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# Privacy as Trust: Sharing Personal Information in a Networked World

Ari Ezra Waldman

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## ARTICLES

### Privacy as Trust: Sharing Personal Information in a Networked World

ARI EZRA WALDMAN\*

*This Article is the first of a series discussing the legal and sociological aspects of information privacy, arguing that private contexts are defined by relationships of trust among individuals. The argument reorients privacy scholarship from an individual right to social relationships of disclosure. This has implications for a wide variety of vexing problems of modern privacy law, from limited disclosures to “revenge porn.”*

*The common everyday understanding is that privacy is about choice, autonomy, and individual freedom. It encompasses the individual’s right to determine what he will keep hidden and what, how, and when he will disclose to the public. Privacy is his respite from the prying, conformist eyes of the rest of the world and his expectation that the things about himself that he wants to keep private will remain so. These ways of understanding privacy are variations on the same*

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*theme: that privacy is a tool of the individual “against the world.” None of them adequately protect personal privacy where sharing personal information with others is a precondition of modern life.*

*This Article argues that in this information disclosure context, privacy is really about trust. Rather than accept the traditional division between public and private, and rather than begin and end the discussion of privacy as an individual right, this Article bridges social science and the law to argue that disclosures in contexts of trust are private. Trusting relationships are determined by the presence of experience, strong overlapping networks, identity sharing, and other indicia derived from the totality of the circumstances. This conceptualization of privacy, and its related ways of defining when invasions of privacy occur, more effectively protects privacy in a modern digital world. The Article argues that law of privacy, therefore, should be used to protect relationships of trust, rather than to protect a collection of individual rights. To this end, this Article proposes a robust tort for breach of confidentiality as one tool to protect privacy in a networked world and illustrates the functionality of this tort through a case study of privacy in previously disclosed information.*

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## I. INTRODUCTION

Most individuals think of the private world as a place distinct or separate from other people. Private spheres presume the existence of public spheres, but only as things from which to detach. I disagree. What follows is a reorientation of the way we think about privacy in the information-sharing context around sociological principles of interpersonal

trust rather than rights-based doctrines of autonomy and choice. The argument is simple: privacy is not exclusively bound up with concepts of choice, autonomy, or seclusion; rather, privacy is a social fact—a constant in our lives—that is based on relationships of trust among individuals and between individuals and institutions. In short, we share when we trust; we retain privacy rights and interests in contexts of trust. Or, put another way, what makes expectations of privacy reasonable are expectations of trust.

Privacy scholarship is no stranger to social theory, but the relationship is still underdeveloped. Both lawyers and sociologists appear to have taken on the traditional assumption that the private world is distinct from the public world. In one of his major works, Erving Goffman lamented the “process of personal identification,” or how easy it is to amass personal information about any given individual and make public his social identity.<sup>1</sup> He saw individuals as nodes at the center of several social networks that knew different things about those individuals, thus recognizing that some personal information can be withheld, or kept private, from the general public at the individual’s discretion.<sup>2</sup> And Goffman is not alone. The sociologist Georg Simmel began his seminal article, *The Sociology of Secrets and of Secret Societies*, by stating that “[a]ll relationships of people to each other rest . . . upon the precondition that they know something about each other,”<sup>3</sup> but recognizing that we rarely, if ever, know everything about another person.<sup>4</sup> Our perceptions of others, based on what we know, what we think we know, and both true and misleading facets of personality, are true *for us*,<sup>5</sup> even if they are manipulated by a delicate balance between secrets and disclosures: “Our fellow man,” Simmel wrote, “either may voluntarily reveal to us the truth about himself, or by dissimulation he may deceive us as to the truth.”<sup>6</sup> He may, in other words, choose to keep certain things private and choose to make certain things public.

Public opinion polls suggest that when most people think of privacy and private things, they think of protection, being hidden, or sepa-

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1. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 57 (1963) [hereinafter *STIGMA*].

2. *Id.* at 72. See generally ERVING GOFFMAN, *BEHAVIOR IN PUBLIC PLACES: NOTES ON THE SOCIAL ORGANIZATION OF GATHERINGS* (1963) [hereinafter *BEHAVIOR IN PUBLIC PLACES*] (discussing behavior in public places, specifically the aspect of public order pertaining to the conduct of individuals by virtue of their presence among others).

3. Georg Simmel, *The Sociology of Secrecy and of Secret Societies*, 11 *AM. J. SOC.* 441, 441 (1906).

4. *Id.* at 442.

5. *Id.* at 443.

6. *Id.* at 444–45.

ration.<sup>7</sup> The popular view is that private things are walled off from others or limited to the very few. Some consider certain things and places, like a diary or a bathroom, private because of the very fact that they are not open for public consumption and separated from the public's access. Privacy has come to be defined by walls or property lines,<sup>8</sup> or the “loss of shared experience,” according to the social psychologists Robert Lauffer and Maxine Wolfe.<sup>9</sup>

The traditional view of privacy is similar, focusing less on spaces than on what it means to define a place or a thing as private. For many, privacy is about choice, autonomy, and individual freedom. It encompasses the individual's right to determine what he will keep hidden and what, how, and when he will disclose to the public. Privacy is his respite from the prying, conformist eyes of the rest of the world and his expectation that the things about himself that he wants to keep private will remain so. I will call this, generally, the “rights conceptions of privacy” to evoke the centrality of the individual, his inviolability, and the Lockean and Kantian origins of this idea.<sup>10</sup>

Under this umbrella are two seemingly distinct strands. The first, which I will call *negative*, sees the private sphere as a place of freedom *from* something. It includes notions of privacy based on seclusion, separation, and private spaces, as well as conceptions based on the sanctity of private things, like discrediting secrets or intimate information.<sup>11</sup> Common to these ways of thinking about privacy is an element of separation, suggesting that they provide freedom from the public eye. The second rights conception of privacy is *positive*. This view retains the assumption of separation, but uses it for a different purpose—namely, for the opportunity to grow, develop, and realize our full potential as free persons. It conceives of privacy as affirmatively *for* something, as

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7. See, e.g., SUSANNAH FOX, TRUST AND PRIVACY ONLINE: WHY AMERICANS WANT TO REWRITE THE RULES, PEW RES. INTERNET PROJECT 2, 4 (2000), available at [http://www.pewinternet.org/files/old-media/Files/Reports/2000/PIP\\_Trust\\_Privacy\\_Report.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2000/PIP_Trust_Privacy_Report.pdf) (explaining that Americans show “great concern” about their privacy, including 84% of respondents stating that they worry about “businesses or people they don’t know getting personal information about themselves or their families”).

8. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–27 (2004) (reviewing Fourth Amendment jurisprudence and concluding that “both before and after *Katz* [v. *United States*, 389 U.S. 347 (1967),] Fourth Amendment protections have mostly matched the contours of real property law”).

9. Robert S. Lauffer & Maxine Wolfe, *Privacy as a Concept and a Social Issue: A Multidimensional Developmental Theory*, 33 J. SOC. ISSUES 22, 23 (1977) (emphasis added).

10. Julie Cohen has also connected conventional privacy theories to liberal political philosophy. See JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 16–20, 107–26 (2012).

11. See *infra* Part II.A.

necessary for full realization of the liberal, autonomous self.<sup>12</sup>

But distinguishing between the public and private assumes, without evidence, the normative implications of the distinction: that privacy is always going to be something different, separate, or apart from the public.<sup>13</sup> Nor is a public-private distinction either a theory of privacy or particularly helpful in applying a theory to answer questions of law and policy.

The rights conceptions of privacy, as Dan Solove argued in his article, *Conceptualizing Privacy*, suffer from several flaws.<sup>14</sup> Professor Solove argues that they are at times too broad—potentially limitless and unworkable—or too narrow—failing to account for many things we would naturally consider private.<sup>15</sup> I share some of these criticisms. I also argue that the rights conceptions of privacy are too simple. Economists like Alessandro Acquisti,<sup>16</sup> legal scholars like Lior Strahilevitz,<sup>17</sup> culture and media scholars like Helen Nissenbaum,<sup>18</sup> and surveys conducted by the Pew Internet and American Life Project<sup>19</sup> reveal that sharing and online social life are far more nuanced. Together, their work suggests that free choice is not the shibboleth of privacy in the information-sharing context. There is more to it. I argue that the missing piece is trust.

Trust is a “social fact” of cooperative behavior.<sup>20</sup> It is a sociological

12. See *infra* Part II.B.

13. We need look no further than Catherine MacKinnon’s argument that privacy law has created an unregulated “other” sphere that endangers women for proof that the traditional public-private distinction carries normative burdens. See CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 35–36, 168–69, 192–94 (1989).

14. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1088–126 (2002).

15. See *id.* at 1092.

16. See, e.g., Alessandro Acquisti & Jens Grossklags, *Privacy and Rationality in Individual Decision Making*, 3 IEEE SECURITY & PRIVACY 26 (2005) (investigating the drivers and apparent inconsistencies of privacy decisionmaking and behavior).

17. See generally Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005) (arguing that insights from literature on social networks and information dissemination can help provide courts with a “coherent and consistent methodology for determining whether an individual has a reasonable expectation of privacy in a particular fact that he has shared with one or more people”).

18. See HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 3 (2010) [hereinafter NISSENBAUM, PRIVACY IN CONTEXT] (a book about privacy that explains how “the huge and growing set of technical systems and technology-based practices have provoked . . . anxiety, protest, and resistance in the name of privacy”); Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004) [hereinafter Nissenbaum, *Privacy as Contextual Integrity*] (arguing that contextual integrity is the appropriate benchmark of privacy).

19. *About the Project*, PEW INTERNET RES. PROJECT, <http://www.pewinternet.org/about/> (last visited Nov. 23, 2014) (exploring the impact of the Internet on families, communities, work and home, daily life, education, health care, and civic and political life).

20. EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 50–51 (Steven Lukes ed., W.D.

institution that is manifested by reciprocal exchanges and assumptions about one's interactional partner.<sup>21</sup> In this Article, I employ a generally accepted definition of interpersonal trust from the sociological literature: trust is an expectation regarding the future actions and intentions of particular people or groups of people.<sup>22</sup> It is, to use a phrase from the sociologists J. David Lewis and Andrew Weigert, a "functional necessity for society"<sup>23</sup> because, among other things, it greases the wheels of effective sharing: you interact when you trust. In this Article, I argue that spheres of privacy mirror spheres of trust: when we trust, we share; when we do not trust, we do not share. We know this because our sense of when our privacy is invaded is similar to the sense of our trust being breached. Empirical research lends strong credibility to this hypothesis. When sharing occurs in contexts of trust, the law of privacy—whether through tort, constitutional, or statutory law—should protect that incident of sharing against subsequent misuse or wider disclosure.

Privacy-as-trust has several advantages over its competitors. It is both pragmatic—it is based on how we actually perceive, understand, and manipulate privacy in everyday life—and clear—it simplifies a complex and amorphous concept and offers an explanation common to privacy interests in all contexts. Where information disclosure occurs in a context of reasonable trust, privacy law should protect that information as against a subsequent, wider disclosure outside the bounds of trust, whether to a wide audience or a snooping government agency. The theory reflects real behavior, rather than visceral whims of a public responding to biased survey questions. Importantly, trust is also an overwhelmingly positive force in society and, therefore, is a norm to be protected and fostered by law.

This project has a simple, but ambitious goal: to solve ongoing privacy law and policy problems by focusing information privacy law on protecting relationships of trust. To be clear, this Article's analysis is restricted to privacy in the information-sharing context, which, although exceptionally important given the terabytes of personal data we share with third parties,<sup>24</sup> only captures one corner of the world of privacy law. In Part II, I review the current legal, sociological, and philosophical

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Halls trans., 1st Am. Ed., The Free Press 1982) (1895), available at <http://comparsociology.com/wp-content/uploads/2013/02/Emile-Durkheim-Rules-of-Sociological-Method-1982.pdf>.

21. See J. David Lewis & Andrew J. Weigert, *Social Atomism, Holism, and Trust*, 26 Soc. Q. 455, 456 (1985).

22. See generally, e.g., RANDY BORUM, *THE SCIENCE OF INTERPERSONAL TRUST* (2010), available at [http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1573&contextlp\\_facpub](http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1573&contextlp_facpub).

23. *Id.*

24. See, e.g., DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2004) [hereinafter *DIGITAL PERSON*]; FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015).

understandings of privacy, arguing that where some embody a negative rights idea of freedom from intrusion and where others reflect the positive rights ideas of autonomy and choice, most assume a public-private distinction and rest on the primacy of the detached individual over his social self. In this way, these conceptions reflect the Lockean and Kantian origins of liberal political theory. Relying in part on the work of Dan Solove and other privacy scholars, I critique these conceptions of privacy as too rigid and inadequate to protect modern sharing. I also use recent sociological and economic studies to prove that they conflict with observable behavior. I conclude this section by addressing Professor Solove's powerful critique of the literature, arguing that his approach is too indeterminate to rescue privacy from its weak analytical state.

Part III takes up the challenge of looking at privacy from a practical, sociological perspective. I argue for privacy-as-trust by first teasing out social elements that have gone unnoticed, ignored, or misinterpreted in the privacy literature. I depart from the conventional understanding of privacy and argue that privacy-as-trust is a social behavior that makes interaction and sharing possible. After laying out the argument in detail, I discuss theoretical benefits of this conception of privacy.

Finally, I use Part IV to begin considering some of the legal implications of privacy-as-trust. I first show how privacy-as-trust leads directly to a robust tort for breach of confidentiality as developed by modern jurisprudence in Great Britain. In part, this analysis stands on the shoulders of the historical analysis of the tort by Neil Richards and Dan Solove, but moves beyond their work by learning the lessons of privacy-as-trust. I then apply the tort to privacy interests in information previously disclosed to a small group. This example is merely a case study; a comprehensive analysis of every privacy problem and every privacy rule, decision, and statute is beyond the scope of this paper. Privacy-as-trust and its robust tort of confidentiality, however, provide a workable solution to problems of modern information sharing. I then conclude with a pathway for future research.

## II. THE CONVENTIONAL WISDOM: RIGHTS-BASED THEORIES OF PRIVACY

The idea of privacy seems universal,<sup>25</sup> but the definition is elusive.<sup>26</sup> As Dan Solove has argued, the widespread agreement about the need for privacy exists in a world where the word "privacy" seems to

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25. See Barrington Moore, Jr., *Privacy*, 35 Soc'y 287, 292 (1998) ("[I]t seems safe to posit at least a desire for privacy as a panhuman trait.").

26. See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 479-82 (2006).



mean different things to different people.<sup>27</sup> I argue that the disagreement is only skin deep. Outside of the ancient concept of privacy as, literally, privation,<sup>28</sup> there is actually widespread agreement about the classical rights-based assumptions underpinning the ways we understand privacy. Consider the philosopher Howard B. White's list of what privacy means:

A 'right to be let alone,' as Warren and Brandeis called it, means more than to have one's papers secure from official scrutiny or one's photographs reserved for one's friends. It means a right to choose a way of life in which sequestration is possible, and it means that that choice is in some way acceptable to liberal society, a good choice. It means the association of what may be distinct things: the private sphere as against publicity, the private life as against the public life, and a private task as against a public task.<sup>29</sup>

All of these ideas—the right to be let alone,<sup>30</sup> secrecy and confidentiality, autonomy, and the separation of the personal and the public—are rights-based: they reflect the Lockean and Kantian ideal of the primacy of the individual over society.

Despite the differences between Lockean and Kantian theory,<sup>31</sup> they are united by the respect they offer the individual and individual rights. And given the pervasiveness of both philosophies in the Ameri-

27. See Solove, *supra* note 14, at 1088–90.

28. See HANNAH ARENDT, *THE HUMAN CONDITION* 58 (1958).

29. Howard B. White, *The Right to Privacy*, 18 SOC. RES. 171, 172 (1951).

30. This phrase refers to the formulation of the right to privacy in a seminal article written by the Boston attorney Samuel Warren and future Supreme Court Justice Louis Brandeis. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). Most privacy scholars and legal historians credit this article as the beginning of legal privacy studies.

31. Lockean and Kantian liberalism offer strong theoretical bases for structuring society around the individual, and both are reflected in the conventional views on privacy. For Locke's discussion of individual freedom, see JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 4, 123, 243 (C. B. Macpherson ed., Hackett Publ'g Co. 1980); see also, e.g., ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 15, 47 (1990); LOCKE'S MORAL, POLITICAL AND LEGAL PHILOSOPHY (J.R. Milton ed., 1999) (a collection of essays discussing Locke's political philosophy); JAMES TULLY, *AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS* (1993) (interpreting Locke's political philosophy). The goal of a Lockean society, Rogers Smith argues, is a liberal goal—namely, the “achieve[ment of] what are still individual goods, be they individual preservation or a more expanded set of individual rights.” SMITH, *supra* at 47. For insightful summaries, analyses, and critiques of Kant's inviolable respect for the individual, see IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 154–57 (Lara Denis ed., Thomas K. Abbott trans., 2005); see also Christine Korsgaard, Professor of Law, Fellow Creatures: Kantian Ethics and Our Duties to Animals, Tanner Lecture on Human Values 5, 12 (Feb. 6, 2004), available at [http://tannerlectures.utah.edu/\\_documents/a-to-z/k/korsgaard\\_2005.pdf](http://tannerlectures.utah.edu/_documents/a-to-z/k/korsgaard_2005.pdf); see generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 1 (1982) (discussing “a liberalism in which the notions of justice, fairness, and individual rights play a central role, and which is indebted to Kant for much of its philosophical foundation”). I have argued elsewhere that Kantian liberalism is at the heart of our Internet free speech jurisprudence. See Ari Ezra Waldman, *Durkheim's Internet: Social and Political Theory in Online Society*, 7 N.Y.U. J. L. & LIBERTY 355, 371 (2013).

can legal tradition,<sup>32</sup> it is no surprise that the conventional theories of privacy also reflect these ideals. Much privacy theory is focused on individual freedom and not only sees the individual as the locus of privacy rights, but also sees the protection of individual freedom as the ultimate goal of privacy. This section argues that this rights-based foundation underlies all of the conventional theories of privacy. These theories can be divided into two categories. Some theories of privacy concern negative rights, or freedom *from* something, whether it is freedom from others, from conformity, or from publicity, for example. Other theories concern positive rights, or the freedom *for* something, including full autonomy, the formation of ideas, or the development of a rich conception of personhood. In all cases, these theories reflect quite a bit of agreement. But, as I will argue later, this general agreement gets us no closer to a coherent, workable understanding of privacy that reflects behavior in everyday life and can be used by judges and policymakers to answer information-sharing problems of privacy law.

#### A. *Privacy as Freedom From*

A central pillar of liberal theory is negative freedom, the freedom from intrusion, encroachment, or violation from the state or other people. I argue that several conventional ways of thinking about privacy reflect the notion that privacy offers freedom from others. For example, many scholars think about privacy as offering a retreat, respite, or separation from the world. They sometimes buttress those theories with spatial analogies, suggesting that there is something special about private versus public spaces. Though this idea has deeply penetrated the privacy literature, it actually limits privacy rights, fails to adequately account for modern technological developments affecting privacy, and reflects a cursory understanding of the literature. In place of a simple theory of separation, some scholars shift from a focus on the act of sequestration to the underlying thing being sequestered, understanding privacy as something inherent in the concepts of secrets and intimacy. However, this subjective idea is too often bound up with a normative moral judgment that secrets are discrediting or, to use the sociologist's term, devi-

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32. On Locke, see generally Waldman, *supra* note 31 (discussing the impact of liberal theory, in general). See also JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 28–29 (3d ed. 2008); Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 155 (2002) (“A mere listing of the primary and secondary sources—from the Founding Fathers to today—that explicitly refer to Locke or implicitly invoke his ideas would rival the Encyclopaedia Britannica in length. His labor argument for property, in particular, has been especially influential.”). On Kant, see, for example, MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 43–119 (1996) (arguing that Kantian and neo-Kantian liberal theory permeates American constitutional law).

ant, that it fails to capture much of the privacy space. In all cases, though, these conceptions of privacy reflect rights theory's primacy of the individual because they involve the individual's power to separate from the world and decide for himself what is and what is not private.

### 1. SEPARATION, SEQUESTRATION, AND EXCLUSION

If privacy is conceived as freedom from others or the state, then it makes sense that much of the literature would focus on seclusion, separation from the public eye, and the exclusion of others from certain aspects of personal life. These conceptions align closely with Locke's theory of property and individual rights and yet do not adequately protect privacy.

Samuel Warren and Louis Brandeis began by conceiving of privacy as some form of separation when they argued that modern technology had made "solitude" and "retreat from the world" more necessary than ever.<sup>33</sup> Anita Allen explained her vision of privacy by listing examples that involved seclusion: "4,000-square-foot homes nestled among mature trees in bucolic suburbs," "vacation[ing] at remote resorts," and "spend[ing] an hour alone with a book behind closed doors."<sup>34</sup> She was suggesting that any every day and theoretical concept of privacy had to include some measure of aloneness or separation because, otherwise, the public had access to you. David O'Brien echoed this seemingly symbiotic relationship when he called privacy "the existential condition of limited access" brought on by the condition of being alone.<sup>35</sup> And Howard White similarly described privacy as a "right against the world," or a right that makes sequestration possible and keeps us free from all manner of intrusions by others.<sup>36</sup> It seems, then, that the separation idea has taken hold in the legal, political, and philosophical literatures on privacy.<sup>37</sup>

This understanding is common among social theorists, as well. Donald Ball, a sociologist, defined privacy as the "ability to engage in

33. Warren & Brandeis, *supra* note 30, at 196.

34. Anita L. Allen, *Is Privacy Now Possible? A Brief History of an Obsession*, 68 SOC. RES. 301, 301 (2001).

35. DAVID M. O'BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* 16 (1979).

36. White, *supra* note 29, at 172.

37. See SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 10–11 (1983) ("Privacy [i]s the condition of being protected from unwanted access by others—either physical access, personal information, or attention."). The public sphere was always the arena of life lived in the open, whereas the private sphere was a "secluded life, a life separated from the compelling burdens of public authority." See, e.g., Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 L. & CONTEMP. PROBS. 281, 283 (1966).

activities without being observed.”<sup>38</sup> The psychologists Robert Lauffer and Maxine Wolfe, who studied notions of privacy among youth, understood it to be the process of separation of an individual from his environment.<sup>39</sup> That separation could be physical—literally hiding away in a space—or psychological—denying warmth, whispering, showing emotional distance. But in each case, a personal zone is created. Raymond Williams, a cultural critic and historian, understood privacy to be “the ultimate generalized privilege . . . of seclusion and protection from others (the public).”<sup>40</sup> Notions of seclusion and protection necessarily take on a “me against the world” bias, privileging the individual as the locus of privacy rights.

They also have distinct spatial overtones.<sup>41</sup> Much of the social science literature conceiving of privacy as sequestration uses the rhetoric of spaces, territories, walls, and other indicators of literal separation to support theoretical arguments. For example, Joseph Rykwert, a historian of the ancient world, argued that there was a direct correspondence between ancient conceptions of privacy and the women’s rooms in the home, on the one hand, and public behavior and the men’s rooms, on the other.<sup>42</sup> The distinction in the home was literal. In his work on secret societies, Georg Simmel not only argued that “detachment” and “exclusion” were necessary for the success of a secret organization, but analogized the role of the secret to a wall of separation: “Their secret encircles them like a boundary, beyond which there is nothing but the . . . antithetic, which therefore shuts up the society within itself as a complete unity.”<sup>43</sup> And when the sociologist Robert Maxwell wanted to study sexual intimacy in pre-industrial societies, he chose to study wall construction, material permeability, and hidden spaces to determine if there was a relationship between intimacy norms in the greater society and private behavior.<sup>44</sup>

38. Donald W. Ball, *Privacy, Publicity, Deviance and Control*, 18 PAC. SOC. REV. 259, 260 (1975).

39. Lauffer & Wolfe, *supra* note 9, at 26–27.

40. RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 243 (1985).

41. Helen Nissenbaum noted that protecting private spaces has been an animating principle of much of traditional privacy law and policy. *See* Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 18, at 129–31.

42. *See* Joseph Rykwert, *Privacy in Antiquity*, 68 SOC. RES. 29, 33–34 (2001).

43. Simmel, *supra* note 3, at 484.

44. *See* Robert J. Maxwell, *Onstage and Offstage Sex: Exploring an Hypothesis*, 1 CORNELL J. SOC. REL. 75, 75–82 (1967) (arguing that stricter intimacy norms in societies were correlated with increased privacy, suggesting that individuals use self-help to find ways to hide their behaviors). Greater study is warranted here. Maxwell argued that certain behavior had to be hidden in societies that had strict rules about deviance and sex because publicity of those behaviors would weaken the norms against them. *Id.* at 75–76. However, he never considered the

For other scholars, the evidence is in the rhetoric they use to explain their views on privacy. Jeffrey Rosen talked about Hillary Clinton's decision to tolerate her husband's extramarital affair as a decision "shielded" by privacy.<sup>45</sup> Milton Konvitz, a legal theorist, argued that privacy is a "sphere of space" that the public cannot enter or control.<sup>46</sup> For yet others, privacy requires "boundaries" and a "territory" of their own that was "insulated" from the rest of the world.<sup>47</sup>

An admittedly cursory reading of the work of Erving Goffman echoes the privacy-as-sequestration idea with similar spatial analogies. Goffman defined private places as "soundproof regions where only members or invitees gather."<sup>48</sup> They are regions physically bounded by walls or doors that offer physical separation between people and between different kinds of social interaction.<sup>49</sup> Stalls are perfect examples.<sup>50</sup> Clothing, personal possessions, and spaces that you own also provide individuals with a certain amount of spatial privacy, allowing total exclusion of others.<sup>51</sup>

Goffman's backstage/front stage distinction is the best analogy for a spatial theory of privacy. In *The Presentation of Self in Everyday Life*, Goffman analyzes social interaction through an extended theatrical conceit, comparing individuals to actors on a stage.<sup>52</sup> He separates the front stage, where the performance of social interaction occurs,<sup>53</sup> and the backstage, where individuals can drop the façade of performance.<sup>54</sup> And he describes them as places, or "setting[s]."<sup>55</sup> The backstage is a place of hiding,<sup>56</sup> so that devices like telephones, closets, and bathrooms could "be used 'privately.'"<sup>57</sup> It is also cut off from the front stage by a partition, passageway, or curtain.<sup>58</sup> The backstage, then, is defined by provid-

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fact that societies with stronger norms against sexual practices may also have official and unofficial enforcement procedures for ferreting out deviant behavior.

45. See Jeffrey Rosen, *Out of Context: The Purposes of Privacy*, 68 SOC. RES. 209, 217 (2001).

46. See Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 L. & CONTEMP. PROBS. 272, 279-80 (1966); see also Solove, *supra* note 14, at 1131.

47. See Arnold Simmel, *Privacy Is Not an Isolated Freedom*, in NOMOS XIII: PRIVACY 71, 72 (J. Roland Pennock & John W. Chapman eds., 1971) (quoted in Solove, *supra* note 14, at 1131).

48. BEHAVIOR IN PUBLIC PLACES, *supra* note 2, at 9.

49. See *id.* at 151-52.

50. See ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 32-33 (1971) [hereinafter RELATIONS IN PUBLIC].

51. *Id.* at 38.

52. See ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

53. *Id.* at 107.

54. *Id.* at 112.

55. *Id.* at 107.

56. *Id.* at 113.

57. *Id.* at 112.

58. *Id.* at 113.

ing the performer with a private space—like a home, a green room, or a bathroom—to do certain necessary things away from an audience.

The legal implication of this theory is to conceive of a right to privacy as a right to exclude, which reflects the Lockean origins of the argument. Ruth Gavison defined privacy as a limited right of access by others to our private spaces.<sup>59</sup> While calling for greater social research into the area, Alan P. Bates, a sociologist, considered the minimal social science literature on privacy and defined the concept as “a person’s feeling that others should be excluded from something which is of concern to him . . . .”<sup>60</sup> That is, much like the law of trespass, a tort for unauthorized encroachments onto another’s land, a theory of privacy based on space and separation necessarily includes the attendant right to exclude others and to determine who should gain entry. And this right to exclude reflects the Lockean liberal tradition. Locke believed that we own ourselves and, therefore, own the fruits of our labor.<sup>61</sup> We can exclude others from our property,<sup>62</sup> and so can a theory of privacy based on sequestration and analogized to spaces and territories allow us to exclude others from our private sphere.

Warren and Brandeis understood this when they used Lockean ideas of personal ownership to argue that our “inviolable personality” mandated legal protection from intrusion by government and private actors.<sup>63</sup> Warren and Brandeis argued that common law intellectual property laws allowed individuals to control the publication of their cultural creations.<sup>64</sup> The laws offered protection of profits and the ability to prevent publication at all.<sup>65</sup> But the authors felt that this basic concept of personal property could not solely be based on the creative or innovative aspects of the underlying artifact.<sup>66</sup> After all, one could have a collection of coins that he would like to keep private, and it would be unjust to allow another to publish a catalogue of those coins even though the

59. See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 446–47 (1980); see also BOK, *supra* note 37, at 10; Ernest Van Den Haag, *On Privacy*, in NOMOS XIII: PRIVACY 149, 149 (J. Roland Pennock & John W. Chapman eds., 1971); Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 31 L. & CONTEMP. PROBS. 307, 307 (1966); O’BRIEN, *supra* note 35, at 16; Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35–36 (1967).

60. Alan P. Bates, *Privacy—A Useful Concept?*, 42 SOC. FORCES 429, 429 (1964).

61. See LOCKE, *supra* note 31, §§ 25–27. Locke argued that there existed in nature a “commons” to which no one person held ownership. *Id.* This included lakes, streams, animals, and anything else created naturally or by God. *Id.* But Locke also believed that “every man has property in his own person.” *Id.* § 27. Therefore, if man owns himself, whenever he “mixe[s] his labour with” something in the commons, it becomes his property. *Id.*

62. See *id.* § 123.

63. Warren & Brandeis, *supra* note 30, at 205.

64. *Id.* at 200.

65. *Id.*

66. See *id.* at 202–03.

coins could not be considered intellectual property in any sense.<sup>67</sup> Rather, the “protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, . . . is merely an instance of the enforcement of the more general right of the individual to be let alone” based on the Lockean principle that we own ourselves.<sup>68</sup> The same principle animated Jeffrey Reiman’s view that privacy “confer[s] title to [one’s] existence” and allows us to claim ownership over our thoughts and actions because the private world is entirely our own.<sup>69</sup> Similarly, Larry Lessig’s conception of privacy-as-property is based on the same notions of separation and Lockean personal ownership.<sup>70</sup>

But although they retain fidelity to individual rights, principles of separation and exclusion do more harm than good.<sup>71</sup> The attendant spatial analogy has become so pervasive in law that, at times, it has limited personal privacy. It used to be the case that violations of the Fourth Amendment, which guarantees freedom from unreasonable searches and seizures at the hands of the government, depended upon a physical invasion of a private place, like a home.<sup>72</sup> In *Olmstead v. United States*, for example, the Supreme Court rejected a Fourth Amendment challenge to a warrantless wiretap because the tap, by virtue of the fact that it was installed on the outdoor phone line and did not require entry into the suspect’s home, could not constitute a search: “There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.”<sup>73</sup> Where there was no entry, or no intrusion into the private space, there was no search.<sup>74</sup> Although *Olmstead* has been over-

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67. See *id.* at 203.

68. *Id.* at 205.

69. Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 300, 309–14 (Ferdinand David Schoeman ed., 1984).

70. See, e.g., Lawrence Lessig, *Privacy as Property*, 69 *SOC. RES.* 247 (2002) (arguing that using the rhetoric of property and ownership along with the moral rights associated with it to understand and argue for privacy would enhance privacy protections).

71. For a powerful critique of Professor Lessig’s notion of privacy as property, see *DIGITAL PERSON*, *supra* note 24. “When personal information is understood as a property right, the value of privacy often is translated into the combined monetary value of particular pieces of personal information. Privacy becomes the right to profit from one’s personal data, and the harm to privacy becomes understood as not being adequately paid for the use of this ‘property.’” *Id.* at 88–89. Professor Solove goes on at some length to discuss the difficulties with this theory. See *id.* at 89–90.

72. See *Olmstead v. United States*, 277 U.S. 438, 463–64 (1928).

73. *Id.* at 464.

74. See *id.* Justice Brandeis, of course, famously dissented, arguing that the right to be let alone that he and Samuel Warren discussed decades earlier meant that a physical invasion was not required for an act of intrusion to constitute a privacy violation. *Id.* at 478 (Brandeis, J., dissenting).

The protection guaranteed by the Amendments is much broader in scope. The

turned,<sup>75</sup> the idea of private spaces that animated *Olmstead* still threatens to limit privacy protections.<sup>76</sup> And as Katrin Byford has noted, a spatial theory of privacy will undermine privacy online, where physical spaces, as such, do not exist: “A territorial view of privacy, which associates the concept of privacy with the sanctity of certain physical spaces, has no application in a realm in which there is no space.”<sup>77</sup> This not only has the effect of erasing privacy from the virtual world, but also, as Professor Mary Anne Franks has argued, it implies that Internet life, and any injuries that occur in it, are less real and less worthy of protection or redress.<sup>78</sup>

More broadly, conceiving of privacy as detachment or separation and using a spatial analogy to make sense of it has logical limitations. It ignores the fact that people can find privacy in public places. What’s more, it tells us little more than the mere fact that there are private places and public places and, therefore, cannot describe the contours of those spaces. We are left with either no clear path to understand privacy or one so bold and absolute that we start treating invasions of privacy like trespasses onto land. Professor Lessig argues that privacy-as-property can function with limitations,<sup>79</sup> but it is not clear how locating the shibboleth of privacy in separation and exclusion could accept any of those limits with any intellectual honesty.

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makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

*Id.*

75. See *Katz v. United States*, 389 U.S. 347, 353 (1967).

76. See, e.g., *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (finding no privacy interest in garbage when placed outside a recognized private space: after all, if we “deposit[ ] . . . garbage ‘in an area particularly suited for public inspection and . . . public consumption, for the express purpose of having strangers take it,’” we cannot reasonably expect to maintain privacy in that discarded trash). See also Kerr, *supra* note 8, at 809–15 (offering a descriptive argument that property principles remain active in Fourth Amendment jurisprudence).

77. Katrin Schatz Byford, *Privacy in Cyberspace: Constructing a Model of Privacy for the Electronic Communications Environment*, 24 RUTGERS COMPUTER & TECH. L.J. 1, 40 (1998) (quoted in Solove, *supra* note 14, at 1131–32).

78. See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 226 (2011) (“[H]arms committed in cyberspace are often dismissed as ‘not really real,’ as they are by their nature not physical, bodily harms.”). Professor Franks has called this phenomenon “cyberspace idealism.” *Id.*; see also Waldman, *supra* note 31, at 359–60.

79. See Lessig, *supra* note 70, at 256–57.



## 2. INTIMACY, SECRECY, AND DEVIANCE

If a theory of privacy based on separation, exclusion, and self-ownership seems too rigid and unrealistic, some privacy scholars avoid the spatial analogy and its attendant difficulties by looking to *what* things are private, not *where* they are kept. Private things, like secrets, can go anywhere and retain their private nature. Conceiving of privacy this way also comports with the common understanding that intimate information—sexuality, medical diagnoses, personal histories—are central to what we consider private. But while these theories retain the Lockean and Kantian presumption of individual inviolability and are reflected in Supreme Court jurisprudence, they too narrowly circumscribe privacy and are often burdened by normative judgments about concealed information.

Much of the literature on privacy centers on intimacy even when it overlaps with theories of separation and exclusion. For example, to explain his theory of public versus private, Howard White offered examples of privacy intrusions to which he expected we could all relate: a question about a military cadet's sexual orientation,<sup>80</sup> an inquiry into why parents only had one child, and questions from the Kinsey Reports.<sup>81</sup> The historian Georges Duby called private things "precious," which "concern nobody else."<sup>82</sup> Robert Gerstein and Jeffrey Rosen both argued that intimate relationships need privacy to function and flourish.<sup>83</sup> And despite the fact that they both concluded that individual privacy includes some measure of control over information dissemination, Jean Cohen's and Julie Inness's conceptions of privacy are bound up with intimacy. To Professor Cohen, privacy is about choice, but the choice is about "whether, when, and with whom one will discuss *intimate* matters."<sup>84</sup> For Professor Inness, privacy is the "state of the agent

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80. White, *supra* note 29, at 180–81. Before its final repeal in 2010, the armed services' so-called "Don't Ask, Don't Tell" policy banned gay service members from serving openly and admitting their sexual orientation. 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515–16. Professor White would still consider the question of sexuality to be an intrusion into the private sphere regardless of the law.

81. White, *supra* note 29, at 180–81. The Kinsey Reports are two books on human sexual behavior: ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948), and ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953). See *Data from Alfred Kinsey's Studies*, KINSEY INST., <http://www.kinseyinstitute.org/research/ak-data.html> (last visited Feb. 5, 2015). The research included thousands of interviews and questions about sex, sexual practices, and physical desires. *Id.*

82. Georges Duby, *Forward to A HISTORY OF PRIVATE LIFE* viii (Philippe Aries et al. eds., Arthur Goldhammer trans., 1987).

83. Robert S. Gerstein, *Intimacy and Privacy*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY* 265 (Ferdinand David Schoeman ed., 1984); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8 (2000).

84. Jean L. Cohen, *The Necessity of Privacy*, 68 *SOC. RES.* 318, 319 (2001) (emphasis added).

having control over [the] realm of intimacy, which contains her decisions about intimate access to herself . . . and her decisions about her own intimate actions.”<sup>85</sup> In other words, what links all areas to privacy is the common denominator of intimacy, which draws its value from an individual’s sense of love, caring, and liking.<sup>86</sup> To these scholars, intimacy is the “chief restricting concept” in the definition of privacy.<sup>87</sup>

Intimacy also reflects the same Lockean and Kantian concepts of personal inviolability as other theories of privacy. If, according to Locke, we own ourselves, then the pieces of ourselves we keep closest to our hearts—namely, intimate details—are at the core of what society is meant to protect. Similarly, we could analogize intimate information to that which defines us in Kant’s purely rational and autonomous realm; if our inclinations, wants, and desires make us all fungible subjects in the physical world, it is the world of pure autonomy that defines who we are as individuals. The same could be said of intimate information, thus elevating intimacy to the forefront of a right to privacy protected by society.

One advantage of privacy-as-intimacy is that, as Dan Solove argued, the concept is already reflected in public law and in several Supreme Court decisions on due process, ranging as far back as 1923.<sup>88</sup> For example, the Family Educational Privacy Act protects information about students,<sup>89</sup> the Right to Financial Privacy Act guarantees secrecy over certain financial holdings,<sup>90</sup> the Video Privacy Protection Act guards our video rental history,<sup>91</sup> and the Health Insurance Portability

85. JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 56 (1992).

86. *Id.* at 56, 78; see also Solove, *supra* note 14, at 1121–22.

87. Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 263 (1977).

88. Though the Court never mentioned the word “privacy,” its decisions in *Meyer v. Nebraska*, which struck down a law prohibiting the teaching of foreign languages in elementary schools, and *Pierce v. Society of Sisters*, which struck down a law requiring that all children attend public schools, suggest that there was something special, or intimate, about the parent-child relationship and the family unit. See *Meyer v. Nebraska*, 262 U.S. 390, 400–03 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925). Both laws at issue in *Meyer* and *Pierce* intruded into the parents’ process of raising their children as they saw fit. See *Meyer*, 262 U.S. at 400–01; *Pierce*, 268 U.S. at 534–35. The Court made the connection between these cases and privacy jurisprudence in *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

89. 20 U.S.C. § 1232g(b)(1) (2012) (“No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein . . .”).

90. 12 U.S.C. §§ 3402–03 (2012) (“No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.”).

91. 18 U.S.C. § 2710(b)(1) (2012) (“A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person . . .”). This law was passed in reaction to the video rental history of Judge Robert Bork and his wife being publicized during his ultimately unsuccessful Supreme

and Accountability Act provides some security for our health data.<sup>92</sup> Furthermore, cases like *Griswold v. Connecticut*, *Roe v. Wade*, and even *Lawrence v. Texas* reflect the Court's concern for the protection of intimacy, whether through a constitutional right to privacy or a more general principle of liberty.<sup>93</sup> *Griswold* used the penumbras of several guarantees in the Constitution to argue that a right to privacy protected a married woman's access to contraception.<sup>94</sup> Justice Douglas concluded his opinion by connecting the intimacy of the marital union with the right to privacy:

We deal with a right of privacy [in marriage] . . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>95</sup>

In *Roe*, the Court enshrined a woman's right to decide to terminate a pregnancy on similar privacy grounds.<sup>96</sup> And in *Lawrence*, the Court struck down a state anti-sodomy law on the ground that gay persons, like all others, enjoy a liberty interest in intimate association: "When sexual-

Court confirmation hearings. See *Video Privacy Protection Act*, ELECTRONIC PRIVACY INFO. CENTER, <https://epic.org/privacy/vppa/> (last visited Feb. 6, 2015).

92. See 42 U.S.C. §§ 1320d-6, d-9 (2012) ("A person who knowingly . . . (1) uses or causes to be used a unique health identifier; (2) obtains individually identifiable health information . . . ; or (3) discloses individually identifiable health information to another person, shall be punished . . .").

93. See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) ("[T]he case should be resolved by determining whether the petitioners were free as adults to engage in . . . private conduct in the exercise of their liberty under the Due Process Clause . . ."); *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."); *Griswold v. Connecticut*, 381 U.S. 479, 482, 485 (1965) (finding unconstitutional a "law [that] operates directly on an intimate relation of husband and wife"). See also Solove, *supra* note 14, at 1106–07.

94. See *Griswold*, 381 U.S. at 484–85.

95. *Id.* at 486.

96. See *Roe*, 410 U.S. at 152–53 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). Justice Stewart, concurring, recognized

"the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters*, or the right to teach a foreign language protected in *Meyer v. Nebraska*."

*Id.* at 169–70 (Stewart, J., concurring) (internal citations omitted).

ity finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>97</sup> In all three cases, the intimate and personal nature of the act in question—contraception and family planning, birth and pregnancy, and sodomy and sex—was at the center of the Court’s rhetoric and substance.

But it is not clear what limits “intimacy.” For the Court, intimate conduct was something personal, perhaps sexual or familial. Professor Inness felt that intimacy includes a heart-felt emotional component;<sup>98</sup> to Tom Gerety, intimacy was a state of “consciousness” where you have access to your own and others’ bodies and minds.<sup>99</sup> Charles Fried defined intimacy as sharing personal information with a select few close associates,<sup>100</sup> which is a narrower conception of intimacy than those of Professors Inness and Gerety.<sup>101</sup> Therefore, limiting privacy to intimacy, variously defined, is unhelpful.

These conceptualizations have an indeterminacy problem. The sociologist’s conception of intimacy, though universally bound up with the concept of secrecy, suffers a different problem: it is burdened by normative judgment. In his seminal article, *The Sociology of Secrecy and of Secret Societies*, Georg Simmel concluded that privacy is a “universal sociological form” defined by hiding something.<sup>102</sup> It is universal in that we do it all the time. If all relationships between people are based on knowing something about each other, then keeping certain facets of ourselves hidden can define those relationships. This does not necessarily mean that the person who knows more about us is more correct in his assessment of who we are; rather, different pictures of personae are true for different people.<sup>103</sup> Secrecy, therefore, allows us to do things and maintain relationships we would not otherwise be able to in a world of complete knowledge.

Simmel’s theory has one distinct advantage over any conception of privacy based on separation and exclusion: his discourse on secret societies can help us understand when a secret has ceased to be private. Privacy-as-separation fails in part because it is too strict—privacy can be eroded when one other person gains access. For Simmel, a secret can maintain its private nature, its inherent secrecy, throughout a group of

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97. *Lawrence*, 539 U.S. at 567.

98. See INNESS, *supra* note 85, at 78–80.

99. See Gerety, *supra* note 87, at 268.

100. Charles Fried, *Privacy*, 77 YALE L.J. 475, 484 (1968).

101. See generally Solove, *supra* note 14, at 1122–24.

102. Simmel, *supra* note 3, at 463.

103. *Id.* at 443, 445.

people when keeping the secret is part of the identity of that group.<sup>104</sup> Members of secret societies “constitute a community for the purpose of mutual guarantee of secrecy.”<sup>105</sup> They define themselves by engaging in rituals and through separation from the rest of society.<sup>106</sup> This does not just happen in cults; social cliques turn their backs on others or deny conversation to outsiders, and groups of friends maintain each other’s secrets all the time. In all cases, the group is defined by what it knows, and it expresses its privileged status by closure.

The sociologist Diane Vaughan connected this conception of secrecy with intimacy in her study of how couples separate, arguing “[w]e are all secret-keepers in our intimate relationships.”<sup>107</sup> Secrets can both enhance relationships, by smoothing over differences or by creating the intimacy of co-conspirators, and contribute to their collapse, by allowing one partner to have a life without open inspection, consent, or participation from the other partner.<sup>108</sup> And Erving Goffman would agree that this type of secrecy is an important element of privacy: “If an individual is to give expression to ideal standards during his performance,” Goffman writes, “then he will have to forgo or conceal action which is inconsistent with these standards.”<sup>109</sup> In this view, privacy is the concealment of things that contradict an individual’s public façade: the “private sacrifice” of some behavior will permit the performance to continue.<sup>110</sup> This is what the backstage is really for.<sup>111</sup> It is not, as a spatial theory of privacy would suggest, a room, stall, or secluded place; rather, it is the locus of private behavior, of secrets. For example, servants use first names, workers laugh and take breaks, and management and employees may eat together and converse informally.<sup>112</sup> In some cases, this culture is associated with a space,<sup>113</sup> but it is what we do in the backstage, the secrets we hide there, that defines it.

There are two central failures of understanding privacy as a means

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104. *Id.* at 445.

105. *Id.* at 477.

106. *Id.* at 484–85.

107. DIANE VAUGHAN, UNCOUPLING: TURNING POINTS IN INTIMATE RELATIONSHIPS 11 (1986).

108. *See id.* at 13.

109. GOFFMAN, *supra* note 52, at 41; *see also id.* at 48. The idea of privacy as based on secrecy was echoed by Judge Posner: “[T]he word ‘privacy’ seems to embrace at least two distinct interests . . . [including] concealment of information, [which] is invaded whenever private information is obtained against the wishes of the person to whom the information pertains.” RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 273–74 (1981).

110. GOFFMAN, *supra* note 52, at 44.

111. *See id.* at 114.

112. *See id.* at 116.

113. Consider, for example, the British television series, *Upstairs-Downstairs*, and the PBS Masterpiece Classic, *Downton Abbey*. Both of these series depict the behaviors of servants, who live “downstairs,” and their aristocratic masters, who live “upstairs.”

of keeping secrets, however. First, once the secret is out, even to one other person, both the secret and its attendant privacy interest are extinguished. Dan Solove has called this the “secrecy paradigm” in American law and lamented its domination of our approach to privacy, especially given the pervasiveness of modern technologies that require us to reveal information to third parties.<sup>114</sup> Second, we have a tendency to conceive of secrets as discrediting, embarrassing, or, to use the sociologist’s term, deviant.<sup>115</sup> A tilt toward deviance, in turn, places a severe limitation on using secrecy to justify a legal right to privacy: if our secrets are so discrediting, society would rarely, if ever, see a need to protect them.

Much of the sociological discourse on secrecy and intimacy as it relates to privacy devolves into a normative moral judgment about those secrets. Despite the fact that he professes to make no such judgment,<sup>116</sup> Goffman’s view of secret, hidden behaviors, for example, has a decidedly negative bias.<sup>117</sup> The backstage is littered with “dirty work”<sup>118</sup> and “inappropriate” conduct done in “secret.”<sup>119</sup> From this introduction of the backstage, Goffman only further burdens it with a normative twist. People “lapse” in the backstage,<sup>120</sup> drifting toward indecorous behavior.<sup>121</sup> They laugh at their audience, engage in mock role-playing, and poke fun through “uncomplimentary terms of reference.”<sup>122</sup> They derogate others and brazenly lie<sup>123</sup> and keep “‘dark’ secrets.”<sup>124</sup> Behind involvement shields, individuals do “sanctionable” or “unprofessional” things, like nurses smoking in a tunnel or adolescent horseplay outside

114. DIGITAL PERSON, *supra* note 24, at 42–43, 143.

115. DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA 58* (1996). “Deviance refers to behavior that violates the norms of some group.” *Id.*; see also Ball, *supra* note 38, at 260 (“[D]eviance occurs when one engages in activities which are recognized as infractions of collectively held rules or norms to which are attached varied punitive sanctions as social control mechanisms.”).

116. See BEHAVIOR IN PUBLIC PLACES, *supra* note 2, at 5.

117. In fact, he echoes Durkheim when he uses the word “profane” seven times to describe activities in the private sphere in *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, *supra* note 52, and in *BEHAVIOR IN PUBLIC PLACES*, *supra* note 2. Surprisingly, the word was never used in *STIGMA*, *supra* note 1. For Durkheim, the profane was the opposite of the sacred; it was the everyday, the dirty and mundane activities of life that would destroy the sanctity of sacred things if they ever touched: “the only way to define the relation between the sacred and profane is their heterogeneity . . . [which] is *absolute*.” EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 38 (Carol Cosman trans., 2001). The same could be said for private activities in the backstage because if any member of the audience saw what went on beyond the performance (the profane), the façade of the performance (the sacred) would be destroyed.

118. See GOFFMAN, *supra* note 52, at 44.

119. *Id.* at 41.

120. *Id.* at 132.

121. See *id.* at 108.

122. *Id.* at 174.

123. See *id.* at 175.

124. *Id.* at 141.

of the view of others.<sup>125</sup> Goffman also points to the little misbehaviors—activities he calls “fugitive involvements,” no less<sup>126</sup>—that you can engage in when outside the public view:

*While doing housework:* You can keep your face creamed, your hair in pin curls; . . . when you're sitting at the kitchen counter peeling potatoes you can do your ankle exercises and foot strengtheners, and also practice good sitting posture. . . . *While reading or watching TV:* You can brush your hair; massage your gums; do your ankle and hand exercises and foot strengtheners; do some bust and back exercises; massage your scalp; use the abrasive treatment for removing superfluous hair.<sup>127</sup>

Privacy, then, is about concealing *bad* things, not just concealment in general. The anonymity provided by privacy does not merely allow someone to do something different; rather, it allows him to “misbehave,” to “falsely present[ ]” himself,<sup>128</sup> or to do the “unattractive”<sup>129</sup> things inappropriate in the public sphere.

One of Goffman's major works, *Stigma*, is entirely concerned with negative or inappropriate behavior. That may sound like an uninspired conclusion given the title, but what is most telling is not the mere recitation of stigmatizing activities and things, but rather the implication that the private sphere is defined by stigma. Stigmas are “discrediting,”<sup>130</sup> “debasing,”<sup>131</sup> and “undesirable.”<sup>132</sup> They are “secret failings”<sup>133</sup> that make us “blameworthy”<sup>134</sup> and “shameful.”<sup>135</sup> This moral judgment pervades the legal, philosophical, and social science literature, as well. For Alan Bates, privacy does not simply protect against disclosures, but rather against “humiliating and damaging” ones about which others would “disapprove[ ].”<sup>136</sup> The sociologist David Diekema follows in a similar vein: privacy shields “improper” behaviors, “transgressions or nasty habits.”<sup>137</sup> And Richard Posner argues that privacy protections grant people a right to conceal “legitimately discrediting or deceiving

125. See BEHAVIOR IN PUBLIC PLACES, *supra* note 2, at 39.

126. *Id.* at 66.

127. *Id.* at 65 (quoting Sam Bellow, *Distractions of a Fiction Writer*, in NEW WORLD WRITING No. 12, 231 (1957)).

128. *Id.* at 130.

129. See *id.* at 66.

130. STIGMA, *supra* note 1, at 3.

131. *Id.* at 43.

132. *Id.* at 3.

133. *Id.* at 31.

134. *Id.* at 78.

135. *Id.* at 140.

136. Bates, *supra* note 60, at 433.

137. David A. Diekema, *Aloneness and Social Form*, 15 SYMBOLIC INTERACTION 481, 487 (1992).

facts.”<sup>138</sup> It should come as no surprise, then, that several sociologists define private spaces as an outlet for deviant, discrediting behavior.<sup>139</sup>

It is hard to deny the moral dimension to this discussion of private behaviors, activities, and symbols. They are stigmatizing, at worst, or dissonant with normal social interaction, at best. In either case, there is a moral dimension that burdens privacy with an attendant profanity;<sup>140</sup> if the private sphere is characterized by dark secrets, or behaviors and activities that society refuses to tolerate, it is unclear how a right to privacy could ever exist.

### B. *Privacy as Freedom For*

The previous theories of privacy reflected the individual’s right to seclude himself and exclude others from certain aspects of his life, whether intimate, deviant, or not. They appreciated privacy as guaranteeing freedom *from* something: private places and private things were so called because they belonged to the individual, who had the power to control dissemination. But, as we have discussed, these theories are too rigid or too burdened by moral judgment to adequately capture what we mean by privacy and justify state protection for a right to privacy.

Several other theories take the same mantle of individual freedom and look forward, viewing privacy as a necessary condition for generating the ideals of independence and autonomy. The argument that privacy protects personhood, or that which constitutes our essence,<sup>141</sup> emerges directly from Locke’s notion of self-ownership and Warren’s and Brandeis’ derivative theory of “inviolable personality.”<sup>142</sup> Conceiving of privacy as essential to the concepts of autonomy and free choice also stems from liberal theory. But although self-realization and autonomy are important values reflected in some Supreme Court jurisprudence, they

138. Richard A. Posner, *An Economic Theory of Privacy*, 2 REGULATION 19, 25 (1978).

139. See, e.g., Ball, *supra* note 38, at 261–62; see also *id.* at 270 (referring to the work of sociologist Jon Lofland, who also defined private spaces as providing opportunities for deviance). See JON LOFLAND, *DEVIANCE AND IDENTITY* 68 (1969).

140. See DURKHEIM, *supra* note 117, at 36 (“The division of the world into two comprehensive domains, one sacred, the other profane, is the hallmark of religious thought.”). Durkheim’s concept of profanity was not limited to curse words. Rather, at least in the context of religion, the mundane every day, as distinct from the purity of ritual and religious objects, was profane. See *id.* at 36–38. For Mary Douglas, a leading Durkheimian of the twentieth century, social “dirt” and “disorder” are profane. MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* 2, 21 (1966). More than any other scholar, Mary Douglas has made Durkheim’s sacred-profane distinction the cornerstone of her scholarship.

141. See, e.g., Professor Paul A. Freund, Harvard University, Annual Dinner Address at the American Law Institute 52nd Annual Meeting 31 (May 23, 1975), at 43–44; see also Solove, *supra* note 14, at 1116.

142. Warren & Brandeis, *supra* note 30, at 205.



offer no pathway toward a workable theory of privacy. Like other rights-based conceptions of privacy, they could be limitless and harmful.

### 1. INDIVIDUALITY, INDEPENDENCE, AND PERSONHOOD

Like Kant, whose metaphysics demanded that individuals be treated with dignity rather than as subjects of others, some scholars argue that respecting privacy is a necessary element of valuing individuals as ends in themselves. Alan Bates channeled Kant when he argued that privacy only has meaning in terms of a rational, autonomous self that is capable of self-consciousness: “privacy refers to an important dimension of [an individual’s] distinction between . . . that which is crucial to self and that which has negligible importance.”<sup>143</sup> He could have been talking about intimate information,<sup>144</sup> but he takes as given the fact that we do not accord privacy rights to children.<sup>145</sup> This suggests that the crux of privacy is the reasoning and self-awareness that comes with maturation and not necessarily the subject matter of any secret. Stanley Benn and Edward Bloustein express a similar idea. For Benn, individuals resent being watched because it makes them feel like tools in someone else’s hands and not as free individuals “with sensibilities, ends, and aspirations of their own, morally responsible for their own decisions, and capable, as mere specimens are not, of reciprocal relations” with others.<sup>146</sup> Bloustein adds that privacy invasions have effects far beyond any physical encroachment or injury: one who is subject to intrusions “is less of a man, [and] has less human dignity” precisely because his privacy, a manifestation of his free self, is at risk.<sup>147</sup> This view evokes both Kant’s mandate to treat everyone as ends in themselves and Locke’s notions of self-ownership and his explanation for creating government out of the state of nature. In both cases, the lack of individual rights and protection for the person’s life, liberty, and property does violence to his sense of self and his entitlements as a free, autonomous person.

One of those entitlements is the protection of individuality and free thought, and many scholars argue that privacy plays an essential role in making such independence possible. Alan Bates, for example, believed that privacy allowed individuals to process information before speak-

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143. Bates, *supra* note 60, at 432.

144. See *supra* Part II.A.2.

145. See Bates, *supra* note 60, at 431.

146. Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in *NOMOS XIII: PRIVACY 1*, 6 (J. Roland Pennock & John W. Chapman eds., 1971); see also Solove, *supra* note 14, at 1116–17.

147. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973–74 (1964).

ing,<sup>148</sup> and the philosophers Mark Alfino and Randolph Mayes argue that a person requires privacy in order to reason about his choices.<sup>149</sup> That intellectual space both defines the individual and would be damaged by any interference from the state or society.

A close corollary to this conception of privacy is the notion that privacy provides us the space necessary to craft and edit ideas before public consumption.<sup>150</sup> This idea, what Julie Cohen refers to as “intellectual privacy,” combines interests in personal autonomy and private spaces.<sup>151</sup> It offers us the freedom to “explore areas of intellectual interest” that we might not feel comfortable discussing around other people,<sup>152</sup> including unpopular ideas, deviant ones, or, more importantly, incomplete ones. It is, therefore, an essential part of our rights of self-determination.<sup>153</sup>

The primary advantages of this theory of privacy and personhood are its rhetorical strength and its ability to move beyond the limited vision of privacy inspired by detachment and intimacy. If privacy is essential to who we are as free selves, then a right to privacy need not wait for a physical intrusion into a private space or a revelation of a stigmatizing private fact. Surveillance, for example, can cause two additional types of injuries. First, as the philosopher George Kateb has argued, simply being watched could constitute an injury because it demeans you as a person.<sup>154</sup> As a subject of surveillance, you are stripped of your entitlement to freedom as a self-aware individual in a free society; you are “oppress[ed],” “degrad[ed],” and made the subject of others.<sup>155</sup> Stanley Benn explains that you begin to see yourself in a new light, “as something seen through another’s eyes,” which “disrupt[s], distort[s], or frustrate[s]” your ability to think and act on your own.<sup>156</sup> Second, Jeffrey Rosen implied in *The Unwanted Gaze* that being watched, being under surveillance, and studied can lead to discrimina-

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148. Bates, *supra* note 60, at 432.

149. Mark Alfino & G. Randolph Mayes, *Reconstructing the Right to Privacy*, 29 Soc. THEORY & PRAC. 1, 8 (2003).

150. Ruth Gavison notes that privacy gives us the opportunity to express unpopular ideas first to sympathetic audiences and, then, “[a]fter a period of germination, [we] may be more willing to declare [our] unpopular views in public.” Gavison, *supra* note 59, at 450.

151. Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 576–77 (2003).

152. *Id.* at 579.

153. *Id.* at 577.

154. George Kateb, *On Being Watched and Known*, 68 Soc. RES. 269, 274–75 (2001).

155. *Id.* at 275.

156. Benn, *supra* note 146, at 7, 26. Channeling Locke and Kant, Professor Kateb argues that privacy allows us to truly own ourselves and treat ourselves as autonomous and “inviolable.” Kateb, *supra* note 154, at 277–78.

tion.<sup>157</sup> For Rosen, “[p]rivacy protects us from being misdefined and judged out of context in a world . . . in which information can easily be confused with knowledge.”<sup>158</sup> Data aggregators used by private companies and government agencies can take incomplete or inaccurate information about us and categorize us in ways that limit our opportunities. Sometimes this is relatively innocuous, like when Google misuses the information in an Orthodox Jew’s emails to awkwardly suggest a banner advertisement for ChristianMingle.com. In other cases, it can be devastating: a health care company, for example, denied coverage to an individual applicant when it found antidepressants in her prescription history and assumed (incorrectly) that she had a severe neurological disorder.<sup>159</sup>

Dan Solove has pointed out that this rich concept of personhood is already reflected in long-standing Supreme Court jurisprudence on privacy and liberty.<sup>160</sup> In 1891, the Court held that a party in a civil case could not be compelled to submit to a medical examination because man has the right “to the possession and control of his own person, free from all restraint or interference.”<sup>161</sup> Later, when the Court had occasion to rule on a woman’s right to choose, it explained the importance of decisions like contraception, family planning, sex, and terminating a pregnancy: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>162</sup> Granted, activities we could consider “intimate” were at the center of these cases; but the freedom to make those decisions is about more than their sexual nature. Rather, the Court seemed to suggest that these decisions define what it means to be treated with dignity as an autonomous individual in a democratic society.<sup>163</sup>

This theory of privacy seems to inspire the most lyricism and poetry from scholars and the courts, but it also appears completely

157. See ROSEN, *supra* note 83, at 7–9 (discussing how others are likely to misjudge and stereotype when personal information is revealed out of context via new technologies).

158. *Id.* at 8.

159. See Chad Terhune, *They Know What’s in Your Medicine Cabinet*, BLOOMBERG BUSINESSWEEK (July 22, 2008), <http://www.businessweek.com/stories/2008-07-22/they-know-whats-in-your-medicine-cabinet>.

160. See Solove, *supra* note 14, at 1117 (“The Supreme Court has espoused a personhood theory of privacy in its substantive due process decisions such as *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*, and others. As early as 1891, the Court articulated this conception in *Union Pacific Railway Co. v. Botsford*.”) (footnotes omitted).

161. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

162. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

163. See *id.* (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”).

boundless. Professors Benn, Bloustein, Kateb, and others never explain what they mean by “personhood” other than by reference to amorphous philosophical concepts. Nor do they attempt to move beyond using the theory to explain why we should value privacy to *how* to use those values in the courts. Therefore, it cannot help judges articulate a workable solution to practical questions of privacy law.

## 2. AUTONOMY, CHOICE, AND CONTROL

Existing alongside all of these theories of privacy are the concepts of autonomy and choice: the choice to disseminate information or the choice to marry a same-sex partner, for example, and the correlative right to control what others know about us. Seen in this way, privacy is about the freely choosing self, exercising his liberty in a democratic society. But like other theories of privacy, privacy-as-choice or control either threatens too broad a reach, providing judges with no adjudicative path and pushing scholars toward intellectual confusion, or actually injures personal privacy.

Autonomy and choice are central to both Locke and Kant, as both agree that the freedom to choose defines man. Locke sees the state as a servant of individual rights because man, while in a state of pure equality in the state of nature, chooses to join together in government.<sup>164</sup> For Kant, autonomy and choice are part of man’s transcendental rational nature: true freedom is only possible in an intelligible realm detached from the things that hold us back as humans.<sup>165</sup> Neo-Kantian liberalism takes the freedom embodied by pure rationality in the intelligible realm and argues that freedom is the right to choose one’s own ends free from state interference.<sup>166</sup>

This choosing self is evident in the conventional understanding of privacy as the individual’s right to choose what the public will know about him. Jean Cohen argues that privacy is the right “to choose whether, when, and with whom” to share intimate information.<sup>167</sup> Charles Fried suggests that different groups of friends exist because we actively choose to share more with intimate friends and less with acquaintances.<sup>168</sup> This free choice gives us the right to control public

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164. See LOCKE, *supra* note 31, § 123, at 66.

165. See KANT, *supra* note 31, at 71–72.

166. See JOHN RAWLS, A THEORY OF JUSTICE 561 (1971) (“[A] moral person is a subject with ends *he has chosen*, and his fundamental preference is for conditions that enable him to frame a mode of life that expresses his nature as a free and equal rational being as fully as circumstances permit.”) (emphasis added); see also generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (arguing for a “minimal state”); SANDEL, *supra* note 31, at 177.

167. Cohen, *supra* note 84, at 319.

168. Fried, *supra* note 100, at 484.

knowledge of our personal selves. Privacy, then, “is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”<sup>169</sup> It is, to Julie Inness, the idea that an individual has “control over a realm of intimacy”<sup>170</sup> and, to Jonathan Zittrain, control over our information, in general.<sup>171</sup> For the philosopher Steve Matthews, exercising privacy is making the choice to “control” and “manage” the boundary between ourselves and others.<sup>172</sup> The common denominator in all these descriptions is free choice and control, both of which are central to the rights ideal.

In his compelling text, *The Digital Person*, Dan Solove argued that the salient problem with private intermediaries and governments amassing digital dossiers about citizens is the loss of individual control over personal information.<sup>173</sup> Collecting data that are already available or required for doing business, Solove argues, does not injure personal privacy in the conventional sense; that is, there is no “discrete wrong” that occurs through the behavior of some “particular wrongdoer” who, say, discloses personal information to the media.<sup>174</sup> Rather, the problem is structural. Data are collected without sufficient controls, so Solove recommends a new architecture of data collection that “affords people greater participation in the uses of their information.”<sup>175</sup> He recommends starting at the Fair Information Practices, a series of recommendations from the Department of Housing, Education, and Welfare in 1973 that are predominantly focused on ensuring individuals have control over their personal data.<sup>176</sup> The guidelines include no secret recordkeeping, a pathway for individuals to read their records, a way for individuals to prevent their information from being used in different ways, and a method of correction and amendment.<sup>177</sup> At their core, these recommendations aim at shifting control over data from the collector (an intermediary or a government agency) back to the source of that information (the individual). Professor Solove’s innovative proposals have revolu-

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169. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

170. INNESS, *supra* note 85, at 56.

171. See Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 *STAN. L. REV.* 1201, 1203 (2000) (“In my view, there is a profound relationship between those who wish to protect intellectual property and those who wish to protect privacy.”).

172. Steve Matthews, *Anonymity and the Social Self*, 47 *AM. PHIL. Q.* 351, 351 (2010).

173. *DIGITAL PERSON*, *supra* note 24, at 90.

174. See *id.* at 94.

175. *Id.* at 102–03.

176. See *id.* at 104.

177. *Id.* at 104. Professor Solove also recommends opt-in clauses, rather than opt-out clauses, which also increases individual control over data dissemination. *Id.* at 105–06.

tionized our discussion of digital dossiers. For now, it seems clear that his theory is based on a conception of privacy that, at least in part, assumes that individual control over personal information is a part of a just privacy regime.

This, however, is a problematic way of understanding information privacy for three reasons. First, it can be too broad. If privacy is all about choice, its exercise becomes entirely subjective, limited only by an individual's personal choice of what to reveal and when. A rule based on this theory would leave everything up to the individual and offer society no opportunity to value other concerns over personal privacy. This is not only unworkable, but also dangerous: online harassers who target their victims behind a veil of pseudonymity are choosing not to disseminate their identities. It is difficult to see how a theory of privacy based on choice alone could honestly argue against an absolute right for them to remain pseudonymous.

Second, this conception of privacy may undermine itself. Privacy as choice, control, or management over what others know damages privacy rights because it turns all revelation into a conscious volitional act. Courts have run with that presumption and have concluded that individuals assume the risk that any disclosures to third parties could result in wider disclosure to others or the government, thus extinguishing privacy interests in all previously revealed information. A telephone user, for example, "voluntarily convey[s] numerical information to the telephone company . . . [and] assume[s] the risk" that the telephone company would subsequently reveal that information.<sup>178</sup> A bank depositor has no legitimate expectation of privacy in the financial information freely given to banks because "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."<sup>179</sup> And this doctrine has been extended to the Internet. Several federal courts have held that because any information conveyed to an online service provider in order to access the Internet is "knowingly revealed," there could be no invasion of privacy when an Internet service provider ("ISP") gives that information to someone else.<sup>180</sup> Therefore, although the ideals of autonomy and free choice appear to empower the individual with all powers of disclosure, it logically leads to an evisceration of personal privacy rights.

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178. *Smith v. Maryland*, 442 U.S. 735, 744 (1979).

179. *United States v. Miller*, 425 U.S. 435, 443 (1976).

180. *United States v. Hambrick*, 55 F. Supp. 2d 504, 508–09 (W.D. Va. 1999); *see also* *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) ("When defendant entered into an agreement with Road Runner for Internet service, he knowingly revealed all information connected to [his] IP address . . . . He cannot now claim to have a Fourth Amendment privacy interest in his subscriber information.").

Third, it is not at all clear that greater individual control over personal information would create a better, more just regime. Even Professor Solove, whose recommendations for creating a more just privacy regime are, in part, dedicated to giving greater control to individuals, admits that control will not always do much good: “people routinely give out their personal information for shopping discount cards, for access to websites, and even for free,” he concedes.<sup>181</sup> Citing Julie Cohen, Solove notes that individuals are incapable of exercising adequate control over each individual piece of information because they cannot comprehend the enormity of the value of the sum of those pieces.<sup>182</sup> Therefore, a privacy regime based on control over our data runs up against a brick wall.

### C. *Moving Away from Rights*

I have argued that the conventional theories of privacy are based on notions of personal inviolability and individual rights, which means that the goal of state or judicial intervention has been, traditionally, to protect those rights. I have also critiqued these theories as either limitless or inelastic or, counter intuitively, damaging to personal privacy interests. What’s more, even though there is a significant difference between seeing privacy as a negative or positive right, both views fall back on the same assumptions: the public-private distinction and the individual as the locus of the purposes of privacy. This feedback loop might explain why scholars are all over the place when discussing privacy. They use the rhetoric of autonomy when arguing for privacy-as-separation;<sup>183</sup> they see privacy as controlling dissemination of information, but seem to think of the information being disclosed as necessarily intimate;<sup>184</sup> and they talk of personhood and choice when considering deviance and secrecy.<sup>185</sup> The end result is the same: privacy law has been predominantly focused on protecting an individual right to control dissemination of information and to be able to separate from the public.

Perhaps these individual-based concepts of privacy are simply incomplete; their problematic implications may just be missing pieces in a larger puzzle. If so, we have two options. We could give up on privacy or we could recognize that the rhetoric and substance of rights only gets

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181. DIGITAL PERSON, *supra* note 24, at 87.

182. *Id.* at 87–88 (citing Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1397 (2000)).

183. *See, e.g.*, ROSEN, *supra* note 83, at 15–21.

184. *See, e.g.*, Cohen, *supra* note 84, at 319.

185. Another explanation is that there is quite a bit of overlap among the various conceptions of privacy. This, of course, is true. But I argue that the overlap exists because all of the conventional conceptions of privacy are based on the same liberal ideal and liberal assumptions.

us so far.<sup>186</sup> Several leading thinkers have taken the first route. Richard Posner finds it incongruous for the state to rightly pass laws preventing sellers from making false or incomplete representations about their goods but to allow an individual to lie or conceal facts to give himself a personal advantage.<sup>187</sup> Amitai Etzioni thinks that our obsession with privacy is endangering public health and safety, preventing us from protecting sexual abuse victims and from keeping children healthy and privileging criminality over the common good.<sup>188</sup> And Catherine MacKinnon argues that privacy laws codify the liberal principle of non-interference, which has the attendant effect of enforcing the hierarchical sexual status quo in the unregulated sphere.<sup>189</sup> Privacy, then, allows men to get away with abuse.<sup>190</sup>

Stringent rights-based privacy protections can indeed lead to worrisome, perhaps unintended negative effects, as Professors Etzioni, MacKinnon, and many others have suggested. But we need not give up on privacy. A second approach would recognize that privacy has value and try to rescue the concept from indeterminacy, inelasticity, and whim. This was Helen Nissenbaum's goal in her groundbreaking work on privacy as "contextual integrity."<sup>191</sup> Like me, Professor Nissenbaum finds conventional understandings of privacy incapable of explaining why certain modern technological developments strike us as invasive.<sup>192</sup> She identified three principles that have governed much of privacy law to date—protecting individuals from intrusive government agents, restricting access to intimate information, and curtailing intrusions into private spaces<sup>193</sup>—but found them unhelpful when it came to the "grey areas" posed by vexing legal questions.<sup>194</sup> Professor Nissenbaum took a ground-up approach and identified the social science concepts of appropriateness and information flow as the factors that, when breached,

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186. I made a similar argument about the rhetoric and substance of rights in Ari Ezra Waldman, *Marriage Rights and the Good Life: A Sociological Theory of Marriage and Constitutional Law*, 64 HASTINGS L.J. 739 (2013) (arguing that although the dominant arguments in favor of ending marriage discrimination against same-sex couples have been based on liberal toleration, a sociological understanding of the benefits of inclusive marriage is what will overcome constitutional hurdles posed by Equal Protection Clause analysis).

187. Richard Posner, *The Right to Privacy*, 12 GA. L. REV. 393, 399 (1978).

188. AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 4, 7–8 (1999).

189. See MACKINNON, *supra* note 13, at 35–36, 89–90, 193–94.

190. See *id.* at 168, 193.

191. See generally Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 18 (positing a new construct, "contextual integrity," as an alternative approach to privacy that better addresses the challenges posed by new information technologies).

192. *Id.* at 119.

193. *Id.* at 125.

194. *Id.* at 131–33.



determine our unease about privacy invasions.<sup>195</sup>

This was also Dan Solove's project in *Conceptualizing Privacy*. In short, Professor Solove wanted the legal academy to take a pragmatic approach and remain open to the revolutionary concept that privacy may not be reducible to one common denominator.<sup>196</sup> In this context, pragmatism alludes to Professor Solove's preference for a bottom-up, context-based study of privacy that learns from specific examples of intrusions into privacy rather than a top-down, universalist approach.<sup>197</sup> He asks us to "act [like] cartographers, mapping out the terrain of privacy by examining specific problematic situations,"<sup>198</sup> and takes the pragmatist John Dewey's advice to begin philosophical inquiry with experience, not abstract principles.<sup>199</sup> Professor Solove would like us to be sociologists,<sup>200</sup> and I would like to take his advice.

### III. PRIVACY-AS-TRUST

I would like to show how privacy, particularly in the information-sharing context, is really a social construct based on trust between social sharers, between individuals and Internet intermediaries, between groups of people interacting online and offline—broadly understood. Trust can be narrow, focused solely on confidentiality or security within networks. But such formulations sell trust short. Trust is broader: it is a social norm of interactional propriety based on the favorable expectations of others behavior. It is this conception of trust that animates our current

195. *Id.* at 138.

196. *See* Solove, *supra* note 14, at 1099. Solove contrasts the traditional approach to conceptualizing privacy with the Wittgensteinian "family resemblance" approach. *See id.* at 1095–99. While the former is a "quest for a common denominator . . . [that] leads to greater clarity," the latter "shows us that such a quest can sometimes lead to greater confusion." *Id.* at 1099. In *A Taxonomy of Privacy*, Solove reiterates his conclusion that "privacy is best understood as a family resemblance concept," in which various kinds of privacy disruptions are different but share some important and overlapping attributes. *See* Solove, *supra* note 26, at 485–86.

197. *See* Solove, *supra* note 14, at 1126–29.

198. *Id.* at 1126.

199. *See id.* at 1127.

200. The branch of pragmatism to which Professor Solove refers resembles a subset of sociology known as phenomenology. Maurice Merleau-Ponty, whose famous *Phenomenology of Perception* rejected the Kantian ideal that truth can only be ascertained through complete detachment from everyday life, argued that the only way to comprehend reality is through experience of the self, the only physical and observable means we have. MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* (Colin Smith trans., 1962). Real experiences mediate our conceptions of the world around us; without them, the world is meaningless to us: "The world is not an object such that I have in my possession the law of its making," Merleau-Ponty wrote; rather, "it is the natural setting of, and field for, all my thoughts and all my explicit perceptions. . . . [T]here is no inner man, man is the world, and only in the world does he know himself." *Id.* at xi–xii. In other words, meaning arises from interactions with the world; meaning is, therefore, experiential.

and future sharing and disclosing behavior. Therefore, privacy law—the collective judicial decisions, legislative enactments, and supporting policy arguments regulating disclosures, searches and seizures, data aggregation, and other aspects of informational knowledge about us—should be focused on protecting relationships of trust. This Section begins by assessing several attempts to develop social theories of privacy, all of which represent significant steps forward. I then make a theoretical and intuitive argument connecting privacy and trust and discuss in detail what I mean by trust. I proceed to the next Section with a set of factors for evaluating whether trust exists in a given situation of disclosure, thereby providing judges and policymakers with a guide for solving modern privacy problems, particularly the problem of determining when individuals retain privacy rights in previously disclosed information. This analysis gives rise to a proposal: a robust tort for breach of confidentiality.

### A. *Social Theories of Privacy*

To speak of a sociological theory of privacy seems counterintuitive. Social things are “collective representations that express collective realities.”<sup>201</sup> Whereas social life involves assembled groups and is a manifestation of collective thought, privacy law’s traditional focus has been the individual. But privacy involves our relationship to society, not our departure from it. There has been a smattering of attempts to craft social theories of privacy, but although they all share the goal of filling the gaps left by the rights-based understandings of privacy discussed above,<sup>202</sup> they remain either incomplete or subject to fatal criticism. I will discuss four here. The first model is what I will call a pure relationship model, where privacy is determined based solely on the relationship, or lack thereof, between an individual and someone with access to his or her personal information: something is public when it is known by those, like strangers, presumably, with whom we have no special relationship, but private when it is only known to intimates. The relationship model explains privacy within defined special relationships like fiduciary and trustee, attorney and client, or doctor and her patient. The philosopher James Rachels, who defined privacy as a right of control and access, nevertheless saw relationships as essential; in fact, our ability to “maintain different sorts of social relationships with different people” was the central goal of privacy.<sup>203</sup> For Rachels, public and private exist

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201. DURKHEIM, *supra* note 117, at 11.

202. See *supra* Part II.

203. James Rachels, *Why Privacy Is Important*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY* 292 (Ferdinand D. Schoeman ed., 1984).

on a scale parallel to a continuum of relationship closeness: intimates are such because they know personal information about us, whereas strangers do not. The private world, then, is an intimate world of friends, lovers, spouses, and close colleagues.

This relationship model is distinctly social: its interpretive tool—the relationship between us and others—lies beyond the individual and ignores the substance of the information. In this way, it does not face the absolutist and normative critiques plaguing conceptualizations of privacy based on autonomy and choice, respectively. It also may rescue us from the erosion of privacy wrought by Dan Solove's secrecy paradigm because its relationship-oriented approach presupposes that information can be shared with others—family, friends, and intimates—and still be considered private. But it nevertheless fails as a governing understanding of information privacy for several reasons. First, by focusing exclusively on relationships, the model makes information irrelevant. But that cannot be the case. Individuals may not be inclined to share embarrassing or stigmatizing information with intimates and feel perfectly comfortable sharing it with strangers and yet still feel that this information is private in some sense.<sup>204</sup> Second, the model seems to imply a proportional and linear relationship between closeness and information shared. But maintaining different relationships with different types of people, as Rachels suggests is embodied in his model, does not necessarily require that those closest to us know the most about us. Third, the model falls back on the assumption, held by many of the rights-based theories discussed above, that information shared with strangers cannot ever be private. In this way, we have still not escaped the “secrecy paradigm”<sup>205</sup> trap because anything shared with even one stranger is considered public under the pure relationship model.

Edward Tverdek's modified relationship model consciously picks up where Rachels left off.<sup>206</sup> Tverdek acknowledges that the public-private divide varies based on an individual's relationships with certain others, but tries to take into account the failings of rights-based and pure relationship models by allowing for the fact that not all information is fungible. For Tverdek, there are two types of personal information: that which creates “esteem-based interests” in how we are regarded by others and that which creates “an interest in preventing the practical harms” that could occur if others knew it.<sup>207</sup> Those interests only arise when certain types of interaction partners are involved. Tverdek argues that

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204. See *id.* (stating individuals feel a “sense of privacy”).

205. See DIGITAL PERSON, *supra* note 24, at 8.

206. See generally Edward Tverdek, *What Makes Information “Public”?*, 22 PUB. AFF. Q., Jan. 2008, at 63.

207. *Id.* (emphasis omitted).

we may prefer to hide a stigmatized sexual fantasy from those closest to us, but have few qualms talking about it to a stranger online.<sup>208</sup> Further, he suggests that we may barely safeguard our Social Security numbers around our spouses, but worry what would happen if strangers got their hands on them.<sup>209</sup> Tverdek's is an improved taxonomy, if only because it recognizes that not all information is fungible and responds to Rachels' problematic proportional correlation between closeness and information. But it cannot be an accurate conceptualization of information privacy for several reasons. First, his esteem versus practical distinction does not fit Rachels' closeness continuum as neatly as he suggests. Many people might not be so cavalier about their Social Security numbers, and most would arguably guard it around their friends and acquaintances, if not their spouses. And esteem-based interests do not disappear as intimacy declines, as the son or daughter of a clergyman or local politician would understand. Second, there is no place for strangers in Tverdek's taxonomy, leaving us once again victimized by Dan Solove's secrecy paradigm. Third, both Tverdek's and Rachels' models are focused on individual pieces of information, for example, an identification number, a stigmatizing illness, a salary. As Frank Pasquale recently noted, privacy problems in a networked world extend far beyond our concern for the disclosure of discrete bits of data;<sup>210</sup> rather, it is the aggregation, analysis, and categorization of terabytes of data about individuals that any theory of privacy must also address. More analog relationship models, then, leave us ill-equipped to handle some of the most vexing questions of modern information privacy law.

Although the relationship models take a step toward a sociological theory of privacy, they do so rather tentatively. They focus on relationships and social interaction, but neglect the fact that privacy is a social phenomenon not merely because other people exist, but because privacy is about the social circumstances in which information flows from one party to another. There are two information flow models in the privacy literature, both of which bring us closer to filling the gaps left by rights-based theories and addressing the modern problems of privacy law.

In an article in the *University of Chicago Law Review*, Lior Strahilevitz suggested that privacy hinges on how information flows among our interaction partners.<sup>211</sup> Based on ongoing research in social network theory, Strahilevitz eschewed the linear and proportional correlations in the relationship models and suggested that the nature of the

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208. *Id.* at 73–75.

209. *Id.* at 75.

210. See generally PASQUALE, *supra* note 24.

211. See generally Strahilevitz, *supra* note 17.

information and with whom it is shared can determine when a piece of shared information is so likely to get out of its original circle of recipients that it cannot be the basis of an invasion of privacy claim when it does.<sup>212</sup> More specifically, the more “interesting” or unusual, surprising, revealing, or novel a piece of information is, the more likely it will be disseminated through a network.<sup>213</sup> Complex or aggregate information, the sum total of pieces of data about a person, is not likely to be known outside of close-knit groups and, therefore, highly likely to stay confidential. But, when information is disclosed to a group that includes highly connected, socially active individuals who are situated in multiple social networks, the information is likely to be disseminated further beyond the initial group.<sup>214</sup> Therefore, Strahilevitz argues that if everyone I know, plus several I do not, know something about me, that information is likely to move through the network and into other networks. That piece of information is public. But if just my friends know a fact, “but not any strangers,” then I can expect it to remain with its intended recipients.<sup>215</sup> Combining these factors together, Strahilevitz concludes, allows a judge to see whether the information originally disclosed was likely to have become “public” regardless of any subsequent disclosure.<sup>216</sup> If it was, it cannot be the basis for an invasion of privacy claim.

This is a dynamic and powerful idea. Privacy scholarship is richer for Professor Strahilevitz’s sociological contribution. However, the role of strangers in the calculus is problematic. Under Strahilevitz’s social network theory, the mere fact that a recipient of information is a stranger—namely, someone with whom we do not have personal, face-to-face, offline experience—may exclude the possibility that we can retain a privacy interest in that datum. The practical effect of Strahilevitz’s theory may be replacing a draconian bright-line rule that extinguishes privacy rights upon any disclosure with an apparently softer, contextual sociology that nevertheless retains a draconian bright-line rule extinguishing privacy rights upon certain disclosures regardless of context, intent, or the presence of trust. He has, in other words, simply moved the line of Dan Solove’s secrecy paradigm a little further down the road. What’s more, applying the theory requires making several arbitrary choices that may not reflect the reality of a particular social network. What may be an unusual or rich secret to a judge may be rather mundane

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212. *See id.*

213. *Id.* at 972.

214. *Id.* at 972–73.

215. *Id.* at 974.

216. *Id.* at 974–75 (“Courts simply need to ask themselves: was the widespread dissemination of this information inevitable, or did the defendant’s actions materially affect the extent of subsequent disclosure?”).

among a different group of people. The social network theory of privacy would invite a judge to impose his or her normative interpretations on someone else's potentially different social network. This has the unique potential to damage marginalized groups with stigmatized identities whose network peculiarities might be wildly foreign to a mainstream judiciary, a problem Professor Strahilevitz did not discuss.

Helen Nissenbaum's theory of privacy as contextual integrity also focuses on the flow of information among social actors.<sup>217</sup> Under this theory, privacy is about "context-relative informational norms"<sup>218</sup> that "govern the flow of personal information in distinct social contexts (e.g., education, health care, and politics)."<sup>219</sup> In other words, privacy is about what is appropriate for different groups to know about us given the nature of the information and the context in which it is shared. An invasion of privacy, then, "is a function of several variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information subjects; on what terms the information is shared by the subject; and the terms of further dissemination."<sup>220</sup> As a governing theory of privacy, contextual integrity is far superior to the rights-based theories discussed above and the nascent social theories of Rachels and Tverdek. Professor Nissenbaum's work retains the core presumption of a social theory—that privacy must account for information exchange among social actors—and eschews problematic reliance on relationship categories that could arbitrarily limit our privacy interests. Although Nissenbaum's work is the latest and most profound attempt to bring social theory to our understanding of privacy, there remain gaps in the theory. Nissenbaum's reliance on the terms of a social interaction threatens a formalistic misapplication of the theory: not all social interactions have terms, and including them in a list of contextual factors could elevate formal written agreements over other, equally important elements. What's more, asking us to analyze the social context of a given incident of disclosure neglects to tell us what kind of context we should be looking for. Nissenbaum's work, then, begs the question: if privacy is determined in context, what is a "private context"?

### B. *Breaches of Privacy as Breaches of Trust*

I argue that a private context is a trusting context. But the sociologist's vision of trust is far broader than the everyday trust we have in our

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217. See generally NISSENBAUM, *PRIVACY IN CONTEXT*, *supra* note 18.

218. *Id.* at 129.

219. *Id.* at 3.

220. Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 18, at 155.

families, loved ones, and friends. It is an aggregation of particularized faith in others and the predictability of future actions. It exists among friends as well as among strangers. Trust reflects a behavioral exchange between two people or among several people or groups. As an exchange—an implied social deal—trust is expressed whenever there is social interaction. And for any interaction that involves sharing some piece of information about ourselves, trust and privacy go hand in hand.

To see how this is the case, consider the following examples gleaned from scholars' assessments of what constitute invasions of privacy. The literature review suggested that breaches of privacy included, among other examples, barging into a bathroom; reading a diary; asking an intrusive question; revealing someone else's secrets disclosed to you; aggregating and analyzing data about someone else, i.e., a consumer, into a virtual persona; staring at another person; overhearing a conversation not meant for you; and governments making documents more available by placing them online. Let us proceed to analyze each example in turn.

Barging into a bathroom and reading a diary are popular examples.<sup>221</sup> Yet that generally accepted view cannot be based on something inherent to a bathroom—the stall's walls or the bathroom door—or a diary—its lock or its owner's name embossed on the front cover; otherwise, privacy would be limited to when we are enclosed by walls or within our property boundaries.<sup>222</sup> It would also ignore the invasion, manifested by a sense of being startled, by someone's mere presence where we do not expect.

Howard White was correct when he suggested that a simple question can be an invasion.<sup>223</sup> Before the repeal of the military's "Don't Ask, Don't Tell" policy, military recruiters were ostensibly prohibited from asking an applicant's sexual orientation.<sup>224</sup> We find such questions invasive even though one person may be proud of his sexual orientation and have no qualms about revealing a detail that might seem intimate to

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221. These examples can be analogized to Goffman's "backstage" in that they are closed off to members of the public, i.e., the audience, and in that the activities that take place there are "kept hidden from [the audience]." See GOFFMAN, *supra* note 52, at 112–13.

222. To be sure, privacy based on property has a long history in American law. See, e.g., *Olmstead v. United States*, 227 U.S. 438, 457, 459–61 (1928) (reviewing precedent that found Fourth Amendment violations where the defendant's right to private property was impinged); see also *id.* at 474–75 (Brandeis, J., dissenting); Kerr, *supra* note 8, at 809–20 (arguing that "a strong and underappreciated connection exists between the modern Fourth Amendment and real property law").

223. See White, *supra* note 29, at 180. Sixty-three percent of respondents agreed that asking an intrusive question could constitute an invasion of privacy.

224. National Defense Authorization Act for Fiscal Year 1994, Pub. L. 103-160, § 571, 107 Stat. 1547, 1670-73 (1993), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (codified at 10 U.S.C. § 654 (2012)).

others. But the crux of the invasion cannot be inherent in the question itself because intimacy and privacy are different things for different people.

Revealing secrets is another prototypical invasion of privacy,<sup>225</sup> but the invasion must be based on more than mere revelation. Spouses can reveal their friends' secrets to each other; indeed, there is anecdotal evidence that many people expect that to happen.<sup>226</sup>

Some feel that private companies and government agencies that aggregate all available information about groups of individuals and categorize those groups based on that analysis invade personal privacy even if that data are never leaked and are never used to any effect.<sup>227</sup> But, again, there is nothing inherently private, in the conventional sense, about that data, which could range from the last book you purchased on Amazon to your prescription drug history and which was all given over to a third-party intermediary at some point. As Dan Solove has argued, analyzing and aggregating information you already disclosed to a third party can only be considered an invasion of privacy if our conception of privacy is based on strict secrecy.<sup>228</sup>

Listening to a conversation between two other people at a party, in a restaurant, or an otherwise public place could amount to a privacy invasion.<sup>229</sup> But if the invasion hinges on the mere fact of overhearing, that conception of privacy transforms everything that passes through one's audiovisual attention field into eavesdropping.

Finally, the mere fact that certain governments are moving to put their public records online has struck some stakeholders as particularly invasive. However, as Helen Nissenbaum noted, the records in question are already public; putting them online is a mere administrative conve-

225. See Bates, *supra* note 60, at 432.

226. During a 1995 episode of "Seinfeld" entitled "The Sponge," George and his girlfriend Susan get into a fight about sharing secrets, with Susan arguing that it is assumed secrets will be shared between boyfriends and girlfriends. George eventually reveals to Susan that Jerry took a woman's number off an AIDS Walk list. Jerry later resists sharing another secret with George because he assumes George will share again. *Seinfeld: The Sponge* (West-Shapiro Dec. 7, 1995).

227. See, e.g., Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 18, at 121 ("When the popular media writes about these webs of personal information from time to time, many react with indignation."); see also DIGITAL PERSON, *supra* note 24, at 1-7 (introducing the "problem of digital dossiers" and highlighting the associated privacy concerns).

228. Solove calls this the "secrecy paradigm." DIGITAL PERSON, *supra* note 24, at 8.

229. See Diekema, *supra* note 137, at 488; Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 L. & PHIL. 559, 559-60 (1998) (positing that privacy should extend beyond "intimate and sensitive information" to the public sphere); see also ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 123-25 (1988). Anita Allen states "anonymity is wrongfully disturbed if uninvited attention is paid or drawn to a person without justification." *Id.* at 124.



nience, not an invasion of privacy in any traditional understanding of the term.<sup>230</sup>

Each example has a behavioral, interactional element that affects both parties, and each behavior becomes an invasion of privacy because it violates the trust we have that others will behave in expected ways. Unannounced entry, whether into a bathroom or onto another's blanket on an empty beach, breaches the trust and discretion implied by occupying a space. Reading a diary violates the trust we have that others will not pierce the implied barrier of the diary's clasp. A person with whom you discuss work, sports, love, mortgage payments, and your daughters' dirty diapers<sup>231</sup> may be able to ask about a recent sexual dalliance, but the same question from a casual friend at work<sup>232</sup> may not only strike you as invasive but could be considered harassment. Given the context, such a question breaches the trust we place in members of our individual social networks that they will continue to behave in a manner appropriate to the relative closeness of our relationship. Revealing secrets to a spouse is not a breach of another's privacy because we expect strong trust and communication in marital relationships, but revelation to a well-connected socialite at a bridge or golf game may extinguish our expectations of privacy because the nature of the relationship indicates a low level of expectations of confidentiality.<sup>233</sup> Data gathering, aggregation, categorization, and subsequent disclosure to third parties could not constitute invasions of privacy under a "secrecy paradigm":<sup>234</sup> they do not take away our control over our information because we already gave up control when we disclosed details about ourselves to banks, consumer websites, and governmental agencies. Rather, the process may be perceived as an invasion of our privacy because the subsequent actions taken with our data violate the expectations we had of the behavior of third parties in whom we entrusted our data.

The notion that invasions of privacy are based on erosions of

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230. Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 18, at 120–21.

231. Social network theorists would call this a "strong tie," or people with whom we share a lot of different information about a variety of topics. It is also called a high "intensity" relationship. See JOHN SCOTT, *SOCIAL NETWORK ANALYSIS: A HANDBOOK* 32 (2d ed. 2000); Gabriel Weimann, *The Strength of Weak Conversational Ties in the Flow of Information and Influence*, 5 *SOC. NETWORKS* 245, 246 (1983).

232. Single-issue friendships at work may be called "weak ties" or "low intensity" relationships. *Cf.* SCOTT, *supra* note 231, at 35 (discussing "the relatively weak ties of less frequent contacts").

233. The well-connected socialite is a "supernode" in social network theory. He is a hub at the center of several networks and may have strong ties to people in different networks, thus increasing the likelihood that information he receives will be further, and widely, disclosed. *Cf. id.* at 83 (discussing how a central point that is close to many other points is "well-connected" or "in the thick of things").

234. See DIGITAL PERSON, *supra* note 24, at 8.

expectations of trust becomes even clearer when we consider acquaintanceship and staring.<sup>235</sup> We expect, or trust, that no one—not even strangers—will stare at us. But staring can happen in public and requires no personal disclosure other than presence, so it is not clear what traditional understanding of privacy, other than the amorphous personhood concept, is implicated. Rather, staring violates our trust that no one will turn us into objects of gawking expressions and leering eyes. Therefore, our privacy is also invaded.

We expect that acquaintances will continue to behave like acquaintances should, a manifestation of particularized trust in groups of others. Georg Simmel argues that acquaintanceship can only work because of discretion; a casual acquaintance shows discretion not by keeping a secret he accidentally overhears, but by restraining himself from ever getting into a position where he oversteps the boundaries of the acquaintanceship in the first place.<sup>236</sup> Simmel adds that certain relationships demand that both parties reciprocally refrain from intruding in the range of things not included in the underlying relationship.<sup>237</sup> Your friends from church or the gym or an extracurricular affinity group may invade your privacy by asking any question, regardless of its ranking on your own personal intimacy scale, about your life outside the church, gym, or that group. This explains why a question can seem inappropriate in one context and engender no objections in another. Trust and discretion, Simmel says, circumscribe all types of relationships and allows them to be born, survive, and endure.<sup>238</sup> It also explains how privacy-as-trust works among different social networks: the imposition of an acquaintance into a social situation more appropriate for a friend or intimate may be considered an invasion of privacy. Different social networks operate under different norms of confidentiality, trust, and discretion. Therefore, the fate of privacy interests in information disclosed to a given social network varies based on the relational expectations we have for that network.

This is also evident in Erving Goffman's explanation for why staring and "intrusive looks"<sup>239</sup> are invasions of privacy. Staring, Goffman writes, is not an ordinary or appropriate social interaction.<sup>240</sup> We stare at zoo monkeys, not people, so the invasion of privacy must either be a

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235. See *RELATIONS IN PUBLIC*, *supra* note 50, at 45 (calling "intrusive looks" an "offense," while saying a "direct gaze is often not an invasion" because it can serve purposes other than being intrusive).

236. Simmel, *supra* note 3, at 452.

237. *Id.* at 458.

238. See *id.* at 444–45, 452.

239. *RELATIONS IN PUBLIC*, *supra* note 50, at 45.

240. *BEHAVIOR IN PUBLIC PLACES*, *supra* note 2, at 86.

threat to the victim's dignity as an end in itself, per Kant, or a breach of some implied duty that strangers owe one another. Goffman argues the latter, calling it a duty "civil inattention."<sup>241</sup> This concept is just one formulation of social trust.

Civil inattention is a form of polite recognition of strangers, manifesting itself in nods of acknowledgment alongside a respectful modesty not to intrude where you do not belong. Staring at a physically injured or deformed bystander is the antithesis of civil inattention. In this example, the target might consider his injury "a personal matter which [he] would like to keep private,"<sup>242</sup> but the fact that it is visible makes it publicly obvious. This obvious injury "differs from most other personal matters"—namely, those personal or private things that go on in the private sphere—because everyone has access to the injury regardless of how much the target would like to keep it secret.<sup>243</sup> We are told not to stare precisely because the behavior's abnormality disrupts the normal course of social interaction appropriate for strangers. It has been known to cause fear and flight<sup>244</sup> and runs counter to our expectations of how strangers are supposed to behave.

Even as bystanders and strangers, Goffman concludes that we owe a duty to other individuals to treat them with discretion, and we expect and trust that others will do the same for us. Every interaction includes bystanders' social obligation to protect social actors so that their interactions can continue. We have a "tactful tendency . . . to act in a protective way in order to help the performers save their own show,"<sup>245</sup> Goffman writes, using his theatrical conceit to analogize to everyday social interaction. This tact is simply another word for discretion and respect, and we trust that it will be there. We also owe a measure of "tactful inattention" to neighboring conversations and nearby individuals to guarantee the "effective privacy" of others, a principle colloquially encapsulated by the phrase, "keep one's nose out of other people's" business.<sup>246</sup> Privacy invasions, therefore, are not simple intrusions into personal territory<sup>247</sup> or the disclosure of negative behaviors;<sup>248</sup> rather, they are socially inappropriate behaviors that violate the trust we have in others.

Putting this all together, privacy-as-trust, then, could create a rela-

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241. *Id.* at 85.

242. *Id.* at 86.

243. *Id.* at 86–87.

244. Phoebe C. Ellsworth et al., *The Stare as a Stimulus to Flight in Human Subjects: A Series of Field Experiments*, 21 J. PERSONALITY & SOC. PSYCHOL. 302, 302 (1972).

245. GOFFMAN, *supra* note 52, at 229.

246. *Id.* at 230.

247. *See supra* Part II.A.1.

248. *See supra* Part II.A.2.

tionship between sharers and recipients of personal data that is akin to a beneficiary-trustee, or fiduciary, relationship. Dan Solove made a similar proposal in *The Digital Person*,<sup>249</sup> but never discussed the salient role of trust in the process and ultimately supported several proposals based on a choice and control conception of privacy. The recipients of our information are entrusted with that information, to safeguard it or use it properly. That notion is reflected in the factors we use to determine the existence of a fiduciary relationship, which includes “the extent to which [one] . . . party entrusted the handling of . . . business affairs to the other and reposed faith and confidence in [the latter party].”<sup>250</sup> In the sections that follow, I will review the social science literature to determine the factors necessary for creating that trusting relationship in the unique context of sharing personal information with others.

### C. *The Sociology of Trust*

For all the research and analysis on trust done by social psychologists, sociologists, economists, and others, there is still some disagreement on how to conceptualize trust.<sup>251</sup> The disagreement is regrettable, and not entirely unexpected, but not fatal to this Article’s argument. Social scientists may disagree on the margins, but an extensive review of the literature on trust evidences broad agreement at its core. Most agree that trust is a “favourable expectation regarding . . . the actions and intentions”<sup>252</sup> of particular “people or groups of people, whether known” or unknown, whether “in-group” or out-group.<sup>253</sup> This kind of trust is what sociologists call particularized social trust: it is interpersonal, directed at specific other people or groups, and forms the basis of person-to-person interaction.<sup>254</sup> It allows us to take risks,<sup>255</sup> cooperate with

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249. See DIGITAL PERSON, *supra* note 24, at 102–03 (positing that businesses that are collecting personal information from us should “stand in a fiduciary relationship with us”).

250. *Pottinger v. Pottinger*, 605 N.E.2d 1130, 1138 (Ill. App. Ct. 1992) (*quoted in* DIGITAL PERSON, *supra* note 24, at 103).

251. See Peter Nannestad, *What Have We Learned About Generalized Trust, if Anything?*, 11 ANN. REV. POL. SCI. 413, 414–32 (2008) (collecting and summarizing the social science literature on trust).

252. See Guido Möllering, *The Nature of Trust: From Georg Simmel to a Theory of Expectation, Interpretation and Suspension*, 35 SOCIOLOGY 403 (2001).

253. Ken Newton & Sonja Zmerli, *Three Forms of Trust and Their Association*, 3 EUR. POL. SCI. REV. 169, 171 (2011).

254. See, e.g., *id.* at 170–72.

255. See JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 91 (1990) (discussing how people can take risks that are “depend[ant] on the performance of another actor” because they trust that other actor).

others,<sup>256</sup> make decisions despite complexity,<sup>257</sup> and create order in chaos,<sup>258</sup> among so many other everyday functions. Trust not only has positive effects on society,<sup>259</sup> it is also essential to all social interaction, is at the heart of how we decide to share information about ourselves, and helps explain when we feel our privacy invaded.

## 1. WHAT IS TRUST?

Particularized social trust is one of three types of sociological trust,<sup>260</sup> all of which are related and interconnected. Particularized trust is the kind of trust implicated when we share things with or interact with others: *A* trusts *B* to do *x*, where *x* can be keeping a secret, doing a job well, or not listening in on a two-way conversation. This kind of trust is sometimes assumed to be entirely based on past knowledge. Russell Hardin thinks so, arguing that “[f]or me to trust you, I have to know a fair amount about you.”<sup>261</sup> But, as Eric Uslaner has noted, past experi-

256. See Diego Gambetta, *Foreward* to *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* ix, ix (Diego Gambetta ed., 1988) (saying “cooperation is predicated [on] trust”).

257. See NIKLAS LUHMANN, *TRUST AND POWER* 4 (1979) (saying that without trust, it would be impossible to endure “the complexity of the world”).

258. See generally BARBARA A. MISZTAL, *TRUST IN MODERN SOCIETIES: THE SEARCH FOR THE BASES OF SOCIAL ORDER* (1996) (discussing the relationship between trust and social cohesion).

259. Trust has been shown to contribute to economic success, effective civic engagement, and health. See S.V. Subramanian et al., *Social Trust and Self-Rated Health in U.S. Communities: A Multilevel Analysis*, 79 J. URBAN HEALTH S21, S21–22 (2002); Charles M. Tolbert et al., *Local Capitalism, Civic Engagement, and Socioeconomic Well-Being*, 77 SOC. FORCES 401, 405–06 (1998) (discussing the positive impact social institutions can have on civic engagement while relying on the idea that “[s]ome institutions . . . are more likely to foster trust and civic embeddedness” than others); Gerry Veenstra, *Social Capital, SES and Health: An Individual-Level Analysis*, 50 SOC. SCI. & MED. 619, 620 (2000) (summarizing literature on interesting correlates with trust, such as economic activity and smooth political functioning). Organizations with a high level of trust are also more efficient and tend to outperform competitors. See Jeffrey L. Bradach & Robert G. Eccles, *Price, Authority, and Trust: From Ideal Types to Plural Forms*, 15 ANN. REV. SOC. 97, 107 (1989). According to several scholars, trust reduces transaction costs in this context. See *id.* at 104–07 for a general discussion of trust as a market efficiency control mechanism; see also MARI SAKO, *PRICES, QUALITY AND TRUST: INTER-FIRM RELATIONS IN BRITAIN AND JAPAN* 47–48 (1992).

260. The related concepts are general social trust, which captures whether people generally think people can be trusted, and institutional trust, which refers to the trust individuals have in government or institutions. These concepts are derived from the sociological literature. Indeed, trust has to be a sociological concept. “[T]rust must be conceived as a property of *collective* units (ongoing dyads, groups, and collectives), not of isolated individuals. . . . [T]rust is applicable to the relations among people rather than to their psychological states taken individually.” J. David Lewis & Andrew Weigert, *Trust as a Social Reality*, 63 SOC. FORCES 967, 968 (1985).

261. Russell Hardin, *The Public Trust*, in *DISAFFECTED DEMOCRACIES: WHAT’S TROUBLING THE TRILATERAL COUNTRIES* 31, 34 (Susan J. Pharr & Robert D. Putnam eds., 2000); see also LUHMANN, *supra* note 257, at 43; Claus Offe, *How Can We Trust Our Fellow Citizens*, in *DEMOCRACY AND TRUST* 42, 56 (Mark E. Warren ed., 1999); Toshio Yamagishi & Midori Yamagishi, *Trust and Commitment in the United States and Japan*, 18 MOTIVATION & EMOTION 129, 130 (1994) (discussing survey that showed that less than half of Americans who were

ence is only one basis for trusting particular people.<sup>262</sup> Another basis for trusting particular people is common identity, or faith “in your own kind.”<sup>263</sup> This is akin to Max Weber’s famous analysis of capitalism in America; he thought that common membership in the Protestant sect in early America allowed people who did not really know each other to trust that they would be competent contractual partners.<sup>264</sup> Talcott Parsons agreed, arguing that trust between persons required common values and common goals: “People defined as sharing one’s values or concrete goals and in whose competence and integrity one has ‘confidence’ come to be thought of as ‘trustworthy individuals’ or ‘types.’”<sup>265</sup> Trust, in this sense, is akin to familiarity, but familiarity can be derived through previous experience or a common identity.

This form of trust is derived from Georg Simmel’s “specific, dynamic, and situational” trust—the trust we have in each other.<sup>266</sup> It is about creating and reacting to expectations of others’ behavior, and it is at the foundation of almost every daily social interaction, including our sharing of personal information. Simmel knew this; he said that society would disintegrate without the trust that people have in each other.<sup>267</sup> As the sociologist Niklas Luhmann noted, trust in others is so essential that an “absence of trust would prevent [a man] even from getting up in the morning.”<sup>268</sup>

What sociologists mean by this type of experiential trust is a set of favorable expectations about the behavior of others. Every time we cross an intersection, we do so with a baseline of trust that the oncoming car is not going to run the red light; every time we enter a crowded subway car, we trust that the passenger sitting in the corner is not going to pull out a gun; when we extend a hand for a handshake, we trust it will be met with someone else’s (clean) hand. We trust that our parents and loved ones will keep our secrets and that our acquaintances will not start behaving like distant strangers or intimate friends. Particularized trust makes it possible to deal with uncertainty and complexity.<sup>269</sup> Knowledge

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questioned thought they could trust “most people,” while only about one quarter of Japanese people thought they could trust “most people”).

262. See Eric M. Uslaner, *Producing and Consuming Trust*, 115 POL. SCI. Q. 569, 573 (2000).

263. See *id.*

264. See MAX WEBER, *The Protestant Sects and the Spirit of Capitalism*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 302, 312 (H. H. Gerth & C. Wright Mills eds., 1946).

265. TALCOTT PARSONS, *ACTION THEORY AND THE HUMAN CONDITION* 47 (1978).

266. Lewis & Weigert, *supra* note 21, at 458.

267. GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 191 (David Frisby ed., Tom Bottomore & David Frisby trans., 2011) (“Without the general trust that people have in each other, society itself would disintegrate . . .”).

268. LUHMANN, *supra* note 257, at 4.

269. See *id.* at 4.

is costly and hard to come by, and often decisions and actions have to come before knowledge even exists.<sup>270</sup> As Simmel implied,<sup>271</sup> and Luhmann made more explicit, “trust begins where knowledge ends.”<sup>272</sup>

Particularized trust is as necessary, if not more so, than generalized, or “metaphysical,” trust.<sup>273</sup> If the former is directed at specific other persons or groups of persons, general social trust is more diffuse, referring to the belief that most people can be trusted, even if you do not know them and even if they are not like you.<sup>274</sup> Those who exude general social trust are trusting and optimistic people.<sup>275</sup> And, finally, there is political or institutional trust, which focuses our trust onto institutions or agents and agencies of government.<sup>276</sup> These forms of trust are all related.<sup>277</sup> Some scholars see them on a continuum of “personal” to “abstract,” referring to the focus of trust, or from “thick” to “thin” or “high density” to “low density,” referring to the ties that sustain trust.<sup>278</sup> Suffice it to say that although the concepts are intimately related, I focus my analysis on particularized trust for several reasons.

First, particularized trust is everywhere. It is reasonable to assume that everyone trusts at least someone.<sup>279</sup> Second, particularized trust needs further study. Social scientists have famously and extensively studied general and political trust, as well as its determinants and the effects of its decline in society.<sup>280</sup> Third, this form of trust is in play

270. See Lewis & Weigert, *supra* note 21, at 462 (noting that it is “costly and time-consuming” to acquire knowledge, and most decisions need to rely on some degree of trust because it may be impossible to acquire enough knowledge to remove all uncertainty about the future).

271. See Simmel, *supra* note 3, at 441 (“[A]pprehension of external nature, along with its elusions and its inaccuracies, still attains that degree of truth which is essential for the life and progress of our species . . . .”); Georg Simmel, *Types of Social Relationships by Degrees of Reciprocal Knowledge of Their Participants*, in *THE SOCIOLOGY OF GEORG SIMMEL* 317, 318 (Kurt H. Wolff ed., trans., 1950) (“The person who knows completely need not trust . . .”).

272. Lewis & Weigert, *supra* note 21, at 462 (analyzing Niklas Luhmann’s work).

273. See *id.* at 458 (analyzing Georg Simmel’s concept of metaphysical trust).

274. See Newton & Zmerli, *supra* note 253, at 171 (discussing how and why general trust is widespread); see also Uslander, *supra* note 263, at 573 (“Generalized trust is the belief that most people can be trusted[, whereas p]articularized trust is faith only in your own kind.”).

275. See Uslander, *supra* note 262, at 573–74.

276. See Newton & Zmerli, *supra* note 253, at 169–70.

277. See *id.* at 172–73 (“A reading of the large and growing social science literature suggests that there are three main models of trust. . . . One [model] claims that different types of social and political trust tend to fit together . . . [while another] model suggests a more complicated pattern in which some but not all forms of trust fit together.”).

278. See *id.* at 171.

279. See *id.* (citing Eric M. Uslander, *Democracy and Social Capital*, in *DEMOCRACY AND TRUST* 121, 123 (Mark E. Warren ed., 1999)).

280. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 347–49 (2000) (arguing, in part, that the decline of community involvement has contributed to a decline in trust among citizens and a decline in the political health of our society).

when someone shares personal information: *A* shares *x* with *B* because *A* trusts *B* with *x*. Therefore, it is essential to speak about privacy alongside particularized trust. Fourth, and perhaps most importantly, particularized trust is a necessary condition for the development of social and political trust,<sup>281</sup> both of which are overwhelmingly positive forces in society. Trust is essential in a modern, heterogeneous society where social, economic, and political actors do not know each other.<sup>282</sup> It is the “bedrock of cooperation” and fosters economic prosperity.<sup>283</sup> It makes democratic institutions run better, more efficiently, and less corruptly.<sup>284</sup> It helps connect us to people different from us and encourages sharing and greater, more meaningful interaction.<sup>285</sup> Trust is a good thing. We need a more trusting society. And centering the law of privacy on protecting and fostering relationships of trust is a significant step forward.

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281. This conclusion has been the source of considerable debate in the social science literature and, although universal consensus is elusive, many scholars agree that there is a positive, yet conditional relationship between particularized trust on the one hand, and general and political trust on the other. For a decade, many sociologists argued that the forms of trust were incompatible: if you only trust people you know or only trust those who look like you, you will not trust strangers or anyone with whom you do not share experience or identity. *See, e.g.*, Kenneth Newton, *Social and Political Trust in Established Democracies*, in *CRITICAL CITIZENS: GLOBAL SUPPORT FOR DEMOCRATIC GOVERNMENT* 169 (Pippa Norris ed., 1999) (discussing correlations between measures of trust and the social, economic, and political barriers of trust); ERIC M. USLANER, *THE MORAL FOUNDATIONS OF TRUST* 54 (2002) (discussing the correlation between generalized and specific trust); Yamagishi & Yamagishi, *supra* note 261, at 160 (concluding that “Americans responded . . . much higher in general trust than Japanese respondents”); Toshio Yamagishi et al., *In-Group Bias and Culture of Collectivism*, 1 *ASIAN J. SOC. PSYCHOL.* 315 (1998) (analyzing the likelihood of giving favor to in-group members because of a preference to do so). More recently, several scholars have shown that particularized trust can promote general trust, or that trusting individuals you know makes you more trusting and can help you trust strangers and society, in general. *See, e.g.*, Paul F. Whiteley, *The Origins of Social Capital*, in *SOCIAL CAPITAL AND EUROPEAN DEMOCRACY* 25, 41 (Jan W. van Deth et al. eds., 1999) (concluding that “face-to-face interactions within voluntary organisations” and “the socialisation process within the family” creates trust); *see generally* Jennifer L. Glanville & Paula Paxton, *How Do We Learn to Trust? A Confirmatory Tetrad Analysis of the Sources of Generalized Trust*, 70 *SOC. PSYCHOL. Q.* 230, 238 (2007) (finding that individuals assess the trustworthiness of people based off of generalizations from experiences). Ken Newton and Sonja Zmerli have argued that particularized trust and general and political trust are positively correlated in some cases. They argue, and show through empirical study, that those who exhibit general trust also exhibit particularized trust; however, it will not always be the case that those who trust other people, in particular, will necessarily and always become trusting people, in general. Newton & Zmerli, *supra* note 253, at 176. This suggests that particular trust is a necessary component of general trust but not necessarily sufficient.

282. *See* Newton & Zmerli, *supra* note 253, at 171; *see also* Nannestad, *supra* note 251, at 422.

283. *See* Nannestad, *supra* note 251, at 422.

284. *See id.* at 428–30.

285. *See* Eric M. Uslaner & Richard S. Conley, *Civic Engagement and Particularized Trust: The Ties That Bind People to Their Ethnic Communities*, 31 *AM. POL. RES.* 331, 332 (2003).



## 2. HOW DOES TRUST DEVELOP?

So far, I have defined trust—favorable expectations as to the behavior of others—and connected trust to privacy by showing that invasions of privacy are felt as such because they breach our expectations of trust. It remains for us to prove *how* trust develops between persons and use this evidence to develop clear guidelines for judges and policymakers when assessing whether disclosures occurred in contexts of trust. Because of the salience of trust in our decisions to share, trust is what makes an expectation of privacy reasonable: it is reasonable to share in a given context if that context is trustworthy. And given that a reasonable expectation of privacy is usually a necessary precondition to winning privacy protection,<sup>286</sup> the genesis of trust is an essential step to be understood. To do this, I have studied the current social science research on the development of trust and concluded that trust can reasonably develop among intimates and friends as well as among strangers.

Among intimates, trust may emerge over time as the product of an iterative exchange;<sup>287</sup> this type of trust is relatively simple to understand and generally considered reasonable. Therefore, I will spend little time proving the reasonableness of trust among intimates. But social scientists have found that trust among strangers can be just as strong and lasting as trust among intimates, even without the option of a repeated game. Trust among strangers emerges, in relevant part, from three social bases—sharing a stigmatizing identity, sharing trustworthy friends, and other forms of transference. When these social elements are part of the totality of the context of a sharing incident among relative strangers, that context should be considered trustworthy and, thus, a reasonable place for sharing.

Traditionally, social scientists argued that trust developed rationally over time as part of an ongoing process of engagement with another: if *A* interacts with *B* over time and *B* acts in a trustworthy manner during those interactions, *A* is in a better position to predict that *B* will act trustworthily the next time they interact.<sup>288</sup> The more previous interactions, the more data points *A* has on which to base his trust.<sup>289</sup> This

286. The generally accepted reasonable expectation of privacy test, derived from Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967), states that a person must "exhibit[ ] an actual (subjective) expectation of privacy and . . . that the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

287. See, e.g., PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 98–99 (1964); John K. Rempel et al., *Trust in Close Relationships*, 49 J. PERSONALITY & SOC. PSYCHOL. 95, 96 (1985).

288. See, e.g., Rempel et al., *supra* note 287, at 96.

289. See Patricia M. Doney et al., *Understanding the Influence of National Culture on the Development of Trust*, 23 ACAD. MGMT. REV. 601, 605 (1998) ("[T]he greater the variety of

prediction process is based on past behavior and assumes the trustor's rationality as a predictor.<sup>290</sup> Given those assumptions, it seems relatively easy to trust people with whom we interact often.<sup>291</sup>

But trust also develops among strangers, none of whom have the benefit of repeated interaction to make fully informed and completely rational decisions about others.<sup>292</sup> In fact, a decision to trust is never wholly rational, it is a probability determination; "trust begins where knowledge ends."<sup>293</sup> What's more, in certain circumstances, trust is also strong early on, something that would seem impossible under a probability approach to trust.<sup>294</sup> Sometimes, that early trust among strangers is the result of a cue of expertise, a medical or law degree, for example.<sup>295</sup> But trust among lay strangers cannot be based on expertise or repeated interaction, and yet, such trust is quite common.

I argue that reasonable trust among strangers emerges when one of two things happen: (1) when strangers share a stigmatizing social identity, or (2) when strangers share strong ties in an overlapping network. Here, we transfer the trust we have in others to a stranger or use the stranger's friends as a cue to his trustworthiness. Sociologists call this a transference process, whereby we take information about a known entity and extend it to an unknown entity.<sup>296</sup> This explains why trust via accreditation works: we transfer the trust we have in a degree from a good law school, which we know, to one of its graduates, whom we do not know. We are willing to trust doctors we have never met even before they give us attentive care, exhibit a friendly bedside manner, or show deep knowledge of what ails us because we trust their expertise, as embodied by the degrees that hang on their walls. Transference can also work among persons. The sociologist Mark Granovetter has shown that economic actors transfer trust to an unknown party based on how

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shared experiences, the greater the generated knowledge base and the more a target's behavior becomes predictable.") (citation omitted).

290. See *id.*; see also David Good, *Individuals, Interpersonal Relations, and Trust*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* 31, 32 (Diego Gambetta ed., 1988).

291. See Michael W. Macy & John Skvoretz, *The Evolution of Trust and Cooperation Between Strangers: A Computational Model*, 63 *AM. SOC. REV.* 638, 648, 655–56 (1998).

292. See, e.g., D. Harrison McKnight et al., *Initial Trust Formation in New Organizational Relationships*, 23 *ACAD. MGMT. REV.* 473, 473 (1998).

293. Lewis & Weigert, *supra* note 21, at 462.

294. See D. Harrison McKnight et al., *supra* note 292, at 473.

295. See Doney et al., *supra* note 289, at 606–07.

296. *Id.* at 606–07 (citing Ronald E. Milliman & David L. Fugate, *Using Trust-Transference as a Persuasion Technique: An Empirical Field Investigation*, 8 *J. PERS. SELLING & SALES MGMT.* 1, 3, 6 (1988); Peter J. Strub & T. B. Priest, *Two Patterns of Establishing Trust: The Marijuana User*, 9 *Soc. Focus* 399, 406 (1976)); see also *id.* at 616.

embedded the new person is in a familiar and trusted social network.<sup>297</sup> That is why networking is so important to getting ahead in any industry and why recommendation letters from senior, well-regarded, or renowned colleagues are often most effective. This is the theory of strong overlapping networks: someone will do business with you, hire you as an employee, trade with you, or enter into a contract with you not only if you know a lot of the same people, but if you know a lot of the right people, the trustworthy people, the parties with whom others have a long, positive history. So it's not just how many people you know, it's who you know.

The same is true outside the economic context. The Pew Research Center ("Pew") found that of those teenagers who use online social networks and have online "friends" that they have never met offline, about seventy percent of those "friends" had more than one mutual friend in common.<sup>298</sup> Although Pew did not distinguish between types of mutual friends, the survey found that this was among the strongest factors associated with "friending" strangers online.<sup>299</sup> More research is needed.<sup>300</sup>

The other social factor that creates trust among strangers is sharing a salient in-group identity.<sup>301</sup> But such trust transference is not simply a case of privileging familiarity, at best, or discrimination, at worst. Rather, sharing an identity with a group that may face discrimination or has a long history of fighting for equal rights is a proxy for one of the greatest sources of trust among persons: sharing values.<sup>302</sup> At the outset, sharing an in-group identity is an easy shorthand for common values and, therefore, is a reasonable basis for trust among strangers.<sup>303</sup>

Social scientists call transferring known in-group trust to an unknown member of that group category-driven processing<sup>304</sup> or characteristic-based trust.<sup>305</sup> But I argue that it cannot just be any group or any

297. See Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985).

298. AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, TEENS, PRIVACY, AND ONLINE SOCIAL NETWORKS: HOW TEENS MANAGE THEIR ONLINE IDENTITIES AND PERSONAL INFORMATION IN THE AGE OF MYSPACE 32 (2007), available at [http://www.pewinternet.org/files/old-media/Files/Reports/2007/PIP\\_Teens\\_Privacy\\_SNS\\_Report\\_Final.pdf.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2007/PIP_Teens_Privacy_SNS_Report_Final.pdf.pdf).

299. See *id.*

300. See *infra* Part V.

301. See Michele Williams, *In Whom We Trust: Group Membership as an Affective Context for Trust Development*, 26 ACAD. MGMT. REV. 377, 381, 385 (2001) (discussing how "[p]eople tend to associate positive beliefs and feelings with the groups to which they belong").

302. Helmut Anheier & Jeremy Kendall, *Interpersonal Trust and Voluntary Associations: Examining Three Approaches*, 53 BRIT. J. SOC. 343, 350–51 (2002) (discussing how trust can be based on "similarity in culture, values and behaviour").

303. See Williams, *supra* note 301, at 380–81.

304. See *id.* at 381, 385.

305. Anheier & Kendall, *supra* note 302, 350–51.

identity; trust is transferred when a stranger is a member of an in-group, the identity of which is defining or important for the trustor. For example, we do not see greater trust between men and other men perhaps because the identity of manhood is not a salient in-group identity.<sup>306</sup> More likely, the status of being a man is not an adequate cue that a male stranger shares your values. Trust forms and is maintained with persons with similar goals and values and a perceived interest in maintaining the trusting relationship.<sup>307</sup> But it is the sharing of values you find most important that breeds trust in the first instance.<sup>308</sup> For example, members of the LGBT (Lesbian, Gay, Bisexual, and Transgender) community are, naturally, more likely to support the freedom to marry for gays and lesbians than are members of any other group.<sup>309</sup> Therefore, sharing an in-group identity that constitutes an important part of a trustor's persona operates as a cue that the trustee shares values important to that group.

There are several reasons why these factors—salient in-group identity and strong overlapping social networks—are the proper bases for establishing when trust among strangers is reasonable and, therefore, when the privacy of those contexts should be protected by society. First, it represents the best social science research into human behavior. It reflects how we actually behave and helps determine when we share our personal information with others. Legal rules that reflect and foster positive social behavior have the best chance of success and of making society better. Second, these are reasonable bases for trust. It is hard to argue that trusting based on experience, identity, and strong overlapping networks is reckless. Third, and most importantly for the law of privacy, in a world where sharing with strangers is important for modern digital life, that most people trust others through these transference processes should, at a minimum, suggest their cultural and social pervasiveness.

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306. Cf. Doney et al., *supra* note 289, at 612 (“The transfer of trust is also inhibited in masculine societies because it is difficult for trustors to identify trusted proof sources from which they may transfer trust to an unknown target. Masculine societies are associated with independence, and people tend to show a skeptical view of others.”) (citation omitted).

307. See Frederique Six et al., *Actions That Build Interpersonal Trust: A Relational Signalling Perspective*, 68 REV. SOC. ECON. 285, 290 (2010); see also Michael R. Welch et al., *The Radius of Trust: Religion, Social Embeddedness and Trust in Strangers*, 86 SOC. FORCES 23, 25–26 (2007).

308. See Gareth R. Jones & Jennifer M. George, *The Experience and Evolution of Trust: Implications for Cooperation and Teamwork*, 23 ACAD. MGMT. REV. 531, 532 (1998) (“An individual whose value system emphasizes loyalty and honesty, for example, will strive to achieve loyalty and honesty in his or her relationships with others. Values contribute to the generalized experience of trust and can even create a propensity to trust . . .”).

309. PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 3 (2013), available at [http://www.pewsocialtrends.org/files/2013/06/SDT\\_LGBT-Americans\\_06-2013.pdf](http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf).

### D. *Benefits of the Approach*

The theory of privacy-as-trust has several advantages over conventional theories of privacy. First, as previously noted, privacy-as-trust is a pragmatic, bottom-up approach that reflects how social actors behave in everyday situations<sup>310</sup> and how we understand what it means to have our privacy invaded.<sup>311</sup> Analyses of human behavior are also better bases for policy: public opinion polls can reflect mere whims, whereas the point of the law is to protect and encourage socially beneficial behavior.<sup>312</sup> A coherent doctrine based on human behavior is, therefore, a qualitatively superior and likely more effective foundation for legal policy.

It is also more determinate and functional for judges and policy makers: it asks judges to determine where trust exists and then, where found, to protect it via an operative tort or constitutional tool. Too often, judges have been forced to approach privacy litigation without a clear understanding of the values at stake and the purposes and goals of privacy. Alan Westin recognized this issue in 1967: “Few values so fundamental to society as privacy have been left so undefined in social theory . . . .”<sup>313</sup> Robert Post called privacy “a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings,”<sup>314</sup> that it is no surprise scholars and judges give up on bringing coherence to it. Myriad other scholars have voiced the same lament.<sup>315</sup> This is especially problematic when a privacy right comes in conflict with another right—the right to speak, for example—whose contours and goals are clearer: privacy will usually lose. In this Article, I have provided clear guidelines for judges and policymakers to use when assessing disclosures in contexts of trust. And although some may argue that my proposal would turn judges into

310. So far, the conclusion that privacy-as-trust reflects real behavior has been based on previous analyses of social interaction, from Simmel, Goffman, Luhmann, and others. This work is supplemented by my own quantitative fieldwork on trust and sharing on online social networks in my doctoral dissertation. Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World* (2015) (unpublished Ph.D. dissertation, Columbia University) (manuscript on file with author).

311. This was Daniel Solove’s advice in *Conceptualizing Privacy*, *supra* note 14.

312. *See, e.g.*, ROGER COTTERRELL, *THE SOCIOLOGY OF LAW* 4–6 (1992).

313. WESTIN, *supra* note 169, at 7.

314. Robert C. Post, *Three Concepts of Privacy*, 89 *Geo. L.J.* 2087, 2087 (2001).

315. *See, e.g.*, J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5.59 (2010) (“Like the emotive word ‘freedom,’ ‘privacy’ means so many different things to so many different people that it has lost any precise legal connotation that it might once have had.”); Judith Jarvis Thomson, *The Right to Privacy*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY* 272 (Ferdinand D. Schoeman ed., 1984) (“Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is.”); Gerety, *supra* note 87, at 234–35 (discussing the utility and expansiveness surrounding the concept of privacy); Gross, *supra* note 59, at 34 (we “stumble when trying to make clear what privacy is”).

armchair sociologists, such criticism misses the fact that we already do this. Judges are already tasked with determining when expectations of privacy are socially “reasonable.”<sup>316</sup> Where we have failed is in providing any helpful and practical guidance to help them consistently, honestly, and justly along that journey.

Second, privacy-as-trust protects and encourages social interaction with intimates and strangers alike. And this is a good thing. It protects sharing and intimacy in close knit relationships by respecting confidentiality. It also appreciates the value in protecting interaction among strangers, which make up the bulk of our everyday interactions. Many of our most enduring relationships begin as encounters among strangers, and most of our daily interactions—market transactions, for example—are ad hoc and rarely move beyond the initial stage of stranger trust. And despite the fact that, at bottom, they are still examples of two strangers interacting, they are essential for a functioning society.<sup>317</sup>

Bright-line rules about choice and exclusion apply universally and comprehensively; that was one of Professor Solove’s main objections to the conventional theories.<sup>318</sup> But trust and discretion may exist among one group in certain contexts but not in others. Members of the HIV-positive community are encouraged to—and many do—disclose their status to friends, family members, and medical professionals.<sup>319</sup> Gene Shelley has shown that this disclosure takes place in a context of trust and discretion: other HIV-positive individuals were much more likely to know about a fellow HIV-positive person’s status than his political affiliations, criminal history, income, religion, major life events, and so on.<sup>320</sup> Those same members of the HIV-positive network were also the most likely recipients of information on HIV status, even compared to family and friends.<sup>321</sup> Fear of stigmatization, homophobia, or worse made HIV-positive individuals hesitate to disclose their status to certain people in certain networks, but it was the feeling of trust in other networks that encouraged them to share.<sup>322</sup> To deny the reasonableness of these disclosures merely because the recipient of information is a stran-

316. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also *supra* note 286.

317. See PUTNAM, *supra* note 280, at 93 (stating that interactions between strangers are “investment[s] in social capital”); see also Welch et al., *supra* note 307, at 27 (discussing that many relationships begin as an “encounter[ ] between strangers,” and while these relationships may not progress beyond that, they are still important “for the functioning of society as a whole”).

318. See Solove, *supra* note 14, at 1090.

319. See Gene A. Shelley et al., *Who Knows Your HIV Status? What HIV+ Patients and Their Network Members Know About Each Other*, 17 SOC. NETWORKS 189, 211 (1995).

320. *Id.* at 203 fig.3.

321. *Id.* at 203–04.

322. *Id.* at 194, 204–13.

ger ignores the fact that trust can emerge among strangers in certain contexts and privileges a bright-line rule over the facts of online social interaction.

On the micro level, social interaction with strangers can help the unemployed find jobs,<sup>323</sup> expand opportunities for love,<sup>324</sup> and create successful and enduring affiliations.<sup>325</sup> On a macro level, it encourages tolerance,<sup>326</sup> it socializes young people to the wider world, and it educates in areas that classroom study cannot. It also imbues the concept of a marketplace of ideas with real meaning. In his 2001 book, *Republic.com*, Cass Sunstein argued that Internet and digital technologies, in general, and aggregators and news feeds, in particular, may undermine democracy because they isolate citizens, allowing them to exist in an echo chamber with those who agree with them and apart from those with different ideas.<sup>327</sup> Failure to protect our interactions with strangers has the same effect. If we are truly interested in creating a diverse pool of content from which to learn and grow, the law should encourage us to expose our thoughts and opinions to people who may have radically different ideas than our own.<sup>328</sup> Any theory of privacy that disincentivizes some measure of sharing and interaction with strangers, then,

323. See, e.g., Susan Adams, *Networking Is Still the Best Way to Find a Job*, *Survey Says*, FORBES (June 7, 2011, 11:01 AM), <http://www.forbes.com/sites/susanadams/2011/06/07/networking-is-still-the-best-way-to-find-a-job-survey-says/>.

324. See, e.g., BERNIE HOGAN ET AL., OXFORD INTERNET INST., A GLOBAL SHIFT IN THE SOCIAL RELATIONSHIPS OF NETWORKED INDIVIDUALS: MEETING AND DATING ONLINE COMES OF AGE 1, 2, 9 (2011), available at [http://blogs.oii.ox.ac.uk/couples/wp-content/uploads/2010/09/MeMySpouse\\_GlobalReport\\_HoganLiDutton.pdf](http://blogs.oii.ox.ac.uk/couples/wp-content/uploads/2010/09/MeMySpouse_GlobalReport_HoganLiDutton.pdf).

325. See Teck-Hua Ho & Keith Weigelt, *Trust Building Among Strangers*, 51 MGMT. SCI. 519, 519 (2005) (“[Trust] holds immense strategic value for a group or organization of any size.”).

326. See, e.g., CIVIL RIGHTS PROJECT, HARVARD UNIV., DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 181–82 (Gary Orfield & Michal Kurlaender eds., 2001) (showing that affirmative action leads to more socialization across racial lines); COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 131–32 (Mitchell J. Chang et al. eds., 2003) (finding that affirmative action leads to decreased stereotyping and lower levels of ethnocentrism); SYLVIA HURTADO ET AL., ENACTING DIVERSE LEARNING ENVIRONMENTS: IMPROVING THE CLIMATE FOR RACIAL/ETHNIC DIVERSITY IN HIGHER EDUCATION iv–v, 19–21 (1999), available at <http://files.eric.ed.gov/fulltext/ED430514.pdf> (discussing how a more diverse student body allows for the reduction of racial conflict); Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education*, in DEBORAH J. WILDS, MINORITIES IN HIGHER EDUCATION: SEVENTEENTH ANNUAL STATUS REPORT 39, 39 (2000), available at <http://files.eric.ed.gov/fulltext/ED457768.pdf>; see also CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 130 (1996) (“[I]nclusion and diversity correspond to the moral virtue of *tolerance*, which is a fundamental element in American political and civic cultural ideals.”).

327. See generally CASS R. SUNSTEIN, *REPUBLIC.COM* (2001).

328. See *id.* at 199–200; cf. Welch et al., *supra* note 307, at 27 (discussing the importance of interactions with relative strangers in the “functioning of society as a whole”).

cripples the very core of a democratic society.<sup>329</sup>

Third, privacy-as-trust will be more effective at encouraging and protecting online social interaction. Internet and other cyber and digital technologies have replaced traditional media in everything from entertainment<sup>330</sup> and advertising<sup>331</sup> to buying coffee.<sup>332</sup> And sociological and economic studies suggest that online social networking and other digital platforms are unique places for sharing intimate details among strangers.<sup>333</sup> Traditional theories of privacy offer no adequate protection for that behavior because they extinguish privacy rights upon publicity. But online platforms encourage the same perceptions of discretion and trust among strangers as they do among intimates.<sup>334</sup> The law has reason to both value and protect social interaction with strangers; therefore, a social theory of privacy is more equipped to both reflect popular behavior and encourage its social benefits.

Fourth, privacy-as-trust is more familiar than it sounds. Robert Post's analysis of the purposes and effects of the tort of intrusion upon seclusion supports my argument.<sup>335</sup> The tort, which protects against any form of invasion of "solitude or seclusion,"<sup>336</sup> would seem, on its face, to reflect the common understanding of privacy as separation and exclusion.<sup>337</sup> Post argues, however, that the tort is meant to "safeguard[ ] rules

329. See *id.* at 200 ("For citizens in a republic, freedom requires exposure to a diverse set of topics and opinions.").

330. See, e.g., Brian Stelter, *Youths Are Watching, But Less Often on TV*, N.Y. TIMES (Feb. 8, 2012), <http://www.nytimes.com/2012/02/09/business/media/young-people-are-watching-but-less-often-on-tv.html?pagewanted=all> (discussing how alternatives such as spending time online and using cellphones are replacing watching television).

331. See, e.g., Verne Kopytoff, *Google's Ad Targeting Goes Behavioral*, S.F. GATE (Mar. 11, 2009) [http://www.sfgate.com/cgi-bin/blogs/techchron/detail?blo-gid=19&entry\\_id=36840](http://www.sfgate.com/cgi-bin/blogs/techchron/detail?blo-gid=19&entry_id=36840) (discussing Google's plans to track user preferences online and then display advertisements that "reflect [people's] interests when they visit [a] partner website").

332. See Molly McHugh, *How to Buy Starbucks Coffee with Your iPhone*, DIGITAL TRENDS (Jan. 19, 2012), <http://www.digitaltrends.com/mobile/how-to-buy-starbucks-coffee-with-your-iphone/> (discussing Starbucks' app allowing users to pay for coffee with their smartphones).

333. See, e.g., MARY MADDEN ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENS, SOCIAL MEDIA, AND PRIVACY (2013), available at [http://www.pewinternet.org/files/2013/05/PIP\\_TeensSocialMediaandPrivacy\\_PDF.pdf](http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf) (discussing the rise in social media and the resulting increase in sharing personal information online).

334. An extensive literature suggests that this trust of strangers derives from the anonymity and pseudonymity provided by digital phones and online platforms. See *id.* at 2-3 ("[F]ew teens embrace a fully public approach to social media. Instead, they take an array of steps to restrict and prune their profiles . . ."). The source of the trust is not my primary concern, however. What matters for the purposes of the social theory of privacy is that trust and discretion characterize interactions among strangers online. A theory of privacy based on that trust and discretion is more equipped to protect that human behavior than theories about choice and exclusion.

335. See generally Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 959-68 (1989).

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

337. See *supra* Part II.A.1 (discussing "separation, sequestration, and exclusion").



of civility that . . . rest[ ] not upon a perceived opposition between persons and social life, but rather upon their interdependence.”<sup>338</sup> Although he never articulated a social theory per se, his analysis accepts the role trust plays in social life and reflects how, as a governing theory, privacy-as-trust would implement the tort.

Post tells his story through the narrative of *Hamberger v. Eastman*.<sup>339</sup> In that case, a landlord installed an eavesdropping device in a couple’s bedroom, the revelation of which greatly distressed, humiliated, and offended the victims.<sup>340</sup> In holding that the device was an invasion of privacy, the court was less concerned with whether, subjectively speaking, the plaintiffs were actually injured. Rather, the court relied on a broader objective principle: that the installation of the eavesdropping device was an intrusion “offensive to any person of ordinary sensibilities.”<sup>341</sup> Or, to use the Restatement’s language, “highly offensive to a reasonable person.”<sup>342</sup> This makes the tort of intrusion rather unique among torts. Successfully litigating most tort claims usually requires the plaintiffs to prove that the defendant’s underlying action actually caused some harm or damage.<sup>343</sup> Claims of negligence, for example, require a showing that the defendant’s negligence in driving a car or operating a crane caused some “demonstrable injury.”<sup>344</sup> But, as Post notes, the tort of intrusion is different: the offense is the action per se; the action does not need attendant negative effects to become offensive.<sup>345</sup> This turns the plaintiff from the recipient of personal injury, in the case of most torts, to the victim of a breach of a social norm that we impliedly owe one another.<sup>346</sup> Post would say that norm is “civility”;<sup>347</sup> I would say trust. The tort of intrusion “focuses the law not on actual injury . . . but rather on the protection of [the individual as] constituted by full observance of the relevant rules of deference and demeanor,” per Goffman.<sup>348</sup>

338. Post, *supra* note 335, at 959–60.

339. *See id.* at 959; *see also* *Hamberger v. Eastman*, 206 A.2d 239 (1964).

340. *Hamberger*, 206 A.2d at 239–40.

341. *Id.* at 242.

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

343. *See, e.g.*, Post, *supra* note 335, at 964 (“[A] lawsuit against you for [a tort] can succeed only if it establishes that your [tortious] behavior has actually caused some demonstrable injury. The basic idea is ‘no harm, no foul.’”).

344. *See, e.g., id.*

345. *See id.* at 964–65.

346. *See id.* at 959, 965 (“[T]he tort does not simply uphold the interests of individuals against the demands of community, but instead safeguards rules of civility that in some significant measure constitute both individuals and community[.]” and “[t]he most plausible interpretation of this legal structure is that the *Restatement* has empowered plaintiffs to use the tort to uphold the interests of social personality . . .”).

347. *See id.* at 965.

348. *Id.* at 963 (discussing E. Goffman, *The Nature of Deference and Demeanor, in INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR* (1967)).

An articulable theory of privacy was not Post's concern, but his central insight is a natural byproduct of privacy-as-trust. He argues that the tort of intrusion is meant to safeguard the social norms that permit social interaction, what he calls "civility rules."<sup>349</sup> Traditional theories of privacy would orient the tort around the protection of an individual's right to be in control of information dissemination and his right to be let alone or take a respite from society.<sup>350</sup> Post reorients the tort around its social purposes. Post's argument runs along the same path as privacy-as-trust because it reflects the role of trust and discretion in sharing and disclosure. And both offer workable solutions for judges to address privacy law problems.

Finally, trust is already a central part of other areas of law; its integration into the law of privacy is, therefore, not only reasonable but also rather unremarkable. Trust is manifested in contract law through the law of good faith and fair dealing. The covenant, which exists behind every contract, codifies the trust we have that our contracting partners will fulfill their obligations and not prevent us from receiving the benefits due us under the contract. No contracting party can predict every eventuality, so ethnomethodologists argue that every contract has an "et cetera assumption": unspoken yet generally understood assumptions about interaction and future contingent actions.<sup>351</sup> Requirements of good faith and fair dealing reflect this "et cetera assumption."<sup>352</sup> The sociologist Randall Collins argued that this and other noncontractual elements of contracts and interaction are largely based on trust.<sup>353</sup> After all, if two parties never trusted each other, it is hard to imagine a contract ever being completed between them; they would either give up or attempt to reduce to writing every conceivable contingency, making the project

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349. *Id.* at 963–64.

350. *See, e.g., id.* at 958–59.

351. *See, e.g.,* Harold Garfinkel, *Studies of the Routine Grounds of Everyday Activities*, 11 *SOC. PROBS.* 225, 247–48 (1964).

352. The implied duty of good faith and fair dealing is a well-known feature of modern contract law. *See, e.g.,* RESTATEMENT (SECOND) CONTRACTS § 205 (1981). Section 1-203 of the Uniform Commercial Code ("U.C.C.") provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (2012). Under the U.C.C., "good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 1-201(b)(20) (2012). A comprehensive review of the duty of good faith is impossible in this space and, in any event, beyond the scope of this paper. The duty arises in a plethora of contexts. *See, e.g.,* Robert S. Summers, *The Conceptualisation of Good Faith in American Contract Law: A General Account*, in *GOOD FAITH IN EUROPEAN CONTRACT LAW* 118, 119 (Reinhard Zimmerman & Simon Whittaker eds., 2000); E. Allan Farnsworth, *Good Faith in Contract Performance*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 153, 153–55 (Jack Beatson & Daniel Friedmann eds., 1995).

353. RANDALL COLLINS, *SOCIOLOGICAL INSIGHT: AN INTRODUCTION TO NON-OBVIOUS SOCIOLOGY* 11–12 (1982).

unworkable.<sup>354</sup> Trust is “social life[’s] . . . fundamental basis”<sup>355</sup> for this precise reason.

Trust is also at the core of the law of privilege: the attorney-client, doctor-patient, and husband-wife privileges, among others, exist because of the paradigms of trust implied in those relationships.<sup>356</sup> And trademark law is meant to protect brand goodwill—the trust that consumers have that certain manufacturers produce quality products.<sup>357</sup> Alongside the practical, empirical, and theoretical benefits of the privacy-as-trust approach, the relative familiarity the law has with trust suggests that my argument for refocusing privacy law will be functional, as well.

#### IV. APPLYING PRIVACY-AS-TRUST: A CASE STUDY IN PRIVACY LAW

Privacy-as-trust is a pragmatic, sociological approach to understanding privacy in the information-sharing context and to crafting a legal response to the problem of protecting privacy in a world where sharing with third parties is inevitable. The theory captures our intuitive sense about intrusions into privacy and reflects social science evidence of our actual behavior. It then links them together into a single doctrine—namely, that because trust is both an essential element of social interaction and at the core of our sense of invasion of privacy, privacy law should protect, foster, and incentivize disclosures in situations of trust. That doctrinal coherence offers judges a workable path for resolving questions of privacy law around three principles.

First, sharing is a good thing. The law of privacy should encourage it by fostering sharing in contexts of trust. Second, trust can exist among friends and intimates as a result of past experience, but trust can also reasonably exist among strangers based on strong overlapping networks and identity sharing. Third, after identifying the nature of the relationship between the parties involved, judges should look to the presence of

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354. *See id.*

355. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 178 (Steven Lukes ed., W.D. Halls trans., 2014).

356. *See, e.g., Williams v. Reed*, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,733) (“When a client employs a[n] attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.”); *Blough v. Wellman*, 974 P.2d 70, 72 (Idaho 1999) (“The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity.”).

357. *See Jeremy N. Sheff, Marks, Morals, and Markets*, 65 *STAN. L. REV.* 761, 773 (2013) (recognizing “the dual mission at the core of trademark law: both to protect producers’ investments in goodwill (by giving them a property-like right in the symbol of that goodwill) and to protect consumers so they can be confident in their purchasing decisions (by imposing tort-like liability for conduct that deceives consumers)”).

indicia of trust from the totality of the circumstances to determine whether a given disclosure was made in a context of trust. If so, the sharer should retain a privacy interest in the information disclosed; if not, the privacy interest is extinguished.

If trust is at the core of information privacy, then the remedy for invasions of privacy should remedy the breach of trust. And if, as the theory and social science evidence suggest, trust can exist or be breached (and privacy can be maintained or invaded) among intimates as well as strangers, then the remedy for invasions of privacy should be similarly broad in scope. This doctrine may have significant implications, all of which merit further research.<sup>358</sup> This Article focuses on applying privacy-as-trust when personal information is shared with other private parties.

Fortunately, the trust-based tort of breach of confidentiality, which has a long tradition in Anglo-American common law, can provide a clear, practical path forward for victims of privacy invasions and for judges looking for answers to vexing problems of modern privacy. Stunted in American law by various contingent historical factors—William Prosser’s failure to include it in his article on “privacy torts,” among other reasons<sup>359</sup>—the breach of confidentiality tort unleashes us from traditional privacy scholarship and reflects the meaning and implications of privacy-as-trust. It focuses not on the *individual* or the nature of the information shared, but rather on the social *relationship* in which the information is shared. Neil Richards and Dan Solove recount the history of the tort of breach of confidentiality, showing how embedded it is in Anglo-American law, and propose a rejuvenation of the tort in the United States by importing modern confidence jurisprudence from Britain.<sup>360</sup> Some scholars, most recently, Woodrow Hartzog, have proposed using the tort to protect privacy,<sup>361</sup> while others have suggested that it

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358. I explored some of the implications of privacy-as-trust in my doctoral dissertation, *Privacy as Trust: Sharing Personal Information in a Networked World*, in the Department of Sociology at Columbia University. See Waldman, *supra* note 310.

359. Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 *GEO. L.J.* 123, 156–58 (2007). Prosser’s inclusion of only four privacy torts—intrusion upon seclusion, public disclosure of private facts, false light, and appropriation—in his article, *Privacy*, 48 *CAL. L. REV.* 383 (1960), and in the *RESTATEMENT (SECOND) OF TORTS* (1977), for which he served as the lead contributor, had the effect of cementing these torts—and no others—as the framework for privacy law in the United States. Richards & Solove, *supra* at 151–52.

360. Richards & Solove, *supra* note 359, at 133–45, 181–82.

361. See, e.g., Woodrow Hartzog, *Reviving Implied Confidentiality*, 89 *IND. L.J.* 763, 765 (2014) (calling for a “revitalization of” the confidentiality tort, Hartzog “argue[s] that the concept of implied confidentiality has not been developed enough to be consistently applied in environments that often lack obvious physical or linguistic cues of confidence, such as the Internet”); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social*

would not do much good.<sup>362</sup> I would like to build on Hartzog's and others' work to show how the tort of breach of confidentiality is premised on particularized social trust and propose modifications to the tort based on the lessons of this Article. I then apply the tort of breach of confidentiality to determine when we should retain privacy interests in previously disclosed information.

### A. *The Tort of Breach of Confidentiality*

The tort for breach of confidentiality is premised on particularized social trust and would impose liability when someone who is expected to keep confidences divulges them. I propose that the claim would have three elements: A successful plaintiff would need to prove that (1) the information is not trivial or already widely known; (2) the original disclosure happened in a context that indicated a confidence; and (3) the use of the information caused an articulable, though not necessarily individualized, harm. These elements are based on the work of Professors Richards and Solove<sup>363</sup> and Helen Nissenbaum's theory of privacy as contextual integrity,<sup>364</sup> but the claim construct departs from those influences to incorporate the lessons of privacy-as-trust. Those lessons are that we expect to retain privacy even after initial disclosures; that strangers can receive information in contexts of trust reasonably based on identity, strong overlapping networks, and other indicia of trust given the totality of the circumstances; and that, as injuries to trusting relationships, privacy harms may antedate any specific, personalized, or defamatory effects. Admittedly, this proposal would take privacy tort law in a new direction; but a reorientation is necessary to protect personal privacy in a networked world filled with both involuntary and voluntary disclosures.

Confidentiality law has always been premised on particularized social trust, as described in privacy-as-trust. For example, the centuries-

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*Change, 1890–1990*, 80 CAL. L. REV. 1133, 1174 (1992) (“I suggest that the privacy tort be formally interred, and that we look to the concept of breach of confidence to provide legally enforceable protection from dissemination of identified types of personal information.”); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 363 (1983) (“More thought should also be given to increasing the use of legal sanctions for the violation of special confidential relationships, in order to give individuals greater control over the dissemination of personal information.”).

362. Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 3 (1995) (“[W]hile contract and fiduciary based actions may occasionally offer relief to a breach of confidence plaintiff who seeks to recover for the revelation of the details of her private life, they have so far proved unattractive remedies, their effectiveness cramped by formal requirements and inadequate damages.”).

363. See Richards & Solove, *supra* note 359.

364. See generally NISSENBAUM, *PRIVACY IN CONTEXT*, *supra* note 18.

old common law evidentiary privileges,<sup>365</sup> where confidentiality law got its start,<sup>366</sup> prohibit one party to a special relationship from revealing the other's secrets in court. As the Supreme Court has stated repeatedly, the attorney-client privilege “encourage[s] full and frank communication”<sup>367</sup> and allows both parties to feel safe to share facts, details, and impressions without fear of disclosure; that is, it protects the relationship and puts the weight of the law behind each party's expectation that the other will behave with discretion. The same is true for spousal privilege, which protects “marital *confidences*” because they are “essential to the preservation of the marriage relationship . . . .”<sup>368</sup> Other special relationships that traditionally warranted confidentiality and discretion—such as those between a doctor and patient, a clergyman and penitent, a principal and agent, a trustor and trustee, a parent and child,<sup>369</sup> to name just a few—are all premised on the expectation that the parties will continue to behave in a manner that protects the disclosing party's confidences.

Notably, the kind of trust at the foundation of special relationship privileges is precisely the kind of particularized social trust that I argue is at the heart of privacy. We trust that our attorneys, doctors, confessors, and other fiduciaries will keep our confidences not because we have long historical data sets that over time prove they do not divulge our secrets. Rather, confidentiality is the norm because of expertise, strong overlapping networks, and transference. Lawyers,<sup>370</sup> doctors,<sup>371</sup> and priests,<sup>372</sup> for example, have canons of ethics that promise confiden-

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365. The attorney-client privilege is the oldest, dating back to 1576. *See* *Berd v. Lovelace*, (1576–77) 21 Eng. Rep. 33; *Austen v. Vesey*, (1577) 21 Eng. Rep. 34; *Hartford v. Lee*, (1577–78) 21 Eng. Rep.; *Kelway v. Kelway*, (1579–80) 21 Eng. Rep. 47; *Creed v. Trap*, (1578–79) 21 Eng. Rep. 74; *Dennis v. Codrington*, (1579–80) 21 Eng. Rep. 53; *Strelly v. Albany*, (1582–83) 21 Eng. Rep. 95.

366. *See* Richards & Solove, *supra* note 359, at 134.

367. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

368. *See* *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (emphasis added).

369. Richards & Solove, *supra* note 359, at 135.

370. AM. B. ASS'N, A.B.A. CANONS OF PROFESSIONAL ETHICS (1937), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons\\_Ethics.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf) (“Canon 37. Confidences of a Client. It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though [sic] there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.”).

371. The modern version of the Hippocratic Oath, written by Dr. Louis Lasgana, states, in part: “I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know.” Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.

372. *Code of Canon Law*, VATICAN, [http://www.vatican.va/archive/ENG1104/\\_P3G.HTM](http://www.vatican.va/archive/ENG1104/_P3G.HTM) (last

tiality. We tend to choose our physicians and lawyers, at least, based on personal recommendations from our embedded networks.<sup>373</sup> We ask close friends and those we know well and then transfer the trust we have in them to the professionals they recommend. Particularized social trust, therefore, is at the heart of these relationships, and the law of evidentiary privileges is meant to protect that trust.

Confidentiality law reflects privacy-as-trust even as British confidentiality jurisprudence has unmoored the tort from the narrow confines of particular relationships. Professors Richards and Solove cite several cases, many of which were dual intellectual property and confidential relationship cases, to show that the required relationships were never very narrow.<sup>374</sup> Those relationships have become even more attenuated in modern British confidentiality law, which only hinges on “the acceptance of the information on the basis that it will be kept secret . . . .”<sup>375</sup> Consider the 1969 case of *Coco v. A.N. Clark (Engineers), Ltd.*,<sup>376</sup> which, according to Richards and Solove, “crystallized” British confidence law.<sup>377</sup> *Coco* involved a trade secret, but the court took the opportunity to define the three elements necessary for a breach of confidentiality claim: The information (1) needs “the necessary quality of confidence about it”; it (2) “must have been imparted in circumstances importing an obligation of confidence”; and (3) there must be some use of the information to the disclosing party’s “detriment.”<sup>378</sup> Richards and Solove show that subsequent case law has shown these categories to be quite broad; the “quality of confidence” prong merely means that the information is “neither trivial nor in the public domain,”<sup>379</sup> and the “circumstances” prong extends beyond defined rela-

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visited Feb. 21, 2015) (Canon 983 § 1 reads: “The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.”).

373. See Roni Caryn Rabin, *You Can Find Dr. Right, with Some Effort*, N.Y. TIMES (Sept. 30, 2008), <http://www.nytimes.com/2008/09/30/health/30find.html>.

374. See Richards & Solove, *supra* note 359, at 136–38 (citing *Duke of Queensberry v. Shebbeare*, (1758) 28 Eng. Rep. 924 (involving unpublished manuscripts); *Yovatt v. Winyard*, (1820) 37 Eng. Rep. 425 (involving medicinal recipes); *Abernethy v. Hutchinson*, (1825) 47 Eng. Rep. 1313 (involving lecture notes); *Pollard v. Photographic Co.*, [1888] 40 Ch. D. 345 (U.K.) (involving photographs); *Prince Albert v. Strange*, (1848) 41 Eng. Rep. 1171 (involving etchings)). Even though these cases all involved intellectual property, many of them are regarded by historians and legal scholars as seminal confidentiality cases as well. See FRANCIS GURRY, *BREACH OF CONFIDENCE* 47 (1984) (“Undoubtedly most of the references in the cases to confidential information as property are metaphorical.”).

375. Richards & Solove, *supra* note 359, at 160 (quoting *Stephens v. Avery*, [1988] W.L.R. 1280 (U.K.)).

376. [1969] R.P.C. 41 (U.K.).

377. Richards & Solove, *supra* note 359, at 161.

378. *Id.* at 161 (quoting *Coco*, R.P.C. at 47).

379. *Id.* at 162.

tionships and even to friends.<sup>380</sup> The “damage” prong has never been clearly explained, but it appears that British law does not require the kind of specific, particularized harm that is common to American tort law.<sup>381</sup>

This jurisprudence reflects many of the lessons of privacy-as-trust. By definition, the tort recognizes that we can retain privacy interests in information already disclosed because the tort holds the subsequent disseminators liable. Most importantly, it distinguishes between the disclosure contexts of trust and wider publicity.<sup>382</sup> Privacy-as-trust would extend the British cases from beyond friends to even the social obligations that arise among acquaintances and strangers, cabined by the presence of the indicia of trust of strong overlapping networks, identity, and expertise. This jurisprudence should also extend beyond cases involving traditional defamatory or reputation damages that result from wide dissemination of information. Under privacy-as-trust and confidentiality law, the breach of confidence is an invasion of privacy because of the damage the breach has done to our expectations and relationships.

Even though the tort so conceived would not fit within traditional privacy scholarship’s individual “right against the world” perspective,<sup>383</sup> our modern socio-technological world requires us to rethink the conventional wisdom. Private parties and public agencies maintain massive “digital dossiers” about us,<sup>384</sup> Internet service providers and other digital platforms hold large amounts of our personal data and may use it to our detriment,<sup>385</sup> and the voluntary and required disclosures associated with online social networking give other users unprecedented access to our personal histories and information. Brandeis and Warren may have been acutely aware of the invasive tendencies of an aggressive yellow press, but the newer risks to personal privacy require innovative solutions that the tort for breach of confidentiality may be able to provide.

### B. *Further Disclosure of Previously Revealed Information*

One of those risks to personal privacy arises when an individual

380. *Id.* at 163–64.

381. *Id.* at 164 (“[S]ubsequent courts have been relatively reluctant both to define the requisite level of injury required and even to state with certainty whether detriment is required as an absolute matter in all cases.”). For a detailed summary and analysis of the case law fleshing out the breach of confidentiality tort in modern Britain, see *id.* at 166–73. See also GURRY, *supra* note 374.

382. See Richards & Solove, *supra* note 359, at 165 (“The determination of whether something is in the public domain, however, is a question of degree . . .”).

383. See, e.g., *supra* notes 34–47 and accompanying text.

384. See DIGITAL PERSON, *supra* note 24, at 1–7, 90–106, and *passim*.

385. See Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 Nw. U. L. REV. 105, 105–24 (2010).



discloses personal information to another person or a small group of people. This happens often: for example, we share information with friends, loved ones, or coworkers. In today's networked world, we share extraordinary amounts of personal information with websites, mobile apps, and Internet intermediaries. Of particular concern is the phenomenon commonly known as "revenge porn," or the dissemination of intimate or sexually graphic images of others without their consent.<sup>386</sup> This often occurs when a jilted lover lashes out after the end of a relationship by taking the intimate images of his former partner and posting them online. The effects are devastating, as Danielle Keats Citron has shown in her recent book, *Hate Crimes in Cyberspace*.<sup>387</sup> At its core, revenge porn is harassment, but it is also an example of an invasion of privacy when privacy is based on trust: a victim shared personal information (a risqué image) with a trusted individual (an intimate partner) in a context of trust only to see that information widely disseminated to disastrous effects. Thus, the tort of breach of confidentiality may be an effective weapon in many minimal disclosure cases.

The general rule of thumb in American privacy law is that the individual disclosing information assumes the risk of further disclosure and thus has no recourse when the recipient of information disseminates it to a wider audience. But privacy-as-trust would hold that, in certain contexts, when someone reveals private information to one or several persons, he or she could reasonably expect that the recipients would not disseminate the information any further. Therefore, a third party's further disclosure of that information—this time to a different and, likely, larger audience—could constitute an invasion of privacy and a breach of confidentiality.

Currently, some courts do not accept this idea at all, and, when others do, there appears to be no coherent scheme for judging when a previous disclosure leaves a privacy interest intact. Lior Strahilevitz addressed these issues in his insightful and powerful article, *A Social Network Theory of Privacy*, arguing that social science literature on information dissemination through social networks could give judges an articulable, quantitative method for adjudicating limited privacy cases.<sup>388</sup> Professor Strahilevitz's work puts us on a path toward a more just and fair privacy jurisprudence. However, his theory is weaker than privacy-as-trust and may fail to protect personal privacy where trust exists among strangers and where different social networks approach a

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386. See generally Mary Anne Franks, *Combatting Non-Consensual Pornography: A Working Paper* (Sept. 7, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2336537>.

387. See DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 1–8 (2014).

388. Strahilevitz, *supra* note 17, at 921.

given piece of information differently. I propose that a robust breach of confidentiality tort informed by British law and the principles of privacy-as-trust would better protect personal privacy and offer judges a clear, practical tool for adjudicating these cases.

Several cases illustrate the danger and lack of coherence in the current law, many of which formed the basis for Professor Strahilevitz's social network theory. I will use some of those same cases here to illustrate the contrast with privacy-as-trust. In *Sanders v. ABC, Inc.*,<sup>389</sup> the California Supreme Court found that an undercover news reporter violated one of her subject's privacy interests in the content of his conversations with her when she broadcast those conversations on television.<sup>390</sup> ABC argued, however, that any privacy right was extinguished by the simple fact that the subject's co-workers had been present and overheard the broadcasted conversations.<sup>391</sup> The court disagreed. Privacy, the court said, "is not a binary, all-or-nothing characteristic. . . . 'The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.'"<sup>392</sup> The concept of limited privacy allowed the court to distinguish between information that was public only as to several co-workers versus information publicized to the broadcast audience of ABC News.

A similar question was resolved in a similar way in *Y.G. v. Jewish Hospital of St. Louis*<sup>393</sup> and *Multimedia WMAZ, Inc. v. Kubach*.<sup>394</sup> In *Y.G.*, a young couple that underwent in vitro fertilization in violation of the doctrines espoused by their conservative church found their images on the nightly news after attending a gathering at their hospital.<sup>395</sup> Prior to the segment, only hospital employees and a parent knew of their plans to have a family, and the young couple was assured that only hospital employees and other participants in the in vitro fertilization program would be attending the party.<sup>396</sup> The court rejected the argument that the couple's attendance at the party waived their privacy rights, holding that the couple "clearly chose to disclose their participation to only the other

389. 978 P.2d 67 (Cal. 1999).

390. *Id.* at 69.

391. *Id.* at 73–75.

392. *Id.* at 72 (quoting J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 5.10(A)(2) (1998)).

393. 795 S.W.2d 488 (Mo. Ct. App. 1990).

394. 443 S.E.2d 491 (Ga. Ct. App. 1994). Both this and *Y.G.* appear to be the seminal cases on the subject, as Strahilevitz cites them in his article and Dan Solove marshals them in his casebook on privacy. See Strahilevitz, *supra* note 17, at 933 n.34; DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 117–18 (4th ed. 2011).

395. *Y.G.*, 795 S.W.2d at 492–93.

396. *Id.* at 492.

*in vitro* couples.”<sup>397</sup> “By so attending this limited gathering, they did not waive their right to keep their condition and the process of *in vitro* private, in respect to the general public.”<sup>398</sup> In *Kubach*, an HIV-positive man who had disclosed his status to friends, health care personnel, and his HIV support group retained a privacy interest in his identity.<sup>399</sup> The court reasoned that a television station could not defy its promise to pixilate his face merely because of Kubach’s previous disclosures because those disclosures were only to those who “cared about him and/or because they also had AIDS.”<sup>400</sup> Kubach, the court said, could expect that those in whom he confided would not further disclose his condition.<sup>401</sup>

And then there are those cases that reject limited privacy. In permitting agents of General Motors to interview associates of Ralph Nader and use the information they gathered under false pretenses to discredit him and his criticisms of the company, a court held that “[i]nformation about the plaintiff which was already known to others could hardly be regarded as private . . . .”<sup>402</sup> Similarly, in an ironically well-publicized case, a Michigan court found that Consuelo Sanchez Duran, the Colombian judge who indicted drug kingpin Pablo Escobar, had no privacy right in her post-relocation Detroit address.<sup>403</sup> She used her real name when shopping and leasing an apartment and told several curious neighbors why she had security guards.<sup>404</sup> The court said that these actions rendered her identity “open to the public eye.”<sup>405</sup>

The results of these cases vary. But most importantly, there seems to be no coherent and consistent way of determining when a previous disclosure extinguishes a right to privacy. Rights-based theories are of little help. Sharers freely and voluntarily disclose information to others, and privacy theories based on separation, secrecy, and exclusion cannot adequately extend beyond an initial disclosure. They would either give individuals unlimited power over disclosure or justify the rigid bright-line rules that characterized *Nader* and *Duran*. In cases like *Y.G.* and *Kubach*, a central animator of the holdings was the fact that the plaintiffs’ free and voluntary agreements to attend the hospital party or go on

397. *Id.* at 502.

398. *Id.*

399. *Kubach*, 443 S.E.2d at 494.

400. *Id.*

401. *Id.* (“Although there was testimony that plaintiff did not explicitly tell his friends and family not to tell anyone else, there was also testimony that they understood that plaintiff’s condition was not something they would discuss indiscriminately.”).

402. *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 770 (N.Y. 1970).

403. *Duran v. Detroit News, Inc.*, 504 N.W.2d 715, 720 (Mich. Ct. App. 1993).

404. *Id.* at 718.

405. *Id.* at 720.

television, respectively, depended upon the defendants' assurances that their identities would not be publicized.<sup>406</sup> They never chose to be identified, and, therefore, the publicity violated their right to choose to be private. This makes little sense as a workable theory of privacy. It would grant individuals total control over a right that must be balanced against others and offers no instruction on where to draw the line between sufficient and insufficient publicity.

Professor Strahilevitz argues that we can rely on social network theory—or the likelihood that a given piece of information would work its way through a given group of persons and transfer to a wider audience—to answer these previous disclosure questions.<sup>407</sup> In *Kubach*, the plaintiff had told medical professionals as well as friends and family about his HIV-positive status.<sup>408</sup> Strahilevitz concludes that since norms prevent patient information from flowing from doctors and since several studies suggest that HIV-status information is rarely divulged outside of certain tight networks, the information was unlikely to get out on its own.<sup>409</sup> Therefore, *Kubach* had a privacy interest on which he could sue ABC for its wide dissemination of his private information. Strahilevitz finds *Y.G.* harder to decide.<sup>410</sup> He has no study on how knowledge of in vitro fertilization travels in a network. Instead, he relies on the assumption that “there appears to be less stigma associated with in vitro fertilization” than, say, HIV status.<sup>411</sup> The pertinent information—that the couple was using in vitro fertilization in contravention of their religious community's wishes—was hard to piece together, so not many people at the gathering would be privy to it. And many of the participants would have been either co-participants or health care providers and thus less likely to spread the news. Strahilevitz found the court's decision to recognize a privacy interest “defensible,” though not a slam dunk under social network theory.<sup>412</sup>

Social network theory, however, would say *Duran* came out

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406. *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994) (“Moreover, defendant explicitly agreed to respect plaintiff's privacy in order to secure his participation in the show.”); *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 501 (Mo. Ct. App. 1990) (“The plaintiffs alleged in their petition that they were ‘assured’ that ‘no publicity nor public exposure’ would occur, that they twice refused interviews or to be filmed, and made every reasonable effort to avoid being filmed, and that no one knew of their reproductive process other than Y.G.’s mother. They stated that the function dealing with the *in vitro* function was a ‘private’ affair in which the public had no legitimate interest.”).

407. Strahilevitz, *supra* note 17, at 970–71.

408. *Kubach*, 443 S.E.2d at 494.

409. Strahilevitz, *supra* note 17, at 977.

410. *Id.*

411. *Id.* at 978.

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

wrong.<sup>413</sup> Strahilevitz notes that shopping and eating in restaurants are “weak-ties interactions,” so using one’s real name would only become interesting and likely to spread through a network if a waiter was able to piece together that the woman to whom he just served salad was the Colombian judge who indicted Pablo Escobar.<sup>414</sup> “Perhaps,” Strahilevitz notes, “a Colombian waiter would have put two and two together,” but the interactions were too fleeting and the information too complex to be likely to get out and reach a wide audience.<sup>415</sup>

None of Professor Strahilevitz’s conclusions are unreasonable. In fact, they make a great deal of sense in part because of the attractive elements of his social network theory. Like Helen Nissenbaum’s privacy as contextual integrity, a social network theory elevates the social context of a given interaction over formal rules and the mere fact of disclosure. It also highlights the important role social science can play in adjudicating modern legal questions. But there remains a question of evidence. Strahilevitz never states how lawyers would go about proving complexity of information, how fast or slow a given piece of information would flow in a network, or how to identify important nodes in a network. Absent substantial evidence from network theorists and social scientists, we are left with assumptions and a judge’s personal views, which would further marginalize populations whose networks look very different from those of mainstream members of the American judiciary. A friend going through in vitro fertilization might be a rather ordinary piece of information for a network of young persons, progressive women, and members of the LGBT community. The same could hardly be said for radically different networks of radically different people.

A social network theory of privacy also has a problematic relationship with strangers. Although Professor Strahilevitz never explicitly argues that strangers automatically extinguish privacy rights, the practical effect of his social network theory, based as it is on the likelihood that information would escape its intended group of recipients, would, at a minimum, make it exceedingly easy for judges to hinge loss of privacy interests when strangers receive information we share.<sup>416</sup> But that should not be the case: trust can exist among strangers. Privacy-as-trust would amend Strahilevitz’s network theory to appreciate the context of information sharing with strangers and retain privacy interests in information shared with strangers who nevertheless exist in a relationship of trust

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413. *Id.*

414. *Id.* at 979.

415. *Id.*

416. *Id.* at 974.

and discretion. The tort for breach of confidentiality may provide a clear, practical alternative.

Armed with the tools of privacy-as-trust and the confidentiality tort, we can consider these cases anew. Currently, the cases are resolved using either a bright-line rule that extinguishes privacy after a minor disclosure to even one person or, to use Professor Strahilevitz's phrase, "an ad hoc, 'I know it when I see it' standard."<sup>417</sup> Ralph Nader and Consuelo Sanchez Duran told several people information about themselves, and a bright-line disclosure rule extinguished any remaining privacy interest in that information as against the world.<sup>418</sup> But, under privacy-as-trust, what matters is not the mere fact that Mr. Nader and Ms. Duran told something to others, but rather the context in which they told it. It is not clear from the record in *Nader* the exact nature of the questions asked and the exact relationships between the interviewees and Mr. Nader; the court only referred to them as "friend[s] or acquaintance[s]."<sup>419</sup> However, we know from British confidentiality law that an obligation of confidence can arise amidst disclosures to friends.<sup>420</sup> *Duran* also makes clear that Ms. Duran only told a few neighbors why she needed security guards and used her real name to lease a home.<sup>421</sup> The nature of the information, not to mention the minimal disclosure to a close-knit group, would engender trust against further disclosure and may satisfy the requirements of the confidentiality tort.

In *Sanders*, ABC had argued that it could broadcast the conversation in question because several of Sanders's co-workers overheard it.<sup>422</sup> The substance of the clip was rather banal: Sanders noted that he used to be a stand-up comedian and that he was hardly enamored with his current job doing over-the-phone psychic readings.<sup>423</sup> Given the original audience and the lack of anything newsworthy or interesting in the conversation, Professor Strahilevitz's social network theory would suggest that it is highly unlikely that such information would have been widely disseminated but for the ABC news report.<sup>424</sup> Here, the result under privacy-as-trust and the confidentiality tort would be the same: Sanders felt comfortable disclosing information because the few people around—his work associates—were trusted to exercise the appropriate discretion

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417. *Id.* at 973.

418. See *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970); *Duran v. Detroit News, Inc.*, 504 N.W.2d 715 (Mich. Ct. App. 1993).

419. *Nader*, 255 N.E.2d at 770.

420. Richards & Solove, *supra* note 359, at 160–64.

421. *Duran*, 504 N.W.2d at 718.

422. *Sanders v. Am. Broad. Cos., Inc.*, 978 P.2d 67, 73–74 (Cal. 1999).

423. See *id.* at 69; Strahilevitz, *supra* note 17, at 976.

424. Strahilevitz, *supra* note 17, at 976.

about whatever non-work information they happened to overhear. Thus, a privacy interest would remain.

*Kubach* and *Y.G.* may have been about juicier bits of information, but privacy-as-trust would protect their rights against further disclosure as well. *Kubach* was about HIV-status disclosure—something that Shelley found is usually only disclosed in an environment contextualized by trust.<sup>425</sup> This kind of information has also been found to be the kind of information that would give rise to an obligation of confidence under British law.<sup>426</sup> Therefore, especially given the social, political, and public health benefits associated with disclosure, privacy-as-trust and confidentiality tort would note the strong trust that exists in an HIV support group and therefore both protect *Kubach*'s privacy and help foster the trust and discretion that permits HIV-status disclosure in the first place. The breach of confidentiality tort would be satisfied: the information has the necessary confidential quality, it was only disclosed to friends, doctors, and an HIV support group, and its dissemination could do significant damage. Similarly, in *Y.G.*, the attendance at the hospital gathering that included only other in vitro fertilization couples and hospital personnel suggests that any information disclosed there was done in an environment of trust,<sup>427</sup> much like *Kubach* disclosing his status to a support group or to fellow members of the HIV-positive community.<sup>428</sup> The couple in *Y.G.* shared with other attendees what they thought was a stigmatizing social identity; they became a network of shared identity even though they were "strangers" in the traditional sense of the word. Moreover, the hospital staff could also be trusted as experts in their fields. Privacy-as-trust and the confidentiality tort would both protect the couple's privacy and encourage them to seek the support of others.

Privacy focused on trust better protects the socially beneficial effects of sharing and gives judges a coherent scheme for answering limited privacy questions. It reflects our intuitive understanding of the injustice of bright-line rules extinguishing privacy rights after one disclosure. Furthermore, it understands the importance of context in sharing behavior. In these ways, a breach of confidentiality tort that accepts that trust and discretion can exist among relative strangers would provide an effective antidote to the current confusion on privacy.

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425. Shelley, *supra* note 319, at 203–04, 208–11.

426. See Richards & Solove, *supra* note 359, at 165 (citing R.G. TOULSON & C.M. PHIPPS, CONFIDENTIALITY 41 (1996)); see also TOULSON & PHIPPS, *supra* at 145–64.

427. *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 492 (Mo. Ct. App. 1990).

428. *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994).

## V. CONCLUSION

We are accustomed to thinking about information privacy in limited ways. Despite their liberating potential, conceptions of privacy based on separation and exclusion, intimacy and deviance, and personhood and autonomy end up damaging our ability to protect our personal information in a world of sharing. At times, these theories are inelastic; they draw bright-line rules that have the perverse effect of taking away personal privacy rights. At other times, these theories are so narrowed by normative judgments that they circumscribe privacy in too tight a noose. Unsatisfied with this, Professor Solove issued a challenge to privacy scholars—take a bottom-up, pragmatic approach to understanding privacy. This Article accepts that challenge and, using lessons from Helen Nissenbaum, Lior Strahilevitz, and others, argues that information privacy is really about trust. A more robust version of the tort for breach of confidentiality may offer some additional protection for personal privacy, particularly in the context of information sharing.

Privacy-as-trust has wide policy implications. As I argued above, it offers judges a clear path to adjudicate information privacy cases, and it suggests that a robust breach of confidentiality tort may be an effective weapon against the scourge of “revenge porn” and other information dissemination cases. It can be used by victims of cyberharassment when embarrassing, intimate, or stigmatizing videos are publicized. It also can affect any aspect of the law that focuses on publicity or publicness because it tries to draw a line between public and nonpublic information. More research is needed to determine if privacy-as-trust can apply in other contexts, such as intellectual property contexts—namely, whether disclosure of inventions for testing, experimentation, or work among colleagues constitutes “public use” in patent law.<sup>429</sup> Privacy-as-trust may also complicate the conventional wisdom that allows online actors to remain anonymous and may even change our understanding of how the Fourth Amendment responds to new technologies.

Some might argue that privacy-as-trust replaces one elusive term—privacy—with another—trust—and, therefore, does little to clarify a vexing and varied concept. There is undoubtedly disagreement among social scientists about the nature and determinants of trust, but I have endeavored to clarify the argument in this Article by showing how there is remarkable uniformity at the core of trust literature. I have also narrowed the scope of the discussion to the information-sharing context and

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429. 35 U.S.C. § 102(a)(1) (2012). This topic is explored in a forthcoming article, Ari Ezra Waldman, *Social Network Norms and Intellectual Property* (Mar. 30, 2015) (unpublished manuscript) (on file with author).



provided tools for practical implementation through the tort of breach of confidentiality.

Seeing privacy as a behavioral exchange of trust and discretion will undoubtedly change how we talk about privacy and, as I have discussed, give judges and legal policymakers clear paths to address certain privacy questions. Privacy-as-trust aims to reorient the way we think and write about information privacy. One of its goals is to break convention and inspire further study. But its primary goal is the protection of privacy in a digital world where information flows are instantaneous, inexpensive, and constant. Situating privacy within its social role is a necessary step toward answering questions posed by Internet, mobile, and future, as yet unimagined, technologies. Sometimes, protecting privacy in this world can feel like tilting at a windmill. But that is only true if we think about privacy in its conventional form. Internet and digital technologies have tapped into an innate human desire to share. Privacy studies should not resist that; they should embrace it.