
ON PRIVACY: LIBERTY IN THE DIGITAL REVOLUTION

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In the dorm room of some college freshman Political Science major at Any College U.S.A is a copy of John Stuart Mill's *On Liberty* shoved under the bed.¹ Mill's *On Liberty*, studied for its discussion of liberty at large in the American polis, makes the fine distinction that our own privacy law in the United States currently struggles to recognize:

“But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation.”²

Our own jurisprudence has recognized these “spheres,” finding there to be a privacy interest in matters relating to women's health issues, familial matters, and other specifically identified

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1. See JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) [hereinafter MILL] (focusing on the nature and limits of individuals in society).

2. MILL, *supra* note 1, at 82-83.

areas.³ Outside of these particular contexts, these spheres, especially in Fourth Amendment jurisprudence, are often based upon spatial distinctions.⁴

Where the “right to privacy” becomes less clear is when a person’s intimate, seemingly obscure actions, in some way cross into the public domain.⁵ Out of the house and into the world, the right to privacy seems to dissolve, especially for those whose careers demand they be in the public view.⁶ In the visceral world, it is easier to make these distinctions as they are both temporal and spatial.⁷ When we take these debates into the virtual world, the boundaries become much less clear.⁸ “Opt in” and “opt out” schemes are not new or just online.⁹ Privacy rules, especially the tort of Publicity Given to Private Life in the *Restatement Second of Torts* § 652D, make it clear that once you enter into the public domain it is up to the public to decide what is of “legitimate concern to the public.”¹⁰

3. See *Griswold v. Conn.*, 381 U.S. 479, 499 (1965) (holding marital privacy is a fundamental right prescribed by the Ninth Amendment); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (concluding that the right of privacy includes mother’s right to terminate or continue pregnancy).

4. See *Kyllo v. United States*, 533 U.S. 27, 27-28 (2001) (deciding surveillance is a search under the Fourth Amendment), *Oliver v. United States*, 466 U.S. 170, 184 (1984) (holding open fields doctrine in deciding discovery or seizure of marijuana on private property).

5. See Samuel Warren & Earl Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-18 (1890) (describing the limitations of the right to privacy).

6. See *Chandler v. Miller*, 520 U.S. 305, 321 (1997) (exposing reduced privacy expectations of candidates for public office); Tiffany D. Lipscomb, *Can Congress Squeeze the “Juice” Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports’ Steroid Controversy*, 69 OHIO ST. L.J. 303, 336 (2008) (cautioning against diminishing privacy rights for celebrities and musicians).

7. See RESTATEMENT (SECOND) OF TORTS § 652C (1977) (portraying the interest protected by the right of privacy as the “name or likeness” of another).

8. See Tigran Palyan, *Common Law Privacy in a Not So Common World: Prospects for the Tort of Intrusion Upon Seclusion in Virtual Worlds*, 38 SW. U. L. REV. 167, 179 (2008) (excerpting peculiarities of privacy invasion in the virtual world).

9. See Pam Dixon and Robert Gellman, *World Privacy Forum’s Top Ten Opt Outs*, WORLD PRIVACY FORUM, archived at <http://www.webcitation.org/5wA26IP1v> (enumerating top ten “opt outs” including the National Do Not Call Registry and CAN SPAM e-mail initiative).

10. See RESTATEMENT (SECOND) OF TORTS § 652D (1977) (prescribing publicity given to private life).

Even Mill qualified his statement about the spheres of privacy:

“When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others through himself, and the objection which may be grounded on this contingency, will receive consideration in the sequel. This, then, is the appropriate region of human liberty.”¹¹

Mill lived in simpler times, as did we, less than fifteen years ago.¹² We had a better idea of when we were “opting in” or “opting out” of our privacy and to whom we were exposing ourselves.¹³ Our demands for privacy were based on the tangible, and much of our jurisprudence has stopped at the doorstep of the digital revolution, refusing to open the door and preemptively deal with the proliferation of exposure that can result from the mass dissemination of technology.¹⁴ So what happens...

- When we move out of the age of newsprint, geographically-restricted, and media outlet-driven information dispersion to the age of the “Celebrealty,” where with the click of a button, average citizens, celebrities, and public figures alike thrust themselves and others into a worldwide public domain that is read-write, user-created, and perpetually-fed through cowboy journalistic tactics, or perhaps the field of citizen journalists?¹⁵

11. MILL, *supra* note 1, at 82-83.

12. See JOHN STUART MILL, AUTOBIOGRAPHY 2 (1874) (detailing his own birth in London in 1806).

13. See, e.g., Lyn Giguere, *Google Alarm: Exposing Internet Privacy Issues One Page at a Time*, TOPWIRENEWS, Aug. 11, 2010, archived at <http://www.webcitation.org/5wA7LI581> (stating that most web surfers are unaware of internet privacy issues and that Google tracks their activity online).

14. See Rita R. Woltz, *The Expanding Government Speech Doctrine in United States Jurisprudence and its Implications for Internet Privacy and Private Speech*, 5 F. ON PUB. POL’Y, no.2, 2009 at 1, 1 (observing the “dearth of case law” involving the Internet).

15. See, e.g., Rachel Giese, *Star-Spangled Blogger: Perez Hilton Basks in*

- When members of Generation X, the Millennial Generation, and even the youngest generational cohort, go public with their private lives, attempt to create online communities and fail to realize that in any small online “town,” your business is not just the business of everyone in that community but also that of the entire world?¹⁶

...when the right to privacy starts being trumped by the emergence of a new “right,” the right not just to “know,” but the “right to know everything?”¹⁷

We, as a society, are faced with the incompatibility of our demands.¹⁸ Within the virtual world, we open ourselves to the public in platforms like Facebook but we demand privacy for some of the same personal information when we participate in the online marketplace.¹⁹ This is even further complicated by the anger we express when these same social network platforms change their terms of use and their “rules of the game” to deal with user privacy.²⁰ In the battle to coalesce the tension between

Celebrity’s Warm Glow, CBC.CA, June 22, 2006, archived at <http://www.webcitation.org/5wE14Wv7l> (contending that the ability of citizen journalists’ to quickly spread news widely has changed how the media reports celebrity gossip); see Imani Perry, *Do You Really Love New York?: Exposing the Troubling Relationship Between Popular Racial Imagery and Social Policy in the 21st Century*, 10 BERKELEY J. AFR.-AM. L. & POL’Y, 92, 105 (2008) (explaining that “[c]elebreality is a term applied to reality shows which [sic] feature celebrities”).

16. See, e.g., David Hector Montes, *Living Our Lives Online: The Privacy Implications of Online Social Networking*, 5 I/S: J. L. & POL’Y FOR INFO. SOC’Y 507, 513 (2010) (positing that cyberbullying induced suicides are one possible result of children posting personal information on public websites).

17. See Lawrence M. Friedman, *The One-Way Mirror: Law, Privacy, and the Media*, 82 WASH. U. L.Q. 319, 330 (2004) (examining the factors underlying the public’s claim of a “right to know everything about celebrities”).

18. See, e.g., Cristina Duarte, *The Family and Medical Leave Act of 1993: Paying the Price for an Imperfect Solution*, 32 U. LOUISVILLE J. FAM. L. 833, 840-41 (1994) (questioning the use of federal legislation to ease societal tensions in light of the incompatible demands of work and family responsibility).

19. Compare Montes, *supra* note 16, at 508 (implying a public interest in divulging personal information on social networking sites), with Jane E. Kirtley, *Privacy Protection, Safety, and Security*, 1027 P.L.I/PAT. 15, 71-72 (2010) (documenting Amazon.com users’ demand of protection against North Carolina Department of Revenue).

20. See Mark Milian, *Facebook Backtracks on Terms of Use After Protests*, LOS ANGELES TIMES, Feb. 19, 2009, archived at <http://www.webcitation.org/5wEBxom51> (describing Facebook users’

the virtual and the visceral world, we face the distinct reality that what we do online is eroding the concept of the “reasonable expectation of privacy” both on and offline.²¹

A balance must be struck. Alan Westin writes that, “each individual must, within the larger context of his culture, status, and his personal situation, make a continuous adjustment between his needs for solitude and companionship; for intimacy and general social intercourse; for anonymity and responsible participation in society; for reserve and disclosure.”²² Balancing our demands for transparency in some spheres with our demand for privacy in others, essentially where does the “right to know” begin and end? Two questions will drive this analysis:

- 1) Whose privacy are we willing easily to surrender, whose privacy should we be willing to surrender, and what matter is “of legitimate concern”²³ to the public?; and
- 2) Have we compromised our right to privacy with online activity, narrowing the spheres in which there is a “reasonable expectation of privacy?”²⁴

A third looming question is whether people like Facebook founder, Mark Zuckerberg, are correct when they assert that the social norm is no longer privacy.²⁵

Part I, *Celebreality*, discusses how the public’s obsession with public figures and the creation of their own “celebrity” is working to destroy privacy protections afforded under already weak torts such as the tort of Publicity Given to Private Life. Part

outrage after terms of use changes).

21. See Montes, *supra* note 16, at 508-09 (concluding that increased online participation results in decreased privacy in various aspects of society).

22. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 42 (1967).

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

24. See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (forming the standard for reasonable expectation of privacy).

25. See Eliot Van Buskirk, *Report: Facebook CEO Mark Zuckerberg Doesn't Believe in Privacy*, EPICENTER, Apr. 28, 2010, archived at <http://www.webcitation.org/5wEEqwldq> (recounting Facebook CEO Mark Zuckerberg’s admissions about privacy online).

II, *R.I.P. to the REP*, explores how the utilization of social networking sites like Facebook, under the guise of corporate-created legal regimes for privacy, is working to erode the reasonable expectation of privacy for individuals on and offline. Part III, *A Naked Truth*, argues the need for revival of tort protection for individual privacy and the need for Congressional action to preserve the privacy of individual users online. Concluding, *No Such Thing as a Free Lunch*, reflects on how the societal demand for the "right to know" will only be won at great cost to individual privacy rights.

I. Part I: Celebreality

With the click of a button, one enters into the world of Celebreality.²⁶ Not the world fashioned by the cable network VH1, which coined the term to represent its programming that purports to track the life of former and aspiring A-List celebrities (and B-List, C-List, D-List, or "No-List" celebrities), but the real world where every movement, clothing choice, cigarette lighting, car exit, restaurant entrance and grocery shopping trip is accounted for.²⁷ This is the world of *TheSuperficial.com*.²⁸

"OJ Simpson arrested."²⁹ The article on this particular *TheSuperficial.com* entry displayed the picture taken upon his

26. See Joyce Millman, *Celebreality: The 'Stars' Are Elbowing Their Way In*, N.Y. TIMES, Jan. 5, 2003, §2, at 1, archived at <http://www.webcitation.org/5x59BBfQy> (heralding a new form of television drama where celebrities act like nonfamous people).

27. See Brian Stelter, *With 'Celebreality,' VH1 Attracts Ratings and Chagrin*, N.Y. TIMES, Aug. 30, 2009, §B, at 5, archived at <http://www.webcitation.org/5x59UStEy> (expanding on the genre VH1 created and the criticism the programming draws for the network).

28. See *Celebrity Gossip - The Superficial - Because You're Ugly*, THESUPERFICIAL.COM (displaying the home page). TheSuperficial.com is an online celebrity gossip website. See *Thesuperficial.com*, QUARKBASE.COM, archived at <http://www.webcitation.org/5x2WszKlW> (collecting various information and statistics about TheSuperficial.com). According to statistics from QuantCast, TheSuperficial.com receives over 669,000 visitors per month and boasts to users the tagline "Because You're Ugly." *TheSuperficial.com*, QUANTCAST.COM, Jan. 25, 2011, archived at <http://www.webcitation.org/5w12FnOis>.

29. *O.J. Simpson arrested*, THESUPERFICIAL.COM, Sep. 17, 2007, archived at <http://www.webcitation.org/5w3M7s0Bq>.

arrest, and explained that Simpson “was charged with two counts of robbery with a deadly weapon, two counts of assault with a deadly weapon, and conspiracy to commit a crime and burglary with a firearm, and the fact that he was currently being held without bail.”³⁰

“Pamela Anderson ages 50 years before your eyes.”³¹ Upon appearances in the photograph accompanying this *TheSuperficial.com* entry, Pamela Anderson is picking up poster board at a local drugstore, likely for one of her two children, but having a particularly unbecoming hair and makeup day.³²

One of these articles appeared in major news sources, concerning the arrest of someone for violent crimes that has consistently been a public figure and who had previously been on trial for murder.³³ The other is someone whose career puts that person in the public spotlight, having somewhat of a haggardly day, picking up some art supplies for one of her children.³⁴ Is this second scenario “of legitimate concern to the public?”³⁵

The first example obviously rises to the level of public concern, without even addressing the legal arguments; it is a crime that violates our laws as well as our societal notions of public safety and welfare.³⁶ The second example, even though mundane, would still be considered acceptable, since the legal fiction of the “reasonable person” would likely not find it “offensive.”³⁷ Has Ms. Anderson put herself in the public view?

30. See *O.J. Simpson Arrested*, *supra* note 29.

31. *Pamela Anderson Ages Fifty Years Before Your Eyes*, THESUPERFICIAL.COM, Sep. 20, 2007, archived at <http://www.webcitation.org/5w3NQ56oo> [hereinafter Pamela Anderson].

32. See *Pamela Anderson*, *supra* note 31 (displaying a picture of Pamela Anderson).

33. See *O. J. Simpson*, N.Y. TIMES, Dec. 3, 2008, archived at <http://www.webcitation.org/5w30xbGzg> (describing O. J. Simpson's professional and criminal history).

34. See *Pamela Anderson*, *supra* note 31 (displaying a picture of Pamela Anderson without makeup, leaving a store, and holding a posterboard).

35. RESTATEMENT (SECOND) OF TORTS, § 652D (1977).

36. See RESTATEMENT (SECOND) OF TORTS, § 652D cmt. d (1977) (highlighting that no liability exists where one discloses already public information such as court pleadings); *O.J. Simpson Arrested*, *supra* note 29 (describing why O. J. Simpson was arrested in 2007).

37. See RESTATEMENT (SECOND) OF TORTS, § 652D cmt. c (1977) (giving an

Yes.³⁸ But because you put yourself into the purview of the public in a professional capacity, are you subject to the tracking of your every move?³⁹ This is the question that remains unanswered in the world of “celebrity,” a status that society has more willingly given to those who might have been considered merely private citizens in the past.⁴⁰

Pushing the envelope much further, a third example is the “crotch shot” phenomenon, where members of the paparazzi wait for a female celebrity to exit a car, see if her legs are spread wide enough apart to snap a shot of the female celebrity’s vaginal area, and take a photograph that exposes that area to the rest of the world.⁴¹ A woman’s private parts are called that for a reason: they are meant to be private.⁴² These pictures display content that would still be considered to be highly offensive to the reasonable person.⁴³ Nonetheless, are these pictures of “legitimate concern to the public?”⁴⁴ Is a celebrity, who wears revealing clothing to a club and decides to “go commando,” subjecting herself to the public purview as cameras specifically wait for that particular money shot?⁴⁵

example of a reasonable person not taking offense at a newspaper report about returning from a trip).

38. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977) (explaining how an actor places himself in public view as a voluntary public figure).

39. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977) (illustrating that some public figures’ private facts are protected).

40. See *id.* (stressing the line must be drawn between legitimate public interest and private facts).

41. See *We Love the Crotch Shot*, PEREZHILTON.COM, Aug. 27, 2007, archived at <http://www.webcitation.org/5w3VewkXT> [hereinafter *We Love the Crotch Shot*] (displaying an example of a “crotch shot”).

42. See MOHAMMAD DIAB, LEXICON OF ORTHOPAEDIC ETYMOLOGY 278 (1999) (showing the etymology of private parts by way of metonymy from pubis).

43. See *We Love the Crotch Shot*, *supra* note 41 (displaying a “crotch shot” of Danielle Harris).

44. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. d. (1977) (commenting on how the common law and the Federal Constitution require that subject matter of the publicity must be a legitimate public concern and therefore, not an invasion of privacy).

45. See *Going Commando!*, THE BS HISTORIAN, Oct. 3, 2007, archived at <http://www.webcitation.org/5w3XuvDqX> (explaining the etymology of “going commando”).

This discussion of the “reasonable person” and “the legitimate concern of the public” has a point, relating to the privacy redress one can gain from torts such as the Publicity Given to Private Life, found in the *Restatement (Second) of Torts* § 652D, which states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of the kind that (a) would be highly offensive to the reasonable person, and (b) is not of legitimate concern to the public.⁴⁶

In theory, this tort shelters people from the revelation of facts considered highly offensive and of no concern to the public, but this protection has been continually eroded by the courts over the years, and by the shifting of social mores regarding what is offensive and what should be in the public interest.⁴⁷ In fact, some scholars feel that the Supreme Court has rendered the tort dead, with no plans for resuscitation in sight.⁴⁸

The concern over the public’s growing interest in the “private” was demonstrated by Warren and Brandeis at the end of their *Harvard Law Review* piece over one hundred and seventeen years ago when they posed a seminal question: “Shall the courts thus close the front door to constituted authority, and open wide the back door to idle and prurient curiosity?”⁴⁹ Arguably, the public’s prurient curiosities are not new. We have always tried to eavesdrop on conversations that we as a society were never meant to be a part of, discussed that one neighbor’s business amongst the rest of the self-appointed “Neighborhood Watch,” and exhibited the desire to know about the lives of those

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

47. See Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Public Domain*, 55 MD. L. REV. 425, 448 (1996) (noting that in several cases, the Supreme Court has narrowed “the tort’s theoretical scope of protection”).

48. See Mintz, *supra* note 47, at 426 (summarizing academia’s position that the tort of public disclosure of private facts is dead).

49. Warren & Brandeis, *supra* note 5, at 220.

whose grass seems greener on the other side of the fence.⁵⁰ With the advent of advanced technologies and digital information systems, coupled with the proliferation of not only access to the Internet, but America's growing familiarity with the use of its applications, it has become easier to satisfy these prurient interests.⁵¹

It is the appropriate recourse that private actors and public actors in private capacities should be of concern to the general public, more specifically, the rising of the threshold to gain protection under the tort of Publicity Given to Private Life.⁵² The primary debate over the tort has been in the context of the First Amendment, pitting the individual's privacy right in the exposition of facts about their lives versus the right of the press to engage in its newsgathering practices.⁵³ Erwin Chemerinsky discusses the importance of the newsgathering function of the media, who argues that for the media to provide a "checking value on the government," it must have the ability to inform "people about matters that are important to their lives."⁵⁴ While the press does feed the public "right to know" in a democratic society, Chemerinsky's arguments are premised on subject-matter, relating to government practices, consumer protection, as well as social and public policy issues.⁵⁵ What would Chemerinsky have us do with "crap?"

The absolutism promulgated in this viewpoint seems too impractical when it comes to newsgathering that is solely for

50. See Warren & Brandeis, *supra* note 5, at 195 (noting the modern technology and business methods aid the invasion of private and domestic life).

51. See Byron Dubow, *Confessions of 'Facebook Stalkers'*, USA TODAY, Mar. 8, 2007, archived at <http://www.webcitation.org/5w41CieUT> (describing casual 'stalking' on Facebook as typical).

52. See RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining right of publicity under tort).

53. See RESTATEMENT (SECOND) OF TORTS § 652D (1977) (elucidating the relationship between right of publicity and the Constitution).

54. Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1159-60 (2000).

55. See Chemerinsky, *supra* note 54, at 1158-64 (articulating protecting newsgathering based on a freedom of speech standard).

entertainment purposes, or to slide further down the scale, to satisfy the public's perversion. This adherence to absolutism must also be questioned as newsgathering and information sharing has shifted from the traditional print media model to individual bloggers and citizen journalists.⁵⁶ Where Chemerinsky does part ways with an absolutist stance is his endorsement of the California Anti-Paparazzi Act, which he considers to be constitutional because it deals with the sphere of the home, an intimate sphere and one that should receive privacy protection.⁵⁷ Still, Chemerinsky's absolutism begins again once you are outside on your doorstep if you are a celebrity.⁵⁸

This discussion is impacted by the exponential increase in exposure that one experiences in today's information age.⁵⁹ Your business is not just published in a finite number of print publications; it is available permanently online for the world to see.⁶⁰ Consider the average readership of print media when this privacy debate first emerged versus the average readership of these same news outlets online.⁶¹ You go from the assumption of

56. See Amy Harmon, *A NATION AT WAR: Weblogs; Facts Are In, Spin Is Out*, N.Y. TIMES, Mar. 25, 2003, §B, at 14, archived at <http://www.webcitation.org/5x5CMVQKp> (portraying an increasing shift where readers look to blogs over traditional media outlets for news and information).

57. See *California Privacy Protection Act*, Cal. Civ. Code §1708.8 (West 2004) (setting forth refined elements to California's invasion of privacy laws). The Act imposes a heightened penalty scheme when a person trespasses in order to "physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person." *Id.*; see also Chemerinsky, *supra* note 54, at 1163-64 (advocating the constitutionality of the California Privacy Protection Act).

58. See Chemerinsky, *supra* note 54, at 1163-64 (emphasizing that privacy protection is for the home).

59. See Kate Murphy, *Web Photos That Reveal Secrets, Like Where You Live*, N.Y. TIMES, Aug. 11, 2010, §B, at 6, archived at <http://www.webcitation.org/5x5CvSU2S> (demonstrating how technology, such as geotagging, can expose where picture takers are at any time).

60. See Allison Hope Weiner, *The Web Site Celebrities Fear*, N.Y. TIMES, June 25, 2007, §C, at 1, archived at <http://www.webcitation.org/5x5DAoIRi> (revealing TMZ.com's impact on publishing celebrity information online).

61. See *Public More Critical of Press, But Goodwill Persists*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, June 26, 2005, archived at <http://www.webcitation.org/5wMJQD3uL> (summarizing media outlet statistics for online and offline publications).

risk that several million people will be exposed to your business to a Panopticonal existence, where instead of having some sense of control over who has access to you that is of essence to your privacy, you lose complete control even of the scope of the public "domain" to which you are exposing yourself.⁶²

A discussion of whose privacy we are willing to surrender and in what ways, couched in the current digital context, applying our current tort doctrine, but accounting for the change in societal attitudes, is necessary at this juncture.⁶³ Rodney Smolla articulates the need for this analysis writing that, "our future laws and public policies on these issues inevitably will be influenced by broader cultural movements regarding privacy."⁶⁴

A. *The Who*

The status of the person involved in the particular behavior that the "media" seeks to report can change the newsworthiness analysis.⁶⁵ Traditionally, public figures were considered to be public officials, elected representatives, appointed officers, movie stars, or other self-identified leaders.⁶⁶ Today, the idea of who is a public official has expanded to include a broad range of actors.⁶⁷ The need to know more about a wider variety of people has been accompanied by a growing interest in gaining more details about people who were traditionally public

62. See 4 JEREMY BENTHAM, *Panopticon, or, The Inspection-House*, in THE WORKS OF JEREMY BENTHAM 40-41 (John Bowring ed., Russell & Russell Inc. 1962) (setting forth the ideal prison layout in which guards can always observe prisoners).

63. See Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1118 (1999) (questioning public benefit derived from tort of intrusion).

64. Smolla, *supra* note 63, at 1097.

65. See Smolla, *supra* note 63, at 1134 (elucidating difficulties in differentiating between "private" and "newsworthy" facts).

66. See Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171, 195-96 (2010) (limiting definition of public figures in the nineteenth century to politicians, inventors, and other traditional public men).

67. See BLACK'S LAW DICTIONARY 570 (2d ed. 2001) (defining public figure as a "person who has achieved fame or notoriety or who has voluntarily become involved in a public controversy").

figures.⁶⁸ Public officials and celebrities are no longer distinct; both of these categorizations have become “mega-celebrities,” all-purpose public figures.⁶⁹ This gets further complicated when members of the general public, who were once considered private citizens, which was a factor in the analysis under Section 652D, create their own “celebreality.”⁷⁰ Reality shows like MTV’s phenomenon *Jersey Shore* catapult people into the limelight who ten years ago would not have been considered to share celebrity status.⁷¹

Newsworthiness analysis hinders celebrities in their ability to wear “their” masks.⁷² Even in public, private citizens expect some sense of privacy in the things that they do.⁷³ We are told as children that it is not polite to stare at someone for a reason: it invades someone else’s personal space.⁷⁴ Unlike the “private” citizen’s ability to mask themselves in the anonymity of the masses, celebrities are treated as if they are continually at work in front of the media.⁷⁵

There are those who may not agree with the forced media presence of the traditional celebrity. Yet, in the face of our current state of “Celebreality,” the line between voluntary and

68. See Warren & Brandeis, *supra* note 5, at 196 (stating “column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle”).

69. See Warren & Brandeis, *supra* note 5, at 195 (portraying “all-purpose” public figures as those lacking any sphere of private life).

70. See Smolla, *supra* note 63, at 1098 (noting tendency of reality television to dissolve the line between public and private figures).

71. See *Jersey Shore*, MTV.COM, archived at <http://www.webcitation.org/5xnb130Zo> (enabling visitors to watch full episodes, access message boards, view cast photos and biographies, and purchase merchandise).

72. See Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 181-82 (1999) (reasoning that “[celebrities’] lives are scrutinized too closely”).

73. See Allen, *supra* note 72, at 177-78 (examining how private citizens may lie in public regarding intimate personal details because of the importance of privacy).

74. See WILBURTA Q. LINDH et al., DELMAR’S CLINICAL MEDICAL ASSISTING 56 (4th ed. 2010) (warning that “[s]taring is dehumanizing and is often interpreted as an invasion of privacy”).

75. See Allen, *supra* note 72, at 182 (contending that politicians and public officials “work and play before the eyes of the media”).

involuntary public figures becomes more blurred.⁷⁶ There is the possibility that private citizens could gain the voluntary status through their activity online.⁷⁷ Comment E to the Restatement states that a private citizen “by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment” could elevate themselves to “newsworthy” status.⁷⁸

Comment H, in a scarier revelation due to today’s current digital state of affairs, states that these factors are determined by “community mores.”⁷⁹ When your community is demanding anything and everything, the last nail seems to have been hammered in the coffin for privacy for even the private citizen who happens to get into a public situation.⁸⁰ The invasion of ordinary citizen privacy is not nascent but will become more widespread.⁸¹ This is the same reason that Oliver Sipple’s sexuality was revealed nationally after he stopped a would-be assassin from shooting President Gerald Ford in 1975.⁸²

B. The What

Within the tort of Publicity Given to Private Life, the bar facially for publication includes offensiveness and a failure of the information in question to be of legitimate public concern.⁸³ The protection given to newsgathering is premised on the fact that if the media is barred from getting the scoop, the public would

76. See Smolla, *supra* note 63, at 1098 (noting that ordinary people are often thrust into public view by the media).

77. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977) (inferring that online activity confers a voluntary public figure status because it is “submitting . . . work for public judgment”).

78. RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977).

79. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

80. See Smolla, *supra* note 63, at 1098 (indicating that the media is intruding more often and more deeply into people’s private lives).

81. See Smolla, *supra* note 63, at 1097 (noting the current trend of privacy erosion).

82. See *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 666 (Ct. App. 1984) (chronicling the newspaper reporting on Sipple’s sexual orientation).

83. See RESTATEMENT (SECOND) OF TORTS § 652D (1977) (requiring publicized matter to be “highly offensive to a reasonable person” and “not of legitimate concern to the public”).

suffer a disservice since such newsgathering is essential in making judgments about people.⁸⁴ After all, in the Information Age, isn't privacy in conflict with the online mantra that "information should roam free?"⁸⁵

Not when the mass media has transitioned from being a reactionary force to what is going on to shaping what happens.⁸⁶ Although the court has expressed that they will "leave it to the press to decide what is newsworthy and what is not," this goes against our personal, almost instinctual, notions, that personal information is a type of property.⁸⁷ Eugene Volokh counters this belief with the idea that even if you feel it is a property right or if you call it one, it is still a speech restriction, where speech is a right that is expressly protected by the First Amendment versus privacy, which is hidden in the "penumbras" of the Constitution.⁸⁸ Are we just left with a framework that pits "speech" v. "privacy"?

1. That Doth Offends Me

Common definitions for what is considered "offensive" under Section 652D includes that which "'shocks the conscience,'" "'outrage[s] the community's notions of decency,'" and "is 'exploitative' rather than 'informational or cultural.'"⁸⁹ This why under the law, even though it is frankly irritating for a

84. See Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1001-02 (2003) (analyzing how the press is given deference in categorizing matters as public or private).

85. See Solove, *supra* note 84, at 973 (stating a general mantra of the online world).

86. See Solove, *supra* note 84, at 1004 (pointing to the media as a guiding force in societal norms).

87. See *Jenkins v. Dell Publ'g Co.*, 251 F.2d 447, 451-52 (3d Cir. 1958) (evaluating the newsworthiness of otherwise private information); see also Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 159-60 (1997) (dissecting the "leave-it-to-the-press" approach).

88. See 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, 1063-64 (2000) (rejecting the effectiveness of labeling speech restrictions as property rights); see also *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., concurring) (using the term "penumbra" to describe the reach of the Fourth and Fifth Amendments).

89. Mintz, *supra* note 47, at 439.

celebrity like Pamela Anderson to be followed to the drugstore on a poster board gathering trip and, frankly, of no use to the public interest, it is not offensive, but rather seen as “daily life matters” speech.⁹⁰

There are situations in which common sense decency is violated.⁹¹ *Daily Times Democrat v. Graham* dealt with the original “crotch shot” case, where a newspaper photographer took a photo of woman’s undergarments as her dress was blown up by vents upon her exit from a carnival funhouse.⁹² The court found the *Daily Times Democrat* to be liable under Section 867,⁹³ determining that information that shows people in ridiculous, embarrassing, or demeaning contexts without revealing any useful new information about them is not newsworthy.⁹⁴

The “crotch shots” that take place today are not offensive because they are embarrassing but because the subject is in a position that, by cultural convention, is seen as ridiculous or undignified.⁹⁵ With the proliferation of technology and the continued exposure to photograph after photograph of such, it does become an imminent threat that “at some unknown future information technology might get so powerful that these values will indeed be threatened with ‘destruction’ by such speech.”⁹⁶

2. Too Legit To Quit

90. See Volokh, *supra* note 88, at 1092 (coining the term “daily life matters” and opining that it is protected by the First Amendment).

91. See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 416 (1960) (noting that indecent photographs violate common decency).

92. See *Daily Times Democrat v. Graham*, 162 So. 2d 474, 476 (Ala. 1964) (describing how the photograph was taken without the subject’s knowledge or permission).

93. RESTATEMENT (FIRST) OF TORTS § 867 (1939). § 652D replaced § 867 in the second restatement of torts. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

94. See *Daily Times Democrat*, 162 So. 2d at 477 (questioning newsworthiness of the photograph based on its obscenity).

95. See Volokh, *supra* note 88, at 1094 (portraying a scenario where a person has an undignified picture taken while on a toilet).

96. Volokh, *supra* note 88, at 1112.

Arguing “*tit-for-tort*” is far too simplistic.⁹⁷ How do we find what is of legitimate concern to the public when “everything is hanging out; nothing is sacred; we have all gone nuts?”⁹⁸ The distinction often hinges on the context in which the behavior takes place.⁹⁹ “A sexual affair is normally [a] private [matter].”¹⁰⁰ Yet, if you take the affair and place it in a context where it involves sexual harassment, the affair becomes simultaneously a private matter that has gained newsworthiness.¹⁰¹ The nature of the subject matter involved in a private matter can “morph” it into a matter of public concern.¹⁰²

Daniel Solove grapples with the public-private distinction when it comes to newsworthiness.¹⁰³ Solove gives the example of the public having the “right to know” where a child molester lives versus the public having or needing the “right to know” about a celebrity foot fetish.¹⁰⁴ His supposition is that the public wants to know about the child molester and not necessarily about the foot fetish.¹⁰⁵ Unfortunately, in the age of *PerezHilton.com*, *TMZ*, and *TheSuperficial.com*, we want to know both and nothing is sacred.¹⁰⁶ We have to embrace the reality that sources like *TMZ* broke some of the major new stories of the 2009 news cycle.¹⁰⁷

97. See Volokh, *supra* note 88, at 1100-05 (indicating complexity by listing alternative proposals for retrenching privacy).

98. Smolla, *supra* note 63, at 1097.

99. See Smolla, *supra* note 63, at 1138 (evaluating impact that the context of the behavior has on transforming a private person’s poignantly tragic incident into a newsworthy story).

100. Smolla, *supra* note 63, at 1134.

101. See Smolla, *supra* note 63, at 1133-34 (noting newsworthiness of sexual harassment committed by a public official).

102. See Smolla, *supra* note 63, at 1134 (reiterating that Bill Clinton’s private sexual affair with Monica Lewinsky became a matter of public concern).

103. See Solove, *supra* note 84, at 1000 (defining the newsworthiness test in the context of the tort of public disclosure).

104. See Solove, *supra* note 84, at 1009 (revealing that information about private figures can be more relevant than information about public figures).

105. See Solove, *supra* note 84, at 1009 (expounding the importance to society of identifying a dangerous child molester).

106. See Smolla, *supra* note 63, at 1097 (stressing the prevalence of aggressive business entities distributing private information).

107. See Eric Deggans, *TMZ Breaks News Michael Jackson is Dead; Does That Also Spell the Death of Traditional Media Showbiz Coverage?*, TAMPABAY.COM, June 25, 2009, archived at <http://www.webcitation.org/5wQUVCe7m> (reporting that *TMZ* broke the news of Michael Jackson’s death an hour before any other news source).

Capitalism is eroding our privacy, because nobody wants to be out-scooped.¹⁰⁸ This is not more evident than when you are in a law school Information Privacy class and the self-proclaimed privacy advocates, while chastising California's Proposition 77 and its violation of the privacy rights of sexual offenders, are surfing the likes of *People.com*.¹⁰⁹ This reflects the lack of consistency in who society is willing to protect with its notions of privacy and who it will not.¹¹⁰ At times, the choice of who we are willing to extend the veil of privacy is confusing.¹¹¹

How did the state of the law arrive here? It was partially by the courts and partially by the public's own making.¹¹² The question of newsworthiness used to be based on whether the legal fiction of the ordinary "reasonable person" would find the material at issue in a case newsworthy.¹¹³ It was much harder to argue ten years ago that a "crotch shot" was newsworthy, especially in view of *Daily Times Democrat v. Graham*.¹¹⁴ If there is even any protection in the last element in this part of Section 652D, which is doubtful for public figures, it has been further if not completely eroded by online Celebrealty.¹¹⁵ Since the market yearns for these types of details and photographs, the public is caught in its own trap.¹¹⁶ By its purchasing,

108. See Solove, *supra* note 84, at 1006 (observing the obligation felt by the media to report what is in the public sphere of discussion).

109. See *Dynamic Mix of Breaking News, Interactive Award Show Coverage, a Growing Social Media Presence, and More Contribute to Record-Breaking Month for the No. 1 Celebrity Magazine Website*, TIME, Feb. 2, 2010, archived at <http://www.webcitation.org/5wQWn7MXE> [hereinafter *People*] (quantifying extent of *People.com*'s popularity).

110. See Solove, *supra* note 84, at 1009 (identifying maleability of a focus upon public figure status).

111. See, e.g., *State v. Rhodes*, 61 N.C. 453, 459 (Phil. 1868) (holding that domestic violence was not a significant enough crime to warrant piercing the veil of privacy).

112. See DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 114-19 (2007) (summarizing the history of defamation law and the right of privacy).

113. See Smolla, *supra* note 63, at 1136 (noting the objective standard of newsworthiness in private figure cases).

114. See *Daily Times Democrat*, 162 So. 2d at 476, 478 (holding that the publication of a picture of a woman with her dress blown up by air vents violated her right of privacy).

115. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977) (justifying the extensive intrusion upon right of privacy for voluntary public figures).

116. See, e.g., *People*, *supra* note 109 (demonstrating public's desire for

downloading, and viewing, the public has made something newsworthy that should not be and that was not anticipated by the courts that crafted our current regime of protections.¹¹⁷ As long as the “reasonable person” can derive social value from a situation, or “The Situation,” the legitimate public interest is satisfied, regardless of the result it has upon the person now open to public purview.¹¹⁸

Critics of the current state of affairs argue that protections, in view of the changing market, must be bolstered. Under the current state of the tort, if you are in a public place, you are treated as though you have impliedly consented to being of “newsworthy” status, but some critics argue that this determination should be a question of degree and should not *prima facie* destroy the right to privacy.¹¹⁹

In *Virgil v. Time, Inc.*, the court stated: “The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.”¹²⁰ Today’s Celebrealty should be considered “a morbid and sensational prying into private lives for its own sake” and that this status of a piece of information is where “the line is to be drawn.”¹²¹

Our “prurient curiosities” are eroding our own causes of action under Section 652, creating a situation where the “privacy plaintiff’s take is the product of the privacy plaintiff’s make.”¹²²

privacy of the celebrities).

117. See THE FUTURE OF REPUTATION, *supra* note 112, at 123 (observing that the current legal system is not sufficient for the remedy of invasion of “newsworth” privacy).

118. See *Sipple*, 154 Cal. App. 3d at 1048 (outlining the test for “newsworthy”). “The Situation” is one of the members of the cast of MTV’s *Jersey Shore* reality show. See *Jersey Shore*, MTV.COM, *supra* note 71.

119. Mintz, *supra* note 47, at 440 (defining privacy by the location of facts disclosed).

120. 527 F.2d 1122, 1129 (Cal. 1975).

121. See Emile Karafiol, *The Right to Privacy and the Sidis Case*, 12 GA. L. REV. 513, 525 (1978).

122. Smolla, *supra* note 63, at 1138; see also RESTATEMENT (SECOND) OF TORTS §

There is a danger in surfing the web for such content: there is the distinct possibility you might drown. The reality is that the courts cannot continue to look at the celebrity issue as black and white as the boundaries of the definition of who qualifies as a celebrity will continue to be pushed outward.¹²³ Individual users are feeding the abuse of their own and others' privacy.¹²⁴ As interesting as that article on actress Lindsay Lohan may be, society's consumption of such media lends to its being deemed a "matter of public interest" or subject to the protections afforded information that is classified as "newsworthy."¹²⁵

II. Part II: R.I.P. to the REP

As demonstrated in the case of Celebrealty, context is everything when it comes to privacy.¹²⁶ For this very reason, it is difficult to have a bright line rule regarding the First Amendment and privacy.¹²⁷ These decisions must necessarily be made on a case-by-case basis as they involve considerations of what is public and what is private.¹²⁸ Jonathan Mintz differentiates between the "public domain" and the "private domain" with a helpful real-world scenario.¹²⁹ Let's say a woman decides to disclose the fact she has had an abortion to riders on a bus.¹³⁰ If she announces this fact upon a public bus, she has voluntarily disclosed such information into the "public domain," even through it is intimate and likely one of the most personal details

652D cmt. c (1977) (explaining that protection afforded is relative to the customs of the time and place).

123. See Solove, *supra* note 84, at 1009-10 (arguing that boundaries need to be determined on a case by case basis).

124. See Smolla, *supra* note 63, at 1098 (critiquing tabloid culture).

125. See Smolla, *supra* note 63, at 1098 (broadening newsworthy subjects).

126. Clifford J. Shapiro, *The First Amendment and the Private Domain* (1963) (unpublished paper).

127. See *Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967) (comparing different possible standards for privacy invasion).

128. See *id.* (cautioning that different issues arise with respect to private and public situations); *Evans v. Evans*, 76 Cal. Rptr. 3d 859, 863 (Cal. Ct. App. 2008) (debating the balance of individual privacy versus the free speech interests in publication).

129. See Mintz, *supra* note 47, at 459 (illustrating the difference between public and private scenarios).

130. See Mintz, *supra* note 47, at 459 (elucidating a scenario where a woman discloses medical information in private and public).

one can reveal about themselves.¹³¹ Yet, if we change the context to another bus, this time a private chartered bus with family members, and she reveals the same details, the information is considered inviolable and secret.¹³² This simple change in context renders the information to be considered within the “private domain,” and thus subject to greater protection in the eyes of the law.¹³³ Now, let us transition from the bus to the Internet. Do these analogies translate online?

In an attempt to adapt these Mintz analogies, is a user entitled to the protection afforded to the private domain when they reveal to someone intimate details through instantaneous messaging tools such as America Online’s Instant Messenger (“AIM”) or Google Chat (“GChat”) versus when a user posts the same information in an open online forum? The answer to this question may at first seem to be obvious. “GChat” would be analogous to the private bus, and the online forum is analogous to the public bus.¹³⁴ In the bus scenario, Mintz is focusing on the conduct of the discloser (and potential plaintiff), and the degree of intimacy in which the disclosure takes place.¹³⁵ As an individual online, I may just be intending to disclose details of my love life to one person, but with GChat especially, conversations are “banked,” allowing Google’s possession of said conversations and the ability to review later on what was discussed.¹³⁶ Conversations go from hearsay to “Here, see?” Adding technology to the privacy equation makes an already complex visceral issue of determining what is public and what is private run haywire.¹³⁷

131. See Mintz, *supra* note 47, at 459 (considering the disclosure of personal information in a public forum).

132. See Mintz, *supra* note 47, at 459 (changing the context of the scenario for comparison between private and public disclosure).

133. See Mintz, *supra* note 47, at 459 (distinguishing how the legal context changes from a public forum to a private forum).

134. See Mintz, *supra* note 47, at 459 (reasoning that private conversations are in the private domain).

135. See Mintz, *supra* note 47, at 460 (noting the importance of who the speaker and listener are in determining whether the forum should be public or private).

136. See *About Gmail*, GOOGLE.COM, archived at <http://www.webcitation.org/5wWRVN0jf> (delineating the chat history saving feature of Gchat).

137. See *About Gmail*, *supra* note 136 (articulating Gchat’s “off the record” features).

Even with these emerging complexities, our existing legal frameworks for privacy may be equipped to deal with this scenario. *Times Mirror Co. v. Superior Court* holds that the revelation of intimate matters to family or close personal friends does not cause one to lose their privacy interest.¹³⁸ Mintz recommends a “zone of fair intimate disclosure,” which would still be subject to the fact-intensive challenges that normally occur in this area of jurisprudence, but the facts of displacement of one-on-one conversations from an offline to an online context.¹³⁹ The same protections afforded to one-on-one conversations in person would be afforded to one-on-one conversations online. Part of this fact intensive challenge may include the fact that a third-party service provider is facilitating the conversation.

Jurisprudence in this area already demonstrates an opinion on the state of protection afforded information that has been “turned over” to third parties.¹⁴⁰ With technology in its current state, surely there needs to be a new view of “intimacy.”¹⁴¹ Some relationships that exist within the virtual world are more substantial and in-depth than those that exist in the real one.¹⁴² With changing social mores, it will be difficult for the courts to make a decision to value one context over the other. What then of changing the context to an online community, where one invites friends to share in the details of their lives, ranging from sexual orientation to after-work excursions to political views to tawdry photographs.¹⁴³ What do we make of the context of *Facebook.com*?¹⁴⁴

138. See *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556 (Cal. App. 1988) (indicating that seeking solace from friends and family by disclosing information did not render her name public information).

139. See Mintz, *supra* note 47, at 461 (analyzing the decisions of the court in the terms of private domain).

140. See Mintz, *supra* note 47, at 438 (noting that divulging private facts to a third person results in some degree of privacy loss).

141. See Pamela Paul, *Does Facebook Make Someone Social Offline?*, N.Y. TIMES, Jan. 28, 2011, archived at <http://www.webcitation.org/5wWTtBFzO> (observing studies that show Facebook creates new means of expressing intimacy).

142. See Paul, *supra* note 141 (asserting that Facebook makes users more sociable).

143. See Paul, *supra* note 141 (demonstrating how men and women use

A. Keeping Your Friends Close and Strangers Even Closer

Over four hundred million people have opted themselves into a community where less than half of them have ever taken the extra precautions available to preserve their privacy.¹⁴⁵ This community is *Facebook.com*, the ever-expanding social networking site that is currently used by 80-90% of undergraduate college students.¹⁴⁶

Researchers at the University of North Carolina have found that while youth users understand the privacy threats that exist when one discloses information online, these users “misjudge the extent, activity, and accessibility of their social networks.”¹⁴⁷ Strater and Richter found that users have an “imagined audience” when they create their profiles on social networking sites like Facebook.¹⁴⁸ Some imagine this audience to be cohorts at school they wish to impress with their online presence.¹⁴⁹ Others imagine this audience to be people who might seriously evaluate who they are as a result of the contents of their profile.¹⁵⁰ Does this mean that the expectation of privacy on a site like Facebook is “unreasonable” in view of the fact that its users underutilize the protections available and are

Facebook).

144. See *Welcome to Facebook.com*, FACEBOOK.COM, archived at <http://www.webcitation.org/5tQbzMQHp> (welcoming new and existing users to Facebook).

145. See Katherine Strater & Heather Richter, *Examining Privacy and Disclosure in a Social Networking Community*, UNIV. OF NORTH CAROLINA, Jul. 18, 2007, archived at <http://www.webcitation.org/5x5PzcOS2> (examining student disclosures on social networking sites versus their privacy initiatives).

146. *Facebook.com Press Room*, FACEBOOK.COM, Jul. 17, 2009, archived at <http://www.webcitation.org/600HgsPyk> (showing statistics for Facebook users and advertisers).

147. See Strater & Richter, *supra* note 145, at 158 (evaluating user awareness of privacy threats on Facebook).

148. See Strater & Richter, *supra* note 145, at 158 (explaining the findings of a study conducted on a group of young Facebook users).

149. See Strater & Richter, *supra* note 145, at 157 (analyzing the motives of young Facebook users).

150. See Diana Smith, *Getting Caught in the Social Web*, N.C. LAW. WKLY., Sept. 28, 2009 (addressing employment concerns of paralegals who use Facebook).

misinformed about the amount of privacy they enjoy in this community?

One of the main issues with the idea of a “reasonable expectation of privacy” online is that there are two co-existing “legal” regimes at this point: the corporate “Privacy Policy” schemes and the breadth of privacy jurisprudence that we operate under. Current jurisprudence has not dealt with the transfer of relationships from the offline to the online context, so the only guidance that exists for users consists of privacy policies and other measures in place on various sites meant to protect privacy.¹⁵¹ Yet, because there are no judge and jury in the corporate setting besides the Board of Directors, shareholders, and often, the ill-informed consumer/user, users are bound by their use or misuse of particular online applications.¹⁵² Whether they are fully aware or not, they could be dutifully eroding their privacy rights.¹⁵³

Yet, expectations of prima facie privacy change depending on the social networking site. Unlike *MySpace.com*, where users create their own profile names, potentially masking their identity, Facebook’s basic operation is premised upon the revelation of a person’s name and a network.¹⁵⁴ After its initial launch and in its original form, Facebook was solely open to college and university students who could provide a college email address.¹⁵⁵ Facebook openly connects “participant profiles to

151. See *Controlling How You Share*, FACEBOOK.COM, Feb. 15, 2011, archived at <http://www.webcitation.org/5tQc5RvR4> (explaining privacy policies and controls on Facebook as set by Facebook).

152. See *Terms of Use*, FACEBOOK.COM, Feb. 15, 2011, archived at <http://www.webcitation.org/5xQe7hHKq> (listing the terms that users will be bound by through account use and agreement).

153. See Strater & Richter, *supra* note 145, at 158 (contending that the complexity of Facebook’s user interface leads to inappropriate privacy settings).

154. *Compare How Can I Add My Real Name to My MySpace Profile So My Friends Can Find Me?*, MYSPACE.COM, Oct. 10, 2010, archived at <http://www.webcitation.org/5wZDAc8k> (implying that a user must take extra steps to add their real name to their profile), with *Browse By Name*, FACEBOOK.COM, archived at <http://www.webcitation.org/5wZDwL7AU> (providing a public listing of users’ real names).

155. See *Facebook Expands to Include Work Networks*, FACEBOOK.COM, May 3, 2006, archived at <http://www.webcitation.org/600HbWxUp>

their public identities.”¹⁵⁶ Despite the link, users do not reveal in the visceral world many of the things they reveal in the virtual world.¹⁵⁷ In the visceral world when users do reveal these details, it is to a limited amount of people at a limited time.¹⁵⁸ With a site like Facebook, one is disclosing the same information twenty-four hours a day to numerous other individuals.¹⁵⁹ Following this logic, should, and does, your online activity on a site like Facebook erode your reasonable expectation of privacy not only online but offline?¹⁶⁰

1. Trail Blazing

Warren and Brandeis’ “Right to Privacy” did not come out of thin air: it was prompted by press coverage of the wedding of Warren’s daughter.¹⁶¹ It was not the result of public behavior, and the article was in defense of a zone that today is recognized as “intimate.”¹⁶² Although online activity in social networking communities takes place from one’s personal computer, it is not occurring in the same type of intimate zone that was of concern in the Justices’ famous article.¹⁶³ The entry of information takes place in a private place, but once a user hits the “return” key, it is unveiled online to the broader worldwide community.¹⁶⁴

(announcing the changeover from requiring a school email address to a general email address).

156. Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks*, WPES ’05: PROC. 2005 ACM WORKSHOP ON PRIVACY ELECTRONIC SOC’Y, 71, 72 (2005).

157. See Gross & Acquisti, *supra* note 156, at 73 (comparing the sharing of personal information online and offline).

158. See Gross & Acquisti, *supra* note 156, at 73 (implying that an offline social network is narrow with strong ties).

159. See Gross & Acquisti, *supra* note 156, at 73 (characterizing online social networks as being wide with weak ties).

160. See Gross & Acquisti, *supra* note 156, at 74 (cautioning that privacy expectations of students within a college that use their school’s online network may be disconnected from reality).

161. See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 43 (2000) (examining how Warren and Brandeis identified a legal principle that could constrain the press from publishing private information).

162. See ROSEN, *supra* note 161 (stating that the publication of truthful but intimate details can cause injury).

163. See ROSEN, *supra* note 161 (identifying private personal details as intimate).

164. See Gross & Acquisti, *supra* note 156, at 73 (noting the vastness of the online social network).

In *United States v. Miller*,¹⁶⁵ the Supreme Court decided that information that has been turned over to a third party, in that particular case, bank records, was not subject to Fourth Amendment protection.¹⁶⁶ The Supreme Court found that the plaintiff did not have a legitimate expectation of privacy in information he turned over to third parties, focusing on the transactional nature of the materials in the case.¹⁶⁷ Information we leave online leaves “electronic footprints.”¹⁶⁸ With features like Facebook’s News Feed, this becomes enhanced, as every friend you add, element of your profile you alter, and action you take within the Facebook community gets reported out to the rest of the people you call your “friends.”¹⁶⁹ While for some, the people they are “friends” with on Facebook reflects their friend selection offline, for others, they have expanded their zone of disclosure to individuals who we previously would consider to be strangers.¹⁷⁰ Once information gets turned over to third parties, specifically in the instance of a platform provider like Facebook, all bets are off in the realm of privacy jurisprudence, since this information has now both been exposed to the third party provider and those who you deem your “friends” online.¹⁷¹

Sometimes, it is difficult to discern which areas are public versus private spaces upon these websites since they offer the illusion of privacy.¹⁷² It may not be fair to say that users throw

165. 425 U.S. 435, 442 (1976).

166. *See id.* at 442 (finding no legitimate expectation of privacy in bank records).

167. *See id.* at 443.

168. *See ROSEN, supra* note 161, at 7 (observing that website visitors leave behind information that can be traced).

169. *See* Caroline McCarthy, *Facebook’s Zuckerberg: ‘We Really Messed This One Up’*, CNET.COM, Sep. 8, 2006, archived at <http://www.webcitation.org/5wZU6PWR9> (chronicling the early negative response to the news feed feature).

170. *See* Gross & Acquisti, *supra* note 156, at 73 (suggesting that online friends can be different than real friends).

171. *See Miller*, 425 U.S. at 443 (emphasizing the Court’s repeated holding that the Fourth Amendment does not apply when information is revealed to a third party).

172. *See* Susan B. Barnes, *A Privacy Paradox: Social Networking in the United States*, 11 FIRST MONDAY (2006), archived at <http://www.webcitation.org/5wZVxvZod> (commenting on the privacy

away their reasonable expectation of privacy merely by signing up for a profile.¹⁷³ According to Jerry Kang, this is the very reason why a new “reasonable expectation of privacy” has to be created for the evolving “techno-cultural regime.”¹⁷⁴ Kang addressed online transactions in the late nineties, when privacy in e-commerce transactions was a concern amongst many privacy advocates (and still is today).¹⁷⁵ In view of the mass proliferation of Facebook and other social networking technologies, “[t]o retard this information processing juggernaut in the name of privacy seems antitechnology, even antiprogess.”¹⁷⁶

2. Imaginations Run Wild

Even with all the information that one provides within a profile, such profiles are still an incomplete picture of how a particular person operates in the visceral world. According to Rosen, while there is “liberty” in truthful disclosure and information, there is a certain captivation that can be had from misinformation.¹⁷⁷ “Privacy protects us from being misdefined and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge.”¹⁷⁸ With the use of social networking sites, people do not understand the major transaction costs they face in placing their profile information online: they are providing a virtual dossier upon which strangers, friends, lovers, professors, and employers can “judge” who they are.¹⁷⁹ These virtual dossiers

difficulties inherent in social networking).

173. See Barnes, *supra* note 172 (surmising that one loses their privacy rights when joining a social networking site).

174. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1284 (1998) (connecting a Fourth Amendment expectation of privacy to evolving technology and culture).

175. See Kang, *supra* note 174, at 1287 (proposing legislation for cyberspace privacy).

176. See Kang, *supra* note 174, at 1285.

177. See ROSEN, *supra* note 161, at 8-9 (elucidating how people disclose information to each other and form relationships).

178. ROSEN, *supra* note 161, at 8.

179. See Steve Lohr, *How Privacy Vanishes Online*, N.Y. TIMES, Mar. 16, 2010, archived at <http://www.webcitation.org/5wZsuCeAX> (describing how small bits of social network site data can be reassembled into a social signature).

are in high demand in an information society, as they allow other people to make “educated” judgments, operating off the assumption that a greater quantity of information will yield more truth.¹⁸⁰

The problem is that while some people are being honest in their presentation of self online, others are portraying themselves online in a way that is not necessarily an accurate reflection of who they are in the visceral world since it is much simpler to do so in an online context.¹⁸¹ What some people put online might not even be true and could still be considered their private information.¹⁸² Deciphering a hard and fast rule of who should be protected and what types of information should be subject to a potential “reasonable expectation of privacy” online is difficult.¹⁸³ Operating under the assumption that “Facebook” is an intimate zone, some people try to share their life with others.¹⁸⁴ Other people, as they likely do in the visceral world to the general public, keep their reputations free of dirt and grime.¹⁸⁵ For the honest user who assumes correctly that sharing things with a small group is intimate in the visceral world, should they be entitled to the same protection online?¹⁸⁶ In an online, user-generated context, you cannot confirm facts or identity.¹⁸⁷ This is

180. See Solove, *supra* note 84, at 1033 (postulating that more information leads to better accuracy in judging people); see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 232 (1983) (stressing how prying into others’ personal information allows for a more accurate picture of the person).

181. See Stephanie Rosenbloom, *Putting Your Best Cyberface Forward*, N.Y. TIMES, Jan. 3, 2008, archived at <http://www.webcitation.org/5wZvipJhn> (stressing an obvious fact that users of online sites lie about their age, weight and attractiveness).

182. See Solove, *supra* note 84, at 1000 (distinguishing between public and private information using the newsworthiness test).

183. See Patricia Sanchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689 (2010) (concluding that courts have avoided acknowledging a reasonable expectation of privacy online).

184. See Noam Cohen, *Married or Single: Is That in the Facebook Sense?*, N.Y. TIMES, Feb. 4, 2011, archived at <http://www.webcitation.org/5wb8W8nyp> (reporting the tendency of Facebook users to post information about their love lives to the online community).

185. See Solove, *supra* note 84, at 1038 (noting that the repression of private aims is necessary in public roles in order to meet others’ expectations).

186. See Abril, *supra* note 183, at 699 (differentiating online social groups from close-knit, visceral, social groups).

187. See Solove, *supra* note 84, at 1037 (reasoning why people conceal their identities online); see also WESTIN, *supra* note 22, at 33 (analyzing underlying

true although most users of a social networking site like Facebook, especially those who signed up prior to it being open to the general public, assumed their decision to share such information was in the context of a more closed, private online community.¹⁸⁸ Thus, these users tried to decrease their transaction costs by selecting the more private option in the online social networking marketplace.¹⁸⁹ Even on the login page to Facebook, it used to read, "Use privacy settings to control who sees your info."¹⁹⁰ Facebook has developed a corporate "legal" regime that has created an expectation of some threshold of privacy that according to current privacy doctrine is juxtaposed with what could happen to a user's information in the real world.¹⁹¹

Certain schools of economists assume that the market corrects for these imbalances.¹⁹² Bearing in mind the "educative" function that gossip has been argued to have, the market is unlikely to correct for the misperceptions of a job candidate that

psychological motivations behind an individual's preservation of distinct private and public identities).

188. See Janet Kornblum, *Facebook Will Soon Be Available to Everyone*, USA TODAY, Sept. 11, 2006, archived at <http://www.webcitation.org/5wbDk2iXC> (reporting Facebook's acceptance of members in the general public after years of serving only college students).

189. See Woyswer007, *Make Facebook More Private*, SHETOLDME.COM, Jan. 8, 2011, archived at <http://www.webcitation.org/5wbFFnjPn> (providing instructions on how to increase privacy settings on Facebook account).

190. Gillian Reagan, *The Evolution of Facebook's Mission Statement*, THE NEW YORK OBSERVER, July 13, 2009, archived at <http://www.webcitation.org/5wbGKGQCz> (chronicling the various mission statements that have appeared on Facebook's login page over time).

191. See Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 118 (2006) (quoting a Facebook policy which indicated that the company would protect users' privacy rights). Facebook's changes to its privacy policy continue to spark debate. See John D. Sutter, *Some Quitting Facebook as Privacy Concerns Escalate*, CNN TECH, May 13, 2010, archived at <http://www.webcitation.org/5wbHP5ibF>. Recent "democratic" attempts by Facebook to include users in the policymaking process included the Facebook Site Governance Vote from April 16 to 23, 2009. See Chris Walters, *You're Participating in the Facebook Terms of Service Vote, Right?*, CONSUMERIST.COM, Apr. 22, 2009, archived at <http://www.webcitation.org/5wbHf30g5> (noting that since this vote, Facebook has continued to take unilateral action in creating its' privacy policy and shaping user options).

192. See Solove, *supra* note 84, at 1042 (explaining Posner and Epstein's view of market balancing).

an employer may get from a profile meant to share someone's personal life.¹⁹³ In a society that purports to value honesty and transparency, if the market is not to correct the imbalance between the revealer and the concealer, should the law? Yet, when the "law" of social networking sites is a corporate policy, then the judge can oftentimes be in the form of an early twenty-something entrepreneur who the business and legal communities have learned in the last year "is a visionary" but "has such a lack of experience in the business world."¹⁹⁴

B. The Misadventures of Mark Zuckerberg

In time long, long ago and in a land far, far away in Internet terms, a preeminent scholar argued that privacy restrictions were necessary to keep the Internet attractive to consumers.¹⁹⁵ While adults over the age of thirty seem to be concerned with online privacy, teenagers and youth who use these privacy-infringing technologies generally do not appear to be as concerned.¹⁹⁶ Youth users of social networking sites, although unlikely to take pro-active approaches to safeguarding their privacy, are certain to retroactively employ strategies to defend their privacy, displaying reactive anger when they feel their privacy has been impinged.¹⁹⁷ A young man named Mark Zuckerberg, the CEO and Founder of Facebook, has discovered this twice in the last three years.¹⁹⁸

193. See Solove, *supra* note 84, at 1034 (arguing that there is a high social value of gossip).

194. See Mike Shields, *Industry to Zuckerberg: Apology (Mostly) Accepted*, ADWEEK, Dec. 10, 2007, archived at <http://www.webcitation.org/5wgywhWkU> (noting strengths and weaknesses of Mark Zuckerberg).

195. See Volokh, *supra* note 88, at 1118 (arguing for privacy restriction online).

196. See Barnes, *supra* note 172 (noting different generational approaches to privacy); ABBY KIESA, ALEXANDER P. ORLOWSKI, PETER LEVINE, DEBORAH BOTH, EMILY HOBAN KIRBY, MARK HUGO LOPEZ & KARLO BARRIOS MARCELO, "MILLENNIALS TALK POLITICS: A STUDY OF COLLEGE STUDENT POLITICAL ENGAGEMENT" 4 (Ctr. for Info. & Research on Civic Learning and Engagement 2007) (explaining that the Millennial generation is anyone born after 1985).

197. See Danah Boyd & Eszter Hargittai, *Facebook Privacy Settings: Who Cares?* 15 FIRST MONDAY 8 (2010) (outlining response to Facebook privacy concerns: "Quit Facebook Day" and developing alternative sites).

198. See, e.g., Mark Zuckerberg, WIKIPEDIA, archived at <http://www.webcitation.org/5wh2CTKmm> (documenting Zuckerberg's trials

1. That “Icky” Feeling

Facebook’s first privacy debacle emerged in September 2006 with the advent of its “News Feed” feature.¹⁹⁹ The feature was meant to update a user’s Facebook “friends” on their comings and goings within the Facebook site.²⁰⁰ Admittedly, some aspects of this feature are enjoyable, especially when it alerts this user to the “Groups” her friends have joined on Facebook.²⁰¹ Through a seven degrees connection, I joined a group entitled, “Save Henry the Pom.” Henry is really a Pomeranian whose owner has created a profile for him, but the group is hilarious, and the dog has such a personality. If not for News Feed, I never would have located this quirky little group.

The News Feed problem emerged because users did not want their friends to know their Facebook business or share their interests, but because Facebook never asked users if they did.²⁰² An “opt out” feature was made available for the application, but users were not warned that the feature had been launched.²⁰³ The launch of News Feeds was the first major issue Facebook would experience by not treading lightly in their decision to have an “opt in” versus an “opt out” system.²⁰⁴ The backlash was huge.²⁰⁵ Within days, users had formed a Students Against Facebook News Feeds group.²⁰⁶

and tribulations with Facebook); Boyd & Hargittai, *supra* note 197 (explaining concerns over Facebook privacy settings).

199. See Boyd & Hargittai, *supra* note 197 (pointing to deployment of “News Feed” as creating privacy concerns).

200. See Boyd & Hargittai, *supra* note 197 (indicating the goal of “News Feed” feature).

201. See *Help Center: Groups*, FACEBOOK.COM, archived at <http://www.webcitation.org/5xQdd0KFP> (explaining the “Groups” features).

202. See *Social Networking Privacy*, ELEC. PRIVACY INFO. CTR., archived at <http://www.webcitation.org/5wh3e8Pr6> (explaining users’ desire to be warned about new features).

203. See *Social Networking Privacy*, *supra* note 202 (acknowledging that privacy features should have been included right away).

204. See *Social Networking Privacy*, *supra* note 202 (detailing Facebook features introduced via an opt out system).

205. See *Social Networking Privacy*, *supra* note 202 (noting that “[t]housands of users voiced their complaints about the News Feed.”).

206. See *Social Networking Privacy*, *supra* note 202 (excerpting a claim from

Didn't these users put all this information online in the first place for all of their friends to see?²⁰⁷ Does it matter that it now alerts their friends when things are edited on their profiles?²⁰⁸ That information was placed online in the first place, but there was still this perception that Danah Boyd describes as "security through obscurity."²⁰⁹ With the News Feeds feature, social faux pas and online Facebook decisions become more visible.²¹⁰ If a user broke up with his or her significant other before News Feeds, another user would have had to click into their profile to get this information.²¹¹ With News Feeds, a friend user's home page will declare, "John Doe is now single," indicating to anyone John has "friended" that his relationship has come to an end.²¹² In an allusion to individual sociological frames of reference, Boyd points out that News Feeds are what Malcolm Gladwell would term as "sticky" in *The Tipping Point*.²¹³ You may never notice John broke up with Jane on his profile.²¹⁴ But when you see the little red broken heart next to the tag line, "John Doe is now single," you are more likely than not going to take notice.²¹⁵

the Students Against Facebook News Feed's mission statement regarding Facebook's overreaching).

207. See *Social Networking Privacy*, *supra* note 202 (noting that users had already exposed their information by posting it on their pages).

208. See *Social Networking Privacy*, *supra* note 202 (questioning Facebook's decision to automatically publish personal information to all of a user's "friends").

209. Danah Boyd, *Facebook's Privacy Trainwreck: Exposure, Invasion, and Social Convergence*, 14 CONVERGENCE: INT'L J. RES. INTO NEW MEDIA TECH. 13, 15 (2008), archived at <http://www.webcitation.org/6007HNt50>.

210. See Boyd, *supra* note 209, at 15 (giving examples of users' ill-considered Facebook usage affecting their real relationships because of News Feeds).

211. See Boyd, *supra* note 209, at 13 (stating that News Feeds made relationship status changes more obvious).

212. See Boyd, *supra* note 209, at 13 (observing that "a [relationship] state change is propagated to everyone's News Feed").

213. See, e.g., MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 25 (2000) (proffering that small changes in how one presents and organizes information can have a large impact—the "Stickiness Factor"); Boyd, *supra* note 209, at 17 (stating that "[n]ews Feeds makes Facebook sticky").

214. See Boyd, *supra* note 209, at 17 (characterizing those who notice small changes on other users' profiles as stalkers or anthropologists).

215. See Boyd, *supra* note 209, at 17 (noting the sudden visibility of profile changes due to the News Feed).

2. Not on My Account

Despite the above discussion of the self-served dossiers Facebook users provide and our society's attraction to "prurience and peccadilloes," there has still been a line drawn in the sand when it comes to the right to use one's information for another's gain.²¹⁶ In the visceral world, this line in the sand is playing itself out due to activity that began in the virtual world: a photo posted on Flickr.²¹⁷

Alison Chang, at a church car wash, posed for a picture for her youth group leader, Justin Wong.²¹⁸ Justin Wong, wanting to share his photos with another online community, Flickr, posted the photos online.²¹⁹ Virgin Mobile saw the photo of Alice and decided to take it from Flickr, using it in a print advertising campaign on billboards throughout Australia, since the photos are licensed by Creative Commons in a fashion that allows the user to grant permission for others to use the photo.²²⁰ Alison finds out her photo has been used in an ad with a slogan emblazoned over her image that implied that Alison was the kind of pen pal "loser" one could dump if they subscribed to Virgin Mobile cellular service.²²¹ Specifically, the ad encouraged consumers to "DUMP YOUR PEN FRIEND."²²² Alison did not consent to her photo being posted in the first place.²²³ She was a

216. See Solove, *supra* note 84, at 1007 (streamlining the argument for pluralism in the media).

217. See *Flickr Home Page*, FLICKR.COM, archived at <http://www.webcitation.org/5wk7epQjO> (welcoming users to share and store their photographs on the website).

218. See *Chang v. Virgin Mobile USA, LLC*, No. 3:07CV1767, 2009 U.S. Dist. LEXIS 3051, at *4 (N.D. Tex. Oct. 19, 2007) (stating the facts and background of the case); see also *Dallas Family Sues Virgin Mobile For Illegal Use of Teen in Advertising Campaign*, FOXNEWS.COM, Sept. 21, 2007, archived at <http://www.webcitation.org/5wk9GJORh> [hereinafter *Dallas Family Sues*] (providing additional background for the lawsuit).

219. See *Chang*, 2009 U.S. Dist. LEXIS 3051, at *4.

220. See *id.*

221. See *id.* (detailing Virgin's use of photo in advertisement).

222. *Id.*

223. See *Chang*, 2009 U.S. Dist. LEXIS 3051, at *1 (laying out the various bases for the lawsuit). Chang sued Virgin USA for invasion of privacy, libel,

victim of the reality of the digital world, that what goes online does not necessarily stay there.²²⁴

In *Chang v. Virgin Mobile USA, LLC*, Alison Chang brought suit against Virgin for misappropriation of Alison Chang's likeness without her consent for their own use and benefit.²²⁵ This sounds ripe for a right of publicity claim, except for the added complication that the Flickr photograph, taken by Justin Wong, Alison's church youth leader, was posted under a Creative Commons "Attribution" license.²²⁶ The license allows anyone to use the photos posted for any purposes, including commercial purposes, as long as the posting user gets credit.²²⁷ Under said license, there is an option when agreeing to the license that asks, "Do you want to allow commercial uses?"²²⁸ Although this case was dismissed for a lack of jurisdiction, it is representative of how small and transparent the online world can be: it was another Flickr user, sesh00, who alerted Alison to her photo's use.²²⁹

Hal Varian in the *Economic Aspects of Personal Privacy* discusses the transaction costs we as users experience in the sphere of online retail.²³⁰ Similar costs emerge with social

breach of contract, and copyright infringement. *Id.*

224. See Gross & Acquisti, *supra* note 156, at 74 (describing the Pentagon's use of Facebook information to compile databases).

225. See Complaint at 18, *Chang v. Virgin Mobile USA, LLC*, No. 3:07CV1767, 2009 U.S. Dist. LEXIS 3051 (N.D. Tex. Oct. 19, 2007) (providing a legal basis for the invasion of privacy claim).

226. See *id.* at *4 (conveying that the Creative Commons Attribution license provides for the most unrestricted use).

227. See Creative Commons Legal Code, *Attribution 2.0*, CREATIVECOMMONS.ORG, Feb. 24, 2011, archived at <http://www.webcitation.org/5wkFSS1qa> (providing the license in question in the case).

228. See Noam Cohen, *Use My Photo? Not Without Permission*, N.Y. TIMES, Oct. 1, 2007, archived at <http://www.webcitation.org/5wkGQEkUa> (showing previous Stanford Law School Professor Lawrence Lessig's opinion on the Creative Commons license).

229. See Brenton Cleeland, *Dump Your Pen Friend*, FLICKR.COM, Feb. 24, 2011, archived at <http://www.webcitation.org/5xroWpdmH> (posting a picture of the advertisement Virgin Mobile Australia ran at a bus stop).

230. See Hal R. Varian, *Economic Aspects of Personal Privacy*, UC BERKELEY, Dec. 6, 1996, archived at <http://www.webcitation.org/5wkIDMfCo> (highlighting the costs associated with searching).

networking sites, as marketers target teen consumers, and can use such information provided on a user's virtual dossier to target that user.²³¹ The potential licensing and contractual problems emerges in the use by Facebook of the personal information you provide on your profile: You technically have agreed to its use by Facebook when you "opted in" to Facebook.²³² Well, so Mark Zuckerberg thought.

In November 2007, Mark Zuckerberg announced the launch of new feature on Facebook, called "Facebook Ads" (also known as "Beacon").²³³ Beacon was meant to be multi-faceted: "Advertisers can create branded pages, run targeted advertisements, and have access to intelligence and analytics pertaining to the site's more than 50 million users."²³⁴ Essentially, like Alison Chang, companies, with the Beacon technology, could utilize a user's "face" to endorse their products.²³⁵ Almost immediately, the reaction was fierce.²³⁶ The *New York Times* covered the reaction in an article "Facebook's Next Privacy Problem."²³⁷ A *CNET* headline read, "Facebook Decides to Bastardize Its Community."²³⁸ Weeks later after a protest organized by *MoveOn.org* on the site, on December 5, 2007, Zuckerberg backed off his ad scheme, announcing that

231. See Barnes, *supra* note 172, at 5 (analyzing the privacy concerns of social networking sites).

232. See *Terms of Use*, FACEBOOK.COM, Feb. 24, 2011, archived at <http://www.webcitation.org/5xQe7hHKq>.

233. See Louise Story, *Facebook is Marketing Your Brand Preferences (With Your Permission)*, N.Y. TIMES, Nov. 7, 2007, archived at <http://www.webcitation.org/5wkV1Jcbq> (breaking news of Facebook's inclusion of commercial messages on users' personal pages).

234. Dave Rosenberg, *Facebook Decides to Bastardize its Community*, CNET NEWS, Nov. 6, 2007, archived at <http://www.webcitation.org/5wkVeTPD5>.

235. See Story, *supra* note 233 (balancing the benefits to advertisers against individuals' right to control their association with products).

236. See, e.g., Caroline McCarthy, *Rough Seas Nearly Sink Facebook's Beacon*, CNET NEWS, Nov. 30, 2007, archived at <http://www.webcitation.org/5wkX445UW> (emphasizing the rapid response and vocal outrage to the Beacon service announcement).

237. See Saul Hansell, *Facebook's Next Privacy Problem*, N.Y. TIMES, Nov. 7, 2007, archived at <http://www.webcitation.org/5wkY9A0FR> (characterizing Zuckerberg's reaction to negative user feedback).

238. Rosenberg, *supra* note 234.

participation in the scheme would be “opt in” versus its initial “opt out” structure.²³⁹

Why would users, who do not even take the precautions necessary on Facebook in the first place, get so angry about the launch of Beacon? *The Economist* aptly describes the concern: “It’s creepy.”²⁴⁰ Beyond being creepy, the Beacon program violates the same notion of self-ownership that Virgin Mobile offended when it took the picture of Alison Chang from Flickr and used it in an Australian advertising campaign.²⁴¹ It is one thing for a youth group leader to share with others the fun he had with his youth group.²⁴² Chang likely did not have a problem with that use.²⁴³ It is another issue to have these same pictures utilized for someone else’s benefit at your own cost.²⁴⁴

On Facebook, Beacon is to the benefit of companies like Coca-Cola, Conde Nast, and Blockbuster, who are utilizing users to hawk their products.²⁴⁵ In an information society, there is a greater demand for demographic and psychographic data.²⁴⁶ It

239. See Saul Hansell, *Zuckerberg Apologizes, Allows Facebook Users to Evade Beacon*, N.Y. TIMES, Dec. 5, 2007, archived at <http://www.webcitation.org/5wkZCcK30> (realizing the backlash, Zuckerberg apologizes and makes Beacon an opt-out system).

240. See *Will Facebook, MySpace and Other Social-Networking Sites Transform Advertising*, THE ECONOMIST, Nov. 8, 2007, archived at <http://www.webcitation.org/5wkaBIAGx> (elucidating the history of online advertising).

241. See Cleeland, *supra* note 229 (exclaiming in a post “hey that’s me!” and signifying outrage at having her image being used without permission).

242. See *Chang*, 2009 U.S. Dist. LEXIS 3051, at *4 (noting that Chang’s photograph was taken by a youth group leader and posted on Flickr).

243. See *id.* (inferring that Chang would not have objected to her counselor posting the photograph on Flickr).

244. See Complaint at 14, *Chang v. Virgin Mobile USA, LLC.*, No. 3:07CV1767, 2009 U.S. Dist. LEXIS 3051 (N.D. Tex. Oct. 19, 2007) (focusing on the humiliation and embarrassment that Alison experienced as a result of Virgin’s unauthorized use of her photo).

245. See Daniel J. Solove, *The New Facebook Ads - Starring You: Another Privacy Debacle?*, CONCURRING OPINIONS, Nov. 8, 2007, archived at <http://www.webcitation.org/5wlkqpYb> (describing the enthusiasm of advertisers in setting up Facebook profiles to gather information about users’ market preferences).

246. See Rohan Samarajiva, *Interactivity as Though Privacy Mattered*, in TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 277, 283 (Philip E. Agre & Marc Rotenberg eds., 1997) (establishing that business interests’ need for personalized data conflicts with individual privacy rights).

has long been obvious that Facebook provides a wealth of information to corporations and marketing firms looking to figure out the youth market.²⁴⁷ When one releases information into any online forum, especially one like Facebook, the platform is set up so that a user is sharing information with a micro-audience.²⁴⁸ The insertion of corporate interests in the scheme and the tagging of your purchases and consumer behavior open you up to a meta-audience that you never intended to be subject to in the first place.²⁴⁹ As a user you may want to share your love of 1970's television programming like "Three's Company" to your friends or a perhaps join a group on Facebook entitled "I Love the 1970's."²⁵⁰ You did not mean for Time Warner to get access to that data to send you Facebook messages about DVD special editions on those same shows.²⁵¹

What is worse is that Facebook Ads was launched in the wake of a Federal Trade Commission hearing regarding concerns about advertisers having too much access to information about people's online activities.²⁵² As Daniel Solove points out, the ads may potentially implicate another familiar section from the *Restatement (Second) of Torts* § 652C, which states: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."²⁵³ Virgin Mobile is already familiar with this section:

247. See Solove, *supra* note 245 (detailing the wealth of information that Facebook provides corporations through its massive user base and communicative features).

248. See Lars Trodson, *The Birth of the Micro-Audience*, ROUNDTABLE PICTURES, Feb. 21, 2011, archived at <http://www.webcitation.org/5wln3M2tt> (announcing preference among younger generations for directing messages towards a specific group of people as opposed to general blogging).

249. See Samarajiva, *supra* note 246, at 285 (characterizing the relationship between corporate interests and the public in interactive media systems).

250. See Jennifer Van Grove, *New Facebook Groups Designed to Change the Way You Use Facebook*, MASHABLE.COM, Oct. 6, 2010, archived at <http://www.webcitation.org/5wloTjOpe> (announcing the availability of Facebook groups – a shared space where members can engage in communal activities).

251. See Story, *supra* note 233.

252. See Solove, *supra* note 245 (noting Federal Trade Commission hearing in Washington about online privacy and customized ads). Information regarding Federal Trade Commission hearings and testimony is available at <http://www.ftc.gov/opa/2007/10/dnctestimony.shtm>.

253. See Solove, *supra* note 245, quoting RESTATEMENT (SECOND) OF TORTS §

Facebook may have saved itself with Zuckerberg's change of tune on the "opt out" versus "opt in" scheme.²⁵⁴ But nonetheless, referring back to themes of self-ownership of personal information, as Bobby, a commenter to Solove's *Concurring Opinions* piece put it: "'FaceCrook'... [is] pimping us big time."²⁵⁵

3. A Facebook Democracy...or Dictatorship?

2009 was a quite a year for Facebook in terms of incompatible responses to its treatment of user privacy.²⁵⁶ From giving users the impression they could vote to set the privacy rules for Facebook's Terms of Use to Mark Zuckerberg declaring that privacy was essentially "dead," Facebook further presents the case of how corporations justify giving users less privacy since there are no legal protections in place.²⁵⁷

Facebook decided in February 2009 to turn its platform into a democracy for its users to decide what the privacy policies for the site should be.²⁵⁸ Before the vote, users were given the chance to leave comments on Facebook's governance policy.²⁵⁹ Between the dates of April 16 to 23, 2009, users were given the chance to participate in the Facebook democracy, voting on proposed changes to the privacy policy.²⁶⁰ It was within this

652C (1977).

254. See Hansell, *supra* note 239 (noting that Facebook now allows users to disable Beacon entirely).

255. See Solove, *supra* note 245.

256. See Kevin Bankston, *Facebook's New Privacy Changes: The Good, The Bad, and The Ugly*, ELECTRONIC FRONTIER FOUNDATION, Dec. 9, 2009, archived at <http://www.webcitation.org/5wlrf4jsk> (commenting on Facebook's privacy changes throughout the latter months of 2009).

257. See Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, THE GUARDIAN, Jan. 11, 2010, archived at <http://www.webcitation.org/5wlsTngbp> (reporting Mark Zuckerberg's comments about the state of privacy in the wake of social networking's emergence).

258. See Rafe Needleman, *Facebook Opens Up to User Debate and Vote*, CNET NEWS, Feb. 26, 2009, archived at <http://www.webcitation.org/5wluKj2lS> (clarifying community-driven process for developing Facebook agreements unveiled in February of 2009).

259. See Needleman, *supra* note 258 (inviting authors of the most insightful comments on the new governance policy to serve on a "user council").

260. See Ben Parr, *The Facebook Democracy: How Will It Affect You*, MASHABLE.COM, Apr. 5, 2009, <http://www.webcitation.org/5wluuFkTy> (noting

limited window that nearly 300 million people were supposed to get the opportunity to voice their opinion on Facebook's privacy regime.²⁶¹ Yet, the rules set in place for this democratic process were pretty unrealistic: "This vote will be binding if 30% or more of all active users as of February 26, 2009, the day that the vote was announced, vote."²⁶² Besides this 30% rule, which means that probably around 100 million of the 300 million registered users would have had to vote, a user only got the chance to vote if they had logged into their account within the 30 days prior to the February 26th date this election was announced.²⁶³ Further, Facebook stated that votes on proposed changes would happen on any change in the future "if at least 7,000 people submit comments."²⁶⁴ The complexity of the rules combined with the legalese used in the policies did not make the voting process accessible in the sense that it should have been.²⁶⁵

The new privacy settings that Facebook has released in the wake of this vote bypass its purported democratic process entirely. By June 2009, Facebook had already begun creeping towards forcing its users to go totally public by making status messages, photos and videos visible to any Facebook user, not just one's approved friend list.²⁶⁶ In December 2009, all users

a democratic approach to revising the Facebook governance documents).

261. See Parr, *supra* note 260 (commenting on the effect that Facebook has on its users by allowing them to vote on its privacy policy documents).

262. Facebook Site Governance Vote on Facebook, FACEBOOK.COM archived at <http://www.webcitation.org/5wrqy8eVO>; cited in Richie Escovedo, *Facebook Rocks the (Site Governance) Vote*, NEXT COMMUNICATIONS, Apr. 17, 2009, archived at <http://www.webcitation.org/5wrrPw7nc>.

263. See Escovedo, *supra* note 262 (quoting Facebook voting rule).

264. Escovedo, *supra* note 262.

265. See Escovedo, *supra* note 262 (stressing that a thirty percent or more vote is needed for the vote to have effect); see also Lidiju Davis, *Facebook's Site Governance Vote: A Massive Con?*, READ WRITE WEB, Apr. 19, 2009, archived at <http://www.webcitation.org/5wrurgTGz> (arguing that Facebook's voting process would have no effect on Facebook's privacy rules), quoting *Privacy International Says Facebook Vote Policy is a "Massive Confidence Trick"*, PRIVACY INTERNATIONAL, Apr. 16, 2009, archived at <http://www.webcitation.org/5wrvQ7STV>.

266. See Marshall Kirkpatrick, *The Day Facebook Changed: Messages to Become Public by Default*, N.Y. TIMES, June 24, 2009, archived at <http://www.webcitation.org/5wrvbdJFy> (commenting on the public default rule Facebook implemented).

went public on Facebook, whether or not they wanted to.²⁶⁷ Overnight, a user's full name, profile picture, gender, current city, networks, pages they were a "Fan" of, and the user's friend's list went public.²⁶⁸ The change in Facebook's privacy settings to public profiles as the default status reflects another unilateral decision made for Facebook users about their privacy.²⁶⁹ When the change went into effect, the change was presented to users in such a way that by pressing the "Accept" button warning about the policy changes, a user's information went public automatically.²⁷⁰

Mark Zuckerberg assumes that all users felt the same way that he feels about his personal privacy: "I set most of my content on my personal Facebook page to be open so people could see it. I set some of my content to be more private, but I didn't see a need to limit visibility of pics with my friends, family or my teddy bear."²⁷¹ Additionally, Zuckerberg, the public face of the world's largest social networking site, unilaterally declared that the age of privacy was over when interviewed by the editor of Silicon Valley's premiere tech blog TechCrunch, Michael Arrington, in January 2010.²⁷² Zuckerberg claimed that, "We view it as our role in the system to constantly be innovating and be updating what our system is to reflect what the current social norms are."²⁷³ By asserting that Facebook is merely taking society's lead

267. See Bankston, *supra* note 256 (observing the effect of Facebook's new privacy rules on users' privacy).

268. See Bankston, *supra* note 256 (criticizing Facebook's new rule to protect privacy and explaining that it actually reduces user control over privacy).

269. See Bankston, *supra* note 256 (clarifying how Facebook's privacy setting decision made profiles more public than before).

270. See Guest Blogger, *Facebook Has You By The Social Balls*, ARTICSTARTUP.COM, Feb. 12, 2010, archived at <http://www.webcitation.org/5ws4I0fxx> (exposing the tactics of Facebook's new privacy acceptance method as unsavory).

271. See Marshall Kirkpatrick, *Zuckerberg Changes His Own Privacy Settings*, READWRITEWEB, Dec. 11, 2009, available at <http://www.webcitation.org/5xrtQMveJ> (commenting on how his profile is left mostly all open).

272. See Ian Paul, *Facebook CEO Challenges the Social Norm of Privacy*, PC WORLD, Jan. 11, 2010, archived at <http://www.webcitation.org/5ws6nbgGH> (outlining Zuckerberg's comments on privacy and Facebook's history of privacy snafus).

273. See Paul, *supra* note 272.

on user privacy, Facebook leaves us in dangerous legal territory in an area of the law that seems to be defined by norms and societal values alone.

C. Are You In?

In reference back to the question posed at the beginning of this section, in a society that purports to value honesty and transparency, if the market is not to correct the imbalance between the revealer and the concealer, should the law? This feeds into the primary question to be discussed in this section: Have we compromised our right to privacy with online activity, narrowing the spheres in which there is a “reasonable expectation of privacy?” If the courts are to take a strict interpretation of the 1970’s decision and apply it Facebook, considering the information that users have turned over to the third party of Facebook to be “transactional” in nature, then those who value their individual privacy maybe best to stay out of online communities like Facebook.

The rule set forth in *United States v. Miller*²⁷⁴ does not allow people as users of the Internet to “comfortably negotiate all contexts.”²⁷⁵ Whereas it is clear from *Miller*, and from jurisprudence relating to information collected through Internet Service Providers (“ISPs”), that such information is not subject to a reasonable expectation of privacy, how do we negotiate the fact that Facebook is perceived to be the same as private visceral space by many of its users?²⁷⁶ This perception is facilitated by the fact that in its privacy options, users can select to show

274. 425 U.S. 435, 445 (1976) (holding that there is no expectation of privacy in publicly available information).

275. Boyd, *supra* note 209, at 14-15.

276. See *Katz*, 389 U.S. at 360 (noting that “conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable”); *In re DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 506 (S.D.N.Y. 2001) (noting that DoubleClick disclosed that it collected personal information about users, belying user privacy expectation); *United States v. Maxwell*, 45 M.J. 406, 419 (1996) (distinguishing how “. . . messages sent to the public at large in the ‘chat room’ or e-mail that is ‘forwarded’ from correspondent to correspondent lose any semblance of privacy”).

individuals a “Limited Profile,” selecting from a list of options of which information one wants to reveal and which information they choose not to.²⁷⁷ This option in itself creates the illusion of a “reasonable expectation of privacy” when one chooses to use these options.

People are angry because Facebook is able to change the rules of the game whenever they want with no consequences, and, literally, that’s not what its users signed up for. People used their real identities on Facebook thinking they had some modicum of privacy, and now their information is indexed and could be found in a Google search.²⁷⁸ With the corporate creation of a “reasonable expectation of privacy,” the corporate violation of this same “reasonable expectation of privacy,” and the court’s definitive view of a “reasonable expectation of privacy,” it is difficult, if not impossible, to apply the “one size fits all” approach to online communication.²⁷⁹

III. Part III: The Naked Truth

The consequence of technological change, information availability, is not the only thing feeding the new “right to know” phenomenon.²⁸⁰ It may be easy to blame someone like a Perez Hilton or a Mark Zuckerberg for providing forums for celebrity and private actors to expose themselves, but both of these sites were created in response to a cultural shift in America.²⁸¹

277. See Help Center, *What is a Limited Profile*, FACEBOOK.COM, available at <http://www.webcitation.org/5x5stgAzs> (explaining that a limited profile allows users to control what information is shared).

278. See Pete Cashmore, *Facebook Profiles Will Appear in Google Results Next Month*, MASHABLE.COM, Sep. 5, 2007, archived at <http://www.webcitation.org/5wsFdMp4A> (summarizing how Google will be able to search Facebook profiles).

279. See Hodge, *supra* note 191, at 120-21 (acknowledging the difficulty in determining when Facebook users have a reasonable expectation of privacy).

280. See Friedman, *supra* note 17, at 330 (examining the consequences of people feeling they have a right to know everything about public figures).

281. See Hodge, *supra* note 191, at 120 (placing the growth of Facebook within the context of the Internet’s societal changes); Jeremy Adam Smith, *How We’re Financing Meaningful Journalism*, KNIGHTGARAGE.STANFORD.EDU, Mar. 1, 2011, archived at <http://www.webcitation.org/5wubelFaG> (implying that the online media convergence gave rise to celebrity gossip sites). Perez Hilton is the founder and primary blogger on PerezHilton.com. See Sheila Marikar,

Americans seem not to mind, or perhaps are not aware, that the user who seeks information about other individuals engages in an involuntary form of information reciprocity: they like are giving away details of their own lives as well.²⁸²

This is a dream for the likes of privacy theorists like David Brin. In his 1998 book, *The Transparent Society*, Brin argues that “we... all benefit [from]... two-way information flows.”²⁸³ Working off of the economic principle of information asymmetry, Brin would argue that by our activity online in places like Facebook, coupled with our demand for transparency on behalf of public figures and private participants of “Celebrealty,” we are arriving at a state where, “We’ll all stumble a lot less if we can see where we are going.”²⁸⁴ This works theoretically if the individual and the media outlet are all operating on a level playing field.²⁸⁵ They are not.²⁸⁶ Brin may advance a theory of reciprocal transparency, and in an ideal honest world this may work.²⁸⁷ “Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.”²⁸⁸ Despite its openness online, society still passes

Perez Hilton's Guide to Getting Famous, No Talent Required, ABCNEWS.COM, Jan. 6, 2009, archived at <http://www.webcitation.org/5wuZIBfeS>. He is “one of the most notorious celebrity bloggers.” Maarten van Sprang, *Comparing Dirt*, MASTERS OF MEDIA, Nov. 6, 2007, archived at <http://www.webcitation.org/5wuaOIHSy>. He refers to himself as a “queen” of media and labels his site, “Hollywood's Most Hated Website.” *PEREZ HILTON: Hollywood's Most Hated Website*, WOLFMANPRODUCTIONS.COM, archived at <http://www.webcitation.org/5wub4zWnp>.

282. See Emily Price, *100M Facebook Profiles Now Available for Download*, PC WORLD, Jul. 28, 2010, archived at <http://www.webcitation.org/5wudtAqw7> (detailing the harvesting of Facebook personal information from profiles).

283. DAVID BRIN, *THE TRANSPARENT SOCIETY* 22 (1998).

284. BRIN, *supra* note 283, at 26.

285. See BRIN, *supra* note 283, at 330-31 (opining that professionals cannot dominate if information transparency is to flourish).

286. See BRIN, *supra* note 283, at 330-31 (delineating the difference between media professionals and amateurs).

287. See BRIN, *supra* note 283, at 81 (detailing the concept of reciprocal transparency).

288. John Stuart Mill, *On Liberty*, in *CLASSICS OF MORAL AND POLITICAL THEORY* 936, 942 (Michael L. Morgan ed., 2005).

judgment on the foibles of others.²⁸⁹ The naked truth is that individuals end up being rendered transparent.²⁹⁰

Why does this behavior matter? Does a user's posting or a profile on Facebook, or their intrigue with celebrity gossip sites, really have an impact on the state of the law? Simply stated: it does, and it will. First, it reflects the notion that society is becoming more willing to surrender the privacy of individuals who ordinarily would not be considered public figures.²⁹¹ While some people are thrusting themselves into the public light voluntarily, others are not, but these involuntary celebrities' own expectation of privacy is eroded due to the activity of others.²⁹² The courts cannot help but look outward when it comes to the protections afforded by the privacy torts, as they turn on elements such as the whether information is of "legitimate concern to the public" and "newsworthiness," which are defined by societal norms.²⁹³ When it is becoming the "norm" for users to seek "crotch shots" and get lurid details, torts like the tort of Publicity Given to Private Life are not dying: they are dead.²⁹⁴

A. A Congressional Resurrection

With the advent of new ways to invade the privacy of a whole new category of people, the private person turned "celebrity," amongst other potential privacy plaintiffs, more than a revival is needed for the privacy torts.

289. See *Dallas Family Sues*, *supra* note 218 (detailing how having a picture posted online can lead to being ridiculed by one's peers).

290. See *Dallas Family Sues*, *supra* note 218 (highlighting the negative consequences of posting personal information online).

291. See Solove, *supra* note 84 at 1004 (cautioning that the evolving expectations of privacy are due to the media's reporting on private matters).

292. See RESTATEMENT (SECOND) OF TORTS, § 652D cmt. f (1977) (commenting that people can become celebrities involuntarily through media's reporting of newsworthy conduct).

293. See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975) (holding that where reasonable minds disagree, newsworthiness is a question of fact).

294. See *Google Insights for Search*, GOOGLE.COM, archived at <http://www.webcitation.org/5xmF0n5k3> (comparing search growth of "crotch shot" relative to news and current events).

First, it is essential that it be made clear, statutorily, who qualifies as a voluntary public figure. While the courts found Oliver Sipple was someone who had placed themselves in the public light, and under the jurisprudence and traditional concept of “newsworthiness,” perhaps rightfully so, today some people who are engaging in wholly unremarkable conduct are subject to the same designation.²⁹⁵ The distinction between voluntary and involuntary public figure must be drawn.

Second, what constitutes a “public activity” must be redefined, especially in view of the proliferation of online media. Revisiting Comment E to Restatement Section 652D, those who engage in “public activities” or are participating in that which qualifies as “submitting himself or his work for public judgment” may also lose the privacy protections afforded by the tort.²⁹⁶ If this applies to online activity such as a Facebook profile—which essentially operates as a “brag page” of one’s activities, work, and degrees—this activity is indeed public and is submitting oneself to the judgment of others within that particular online space.²⁹⁷ Most users of Facebook have likely not taken this privacy loss under consideration when they create their profiles.²⁹⁸

Returning to Comment H, the factors in Restatement Section 652D are determined by “community mores.”²⁹⁹ The online community is not sequestered or localized: it literally

295. See *Sipple*, 201 Cal. Rptr. at 669 (finding that Sipple had placed himself in the public light through his own conduct); Noam Cohen, *Use My Photo? Not Without Permission*, N.Y. TIMES, Oct. 1, 2007, archived at <http://www.webcitation.org/5wkGQEkUa> (goofing around in a photograph taken at a local carwash lead to Alison Chang’s image being posted throughout Australia on billboards).

296. See RESTATEMENT (SECOND) OF TORTS, § 652D cmt. e (1977) (defining voluntary public figure and noting that he cannot seek redress when he receives publicity sought).

297. See Strater and Richter, *supra* note 145 (reporting findings that sixty-seven percent of Facebook users responded within all personal fields).

298. See Strater and Richter, *supra* note 145 (highlighting lack of consideration among users regarding privacy implications when disclosing information online).

299. See RESTATEMENT (SECOND) OF TORTS, § 652D cmt. h (1977) (stressing the importance of examining “customs and conventions of the community” in determining what is a matter of legitimate public interest).

encompasses a worldwide network of websites and users.³⁰⁰ Is an individual's "community" determined by that person's community in the real world, such as the city of San Francisco, or the State of California, or is it determined by their online community, like Facebook?³⁰¹ It is near impossible for a court to determine the values of the "community" that constitutes Facebook with its diverse worldwide membership.³⁰²

One of the reasons for the ardent adherence to the "newsworthiness" factor by the courts has been the idea of the responsible nature of journalists, wanting to get nothing but the facts and truth to citizens and other consumers of the news.³⁰³ Today, it is questionable if it is possible to make these same blanket assumptions for media, treating all media sources the same.³⁰⁴

1. Online Messaging Applications

Unlike telephone conversations, the surveillance of which receives Fourth Amendment protection under *Katz v. United States*, electronic communications have yet to see this same types of protection under the law.³⁰⁵ A glimmer of hope for Fourth Amendment protection for electronic communications was briefly found in the 2007 case *Warshak v. United States*, which

300. See Paul Gibler, *Virtual Communities Make Online Connections*, WTN NEWS, Dec. 4, 2006, archived at <http://www.webcitation.org/5wwPpmnLh> (recognizing that the Internet provides worldwide communication capabilities to its users).

301. See David R. Millen, John F. Patterson & Cory Costanzo, *The Dynamics of Social Interaction in a Geography-based Online Community*, IBM.COM, archived at <http://www.webcitation.org/5wwRIwsbB> (distinguishing online communities from geographic-based communities).

302. See H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 KAN. L. REV. 369, 385 (2008) (hypothesizing that online values are imposed by legal systems and commercial entities rather than emerging from the commons).

303. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977) (indicating that publishers and broadcasters are afforded the leniency to define "news").

304. See Kendyl Salcito, *Online Journalism Ethics: New Media Trends*, JOURNALISM ETHICS FOR THE GLOBAL CITIZEN, archived at <http://www.webcitation.org/5wwUDt05P> (listing negative effects of journalism's transition to online media including the pressure to lower ethical standards).

305. *Katz*, 389 U.S. at 353 (holding that electronic surveillance of telephone booth constitutes a search and seizure under the Fourth Amendment).

considered the question of whether individuals had a reasonable expectation of privacy in the contents of emails stored by an ISP.³⁰⁶ The Sixth Circuit affirmed a preliminary injunction, holding that the Fourth Amendment precluded the government from obtaining *ex parte* access to an email stored long-term on the servers of an ISPs without a demonstration of probable cause.³⁰⁷ The statute in question, Section 2703(d) of the Stored Communications Act, was held unconstitutional to the extent that it would allow law enforcement officials to get the contents of an email from an ISP without demonstrating probable cause and giving notice to the person who sent the emails.³⁰⁸

Although a Sixth Circuit en banc panel vacated the decision and remanded it back to the trial court for dismissal in 2008, the panel did note that a Fourth Amendment constitutional issue relating to online messaging would turn on “the expectations of privacy that computer users have in their emails—an inquiry that may well shift over time, that assuredly shifts from Internet-service agreement to Internet-service agreement and that requires considerable knowledge about ever-evolving technologies.”³⁰⁹

Warshak would have been the first case to set forth protections for communications that happen over third-party platforms and communication clients online.³¹⁰ The core ideas set forth regarding email privacy hopefully reflect an emerging tendency to afford privacy protection to not only the content of email communications, but also the contents of other online communications, such as those that occur in online conversations

306. 490 F.3d 455, 473 (6th Cir. 2007) (recognizing a privacy interest in content of an e-mail).

307. *Id.* at 482 (balancing public interest in privacy and governmental interest in intrusion while justifying the preliminary injunction against government).

308. *Id.* (requiring a fact-specific showing of probable cause to seize e-mails under the Stored Communications Act); Stored Communications Act, 18 U.S.C. § 2703(d) (2010).

309. *Warshak v. United States*, 532 F.3d 521, 526-27 (6th Cir. 2008).

310. See Susan Freiwald and Patricia L. Bellia, *The Fourth Amendment Status of Stored E-Mail: The Law Professors' Brief in Warshak v. United States*, 41 U.S.F. L. REV. 559, 560 (2007) (arguing that Warshak had a reasonable expectation of privacy for emails stored with service providers).

through instant messaging applications such as Google Chat, Microsoft's MSN Messenger, and America Online's Instant Messenger.³¹¹ These do not yet receive protection, even though they are becoming as much of commonly used medium as email and are applications that "bank" all previous conversations (unknownst to many users).³¹²

2. Social Networking Services

Despite the promise of *Warshak*, there are not laws or precedent protecting other types of disclosures online, even though they are arguably another form of "content" being shared online.³¹³ The concept of a "zone of fair intimate disclosure" is nonexistent in the online world.³¹⁴ Facebook is emerging as not only a violator of privacy through its own policy choices, but inadvertently through the utilities that it provides for user to trip up their privacy rights.³¹⁵

Many of our laws are fashioned to protect people who cannot, or do not know how, to protect themselves.³¹⁶ For those who do not realize they are pushing themselves into a public light which sacrifices their privacy interests, Jonathan Mintz's "zone of fair intimate disclosure" operates as a standard which can be adopted to protect such persons.³¹⁷ This zone, which could take into account those who use social networking sites, could be

311. See *Warshak*, 532 F.3d at 527 (noting that every evolving technology requires "a comprehensive understanding of technological facts").

312. See *id.* (explaining how service providers use saved information to target consumers); *Chat History*, GOOGLE, archived at <http://www.webcitation.org/5x2GNuVeV> (outlining Google Chat's terms of use and storage).

313. See *Warshak*, 532 F.3d at 526-27 (arguing that the field of electronic content is more expansive than simply email and should be protected).

314. See Mintz, *supra* note 47, at 460-61 (suggesting that intimate disclosure requires a reasonable expectation of privacy).

315. See Boyd & Hargittai, *supra* note 197 (pointing to log-in prompt which led to many users inadvertently accepting minimal privacy settings).

316. See Dayle D. Deardurff, *Representing the Interests of the Abused and Neglected Child: The Guardian Ad Litem and Access to Confidential Information*, 11 U. DAYTON L. REV. 649, 650-51 (characterizing the guardian ad litem as a protector of those who cannot protect themselves).

317. See Mintz, *supra* note 47, at 460-61 (advocating for adoption of "zone" to determine the scope of the private domain that the statement was made in).

determined on a case-by-case basis, using a fact intensive challenge, considering primarily whether the media source's act constitutes a morbid, sensational prying into one's private life, focusing on the depth of the intrusion into ostensibly private affairs.³¹⁸ In the online context, it must not only be remembered that the law is forced to deal with not only non-traditional plaintiffs, but non-traditional media sources, such as bloggers and citizen journalists, who arguably would be entitled to the same protections as a large on or offline media source.³¹⁹

Remedying privacy problems on a social networking service like Facebook is admittedly difficult.³²⁰ Although the information placed on Facebook is voluntarily placed online, this content should still be protected from audiences whom the user did not intend to see the information.³²¹ In the case of a voluntary disclosure situation, Congress should build a framework that considers the intent of the user and courts should turn to the intent of the user asking: 1) Who was the intended audience and 2) Were the persons to whom it was disclosed part of this intended audience?

In addition to this intent consideration, it is imperative for Congress to place upon social networking services an obligation to give proper notice to users. This is most important not in the voluntary decision to place information in one's profile, but the uninformed decision that a user makes when adding Facebook

318. See Mintz, *The Remains of Privacy's Disclosure Tort*, *supra* note 47, at 460-61 (explaining why court's fact-finding process will be efficient in determining if there was disclosure of privacy).

319. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting) (observing that six members of the Supreme Court agree that "in the context of defamation law, the rights of the institutional media are not greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.")

320. See Boyd & Hargittai, *supra* note 197 (recognizing facebook users' difficulty and lack of confidence in ability to change privacy settings). This analysis did not include review of the social networking/microblogging platform Twitter.com. See *id.* The platform's nascence, and the recent explosion of its' use since February 2009, leaves many open questions as to its' impact upon privacy and transparency. See *id.*

321. See Bankston, *supra* note 256 (highlighting the fact that certain information is "publicly available information" despite users' other heightened security settings).

Applications, like the popular, but now defunct, “Scrabulous,” to their profile.³²² Many users are unaware that when they accept an application, the developer of that application has access to all the information in their profile.³²³ This allows a person to make an educated judgment as to whether or not they wish to compromise their privacy in this manner.³²⁴

This type of regulation allows users online to make the same decisions about their privacy that they make in real space. In the visceral world, people are aware when they are in a public place or when, and to whom, they are revealing information.³²⁵ The same type of protection should be afforded in virtual space. With proper notice, a user can be held to a standard where they “knew or should have known” that their privacy was being compromised.³²⁶ Borrowing from Jerry Kang’s approach to e-commerce transactions, application developers would further be limited to the information that is “functionally necessary” for the application’s use.³²⁷

IV. Conclusion: No Such Thing as a Free Lunch

“Privacy is not a free lunch.”³²⁸ Ben Parr, the moderator of the Students Against Facebook News Feeds group, found this out the hard way, when his life was turned upside down as he became the “face” of liberty for Facebook users who valued

322. See Emily Steel & Geoffrey A. Fowler, *Facebook in Privacy Breach*, WALL ST. J., Oct. 18, 2010, archived at <http://www.webcitation.org/5x2MkMtzK> (noting that applications sometimes gain access to private information).

323. See Steel & Fowler, *supra* note 322 (explaining that applications have access to Facebook ID numbers which reveal all public information).

324. See Steel & Fowler, *supra* note 322 (summarizing Facebook’s recent attempt to provide users with more control over what information is shared via applications).

325. See Mintz, *The Remains of Privacy’s Disclosure Tort*, *supra* note 47, at 459 (observing that when people make statements in public they know the information is in the public domain).

326. See *Warshak*, 532 F.3d at 526 (arguing that having privacy notices reduces a person’s need for privacy protection).

327. See Kang, *supra* note 174, at 1271-72 (arguing that in online transactions only information that is “functionally necessary” should be used).

328. Jeffrey Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed By The Information Technology of the Future*, in *PRIVACIES: PHILOSOPHICAL EVALUATIONS* 194, 197 (Beate Rössler ed., 2004).

privacy. His own defense of privacy threw him into Celebrealty, and much like the other instances that have been discussed, his efforts to defend this value eroded his claim to it. Parr simply had one wish: "My goal is to slowly return to normality, to a time when I didn't get called out of a room by CBS, to a time when *Time Magazine* correspondents did not ask for interviews, to a time when I did not have fan clubs, and to a time where I was not demonized because of Facebook."³²⁹ In a world where even defenders of privacy are victimized by Celebrealty, what are we to make of Warren and Brandeis' time-honored value?

Our demands in this information hungry society are in a state of great conflict. In a world where Ben Parr, Pamela Andersen, and OJ Simpson are all to be treated the same, who is still entitled to privacy? Elli Langford, a student interviewed at Auburn University in Alabama, makes the most insightful point of all: "I mean, every other celebrity couple is letting movie cameras into their houses. And you've got shows like *The Hills* and *Laguna Beach* (both on MTV) where they're in high school, but they're letting cameras follow them around and putting their lives onto TV."³³⁰ What we have in these situations is false transparency, the impact of which ends up in an increase in the demand for authentic transparency from private actors.

"It may dawn on us too late that privacy should have been saved along the way."³³¹ A little over ten years later, this statement has the disquieting feel of a biblical revelation. It is too easy for consumers and users to get lost in the glitz and glamour of celebrity existence, and the lure of increasing their social prowess. Demanding the "right to know" is a scary proposition; you cannot be halfway naked in the privacy game. It's all or nothing.

329. Boyd, *supra* note 209.

330. Janet Kornblum, *Online Privacy? For Young People. That's Old-School*, USA TODAY, Oct. 22, 2007, archived at <http://www.webcitation.org/5x2PQMwX>.

331. Kang, *supra* note 174, at 1286.