PRIVACY, FREE SPEECH, AND "BLURRY-EDGED" SOCIAL NETWORKS

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Abstract: Much of Internet-related scholarship over the past ten years has focused on the enormous benefits that come from eliminating intermediaries and allowing user generated one-to-many (one person to many people) communications. Many commentators have noted the tension created between the positive benefits for free speech and the negative effects on user privacy. This tension has been exacerbated by technologies that permit users to create social networks with "blurry edges"—places where they post information generally intended for a small network of friends and family, but which is left available to the whole world to access. The thought is that someone the user cannot identify *a priori* might find the information interesting or useful. These technological advances have created enormous benefits as people connect to each other and build communities online. The technology that enables these communities, however, also creates an illusion of privacy and control that the law fails to recognize. This Article discusses the technological, social, and legal regimes that have created this framework, and proposes a technical solution to permit users to maintain networks with blurry edges while still appropriately balancing speech and privacy concerns.

Introduction

One of the many important aspects of the Internet is the "many-to-many" communication it enables—allowing individuals to distribute a message to many recipients at once.[1] For the first time in history, the economics of publishing place the individual speaker on even ground

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[1] David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal. F. 139, 162; Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 Cal. L. Rev. 833, 834 (2006).

with institutional speakers.[2] For a reasonable fee and with limited technical skills, any person can tell her story to the world.[3]

Every day users upload personally identifiable pictures, movies, data, and stories to the web. A complex and often relatively complete "digital dossier" of some individuals can be assembled from their uploads.[4] These are not dossiers compiled by covert spies skulking in dark corners with penlight cameras, nor by government agents scouring the data files held by big data aggregators.[5] Rather, these dossiers are the result of sometimes extraordinary personal accounts of life's ups and downs told in the first person.[6] Although some people would not share these stories with individuals they had not known, many individuals do post detailed accounts of their lives on a medium that is accessible to millions.[7]

In his book, *Here Comes Everybody*, Clay Shirky describes blog posts he found online during the course of daily web surfing.[8] These posts range from the mundane to unintelligible.[9] According to Shirky, the reason these posts appear completely uninteresting and a waste of time is that "[t]hey're not talking to you."[10] This proposition is both utterly profound and at the same time obvious. Some content on the Internet is not written for me, yet I can still access it. Which begs the question: why do people post content on a medium available to the whole world when that content is not intended for the whole world?

The answer lies in what I call "blurry-edged social networks." A simple non-Internet example of this is listing one's phone number in the white pages. In general, individuals do not want to receive calls from people they do not want to talk to. This would suggest that every residential phone customer would want to have an unlisted number

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[2] *See* Perzanowski, *supra* note 1, at 853–54.

[3] Dan Gillmor, We the Media: Grassroots Journalism by the People, for the People, at xii (2004).

[4] Daniel Solove, The Digital Person: Technology and Privacy in the Information Age 1–2 (2004).

[5] *Id.* at 3–5.

[6] Daniel Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet 5–6 (2007); *see, e.g.*, Amalah: Blog, http://www.amalah.com (description of child's difficulty in school) (last visited Oct. 26, 2009); Breed'em and Weep: Blog, http://breedemandweep.com (description of going through a divorce and suffering from bipolar disorder) (last visited Oct. 26, 2009); Dooce: Blog, http://dooce.com (description of mental breakdown following birth of first child) (last visited Oct. 26, 2009).

[7] *See supra* note 6.

[8] Clay Shirky, Here Comes Everybody: The Power of Organizing Without Organizations 81–83 (2008).

[9] *See id.*

[10] *Id.* at 85.

and may even pay for such a privilege.[11] However, the problem with that approach is that it is impossible to know in advance everyone who fits into the category of people with whom one does not wish to speak. To put it another way, the social cost of not receiving phone calls from someone you fail to identify *a priori* as being in your social network outweighs the harm of having to answer the phone and hang up on telemarketers.[12]

Of course, some people do have unlisted phone numbers. I am one such person. I assume that people who want to reach me will find a way, or that the cost of a failed connection is worth the avoiding the potential harm from unsolicited calls. The cost-benefit calculation that is part of this decision depends on how we rate our ability to identify the set of people with whom we *do* want to speak.

This same calculus may be driving many of people to post personal details on their blogs, pictures on Flickr, movies on YouTube, and place material on the other social networking utilities Web 2.0 has made available.[13] There are equally available, free options to post the same content on password-protected applications, yet some people choose the available-to-the-world option.[14] For example, some new moms and dads post their baby pictures in a photostream on the photo-sharing website Flickr instead of either using Flickr's password protection option, or a free website like Shutterfly.com that allows users to restrict access.[15] Yet no matter how cute the picture of the first bath is, it is unlikely to be directed at the whole world.

So why choose the public option? Similar to the choice people face between listing or not listing one's phone number, Internet users are calculating that they are unlikely to identify *a priori* all the people they intend to reach with their posts because their social network is undefined. To take advantage of this "blurry edge," given the choice of the binary options the Internet currently offers—making information

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[11] *See* Marc Lifsher, *A Proposed Ban on Fees for Unlisted Numbers Put on Hold*, L.A. TIMES, May 6, 2009, at B7.

[12] *See, e.g.*, Telephone Consumer Protection Act, 47 U.S.C. § 227 (2006) (regulating unsolicited telemarketing calls).

[13] *See, e.g.*, Andrew Sullivan, *Why I Blog*, ATLANTIC, Nov. 2008, at 106.

[14] *See* Pamela Paul, *The New Family Album*, TIME, Apr. 12, 2004, at A1.

[15] *See* Flickr Privacy Policy, http://info.yahoo.com/privacy/us/yahoo/flickr/details.html (last visited Oct. 25, 2009); Shutterfly Privacy Policy, http://www.shutterfly.com/help/privacy.jsp (last visited Oct. 25, 2009).

available to the world, or password-protecting it for a perfectly defined set—Internet posters are choosing the former.[16]

The problems with this choice are two-fold. First, the users' assumption that the information they post will only be accessed by people for whom it is written is—to use Shirkey's language—mistaken.[17] Most information on the Internet is captured, indexed, saved, and searchable.[18] Yet people continue to post. This notion of user postings as "semi-private" may have been inherited from two distinct Internet fora, both of which predate Web 2.0, blogs, and modern social discovery sites:[19] these are message boards and personal web pages. Message boards allow users to connect with people with the same interests.[20] Web pages permit individuals unmediated communication with the world. When the two combined in what is commonly called Web 2.0, users imported the semi-private notion of a community without geography into applications that, by default, publish to a much greater audience.[21]

The second problem with users' choices, and perhaps the more important reason to ask whether the current privacy regime is adequate, is that the information individuals post online is rarely limited to identifying information about themselves. This is because one engaging aspect of people's stories is that they usually involve others. There are few available legal protections, however, for the people about whom users post.[22] Privacy law most often bends in the interest of promoting free speech.[23] Thus, the person captured in the photograph posted on

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[16] *See* Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks*, *in* Proceedings of the 2005 ACM Workshop on Privacy in the Electronic Society 74—78 (Sabrina DeCapitani di Vimercati & Roger Dingledine eds., 2005).

[17] *See* Shirky, *supra* note 8, at 85.

[18] *See* Gross & Acquisti, *supra* note 16, at 79.

[19] *See* Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, Sept. 30, 2005, http://oreilly.com/web2/archive/what-is-web-20.html.

[20] *See id.*

[21] *See id.*

[22] *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 528–35 (2001) (holding that the First Amendment protects disclosure of contents of cellular telephone conversations that were obtained through a third party's interception); Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) (allowing poster on a message board to remain anonymous because no libelous statements were made); Cefalu v. Globe Newspaper Co., 391 N.E.2d 935, 939 (Mass. App. Ct. 1979) (holding that publication by a newspaper of a photograph of people standing in line to collect unemployment compensation did not violate a state statute providing that a person has the right against unreasonable, substantial, or serious interference with his or her privacy; the appearance of a person in a public place necessarily involved doffing the cloak of privacy that the law protects).

[23] *See* Neil M. Richards, *Intellectual Privacy*, 87 Tex. L. Rev. 387, 389 (2008); *see, e.g.*, Ostergren v. McDonnell, No. 3:08CV362, 2009 WL 1608884, at *13 (E.D. Va. June 2, 2009) (permitting republication of public documents containing sensitive information, such as

Flickr has little recourse in law if he or she finds the posting offensive.[24] Even when people post information about themselves, the law refuses to recognize this information as "private" information published online, even if the intent was for limited disclosure.[25]

We thus find ourselves in a world where there are strong incentives for people to post personal information about themselves and others in a form made available broadly, in a medium where all data is saved and easily searchable. Opportunities to profess and protect the individual's privacy interest, however, are limited. This Article asks whether we can protect the value captured by exploiting the blurry edge of our social networks while still maintaining the free speech protections and innovative capacity of today's Internet.

Part I suggests that the personal stories people share online are not a result of an innate exhibitionism, but rather of technology that creates an illusion of privacy and control that users can fall victim to.[26] Part II elaborates on blurry-edged social networks and the problem of protecting privacy while facilitating speech by analogizing the current situation to the one in copyright law.[27] Part III looks at how the Internet has changed who makes decisions regarding what private information to publish and to which audience to publish it. Additionally, it examines how the law has failed to keep up with the realities of online publication.[28] Finally, Part IV suggests a technical change—a tool—that would continue to incent users to capture the value of the blurry edge of their social network while promoting free speech interests.[29] I suggest that such a technical modification can lead to changes in privacy law that will permit users to make certain online disclosures without losing all privacy rights in those publications.

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social security numbers, on the Internet); Mathis v. Cannon, 573 S.E.2d 376, 382–83 (Ga. 2002). *But see* Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058, 1088 (9th Cir. 2002) (finding that the First Amendment does not protect a website that published names of doctors known to perform abortions).

[24] *See, e.g.*, Noam Cohen, *Use My Photo? Not Without My Permission*, N.Y. TIMES, Oct. 1, 2007, at C3 (advertising agency uses a photo posted on Flickr of a 15-year-old in one of its advertising campaigns); Eli Saslow, *Teen Tests Internet's Lewd Track Record*, WASH. POST, May 29, 2007, at A1 (high school athlete becomes victim of unwanted attention after photo of her is posted on sports blog).

[25] *See, e.g.*, Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858, 862–63 (Cal. Ct. App. 2009).

[26] *See infra* notes 30–109 and accompanying text.

[27] *See infra* notes 110–132 and accompanying text.

[28] *See infra* notes 133–168 and accompanying text.

[29] *See infra* notes 169–178 and accompanying text.

I. Technological Evolution

Is it true that we are all just inherently exhibitionistic?[30] Or is there something about the Internet's evolution that has created an illusion of privacy and control and an environment conducive to personal disclosures? This question lies at the heart of whether the law should consider some disclosures on the Internet as intended for a limited audience.[31]

The early Internet offered two ways to communicate to the world. The first was message boards that connected individuals in disparate locations with others with similar interests. The second was the World Wide Web (the "Web") that allowed users to speak to the world.[32] When Web 2.0 technologies combined with the advent of powerful search tools, the combination shattered the technical and social divide between these two previously distinct technologies.[33] The rapid nature of the transformation did not allow any time for Internet users to understand the enormity of the changes that had occurred.[34] This Part presents one story about the historical development of publication on the Internet and how it created an environment where users feel comfortable disclosing their private stories.

A. *Bulletin Board Systems and Usenet Newsgroups*

Since the introduction of Internet technology, people have used computers to connect with other users with similar interests. What today is known as user-generated content was once confined to message board forums dedicated to groups with similar interests.[35] On these forums, called Bulletin Board Systems ("BBS"), individuals could read topic-specific message boards, where they could meet others with similar interests, have discussions on various topics, publish articles, download software, and play games, all under a single application.[36] The Whole Earth 'Lectronic Link ("WELL") launched in 1985 as a type of subscrip-

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[30] *See* Andrew Keen, The Cult of the Amateur 16 (2007).

[31] *See* Daniel J. Solove, *I've Got Nothing to Hide*, 44 San Diego L. Rev. 745, 747–49 (2007); Wael Nawara, *Facebook Blues and the Death of Privacy*, Huffington Post, Sept. 14, 2000, http://www.huffingtonpost.com/wael-nawara/facebook-blues-and-the-de_b_286265.html.

[32] *See* O'Reilly, *supra* note 19.

[33] *Id.*

[34] *See* Harry Surden, *Structural Rights in Privacy*, 60 SMU L. Rev. 1605, 1629 (2007) (describing how changes in technology can have a greater impact than changes in the law).

[35] *See* Encyclopedia of New Media 47 (Steve Jones ed., 2003).

[36] *Id.* at 45–47.

tion BBS that aimed to create a virtual community.[37] It also allowed its members to communicate in online forums called "conferences," which were similar to BBS message boards.[38] Originally, only members selected by staff could initiate a conference, but in 1995 the terms changed so any member could.[39] Like a BBS, WELL membership was available to almost anyone, but required a paid subscription and use of one's real name.[40] Postings in any conference were available only to members, unless a user chose to release it to a wider audience on the burgeoning Internet.[41]

Usenet newsgroups are different in that they were available to any user with an Internet connection and an Internet Service Provider ("ISP") that ran Usenet software.[42] One did not need to be a member of an online community or connect to a BBS to start posting.[43] Both Usenet and BBS applications, however, served the same purpose. Usenet newsgroups linked individuals interested in fashion, religion, or TV shows.[44] Anybody could post to a Usenet newsgroup.[45] Although technologies allowing anonymous posting were available, it was common in most groups to post using one's real name.[46] Web-based archiving of Usenet posts did not begin until 1995, when Deja News launched a large, searchable archive.[47] Ten-years later, the Usenet era substantially came to a close when AOL—a provider of Usenet services—announced that it would discontinue its integrated Usenet service in early 2005, citing the growing popularity of weblogs, chat forums, and online conferencing.[48]

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[37] Fred Turner, From Counterculture to Cyberculture: Steward Brand, the Whole Earth Network, and the Rise of Digital Utopianism (2008); *see, e.g.*, Encyclopedia of New Media , *supra* note 35, at 481–82.

[38] Turner, *supra* note 37, at 6.

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See* Encyclopedia of New Media, *supra* note 35, at 457–59; Wendy G. Lehnert & Richard L. Kopec, Web 101, at 290–92 (3d ed. 2007).

[43] Encyclopedia of New Media, *supra* note 35, at 458.

[44] *See* Lehnert & Kopec, *supra* note 42, at 290–91.

[45] Encyclopedia of New Media, *supra* note 35, at 457.

[46] *See* Michael A. Caloyannides, Privacy Protection and Computer Forensics 178–81 (2d ed. 2004); CyberSociety 2.0: Revisiting Computer-Mediated Communication and Community 55 (Steve Jones ed., 1998).

[47] Encyclopedia of New Media, *supra* note 35, at 458–59.

[48] Jim Hu, *AOL Shutting down Newsgroups*, CNet, Jan. 25, 2005, http://news.cnet.com/AOL-shutting-down-newsgroups/2100-1032_3-5550036.html.

BBSs and Usenet both date back to the very beginnings of the Internet.[49] In fact, the Internet's capacity to link users in disparate geographic communities with different interests was presaged by these technologies.[50] Posting to the bulletin boards was public because most BBSs, and all of the Usenet groups, were open to the general public.[51] One was able to locate a group that was of interest, read the FAQ for the group to learn about its subject matter and any posting guidelines, and then jump right into the conversation.[52] A user could go to a group about religion for example, and share intimate details about religious beliefs with an audience pre-disposed to wanting to hear those details and respond. The audience was not driven by the identity of the poster, but by a shared interest in the subject matter. If a user wanted to expand his or her network to include people outside his or her geographic location with similar religious beliefs or interest in discussing religious ideology, message boards provided that forum.

B. *The World Wide Web*

The development of the World Wide Web (the "Web") was different. The early Web was less about finding other users with similar interests than about publication to the world.

Three elements came together by 1995 that made one-to-many publication possible: websites became easy to create, easy to publish, and easy to find.[53] The 1993 release of a software application for navigating the Web called Netscape Mosaic created a free and relatively intuitive means to both access the newly forming graphical Web, and form a vision for one's own website.[54] The earliest websites were created by a small cadre of technology enthusiasts well versed in Hypertext Markup Language ("HTML")—the language of the web.[55] Thanks to the publication of books like *HTML for Dummies*, software programs such as FrontPage and Dreamweaver that created user-friendly interfaces for web page design, and a phenomenon that allowed users to

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[49] *See* Encyclopedia of New Media, *supra* note 35, at 45–46, 457–58.

[50] *See id.*

[51] *Id.*

[52] *Id.*

[53] For example, Trellix Xorporation was created in late 1995 and was one of the early providers of website publishing technology and managed hosting services for small-business and personal websites. Its main product was Trellix Web Express, a server-based website authoring system private labeled by web communities and hosting services. *See* Trellic Xorporation Home Page, http://www.trellix.com (last visited Oct. 20, 2009).

[54] *See* Encyclopedia of New Media, *supra* note 35, at 43–44.

[55] *See id.* at 19.

copy aspects of published websites, creating and maintaining one's own website soon became doable for the average user.[56] Publication required only procuring a web hosting service. Companies such as Yahoo! and Google were founded and helped make the Web searchable by creating directories and indexes of the growing web.[57]

The earliest websites were commercial in nature, but personal websites started to emerge as well. In 1997, in *Reno v. American Civil Liberties Union*, the U.S. Supreme Court described the Internet by observing: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[58] The potential of the Internet to amplify the speech of everyday people was a powerful cultural image.[59] And it was the very public nature of the webpage that captured the imagination on the first generation of Internet settlers in the late 1990s.[60]

C. *Web 2.0*

BBSs, Usenet groups, and the Web came together in early 2000 to form what we now call Web 2.0.[61] The modern blog evolved from the online diary, where people would keep a running account of their personal lives.[62] Early weblogs were simply manually updated components of common websites.[63] However, the evolution of tools to facilitate the production and maintenance of web articles posted in reverse chronological order made the publishing process feasible to a much larger, less technical population.[64] The use of web browser-based software is now a typical aspect of "blogging"—publishing entries in a blog.[65]

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[56] *Id.* at 20. *See generally* Ed Tittel & Stephen N. James, HTML for Dummies (3d ed. 1997).

[57] Encyclopedia of New Media, *supra* note 35, at 401–03.

[58] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).

[59] *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U L. Rev. 1, 33–34 (describing five characteristics of Internet speech that are exemplary of freedom of speech generally); John Perry Barlow, *A Declaration of Independence for Cyberspace*, Feb. 9, 1996, http://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaration (an influential paper written in 1996 describing how early cyber frontiersmen felt about the Internet).

[60] *See* O'Reilly, *supra* note 19.

[61] *See id.*

[62] *See* Encyclopedia of New Media, *supra* note 35, at 33–34.

[63] *See id.*

[64] *See id.*

[65] *See id.*

Blogs can be hosted by dedicated blog hosting services, run by using log software, or on regular web hosting services.[66]

Blogging software heralded the Web 2.0 phenomenon.[67] Finally, users had easy tools to publish to the web. All of the important free speech groundwork that had been laid could apply to technologies for individual users' speech and not just the corporations that had rushed to populate the web with new ways to provide access to pornography.[68] Protecting such user-generated content was the aim of the activists that had argued *Reno* and similar cases.[69] Now, users had the tools to start publishing.

Some blogs are written for a world-wide audience. Some are political blogs where Washington "outsiders" became important political players by gaining wide audiences for perspectives that might never have been published by traditional media institutions.[70] Yet another popular blog was the personal one.[71] This form of publication had the look and feel of a diary. It was a very different notion of web publication than had existed for static web pages. The common understanding of a blog was for users to "get personal," and blog posts tended to resemble posts on message boards and mailing lists.[72]

Building on the idea of a personal diary, users started sharing their most personal experiences. On "mommy blogs," mothers share the everyday highs and lows of child rearing.[73] Those with critical illnesses

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[66] *See id.*

[67] *See* O'Reilly, *supra* note 19. O'Reilly explains:

> If an essential part of Web 2.0 is harnessing collective intelligence, turning the web into a kind of global brain, the blogosphere is the equivalent of . . . the voice we hear in all of our heads . . . . And as a reflection of conscious thought and attention, the blogosphere has begun to have a powerful effect.

Id.

[68] *See* Cheryl B. Preston, *The Internet and Pornography: What If Congress and the Supreme Court Had Been Comprised of Techies in 1995–1997?*, 2008 MICH. ST. L. REV. 61, 73–74.

[69] *See Reno*, 521 U.S. at 870; Press Release, Am. Civil Liberties Union, ACLU Hails Supreme Court Victory in Internet Censorship Challenge (June 27, 1997), *available at* http://www.aclu.org/privacy/speech/15493prs19970627.html.

[70] Rob Morse, *Web Forum Shapes Political Thinking*, S.F. CHRON., Jan. 15, 2004, at A15.

[71] *See* Paul, *supra* note 14.

[72] *See* Karen McCullagh, *Blogging: Self Presentation and Privacy*, 17 INFO. & COMM. TECH. L. 3, 8 (2008). In a 2007 online survey of bloggers, 58.4% said their blogs could be characterized as describing "[m]y life (personal diary/journal)." *Id.* ("[T]he opportunity to continuously work on the project of the self via the interaction on blogs and comments to posts was the main reason why the majority of bloggers engaged in blogging.")

[73] Ellen Lee, *Motherhood Can Be Mother of Blogging*, S.F. CHRON., May 11, 2008, at C1. *See, e.g.*, Just Another Mommy Blog, http://tracey-justanothermommyblog.blogspot.com (last visited Oct. 26, 2009); The Mommy Blog: Adventures from the Wonderbelly of Motherhood,

use blogs to share their stories.[74] For any of life's tough challenges, there could be a blogger writing online about her experiences with it. In some cases, individual bloggers use their own names, and name others in their lives. In other cases, where people wish to hide their identity, their readers "unmask" them.[75]

Early on in blog publishing, people began to realize the potential repercussions of publishing private information on their blogs. A famous example of this is Heather Armstrong, who wrote a blog starting in 2001, Dooce.com, under her own name, and including some sensitive and unflattering comments about her family and employer.[76] On April 22, 2002, she stopped updating her blog, stating:

> There are several reasons that have led me to this decision, the biggest of which is that this website has caused more damage and sorrow to my personal life than it has good. I can't take it anymore. I'd love to be able to sit here and say that artistic expression and freedom are worth all the damage they have wreaked on the personal relationships I have with family, friends, neighbors and employers, but I cannot and will not. The people in my life just aren't ready for it.[77]

Her story was widely retold online and became part of Internet lore; according to the Urban Dictionary, getting "dooced" means to lose one's job because of one's website.[78]

Social networking software also brought the community elements of newsgroups and BBSs together with the public nature of the Web.[79]

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http://themommyblog.net (last visited Oct. 26, 2009); MommyBlog, http://www.mommyblog.com (last visited Oct. 26, 2009).

[74] Benny Evangelista, *Blogs: Baring Their Souls for the World to Read*, S.F. CHRON., Jan. 24, 2005, at C1; *see, e.g.*, Appendix Cancer Survivor Blog, http://appendix-cancer.blogspot.com (last visited Oct. 26, 2009); Cancer Guy, http://www.cancerguy.com/blog (last visited Oct. 26, 2009); Chronicles of a Cancer Patient, http://www.preservationrecords.com/blog (last visited Oct. 26, 2009).

[75] *See, e.g.*, Brad Stone, *A Mystery Solved: "Fake Steve" Is an Editor*, N.Y. TIMES, Aug. 6, 2007, at C1.

[76] Dooce: Blog, http://www.dooce.com (last visited Oct. 1, 2009).

[77] *Untitled Posting*, Dooce: Blog, http://web.archive.org/web/20020526121024/http://dooce.com/ (Apr. 22, 2002).

[78] *See* Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 357 (2007); Marc Cote, Note, *Getting Dooced: Employee Blogs and Employer Blogging Policies Under the National Labor Relations Act*, 82 WASH. L. REV. 121, 122–23 (2007); Elizabeth R. Rita & Eric. D. Gunning, *Navigating the Blogosphere in the Workplace*, COLO. LAW., May 2005, at 55.

These software applications allow users to publish information indented only for limited groups of "friends."[80] A primary reason users participate in these networks is to connect with people they cannot identify or find in advance, such as high school friends.[81] Thus, these networks' main value proposition is to help define their users' blurry-edged networks.

Facebook is a social networking website that allows registered users to connect through their platform.[82] Upon creating an account, users are asked to submit personal information that will help others find them, as well as pictures, interests, date of birth, schools attended, relationship status, and similar personal details.[83] This information is then made available to one's contacts or friends.[84] Using various privacy settings, the user can choose what information can be seen by friends, friends of friends, all Facebook users, or only the individual user.[85] One can also prevent individual contacts and friends from viewing a particular category of information.[86] There is a wide variety of Facebook applications that allow users to participate in activities such as sharing videos they like, reviewing books, and playing online games.[87] To use any application, the user has to turn over her personal information to the application developer.[88] Similarly, Facebook itself also retains all the data that users provide to the site.[89]

The utility of the service is directly linked to how easy an individual user makes it for others to find her. For example, by becoming a part of the network for her high school, the user opens the door to reconnect-

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[79] *See* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. Computer-Mediated Comm. 1, ¶ 11 (2007), http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html.

[80] *See* O'Reilly, *supra* note 19.

[81] James Grimmelmann, *Saving Facebook*, 94 Iowa L. Rev. 1137, 1175 (2009); *see, e.g.*, Classmates.com, http://www.classmates.com (last visited Oct. 26, 2009).

[82] *See* Grimmelmann, *supra* note 81, at 1142–49.

[83] *See id.* at 1149.

[84] *See id.* at 1149–50.

[85] *See id.* at 1145.

[86] *See id.* at 1146–47.

[87] *See id.* at 1147–50.

[88] Sarah Perez, *What Facebook Quizzes Know About You*, ReadWriteWeb: Blog, http://www.readwriteweb.com/archives/what_facebook_quizzes_know_about_you.php (Aug. 27, 2009, 7:29 EST). The American Civil Liberties Union ("ACLU") of Northern California distributed a Facebook application "quiz" about privacy on Facebook applications that was designed, ironically, to raise user awareness about how much information users are forced to turn over to application developers. *Id.*

[89] Facebook, Statement of Rights and Responsibilities, http://www.facebook.com/terms.php (last visited Oct. 1, 2009).

ing with friends from that era of her life. Similarly, she can associate with her university, place of employment, or a professional or social activity, such as attending a particular conference or supporting a social cause. By default, Facebook profiles are not searchable by those who are not users of Facebook.[90] Additionally, users can delete their information from the site at any time.[91] Facebook's Privacy Policy, however, does not address whether the company deletes the information from its records, or what happens to the data transferred to third-party application developers.[92]

Several other social networking applications have sprung up to compete with Facebook. On one end of the spectrum is LinkedIn, a specialized site for professional networking.[93] Although users might post photos of their children on Facebook, LinkedIn users join the site primarily for career-oriented activity. Lawyrs.net is an even more specialized site, designed to allow attorneys to network with other professionals.[94] MySpace, on the other end of the spectrum, offers more opportunities to personalize one's profile page, and has more applications focused at a youth community.[95]

Each of these sites allows some selection in what personal information users disclose to other users.[96] Thus, these sites have conquered the binary decision—whether to publish or keep private certain information—that traditional news institutions, bloggers, and non-traditional intermediaries face. However, there are two problems with relying on this model to solve the privacy dilemma described above.[97] First, these sites accomplish this task by using the property model of cutting themselves off from the rest of the Internet. Users must first become identifiable members of a social network, and then rely on that network to in-

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[90] *See* Facebook, Privacy, http://www.facebook.com/help.php?page=419 (last visited Oct. 25, 2009) (listing privacy options available to Facebook users). A Facebook user's name, picture, and limited aggregated data about her profile are, however, available via third-party search engines like Google. *Id.*

[91] *See id.*

[92] *See id.*

[93] LinkedIn, About Us, http://press.linkedin.com/about. (last visited Oct. 1, 2009); *see* Madeline Kriescher, *Professional Benefits of Online Social Networking*, COLO. LAW., Feb. 2009, at 61.

[94] Lawyrs Home Page, https://www.lawyrs.net (last visited Oct. 1, 2009); *see* Kriescher, *supra* note 93, at 61.

[95] MySpace Home Page, http://www.myspace.com (last visited Oct. 1, 2009).

[96] Eszter Hargittai, *Whose Space? Differences Among Users and Non-Users of Social Network Sites*, 13 J. COMPUTER-MEDIATED COMM. 1, ¶ 14 (2007). http://jcmc.indiana.edu/vol13/issue1/hargittai.html.

[97] *See supra* notes 17–25 and accompanying text. *See generally* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT (2009).

novate and protect all of the personal information that they collect. Reliance on this model was artfully dismissed in Jonathan Zittrain's *The Future of the Internet—And How to Stop It*.[98] Zittrain explains how even when closed systems (like Facebook) allow applications to be created on top of the platform, they still maintain control by leaving open the possibility they could change the terms for application developers at any time.[99] Applying Zittrain's analysis, relying on closed systems for protecting privacy online will impede innovation in privacy and have a detrimental effect generally on the "generativity" of the Internet.[100]

The second problem is that, as stated above, the purpose of these sites is to capture the economic benefit of users' blurry-edged networks.[101] Although this may be financially beneficial for the social networking companies, it may not be such a great deal for users.[102] For example, Facebook allows users to "tag" pictures to identify people in them.[103] Users can also write on other users' virtual "walls."[104] As I stated earlier, our stories are not only about ourselves, but are much richer when we identify other participants in our lives. This richness, however, comes with a price. The Facebook platform is built to incent users to disclose more information. The more users link to their friends, upload photos, and download and recommend applications, the more valuable the platform becomes.[105]

The community collaborates with the platform to push each member to disclose more.[106] Thus, the privacy controls are often designed to

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[98] *See generally id.*

[99] *See id.* at 184 ("Those who offer open APIs on the Net in an attempt to harness the generative cycle ought to remain application-neutral after their efforts have succeeded, so all those who have built on top of their interfaces can continue to do so on equal terms.").

[100] *See id.* By "generativity," Zittrain means the "capacity for unrelated and unaccredited audiences to build and distribute code and content through the Internet to its tens of millions of attached personal computers . . . . Jonathan Zittrain, *The Generative Internet*, 119 Harv. L. Rev. 1974, 1975 (2006). It is this connection between disparate users on a neutral platform that has led to the innovations in Internet applications we see online today. *See id.*

[101] *See* Grimmelmann, *supra* note 81, at 1155–57 (describing the norms and designs of social networks to illicit the most personal information from users).

[102] *See id.* at 1165–1178.

[103] *Id.* at 1145–46.

[104] *Id.* at 1145.

[105] *See id.* at 1155–57.

[106] James Grimmelmann describes seven proxies for privacy risks that people use on Facebook to help them navigate the novel environment. *See id.* at 1160–63. His excellent descriptions show how Facebook's design takes advantage of the misperception inherent in the heuristics to induce more sharing of personal information and use of others' information. *See id.*

incent users not to deploy them.[107] A study of college students found that between twenty and thirty percent did not know how Facebook's privacy controls worked, how to change them, or even whether they themselves had ever charged them.[108] It is socially difficult to say "no" to a friend request, so the basic information the user uploads generally becomes accessible to any Facebook member who can find that user. Invitations from friends to join groups or support causes are similarly hard to decline. Thus, it becomes increasingly challenging to maintain a profile that segregates disclosures suitable for work colleagues and those for high school friends. Herein lies the problem—the design of these sites creates an aura of privacy by suggesting they are for limited disclosure of information to a defined social network of "friends." The law, however, fails to recognize limited disclosures when they occur on a public network.[109]

II. Social Evolution

This Article uses the term "blurry-edged" social networks to describe the simple fact that individuals cannot at any given moment list those people who comprise their social network. Thus, one's social network comprises a finite set of nodes linked by discoverable interdependencies such as "Lauren's nuclear family" or "the students in Ms. Ames class," and other nodes—such as "cancer survivors" or "mountain climbers"—that cannot be accurately enumerated. Persons who fit the latter categories might feel a kinship with others similarly situated, but they cannot list everyone with whom they are thus connected. Another example is that of a smoker: a person might be in the community of people sitting in a conference room who want to take a cigarette break, but unable to identify others in this category without stepping outside the room and publicly wielding a pack of cigarettes.

The personalization of the term "social networks" fits comfortably with the common use of the phrase social networking software or utility

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[107] *See* Jay P. Kesan & Rajiv C. Shah, *Setting Software Defaults: Perspectives from Law, Computer Science and Behavioral Economics*, 82 Notre Dame L. Rev. 583, 589–97 (2006) (emphasizing the power of defaults). *See generally* Gross & Acquisti, *supra* note 16.

[108] Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook*, *in* Privacy Enhancing Technologies 36, 52 (George Danezis & Philippe Golle eds., 2006).

[109] *See, e.g.*, Moreno v. Hanford Sentinel Inc., 91 Cal. Rptr. 3d 858, 863 (Cal. Ct. App. 2009).

described earlier.[110] These services allow users to connect with other "members" of the service who they currently know or once knew, or those who share similar backgrounds and interests.[111] Thus, these services perform the function of giving form to members' blurry-edged networks by connecting them with "friends" who share interdependent links.

For example, if I wish to tell a personal story about problems with my pregnancy, my social network might include people who know and care about me, as well as other women who have had similar problems and are looking for compatriots to discuss ways of dealing with such problems. It is impossible to identify who, in advance of sharing the story, fits in this latter category.

Prior to the advent of a global communications medium that any user could employ to tell her story, this was not a phenomenon that raised privacy issues. In the past, I might have identified members of this group by attending a private meeting organized by a hospital or through telling the story to close friends. Unless a news organization or other publisher chose to publish the details of my saga, I would have had to identify interested individuals first, and only then share. The Internet changed this. Today, I can disclose this information on my blog first, and then women who share my predicament can find me. In other words, I can capture the value of the blurry edge of my social network by announcing to the world the "node" I occupy and letting others with the same characteristics either initiate communication with me or benefit silently from reading my tale. Through this mechanism, I can increase my social network to those with similar interests but in disparate geographical locations. This creates enormous personal value for individuals who share their information online, and societal value as people connect or learn from others with similar interests.

To capture that value, however, one has to disclose their situation. My disclosure might be directed only at women who are situated similarly to me, but the nature of the technology requires that I concurrently reveal it to anyone who can access the Internet.[112] A privacy re-

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[110] *See* Boyd & Ellison, *supra* note 79. Boyd and Ellison use "social network site" rather than "social networking site" because "participants are not necessarily 'networking' or looking to meet new people; instead, they are primarily communicating with people who are already a part of their extended social network." *Id.*

[111] *Id.*

[112] *See* Danah Boyd, *None of This Is Real: Identity and Participation in Friendster*, *in* Structures of Participation in Digital Culture 132 (Joe Karaganis ed., 2007) (describing the fakester phenomenon). A "fakester" profile is one that is created for a non-existent

gime that interprets public disclosure as an absolute bar to any subsequent privacy right claimed in the information creates disincentives for privacy-conscious users to use the medium to capture the value of the blurry edge of their social networks.

Courts have struggled with this problem as they have tried to strike a balance between public and private facts.[113] The most hefty of the privacy torts—public disclosure of private facts and intrusion upon seclusion—recognize disclosure as transforming a private fact into a public one, and there is no protection for republication of public facts.[114] Under this regime, once a private fact is disclosed on the Internet, anyone is free to republish it.[115]

The phenomenon of publishing to round out the blurry edge of one's social network raises another privacy problem: As the aforementioned discussion illustrates our stories are not only about ourselves. A Flickr user's photostream tells her story through pictures. But photos can be captioned or tagged to identify individuals in the pictures. A particular irony with photographs is that often the photographer, who is not in the picture, is the only person with any rights to prevent its republication, and the person of who the photograph was taken has no

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person, or an unauthorized profile claiming to be someone other than the author, such as a pet or a celebrity. Grimmelmann, *supra* note 81, 1152–53.

[113] *See, e.g.*, Kilgore v. Younger, 640 P.2d 793 (Cal. 1982) (holding that California law provides an absolute privilege for publications made by an attorney general in the discharge of an official duty); Steele v. Spokesman-Review, 61 P.3d 606 (Idaho 2002) (finding the facts disclosed by a publication—including the post office box used by Steele for purposes of the taxpayer coalition and the Aryan Nations' legal defense fund, the relocation of Steele from California to Idaho, and that he is a licensed Idaho attorney—are not private facts but were readily available from public sources); Howard v. Des Moines Register & Trib. Co., 283 N.W.2d 289 (Iowa 1979) (finding a person identified as a victim of forced sterilization in a county mental facility was a good example of investigative journalism and was the subject of grave public interest); Ledsinger v. Burmeister, 318 N.W.2d 558, 564 (Mich. Ct. App. 1982) ("[T]he alleged epithet, although offensive, revealed about plaintiff only that he was black. . . . [T]here are no allegations that Mr. Ledsinger's race was in the nature of a private fact. . . . Thus, plaintiffs have failed to state a cause of action for invasion of privacy.").

[114] Restatement (Second) of Torts § 652D cmt. b (2009); *see, e.g.*, Steinbuch v. Cutler, 518 F.3d 580, 586 (8th Cir. 2008) (dismissing plaintiff's publication of private facts claim against defendant because defendant did nothing but blog about a matter that was already public); *cf.* Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994) (finding plaintiff was defamed when defendant announced plaintiff had AIDS on a television talk show even though his medical status was known to a small community of friends, family, and other supporters).

[115] *See, e.g.*, Swerdlick v. Koch, 721 A.2d 849, 859 (R.I. 1998) ("There is no liability [for publication of private facts] when the defendant merely gives further publicity to information about the plaintiff that is already public.") (quoting Restatement (Second) of Torts § 652D cmt. b).

mechanism in law to assert any interest.[116] Blog posts also reveal highly personal information about third parties. Copyright law provides strong protections to authors to prevent subsequent uses of their works.[117] Privacy law presumes that most pictures are taken of public acts and therefore represent public disclosures where there is no reasonable expectation of privacy.[118] As a result, the law offers minimal protections to individuals who believe their privacy has been invaded because of a compelling concern about the free speech interests of the posters.[119]

The constitutional mandate on government to refrain from impeding speech tends to implicate other values that we cherish.[120] The final part of this Article proposes that law and technology should work together to offer users ways to notify readers of how they intend their publications to be used, and offer aggrieved parties a means to notify publishers that they would prefer content to be removed. Each proposal, however, attaches potential harms to free speech.

Here, there are lessons that can be taken from the experience of balancing copyright and speech interests in the Internet age. My ability to protect my privacy may interfere with your ability to speak your life story, just as the monopoly control over words I speak granted by copyright law interferes with your ability to speak those words to convey a different meaning.[121] The combination of the doctrine of fair use and litigation tools such as the preliminary injunction allow copyright owners and subsequent speakers to "duke it out" in negotiations and in the

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[116] Restatement (Second) of Torts § 652C cmt. d; *see, e.g.*, Nelson v. Maine Time, 373 A.2d 1221, 1224 (Me. 1997) (holding the publication by a newspaper of the smiling face of a young boy of Indian origin set against the background of woods and water disclosed nothing not otherwise available to the public and thus did not constitute an invasion of privacy).

[117] *See* 17 U.S.C. § 106 (2006). *See generally* Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068 (9th Cir. 2000); Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

[118] Restatement (Second) of Torts § 652C cmt. d. *But see* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 Wash. L. Rev. 119, 136–50 (2004). Nissenbaum's description of contextual integrity offers a wonderful refutation of this claim in the context of video surveillance. *See id.* Her theory has been applied to privacy issues on Facebook. *See generally* Gordon Hull et al., *Contextual Gaps: Privacy Issues on Facebook* (University of North Carolina at Charlotte Working Paper, 2009), *available at* http://ssrn.com/abstract=1427546.

[119] Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1149, 1190 (2005).

[120] *See, e.g.*, *id.*; Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 Stan. L. Rev. 1559, 1564 (2000).

[121] *See* Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2617–21 (2009).

courtroom to make sure that the values of free speech and inducing speech through economic monopoly are equally balanced.[122]

The Internet threw a wrench in those procedural protections for copyright owners. The elimination of distribution intermediaries meant that any user could post her speech to the world, even if it was speech someone else spoke first. And if it lacked the creative quotient the fair use doctrine required, copyright owners were left with the task of finding the often anonymous speakers and bearing the economic costs that could not be recouped through the liability regime. The social role intermediaries played in assuring that copyrighted content was not unlawfully distributed vanished, and copyright owners were left alone to protect their work without a useful ally.[123]

The same story can be told about privacy. Prior to the advent of the Internet era, individuals lacked the technological megaphone to broadcast their story to the world. Instead, their content was filtered through news or other publishing intermediaries.[124] These entities played an important social role in balancing the newsworthiness of information against the privacy interests of third parties who were identified.[125] Now, individuals can no longer rely on intermediaries to filter privacy-invasive content with no "newsworthy" purpose from reaching a mass audience.

The social toll, however, of eliminating intermediaries falls differently in copyright and privacy. Copyright law provides a broad protection covering all content "fixed in a tangible medium" for the life of the author plus seventy years.[126] The formation and popularity of Creative Commons demonstrates that many users are not interested in protecting their works with the full bundle of rights copyright law automatically confers.[127] Similarly, the debate over Orphan Works—works that remain under copyright protection but whose author cannot be

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[122] There is excellent work on areas where the goals of copyright and privacy conflict. *See, e.g.*, Julie E. Cohen, *DRM and Privacy*, 18 BERKLEY TECH. L.J. 575 (2003). Here I am focused on their relationship to free speech ideals.

[123] *See, e.g.*, Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 347 (2005); Edward Lee, *Developing Copyright Practices for User-Generated Content*, 13 J. INTERNET. L. 1, 20–21 (2009).

[124] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 286–92 (1964); *see also* GILLMOR, *supra* note 3, xii.

[125] *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); *Sullivan*, 376 U.S. 254.

[126] 17 U.S.C. §§ 102, 302 (2006).

[127] Creative Commons is a system that permits users to voluntarily relinquish some of their copyright interests. *See generally* Michael W. Carroll, *Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 45 (discussing the role of Creative Commons' licenses).

found—shows that many people are not interested in asserting their rights for the full term copyright confers.[128] Although the Internet places a greater burden on copyright owners in asserting their rights, it also creates enormous social good from innovation. Not just in opportunities to create fair uses, but in incentives to limit one's copyrights to allow others to access and reuse speech.

In contrast, the Internet has created incentives for people to publish personal information to the world, without any corresponding tools to prevent such speech when it harms a privacy interest. Users, like copyright owners, are left without a valuable ally to protect their privacy. However, unlike copyright owners, individuals are ill equipped to negotiate this new challenge. The laws that protect privacy are far narrower than copyright law.[129] Individuals are less likely to have lawyers on retainer to protect their interest.[130] And more importantly, there is no inherent monetary value in most private information that can be recouped when it is disclosed.[131] So although copyright owners have strong legal protections, with a robust statutory damages regime to weigh in determining whether to protect the value of the copyrighted work against a purported infringer, individuals have weak laws and uncertain economic value to weigh when determining whether to pursue an action against someone who revealed private information about them.

The analogy between copyright and privacy interests is significant here because of the important and substantial benefits to speech the unmediated Internet permits. Persuasive scholarship asserts that the additional cost borne by copyright owners as a result of an open end-to-end architecture is outweighed by the social good, innovation, and economic benefit of the past decade.[132] The current privacy legal regime, however, coupled with the incentives to capture the benefits of blurry-

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[128] *See generally* U.S. Copyright Office, Report on Orphan Works (2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf.

[129] Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1130 (1990).

[130] Privacy torts tend to protect *personal* interests while copyright actions are frequently about *commercial* interests. *See* Rochelle Cooper Dreyfuss, *Finding (More) Privacy Protection in Intellectual Property Lore*, 1999 Stan. Tech. L. Rev. 8, http://stlr.stanford.edu/STLR/Symposia/Privacy/99_VS_8/fsarticle.htm.

[131] *See, e.g.*, Manville v. Borg-Warner Corp., 418 F.2d 434, 437 (10th Cir. 1969) (plaintiff in a privacy suit can recover without proof of special damage and without proving general damages in specific amounts).

[132] *See generally* CODE: Collaborative Ownership and the Digital Economy (Rishab Aiyer Ghosh ed., 2005); Lawrence Lessig, Code and Other Laws of Cyberspace (2000); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 Yale L.J. 273 (2004).

edged social networks, leaves users who find speech online that affects their privacy in a far different posture than that of the copyright owner.

III. Legal Evolution

The body of law that addresses publication of private information evolved in a very different environment than exists today. In particular, courts that have addressed decisions to publish information later claimed to be private were largely addressing decisions made by institutional publishers and whether the facts they published were newsworthy.[133] Courts that examined whether information was kept private by the plaintiff did not have to consider publication intended for a limited audience made on a public medium.[134] Here I consider these two questions and offer examples to show why the current law might not be adequate to protect individuals' privacy.

A. *Choice of What to Publish*

Newspapers and other publishers have traditionally served as institutional barriers between people who wanted to speak and their intended audience. For one's message to travel beyond the water cooler or town square, a speaker had to find an entity with a business model sufficient to bear the costs of the technology necessary for one-to-many communication. The Internet eradicated that barrier. With transmission costs no longer at issue, any speaker could communicate anything to the world, at times anonymously. In essence, the individual became the sole decider of what was newsworthy. And there are fewer physical or technical limitations on the amount of content that can be published.

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[133] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 704 (1972); *see also* Edward Lee, *Freedom of the Press 2.0*, 42 Ga. L. Rev. 309, 339-51 (2008).

[134] *See, e.g.*, M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623, 632 (2001) ("[T]he claim of a right of privacy is not 'so much one of total secrecy as it is of the right to *define* one's circle of intimacy—to choose who shall see beneath the quotidian mask.' Information disclosed to a few people may remain private.") (quoting Hill v. Nat'l Collegiate Athletic Assn., 7 Cal. 4th 1, 25 (1994)).

The social benefits of this are enormous and well documented.[135] There are, however, costs as well. The very notion of newsworthiness inheres a balancing that some content is not newsworthy: that there exists limitations on what news institutions will publish and delegate to a category they choose, based on institutional capacity, not to publish. It is clear that the choice is binary: either publish information and make it part of the public record, or do not publish and keep the information private.

The legal doctrine of newsworthiness developed in this binary framework.[136] Courts are frequently willing to find that the institution's choice to publish information is itself a sufficient sign of newsworthiness.[137] It is, ironically, the latter that is most important to this discussion of privacy. News organizations' institutional message is to convey information. But even the most famous of the newspapers' slogans, "All the news that's fit to print," implies that equally important is the determination not to print information.[138] News organizations make decisions not to publish information regularly.

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[135] *See, e.g.*, *Net Neutrality: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 109th Cong. 11 (2006) (statement of Prof. Lawrence Lessig), *available at* http://commerce.senate.gov/pdf/lessig-020706.pdf; Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 932–33 (2001); Martin M. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 Nw. U. L. Rev. 1083, 1130–31 (1999); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. Rev. 1653, 1670–73 (1998); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805, 1834–38 (1995); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141, 145–49 (2003); Eli M. Noam, Media Concentration in the United States: Trends and Regulatory Responses, http://www.vii.org/papers/medconc.htm (last visited Nov. 8, 2009).

[136] *See* Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 Sup. Ct. Rev. 225, 227–29, 265. The determination of newsworthiness requires a finding by reasonable members of a community, a jury, that the information in question is of public interest; this interest is then balanced against the right to privacy. *Id.*

[137] *See, e.g.*, Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) (stating that the constitutional privilege to publish truthful material "ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest"); Shulman v. Group W Prods., Inc., 955 P.2d 469, 485 (Cal. 1998) ("An analysis measuring newsworthiness of facts about an otherwise private person involuntarily involved in an event of public interest by their relevance to a newsworthy subject matter incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest.").

[138] Clay Calvert & Robert D. Richards, *Journalistic Malpractice: Suing Jayson Blaker and the New York Times for Fraud and Negligence*, 14 Fordham Intell. Prop. Media. & Ent. L.J. 1, 1 (2003).

This delegation makes sense. Sensationalist journalism is usually turned towards the already famous; individuals who are already in the public eye and about whom the public is interested, and who generally have the resources to assert their privacy interests where reporting steps over the line.[139] More traditional news reporting balances privacy interests writ large against the need of the public to know. Of course, in a world of unlimited column inches, it is easy to criticize the role of intermediaries in making decisions about what the public needs to know. However, even as that barrier is eliminated today, the editorial judgment exercised by institutional journalists is valued.[140]

There are several reasons proffered to explain this value. The one that this Article focuses on is the mission of news institutions. We assume that the free speech goals that society values will be furthered by the media. Of particular interest here is the judgment exercised to determine when to print private facts or personally identifiable information about individuals, or documentary or other evidence that the government deems private. Internet applications that allow users to directly communicate with a mass audience leave the decision to publish or not publish this type of information to individuals or institutions with very different missions than traditional news institutions. This raises the question of whether a legal regime developed around binary choices made by institutions with news-distributing missions and limited space to publish makes sense given today's technologies.[141]

This methodology breaks down when publication space is unlimited and newsworthiness determinations are made by individuals or entities with different goals than traditional news institutions.[142] As an

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[139] *See* CHARLES J. SYKES, THE END OF PRIVACY 188 (1999).

[140] Studies demonstrate that despite the amount of free blog news content available, people still want to read newspapers. *See, e.g.*, Robert Ivan, The Krugman Paradox: Newspaper Websites' Inability to Generate Economically Sustainable Advertising Revenue (unpublished Master of Arts thesis, New York University, 2008), *available at* http://blog.metaprinter.com/Projects/Robert_Ivan_MAthesis_2008NYU.pdf.

[141] *See* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1043–44 (2009) (offering an alternative description for the deference given to news media and arguing that courts are too willing to take privacy into account).

[142] *See* Daniel Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L.R. 1195, 1199–1200 (2006) (arguing that bloggers should be held to a reasonable standard of care when disclosing information about others). The *Restatement (Second) of Torts* defines matters of public concern as those about which the public is interested in learning. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (2009). This public interest is determined by societal customs and values. A matter ceases to be of public concern when the publicity surrounding it "ceases to . . . giv[e] information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with

example, consider the case of Megan Meier, a 13-year old user of MySpace. After a falling out with a friend, the friend's mother and babysitter created a false account for a young boy named Josh who pretended to be in love with Megan.[143] After exchanging numerous messages, "Josh" told Megan: "This world would be a better place without you."[144] Megan committed suicide the next day.[145] There was no reporting about the case for a year as police investigated the crime.[146] After Megan's aunt told the story to the *St. Louis Dispatch*, a press frenzy ensued.[147] The newspaper chose not to publish the name of Meier's friend's mother—Lori Drew, who was under investigation at that time—to protect the privacy of her daughter.[148] Within hours, however, bloggers posted photographs, telephone numbers, e-mail details, and addresses of the Drews on various websites.[149]

In this case the blogger and institutional publication made different choices about protecting the privacy of a minor. Whether the right decision was made, as a normative matter, is a hard call. But the definition of newsworthiness is hardly helpful. One can imagine that the newspaper and the blogger each felt strongly about their choice. Sarah Wells, a blogger who revealed the first and last names of Lori Drew, stated in an e-mail message, "I don't regret naming Drew."[150] What is interesting is to look at the institutional competence of the individuals who made that choice. The newspaper reporter was a third-party to the events, and made what one assumes to be a dispassionate choice based on a historical memory of addressing questions like this in the past. Ms. Wells, on the other hand, was a middle-aged mother in Virginia who was outraged by the newspaper story and performed her own investiga-

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which a reasonable member of the public, with decent standards, would say that he had no concern." Restatement (Second) of Torts § 652D cmt. h.

[143] *See* Tamara Jones, *A Deadly Web of Deceit: A Teen's Online "Friend" Proved False, and Cyber-Vigilantes Are Avenging Her*, Wash. Post, Jan. 19, 2008, at C1.

[144] *Id.*

[145] *Id.*

[146] *See* David Hunn & Joel Currier, *Law Lags as Taunts Ruin Lives*, St. Louis Post-Dispatch, Nov. 19, 2007, at B1.

[147] *Id.*

[148] Steve Pokin, *"MySpace" Hoax Ends with Suicide of Dardenne Prairie Teen*, Suburban Journals, Nov. 11, 2007, http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt.

[149] *See* Jones, *supra* note 143.

[150] *See* Stephen Hutcheon, *Net Vigilantes Target MySpace Mum*, Sydney Morning Herald (Austl.), Dec. 7, 2007, http://www.smh.com.au/news/web/vigilantes-target-myspace-mum/2007/12/07/1196812986566.html.

tion to find Lori Drew's name to release on her blog.[151] Once released, the impact was immediate. Subsequent posters revealed her address, phone number and business information.[152] Her daughter had to leave school, but thanks to the Internet's memory, a record of this will follow her forever.[153]

Again, this might be an appropriate outcome. But the binary choice of whether personal information of Lori Drew should have been published was understood differently by the newspaper and Ms. Wells. Should Lori Drew or her daughter wish to pursue a privacy claim against Ms. Wells, the legal doctrine that applies would ask whether this information is truthful and newsworthy.[154] As argued above, this regime contemplates certain variables that permit a balance in favor of permitting publication. Unlike Ms. Wells, the *St. Louis Dispatch* is in the business of distributing news.

The important point here is that the legal doctrine for balancing privacy and speech interests contemplates binary publication. News intermediaries are presumed to have a worldwide audience and create a lasting record. Their choice to publish imbues the subject of the publication with worthiness to become part of the public record. The doctrine presumes that choices are made to keep certain things private, and this is an acceptable burden on free speech.[155] Choices to publish are made for the furtherance of speech values we cherish.[156]

Ms. Wells' decision to publish private facts may have come after a thoughtful internal debate about whether the information was newsworthy. But in a world of millions of potential citizen journalists and bloggers, only one less-thoughtful speaker has to release private facts, for any reason they deem valid, for information to become part of the

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[151] *See* Jones, *supra* note 143. Wells' blog, Bluemerle, has the quixotic subtitle given her role in the disclosure of Lori Drew, "It is a joy to be hidden but a disaster not to be found." *See generally* Bluemerle: Blog, http://www.bluemerle.blogspot.com (last visited Oct. 26, 2009).

[152] *See* Jones, *supra* note 143.

[153] Lauren Collins, *Friend Game*, New Yorker, Jan. 21, 2008, at 34.

[154] *See supra* note 137 and accompanying text.

[155] *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 997–98 (D.C. Cir. 2005). Judge David Tatel of the U.S. Court of Appeals for the District of Columbia argued that courts should "weigh the public interest in compelling disclosure [versus] the public interest in newsgathering." *Id.* (Tatel, J., concurring). A district court judge in a separate case later rejected Judge Tatel's test, however, on the grounds that it contradicted precedent and would put judges in the "very troubling" position of defining what is or is not newsworthy. Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 139 (D.D.C. 2005).

[156] *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (holding that the press is not immune from generally applicable tort laws violated while gathering information).

public record. This applies to any personal information about themselves or others. If the information is newsworthy, it is not entitled to any privacy protection.

B. *Choice of Where to Publish*

Professor Lior Strahilevitz identified the problem courts have in applying the public-private distinction to determine if individuals have a reasonable expectation of privacy in facts disclosed to a small group.[157] He asked whether social networking theory could provide empirical results useful to courts in determining whether a certain fact would have become public based on disclosure to one member of a community.[158] His work is premised on the assumption that the law should not treat disclosure as a binary choice; one should not give up all legal recourse based on a single disclosure if, empirically, it can be proved that that disclosure would not have likely led to broad knowledge of the fact at issue.[159]

Publication to a global communications medium raises a question of far greater scope and scale than Strahilevitz's work assumes. But at issue is the same question of whether certain disclosures are worth incentivizing, or, put differently, whether the social good from encouraging people to post their stories outweighs the harm to free speech from stopping others from re-publishing those stories. If the social value secured by disclosures that fill in the blurry edge of our social networks is worth capturing, then the law needs to change to protect the privacy of private information once disclosed, even beyond what Strahilevitz proposes.

In 2009, in *Moreno v. Hanford Sentinel, Inc.*, the California Court of Appeals wrestled with the question of whether publishing information on a public network available to the world could be considered private if the intent was to reach only a limited audience.[160] Cynthia Moreno wrote a negative post about her hometown called "An ode to Coalinga," and posted it on her MySpace web-page.[161] A reader submitted the ode to the local newspaper, *The Coalinga Record*, and it was published in the Letters to the Editor section.[162] It was attributed to Cynthia, using her

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[157] *See* Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. Chi. L. Rev. 919, 943–46 (2005).

[158] *Id.* at 939–43.

[159] *Id.* at 973–74.

[160] 91 Cal. Rptr. 3d 858, 860 (Cal. Ct. App. 2009).

[161] *Id.* at 861.

[162] *Id.*

full name.[163] A significant backlash resulted, with the Moreno family receiving death threats and having to close the family store.[164]

Cynthia and her family sued the newspaper for, among other things, a violation of the public disclosure of private facts tort.[165] The court ruled that there were no private facts at issue because "[a] matter that is already public or that has previously become part of the public domain is not private."[166] The court noted that an individual who published information on the Internet could not have a reasonable expectation that it would remain private, finding that "the fact that Cynthia expected a limited audience does not change the above analysis. By posting the article on Myspace, Cynthia opened the article to the public at large. Her potential audience was vast."[167]

Here, one might imagine that Cynthia's intent was to reach an audience other than the town newspaper, but she had no way to indicate that to her readers. And even after she decided to remove the post from her MySpace page, she had already lost control of the ode because someone had copied it.[168] MySpace and other social networking sites create the illusion of limited publication and control, but there is no technological mechanism for users to effectuate that control, nor law that recognizes those decisions.

IV. A Proposal for a Technological Solution

Internet users are releasing incredible amounts of personal content online, often without the means to communicate their privacy preferences or limit third-party uses of this content.[169] Once disclosed, users largely surrender control over this information. The result is more expression, but also more potential for privacy harms and abuse.

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[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Moreno*, 91 Cal. Rptr. 3d at 862 (citing Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665 (Cal. Ct. App. 1984)).

[167] *Id.* at 863.

[168] *Id.* ("That Cynthia removed the Ode from her online journal after six days is also of no consequence. The publication was not so obscure or transient that it was not accessed by others. . . . The only place that Campbell could have obtained a copy of the Ode was from the internet, either directly or indirectly.").

[169] *See* Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 740 (1989). *But see* Daniel J. Solove & Marc Rotenberg, Information Privacy Law 1 (2d ed. 2006) ("Information privacy concerns the collection, use, and disclosure of personal information."); Paul M. Schwartz, *Internet Privacy and the State*, 32 Conn. L. Rev. 815, 816 (2000) (criticizing this "privacy-control" paradigm which "conceives of privacy as a personal right to control the use of one's data").

Without more control, users may face the adverse consequences of unwanted scrutiny and eventually become more reluctant to generate and share content. A technological solution that empowers users to express their privacy preferences with regard to content they share would be a valuable way to provide some privacy protections while protecting important free speech interests.

One option would be a tool for users to express and exercise privacy preferences over uploaded content. It would permit users to express their intentions by tagging any uploaded content with an icon that immediately conveys privacy preferences to third parties. Based on a Creative Commons model,[170] this tool would provide immediate visual feedback to third parties about the content owner's preferences and link to a website that provides more detailed guidance about how the content may be used or shared. It could also allow third parties to ask publishers to remove content they prefer not be published.

Social norms in online communities, as well as existing principles of law, promote neighborly respect for expressed privacy preferences.[171] Websites have long been able to signal to search engines their intention to keep certain pages private by embedding metadata.[172] Search engines overwhelmingly respect these preferences.[173] For example, when a person tags their webpage with a particular metatag, search engines voluntarily skip the page and do not include it in their databases.[174] A similar metadata system targeted at individual postings or pictures could create a widely accepted social norm regarding privacy preferences. Commercial and individual users alike are likely to be

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[170] *See supra* note 127 and accompanying text. Creative Commons provides Internet users with a simple means to "tag" content they upload online with varying copyright preferences. So instead of the default rules that automatically attach to creative and original works, users "tag" their content to allow sharing of their works, for example, but only with attribution and only for noncommercial users. These "tags" include both prose that is visible to other Internet users and code that technologies like search engines can read. Creative Commons currently offers six different licenses, allowing users to express a variety of preferences about how their work can be used.

[171] *See* James Grimmelmann, *Accidental Privacy Spills*, J. of Internet L., July 2008, at 3.

[172] *See generally* Nat'l Info. Standards Org., Understanding Metadata 1 (2004) (discussing metadata and how it is used).

[173] *Id.*

[174] Examples of these metatags include a "robots.txt" file that search engines look for on websites that they index. *See* Web Robots Home Page, http://www.robotstxt.org (last visited Oct. 26, 2009). Jonathan Zittrain describes a system of privacy genealogy with data about the content attached to its signaling how the data would be treated. Zittrain, *supra* note 97, at 227 ("One could indicate that photos were okay to index by tag but not by facial recognition, for example.").

more hesitant to abuse user privacy preferences when such preferences appear clearly alongside the relevant content.

Enhancing privacy will likely promote voluntary content sharing; because this is the goal, the model needs to be deployed in a way that does not limit users to only particular websites or environments. Much user-generated content is already available without requiring users to login to access the content, and gate-keeping measures do little to stem the easy flow of content across communities and hosts.[175] To be effective, the privacy tool should be equally mobile. By the same token, to ensure widespread adoption and full use, it should be available to all consumers of user-generated content at the click of a button, regardless of whether they are members or authenticated users of the particular environment in which it is deployed.

Similarly, privacy preferences expressed with the tagging tool should not trigger mandatory enforcement by technological means. Such a "kill switch" for content would defeat the ultimate objective of promoting content sharing, and severely chill speech online. Simple neighborliness requires that we honor each other's privacy preferences until and unless they conflict with stronger interests or implicate free speech values. When such a situation occurs it should be possible to override another user's preferences. Automatic enforcement of expressed privacy preferences would disrupt this delicate balance.

I believe that Internet users will respect the social force of a plea for privacy if they are faced with such a request at the time they access online content. The best way to counteract the erosion of privacy that results when content of a personal nature is shared online is not to deploy gate-keeping measures and an inflexible hierarchy that privileges certain speakers, subjects, or expressed preferences. It is to let simple social signals exert their own force across forums.

Finally, such a tool could help courts incent public disclosures that allow users to capture the value of the blurry edge of their social network by providing some legal privacy protections for them. As Strahilevitz and other privacy scholars have long recognized, a regime that treats

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[175] *See, e.g.*, Jon Swartz, *Soon Millions of Facebookers Won't Be Incognito*, USA Today, Sept. 12, 2007, at B3. On September 5, 2007, Facebook announced that profiles with the privacy options set to public would be indexed and searchable by major search engines. Philip Fung, *Public Search Listings on Facebook*, The Facebook Blog, http://blog.facebook.com/blog.php?post=2963412130 (Sept. 5, 2007, 15:57 EST). The public search listing of a profile shows a thumbnail of that user's profile picture and provides a link to interact with that user on Facebook. *Id.* A user can also restrict what information shows in their public listing by going to the Search Privacy page. *Id.*

all disclosures equally as a barrier to claims under the privacy torts fails to take into account the benefits and nature of some disclosures.[176] However, a regime that fails to recognize that not everything posted on the Internet is meant for every user of the Internet, fails to understand the technology and its potential.[177]

A tool that allows users to express their preferences about content they post could lead to other changes in privacy law as well. The privacy torts apply an objective test to determine whether a reasonable person would have found a particular disclosure offensive.[178] This standard makes sense because it would be too burdensome to require people to calculate the particular sensitivity of an individual in advance of publication. However, if individuals were able to tag content with their preferences, or be provided with a means to contact others to let them know they find a particular disclosure to have invaded their privacy, one could envision the privacy torts evolving to take account of individual privacy expectations.

Conclusion

If we expect Internet users to continue to use Web 2.0 technologies, we need to provide tools to enable them to make more granular decisions about the privacy of the content they post. Some may continue to publish even in the absence of such protections, but many will stop expressing themselves and refrain from building online communities as they experience the harms of privacy violations. A tool which provides users with some means to express their preferences as to their content coupled with concurrent changes in current privacy tort law to recognize those preferences would offer Internet users some privacy protections while maintaining equally important protections for speech.

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[176] *See* Strahilevitz, *supra* note 157, at 973–75; *see also* Anita Allen, *Dredging up the Past: Lifelogging, Memory, and Surveillance*, 75 U. Chi. L. Rev. 47, 74 (2008); Woodrow Hartzog, *Promises and Privacy: Promissory Estoppel and Confidential Disclosure in Online Communities*, Temp. L. Rev. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473561; Sharon Sandeen, *Relative Privacy: What Privacy Advocates Can Learn from Trade Secret Law*, 2006 Mich. St. L. Rev. 667, 707; Solove, *supra* note 142, at 1200; Robert Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, 25 Hofstra Lab. & Emp. L.J. 395, 417 (2008).

[177] Other scholars have proposed interesting ways to change the privacy torts to protect limited disclosure. *See, e.g.*, Zittrain, *supra* note 97, at 223; Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 Santa Clara L. Rev. 313, 392 (2009); Eli Edwards, Throwing it All Away: Community, Data Privacy and False Choices of Web 2.0 (May 10, 2008) (unpublished manuscript) *available at* http://ssrn.com/abstract=1370745.

[178] Restatement (Second) of Torts § 652A (2009).