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The “New” Privacy and the “Old”: Is Applying the Tort Law of Privacy like Putting High-Button Shoes on the Internet?

Diane Leenheer Zimmerman¹

The topic this issue of the journal seeks to address is whether and how privacy concerns are changing in the face of rapidly evolving technologies of communication. The problem with the topic is that privacy is label that is applied to such a higgledy-piggledy collection of concerns that saying I intend to write about it gives readers very little useful information about what to expect. Anxiety over what we call privacy has been increased in all sorts of arenas by virtue of our recognition that a proliferation of new technologies makes it possible to probe into our lives and to record our preferences, opinions and personal quirks with greater efficiency. Am I concerned with the mishandling of medical or financial information? With surveillance cameras? With the search engines and commercial data aggregators like DoubleClick that track the places I visit on the internet, profiling my interests and preferences in order to target me with personally “appropriate” ads? With a social network site that lets my friends know what book I just bought? With the use of airport body scanners that strip me (virtually) naked each time I want to fly somewhere? With the dissemination of personal information via traditional media or on social networks? With government access to the details of my daily life? The answer is that I could be intending to address all those things and more.

Privacy is nothing if not multivalent – a capacious and underinformative label² -- and all its various faces (including some I have not even mentioned) have their own

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² The multiplicity of interests, and the often conflicting claims about the nature of privacy, once led Robert Post to lament that “[p]rivacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.” Robert C. Post, *Three Concepts of Privacy*, 89 Geo. L. Rev. 2087, 2087 (2001).

particular interface with technology and raise quite divergent sets of questions. In the face of that reality (Daniel Solove has identified at least four categories of privacy problems that he further breaks down into sixteen different subgroups³) I will opt instead for radical simplification. Leaving aside worrisome practices by government agencies and by purely commercial actors, this Article will address itself to just one of the multiplicity of situations that are commonly described as involving incursions into private matters: whether digital technology demands a revised body of privacy tort law to address the problem of the public dissemination of personally identifiable information in the new mass media.

I. The Privacy Torts

The attempt by individuals to control the mass circulation of personally identifiable information has, by now, a long history with important ramifications for how the law has been able to deal with conflicts between competing interests of subject and user. There has been, I think, a tendency to see this conflict as belonging firmly to the past, with not very much to say about the rights and wrongs of mass dissemination as information flows less through traditional analog media and more and more through cyberspace.

As many readers know, the creation of a body of tort law designed to protect privacy was first suggested in the United States in 1890 in a law review article by Samuel Warren and Louis Brandeis.⁴ The authors targeted as their concern about invasion of privacy revelations made in the press, without consent, of information about the personal lives of identifiable individuals. Warren and Brandeis pointed out that the law, indirectly,

³ DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 172 (2008).

⁴ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

already helped make publication of such material as off limits by using property concepts, such as common law copyright, to allow the authors of personal letters to control their public dissemination, even if the intended recipients or owners of the letters had other preferences. The two Bostonians argued that the principle applied in these earlier cases needed to be generalized into a legally recognized personal right against invasions into the personal sphere.

The invasions that worried them were not ones committed by friends chatting about one another's foibles and affairs. No where in the famous article did the authors suggest the creation of a legal right for use against friends, family and social acquaintances who spread personal information; gossip appears to have been considered annoying and distasteful, but ultimately beneath the notice of the law. The press was the agent of dissemination that worried and offended them. They did make an exception for the publication of personal information if it bore directly on an individual's fitness to act in a responsible public or quasi-public capacity,⁵ but the exception was a narrow one: the authors were adamant that even actors in the public limelight were entitled a broad control over what could be said about their personal lives in the media. Presumably, even presidents ought not to expect that their personal habits or even their sexual peccadilloes

⁵ The authors wrote:

In general, . . . the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. . . . Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.

Id. at 216.

would ordinarily be fair game for the media. Within a few years, courts began to pick up on Warren and Brandeis's idea, and the tort law of invasion of privacy was born.⁶

The tort was not, however, fated to develop along a straightforward path.⁷ By the middle of the twentieth century, Dean Prosser was able to identify not just one tort, but four -- joined together by little other than a common title, "invasion of privacy" -- that had evolved from the original Warren and Brandeis proposal. Three of the four were direct descendents of their focus on the media, in that they all were directed against disclosures to the public at large of information about the lives and experiences of individuals.⁸ The fourth had no disclosure requirement.

A. False Light and Misappropriation

This Article will not discuss two of the four faces of the tort because, although both can be committed in cyberspace, they protect rather specialized interests, and hence hit only at the margins of what users of Facebook or participants in the blogosphere worry about with regard to the viral spread and persistence of publicly accessible personal information across the internet. They are invasion of privacy by misappropriation and by presenting the plaintiff to the world in a "false light.

⁶ The first state to adopt the tort of invasion of privacy was Georgia in a dispute involving the use of the plaintiff's name to endorse an insurance company. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 73-74 (1905).

⁷ There were, in fact, other legal theories outside the tort law of privacy that also addressed violations of a plaintiff's reasonable expectations about the use of her personal data. One is the existence of a confidential relationship, obligating the recipient of information not to disclose it to unforeseen third parties.

⁸ False light cases were targeted against the press and entertainment media. See, e.g., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (news report); *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980) (work of fiction). Misappropriation claims could not be brought for uses of personal information in journalistic reporting, but it nonetheless targeted public media through attacks on advertisers, entertainment media, and disseminators of what I call information products (such as posters, baseball cards or tee shirts). See, e.g., *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953) (baseball cards); *Midler v. Young & Rubicam, Inc.*, 849 F.2d (9th Cir. 1988), cert. denied, 503 U.S. 951 (1992) (advertising).

1. *False Light*. The false light tort comes into play only if the information at issue is inaccurate. A claim may exist for misrepresentations about an individual's personal life or his most public activities. In theory, false light claims are available without regard to whether the mistake is flattering or insulting.⁹ However, the burden a plaintiff must meet to succeed on a false light claim, the United States Supreme Court has ruled, is to prove that the defendant disseminated the falsehood either intentionally or with reckless disregard of its accuracy – what is known in libel law as proof of actual malice.¹⁰ This limitation was imposed to protect freedom of speech. But even hemmed in by this constitutional limitation, several states have remained convinced that the tort is nothing more than an attempt to end-run free speech and common law restrictions on defamation actions and they have refused to recognize it.¹¹

2. *Misappropriation and Publicity Rights*. Misappropriation is committed by high-jacking someone's personally identifying characteristics and using them for commercial purposes. Although this behavior was initially considered to violate privacy, over time it became clear that not everyone complaining about commercial uses of their identity were people who objected, generally, to being in the public eye, or at least to appear to be promoting a product or service.¹² Many complainants were quite happy to receive publicity and did not mind endorsing products; what they wanted was the ability

⁹ Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967).

¹⁰ The Supreme Court first applied First Amendment limitations to actions for defamation in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Only three years later, the Court concluded that false light cases were by necessity subject to similar restrictions. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court ruled that plaintiffs could not succeed in a false light action unless they could prove that the falsehood in question was knowing or uttered without any regard to its likely veracity. *Id.* at 389. Accord, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

¹¹ Several states have refused to adopt the tort of false light. See, e.g., *Massachusetts, Elm Medical Laboratory, Inc. v. RKO General, Inc.*, 532 N.E. 2d 675, 681 (Mass. 1989); *North Carolina, Renwick v. News & Observer Publ. Co.*, 312 S.E. 2d 405 (N.C. 1984); *Texas, Cain v. Hearst Corp.*, 878 S.W. 2d 577 (Tex. 1994). For a general discussion of the problems with this branch of tort law, see Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. Rev. 364 (1989).

¹² *Robeson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

to control their exposure and to exploit it for personal gain. Over time, the idea that commercial use implicates a kind of intellectual property interest rather than a privacy one has taken hold and has become the favored explanation for why the law should protect the interest and misappropriation slanted toward a property interest called the right of publicity.¹³ As companies become more creative about using the internet to push their wares, misappropriation and publicity rights claims may well be used creatively as well. But, again, the target for such claims is comparatively limited.

B. Private Facts and Intrusion

The two remaining branches of the common law tort address the public dissemination of personal information in more general terms. The so-called “private facts” tort offers redress for publication of embarrassing or highly personal information. The tort of intrusion into seclusion imposes enforceable limits on how information about an individual’s private life can be obtained. These are the two torts that, historically, have been most closely associated with what, to many, are the core interests of privacy: protecting intimacies and secrets, and securing opportunities to withdraw into certain spaces where the uninvited may not penetrate. I will focus on these two branches. First, they are the primary tools the common law has used to curb unwanted dissemination of personally identifiable information, and second because they are the tools that have been targeted directly or indirectly by contemporary privacy scholars as inadequate and indeed as misconceiving the true nature of the interest in privacy.

¹³ ¹³ For a discussion of the right of publicity and its relationship to misappropriation, see Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DePaul J. Art & Enter. L. 35 (1998). For general discussions of publicity rights, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 127 (1993); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 Vand. L. Rev. 1199 (1986)

1. *The Private Facts Tort.* The private facts tort is the branch of the law that seems most clearly addressed to the interest that motivated Warren and Brandeis to write their article. It targets unwanted publicity given to private information. In the early years of the law's development, it seemed as if the tort might follow the general outlines suggested in the Harvard article: that is, absent a narrow exception for material that was clearly newsworthy, personal information about individuals was off limits to the mass media.¹⁴ But almost from the beginning, courts, however sympathetic to the project, worried that strong protection for personal data would conflict with freedom of the press and the right to discuss matters of public interest.¹⁵ Over time, the area covered by the tort narrowed until it was down to protecting against the sorts of information that reasonable people would consider highly personal, and the revelation of which would strike them as highly offensive.¹⁶ At the same time, what was newsworthy expanded from the narrow category of things bearing on fitness for positions of public trust to things bearing on matters of legitimate public concern.¹⁷

2. *Intrusion.* Intrusion, unique among the privacy torts, is not specifically targeted to mass disseminations of information, although it has proven itself a significant tool in limited newsgathering techniques used by the press. Intrusion, unlike the private facts tort, is indifferent to the nature of the information that is obtained. An intrusion is actionable whether the defendant has used a hidden camera to photograph her subject,

¹⁴ See, e.g., *Cason v. Baskin*, 20 So.2d 243 (Fla. 1944) (finding that defendant invaded privacy merely by describing plaintiff's personality in a generally favorable way in her book).

¹⁵ The earliest court to adopt the common law right of privacy, *Pavesich v. New England Life Ins. Co.*, 50 S. E. 68 (Ga. 1903), nonetheless cautioned that freedom of speech was a more important right than the right of privacy, and that an individual should not be allowed to "assert his right of privacy in such a way as to interfere with the free expression of one's sentiments and the publication of every matter in which the public may be legitimately interested." *Id.* At 74.

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

¹⁷ Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291 (1983).

fully clothed and curled up on the living room couch with a book, or has planted a microphone under a bed to record a couple's conversation. The act itself is the tort; it is not necessary for the intruder to disclose what she has learned to anyone else. Intrusion assumes the existence of private loci into which individuals are entitled to withdraw and where they can exercise control over who has access to them and in what form. It seems premised on the reasonable idea that people should not have to resort to underground bunkers to gain respite from the eyes and ears of neighbors and strangers alike. One might usefully think of the intrusion tort as a Fourth Amendment for private actors.

III. The Privacy Torts and Digital Mass Media

The understanding of privacy embedded in the private facts and intrusion torts may seem on first glance both quaint and wholly unresponsive to modern conditions of information flows. It reflects a definition of privacy that limits it to the protection of secrets and intimacies, or to the walling off of a narrow set of places where it is “reasonable” to expect that surveillance will not occur. Faced with the ubiquity of computers, new platforms, telephone cameras, and the rest of the new information-capturing and-disseminating technologies, personally identifiable information seems increasingly impossible to fence in. Rules based on secrecy, intimacy or spatial considerations can easily seem underinclusive and wholly inadequate.¹⁸ Photo albums

¹⁸ One critic of the conception private information is limited to that trenching on one's intimate life and one's secrets. is Julie Cohen. Cohen, who largely focuses in her privacy writings on such issues as government surveillance and commercial data aggregation, argues that invasion of privacy today is largely a product of deferral to commercial interest in profits and to government security claims. She would say that privacy is every bit as implicated by misuse of data about our public lives as our private ones. See, e.g., Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 *Geo. L. J.* 2029, 2036-37, 2040 (2001) (data collection for marketing and government surveillance are chief privacy problems). Further discussion on these forms of privacy invasions can be found in Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 *U. Chi. L. Rev.* 181 (2008); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *Stan. L. Rev.* 1373 (2000) [hereinafter Cohen, *Subject*

stored on Picasa, videos loaded onto YouTube, or profiles posted on Facebook are not exactly secluded and concepts of “spatial” privacy do not address the desire to control their dissemination. And because material that enters the open channels of the internet spreads so quickly and so far, its persistence and irretrievability amplify the damage it can do.¹⁹ Therefore, even if the information is not intimate in any traditional sense, or secret, its widespread availability still seems problematic. An unflattering photograph of Jane in a silly Halloween costume may be something she’d quite reasonably prefer not to be the first thing that pops up whenever, in the foreseeable future, someone searches for information about her in Google.

These are changes indeed, but are they so fundamental that we need to scrap the approach taken by the tort law of privacy in favor of a more highly protective regime? In my own view, the answer is no. There are important, indeed fundamental, reasons that the tort regime governing privacy has the shape it does, and, at least when we are talking about the issue of public dissemination of personally identifiable information, I would argue that, technological change or not, the center holds because it must.

A. The Things That Have Changed

To explain why I believe that the current tort regime, with all its limits and limitations, is in fact the best we can and should hope for, I would like to explore two changes in the ecology of information dissemination. These changes, I think, both illustrate what makes many observers increasingly frustrated with existing legal solutions

as Object]. See also, SOLOVE, *supra* note 3, at 34-37 (criticizing the emphasis in privacy on protection of intimacy).

¹⁹ This point is made by Danielle Citron, who writes, “While Twenty-first century technologies continue to interfere with individual privacy, they magnify the harm suffered. The searchable nature of the internet extends the life and audience of privacy disclosures, exacerbating individuals’ emotional and reputational injuries.” Danielle Keats Citron, *Mainstreaming Privacy Torts*, forthcoming in Cal. L. Rev. (2011), draft available at

http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1931&context=fac_pubs.

and why, however convinced one might be that uncontrolled disseminations can cause significant personal damage, the fundamentals of the existing law are resistant to change.

The first has to do with how information today is likely to work its way into public channels – as a result of choices made by individual noninstitutional actors. The internet has given us the option of being our own publishers, but who will be our editors? The diminishing presence of filters to mediate between what is known and what is published increases the likelihood that personal information will be vulnerable to uncontrolled public dissemination. The second change is in the range of thoughts and behaviors that people are willing to communicate about themselves to a wide circle of friends and acquaintances. With the benefit of hindsight, many of these disclosures are going to seem like a terrible idea, leading others to conclude that the individual is feckless or at least foolish; some are so intimate that it is painful, even to a compassionate outside observer, to think that this kind of information is rattling around in cyberspace for anyone to see.

a. The Absent Editor and the Self-Publisher

More and more, the fact that personally identifiable information becomes widely available is a result of choices that the subject herself makes, choices that are facilitated by the increasing amount of direct access she has to tools of mass communications. In traditional cases, the plaintiff might unexpectedly (and very unintentionally) have been exposed in public in a way that was deeply embarrassing or psychologically hurtful in some other way. One thinks of the case of the woman who was photographed with her skirt blown above her waist as she exited a funhouse,²⁰ or perhaps the situation of a parent whose intense grief at the injury of a child in a traffic accident is captured by a

²⁰ Daily Times Democrat v. Graham, 162 So.2d 474 (Ala. 1964).

photographer on a public street. In other instances, conduct or confidences trustingly shared within a small social network might unexpectedly be revealed to the public at large because a member of that circle passed the information along to a member of the press. The case of Monica Lewinsky and Linda Tripp comes to mind.

But in the Picasa, Facebook and Twitter era, the subject herself may “go public” (or at least semi-public by virtue of indiscriminate “friending” of people she barely knows) by publishing highly intimate or at least potentially embarrassing information on her or someone else’s page, often without thinking through the possible negative consequences.²¹ Social networking and other advances in uses of the internet have turned us into our own editors and publishers.

Now, that is, on the whole quite a good thing. The powerful advantages of the connectedness enabled by these sites is readily apparent.²² One has only to think about the use of social media in promoting the political protests that brought down a repressive government in Tunisia, and that led to similar protests in Egypt. As a general matter, the internet generally has put power it has put in the hands of individuals to make their voices heard and to seek out receptive audiences, without the interposition of gatekeepers. Musicians can use the internet to try to escape the narrow funnel to the public that was once imposed by music labels; authors can now bypass an increasing sclerotic publishing establishment and try to build a following for themselves. Anyone with something to say can blog it or tweet it or post it in video format and hope to connect in cyberspace with

²¹ Concerns have also been raised about the fact that the availability of this information aggravates the potential for invasive commercial profiling or government spying.

²² Advantages range all the way from reconnecting with old friends to the facilitation of information transfer in the case of disasters. According to the New York Times, the Federal Emergency Management Agency (FEMA) is currently working with Twitter to develop new methods of communicating with the public in emergencies. Ashley Parker, *Twitter’s Man on Capitol Hill Is an Evangelist Whose Message is the Medium*, N.Y. Times (Jan. 30, 2011) at p. 18, col. 1.

like-minded folk. All well and good. These are potential game changers for how cultural products are produced and distributed and political movements are formed.

But the absence of editorial gatekeepers has some downsides that tend to be overlooked: once everyone has access to public media, to quote Cole Porter, anything goes. When the press was solely institutional, entities, with an eye toward their circulation and possibly informed by ethical concerns, developed policies about the kinds of things that would or would not be published. The editors could decide to withhold a crime victim's name or not to publish nude photographs, even when the nudity was in some sense public. But the content posted for public consumption on the internet is less and less subject to filtering through institutional policies and more and more gets there as a result of individual taste or simple thoughtlessness. Even when the disclosure comes about through a third party (a contact to whom the information was provided by the subject, for example), gatekeepers governed by institutionalized social norms provided a second chance at short-circuiting the disclosure.²³

Admittedly the existence of gatekeepers did not prevent some pretty slimy material from making it into print or onto television screens, but there were practical as well as policy limits. When skater Tonya Harding's former husband wanted to humiliate her by selling a videotape of the couple having sex on their wedding night, he was successful largely because of the fame and notoriety that already surrounded the pair. It is unlikely that Penthouse would have been willing to pay for the pictures if Jeff Gillooly were an unknown used car salesman and his former wife a similarly unknown

²³ Newspapers, for example, commonly had policies against identifying rape victims by name. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 528 (1982) (Supreme Court notes that newspaper's report of victim's name a violation of its own policy).

accountant.²⁴ Scarcity of time or space required selection. Probably, an unknown Gillooly with an equally unknown former wife might well have had to settle for the revenge of passing a few steamy prints among his personal pals. We did expect the press to exhibit some judgment, and felt that it was possible to hold them responsible when they did not – even if, as a practical matter, enormous deference was given to editorial determinations of newsworthiness.

The internet and digital technology, however, have enabled anyone, no matter how obscure, to exhibit himself (and his bad judgment) before a remarkably broad swath of the public. Only after having put up photos of himself at a drunken, drugged-out bash, or having blogged in ways that reveal his least attractive personality traits or opinions and prejudices may a self-publisher realize that he may be reaching audiences -- prospective employers, parents or admissions directors, to name a few -- who are not on the same page as the poster's peers with regard to how they react to these revelations. The damage done by this kind of exposure ranges from shaming to loss of economic and social opportunities. But in a real sense, it occurs with the active participation of the victim. Even when information is intended for genuine social acquaintances rather than the world at large, the disseminator (who has herself probably thought little of sending on to others the digital photos or e-mails she thinks are funny or interesting) cannot realistically expect that, given the ease of re-communication, the content will necessarily “stay put.”

Can and should the legal system respond to this change with new rights and remedies? That is a subject on which one might expect philosophical disagreement. Some might say that any claims that privacy law should come to the aid of the self-

²⁴ The entire sordid story is retold in Harding's biography on Wikipedia, along with a link to the video. Readers can find the site for themselves. **Ed. Note: If you insist, it is:** http://en.wikipedia.org/wiki/Tonya_Harding

discloser are ridiculous. These self-publishers, it might be argued, have demonstrated that they do not value privacy, but simply want to avoid the negative consequences of the disclosures they have made.²⁵ Others might disagree, arguing that privacy and how much we should protect it are normative questions that are independent of the value that any individual does or does not place on taking steps to protect her own personal information.²⁶

The approach taken in the common law has been to resolve this dilemma by the application in privacy of rules applying the principle of consent. Even Warren and Brandeis, who were privacy maximalists in terms of the range of personal information they sought to protect, treated consent as waiving any cause of action. They took it as a given that a plaintiff who consented to publicity should not then be able to seek a legal remedy for any harm that he suffered as a result.²⁷ From the beginning, therefore, this limitation was imbedded, along with the newsworthiness defense, as one of the major limitations on the private facts tort. As the law developed, what counted as consent was not necessarily limited to information that individuals knowingly disclosed in places open

²⁵ Long before the internet era, Judge Posner argued that the right of privacy is suspect because it protects the ability of individuals to manipulate their public image and misrepresent themselves to others. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978). Cf. ANITA L. ALLEN, *WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY* (2003). Allen argues in her book that claims of privacy must often be tested against claims of accountability. "We are accountable," she writes, "for nominally private conduct both to persons with whom we have personal ties and to persons with whom we do not...." *Id.* at 2.

²⁶ Helen Nissenbaum argues, for example, that "Privacy's moral weight, its importance as a value, does not shrink or swell in direct proportion to the numbers of people who want or like it, or how much they want or like it. Rather, privacy is worth taking seriously because it is among the rights, duties, or values of any morally legitimate social and political system." HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 66 (2010).

²⁷ Some examples of the application of this principle can be found in *Grimsley v. Guccione*, 703 F. Supp. 903, 910 (M.D. Ala. 1988) (where plaintiff cooperates in making material public, no right of privacy); *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr.665 (Cal. App. 1984) (fact that plaintiff homosexual not private because his sexual orientation known among members of gay community); *Langford v. Vanderbilt University*, 287 S.W. 2d 32, 38-39 (Tenn. 1956) (something plaintiff put into a public record cannot be the subject of a privacy action).

to the general public. In several cases, courts have found that plaintiffs are barred from suing for the mass publication of content even when the information has been revealed in purely social settings where the only audience is a circle of friends and acquaintances.²⁸

The reasons for the importance of consent as a limit on the privacy tort are, I believe, two-fold. One is deeply embedded in the history of tort law. The existence of express or implied consent has traditionally negated the existence of a whole range of intentional torts. The idea that one cannot both consent (or appear to do so²⁹) and then complain about the consequences reflects traditional, deeply-held notions both of personal responsibility and of respect for individual autonomy.

For example, although the law of intentional torts rigorously protected individuals against being touched against their will, even if the defendant did so in what might seem to outsiders as the best interests of the plaintiff – for example to treat a harmful medical condition.³⁰ But neither did it offer compensation for the untoward results of an agreed-to touching. And even as negligence principles began to replace reliance on the law of battery to deal with injuries, consent continued to play a limiting role on liability through doctrines like assumption of the risk. Unquestionably, the legal system can conclude, as a matter of policy, that it should not hold the individual responsible for the consequences of her consent in some situations because the nature of the degree or kind of the potential

²⁸ See, e.g., *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888, 891 (Mass. App. 1999); *Porter v. Channel 7 of Detroit*, 17 Med. L. Rptr. 1898 (Mich. Cir. Ct. 1990) (once plaintiff tells others about a relationship, she cannot claim it is private); *Sipple*, 201 Cal. Rptr.665 (Cal. App. 1984).

²⁹ A famous example is *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. 1891) where a woman who held out her arm for a vaccination was deemed to have consented, even though she did not do so expressly and later objected..

³⁰ *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905) is a well-known illustration; here the surgeon had permission to operate on one of the patient's ears, but instead operated on the other after finding that it was in worse condition. He was held to have committed a battery on the patient.

harm is too socially costly.³¹ These exceptions are made rarely, however, and where they exist, they are often controversial – even when intended to ward off unambiguously serious risks to health and safety or even to safeguard the welfare of children.³²

The harms caused by thoughtless consent to publicity about one’s personal life may be, on occasion, palpable, but they do not, I think, rise to the same magnitude as risks of death or mutilation. Were the law to adopt the view that the indiscreet cannot legally consent to the dissemination of personal information, it is hard to argue in a principled way for why notions of consent should not be deemed obsolete in all cases where an individual’s voluntary acts expose them to untoward consequences. Not only does this raise the specter creating moral hazards, but it seems wholly inconsistent with one of the chief arguments made by advocates for why privacy should be protected: respect for individual autonomy.

But the doctrine of consent is not simply a general feature of tort law that incidentally applies to privacy law as well. In this setting, it also has an important speech-protective role. Consent is one of the legal tools that courts have wielded to keep privacy from trumping the constitutional priority given to freedom of speech. It is not the only tool; we will come to the newsworthiness rule in a bit. But think about the way in which the absence of a broad consent rule would affect the ability to discuss social and political issues. If individuals were deemed legally incompetent to consent to the public dissemination of personal information, the result would be a public policy declaration that personally identifiable information should be entirely off-limits for purposes of

³¹ Consent was generally ineffective, for example, where the conduct was likely to lead to death – for instance, consent was unlikely to bar wrongful death action in the case of a duel.

³² Children, for example, are deemed incapable as a legal matter of giving consent to a wide variety of activities. Any argument about the effect of consent in privacy must therefore take account of the age of the subject of the publicity.

public consumption and consideration, a position that simply defies common sense. Even a less draconian approach to consent, requiring that mass publication of this kind of material proceed only after releases have been obtained, would essentially give everyone the equivalent of a copyright in their personas and the details of his life histories. As a practical matter, the expense and administrative burden of acquiring the necessary releases -- as anyone familiar with the problems of licensing in copyright knows -- would profoundly impact on what could be published, and, depending on the weight given to its importance, could cause greater or lesser impediments to the exercise of first amendment rights. Even Warren and Brandeis, whose willingness to protect personal information extended far beyond what courts and legislatures have deemed to be constitutionally acceptable, were unwilling to abandon the defense of consent and it is hard to imagine modern courts or legislatures doing it today.

b. Excuse Me, but Where Do We Put the Off-Limits Signs?

The second change that I believe has made the publication of personal information such a concern in the twenty-first century has to do with the content of what is published. The easy access to the tools of public communication makes it possible for people to leave a permanent, publicly-accessible trail of moments in life that, in retrospect, they are likely to regret having there. Some will make them look silly or trivial or will represent selves that they have long since outgrown. But more troubling, a surprising amount of the material now available to others is exactly the kind of stuff that, at the time Dean Prosser wrote his analysis of the privacy tort and the American Law Institute memorialized in the Restatement (Second) of Torts, was generally assumed to be unfit for publication, and rarely touched by the mainstream mass media.

A cursory glance through a selection of current videos on YouTube quickly reveals individuals who have either posed for or created visual records of themselves and their peers in states of thorough inebriation, in various degrees of undress, and even having what looks like a sexual encounter on a tabletop in “hot” dance club. In one particularly graphic photograph recently circulated on line, a member of Congress was shown with another woman who was busily licking the Congresswoman’s breast.

Another recent incident, exemplifying both the reduction in people’s inhibitions about what they are willing to reveal, and the inexorable power of the internet to give those revelations exposure and permanency comes from a college campus. In the fall of 2010, a Duke undergraduate e-mailed a PowerPoint “thesis” to several of her friends. The thesis consisted of photographs of each of more than a dozen student athletes with whom the author claimed to have had sexual relations, accompanied by a written evaluation of the nature and quality of each experience. Even if the young woman in question hoped she could “trust” the recipients to keep the e-mailed document to themselves, its contents, the ease of passing it on – and the prominence of the star athletes whose off-the-field prowess was evaluation – pretty much ensured that it would quickly make its way all across the campus and indelibly into cyberspace. And, given the current climate with regard what constitute acceptable disclosures, it is easy to imagine that the recipients of the original e-mail may well have assumed that the author would not object to their passing it on.³³ The result is that both the author and her subjects have been

³³ Presumably, none of the players gave a lot of thought to privacy implications, from the young men’s perspective, of disseminating an evaluation of their sexual performances, accompanied by the men’s photographs. This is a chronic complication in thinking about privacy and who gets its protection. When a person chooses to make personal disclosures, it is common that those disclosures will reveal important information about the lives of those with whom she is involved. Because those associated with the person who wants to tell her life story may well object to being included, protecting their privacy might well mean barring her from talking about her own life.

frozen in cyberspace in a particularly sensitive (and embarrassing) moment in time for the foreseeable future.

The permanence and availability of these kinds of revelations and the effect they have on how the individuals may be perceived by others throughout their subsequent lives are reasons some scholars have argued that we need to take a stronger legal stand against uncontrolled dissemination and reuse. While the impulse to give individuals a chance to wipe their slates clean of embarrassing disclosures is understandable, I do not believe this is a change that law is capable of achieving. To suggest the contrary is to fail to take account of the reasons that the common law has been so parsimonious in its definition of what is private, and so expansive in its definition of newsworthiness.

As the right to privacy was originally conceived by Warren and Brandeis, nonconsensual revelations of personal information in the media would be actionable,³⁴ with only a limited exception for matters of public interest, narrowly defined. It seems unlikely, for example, that Warren and Brandeis would have looked kindly on the public exposure of an American President's sex life unless it could be convincingly argued that the behavior in questions (molestation of a child, perhaps) unambiguously had direct bearing on his fitness for public office.³⁵

³⁴ Support for the argument that the authors' definition of "private" was very broad may be found in Amy Gajda, *What If Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage That Led to "The Right to Privacy"*, [2008] Mich. St. L. Rev. 35 (speculation that the triggers for the article were Warren's unhappiness over press coverage of his wedding and of the deaths and funerals of his mother- and sister-in-law).

³⁵ A legitimate debate exists over the kinds of personal behavior that are pertinent to this question. A choice to have a sex partner outside marriage, for example, will be for some an indelible moral stain that, in their eyes, disqualifies the individual from holding a position of public trust. For others, the perceived appropriateness of the partner would be the dividing line. For others, the matter would be one of indifference. I think it fair to guess that Warren and Brandeis would have opposed calling this kind of information "newsworthy" in any but the most extreme cases.

As already noted, it did not take much time for courts to conclude that the form of protection advocated by Warren and Brandeis was in serious tension with the First Amendment. To deal with this tension, the defense that the revelation was newsworthy grew more and more expansive.³⁶ Courts recognized that public questions were not limited to a subject's fitness for positions of public office or public trust; rather, reportage on a much wider range of human behavior potentially could inform a community of self-governing citizens on policies and problems of significant concern to them.³⁷ Not having an objective yardstick for measuring newsworthiness, or a crystal ball that predicted accurately the productive uses to which various bits of information might be put, courts were reluctant to conclude that very many things were outside the sphere of public concern, leading Harry Kalven to conclude that, over the years, newsworthiness had more or less swallowed the entire tort of public disclosure.³⁸ To make the point that an informed public took priority over privacy, courts also whittled away at the subject matter that could potentially be the subject of a privacy suit. That is why, by the 1960s, the reach of the cause of action was limited to matters likely to "shock the conscience" of reasonable people.³⁹ When combined with notions of consent, these standards largely

³⁶ As the Supreme Court noted in *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967), "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community." Part of the reason this must be so, the Justices went on to add, was that our society places such a high value on free speech. *Id.*

³⁷ See, e.g., *Sidis v. F-R Publ. Corp.*, 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940) (court finds that story of childhood genius and his later life is newsworthy). Just recently, Sidis reappeared as the subject of an essay on National Public Radio's All Things Considered, entitled *Meet William James Sidis: The Smartest Guy Ever?*, available at <http://www.publicbroadcasting.net/kcur/artsmain/article/12/1338/1753163/TheaterPerformance/Meet.William.James.Sidis.The.Smartest.Guy.Ever>.

³⁸ Harry Kalven, *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 L. & Contemp. Probs. 326, 336 (1966).

³⁹ Injunctions are in theory available to stem further distribution of materials that invade privacy. See *Commonwealth v. Wiseman*, 249 N.E.2d 610 (Mass. 1969) (issuing a limited injunction, eventually dissolved, to prevent the showing of Fredrick Wiseman's *Titticut Follies*). They are exceedingly rare, however, and if publication has already occurred, getting existing copies out of circulation would be difficult even with analog media; on the internet, it may be impossible.

excluded causes of action for things taking place in what were deemed public areas or for the kinds of information that did not seem to fit into the category of the intimate. And even intimate disclosures might pass muster if the public interest was served by them.

These restrictive legal principles did not arise because courts were unsympathetic to the normative values of privacy or unable to identify with the possible pain or humiliation that could attend publicity. Instead, the branch of the privacy tort involving publication of embarrassing facts developed the way it, at each turn, it became more and more apparent that permitting the vast majority of privacy claims, even limited to intimate information, to succeed would exact a significant price: damage to freedom of speech and of the press. Although digital technology has made it easier for personally identifiable information to be disseminated to the public, and easier to find once disseminated, I remain convinced that these changes do not alter the underlying constitutional equation.

Before assuming that the balance has shifted, the extent of what is “new” has to be evaluated critically. Let us begin with the basic theoretical arguments about why individuals should be entitled to stronger protection for their personal information. Privacy advocates regularly invoke such justifications as protection of individual autonomy, and the importance of having some right to control how each of us presents our self to others.⁴⁰ These are old arguments, common to privacy literature long before the possibilities and risks of cyberspace could be appreciated, or indeed imagined. While they have at least rhetorical force, they did not succeed in convincing courts to shift

⁴⁰ NISSENBAUM, *supra* note 26 at 81-84; (autonomy as value protected by privacy); Cohen, *Subject as Object*, *supra* note 18, at 1373 (privacy provides individuals with opportunity to experiment with how they present themselves to the world); Citron, *supra* note 19 (accord); SOLOVE, *supra* note 3, at 93 (privacy enables “our participation in public and community life”).

greater protection to privacy at the expense of speech in the past. While changes certainly have occurred over time, on close examination, just how different contemporary circumstances relating to privacy are is not so easy to evaluate. Think about concrete examples. Is it realistic to believe that Monica Lewinsky's embarrassment over the public revelation of her sexual conduct would have been less had it only occurred in the print media rather than originating on line in the Drudge Report? Or that the impact on the congresswoman of the breast-licking photograph would be of a reduced level of magnitude if it appeared only the front page of a national newspaper, rather than on a variety of websites?

It is undoubtedly true that search capabilities make it harder for embarrassing or unflattering information to get lost or forgotten once on the internet, but information distributed by the analog media was plenty sticky, too. The literature is replete with old media examples of people whose carefully recrafted images were rudely upset by the reappearance after many years of unsavory or embarrassing past events.⁴¹ The fact that an old picture of the subject swilling beer at a college party is more likely to emerge on the internet is something we should worry about, but not something that demands the tilt toward free speech be abandoned.

And this brings us back to the kind of increasingly frank and uninhibited disclosures exemplified by the case of the Duke sexual-performance thesis. Even the pre-digital legal regime was willing to concede that publicity given to information about a person's sex experiences, nudity, serious illness and sensitive family relationships raised

⁴¹ See, e.g., *Gates v. Discovery Communications, Inc.*, 101 P. 3d 552 (Cal. 2004) (account of 12-year-old crime does not invade plaintiff's privacy).

a sort of “red flag.”⁴² These were recognized as “shock-the-conscience” types of revelations that deserved careful consideration even within a very limited sphere of protection for privacy. In fact, cases involving publication of this kind of material were fairly rare, in part because the mainstream press did not consider this material suitable for its audience, and in part because individuals themselves did not readily disclose it.

It might seem at first glance then, that, at a minimum, the balance between free speech and privacy should tip toward privacy where the information being disseminated is exactly at the core of what the common law courts conceded was truly private.⁴³ The author of the thesis did not expressly intend to expose this information to the general public; the young men who were the subjects of the thesis had no opportunity to short-circuit even a limited distribution of the content; and the information contained in it is intensely intimate. When this kind of material makes its way around the internet, is it a situation, at the very least, where tort law should make damages and the right to get the material taken down available? I believe these remedies, even here, exceed the powers of the legal system because the information is actually newsworthy.

What is and is not acceptable as a subject of public discussion is inevitably a moving target. In Warren and Brandeis’s day (and among members of their social class), any discussion of personal matters – however benign – outside the immediate circle of one’s peers and acquaintances was deeply embarrassing. A few decades later, a generation emerged that thought it quite permissible to discuss sexual liberation, the birth control pill, premarital sex, and abortion and to use the experiences of identifiable people

⁴² Rodney A. Smolla, *SMOLLA & NIMMER ON FREEDOM OF SPEECH*, Privacy and the First Amendment – Publication of Private Facts § 24.5 (2010).

⁴³ College students are adults for most purposes; a serious question exists whether or not the law could be more protective of younger children without running afoul of first amendment constraints, but a full discussion of this issue would require extensive separate treatment to do it justice.

to support their positions. On the other hand, they were generally chary of sharing nude pictures of themselves or exploring the details of a partner's sexual adequacy in writing, even with close friends. Now, more decades have passed, and new baselines are in play. The law of privacy must adapt to those baselines if freedom to discuss public issues is to remain protected.

I strongly suspect that the reason so much deeply revealing information is so widely available has comparatively little to do with the ease of posting and disseminating it in digital form. Although immaturity and poor judgment play their part, the willingness to go at least semi-public with the kinds of revelations that would have sent my grandmother to an early grave seems, for better or worse, to be part and parcel of a genuine culture shift that has taken place across both digital and analog media.

People began by confessing their deepest secrets to Oprah⁴⁴ on television long before Facebook and Twitter.⁴⁵ By now many are willing to discuss things about their lives on talk shows that could not have been openly mentioned thirty years ago in polite society. Reality television shows, like the popular *Jersey Shore*, have brought into the open many of the kinds of behaviors that the drafters of the Restatement of Torts might well have thought occupied the core concerns of privacy. It is surprising numbers to someone of my more reticent generation that people seem so anxious to confess to their extramarital flings or to admit that they have frequently fantasized about dropping their newborns out a window. The internet provides another venue for these kinds of

⁴⁴ Winfrey is credited with jump-starting the popularity of confessional television. See Deborah Tannen, *Oprah Winfrey*, Time Magazine (June 8, 1998), available at <http://205.188.238.181/time/time100/artists/profile/winfrey.html>.

⁴⁵ The star's talk show began in the mid 1980s and became nationally syndicated in 1986, well before the internet became part of daily life. See <http://www.oprah.com/pressroom/Oprah-Winfreys-Official-Biography>.

revelations, but it didn't "invent" the genre. It is complicated, therefore, to maintain that this sort of information deserves special protection, and even harder to argue that it is not, in a significant sense, newsworthy.

Think back on the example of the Duke student and her thesis. What could the public interest (as opposed to the prurient interest) be in such fare? Well, for one thing, Duke has definitely been in the spotlight in recent years in connection with the sexual and sexist mores of its student athletes, a matter on which the thesis certainly bears.⁴⁶ That fact alone makes it inevitable that the thesis would trigger some interesting conversations on campus and beyond. But the social implications are broader: just a couple of months later, the thesis (and some related examples of revealing portraits of campus life) prompted a thoughtful essay in *The Atlantic*, a very mainstream, politically savvy venue. The author of the *Atlantic* article found that the thesis provided a window onto a series of concerns ranging from the troubling dynamics of sexual relationships among young people, to the ubiquity of binge drinking on campuses, to the failure of universities to come to terms with the implications of both, in particular for their women students.⁴⁷ Clearly the thesis is also material that can contribute to discussions about the lionization of young athletes and the special treatment they receive on many campuses.

One could also imagine this kind of disclosure informing heated intergenerational debates about the evolution of sexual mores generally, the role of parenting, the values transmitted by educational institutions and the sustainability of a whole set of social taboos that informed the behavior (real and putative) of earlier generations. That these subjects are on the table and are of deep public concern can be seen in the amount of

⁴⁶ Caitlin Flanagan, *The Hazards of Duke*, 307 *The Atlantic* 87, 95 (2011).

⁴⁷ See generally *id.*

MTV has received over its decision to air the show, *Skins*. The series features what was characterized by the New York Times as “the sexual and drug-fueled exploits of misfit teenagers.”⁴⁸ Derived from a popular, and apparently not very controversial, program on British television, *Skins* in the United States is, on the one hand, accused of crossing the boundaries of child pornography law and promoting antisocial behavior in teens, and on the other, admired for being bold enough to depict the life that many modern teens actually live.

Whether the consequences of such shocking frankness in entertainment and real life is debasing or instead promotes a desirable loosening of what many see as American sexual prudery, it can scarcely be described as not of public concern. Informed debate over morals and politics alike are sharper and more insightful when real examples and actual experience can be used to test theories and principles. Providing the raw material for public discussion may well exact a steep price from individual donor, but the choices we have made about how to prioritize rights in this country make it hard to protect subjects and open and free exchanges of ideas at the same time. Try to imagine, for example, how a court would go about justifying an award of damages or the issuance of an injunction against The Atlantic for invasion of privacy based on the Duke article.

Clearly, there are possible alternatives. One fallback with real possibilities for an *in terrorum* effect might be to construct a theory of liability, similar to breach of confidentiality, for use against those, like the friends who put the Duke student’s thesis

⁴⁸ Brian Stelter, *A Racy Show with Teenagers Steps Back from A Boundary*, NYTimes, Jan. 20, 2011, at A1, col. 1.

into circulation. This idea has in fact been broached by some scholars,⁴⁹ and it would seem likely to increase the care with which personal information is shared. However, the legalizing the terms of social interactions has its own considerable drawbacks,⁵⁰ and is too complicated a subject to pursue here. But my personal conclusion remains the same: even the increasing intimacy of disclosures and the risk associated with them are not enough to justify remaking the legal structure of the privacy tort. Rather, the same core values that historically account for the legal system's reluctance to use the private facts tort to intervene in public disseminations of information remain pretty much untouched, even as the technologies of communication have so radically evolved

C. Is There No Where to Hide? What Law Can Do

1. *Intrusion.* There are, having said this, roles that law has and can continue to play without trenching on deep-seated interests in free speech, although they are, to be sure, quite limited. One such role is to police how information is obtained in the first place. The intrusion tort reflects a broadly shared consensus that information cannot be obtained by private spying; it proscribes a wide range of intrusive methods of gathering information does not run afoul of the rights protected by the first amendment.⁵¹

Although it is common in government surveillance cases to use the term “reasonable expectation of privacy” in a reductive sense, equating what we can expect

⁴⁹ The suggestion that breach of confidentiality be available to deal with disclosures by social acquaintances is explored in Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L. J. 123 (2007).

⁵⁰ See Sonja R. West, *The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Informational Privacy*, 67 Wash. & Lee L. Rev. 589, 620-25 (2010) (criticizing the idea that breach of confidentiality is appropriate as a solution to disclosures by friends and acquaintances).

⁵¹ Not surprisingly, questions about what are legitimate and illegitimate newsgathering techniques exist at the margins and how they are resolved can have substantial impact on the ability to uncover and disseminate publicly significant information, see generally Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. Rich. L. Rev. 1185 (2000).

with what we know is out there, this approach has less purchase in the tort law.⁵²

Because we know that monitoring devices are becoming more commonly available and more sophisticated does not mean we are expected to be spied on with them.

An example of the sort privacy invasion intrusion can address occurred in the fall of 2010 on the Rutgers University campus in New Jersey. A student left the webcam in his computer turned on and used it to film his unwary roommate during a romantic encounter, reportedly with another man. The perpetrator and a classmate then issued an online invitation to people all around campus to log on and watch the live video feed with them.⁵³ Although the students responsible for the intrusion were subsequently charged with criminal invasion of privacy, their actions were precisely those toward which the intrusion branch of the privacy tort is also targeted. Surreptitious filming in a private place, hacking into someone's e-mail account or breaking into a secure site to obtain personal data are reachable by tort law, even though, once the information has escaped those who have access to it will probably not be liable for the uses to which they choose to put it.⁵⁴

2. *Preventing injury to targets of disclosure.* A second area where the legal system can sometimes intervene is where it can be demonstrated that the dissemination of a particular kind of personal information poses a foreseeable and imminent risk of

⁵² See, e.g., *Sanders v. American Broadcasting Cos., Inc.*, 85 Cal.Rptr.2d 909, 915-16 (Cal. Sup. 1999) (“the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law”).

⁵³ Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, NY Times, Sept. 29, 2010, available at http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=1&_r=1; Melanie Muller, *Rutgers' Student's Death Sparks Shock, Outrage*, Daily Collegian.com (October 12, 2010), available at <http://dailycollegian.com/2010/10/12/rutgers%E2%80%99-student%E2%80%99s-death-sparks-shock-outrage/>.

⁵⁴ The law is clear that individuals are normally free to use or further disseminate information they receive from a wrongdoer as long as the recipients played no role in the illicit acquisition of the material. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (press free to publish material obtained from source who illegally intercepted cell phone calls).

palpable harm to an individual. The situations have typically not been seen so much as invasions of privacy but rather as forms of harassment or seriously threatening conduct, and they have been dealt with on a fact-sensitive, rather than a categorical, basis. Again the object was to strike a balance between safety and the competing constitutional interests in access to information and freedom of speech. The fact, for example, that the publication of information like names and addresses could aid a stalker has never been, and is unlikely ever to be in the future, a basis for giving people the right to prevent the dissemination of this information. On the other hand, if the name, home address and photograph of an abortion provider is publicized to a target audience of abortion opponents in a way that seems intended to incite violence against the subject, a court may punish or even enjoin the speech, not because it has invaded the provider's privacy but because it is a threat to his safety and that of his family and friends.⁵⁵ The normal response, however, when speech contributes, but only indirectly, to harm is to punish the wrongful act rather than to shut down the speech.⁵⁶

This approach is no cure-all. It did not support a broad preemptive strike to avoid the potential for harms that publicity to personal information can cause in the analog world, and it cannot be deployed more broadly now. Thus, although one can safely predict that in some cases, disclosure of particularly intimate information can lead to bad endings – the Rutgers student who was filmed in his dormitory room subsequently

⁵⁵ *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), cert. denied sub nom. *American Coalition of Life Activists v. Planned Parenthood of Columbia/Willamette, Inc.*, 539 U.S. 958 (2003) (finding information on website to constitute a true threat to the safety of personnel in abortion clinics). See also, *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), cert. denied, 506 U.S. 1071 (1993) (court finds that accepting advertisement for “gun for hire” creates foreseeable risk of harm so that magazine liable when murder results).

⁵⁶ Courts do, however, occasionally target particular bits of information that they deem especially risky. See, e.g., *City of Kirkland v. Sheehan*, 29 Med. L. Rptr. 2367 (Wash. Super. Ct. 2001) (finding social security numbers to be generally protectable based on risk of harm from publication).

committed suicide by jumping from the George Washington Bridge⁵⁷ – the dissemination of information cannot be barred simply because it has a tendency to cause harm.

Elimination of this kind of bad tendency test has been the centerpiece of modern first amendment jurisprudence⁵⁸

3. *Other routes.* The fact that the tort of law of privacy can, by necessity, provide only tangentially effective assistance in controlling the spread of potentially embarrassing or harmful personal information does not mean that no other avenues are open to reduce the risks. Because, as a number of commentators have observed, “public” information becomes much more “public” once it is electronically searchable, one approach is to monitor more closely what public actors put into the public domain. Although there is much to applaud in the trend toward putting public records on the internet, the kinds of information that has historically been in them may well increase some risks, such as that of identity theft. Awareness of this fact has begun to generate useful discussion about redacting certain kinds of information before it is uploaded, or better yet being more careful about what is collected in the first place. Court files, for example, often contain things like social security numbers, bank account numbers, birth dates and other material that may not have been needed to handle an actual case, but have been included as a matter of habit. And even where it is necessary, much of this sort of detail could probably be shielded without violating the requirement of a public trial or the goal of transparency in government proceedings.

Major players on the internet make structural design choices that affect how information is monitored and shared. Critics from all sectors – government, academia

⁵⁷ See Melanie Muller, *supra* note 53.

⁵⁸ The evolution of first amendment jurisprudence away from the bad tendency test is outlined in David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. Chi. L. Rev. 1205 (1983).

and watchdog groups alike – have argued for the need to make privacy options clearer to internet users and easier to use.⁵⁹ Recently, attention has turned to the possibility of regulatory intervention to push social networking sites and others to do a better job of allowing their users to make meaningful choices about what is communicated and to whom. Facebook, for example, which has a history of tinkering with its privacy policies to the detriment of its users,⁶⁰ has been the subject of a complaint to the Federal Trade Commission for making it difficult for people to understand and select their desired level of privacy protection, and for misleading them about the extent to which their personal information will be available beyond what the user assumes to be his selected social contacts.⁶¹ Better, clearer and easier to navigate privacy options will not insure that recipients do not leak personal data out into cyberspace. But addressing the architecture

⁵⁹ The Federal Trade Commission recently issued a preliminary report recommending that consumers be given a “do not track” option so that they can avoid having their usage tracked by third party aggregators or by search engines. FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Business and Policy Makers* (2010) <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>. This is an example of an approach to redesign of the architecture of the internet or individual sites of the sort that could enable users to make sounder choices about the scope of dissemination they desire for their information without the need to remake the tort system or reduce free speech protections.

⁶⁰ The messy history of Facebook and user privacy is outlined in detail in James Grimmelman, *Saving Facebook*, 94 Iowa L. Rev. 1137 (2009). The founder of Facebook, Mark Zuckerberg, has called the site’s privacy policy “a third-rail issue.” Jose Antonio Vargas, *The Face of Facebook: Mark Zuckerberg Opens Up*, *The New Yorker*, September 20, 2010, p. 54, available at http://www.newyorker.com/reporting/2010/09/20/100920fa_fact_vargas.

⁶¹ According to the Electronic Privacy Information Center, the organization that brought the complaint, “Facebook’s privacy policy doesn’t actually protect users; it misleads them into believing that their information is safe, while the site actually discloses information to third-party application developers and the public. Facebook’s revised privacy policy mandates the sharing of large amounts of personal information, whether or not users want to share that information.” EPIC, *Frequently Asked Questions Regarding EPIC’s Facebook Complaint*, available at <http://epic.org/privacy/socialnet/faq.html>. Although Facebook altered its policies in 2010 to deal with the criticisms, many observers remain convinced that the response is insufficient. See, e.g., Katie Kindelan, *Mark Zuckerberg Says Facebook’s Privacy Policy Is a Third-Rail Issue: Do You Agree?* *Social Times* (Sept. 14, 2010) <http://www.socialtimes.com/2010/09/mark-zuckerberg-says-facebooks-privacy-policy-a-%E2%80%98third-rail-issue%E2%80%99-do-you-agree/>.

of privacy on internet sites could greatly improvement the control users have over their information without simultaneously trenching on protections for free speech.

But in the end, it must be conceded that problems of poor judgment about what to say and how broadly to share it are not easily addressed by the law. Information is inherently leaky, and our societal commitment to open debate reflects faith that, on balance, we benefit more from that leakiness than we suffer from it. Thus if people want to protect their personal information from becoming the fodder of public discussion, the only real answer may be that port of last resort, reliance on social norms -- norms that, in the words of Helen Nissenbaum, will respect “people’s expectations in relation to the flows of information in society.”⁶² Satisfactory norms would be ones that acknowledge the personal costs attached to insensitive disclosures, and that foster a commitment to honor the values of trust and friendship. Although falling back on the norms response may seem like cold comfort to someone who realizes that her humiliating photograph is out there for everyone to see, it is not necessarily so toothless. Ethical standards and concepts of personal responsibility actually do mediate many of the most sensitive aspects of human relationships and there is no reason to suppose that, as experience with the new technologies – its pitfalls and its potential -- grows, so too will standards of behavior evolve that will not prevent all deviations, but will effectively inform and constrain most people’s behavior. Or perhaps the norms will develop in a different direction, and we will conclude that, even if our fifteen seconds of fame does not always present us at our best, living with that fact is an acceptable tradeoff for the convenience and ease of open communication. I cannot predict which will be the more likely outcome. But I am sure about is that it would be a mistake to try to resolve our dispute

⁶² NISSENBAUM, *supra* note 26, at 231-32.

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about unwanted publicity by giving a radical makeover to the necessarily constricted and usually unhelpful private facts tort. It got that way for a good reason and we need to leave it alone.