.[6] The rampant self-disclosure of personal information is a problem because courts have struggled to determine whether and to what degree self-disclosed information is private.[7] Lior Strahilevitz stated, "Despite the centrality of this issue, the American courts lack a coherent, consistent methodology for determining whether an individual has a reasonable expectation of privacy in a particular fact that has been shared with one or more persons."[8]

This problem with online disclosure is why the law of confidentiality and the context in which information is disclosed might be increasingly important to Internet users. Implied obligations of confidentiality can

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[5] *See* Daniel Solove, *The Slow Demise of Defamation and Privacy Torts*, HUFFINGTON POST (Oct. 12, 2010, 11:14 am), http://www.huffingtonpost.com/daniel-j-solove/the-slow-demise-of-defama_b_758570.html; Lauren Gelman, *Privacy, Free Speech, and Blurry-Edged Social Networks*, 50 B.C. L. REV. 1315 (2009); James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1197 (2009).

[6] *See* DANIEL SOLOVE, THE FUTURE OF REPUTATION (2007). It is a fact of modern life that individuals must disclose information that, if misused, could subject them to harm. For example, support groups like alcoholics anonymous or dating services like match.com are social by design but also involve the disclosure of sensitive information. Police reports and medical records, necessary for response and treatment, also require the disclosure of very personal information.

[7] *Id.* at 920-21.

[8] *Id.*

protect people revealing harmful information when explicit promises of confidentiality were not obtained. Although the general concept of "offline" implied confidentiality has a rich history, it is doctrinally unorganized, conceptually underdeveloped, and bereft of a unifying theory.

A significant weakness of implied confidentiality doctrine is its tendency to rely on obvious cues of confidentiality that are unique to face-to-face relationships or physical in nature. Patricia Sánchez Abril has observed the same problem in the tort of public disclosure of private facts.[9] The absence of obvious physical cues online brings the undeveloped nature of the concept into clear view. This unorganized and potentially misguided approach to the concept of implied confidentiality has crippled its application in new contexts such as the Internet. Instead of exploring the cues and relationships augmented by new technologies, courts are largely shying away, instead deferring to the explicit text in dense and unread boilerplate agreements.

1. Privacy, Confidentiality and the Digital Age

Most evidence suggests that digital technology has increased our risk of privacy harms.[10] The privacy torts, once thought to adequately address most privacy harms, have proven to be too inflexible or limited to adapt to changing notions of privacy.[11] Privacy protection legislation is a

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[9]. Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1 (2007) (finding that online contexts lack the traditional privacy-preserving mechanisms of physical space such as locked doors and hushed voices to protect information). In addition to protecting privacy, such mechanisms can also serve as cues of implied confidentiality to recipients.

[10] *See, e.g.*, Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1466 (2000); DANIEL SOLOVE, THE DIGITAL PERSON 42 (2004); HELEN NISSENBAUM, PRIVACY IN CONTEXT (2009) (hereinafter referred to as "Context"); Helen Nissenbaum, *Protecting Privacy in the Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559 (1998); Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004) (hereinafter referred to as "Integrity").

[11] Neil Richards & Daniel Solove, *Prossers Privacy Law: A Mixed Legacy,* 98 CAL. L. REV. 1887 (2010); Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 112-14 (2000) (discussing the hesitancy with which courts have applied tort of public disclosure); 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, 1057-58 (2000) (explaining that parties who contract to maintain confidentiality have a reasonable expectation of privacy); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and*

patchwork of statutes that can often be easily circumvented by online user agreements that few read and even fewer fully understand.[12] Though, ultimately, many problems with the current regimes stem from our inability to articulate what information is "private."

Not all legal protections of personal information are problematic in these ways. Confidentiality, or "the state of having the dissemination of certain information restricted,"[13] focuses not on the nature of the information as public or private, but rather the nature of the relationship or agreement between parties. Even if self-disclosed information is not "private," it could be disclosed in confidence. From a doctrinal perspective, the law of confidentiality offers many benefits that are absent from the common law privacy torts and current privacy statutes. Under the law of confidentiality, courts can largely avoid the difficult question of whether information was private or offensive, and focus instead on whether a trust was breached. Additionally, the law of confidentiality is less constitutionally suspect than the disclosure tort, which has significant First Amendment limitations.[14] Yet this area remains underdeveloped, particularly with respect to online communication. No scholarship has thoroughly analyzed the various factors relied upon by courts when analyzing implied agreements of confidentiality.

This void has seemingly resulted in an assumption that courts will know an implied obligation of confidentiality when they see it. Implied confidentiality is found where it is "clear" that such an obligation would have been recognized by the parties to the disclosure.[15] This assumption is

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Brandeis's Privacy Tort, 68 CORNELL L. REV. 291, 311-20 (1983); Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1 (2007).

[12] Jonathan K. Sobel, et. al., *The Evolution of Data Protection as a Privacy Concern, and the Contract Law Dynamics Underlying It, in* SECURING PRIVACY IN THE INTERNET AGE 56 (Anupam Chander et al. eds. 2008).

[13] BLACK'S LAW DICTIONARY, CONFIDENTIALITY (9th ed. 2009). Ethicist Sissela Bok defined confidentiality as "the boundaries surrounding shared secrets and the process of guarding these boundaries. While confidentiality protects much that is not in fact secret, personal secrets lie at its core." SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 119-21 (1983).

[14] *See, e.g.*, Zimmerman, *supra* note 11; Singleton, *supra* note 11; Volokh, *supra* note 11; Gelman, *supra* note 5. The Supreme Court ruled in *Cohen v. Cowles Media* that the First Amendment does not bar an action for breach of a promise of confidentiality. 501 U.S. 663, 670 (1991).

[15] *See* Part II, *infra*.

not helpful for those seeking to enforce obligations of confidentiality, particularly in an environment such as the Internet which has yet to be fully explored by the courts.

2. *The Law of Implied Confidentiality*

Although implied confidentiality has been touched upon by some scholars,[16] it has yet to be well-conceptualized in the literature or doctrine. It is clear that obligations of confidentiality don't have to be explicitly formed. They can be implicit parts of confidential relationships or created through implied agreements of confidentiality. These obligations can be inferred from customs, norms, and other indicia of confidentiality beyond explicit confidentiality agreements. Yet no research has examined which specific contexts, if any, are important to courts when inferring obligations of confidentiality online or offline. Given the uncertainty surrounding privacy in the digital era, it is more important than ever to understand how implied obligations of confidentiality are formed.

Obligations of confidentiality are found in multiple areas of the law including contracts for confidentiality,[17] the still-developing tort of breach of confidentiality,[18] evidentiary privileges regarding confidentiality,[19] procedural protections like protective orders to prevent the disclosure of embarrassing personal information in court records,[20] and statutes explicitly creating confidential relationships.[21] This article will focus on implied agreements for confidentiality for specific disclosures and implied confidential relationships. The general test, which provides little guidance, is that courts will impose an obligation of confidentiality when an individual or other entity voluntarily assumes, promises, or agrees to

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[16] *See, e.g.,* McClurg, *supra* note 4.
[17] *Id.*
[18] *See, e.g.,* Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort,* 82 COLUM. L. REV. 1426 (1982).
[19] *See, e.g.,* Richards & Solove, *infra* note 1.
[20] *See, e.g.,* FED. R. CIV. P. 26(c) (authorizing protective orders "to protect a party or person from annoyance, embarrassment [or] oppression").
[21] *See, e.g.,* Fair Credit Reporting Act 15 U.S.C. 1681 *et. seq.;* Gramm-Leach Bliley Act 15 U.S.C. § 6801 *et. seq.;* Health Insurance Portability and Accountability *Act* 42 U.S.C. § 1301 *et. seq.;* Video Privacy Protection Act 18 U.S.C. § 2710(b)(2)(B) (2008).

confidentiality with respect to designated information or enters into a confidential or fiduciary relationship.[22]

a. Implied Confidentiality Agreements

Confidentiality agreements are binding agreements that prohibit the disclosure of information. These contracts are relied upon to protect anonymity, arbitration proceedings,[23] settlement agreements, and trade secrets.[24] Additionally the contracts are used to protect sensitive information such as health information, sexual preference, intimate feelings, and other similar pieces of personal information.[25] Even quasi-contractual promises of confidentiality can be effective.[26]

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[22] Susan Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 15 (1995). Daniel Solove and Neil Richards succinctly summarized the law of confidentiality:

> Confidentiality rules involve instances where one party has a legal duty not to disclose certain information it has acquired from another party. These rules include: (1) the breach of confidentiality tort, which imposes liability for disclosing another person's confidential information if in breach of a duty of confidentiality; (2) the breach of an express or implied contract of confidentiality; (3) statutory provisions restricting the disclosure of confidential information; (4) protective orders preventing the disclosure of confidential information obtained during discovery; and (5) trade secret law restricting the disclosure of confidential information maintained by businesses. There are also other confidentiality rules not involving civil liability, such as criminal prohibitions on divulging certain kinds of confidential information, evidentiary privileges restricting testimony about confidential data, and statutory protections that limit the release of confidential information by certain companies or government agencies.

Daniel J. Solove & Neil H. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1669 (2009).

[23] *See, e.g.*, Amy Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006).

[24] *See, e.g.*, Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125 (2000).

[25] *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); *see also* Neil Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 124 (2007).

[26] In the case of *Cohen v. Cowles Media*, the Minnesota Supreme Court affirmed that the use of the equitable doctrine of promissory estoppel could be utilized when individuals justifiably rely on a promise to their detriment. 478 N.W.2d 387 (Minn. 1992), *on remand from* 501 U.S. 663 (1991). Promissory estoppel is an equitable doctrine designed to enforce promises that are detrimentally relied upon even though the formal elements of a contract might not be present. *See, e.g.*, Woodrow Hartzog, *Promises and Privacy: Promissory Estoppel and Confidential Disclosure in Online Communities*, 82 TEMP. L. REV. 891 (2009).

Implied agreements can arise "in fact" and "in law." Andrew McClurg stated, "Implied contracts that arise in law are also called 'quasi-contracts.' Implied contracts arising in fact are based on the apparent intention of the parties, whereas quasi-contracts are imposed by law without regard to the intentions of the parties to create or not create a contract."[27] In other words, implied confidentiality agreements "in fact" arise when individuals *actually* objectively agree to confidentiality, but the understanding is implied in lieu of an explicit agreement. Implied confidentiality agreements in law are actually not "agreements" between the parties at all, but rather an imposition of confidentiality by the state in order to do justice as a matter of public policy.[28]

b. Confidential Relationships

In addition to agreements for confidentiality, an obligation of confidentiality may be created by entering into a special kind of confidential relationship known as a "fiduciary relationship." The law of equity has traditionally designated certain relations as "fiduciary."[29] Gilles wrote that "[w]here such a relation exists, a fiduciary is under a duty 'to act for the benefit of the other party to the relation as to matters within the scope of the relation.' This duty, often characterized as the 'duty of loyalty,' includes an obligation not to reveal information."[30]

Like confidentiality agreements, the existence of a confidential relationship is a question of fact.[31] Roy Ryden Anderson found that "confidential relationships have been labeled 'fact-based' fiduciary

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[27] McClurg, *supra* note 4, at 916.
[28] *Id.*
[29] *Id.* at 39.
[30] *Id.* at 39-40 (citations omitted). According to Roy Ryden Anderson:

> The essence of a confidential relationship is fiduciary obligation.... Fiduciary obligation is the highest order of duty imposed by law. In the relationship with the principal, the beneficiary of the relationship, the fiduciary must exercise utmost good faith and candor, must disclose all relevant information, and must not profit from the relationship without the knowledge and permission of the principal. The fiduciary must make every effort to avoid having his own interests in conflict with those of the principal, and, when conflict is unavoidable, the fiduciary must place the interests of the principal above his own. These principles are both basic and uncompromising.

Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. Rev. 315, 317 (2000).
[31] *Id.*

relationships to distinguish them from formal [fiduciary relationships]."[32] Although professional relationships such as doctor/patient and attorney/client relationships are the most common types of confidential relationships, courts have found many kinds of relationships to be fiduciary, including friendships, business relationships, and familial relationships.[33]

Of course, there is no bright-line test for determining confidential fiduciary relationships.[34] However, Gillis did identify some factors that courts consider in determining whether a confidential relation exits: "length of time of the reliance, a disparity in the positions of the parties, and a close relationship between the parties. It is 'great intimacy, disclosure of secrets, entrusting of power, and superiority of position' that evidence a confidential relation."[35] As will be discussed, Gillis here mentions just a few of the many factors relevant to courts in determining obligations of implied confidentiality. These duties are not imposed lightly, and not every relationship involving trust and confidence is a fiduciary one.[36] While confidential obligations *can* be created by contract, fiduciary relationships require more than a contract.[37] Additionally,

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[32] *Id.*

[33] *Id.*

[34] Gilles wrote that "[e]quity has never bound itself by any hard and fast definition of the phrase 'confidential relation' and has not listed all the necessary elements of such a relation, but has reserved discretion to apply the doctrine whenever it believes that a suitable occasion has arisen." Gilles, *supra* note 22, at 41.

[35] *Id.* (quoting GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 482 at 281 (2d ed. 1981). The Supreme Court of Texas held that "[a]n information relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one." Schlumberger Tec. Corp. v. Swanson, 959 S.W.2d 171, 176-77 (Tex. 1997).

[36] Anderson identified three limitations on establishing a fact-based fiduciary relationship:

> First, the alleged relationship must be found to have existed prior to the transaction at issue. Second, the reliance by the aggrieved party that the other would act toward him as a fiduciary must not have been subjective. Third, the alleged confidential relationship may not be established solely by private agreement, but must arise sui generis from the nature of the relationship.

Anderson, *supra* note 30, at 324.

[37] *Id.*; *see also* ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP--AND WHAT THE LAW HAS TO DO WITH IT (2011).

confidentiality agreements and fiduciary relationships can be simultaneously present.[38]

3. The Need for Implied Confidentiality

The reluctance of courts to find implied confidentiality in informal relationships is problematic because those relationships are the most likely to implicitly share expectations of confidentiality.[39] In intimate relationships, explicit contracts for confidentiality might be seen inappropriate or unnecessary. Social norms and propriety might inhibit explicit requests for confidentiality in simple arms-length transactions, given the societal expectations that the recipient will keep disclosed information confidential.[40] Indeed, explicit contracts for confidentiality are simply too clunky for most social interactions where they would be useful.[41] Garfield argued that a number of problems arise when trying to use informal contracts of confidentiality to protect privacy interests.[42]

Eugene Volokh asserted that contracts, particularly implied obligations of confidentiality, were perhaps the only constitutional imposition of civil liability for speech.[43] Andrew McClurg furthered this

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[38] In *Snepp v. United States,* the federal government successfully sued an ex-employee who published a book about his CIA experience for both breach of contract and breach of fiduciary duty. 444 U.S. 507, 508 (1980). The Supreme Court found that Snepp had "violated his trust" by publishing his book, and the Court imposed a constructive trust on his profits. *Id.* at 516.

[39] *See, e.g.,* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 272-73 (1998).

[40] *Id.*

[41] *Id.* at 277 ("An informal contract of silence may be found to exist after one party casually shared information with another, and later claims that the other party understood that he or she gave the information in exchange for a promise not to disclose it."). According to Garfield, the more difficult contracts of silence were the ones created informally, particularly oral contracts. Garfield noted that the "basic elements of contract formation – offer, acceptance, and consideration – are unlikely to pose any problems for contracts of silence prepared in formal settings."

[42] *Id.* (stating that "[o]f course, one has to distinguish between a social engagement between friends, which is unlikely to be enforceable, and a commercial transaction between friends, such as a loan of money, which will be enforceable. A commitment of nondisclosure one friend makes to another would seem to fall somewhere between these two extremes."). *Id.* at n. 98.

[43] Volokh, *supra* note 11, at 1057. Volokh noted that implied contracts for confidentiality arise where "people reasonably expect – because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract – that part of what their contracting partner is promising is confidentiality." Volokh stated, "I tentatively think that a legislature may indeed enact a law stating that certain legislatively

argument and noted that implied contracts of confidentiality might be effective for people in intimate relationships sharing information online.[44] McClurg stated the maxim that "[p]romises can be made orally or in writing, or can be inferred from conduct" and argued that "[n]o difference in legal effect between express and implied contracts exists. The only distinction lies in how assent to the contract is manifested."[45]

McClurg's central argument was that agreements of confidentiality arise in fact in intimate relationships because it is commonly understood in these relationships that certain information is to be kept between intimates.[46] McClurg proposed that mutual assent to the confidential agreement "arises as a matter of custom and common understanding from the decision to participate in an intimate relationship. It can be inferred from the course of dealing between the parties and the overall context of an intimate relationship, including the manner in which the private information is conveyed between intimate partners."[47]

Here, McClurg engaged in one of the few attempts to identify specific contexts that could give rise to implied obligations of confidentiality: "The fact that private information is shared…between intimate partners outside the presence of others, often within homes behind closed doors and drawn curtains, lends support to the assumption

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identified transactions should be interpreted as implicitly containing a promise of confidentiality, unless such a promise is explicitly and prominently disclaimed by the offeror, and the contract together with the disclaimer is accepted by the offeree." *Id.* At 1060. According to Volokh: "The great free speech advantage of the contract model is that it does not endorse any right to 'stop people from speaking about me.' Rather, it endorses a right to 'stop people from violating their promises to me.'" *Id.* at 1061.

[44] McClurg, *supra* note 4, at 912.

[45] *Id.* McClurg recognized:

> The central features of an implicit promise of confidentiality, shared by all [intimate, fiduciary, and otherwise confidential] relationships, include: (1) confidentiality is reasonably expected as a matter of custom and general understanding; (2) people part with private information in reliance on this expectation (in many cases, detrimentally changing their position in doing so); and (3) trust in the confidentiality of private information is necessary to make the relationship function properly.

Id. at 913.

[46] *Id.* at 917. McClurg argued that "consideration for the contract exists in the mutuality of the confidential agreement as well as in the broader emotional, physical, and other benefits each partner to an intimate relationship confers upon the other." *Id.*

[47] *Id.*

that the tacit understanding of the parties is: 'I'm sharing this with you because I expect you to keep it in confidence.'"[48]

Online relationships are not devoid of confidentiality cues, but such signs might be subtle or as of yet unrecognized by courts, even if they are clear to Internet users. As such, implied confidentiality online might require a more thorough analysis by courts. Patricia Sánchez Abril has explored how courts might recognize online cues such as privacy settings as indicia of expectations of privacy.[49] Indeed, virtually any aspect of website design or online interaction could be considered relevant in a finding of implied confidentiality.[50] Yet no literature has sufficiently addressed the next logical question: *How* should courts determine *which factors* contribute to an implied obligation of confidentiality online?

II. SEEKING ANSWERS IN THE LIFE OF IMPLIED CONFIDENTIALITY

It is unclear exactly how to determine when an implied confidence has been created and should be enforced. While courts and scholars have developed general rules for such a finding, such as "whenever a reasonable person would conclude an agreement of confidentiality was implied" or "whenever a fiduciary relationship exists," there is little explicit guidance beyond these often circular principles. Courts are largely left to their own devices and the facts of each dispute in determining whether a party was implicitly bound to confidence or whether an implied expectation of confidentiality was reasonable in any given circumstance.

This part helps remedy this dearth of analysis by investigating judicial consideration of context-relative informational norms in order to determine how implied obligations of confidentiality might be formed. Specifically, this part examines implied confidentiality disputes to determine precisely what courts consider important in the creation of

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[48] McClurg, *supra* note 4, at 917. Ultimately, McClurg still proposed the use of explicit confidentiality agreements between intimates because of the "difficulty in identifying the terms of an implied confidentiality contract between intimate partners…." *Id.* at 929.
[49]. Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1 (2007) (finding that online contexts lack the traditional privacy-preserving mechanisms of physical space such as locked doors and hushed voices to protect information). In addition to protecting privacy, such mechanisms can also serve as cues of implied confidentiality to recipients.
[50] *See, e.g.*, Woodrow Hartzog, *Website Design as Contract*, 60 AM. U.L. REV. 1635 (2011).

implied obligations of confidentiality. Because implied confidentiality is entirely dependent upon context, this article uses Helen Nissenbaum's theory of privacy as contextual integrity to frame the analysis.

1. A Theory of Context for Implied Confidentiality

Generally, courts look to context when analyzing implied obligations of confidentiality. Yet, the general rule that courts should consider "context" provides little guidance in specific disputes. A better framework is needed. This article uses the emerging theory of privacy as contextual integrity as a lens to analyze courts' treatment of online and offline implied obligations of confidentiality. Because confidentiality is generally considered a type of privacy,[51] this lens for privacy analysis is well-suited for analyzing questions about the context surrounding promises of confidentiality.

In short, the theory of privacy as contextual integrity is the theory that privacy violations occur when "context-relative informational norms" are not respected when sharing information.[52] According to its creator, Helen Nissenbaum, the framework of contextual integrity provides that "finely calibrated systems of social norms, or rules, govern the flow of personal information in distinct social contexts (e.g., education, health care, and politics)."[53] Nissenbaum stated that these norms "define and sustain essential activities and key relationships and interests, protect people and groups against harm, and balance the distribution of power."[54] Developed as a model of informational privacy, contextual integrity is defined by Nissenbaum as "compatibility with presiding norms of information appropriateness and distribution."[55] Specifically, Nissenbaum posited:

> [W]hether a particular action is determined a violation of privacy is a function of several variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information

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[51] *See* Daniel Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477 (2006).
[52] NISSENBAUM, CONTEXT, *SUPRA* NOTE 10, at 3.at 129.
[53] *Id.* at 3.
[54] *Id.*
[55] Nissenbaum, Integrity, *supra* note 10, at 155.

> subjects; on what terms the information is shared by the subject; and the terms of further dissemination.[56]

Nissenbaum has also referred to these variables simply as 1) contexts; 2) actors; 3) attributes; and 4) transmission principles.[57] Nissenbaum posited that context-relative informational norms are characterized by these variables, which "prescribe, for a given context, the types of information, the parties who are the subjects of the information as well as those who are sending and receiving it, and the principles under which this information is transmitted."[58] These four variables guide the analysis in this article regarding when and how courts consider implied obligations of confidentiality.

2. The Factors Important in Implied Confidentiality Disputes

Courts have decided a bevy of implied confidentiality cases. Yet they have left few explicit guidelines to show how they reached their decision and how future courts should analyze similar claims. The goal of this part is to dig deeper into the case law to ascertain what courts consider important in disputes involving implied obligations of confidentiality. Utilizing Nissenbaum's theory of contextual integrity as a guide, over 130 cases involving implied obligations of confidentiality were examined to determine how courts consider contextual informational norms in these disputes. The cases revealed that courts gave the most attention to context and the terms of disclosure. However, all four factors of informational norms were relevant to courts. These numbers reflect only cases in which a court expressly considered one of the factors and where the court's consideration was significant.[59] Each factor considered by the courts consisted of numerous smaller considerations. In aggregate, these considerations reflected trends in judicial decision-making.

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[56] *Id.*
[57] *Id.* at 140.
[58] *Id.* at 141.
[59] In a number of excluded cases, it was possible that one of the four factors influenced the judge's opinion, but because that consideration was not apparent, it was not included in the analysis. Additionally, in other excluded cases, courts expressly mentioned one or more of the four factors, but the factors did not appear to play a significant role in the legal analysis. For example, courts often would describe the job title of actors in disputes where the jobs held by the actors were largely immaterial to the implied confidentiality analysis. These cases also were not included in this article's analysis.

a. Context

The word context is defined as "circumstances in which an event occurs; a setting."[60] Because this definition is so broad, it is only minimally helpful when analyzing implied obligations of confidentiality. Nissenbaum defined contexts within her framework as "structured social settings characterized by canonical activities, roles, relationships, power structures, norms (or rules), and internal values."[61] However, this definition is also too broad for the purposes of this article because it can overlap with other aspects of Nissenbaum's theory.

A more specific definition is required to separate the term "context" from the other three factors in Nissenbaum's framework for contextual integrity. Thus, for the purposes of this article, context is defined as 1) the relationship between the actors to a disclosure or 2) any external circumstance affecting the actors to a disclosure, the nature of the information disclosed, or the terms of disclosure. By focusing on relationships and external circumstances instead of the intrinsic aspects of the actors, disclosed information, and terms of disclosure, the term "context" is different than the other three factors.

The cases revealed that courts routinely and explicitly rely on context when analyzing implied obligations of confidentiality. Over half of the case analyzed considered context relevant in analyzing claims of implied confidentiality. This analysis of context occurred in many different types of disputes, including breach of contract;[62] the breach of confidentiality tort;[63] fraud;[64] negligence;[65] breach of trade secret;[66] patent infringement;[67] failure to properly disclose information under FOIA;[68] and waiver of testimonial, evidentiary, and *Miranda* privileges.[69]

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[60] "Context," THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, http://education.yahoo.com/reference/dictionary/entry/context (last accessed March 12, 2011 11:47 am).
[61] NISSENBAUM, *SUPRA* NOTE 10, AT 132.
[62] *See, e.g.*, Givens v. Mullikin ex. Rel. Estate of McElwaney, 75 S.W.3d 383 (Tenn. 2002).
[63] *See, e.g.*, Humphers v. First Interstate Bank Oregon, 696 P.2d 527, 534 (Or. 1985).
[64] *See, e.g.*, Scott v. Kemp, 316 A.2d 883 (Pa. 1974).
[65] *See, e.g.*, Thomas v. State Emp. Grp. Benefits Prgm, 934 So.2d 753 (La. Ct. App. 2006).
[66] *See, e.g.*, RTE Corp. v. Coatings, Inc., 267 N.W.2d 226 (Wis. 1978).
[67] *See, e.g.*, Diodem, LLC v. Lumenis Inc., 2005 WL 6220720 (C.D. Cal.).
[68] *See, e.g.*, Council on American-Islamic Relations, Cal. v. FBI, 2010 WL 4024806 (S.D. Cal).

All but a scant few of these cases involved offline instead of online disputes. Although an overwhelming majority of the cases were not related to the Internet, the courts' logic and analysis of implied obligations of confidentiality could be applied to online disputes.

Relationship Between the Parties. The nature of the relationship between the parties is one of the most important contextual factors used to analyze a claim for implied confidentiality.[70] Courts consistently found that *long-standing, developed relationships* were likely to give rise to an implied obligation of confidentiality because a developed relationship likely involves trust and custom.[71] To courts, implied expectations of confidentiality were more plausible in developed relationships,[72] unequal bargaining power[73] could inhibit the ability of vulnerable parties to explicitly request confidentiality, and relationships formed in pursuit of a common goal required confidentiality to be effective.[74] The courts' keen attention to vulnerability has yet to be as rigorously applied in most online environments.

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[69] *See, e.g.*, WBAI-FM v. Proskin, 42 A.D.2d 5 (N.Y. App. Div. 1973).
[70] *See, e.g.,* Roth v. U.S. Dept. of Justice, 656 F. Supp. 2d 153, 165 (D.D.C. 2009) (finding that "[c]ircumstances that may indicate implied confidentiality include…the informant's relationship with the agency….") (citing U.S. Dept. of Justice v. Landano, 508 U.S. 165, 179 (1993)).
[71] *See, e.g.,* Meyer v. Christie, 2007 WL 3120695 at *4 (D. Kan.) (finding that a bank's privacy policy promising confidentiality resulted in a binding contract where, among other things, the plaintiff "has a long-term banking business and banking relationship with [one of the defendants]."). Additionally, courts were more amendable to claims of implied confidentiality where the party requesting or relying on confidentiality did not have equal bargaining power with the recipient of the information. *See, e.g.,* L-3 Comm. Corp., v. OSI Sys., Inc., 2008 WL 2595176 at *5 (2d Cir.).
[72] *See, e.g.,* Ecolaire v. Crissman 542 F. Supp. 196, 207 (E.D. Pa. 1982) (noting in a trade secret dispute that noted that an employee's position as vice president "gave him access to numerous pre-existing trade secrets" and, as a result, an implied duty of non-dislcosure).
[73] *See, e.g.,* Paul v. Aviva Life and Annuity Co., 2010 WL 5105925 at *9 (N.D. Tex.)(citing Martin v. State Farm Mut. Auto. Ins. Co., 808 N.E.2d 47, 52 (Ill. Ct. App. 2004)); *Fischer,* 115 F. Supp. 2d 535, 543 (D. Md. 2000) (noting the general rule that "an implied duty of confidentiality exists in circumstances where the parties deal on unequal terms, the transaction is more than an arm's length deal, and one party trusts and relies on the other."); Hogan v. D.C. Comics, 1997 WL 570871 at *5 (N.D.N.Y.) (citing case law stating "'[a] confidential or fiduciary relationship exists between parties 'where the parties do not deal on equal terms and one trusts and relies on the other.'") (citations omitted).
[74] *See, e.g.,* Farris v. Enberg, 97 Cal. App. 3d 309, 323 (Cal. Ct. App. 1979) (stating that that among the factors from which a confidential relationship can be inferred is "proof of a particular relationship such as partners, joint adventurers, principal and agent or buyer and seller under certain circumstances."); Fail-Safe v. A.O. Smith, 2010 WL 3503427 at

The Internet and even the social web have existed long enough for Internet users to form developed relationships, both with websites and each other. Consider the average online community, such as a topic-specific message board or community weblog like the popular website Metafilter.[75] Active since 1999, users of this tech-friendly community have developed long-standing relationships with each other and the website itself, which seemingly has no standard mandatory terms of use agreement.[76] Evidence of these developed relationships and the norms that govern them could be explored in disputes involving assertions of implied obligations of confidentiality.

Custom. One of the most important aspects of an implied obligation of confidentiality is that the discloser and recipient of information ***knew or should have known*** that the information was ***disclosed in confidence***. For this reason, courts considered custom a very significant factor in analyzing implied obligations of confidentiality.[77] If confidentiality was a regular and accepted practice in a given context,

*22 (E.D. Wis.) (observing that a joint business venture between the parties "by its very nature implied that disclosures made in the context of such an arrangement were confidential."); Cloud v. Standard Packing Corp., 376 F.2d 384, 389 (7th Cir. 1967) (stating that "[w]here the facts show that a disclosure is made in order to further a particular relationship, a relationship of confidence may be implied…."); RTE Corp. v. Coatings, Inc., 84 Wis. 2d 105, 199-20 (Wis. 1978) (stating that "a relationship of confidence may be implied when a disclosure is made solely for the purpose of advancing or implementing an existing special relationship."); Carpenter Foundation v. Oakes, 26 Cal. App. 3d 784, 789, 798 (Cal. Ct. App. 1972) (stating, "[W]e have no difficulty in finding a fiduciary relationship established not only by reason of the agency created in the operation of the [non-profit's satellite branch], but also by virtue of the long, intimate, personal friendship" between the president of the corporation and the defendant, a former employee."

[75] METAFILTER, http://www.metafilter.com/ (last accessed April 26, 2012).

[76] Noor Ali-Hasan, *MetaFilter: An Analysis of a Community Weblog* (Apr. 20, 2005), http://www.nooratwork.com/pdf/ali-hasan_metafilter.pdf.

[77] *See* Bergin v. Century 21 Real Estate Corp., 2000 WL 223833 at *2, *4 (S.D.N.Y.); Vantage Point v. Parker Bros., 529 F. Supp. 1204, 1217-18 (1981) (Markogianis v. Burger King Co., 1997 WL 167113 (S.D.N.Y.) (noting that "[i]ndustry custom can create an implied-in-fact contract between the parties…."); Prescott v. Morton Int'l, Inc., 769 F. Supp. 404, 410 (D. Mass. 1990) (holding that a genuine issue of material fact exists "as to whether the parties' conduct would lead a reasonable person in the industry to infer that Morton promised not to use the information in the design plans without authorization."); Metrano v. Fox Broadcasting, 2000 WL 979664 (C.D. Cal.) (recognizing that, if proven, the television industry's practice of implied confidentiality in all pitch meetings supported a plaintiff's claim for breach of confidence); Moore v. Marty Gilman, 965 F. Supp. 203 (1997) (detailing detailed the importance of customs in implied confidential relationships that are necessary to protect a trade secret).

courts often found a discloser's reliance on that custom reasonable. This reliance was reasonable because the common knowledge of a custom made it likely that the recipient of the information was aware of an expectation of confidentiality before the information was disclosed, or, in any event, the recipient should have known to keep the information confidential.

Courts found two types of customs important: ***party customs*** and ***industry customs***. Courts were likely to find an implied obligation of confidentiality for parties if they offered or required confidences in previous, similar contexts.[78] Industry customs of confidentiality, most commonly found in intellectual property disputes, were important to courts if confidentiality was a commonly accepted practice in any given industry, though not necessarily the custom of the parties currently requesting or being charged with an obligation of confidentiality. A custom of confidentiality should be firmly established to be legally binding.[79]

The growth of ecommerce would seem to pave the way for industry and party norms of confidentiality and privacy. Indeed, some websites explicitly tout their common practice of "never selling or sharing information with third parties."[80] Although these statements appear

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[78] *See, e.g.,* Moore v. Marty Gilman, Inc., 965 F. Supp. 203, 214 (D. Mass. 1997) (citing Burten v. Milton Bradley Co., 592 F. Supp. 1021, 1027 (D.R.I. 1984) (noting that in previous cases, a business's adherence to an industry custom of confidentiality was a key point in determining whether an implied confidential relationship exists); *cf* Mass. Inst. of Tech. v. Harman Int'l. Indus., 584 F. Supp. 2d 297, 304-05 (D. Mass. 2008) (finding no implied obligation of confidentiality where, among other things, the researchers "failed to support the notion that there is a 'recognized culture that would preclude, or at least inhibit, most of the participants in the field tests from disclosing information…to others.'").

[79] Fischer v. Viacom, 115 F. Supp. 2d 535, 544 (D. Md. 2000) (observing that the "commonplace give-and-take between those who 'pitch' ideas and those who listen and consider" was not enough of a custom to give rise to a duty of confidentiality); [79] Star Patrol Enter. v. Saban Entm't, Inc., 1999 WL 683327 (9th Cir) (finding that "[p]roper and competent proof of an industry custom and usage which created an obligation on the part of the defendants might form part of the [circumstances that can demonstrate voluntary acceptance of confidentiality.]" *Id.* at *1; Markogianis v. Burger King Corp., 1997 WL 167113 at *5 (S.D.N.Y.) (holding that "[i]ndustry custom can create an implied-in-fact contract between the parties, resulting in a requisite legal relationship needed to support a misappropriation claim.").

[80] *See, e.g.,* CBS NEWS, *Mark Zuckerberg and Facebook: What's Next?,* http://www.cbsnews.com/2100-18560_162-7108060.html (quoting Facebook founder

outside the language of the websites' privacy policies, it seems that such statements of company practices would count as evidence of a party custom (and in the aggregate, perhaps an industry custom) of implied confidentiality.

Negotiation. Courts had varying opinions on how negotiations should impact an inference of confidentiality. Some courts opined that a lack of negotiation reflected an absence of the "meeting of the minds" necessary for true agreement between the parties.[81] Other courts looked to whether the parties were negotiating at "arm's-length," defined as "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship."[82] For courts, "arms-length negotiations" tended to serve as evidence of ample opportunity to explicitly request confidentiality, with the implication that the failure to exploit that opportunity meant that an implied obligation of confidentiality was unlikely.[83]

Mark Zuckerberg as stating "We never sell your information. Advertisers who are using the site never get access to your information.).

[81] Meyer v. Christie, 2007 WL 3120695 at *5 (D. Kan.) (finding that "the terms of the manual were not bargained for by the parties….No 'meeting of the minds' occurred.'").

[82] ARM'S-LENGTH, BLACK'S LAW DICTIONARY (9th ed. 2009).

[83] *See, e.g.,* Fischer v. Viacom Int'l, Inc., 115 F. Supp. 2d 535, 544 (D. Md. 2000) (finding that "[r]ather than establishing a relationship of trust and confidentiality….[plaintiff] merely contacted [defendant] and asked to keep 'the details of the series on file'" with no explicit promise of confidentiality). The court found it important to describe the fact that "[t]hese alleged facts describe the parties acting at arm's length, with no prior dealings, no promise of confidentiality, and no employment or personal relationship that could give rise to a duty of trust." *id; see also* Vantage Point, Inc. v. Parker Brothers, Inc., 529 F. Supp. 1204, 1218 (E.D.N.Y. 1981) (finding that the creation of a confidential relationship would be "unduly burdensome and unwarranted in policy where the sole contract between the parties has been the arms-length submission of an idea."); Star Patrol Enter., Inc. v. Saban Entm't., Inc., 1997 WL 683327 at *2 (9th Cir.) (stating that "[a]n action for breach of confidential relationship would fail because the arms-length business relationship between Star Patrol and the defendants is insufficient to impose fiduciary-like duties that arise from a confidential relationship."); Ranger Enter., Inc. v. Leen & Assoc., Inc., 1998 WL 668380 at *6 (9th Cir.). Failed negotiations for confidentiality were also relevant to some courts because they indicated that an implied obligation of confidentiality was likely. *See, e.g.,* L-3 Comm. Corp., v. OSI Sys., Inc., 2008 WL 2595176 at *5 (2d Cir.) (finding that no obligation of confidentiality existed in an intellectual property dispute where the plaintiff could have, but failed to, insist upon "explicit contract terms providing that L-3 would act in a fiduciary capacity."); Omintech Intern., Inc. v. Colorox Co., 11 F.3d 1316, 1331 (5th Cir. 1994) (finding that no confidential relationship existed in a trade-secret dispute where, among other things, the parties "had only an arms-length business

It would be difficult to characterize the standard adhesive terms of use that are proposed by websites to users as open to negotiation. However, to the extent an actual agreement exists between Internet users, those who are more likely to be negotiating at arms-length and who are not on close terms and have similar bargaining power would likely find these factors weigh against a finding of implied confidentiality. For example users of the popular online classifieds on the website Craigslist are often strangers engaging in discrete or "one time only" transactions with each other and can easily negotiate for confidentiality as part of their agreement if they so desire. Thus, if they fail to do so, a court might be hesitant to find that confidentiality was implied. Note that a different analysis might apply to users who are on closer terms or involved in more developed relationships.

Timing of the Disclosure. The timing of the disclosure of information was significant for courts, as they were loathe to imply confidentiality when disclosures ***occurred before*** a promise of confidentiality was made or before a substantive relationship was formed.[84] By focusing on timing, the courts seem to be trying to ensure

relationship" and "the parties vigorously negotiated the instruments already executed."); Young Design v. Teletronics, 2001 WL 35804500 at *5 (E.D. Va.) (finding no implied confidential relationship where the plaintiff "did not require [the defendant] to sign non-disclosure agreement of any kind" and the fact that there was no evidence the plaintiff "probed…for any explicit commitment to keep the technology confidential" after the defendant refused to sign a non-disclosure agreement during a business meeting); Fail-Safe v. A.O. Smith, 2010 WL 3503427 at *21 (E.D. Wis.) (finding no implied confidential relationship where plaintiff willingly agreed to a confidentiality agreement that protected [the defendant's] proprietary information, but did nothing to protect [its own] information provided an obvious signal to [the defendant] that [the plaintiff] 'knew how to ask that information be considered confidential if it really thought the company's crown jewels were at risk.'").

[84] *See, e.g.,* Vantage Point v. Parker Brothers, 529 F. Supp. 1204 (E.D.N.Y. 1981) (stating that "the mere voluntary act of submitting an idea to one with whom the plaintiff has had no prior dealings will not make the disclosure one in confidence, even if stated to be so. A person may not 'by his gratuitous and unilateral act,…impose upon another a confidential relationship.'") (citations omitted); Klekas v. EMI Films, Inc., 150 Cal. App. 3d 1102 (Cal. Ct. App. 1984); Enberg v. Syndicast Serv., Inc., 97 Cal. App. 3d 309, 323-24 (Cal. Ct. App. 1979); Keane v. Fox Television Stations, Inc. 297 F. Supp. 2d 921, 942 (S.D. Tex. 2004) ("The 'idea man who blurts out his idea without having first made his bargain'—whether in a so-called sales packet, Internet postings, or discussions with family members and callow undergraduate students – 'has no one but himself to blame for the loss of bargaining power.'"; Learning Curve Toys, LLC v. Playwood Toys, Inc., 1998 WL 46894 (N.D. Ill.) (referencing testimony that supported the fact that the parties "arrived at a confidentiality agreement prior to sharing information with each other"); Kleck v. Bausch & Lomb, Inc.,

that the recipient of the information had the opportunity to either decline confidentiality or refrain from entering into a relationship with confidentiality obligations. Courts will not imply confidentiality unilaterally. A promise of confidentiality or decision to enter into a confidential relationship must be voluntary by both parties.[85]

Purpose of the Disclosure. Courts regularly looked to the purpose of the disclosure of information to determine if an implied obligation of confidentiality existed.[86] Courts considered disclosures

145 F. Supp. 2d 819, 824 (W.D. Tex. 2000); Smith v. Snap-On Tools, 833 F.2d 578, 581 (5th Cir. 1988) ("Reliance on confidentiality, however, must exist at the time the disclosure is made. An attempt to establish a special relationship long after an initial disclosure comes too late."); Metrano v. Fox Broad. Co., 2000 WL 979664 at *7 (C.D. Cal. 2000) (finding that "[n]othing in the pleadings suggests that plaintiff communicated to defendant the requirement of confidentiality before the presentation"); RTE Corp. v. Coatings, Inc., 84 Wis. 2d 105, 119 (Wis. 1978) (finding that "[t]he contract clause came too late to protect the confidentiality of the drawing, which had been disclosed at an earlier time"); Holloman v. O. Mustad & Sons (USA), Inc., 196 F. Supp. 2d 450, 460 (E.D. Tex. 2002) (finding that no confidentiality obligation existed where the plaintiff admitted to revealing a trade secret to others for testing purposes without first entering into non-disclosure agreements with those people); Hoeltke v. C.M. Kemp Mfg. Co., 80 F.2d 912, 923 (4th Cir. 1935); *but cf,* Landsberg v. Scrabble Crossword Game Players, 736 F.2d 485, 490 (9th Cir. 1984) (finding that a disclosure might have been made in confidence even if the disclosure preceded any conduct on the recipient's part indicating the existence of an implied-in-fact contract).

[85] *See, e.g.,* Innospan Corp. v. Intuit, Inc., 2011 WL 856265 at *6 (N.D. Cal.) (stating that "[i]t is trickery to send an unsolicited business plan to someone the sender thinks is a potential business investor and then to foist confidentiality duties on that recipient without his agreement in advance"); Klekas v. EMI Films, 150 Cal. App. 3d 1102, 1114 (Cal. Ct. App. 1984) (""the plaintiff must show, [among other things], that under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered (i.e. the offeree must have the opportunity to reject the attempted disclosure if the conditions were unacceptable)…."); *see also* Star Patrol Enter. v. Saban Entm't, Inc., 1997 WL 683327 at *1 (9th Cir.).

[86] *See, e.g.*, Carpenter Found. v. Oakes, 26 Cal. App. 3d 784, 798 (Cal. Ct. App. 1972) (finding that a fiduciary confidential relationship existed where, among other things, the purpose of the disclosure of sensitive information was clearly to advance a relationship in which the recipient was to inform a restricted group of students); Zippertubing Co. v. Teleflex Inc., 757 F.2d 1401, 1408 (3d Cir. 1985) (finding that an implied duty of confidentiality existed where, among other things, the only purpose of a disclosure of confidential information was to facilitate a business relationship and procurement of services); RTE Corp. v. Coatings, Inc., 84 Wis. 2d 105, 119-20 (Wis. 1978) (stating, "[I]t is true that a relationship of confidence may be implied when a disclosure is made solely for the purpose of advancing or implementing an existing special relationship."); Omitech Intern., Inc., v. Clorox Co., 11 F.3d 1316, 1331 (5th Cir. 1994); Cloud v. Standard Packaging Corp., 376 F.2d 384, 388-89 (7th Cir. 1967).

made in order to promote a common goal or further develop the relationship as evidence of an implied obligation of confidentiality.[87] Courts seemed to recognize that if ***confidentiality is necessary to encourage disclosure*** or if it is ***necessary for any given disclosure to be effective***, then an inference of confidentiality is more reasonable than it is in relationships where confidentiality seems unnecessary.[88]

There is no more paradigmatic example of this factor than disclosing deeply personal information for purposes of therapy or diagnosis. The relevant cases recognize this fact, which is equally applicable online. Internet users regularly turn to websites and online disclosures as a way to seek therapeutic help from peers and professionals. For example, the Online Intergroup of Alcoholics Anonymous considers confidentiality imperative to its mission to help alcoholics recover through shared stories of their experiences and struggles.[89]

Solicitation. Some courts analyzing a claim for implied confidentiality considered whether and how information was solicited although no court considered this factor as solely determinative.[90]

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[87] *See, e.g.,* MacDonald v. Clinger, 84 A.D.2d 482 (N.Y. Ct. App. 1982); Doe v. Roe, 93 Misc. 2d 201, 210-11 (N.Y. Gen. Term 1977) (finding that in the dynamics of psychotherapy "[t]he patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature....He is expected to bring up all manner of socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts – in short, the unspeakable, the unthinkable, the repressed.'").

[88] *See, e.g.,* Sentinel Products v. Mobil Chemical, 2001 WL 92272 at * 12 (D. Mass) (that "'where the facts demonstrate that a disclosure was made in order to promote a specific relationship, e.g. disclosure to a prospective purchaser to enable him to appraise the value of the secret, the parties will be bound to receive the information in confidence.'"); Knapp Schenk v. Lancer Management, 2004 WL 57086 (D. Mass).

[89] Online Intergroup of Alcoholics Anonymous, *Anonymity & Privacy,* http://www.aa-intergroup.org/privacy.php (last accessed April 26, 2012).

[90] *See, e.g.,* Moore v. Marty Gilman, 965 F. Supp. 203, 215 (D. Mass. 1997) (finding in a claim for breach of implied confidentiality that "[d]efendants did not solicit plaintiffs or do anything to foster the impression that it was their regular practice to seek out and buy ideas of others"); Meyer v. Christie, 2007 WL 3120695 at *4 (D. Kan.); Jackson v. LSI Industries, Inc., 2005 WL 1383180 at * 3 (M.D. Ala.) (finding in a claim for breach of implied contract for confidentiality and a promise to pay for an idea that "[i]f Defendant is requesting that the Plaintiff disclose his idea, most Courts will find that such requests or solicitation implies a promise to pay for the idea, if the Defendant uses it."); Enberg v. Syndicast Serv., Inc., 97 Cal. App. 3d 309, 323-24 (Cal. Ct. App. 1979) (stating that "[w]e

Instead, it was seen as one of many factors relevant in their analysis.[91] Courts seemed to deduce that solicited information was more likely more sensitive than unsolicited disclosures and, as a result, this information was more likely to be seen as being implicitly disclosed in confidence. Or, perhaps courts felt more comfortable placing the onus of rebutting an inference of confidentiality on those who solicit information.[92]

This consideration is relevant online as a variety of merchants and software vendors solicit information, often for reasons unrelated to the purpose of their featured good or service.[93] For example, if a gaming application for a smartphone asks to collect and use GPS location data, the fact that the information was solicited rather than voluntarily offered might play into whether the app developer is subject to an implied obligation of confidentiality.

Public Policy. Some courts explicitly considered public policy when analyzing implied confidentiality disputes. Public policy was less important in disputes involving implied-in-fact agreements for confidentiality than it was in what courts referred to as implied-in-law

do not believe that the unsolicited submission of an idea to a potential employee or potential business partner…presents a triable issue of fact for confidentiality.").

[91] *See, e.g.,* DPT Lab., LTD. v. Bath & Body Works, Inc., 1999 WL 33289709 (W.D. Tex.) (finding that "confidentiality may be implied when the recipient actively solicits the disclosure."); Phillips v. Frey, 20 F.3d 623, 632 (5th Cir. 1994); Smith v. Dravo Corp., 203 F.2d 369, 376 (7th Cir. 1953); Research, Analysis & Dev., Inc., v. United States, 8 Cl. Ct. 54, 56 (Cl. Ct. 1985) (finding that although unsolicited data was disclosed, an implied-in-fact contract of confidentiality was formed on other factors such as preexisting laws governing confidential disclosure to the government); Smith v. Snap-On Tools, 833 F.2d 578, 580 (5th Cir. 1987) ("When a manufacturer has actively solicited disclosure from an inventor, then made use of the disclosed material, the manufacturer may be liable for use or disclosure of the secret in the absence of any expressed understanding as to confidentiality.").

[92] Those who solicit information as part of a transaction have the power to shape their offer and, as a result, are in better position to explicitly dispel any notion of confidentiality. The absence of solicitation was also seen as a significant factor by courts. Courts typically found that unsolicited disclosures did not support a finding of implied confidentiality. *See, e.g., Smith*, 833 F.2d at 580 (finding that there is no implied confidential relationship where plaintiff "disclosed the invention of his own initiative…[and] without discussing pecuniary recompense for his suggestion"); Moore v. Marty Gilman, 965 F. Supp. 203, 215 (D. Mass. 1997); Rogers v. Desa Int'l, Inc., 183 F. Supp. 2d 955, 957 (E.D. Mich. 2002) (emphasizing the unsolicited nature of the disclosed information in rejecting a claim for implied confidentiality).

[93] *See* PRIVACYSCORE, http://www.privacyscore.com/ (last accessed May 2, 2012).

agreements and fiduciary relationships.[94] Public policy was invoked when the dynamics of a particular relationship were such that justice demanded it, not when there was a mutual agreement of confidentiality between the parties.[95]

b. Nature of the Information

While all obligations of confidentiality involve the disclosure of information, not all information is the same. Some information is very sensitive, such as intimate sexual thoughts and health-related information. Other information is mundane and uninteresting, such as an individual's daily routine. Some information is completely public, like the price of goods and services. Other information is proprietary, secret, or both, such as a company's trade secrets. This section analyzes how the nature of information, which can vary greatly, can affect the judicial analysis of implied obligations of confidentiality.

Within her framework, Nissenbaum sometimes referred to the nature of information as the "attributes of the information" or "information types."[96] According to Nissenbaum, the nature of the information concerns what the information was about, or, as James Rachels has put it, "the kind and degree of knowledge."[97] The concept of "the nature of the information" is expansive. It seems virtually impossible to create an exhaustive taxonomy for the category.[98] Thus, the goal of this

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[94] *See, e.g.,* Doe v. Roe, 93 Misc. 2d 201, 214 (N.Y. Gen. Term. 1977); MacDonald v. Clinger, 84 A.D.2d 482, 484 (N.Y. Ct. App. 1982); Ghayoumi v. McMillan, 2006 WL 1994556 (Tenn. Ct. App.); Alsip v. Johnson City Medical Center, 197 S.W.3d 722, 726 (Tenn. 2006) (observing that that the covenant of confidentiality between physicians and patients "arises not only from the implied understanding of the agreement between the patient and the doctor, but also from a policy concern that such private and potentially embarrassing information should be protected from public view.") (citations omitted).

[95] Metrano v. Fox Broad. Co., Inc., 2000 WL 979664 (C.D. Cal.) (holding that "[a]n action for breach of confidence 'is not based upon apparent intentions of the involved parties; it is an obligation created by law for reasons of justice' and 'where in fact the parties made no promise.'") (citations omitted). The court further specified that "a breach of confidence claim is not limited to circumstances were a fiduciary relationship exists between the parties."). *Id.*

[96] NISSENBAUM, *SUPRA* NOTE 10,. AT 143.

[97] *Id.* (quoting James Rachels, *Why Privacy is Important,* 4(4) PHIL. & PUBLIC AFFAIRS 323, 371 (1975)).

[98] Indeed, Nissenbaum did not even define the "nature of the information," stating:

> Those who may be expecting a precise definition of information type or attribute will be disappointed, for I rely throughout on an intuitive

section is simply to identify which attributes had a noticeable impact on the courts' decisions.

The cases revealed that courts regularly and often explicitly relied on the nature of the information when analyzing implied obligations of confidentiality.[99] Judicial analysis of the nature of the information occurred in many different types of disputes, including suits involving banking relationships,[100] implied covenants of confidentiality in medical-care contracts,[101] trade secret misappropriation,[102] patent ownership and infringement,[103] requests for information under the Freedom of Information Act,[104] and general contract and business-related disputes.[105] The cases revealed that, consistent with the courts' consideration of context, courts tended to find implied obligations of confidentiality in situations involving information that, if disclosed, could harm a vulnerable party. Courts also seemed to protect information that intrinsically could be expected to remain confidential, which is another trait of sensitive and proprietary information. Finally, courts seemed to

> sense, assuming that it is as adequate for the explication of contextual integrity as for many important practices and polices successfully managed in society with nothing more. One need look no further than the endless forms we complete, the menus we select from, the shopping lists we compile, the genres of music we listen to…and the terms we submit to search engines to grasp how at ease we are with information types and attributes…. In general, attribute schemes will have co-evolved with contexts and not be readily accessible to fixed and finite representations.

Id. at 144. Nissenbaum noted this problem herself when she stated that the concept of the nature of the information "recognizes an indefinite array of possibilities." *Id.*

[99] *See, e.g.,* Resnick v. Resnick, 1990 WL 164968 at *7 (S.D.N.Y.).

[100] Resnick v. Resnick, 1990 WL 164968 (S.D.N.Y.); Twiss v. New Jersey, 591 A.2d 913 (N.J. 1991); Graney Dev. Corp. v. Tasken, 92 Misc. 2d 764 (N.Y. Gen. Term. 1978); McGuire v. Shubert, 722 A.2d 1087 (Penn. 1998).

[101] Alsip v. Johnson City Medical Center, 197 S.W.3d 722 (Tenn. 2006); MacDonald v. Clinger, 84 A.2d 482 (N.J. Sup. Ct. Ch. Div.1982); Doe v. Roe, 93 Misc. 2d 201 (N.Y. Gen. Term. 1977).

[102] Rogers v. Desa Int'l, Inc., 183 F. Supp. 2d 955 (E.D. Mich. 2002); Daily Int'l Sales Corp. v. Eastman Whipstock, Inc., 662 S.W.2d 60 (Tex. Ct. App. 1983).

[103] FMC Corp. v. Guthery, 2009 WL 485280 (D.N.J.); Google, Inc. v. Traffic Info., LLC, 2010 WL 743878 (D. Or.); Diodem, LLC v. Lumenis, Inc., 2005 WL 6220720 (C.D. Cal.).

[104] Wildearth Guardians v. U.S. Forest Serv., 713 F. Supp. 2d 1243 (D. Colo. 2010); Council on American-Islamic Relations, Cal. v. FBI, 2010 WL 4024806 (S.D. Cal); Roth v. U.S. Dept. of Justice, 656 F. Supp. 2d 153, 165 (D.D.C. 2009).

[105] Smith v. Dravo Corp., 203 F.2d 369 (7th Cir. 1953); Faris v. Enberg, 97 Cal. App. 3d 309 (Cal. Ct. App. 1979).

recognize that an inference of confidentiality was much more reasonable when the disclosed information intrinsically evoked a heightened sense of *gravitas* in the recipient.

Secret Information. Courts placed great significance on whether the information disclosed was a secret. For the purposes of this analysis, a secret is defined as "[s]omething kept hidden from others or known only to oneself or to a few."[106] Many of the cases in which secrecy was a relevant factor in a claim for implied confidentiality were disputes involving trade secrets. Part of the reason courts considered secrets important in these disputes is that information must be generally unknown or the owner must have attempted to protect the information in order for it to be eligible for trade secret protection.[107] In determining whether information was adequately protected, courts often were asked to determine if an agreement of implied confidentiality was reasonable in a given context.[108] This is particularly true when dealing with ideas that were pitched to potential investors or businesses.[109]

Highly Personal Information. Some courts considered highly personal information an important factor in the creation of an implied obligation of confidentiality. Highly personal information seemed to be most significant to courts when dealing with health-related

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[106] *Secret*, AMERICAN HERITAGE DICTIONARY (May 10, 2011), http://education.yahoo.com/reference/dictionary/entry/secret. It is important to differentiate the concept of secrecy from the larger concept of privacy, which includes secrets as well as other concepts such as control over information, blackmail, and the right to make decisions about one's body and family. In distinguishing between secrets and private information, the Supreme Court of Oregon stated in *Humphers v. First Interstate Bank of Oregon,* "Secrecy involves intentional concealment. 'But privacy need not hide; and secrecy hides far more than what is private.'" 696 P.2d 527 (Or. 1985) (quoting SISSELA BOK, SECRETS 11 (1983)); *see also* DANIEL SOLOVE & PAUL SCHWARTZ, INFORMATION PRIVACY LAW 1 (2009).

[107] *See, e.g.,* Keane v. Fox Television Stations, Inc., 297 F. Supp. 2d 921 (S.D. Tex.2004) ("The critical threshold requirement for pursuing [a claim for misappropriation of a trade secret or misappropriation of an idea] is secrecy/confidentiality.").

[108] *See, e.g.,* Universal Reinsurance Co. LTD., v. St. Paul Fire and Marine Ins. Co., 1999 WL 771357 at *10 (S.D.N.Y.); Diodem, LLC v. Lumenis Inc., 2005 WL 6220720 at *10 (C.D. Cal.) (analyzing how secret information was for purposes of an implied obligation of confidentiality in the context of a patent dispute); Williams v. Coffee County Bank, 308 S.E.2d 430 (Ga. Ct. App. 1983).

[109] Torah Soft LTD. v. Drosnin, 2001 WL 1425381 (S.D.N.Y) (finding no implied confidentiality where an idea was disclosed in a letter to others besides the alleged confidant.).

information.[110] However, the courts' logic could extend to any personal information such as intimate thoughts or conversations, embarrassing personal facts, or even financial information.[111]

It appears that when considering obligations of confidentiality that were implied-in-fact, courts looked at whether the sensitive nature of the information would serve as a signal to the recipient that the information was disclosed in confidence.[112] This is because implied-in-fact obligations are based on the understanding between the parties. Here social norms can play a large role in determining whether an implied obligation of confidentiality was reasonable or likely.[113]

Highly personal information is shared online for various purposes. Much of this disclosure is intended for a closed group and, although it

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[110] *See, e.g.,* Alsip v. Johnson City Medical Center, 197 S.W.3d 722 (Tenn. 2006) (recognizing an implied covenant of confidentiality in medical-care contracts between physicians and their patients due to the intimate nature of the information shared within the relationship); MacDonald v. Clinger, 84 A.D.2d 482, 484-46 (N.Y. Ct. App. 1982); Crippen v. Charter Southland Hosp., Inc., 534 So. 2d 286 (Ala. 1988).

[111] Overstreet v. TRW Commercial Steering Division, 256 S.W.3d 626 (Tenn. 2008); Doe v. Roe, 93 Misc. 2d 201, 210 (N.Y. Gen. Term. 1977). (observing that implied covenants of confidentiality are particularly important and neessary for the psychiatric relationship, for in the dynamics of psychotherapy "[t]he patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature.... He is expected to bring up all manner of socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts – in short, the unspeakable, the unthinkable, the repressed.") (citing Marvin S. Heller, *Some Comments to Lawyers on the Practice of Psychiatry*, 30 TEMP. L. REV. 401, 405-406 (1957));Twiss v. Dept. of Treasury, Office of Financial Mgmt., 591 A.2d 913, 919-20 (N.J. 1991) (recognizing that New Jersey has recognized an implied obligation of confidentiality in bank records); Const. Defense Fund v. Humphrey, 1992 WL 164734 (E.D. Pa.) ("The general view...is that a bank has an implied contractual duty of confidentiality and can be held liable to its customer for disclosing information on the customer's accounts without the customer's consent or other justification."); McGuire v. Shubert, 722 A.2d 1087, 1090-91 (Penn. 1998) ("Based on common law principles of contract and agency, a number of jurisdictions have held that a bank has an implied contractual duty, as a matter of law, to keep financial information concerning a depositor confidential.").

[112] *See, e.g.,* Wildearth Guardians v. U.S. Forest Serv., 713 F. Supp. 2d 1243 (D. Colo. 2010) ("'[T]he texts of the emails undermine any implication that the documents were meant to be protected by a [confidential] privilege.'").

[113] Courts seemed to reason that sensitive information was more likely than non-sensitive information to have been disclosed according to an implicit promise of confidentiality. The rationale for this logic is that the recipient would or should have realized that sensitive information is routinely disclosed in confidence, thus an express promise of confidentiality need not be made. Instead, as a matter of course, it is reasonable to expect and rely on implied confidentiality when disclosing sensitive information.

leaves the discloser vulnerable, is shared for various benefits. Consider the online community "Veteran's Children," a group for the children of war veterans whose purpose is to "serve as a resource for healing and a forum for sharing services."[114] It is likely that much of the information shared within this community is highly personal, which would likely be part of the calculus in determining of the other members of the community were bound to an implied obligation of confidentiality.

Proprietary or Useful Information. Some courts considered the proprietary and useful nature of information when determining whether implied obligations of confidentiality existed.[115] Proprietary information was information individuals and business considered to be their property. Useful information was any information that had a utility for individuals and organizations and was typically commercial in nature. Much like with sensitive information, the disclosure of proprietary information can serve as a signal to recipients of the information that the disclosure is expected to be confidential. Specifically, in commercial settings, courts seemed to hold that proprietary and useful information was likely to be disclosed via an implied obligation of confidentiality. [116]

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[114] VETERAN'S CHILDREN, http://www.veteranschildren.com/wordpress/ (last accessed April 26, 2012).

[115] *See, e.g.,* Sentinel Prod. Corp. v. Mobil Chem. Co., 2001 WL 92272 (D. Mass.) (finding that an implied confidential relationship could exist where one business received information about a product from a potential seller with knowledge that the product was eligible for patent protection and reason to know that the seller was disclosing a trade secret); Research, Analysis, & Dev., Inc. v. United States, 8 Cl. Ct. 54 (Cl. Ct. 1985) (referencing the propriety nature of plaintiff's information in finding that an implied-in-fact contract existed prohibiting the Air Force from disclosing the plaintiff's proposal regarding aerospace research and development); Prescott v. Morton Int'l., Inc., 769 F. Supp. 404 (D. Mass. 1990) (finding that a genuine issue of material fact existed as to whether an implied-in-fact contract of confidentiality existed where the discloser of information made the proprietary nature of the information clear to the recipients); Kleck v. Bausch & Lomb, Inc., 145 F. Supp. 2d 819, 824 (W.D. Tex. 2000) ("[T]he great weight of authority requires that an idea be novel before it will be protected under a breach of confidence or other quasi-contractual theory."); Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 300 (2d Cir. 1986) (finding that "New York law implied a requirement that 'when one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent'").

[116] 80 F.2d 912 (4th Cir. 1935); *cf* Densey v. Wilder, 46 Cal. 2d 715, 739 (Cal. 1956) ("The law will not imply a promise to pay for an idea from the mere fact that the idea has been conveyed*, is valuable*, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue.") (emphasis added).

Many of these courts focused on, among other things, the signaling effect of the valuable and proprietary nature of the disclosed information in order to find an implied obligation of confidentiality. The courts seemed to reason that because the information was valuable, it should be obvious that individuals would not disclose it to the potential recipients without restrictions on its use. Thus, it was reasonable in some contexts to find an implied obligation of confidentiality.

Information Exposing Discloser or Subject to Physical Harm. Some information is kept confidential because revealing it could subject the discloser or subject of the information to physical harm from a third party. [117] For example, the identity of police informants and related pieces of information often are kept confidential because if they were to be made public, criminals implicated by the informant might seek to harm him. Courts considered this factor significant in eight cases in which the courts were called upon to determine if an implied obligation of confidentiality existed between the discloser and recipient of information. All of these cases involved disputes under the Freedom of Information Act (FOIA). In these cases, requests were filed for the identities and other information concerning confidential government informants. The agencies responded to the requests by invoking a FOIA exemption to

[117] Council on American-Islamic Relations v. Federal Bureau of Investigation , 2010 WL 4024806 (S.D. Cal); U.S. Department of Justice v. Landano, 508 U.S. 165 (1993); Roth v. U.S. Department of Justice, 656 F. Supp. 2d 153 (D.D.C. 2009); Richardson v. U.S. Department of Justice, 2010 WL 3191796 at * 9 (D.D.C.) ("In determining whether the source provided information under an implied assurance of confidentiality, the Court considers 'whether the violence and risk of retaliation that attend this type of crime warrant an implied grant of confidentiality for such a source.'") (citations omitted); Rugerio v. U.S. Dept. of Justice, 234 F. Supp. 2d 697, 704 (E.D. Mich. 2002) (observing that "established that implied assurances of confidentiality existed here because the information given by the DEA's informants related to crimes that inherently involve violence and risk of retaliation."); Richardson v. U.S. Dep't. of Justice, 730 F.Supp.2d 225, 237-38 (D.D.C. 2010) ("The nature of the crime investigated and informant's relation to it are the most important factors in determining whether implied confidentiality exists."); Coleman v. FBI, 13 F. Supp. 2d 75, 82 (D.D.C. 1998) (finding that plaintiff's conviction for "numerous violent crimes" including murder, rape, and kidnapping, as well as "the relation of the witness thereto is precisely the type that the implied confidentiality exemption expressed in *Landano* is designed to encompass"); Skinner v. U.S. Dep't. of Justice, 2010 WL 3832602 (D.D.C.) (recognizing that an implied grant of confidentiality for confidential sources has been recognized with respect to the cocaine trade, gang-related murder, methamphetamine trafficking operations, and other violent acts committed in retaliation for witnesses' cooperation with law enforcement).

disclosing the information. The agencies claimed an implied obligation of confidentiality between the government and their confidential sources.

Courts conclusions implied claims of confidentiality was supported under FOIA, it was often justified because disclosure of the requested information would likely cause substantial harm to the sources who disclosed information to the FBI.[118] Courts seemed to reason that the threat of harm to the discloser of information was so great that it was reasonable to infer that disclosure ***would not have occurred without an obligation of confidentiality***. Thus, even if a promise of confidentiality was not explicit, it was implied.

Information that is Likely to Be Shared. Some courts called upon to determine if an implied obligation of confidentiality existed simply asked if the disclosed information was inherently the kind of information that would be shared with others. This kind of information was less likely to be subject to an implied obligation of confidentiality than information that is traditionally kept confidential. Whereas the other types of information contributed to the creation of an obligation of information, this type actually detracted from implied obligations of confidentiality. This type of information was not a neutral or "catch-all" category. Rather, some courts expressly discussed how information that is likely to be shared eroded the likelihood of an implied obligation of confidentiality.[119]

c. Actors

Often, assumptions of confidentiality are not based on the circumstances surrounding a disclosure of information or on the nature of what is being disclosed, but rather, on who is sending, receiving, or is the subject of the information. Every disclosure of information involves actors, and the attributes of these actors can affect implied obligations of confidentiality. [120]

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[118] *Council,* 2010 WL 4024806 at *16.
[119] Google v. Traffic Information, 2010 WL 743878 at *3 (D. Or.) (finding no implied duty of confidentiality where the discloser should have reasonably anticipated, and perhaps intended, that disclosed information would eventually be disclosed to third parties)..
[120] NISSENBAUM, *SUPRA* NOTE 10, AT 129 (2010).

Actors play a large role in developing the contextual integrity of information. Within her framework, Nissenbaum stated that "[i]nformational norms have three placeholders for actors: senders of information, recipients of information, and information subjects."[121] Nissenbaum held that "[i]n specifying an informational norm, it is crucial to identify the contextual roles of all three actors [sender, recipient, and subject] to the extent possible; that is, the capacities in which each are acting."[122] Our sense of privacy in disclosed information is almost always at least somewhat affected by the attributes and roles of the sender, subject, and recipient of information. Nissenbaum stated, "Usually, when we mind that information about us is shared, we mind not simply that it is being shared but that it is shared in the wrong ways and with inappropriate others…. [M]ost of the time these requirements are tacit and the states of all parameters need not be tediously spelled out."[123]

This section identifies which actor attributes had a noticeable impact on the courts' decisions. The cases revealed that vulnerability and an imbalance of power or sophistication were the most significant actor-related factors for courts analyzing obligations of confidentiality.[124] Some

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[121] *Id.* at 141. According to Nissenbaum, the sender and recipient can be single or multiple individuals or collectives such as organizations and companies. However, since privacy is an inherently personal concept, Nissenbaum believed that only people, not entities like corporations, could be the "subjects" of information under her theory.

[122] *Id.* at 142. Nissenbaum gave the healthcare context as an example. She stated that "there are numerous informational norms prescribing information sharing practices where the subjects and senders are patients themselves, and where the recipients are physicians…. Other norms apply in cases where the recipients are receptionists, bookkeepers, nurses, and so forth." *Id.* The importance of actors also can be seen after the initial disclosure of information, i.e., in the "downstream" disclosure of confidential information to third parties. For example, Nissenbaum noted that different norms apply when a physician shares a patient's information with fellow practitioners, insurance companies, and the physician's spouse.

[123] *Id.* Nissenbaum maintained that "it is relevant to know whether the actors are government or private, and in what capacity they act, among an innumerable number of possibilities." *Id.* at 143.

[124] Courts most often merely mentioned an actor's job title or level of sophistication, which seemed to indicate that the court at least recognized that attribute. Obvious examples of implied confidentiality based on profession include claims of implied confidentiality based on a specific evidentiary privilege such as the attorney-client privilege. In *Wildearth Guardians v. U.S. Forest Serv.*, the U.S. District Court for the District of Colorado denied a claim of implied confidentiality based on the attorney-client privilege where an e-mail was "shotgunned" to more than ten recipients, "only two of whom were attorneys." 713 F. Supp. 2d 1243, 1266 (D. Colo. 2010); *see also* Union Pacific Railroad Co. v. Mower, 219 F.3d 1069, 1073 (9th Cir. 2000) (recognizing that employees categorically owe an implied

disclosers of information were seen as inherently vulnerable, such as the infirm and elderly, while others were vulnerable because they were significantly less sophisticated or had fewer resources than the recipient of information.

Vulnerability or Sophistication. If one party to a disclosure of information was more sophisticated than the other, courts seemed to find that there was an imbalance between the parties and that the less sophisticated party was vulnerable to harm. Additionally, some individuals were seen as inherently vulnerable, such as minors, the elderly, the feeble-minded, and the infirm. Courts found that vulnerable disclosers of information increased the likelihood of an implied obligation of confidentiality.[125]

Additionally, courts seemed to find sophisticated recipients more likely than unsophisticated recipients to understand that their obligation of confidentiality was implied in a given context because sophisticated parties were more likely to be cognizant of norms of confidentiality in which information is disclosed. The recipient's awareness of the need for confidentiality with vulnerable parties[126] could be the basis for an implied-in-fact confidentiality agreement or confidential relationship, but it also could subject the recipient to an obligation of confidentiality that was created by courts in the absence of an understanding between the parties.[127] The attributes of actors in implied obligations of confidentiality

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duty of confidentiality to employers to protect their trade secrets and confidential information).

[125] To reiterate, in all of the cases analyzed that involved personal information, the discloser and the subject of the information were the same person. All of the sensitive personal information revealed in the cases was self-disclosed.

[126] *See, e.g.,* McGuire v. Shubert, 722 A.2d 1087, 1091 (Penn. 1998) ("It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors."); Sharma v. Skaarup Ship Mgmt. Corp., 699 F. Supp. 440 (S.D.N.Y. 1988) ("New York recognizes an implied duty of confidentiality between a bank and its depositors, but not between a bank and its borrowers. Information about the status of a borrower's loan is 'not information that the borrower would normally expect would be kept confidential.'") (citations omitted)).

[127] *See, e.g.,* Alsip v. Johnson City Medical Center, 197 S.W.3d 722 (Tenn. 2006) ("[T]he covenant of confidentiality arises not only from the implied understanding of the agreement between a patient and a doctor, but also from a policy concern that such private and potentially embarrassing information should be protected from public view."); Overstreet v. TRW Com. Steering Div., 256 S.W.3d 626, 634 (Tenn. 2008).

were most significant in the healthcare context.[128] Courts considered sophistication and vulnerability in relation to the other party, as opposed to in isolation.[129] If both parties are equally vulnerable or equally sophisticated, then it appears that courts are less likely to find an implied obligation of confidentiality than in relationships where the discloser is more vulnerable or sophisticated than the recipient.[130]

Resources. Courts also found that an imbalance of resources between the parties contributed to a finding of an implied obligation of confidentiality. This was demonstrated in the practical distinction between individuals and corporate or group actors. No court explicitly analyzed individuals under different standards than corporations or groups in disputes involving implied obligations of confidentiality.[131] However, in practice, corporate or group entities typically had access to more resources than individuals, and in eight cases, courts seemed to take this factor into consideration. [132] For example, a focus on availability of

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[128] *See, e.g.,* Biddle v. Warren General Hosp., 1998 WL 156997 at *12 (Ohio Ct. App.) (finding that in confidential relationships between physicians and patients "there is no indication that patients bargain for confidentiality; rather, it is assumed"); Humphers v. First Interstate Bank Oregon, 696 P.2d 527, 534 (Or. 1985); Overstreet v. TRW Commercial Steering, 256 S.W.3d 626 (Tenn. 2008).

[129] *See, e.g.,* Harold *ex rel.* Harold v. McGann, 406 F. Supp. 2d 562 (E.D. Pa. 2005).

[130] While this logic was seemingly employed by most courts, it was often countered by other factors. For example, in *Smith v. Snap-On Tools Corp*., the Fifth Circuit reversed a finding of implied confidentiality by the district court where a "relatively unsophisticated individual" with little education submitted an invention to a large corporation. 833 F.2d 578, 580 (5th Cir. 1987). The district court accepted the plaintiff's argument that "[u]nder the circumstances…the manufacturer should have known that he, as the inventor, expected [compensation or confidentiality] even if he did not request it." *Id.* In reversing, the Fifth Circuit found that because the plaintiff disclosed his idea before requesting confidentiality, the court found no implied confidentiality existed. *Id.* at 581.

[131] Some courts did note that commercial entities were less likely to need confidentiality than individuals. *See, e.g.,* Council on American-Islamic Relations, Cal. v. FBI, 2010 WL 4024806 at *16 (S.D. Cal.) (noting that while it is possible for the government to claim an exemption to the Freedom of Information Act based on an implied promise of confidentiality to entities, that exemption is "is claimed sparsely with regard to commercial institutions").

[132] *See, e.g.,* Omnitech International v. Clorox , 11 F.3d 1316, 1331 (5th Cir. 1994) (finding that that no confidential or fiduciary relationship existed because, among other things, "the record in this case is replete with evidence that Omnitech and Clorox had only an arms-length business relationship, including undisputed testimony that…both sides were represented by competent counsel in the drafting and consummation of the agreements."). The court also found that no fiduciary relationship existed because the parties vigorously negotiated the terms of their proposed agreement and Omnitech concealed much of its

counsel demonstrates how equality in resources can diminish the likelihood of an implied obligation of confidentiality between the parties. This seems particularly true when the parties are engaged in complex business negotiations instead of simple verbal exchanges.[133]

Bad-faith. A few courts considered whether an actor was acting in bad faith.[134] Bad-faith recipients of information were more likely to be subject to implied obligations of confidentiality than recipients acting in good faith.[135] According to these courts, acting in bad faith to gain information, for example, by pretending to be interested in business negotiations, demonstrated that the information was not freely obtainable otherwise and, thus, the information was likely disclosed in confidence.

d. Terms of Disclosure

Terms regarding the disclosure of information are naturally present in express confidentiality agreements. However, terms can also shape an implied agreement of confidentiality. For example, a stamp of "confidential" on documents, by itself, is not sufficient to form an express confidentiality agreement. However, it might serve as evidence of an implied agreement of confidentiality. Often, terms of disclosure conflict

financial information from Clorox, which would seem to indicate that Omnitch did not view Clorox as a confidant.

[133] *See, e.g.,* Formex Mfg., Inc. v. Sullivan Flotation Sys., Inc., 972 F.2d 1355 (Fed. Cir. 1992) (Neis, dissenting) (arguing against the majority decision that no implied duty of confidentiality existed because the parties were simply two businesses negotiating at arm's length with no preexisting contracts.).

[134] *See, e.g.,* Phillips v. Frey, 20 F.3d 623 (5th Cir. 1994) (finding an implied obligation of confidentiality apparently arising out of the potential purchaser's actions taken in bad faith to convince plaintiff to disclose information.); Flotec v. Southern Research, 16 F. Supp. 2d 992, 1006 (S.D. Ind. 1998) (observing that that a jury can find an implied obligation of confidentiality "in view of evidence tending to show that the defendant had not been sincere in its interest in buying the business and had used negotiations merely as a guise for obtaining the secret manufacturing process.").

[135] *See, e.g.,* Bartell v. Onbank, Onbank & Trust Co., 1996 WL 421189 (N.D.N.Y.) ("New York law does not appear to recognize an implied duty of confidentiality, a fiduciary duty, or any other duty of care between a bank and its borrowers, absent a showing of malice or bad faith."). In *Bartell,* the U.S. District Court for the Northern District of New York dismissed claims of breach of fiduciary duty and breach of an implied duty of confidentiality against a bank because the plaintiffs failed to allege any malice or bad faith on the part of the bank. However, it refused to dismiss the same claims against an individual employee of the bank who was the bank's agent because it found that employee acted with malice and ill will toward the plaintiff in obtaining the plaintiff's loan request documents and distributing the materials at a mergers and acquisitions seminar as a demonstrative aid. *Id.* at *1, *4.

with each other. Other times, external laws or codes of conduct regarding the disclosure of information can serve as "terms" that can create (or abolish) an implied obligation of confidentiality.

Within her framework, Nissenbaum, who also called terms "transmission principles," defined terms as constraints "on the flow (distribution, dissemination, transmission) of information from party to party in a context."[136] According to Nissenbaum, "The transmission principle parameter in informational norms expresses terms and conditions under which such transfers ought (or ought not) to occur."[137] While terms could be explicit, Nissenbaum found that they usually were implied. She stated, "The idea of a transmission principle may be the most distinguishing element of the framework of contextual integrity; although what it denotes is plain to see, it usually goes unnoticed."[138] Nissenbaum held that terms could stipulate many things: they could dictate that information could be shared freely. Alternatively, terms could stipulate that information can only be used if the subject of the information knows about the use ("notice") or if the subject gives her permission for the use ("consent").[139]

Terms of disclosure can be explicit in or inferred from a virtually limitless number of contexts. Yet scholars have not analyzed exactly how courts consider the terms in analyzing implied obligations of confidentiality. No framework for such an analysis has been adopted by the courts. Thus, the goal of this section is to determine which terms courts explicitly recognized as significant in implied confidentiality disputes. The cases revealed that courts typically tried to locate the true understanding of the parties by looking at terms within and outside of disclosure relationships. Courts placed the most emphasis on any term (statement, action, symbol, etc. indicating a preference regarding disclosure) that would have been apparent to the other party.

Confidentiality Indicators. Courts often looked for what I refer to as "confidentiality indicators," i.e., signals, statements, or actions that indicate that either a desire for confidentiality or that the disclosed

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[136] NISSENBAUM, *SUPRA* NOTE 10, AT 129, 145 (2010).
[137] *Id.*
[138] *Id.*
[139] *Id.*

information would be kept confidential.[140] In effect, courts held that two different kinds of confidentiality indicators could contribute to the formation of an implied obligation of confidentiality: terms indicating a desire for confidentiality and terms indicating that confidence would be kept.

*Terms Indicating a Desire for Confidentiality***.** Unsurprisingly, one of the most important terms of disclosure to courts was a desire or request for confidentiality by the discloser of information. A simple request for confidentiality does not, by itself, constitute a binding agreement between the parties. However, courts were significantly more likely to find an implied obligation of confidentiality when the discloser of information displayed a desire to restrict the flow of information than when the discloser showed no interest in confidentiality.[141] Conversely, the absence of an indicator or signal of confidentiality by the discloser was relied upon by courts to find that no implied obligation of confidentiality existed.[142]

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[140] *See, e.g.,* Grayton v. United States, 92 Fed. Cl. 327 (Fed. Cl. 2010); Nilssen v. Motorola, Inc., 963 F. Supp. 664, 679-82 (N.D. Ill. 1997) (finding that no obligation of confidentiality existed for any disclosure not explicitly marked as "confidential" under a pre-existed agreement regarding use of disclosed information within a business relationship.); Klekas v. EMI Films, Inc., 150 Cal. App. 3d 1102, 1114 (Cal. Ct. App. 1984); Rogers v. Desa Int'l, Inc., 183 F. Supp.2d 955, 957 (E.D. Mich. 2002) (finding that a claim of implied confidentiality is without merit where, among other things, the plaintiff "did not indicate on the video tape he sent [to the defendant], either in the video itself or on an outside label, that information contained therein was confidential."); Daily Int'l Sales Corp. v. Eastman Whipstock, Inc., 662 S.W.2d 60 (Tex. Ct. App. 1983) (finding no implied obligation of confidentiality where, among other things, "[n]o documents were stamped or labeled with the word 'confidential' or like warnings."); Neimi v. Am. Axle Mnfg. & Holding, Inc., 2007 WL 29383 at *4 (Mich. Ct. App.) (finding no implied obligation of confidentiality where, among other things, plaintiffs "did not make any reasonable efforts to preserve the confidentiality of the designs provided to the defendants. They did not mark the documents as confidential, or require an express agreement of confidentiality").

[141] *See, e.g.,* Knapp Schenk & Co. Ins. Agency, Inc. v. Lancer Mgmt. Co., Inc., 2004 WL 57086 (D. Mass.); WBAI-FM v. Proskin, 42 A.D.2d 5, 9-10 (N.Y. Gen. Term. 1973) ("[T]he very scheme adopted for communicating the letter reveals a deliberate intention not to reveal the author's personal identity. All these circumstances yield but one possible conclusion: that the author of the letter did not want his personal identity revealed and, therefore, that the letter was communicated under an implied understanding of confidentiality.").

[142] *See, e.g.,* Grayton v. United States, 92 Fed. Cl. 327 (Fed. Cl. 2010); FMC Corp. v. Guthery, 2009 WL 485280 at *5 (D.N.J.) ("Here, the Court is not convinced that Guthery provided confidential information.... [W]hen he produced [documents], he did not request that they be marked 'confidential.'"); Mass. Institute of Tech. v. Harman Int'l Indust., Inc.,

These terms were created many different ways. Some terms were symbols or single words, such as a "confidential" stamp on documents.[143] Other terms were vague assertions, such as "this is between us."[144] Other factors of contextual integrity – context, actors, and the nature of the information – served as evidence of an implied term of confidentiality in a relationship.[145] The reason courts considered the expression of confidentiality so important is that, in order to find an implied obligation of confidentiality, courts asked whether the recipient "knew or should have known" that the disclosed information was confidential.[146] One of

584 F. Supp.2d 297, 304 (D. Mass. 2008) (finding that no implied obligation of confidentiality existed where "[n]o record evidence shows either that the researchers gave any instructions to keep any information that drivers gathered while using the Back Seat Driver system confidential…."); Young Design, Inc. v. Teletronics Int'l, Inc., 2001 WL 35804500 at *5 (E.D. Va.) ("There is no evidence in this record that plaintiff took any efforts to create a confidential relationship with defendant. There were no proprietary use warnings on invoices, no letters or emails reminding defendant about confidentiality obligations, and no evidence of oral discussions with any other of defendant's employees."); Fail-Safe LLC v. A.O. Smith Corp., 2010 WL 3503427 at *21 (E.D. Wis.) (finding no implied duty of confidentiality exists where the plaintiff provided "no indication" to the defendant that the information the plaintiff was provided was intended to be kept in confidence.);

[143] *See, e.g.,* Research, Analysis, & Dev., Inc. v. United States, 8 Cl. Ct. 54 (1985).

[144] *See, e.g.,* Lee v. State, 418 Md. 136, 156 (Md. 2011) ("Detective Schrott's words, 'This is between you and me bud. Only me and you are here, all right? All right?,' on their face imply confidentiality…. No reasonable lay person would have understood those words to mean anything other than that the conversation, at that moment and thereafter, even if not before, was 'between' only Detective Schrott and Petitioner.").

[145] *See, e.g.,* Diodem, LLC v. Lumenis Inc., 2005 WL 6220720 at *10 (C.D. Cal.) (finding an implied obligation of confidentiality could exist from a totality of the circumstances, where, among other things, none of the recipients of information had any basis for inferring the information was disclosed for free and unrestricted use); Young Design, Inc. v. Teletronics Int'l, Inc., 2001 WL 35804500 at *5 (E.D. Va.) (recognizing that indicators such as reminders about confidentiality obligations, oral discussions about confidentiality, or warnings on communications designating the information as confidential could demonstrate efforts to create a confidential relationship); Hollomon v. O. Mustad & Sons (USA), Inc., 196 F. Supp. 2d 450, 460 (E.D. Tex. 2002) (finding no confidential relationship where the plaintiff failed to present any evidence that he informed the defendant his designs were being disclosed in confidence).

[146] *See, e.g.,* Fail-Safe LLC v. A.O. Smith Corp., 2010 WL 3503427 at *21 (E.D. Wis.) ("None of the letters or data…bared any symbol denoting that the information contained therein was confidential. Moreover, there is no evidence that FS even told AOS that the Colorado company considered the information in question confidential."); Faris v. Enberg, 97 Cal. App. 3d 309 (Cal. Ct. App. 1979); Flotec v. Southern Research, Inc., 16 F. Supp. 2d 992 (S.D. Ind. 1998); Rockwell Graphics Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 177 (7th Cir. 1991); Furr's Inc. v. United Specialty Adver. Co., 385 S.W.2d 456, 459-60 (Tex. Ct. App. 1964) ("Confidential relationship is a two-way street: if the disclosure is made in confidence, the 'disclosee' should be aware of it. He must know that the secret is being

the ways this knowledge is transmitted to the recipient of information is through terms of disclosure.

Some of the confidentiality indicators identified by courts were signals, statements, or actions that indicated to recipients a desire by the discloser for confidentiality or an assumption or expression that the disclosed information was confidential.[147] The importance of a discloser's communication of a desire for confidentiality also is reflected in some courts' requirement that the recipient of the information be notified of the desire for confidentiality before the disclosure is made. Courts were hesitant to enforce an implied obligation of confidentiality if the recipient did not have the opportunity to reject the proposed confidentiality agreement.[148]

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revealed to him on the condition he is under a duty to keep it."); Sentinel Products Corp. v. Mobil Chem. Co., 2001 WL 92272 (D. Mass. 2001).

[147] *See, e.g.,* Grayton v. United States, 92 Fed. Cl. 327 (2010); Nilssen v. Motorola, Inc., 963 F. Supp. 664, 679-82 (N.D. Ill. 1997) (finding that an obligation of confidentiality existed for any disclosure not explicitly marked as "confidential" under a pre-existed agreement regarding use of disclosed information within a business relationship); Klekas v. EMI Films, Inc., 150 Cal. App. 3d 1102, 1114 (Cal. Ct. App. 1984); Rogers v. Desa Int'l, Inc., 183 F. Supp. 2d 955, 957 (E.D. Mich. 2002) (finding that a claim of implied confidentiality is without merit where, among other things, the plaintiff "did not indicate on the video tape he sent [to the defendant], either in the video itself or on an outside label, that information contained therein was confidential"); Daily Int'l Sales Corp. v. Eastman Whipstock, Inc., 662 S.W.2d 60 (Tex. Ct. App. 1983) (finding no implied obligation of confidentiality where, among other things, "[n]o documents were stamped or labeled with the word 'confidential' or like warnings"); Neimi v. Am. Axle Mnfg. & Holding, Inc., 2007 WL 29383 at *4 (Mich. Ct. App.) (finding no implied obligation of confidentiality where, among other things, plaintiffs "did not make any reasonable efforts to preserve the confidentiality of the designs provided to the defendants. They did not mark the documents as confidential, or require an express agreement of confidentiality.").

[148] *See, e.g.,* Faris v. Enberg, 97 Cal. App. 3d 309, 324 (Cal. Ct. App. 1979) (""One could not infer from anything Enberg did or said that he was given the chance to reject disclosure in advance or that he voluntarily received the disclosure with an understanding that it was not to be given to others." The court went on to find that "Only in plaintiff's response to summary judgment is there reference to his own thoughts from which one might infer that he felt there was a confidence. But he never, so far as we can tell, communicated these thoughts to Enberg, and nothing of an understanding of confidence can be inferred from Enberg's conduct."). Of course, not all courts found that confidentiality indicators contributed to an implied obligation of confidentiality. Google v. Traffic Information, 2010 WL 743878 (D. Or.) (finding that an e-mail marked "confidential" did not, by itself, create an implied obligation of confidentiality); Innospan v. Intuit, 2011 WL 856265 (N.D. Cal. 2011) (stating that "[a] rote stamp [claiming confidentiality] cannot, in and of itself, create an implied-in-fact contract.").

Terms Indicating Confidence Will Be Kept. Courts were also more likely to find an implied obligation of confidentiality if the recipient of information gave some indication the information disclosed would remain confidential than when such an indicator was absent.[149] Terms recognizing that disclosed information was confidential also fulfilled the requirement that the recipient know about the implied confidentiality.[150] An assurance of confidentiality might seem counterintuitive to the concept of an implied obligation of confidentiality because the most obvious examples of assurances of confidentiality are explicit, e.g., "I promise not to tell a soul." However, not all assurances of confidentiality are express or clear. A potential recipient's vague reassurances to the discloser that the information will be protected could form an implied obligation of confidentiality. This is true even if confidentiality was not expressly agreed upon otherwise. A wide range of statements, conduct, and symbols ("indicators") could demonstrate an implied willingness to keep the confidence of information.[151] Conversely, terms that indicated that the recipient did not intend to keep information confidential could decrease the likelihood of an implied obligation of confidentiality.[152]

External Terms. Sometimes the terms of an agreement were not offered by the parties or did not originate within the relationship between the parties. Instead, they were supplied by reference to external laws, organizational codes, policies, and external arrangements and agreements. These "external terms" were often not expressed in the agreement between the parties, but they still contributed to an implied

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[149] *See, e.g.,* Moore v. Marty Gilman, Inc., 965 F. Supp. 203 (D. Mass. 1997) (finding no implied or express obligation where, among other things, "Coach Moore did not request, and Gilman did not give, assurances of confidentiality"); Research, Analysis, & Dev., Inc. v. United States, 8 Cl. Ct. 54 (1985).

[150] *See, e.g.,* Faris v. Enberg, 97 Cal. App. 3d 309, 324 (Cal. Ct. App. 1979) ("[E]vidence of knowledge of confidence or from which a confidential relationship can be implied is a minimum prerequisite to the protection of freedom in the arts.... [N]othing of an understanding of confidence can be inferred from [Defendant's] conduct.").

[151] *See, e.g.,* Kashmiri v. Regents of the Univ. of California, 156 Cal. App. 4th 809 (Cal. Ct. App. 2007) ("The terms of an express contract are 'stated in words,' while the terms and existence of an implied contract are 'manifested by conduct.'); Flotec, Inc. v. Southern Research, Inc., 16 F. Supp. 2d 992, 1006-07 (S.D. Ind. 1998); Sentinel Products Corp. v. Mobil Chem. Co., 2001 WL 92272 (D. Mass.); Research, Analysis, & Dev., Inc. v. United States, 8 Cl. Ct. 54 (1985).

[152] *See, e.g.,* FMC Corp. v. Guthery, 2009 WL 485280 (D.N.J.); Chief of Staff v. Connecticut Freedom of Information Commission, 1999 WL 643373 (Conn. Super. Ct.)..

obligation of confidentiality. For example, in cases involving a physician's implied obligation of confidentiality to his or her patient, courts looked to external laws such as a state's professional licensing requirements, statutes, and the Hippocratic Oath to affirm the implied obligation.[153]

These external terms increased the likelihood of an implied obligation of confidentiality. Disclosers of information are more likely to rely on implied confidentiality when external terms apply to the disclosure than when they do not. For example, most patients likely know that their physicians take the Hippocratic Oath, which requires that doctors respect their patients' confidentiality.[154] Thus, a patient's inference of confidentiality is likely reasonable. External terms also

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[153] *See, e.g.,* Biddle v. Warrant Gen. Hosp., 1998 WL 156997 (Ohio Ct. App. 1998);Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626 (Tenn. 2008) (looking to state statutes such as the Patients' Privacy Protection Act and the Workers' Compensation Act that convey a public policy favoring the confidentiality of medical information in order to support an implied-in-law covenant of confidentiality between a patient and a doctor); Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 726 (Tenn. 2006) (citing multiple sections of the Tennessee Code in finding an implied covenant of confidentiality in medical-care contracts between treating physicians and their patients. These statutes, according to the Supreme Court of Tennessee, "are indicative of the General Assembly's desire to keep confidential a patient's medical records and identifying information."); Humphers v. First Interstate Bank of Oregon, 696 P.2d 527 (Or. 1985) (looking to external sources such as professional regulations to find a physician's nonconsensual duty of confidentiality to his or her patient); Hammonds v. Aetna Cas. & Surety Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965); MacDonald v. Clinger, 84 A.D.2d 482, 484-46 (N.Y. Ct. App. 1982) (citing several statutes and regulations requiring physicians to protect the confidentiality of patients' information in finding that physicians impliedly promise to keep patients' information confidential as a matter of, among other things, contract); Doe v. Roe, 93 Misc. 2d 201 (N.Y. Gen. Term. 1977); Givens v. Mullikin *ex. Rel.* Estate of McElwaney, 75 S.W.3d 383 (Tenn. 2002) (finding an implied obligation of confidentiality via a contract between a patient and physician based on, among other things, statutes requiring the physician to respect the patient's confidential information); *cf* Suarez v. Pierard, 663 N.E.2d 1039, 1044 (Ill. Ct. Ap. 1996) (finding that the state's Pharmacy Practice Act does not create an implied contract of confidentiality between pharmacists and their patients because, among other reasons, the relevant provision was not in effect when the alleged contract was made.); Ghayoumi v. McMillan, 2006 WL 1994556 (Tenn. Ct. App.) ("[T]here can be no covenant of confidentiality, implied or agreed, because the relationship between Plaintiff and Defendant resulted from a court order that necessitated disclosure of Defendant's communications with Plaintiff and his family members and mandated disclosure of his evaluations, report and recommendations to the Court and parties.").

[154] *See, e.g.,* Hammonds v. Aetna Cas. & Surety Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) ("Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence….Consequently, when a doctor breaches his duty of secrecy, he is in violation of part of his obligations under the contract.").

increase the likelihood that the recipient of information knew or should have known of his or her obligation of confidentiality.

Courts looked to various laws, organizational codes, policies, and external arrangements and agreements to shape their analysis of implied obligations of confidentiality.[155] The common theme of all these cases was that if the discloser of information knew or should have known that the recipient was bound by some law, organizational code, policy, or external arrangement or agreements to keep the information confidential, then the law, policy, or regulation could be considered an external term regarding the disclosure of information and could create or dispel an implied obligation of confidentiality.

Conflicting Terms. Often, a relationship can involve conflicting terms about whether certain information is confidential. This conflict can be significant in analyzing implied obligations of confidentiality. Even if the parties have a previous agreement, implied confidentiality can be created or dispelled by terms that conflict with that previous agreement. When faced with conflicting terms, most courts looked at the most recent term regarding the disclosure of information to determine whether an implied obligation of confidentiality existed. A notable exception was in instances in which explicit terms prohibited implied agreements of confidentiality.[156] In such cases, courts typically refused to find an implied

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[155] *See, e.g.,* Suarez v. Pierard, 663 N.E.2d 1039, 1044 (Ill. Ct. Ap. 1996) (recognizing that "existing laws and statutes become implied terms of a contract as a matter of law…."); Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 726 (Tenn. 2006); Grayton v. United States, 92 Fed. Cl. 327 (2010) (acknowledging that a restrictive legend added pursuant to an administrative regulation could help form an implied obligation of confidentiality); United America Financial v. Potter, 667 F. Supp. 2d 49 (D.D.C. 2009) (stating that the Inspector General Act (IGA) helped create an implied obligation of confidentiality in submitted complaints because the IGA provides that such complaints are to be anonymous to the public at large.); Biddle v. Warren General Hospital, 1998 WL 156997 (Ohio Ct. App.) (referencing the Hippocratic Oath and the confidentiality required to maintain a physician's license in recognizing the breach of tort of confidentiality).

[156] *See, e.g.,* Prescott v. Morton, 769 F. Supp. 404, 410 (D. Mass. 1990) (stating that where the contractual agreement between the parties "does not memorialize their entire relationship. A separate implied-in-fact contract governing the dissemination of information between the parties would not be contradictory."); Knapp Schenk v. Lancer Mgmt., 2004 WL 57086 (D. Mass.); DPT Laboratories v. Bath & Body Works, 1999 WL 33289709 at *6 (W.D. Tex.) (stating that implied confidentiality can co-exist with express confidentiality agreements for similar disclosures in certain situations and, in the present case, that "the limitation on [Bath & Body Works]'s actions is not determined solely by the specific terms of the confidentiality agreements.").

obligation of confidentiality. This research suggests that an implied obligation of confidentiality can be created by terms even if the parties are otherwise bound by a contract with no reference to confidentiality.[157]

Explicitness. Courts held that terms that purportedly create implied obligations of confidentiality must be clear and definite enough for the promises and required performances of each party to be reasonably certain.[158] When courts were presented with terms regarding the disclosure of information, they looked to the reasonable expectations of the parties at the time the terms were offered.[159] The expectations of the parties are typically determined by examining "the totality of the circumstances" and may be "shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances."[160] Part of this analysis looks to how explicit the representations at issue are.[161] Highly specific terms dispelled any implied obligation of confidentiality in several of the cases analyzed.[162] Courts

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[157] *See, e.g.,* DPT Lab., LTD. v. Bath & Body Works, Inc., 1999 WL 33289709 (W.D. Tex.). Terms of disclosure also could dispel an obligation of confidentiality, even if such an obligation was previously implied. *See, e.g.,* Anderson v. Century Products Co., 943 F. Supp. 137 (D.N.H. 1996) ("[A]n implied confidential relationship can be defeated if the parties, by agreement, expressly disclaim any such relationship."); *cf* Medical Store, Inc. v. AIG Claim Serv., 2003 WL 25669175 (S.D. Fla.) (holding that subsequent agreements can imply modifications but not contradictions to previously existing confidentiality agreements).

[158] *See, e.g.,* Watson v. Public Serv. Co. of Colo., 207 P.3d 860, 868 (Colo. Ct. App. 2008); Moore v. Marty Gilman, 965 F. Supp. 203 (D. Mass. 1997) (finding that, based on a number of contextual factors, the phrase "between you and I" was not explicit enough to create an implied obligation of confidentiality); Faris v. Enberg, 97 Cal. App. 3d 309 (Cal. Ct. App. 1979) (refusing to find an implied confidential relationship and no implied-in-fact contract where the plaintiff failed to specifically communicate his thoughts from which one might infer that the plaintiff felt there was a confidence).

[159] *See, e.g.,* Kashmiri v. Regents of the Univ. of Cal., 156 Cal. App. 4th 809, 832 (Cal. Ct. App. 2007).

[160] Foley v. Interactive Data Corp., 47 Cal. 3d 654, 681 (Cal. 1988).

[161] *See, e.g.,* Sanchez v. The New Mexican, 738 P.2d 1321, 1324 (N.M. 1987); Jackson v. LSI Indus., Inc., 2005 WL 1383180 (M.D. Ala.) (finding that merely asking for a faxed sketch of an idea was not specific enough to warrant an implied promise to pay or keep the idea confidential); Goldthread v. Davidson, 2007 WL 2471803 at *5-7(M.D. Tenn.); Tecza v. Univ. of San Francisco, 2010 WL 1838778 (N.D. Cal.) (dismissing a claim for breach of an implied-in-fact contract of confidentiality because the plaintiff failed to "specify any particular conduct" that would reflect the existence of the basic elements for such a claim).

[162] *See, e.g.,* Watson v. Public Serv. Co. of Colo., 207 P.3d 860, 868 (Colo. Ct. App. 2008); BDT Products v. Lexmark, 274 F. Supp. 2d 880, 894 (E.D. Ky. 2003) ("Because it is undisputed that the parties repeatedly entered into confidentiality agreements that

would only infer a term of confidentiality between the parties only if it was abundantly clear that the parties intended to be bound to confidentiality.[163] Vagueness of terms was not always a bar to an implied obligation of confidentiality, however. [164] According to some courts, a certain amount of vagueness is tolerated so long as the obligations and expectations of the parties can be ascertained.[165]

Summary. A few themes dominated the cases. First, the cases made it clear that the parties' perceptions of confidentiality were paramount in implied obligations of confidentiality. This could be seen most prominently in the courts' focus on industry customs, sensitive information, confidentiality indicators, and external terms. Courts found that the presence of all of these factors contributed to a finding of an implied obligation of confidentiality because their presence made it likely that such an obligation was or should have been perceived by the parties.

Additionally, after the perception of confidentiality, the most important factor for courts in finding an implied obligation of confidentiality was the inequalities between the parties. A disclosure involving parties that had similar resources, sophistication, or bargaining power was unlikely to be subject to an implied obligation of confidentiality. However, if the discloser of information was either

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expressly and unambiguously disclaimed any restrictions on Lexmark's use of information provided by BDT, it is axiomatic that no express or implied duty restricting Lexmark's use of such information can be found here.").

[163] *See, e.g.,* Learning Curve Toys, LLC v. PlayWood Toys, Inc., 1998 WL 46894 (N.D. Ill.) ("PlayWood offers a vague assertion that because a confidentiality agreement existed, there was an intention to be bound. But PlayWood does not specify what the parties were bound to....Thus, there is no evidence that there was a 'meeting of the minds'...."); Bergin v. Century 21 Real Estate Corp., 2000 WL 223833 (S.D.N.Y.) (denying a claim for breach of implied-in-fact contract for, among other things, confidentiality because the agreement between the parties was too vague and lacked essential terms such as payment); Graney Dev. Corp. v. Taksen, 92 Misc. 2d 764 (N.Y. Gen. Term. 1978); Bakare v. Pinnacle Health Hospitals, 469 F. Supp. 2d 272 (M.D. Penn. 2006).

[164] *See, e.g., Copley Press v. Superior Court,* 228 Cal. App. 3d 77 (Cal. Ct. App. 1991).

[165] *See, e.g.,* Lee v. State, 418 Md. 136, 156 (Md. 2011) ("Detective Schrott's words, 'This is between you and me bud. Only me and you are here, all right? All right?,' on their face imply confidentiality.... No reasonable lay person would have understood those words to mean anything other than that the conversation, at that moment and thereafter, even if not before, was 'between' only Detective Schrott and Petitioner."). Regarding explicitness, courts, generally acted consistently with Nissenbaum's holistic approach, which incorporates other factors besides the terms of disclosure in implied obligations of confidentiality.

inherently vulnerable, had fewer resources, had less bargaining power, or was less sophisticated than the recipient, then an implied obligation of confidentiality was more likely than with similarly situated parties.

III. THE REVIVAL OF IMPLIED CONFIDENTIALITY FOR THE INTERNET AND BEYOND

Notwithstanding the myriad of factors used to analyze implied obligations of confidentiality, no unifying framework has been adopted by the courts. Instead, courts seem to haphazardly highlight various facts that either contribute to or detract from a finding of an implied obligation of confidentiality. The relevant cases revealed that courts implicitly utilize considerations that fall within Nissenbaum's four factors of context-relative informational norms: context, actors, nature of the information, and the terms of disclosure. Given this utilization, the theory of contextual integrity can help create a much needed decision-making framework for courts analyzing implied obligations of confidentiality.

1. Towards a Decision Making Framework

This article proposes a framework that is designed as a test with four distinct factors. These factors are to first be analyzed independently, then collectively to determine if an implied obligation of confidentiality existed in a given dispute. Due to the importance of context, courts should engage in a case-by-case analysis of the factors, with no explicit preference for any particular factor.[166]

This framework is designed to help courts ascertain the two most important considerations in implied obligations of confidentiality, according to the themes arising from own analysis: party perception and inequalities. To that end, when courts are presented with a claim of an implied obligation of confidentiality, they should ask the following questions and consider the inherent relevant factors discussed in Part II, which correspond to Nissenbaum's framework:

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[166] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task [of deciding whether a work is a fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."). It is important to note that the similarity between this proposed framework and fair use is in form rather than in substance.

1. What was the context surrounding the disclosure?
    a. History and development of the relationship
    b. Custom
    c. Presence of negotiation
    d. Timing of the disclosure
    e. Purpose of the disclosure
    f. Presence of solicitation
    g. Public policy
2. What was the nature of the information?
    a. Secret information
    b. Highly personal information
    c. Proprietary or useful information
    d. Information that could lead to physical harm
    e. Information likely to be shared or inevitably disclosed
3. Who were the actors and what was their relationship?
    a. Vulnerability or sophistication
    b. Resources
    c. Bad-faith
4. What were the internal and external terms of disclosure?
    a. Confidentiality indicators
    b. External terms
    c. Conflicting terms
    d. Explicitness of terms

Courts would ask each question individually, then analyze their answers as a whole to determine if an implied obligation of confidentiality existed. Each question would include several considerations that may or may not be applicable in a given factual scenario.

This framework will not completely eliminate uncertainty from the law surrounding implied obligations of confidentiality. The concept of

implied confidentiality is too dependent upon specific facts for a completely consistent application of the law. However, the adoption of this decision-making framework can increase clarity and minimize uncertainty by asking the same questions in every dispute.

2. Application

This decision-making framework is necessary if the concept of implied confidentiality is to be clearly and consistently applied where it is most needed – on the Internet. The framework should be applied to online cases the same way it should be applied to offline cases. Given the technology neutral nature of the framework, there is no reason to systematically alter implied confidentiality analysis for online disputes.

Consider the plight of Cynthia Moreno.[167] Moreno published a missive on her hometown, titled "Ode to Coalinga," on the journal section of her personal profile on the social network site Myspace.com. Roger Campbell, the principal of Coalinga High School, read the Ode before it was removed and forwarded it to the local newspaper, the *Coalinga Record*, which published the Ode in the newspaper's letters-to-the-editor section. The Coalinga community reacted violently to the publication of the Ode, threatening Moreno and her family and ultimately causing the Moreno family to close its 20-year-old family business.[168] Moreno filed suit against Campbell alleging invasion of privacy and intentional infliction of emotional distress, ultimately losing on both claims. For the sake of exposition, assume Moreno also alleged breach of an implied obligation of confidentiality against Campbell, who originally accessed Moreno's post.[169]

First, the court would attempt to ascertain the context of the disclosure. There is some debate as to whether customs of confidentiality exist in social network sites.[170] This is a factually specific inquiry,

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[167] Moreno v. Hanford Sentinel, 172 Cal. App. 4th 1125, 1128 (Cal. Ct. App. 2009); John Ellis, *Coalinga grad loses MySpace rant lawsuit*, THE FRESNO BEE (Oct. 12, 2010, 2:07 pm), http://www.fresnobee.com/2010/09/20/2085862/ex-student-loses-myspace-rant.html#storylink=mirelated.
[168] *Id.*
[169] Note that the claim here is against an audience member, not an intermediary. Had MySpace itself disclosed her poem to a third party, this analysis would be different.
[170] *See, e.g.,* McClurg, *supra* note 4; Abril, *supra* note 4, at 77; Emily Christofides et al., *Information Disclosure and Control on Facebook: Are They Two Sides of the Same Coin*

particularly because customs vary by site and user. However, given that seemingly no persuasive evidence was introduced at trial to support the notion that a custom of confidentiality existed on MySpace, this factor does not favor a finding of implied confidentiality. The disclosure was not made in the process of ongoing negotiations, nor was the disclosure solicited by Campbell. Indeed, the Ode was simply a gratuitous post for friends to read. Indeed, there was no purpose for the disclosure other than to vent. Thus, the context weighs against a finding of an implied obligation of confidentiality.

Next, the court would look to the nature of the information. Here, the information was arguably personal. The ode was a confessional that divulged raw emotions and personal histories with classmates. Additionally, the information subjected Moreno and her family to potential physical harm as bricks were thrown at her house. However, it is debatable whether Campbell either knew or should have known this would be the result of his disclosure. Unlike revealing the identity of a government informant, it does not necessarily follow that disclosing an angry blog post will lead to physical violence against the blogger. Additionally, the confessional addressed Moreno's adversaries in the second person, which might implicate a desire for them to read it. Thus, this factor cannot be seen as overwhelmingly in favor of an implied obligation of confidentiality. Any support for confidentiality should be seen as marginal.

Third, the court would identify the attributes of the actors and their relationship to each other. Here, there is no evidence Campbell acted in bad faith to access the information. There does not appear to be any inequality between the parties. Both Moreno and Campbell seem to be relatively sophisticated parties with no advantage of resources or bargaining power over another. Additionally, the parties have no history together. Indeed, it would appear that Moreno and Campbell were strangers. This factor weighs against a finding of an implied obligation of confidentiality.

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or Two Different Processes?, 12 CYBERPSYCHOLOGY & BEHAV. 341 (2009); Zeynep Tufekci, *Can You See Me Now? Audience and Disclosure Regulation in Online Social Network Sites*, 28 BULL. SCI. TECH. & SOC'Y 20 (2008).

Finally, courts would seek to identify any internal or external terms of disclosure. Internally, there appear to be no confidentiality indicators. Moreno did not utilize privacy settings to restrict access to her post, which might have indicated the confidential nature of her Ode. Instead, her post was accessible to anyone with an Internet connection.[171] Nor did Campbell give any indication that he was going to keep the information confidential. Moreno could have created a small group for disclosure of the Ode and premised invitations to the group upon an indication the group members would keep the information disclosed within confidential, but she did not.

However, there was one external term that might weigh in favor of an implied obligation of confidentiality. The MySpace terms of use prohibit "publicly post[ing] information that poses or creates a privacy or security risk to any person," violating "the privacy rights, publicity rights, [or] copyrights…of any person," or "using or distributing any information obtained from the MySpace Services in order to harass, abuse, or harm another person or entity, or attempting to do the same."[172] Thus, by accessing the Ode subject to these terms, Campbell was potentially legally bound to confidence via an agreement with MySpace. However, the facts do not indicate that this term was relied upon or even known by Moreno. Few if any users actually read the fine print. This matters because the courts focus on the perception of the parties. Nor do the facts indicate that Campbell intended to harm Moreno by redistributing the post. Ultimately, this factor weighs against a finding of an implied obligation of confidentiality.

Looking at the factors as a whole, a court would likely conclude that Campbell was not bound by an implied obligation of confidentiality. Three of the four factors weigh against such a finding, and the sole factor that favored an implied confidentiality did so only marginally. This analysis demonstrates how the framework might be applied online.

Contrast the Moreno case with a similar dispute that might have a different result under the framework: *Pietrylo v. Hillstone Restaurant*

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[171] Moreno v. Hanford Sentinel, 172 Cal. App. 4th 1125, 1130 (Cal. Ct. App. 2009).
[172] *Terms of Use*, MySpace, http://www.myspace.com/index.cfm?fuseaction=misc.terms#ixzz12AolEv1N (last visited Oct. 12, 2011).

Group.[173] In this case, the U.S. District Court for the District of New Jersey was asked to determine the privacy interest in information contained on a "closed" webpage on Myspace.com. A waiter at a local restaurant called Houston's, Brian Pietrylo, created a group for he and his fellow employees to vent about their employer "without any outside eyes spying in on [them]"[174] Pietrylo stated on the group's page that "[t]his group is entirely private, and can only be joined by invitation." The court noted that the icon for the group, which was Houston's logo, "would appear only on the MySpace profiles of those who were invited into the group and accepted the invitation."[175]

Because each member accessed her or his own profile by entering in a username and password, Pietrylo effectively restricted the website to authorized users in possession of an invitation to the group and a password-protected MySpace profile. Under pressure at a party one night, a Houston's greeter disclosed her password to her managers. Pietrylo was then fired for creating the group, which resulted in a lawsuit alleging that the managers violated the group's privacy. The court found that "[p]laintiffs created an invitation-only Internet discussion space. In this space, they had an expectation that only invited users would be able to read the discussion."[176] Ultimately, a jury found that Houston's managers had violated the Stored Communications Act and the New Jersey Wire Tapping & Electronic Surveillance Act. However, the jury did not support Pietrylo's claim for invasion of privacy. The jury found that Pietrylo had no reasonable expectation of privacy in the MySpace group, presumably because so many people were in the group, although it gave no official reasoning.[177]

Suppose the fired employees brought a claim for breach of an implied obligation of confidentiality against the hostess or the managers

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[173] 2008 WL 6085437 (D.N.J.).
[174] *Id.* at *1.
[175] *Id.*
[176] *Id.* at *6.
[177] *Hillstone Restaurant Group v. Pietrylo*, CITIZEN MEDIA LAW PROJECT (July 13, 2009), http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-06-16-Marino%20Verdict.pdf.

for inducement to breach confidentiality.[178] The first factor of the framework, context, would likely weigh in favor of an implied obligation of confidentiality. Like in *Moreno*, the facts do not reveal that access to the group was solicited by the hostess. However, unlike in *Moreno*, these disclosures were made for a specific purpose, to vent "without any outside eyes prying" on the members of the group. Thus, confidentiality was seemingly necessary to further the purpose of the group.

The second factor, the nature of the information, also favors a finding of implied confidentiality. Like in *Moreno*, the information disclosed here was personal in nature because it revealed the negative thoughts of the employees toward their manager. While the information might not inherently expose the discloser to physical harm, it certainly exposes the discloser to some form of retaliation, as evidenced by the fact that Pietrylo was fired for creating the group.

Regarding the third factor, the attributes of the actors and their relationship to each other, there is no evidence the hostess acted in bad faith to receive an invitation to the group. Additionally, there does not appear to be any inequality between the parties. The hostess and the waiters who created the group all were employees of Houston's of relatively the same status with no apparent advantage of resources or bargaining power over another. Unlike in *Moreno*, however, the parties likely had at least a partially developed relationship. Ostensibly, the parties worked together and got to know each other at least slightly before the invitation to join the group was sent out. This factor weighs in favor of finding of an implied obligation of confidentiality.

The final factor – terms of disclosure – is applied the most distinctly from *Moreno*. The website in *Pietrylo* explicitly stated that "[t]his group is entirely private, and can only be joined by invitation." The

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[178] Additionally, under some theories of the breach of confidentiality tort in the United States and England, a claim for inducement of breach of confidentiality could be successful against the managers. *See, e.g.,* STANLEY, THE LAW OF CONFIDENTIALITY: A RESTATEMENT 1-5 (2008); Attorney Gen. v. Observer, Ltd., (1990) 1 A.C. 109, 268 (H.L.) (appeal taken from eng.); Campell v. MGN Ltd., [2002] EWCA Civ 1373 [2003] Q.B. 633, 662; *see also* Patricia Sánchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689 (2010); Richards & Solove, *supra* note 1, at 178 ("[A] third party can freely disclose private facts about a person as long as the third party did not learn the information from a confidant.").

website also provided that the icon for the group, which was the restaurant's trademarked logo, "would appear only on the MySpace profiles of those who were invited into the group and accepted the invitation."[179] The fact that the privacy settings were used to restrict access to the group also served as a confidentiality indicator. Although the word confidential was apparently not used, the confidential nature of the group postings was indicated throughout the website and invitation. This factor weighs heavily in favor of an implied obligation of confidentiality for every member of the group.

Thus, three of the factors weigh in favor of an implied obligation of confidentiality, and one is neutral. Observing the factors as a whole, it is likely that a court would find an implied obligation of confidentiality under this framework. The *Moreno* and *Pietrylo* cases demonstrate the various ways the framework for implied obligations of confidentiality could be applied online in the same way it would be applied to offline cases.

CONCLUSION

It is clear that Internet users often have implicitly shared expectations of confidentiality. Yet the law has failed to reliably recognize this reality. The concept of implied confidentiality has not been developed enough to be consistently applied in an environments that often lack obvious physical or linguistic cues of confidence, such as the Internet. Implied confidentiality remains an unpredictable and underdeveloped concept because courts have left little explicit guidance in their relevant opinions. However, the rich history of implied confidentiality doctrine has left enough clues to refine the concept with a unifying decision-making framework.

This technology-neutral framework would help courts ascertain the two most common and important judicial considerations in implied obligations of confidentiality – party perception and party inequality. Such a nuanced framework will better enable the application of implied confidentiality in online disputes than the currently vague articulation of the concept. The Internet need not spell the end of implied agreements

[179] *Id.*

and relationships of trust. Courts need only dig deeper into the complex and developed relationships that fuel our online existence.

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