The Mythical Right to Obscurity

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THE MYTHICAL RIGHT TO OBSCURITY:
A PRAGMATIC DEFENSE OF NO PRIVACY IN PUBLIC

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ABSTRACT

In several states, citizens who videotaped police misconduct and distributed the videos via the Internet recently were arrested for violating state wiretapping statutes. These arrests highlight a clash between two key interests—the public’s desire to hold the officers accountable via exposure and the officers’ desire to keep the information private. The arrests also raise an oft-debated privacy law question: When should something done or said in public nevertheless be legally protected as private?

For decades, the answer has been: “There can be no privacy in that which is already public.” However, given recent technological developments (e.g., cell phone cameras and YouTube), some scholars suggest that the law sometimes should restrict the exposure of truthful information shared in public. Like the police who claim to need privacy to do their job, these scholars claim that people need privacy in public in order to feel dignified and to feel comfortable developing new ideas. In their pragmatic balance, these privacy-related needs trump exposure-related benefits.

In this Article, I argue that these scholars have overstated privacy-related harms and understated exposure-related benefits. After documenting and correcting these errors, I show how the proper balance favors exposure over privacy in all but a few special cases. Ultimately, I conclude that the law should continue to protect the mass exposure of truthful yet embarrassing information via the “no privacy in public” rule. Otherwise, we risk sacrificing the many benefits of exposure—including those resulting from exposure of police misconduct—on the altar of a mythical right to obscurity.
When it comes to privacy and accountability, people always demand the former for themselves and the latter for everyone else.¹

INTRODUCTION

On June 14, 2010, police officer Ian Walsh attempted to detain two teenaged criminal suspects at a busy intersection in Seattle, Washington.² While he was struggling with one suspect, a second suspect pushed Officer Walsh’s arms away from the first suspect.³ Immediately, Officer Walsh swung and punched the second suspect directly in the face.⁴ The suspects were arrested and later released.⁵

Had this confrontation occurred on June 14, 1980 instead of June 14, 2010, few people other than those present at the time would have learned about it or discussed it afterwards. If anyone later shared his account with others, listeners may have doubted his veracity or have been skeptical about the events that occurred. In all likelihood, the confrontation would have become a story shared among few, and perhaps forgotten. But that is not what happened with this story. Instead, because the confrontation occurred in 2010, it was videotaped by a passerby using a handheld video camera who then posted the video on a website, YouTube, where it could be found by via a simple search engine query (e.g., “Seattle police punch”), and watched repeatedly, on demand, by anyone with an Internet connection.⁶

¹ DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM 1 (1998) (commenting on the proliferation of video surveillance). Justice Scalia once shared a similar sentiment regarding the conflict between people’s desires for privacy and accountability, stating: “This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself.” Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J. concurring). In Florida Star, the Court held that a state law forbidding the reporting of a rape victim’s name by mass media but not by individuals was unconstitutionally under-inclusive. Id. at 540. Also commenting upon the conflict between privacy and accountability, privacy scholar Daniel Solove has acknowledged that “[p]rivacy impedes discourse, impairs autonomy in communication, and prevents accountability for one’s conduct.” Daniel J. Solove, The Virtues of Knowing Less, 53 DUKE L.J. 967, 973 (2003).
² Seattle Officer Punches Girl in Face During Jaywalking Stop, SEATTLE POST-INTELLIGENCER, June 15, 2010.
³ Id.
⁴ See Levi Pulkkinen and Casey McNerthney, Police Punch Caught on Video Prompts Seattle Police Review of Arrest Procedures, SEATTLE POST-INTELLIGENCER (June 15, 2010) (noting that “[w]hen another woman grabbed him, [the officer] punched her in the face”). The video clip, which includes some profanity, is available at http://www.youtube.com/watch?v=E9w9AfptGGQ.
⁵ See Punch Caught, supra note 4 (documenting suspects’ release).
⁶ Punch Caught, supra note 4 (reporting that video was recorded by a “bystander”).
The easily-retrieved Seattle video clip inspired many viewers to comment online—by writing comments below online news stories, by posting Facebook updates, and by Tweeting. These conversations about the incident addressed several important public policy issues, including: (i) racial tension (Officer Walsh was white, the suspects were African-American), (ii) sex discrimination (Officer Walsh was male, the suspects were female), and (iii) the government’s police power versus the liberty of its citizens (the punch was viewed by many as excessive given the suspects’ relatively minor offense of jaywalking).

Similarly rigorous policy debates have occurred in multiple cities throughout the United States in recent years, all triggered by violent police behavior exposed via “citizen journalism.” With each police exposure video, the public and government response generally proceeds in one of two directions. Some government


The inner workings and appeals of these social networking sites have been well-documented elsewhere. See, e.g., James Grimmelmann, Saving Facebook, 94 IOWA L. REV. 1137, 1142-49 (2009) (describing architecture of, and most common uses of, Facebook and MySpace); Paul M. Schwartz, Review: From Victorian Secrets to Cyberspace Shaming, 76 U. CHI. L. REV. 1407, 1447 (2009) (describing Twitter as “a microblogging service that allows its users to send and read other users’ messages…known as tweets, which are messages of no more than 140 characters in length.”).


Only three months earlier, a different Seattle policeman was videotaped stomping on the head and body of a wrongly-apprehended Hispanic suspect while exclaiming, “I’m going to beat the [expletive] Mexican piss out of you, homey. You feel me?” FBI Investigating Seattle Police Beating, SEATTLE POST-INTELLIGENCER, May 10, 2010. Perhaps the most infamous police brutality exposure in recent memory was the video depicting Bay Area Rapid Transit police Officer Johannes Mehserle shooting unarmed passenger Oscar Grant in the back. See John Cote, Oakland, BART Police Kill Man Near Station, SAN FRANCISCO CHRONICLE, July 18, 2010 (recalling how “Grant was killed as he lay face down on the platform” and how “the shooting touched off widespread protests in Oakland…after a Los Angeles jury convicted Mehserle of involuntary manslaughter…instead of a more serious murder charge”). A quick Google search for “police beating video” sadly reveals hundreds of such incidents in 2010. See Injustice Everywhere: The National Police Misconduct Statistics and Reporting Project, http://www.injusticeeverywhere.com (maintaining “national police misconduct newsfeed” with summaries and links) (last visited Jan. 5, 2011).
officials react with a look inward, via internal investigations and, ultimately, changed policies. Others react by pointing the finger outward—at the one doing the videotaping. For example, in at least five states, citizens who videotaped police misconduct were prosecuted for violating eavesdropping and wiretapping laws which bar recording conversations, absent consent of all parties, except when there is no reasonable expectation of privacy. In one notable example, a motorcyclist posted a video of his own roadside encounter with a plain-clothed, gun-wielding police officer who cited him for speeding. Shortly after the video received a great number of views on YouTube, six state troopers showed up at the motorcyclist’s home with a warrant, seized his computer, and later charged him with violating Maryland’s anti-wiretapping statute; if convicted, he faced up to 16 years in prison.

Arrests like these (i.e., arrests of those “caught” videotaping police) consequently have triggered their own privacy-themed debate. Because the threat of criminal prosecution for taping police acts as a censor, some commentators have called for states to more clearly permit such recordings and facilitate the public interest benefits they trigger. In opposition,
police officers and their supporters have argued that the threat of constant surveillance and later distribution via the Internet is an unfair invasion of privacy that prevents them from doing their job adequately, which, in turn, threatens public safety.\[^{15}\]

In many ways, the current debate over citizen exposures of public police conduct mirrors a broader exposure versus privacy debate among legal scholars: When should something done “in public” nevertheless be “private” and, thus, legally protected from exposure?\[^{16}\] Interestingly, the very combination of technologies that helped the Seattle police incident ignite such a useful debate—recording (small video camera), distribution (Internet/YouTube) and indexing (Google)—is the same combination that deeply troubles some legal scholars and even has led some to call for restricting the exposure and flow of truthful information shared in public.\[^{17}\]

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\[^{15}\] See Dennis J. Slocumb and Rich Roberts, Opposing View On Cops and Cameras: Respect Officers’ Rights, USA TODAY, Opinion, July 14, 2010 (opposing videotaping of officers in part because of “the inability of those with no understanding of police work to clearly and objectively interpret what they see”). In retort to this argument, one journalist responded: “If they’re doing good police work, they should not be worried about getting caught on tape.” Rittgers, supra note 14; c.f. Daniel J. Solove, “I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy, 44 SAN DIEGO L. REV. 745 (2007) (critiquing “nothing to hide” arguments like that of Rittgers).

\[^{16}\] See, e.g., Solove, supra note 1, at 969 (framing question as “When is it justifiable for the law to prohibit the disclosure of another person’s private information?”); see generally Richard A. Posner, The Right to Privacy, 12 GEORGIA L. REV. 393 (1978) (using economic theory to justify only a few circumstances in which one should be able to restrict the flow of accurate, personal information about one’s self).

\[^{17}\] See Neil M. Richards and Daniel J. Solove, Prosser’s Privacy Law: A Mixed Legacy, 98 CALIF. L. REV. ___, 1 & n. 9 (forthcoming 2010) (“Today, the chorus of opinion is that the tort law of privacy has been ineffective, particularly in remedying the burgeoning collection, use and dissemination of personal information in the Information Age.”); M. Ryan Calo, People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship, 114 PENN St. L. REV. 809, 817-824 (2010) (collecting other scholars’ technology-based arguments for privacy regulation and concluding that “the notion that technology implicates privacy insofar as it arguments the power to collect, process, or disseminate information dominates privacy and technology commentary”); Jacqueline D. Lipton, “We the Paparazzi:” Developing a Privacy Paradigm for Digital Video, 95 IOWA L. REV. 919, (2010) (suggesting that “[t]he fact that individuals can instantly snap a photograph…and can then disseminate that image instantaneously and globally at the push of a button, raises significant problems”); Solove, supra note 1, at 970 (justifying the regulation of personal disclosures “[g]iven the development of technologies that permit extensive data gathering and dissemination”); DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 101 (2009) (“New technologies have spawned a panoply of
Their thesis is supported, in part, via anecdotal stories about persons exposed and the harm such persons suffered. Like the police who claim to need privacy to do their job, these scholars argue that people often need protection from exposure of what they do or say in public in order to feel wholly dignified and to feel comfortable developing new ideas.

Although these scholars’ primary goals—protection of individual dignity and individual “thinking space”—may be admirable, their attempts at balancing the costs and benefits of their proposed protections are misplaced in at least two ways. First, they overstate the potential privacy-related harms that result from exposure of information initially shared in public. Second, they understate the many existing and potential benefits of exposing truthful information shared in public. After correcting for these errors, the revised pragmatic balance shared below indicates that the benefits of exposing public conduct likely outweigh the harms, even without directly invoking First Amendment speech rights. Accordingly, this Article concludes that the law should not restrict the collection and reporting of truthful information shared in public in order to prevent a perceived, potential harm to someone’s privacy interests.

Part I of this Article briefly defines the conflict between exposure

different privacy problems”) [hereinafter, SOLOVE, UNDERSTANDING PRIVACY].

18 See infra notes 105-18 and accompanying text; Lipton, supra note 17, at 921-922 (chronicling stories of Star Wars Kid and Dog Poop Girl as evidence of “worrying new trend” of “intruding into each other’s privacy and anonymity with video and multimedia files in ways that harm the subjects of these digital files”); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET, 38-48 (2007) (documenting the “sobering consequences” of the online exposures of individuals known as Dooce, the Numa Numa dancer, Little Fatty, and Star Wars Kid) [hereinafter, SOLOVE, FUTURE OF REPUTATION]. Implicit in some of these stories is a fear directive—that you, too, should be afraid of becoming Dog Poop Girl or her ilk. See infra notes 284-85 and accompanying text.

19 See SOLOVE, UNDERSTANDING PRIVACY 174-179 (dividing privacy harms into categories such as “emotional and psychological harms,” “relationship harms” and “chilling effects”); Eugene Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You, 52 STAN. L. REV. 1049, 1110-1112 (2000) (chronicling other scholars’ arguments for privacy restrictions on the basis that the disclosure “injures people’s dignity or emotionally distresses them”).

20 See infra notes 174-216 and accompanying text.

21 See infra notes 217-269 and accompanying text.

22 See infra Part III.C. Although some of the exposure-related harms and benefits I identify involve speech elements, and, thus, the First Amendment interests of the speaker, one need not constitutionalize my arguments in order to make them persuasive.

23 See infra notes 281-85 and accompanying text.
and privacy.\textsuperscript{24} It also documents how the law previously has resolved that conflict through the “no privacy in public” rule.\textsuperscript{25} Part II reviews other scholars’ position that the “no privacy in public” rule is an inadequate and antiquated rule that fails to protect obscurity.\textsuperscript{26} Part III argues that these scholars’ demand for a right to obscurity is misplaced because they (i) overstate the potential harms linked to more technologically-advanced and democratized exposure, and (ii) inadequately account for the many benefits of exposure that would be blocked should their quest for a right to obscurity succeed.\textsuperscript{27} Finally, Part IV tentatively concludes that the benefits of the “no privacy in public” rule likely outweigh the privacy harms.\textsuperscript{28} Ultimately, changing the “no privacy in public” rule would risk sacrificing the many benefits of exposure—including those resulting from the exposure of police misconduct—on the altar of a mythical right to obscurity.\textsuperscript{29}

I. THE CONFLICT BETWEEN EXPOSURE AND ONSCURITY

In this Part, I discuss the terminology and historical background necessary to appreciate the current debate over technology’s alleged assault on obscurity. In Part I.A, I briefly define the terms exposure and privacy and characterize certain conflicts between the two as the “Obscurity Problem.” Next, in Part I.B, I show how the law generally has resolved the Obscurity Problem through the simple “no privacy in public” rule. In later Parts, I demonstrate how this rule remains proper today, despite most pro-obscurity scholars’ assertions to the contrary.\textsuperscript{30}

A. Defining the Obscurity Problem

Generally, exposure occurs when one, without the express consent of the other: (i) lawfully gathers truthful information about another person or entity shared in public, and (ii) makes that information available to someone other than himself, often in a context other than the one in which the information was shared.\textsuperscript{31} Exposure encompasses a broad range of

\textsuperscript{24} See infra notes 30-43 and accompanying text.
\textsuperscript{25} See infra notes 44-89.
\textsuperscript{26} See infra notes 90-131 and accompanying text.
\textsuperscript{27} See infra notes 132-269 and accompanying text.
\textsuperscript{28} Note, however, that there are special cases for which this balancing tips the other way. See infra Part III.D.
\textsuperscript{29} See supra notes 2-9 and accompanying text (equating calls for privacy in public to calls for a right to obscurity).
\textsuperscript{30} See infra notes 112-139 and accompanying text.
\textsuperscript{31} For those familiar with Daniel J. Solove’s privacy taxonomy, this definition
actions, including an in-person recount to another of an event one witnessed earlier, a blog post about a speech recently given, and the surreptitious video recording of someone in public, later published to a website. As these few examples demonstrate, exposure can be helpful, neutral, or perhaps hurtful to the one exposed. If enough people pay attention to it and remember it, one effect of an exposure on the exposed person is to reduce his obscurity. Prior to the exposure, his words or actions were known only to a few; after the exposure, they are known to many. Ultimately, it is most helpful to view obscurity as the absence of exposure.

Viewing obscurity as the absence of exposure helps to better frame the current debate over the validity of the “no privacy in public” rule as a binary conflict of interests. On one side, the side of exposure, are the benefits that flow immediately and in the long run from the general sharing of public information about people with each other; on the other side, the side of obscurity, are the harms prevented by protecting the same and similar information from exposure. Setting up the analysis in this “harms versus benefits” fashion also permits us to do the situational, problem-based harm analysis that at least one pro-pragmatism scholar, Daniel Solove, incorporates, in part, the allegedly “harmful activities” of “information collection,” “information processing” and “information dissemination.”

For example, the person exposed may view the in person recount as neutral gossip, the blog post about the speech as helpful publicity, and the surreptitious video recording as harmful to his dignity.

See Lior Jacob Strahilevitz, Reputation Nation: Law in an Era of Ubiquitous Personal Information, 102 NW. U. L. REV. 1667, 1670 (2008) (“Personal information that was once obscure can be revealed almost instantaneously via a Google search.”); see also Solove, Understanding Privacy 149 (quoting Aesop for proposition that “Obscurity often brings safety”).

See Solove, Future of Reputation 7 (“People who act inappropriately might not be able to escape into obscurity anymore; instead, they may be captured in pixels and plastered across the Internet.”).

Focusing on the exposure versus privacy conflict also narrows the applicability of this article’s arguments to only those issues involving private citizens’ exposure of public conduct, thus excluding those privacy issues involving other core interests. This category may be viewed as a subset of the “informational privacy” category. See Lior Jacob Strahilevitz, Reunifying Privacy, 98 CALIF. L. REV. __ (forthcoming 2010), at 3 (agreeing that “information privacy is a category with enough commonalities to render it a coherent concept”) (citing Neil M. Richards, The Information Privacy Law Project, 94 GEO. L.J. 1087 (2006)).

Samuel Warren and Louis Brandeis described the natural conflict as follows: “Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow citizens.” See Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 215 (1890).
suggests is appropriate.\textsuperscript{37} In his book \textit{Understanding Privacy}, Solove argues that the proper approach to addressing privacy concerns is to consider the interests involved in individual privacy problems.\textsuperscript{38} In this article, I accept Professor Solove’s invitation to begin balancing harms and benefits in particular “problem situations” involving privacy.\textsuperscript{39} Specifically, I consider the harms and benefits of what I call the Obscurity Problem.\textsuperscript{40} The Obscurity Problem occurs when a private actor (whom I and others describe as a “citizen journalist”\textsuperscript{41}) lawfully collects and further exposes information (spoken or behavioral) that someone else initially shared in public.\textsuperscript{42} Because any legal response to the Obscurity Problem would involve changing the “no privacy in public” rule, the next section briefly chronicles the evolution of this rule as a way to resolve the Obscurity Problem.\textsuperscript{43}

\textbf{B. The “No Privacy in Public” Rule}

The “no privacy in public” rule is tantalizing in its simplicity. Generally stated, it is: “There can be no privacy in that which is already


\textsuperscript{38} See Solove, \textit{Understanding Privacy} 174.

\textsuperscript{39} Id.

\textsuperscript{40} This problem would encompass, at least in part, the sub-problems Solove identifies as Identification, Disclosure, Accessibility and Distortion. Solove, \textit{Understanding Privacy} 121-26 (identification), 140-46 (disclosure), 149-50 (increased accessibility), 158-61(distortion).

\textsuperscript{41} See Randall D. Eliason, \textit{The Problems with the Reporter’s Privilege}, 57 Am. U.L. Rev. 1341, 1366-67 (2008) (discussing “the rise of so-called citizen journalists” who “post information of public concern” via blogs, social networking sites and cable news sites). As Eliason further notes, CNN calls reports from citizen journalists “I-Reports” while Fox News calls similar reports “U-Reports.” Id. at n. 97; see also Jonathan Krim, \textit{Subway Fracas Escalates Into Test of the Internet’s Power to Shame}, \textit{Washington Post}, July 7, 2005 (describing the Internet as “a venue of so-called citizen journalism, in which swarms of surfers mobilize to gather information on what the traditional media isn’t covering, or is covering in a way that dissatisfies some people”).

\textsuperscript{42} By definition, the Obscurity Problem excludes other related yet distinct privacy “problems,” such as government surveillance or stalking, and only applies when the exposed person is the one who initially shared the information. For a discussion of how such problems are different from the Obscurity Problem, see Daniel Solove, \textit{A Taxonomy of Privacy}, 154 U. Pa. L. Rev. 477 (2006).

\textsuperscript{43} See infra notes 44-89 and accompanying text. In Part III, I show how balancing harms and benefits supports retention of the “no privacy in public” rule.
public.” The practical effect of the rule is that one has no legally-protectable privacy interest (including a right to obscurity) in what one does or says in public. This section begins with a brief overview of how this rule emerged in the late 19th century and how it developed through the mid-20th century in both tort and criminal procedure contexts. The overview illustrates how the rule’s concept of “in public” was used initially as an adjective describing the nature of the person or information exposed and later as an adjective describing the person’s physical location. Later sections of the Article will detail others’ critiques of, and my defense of, the “no privacy in public” rule as it applies to the Obscurity Problem.

1. Public versus Private in The Right to Privacy

Privacy first was identified as a common law right in Samuel Warren and Louis Brandeis’s Harvard Law Review article, The Right to Privacy. Warren and Brandeis defined the right in various ways,

44 Gill v. Hearst Pub. Co., 253 P.2d 441 (Cal. 1953). In Gill, the plaintiffs sued after Harper’s Bazaar and related magazines published a photo of them in an “affectionate pose” at the Los Angeles Farmers’ Market. 253 P.2d at 442. The court rejected plaintiffs’ invasion of privacy claim because the photographed and published kiss took place “not…on private grounds but rather…in a public market place.” 253 P.2d at 444. By “voluntarily expos[ing] themselves to public gaze in a pose open to the view of” others, the plaintiffs “waived their right of privacy.” 253 P.2d at 444.

45 See Patricia Sanchez Abril, Recasting Privacy Torts in a Spaceless World, 21 HARV. J. LAW & Tec 1, 6 (2007) (“[C]ourts have generally held that anything capable of being viewed from a ‘public place’ does not fall within the privacy torts’ protective umbrella.”) As with any rule, there are exceptions in certain contexts, especially those involving property. For example, dropping one’s unpublished manuscript in public does not mean that anyone can pick it up and print it without paying royalties any more than one could take one’s house keys dropped in public and claim the house as one’s own. Such extreme examples involve appropriation, in the former instance, and criminal breaking and entering, in the second, both of which fall outside the scope of this article.

46 See infra notes 61-89 and accompanying text.

47 See infra notes 54-60 and accompanying text; see also Abril, supra note 45, at 2 (using examples of gossip regarding drunken behavior to illustrate that “privacy is usually a function of the physical space in which the purportedly private activity occurred, its subject matter, whether it was veiled in secrecy, and whether others were present”).

48 See infra Parts II and III.

49 Although the term “right to privacy” permeates legal and popular writings, many scholars have challenged the concept of privacy as a “right.” See, e.g., Diane L. Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort, 68 CORNELL L. REV. 291 (1983); Volokh, supra note 19. Unlike this article, however, these critiques focus on the First Amendment as the primary justification for limiting privacy.
including as the “right to be let alone”\textsuperscript{50} and as the “right of determining...to what extent [one’s] thoughts...shall be communicated to others.”\textsuperscript{51} Their widely reported, yet later questioned, motivation for writing the piece was a disdain for exposures that occurred after Warren’s marriage to a New York socialite, and his associated loss in obscurity.\textsuperscript{52} Ultimately, Warren and Brandeis called for a limited freedom from exposure of certain actions and information shared “in public” in order “to protect the privacy of private life.”\textsuperscript{53}

Most relevant to the instant Article, Warren and Brandeis also attempted to define the types of information to which one’s right to privacy did not extend, using a three-pronged public-versus-private distinction. First, they stated that “[t]he right to privacy does not prohibit any publication of matter which is of public or general interest.”\textsuperscript{54} This exclusionary statement used the word “public” as an adjective describing the nature of the information involved, regardless of the physical space in which the information was shared.\textsuperscript{55} Next, Warren and Brandeis used “public” to describe the kind of individual involved, versus the nature of the information or its physical origin, inferring that the professional aspirations of the man himself determine whether the information about him is public or private. Specifically, they opined that information about one who seeks public office or position is “public,” while the same kind of information

\textsuperscript{50} Warren & Brandeis, supra note 36, at 195 (citing COOLEY ON TORTS, 2d ed., at 29).

\textsuperscript{51} Warren & Brandeis, supra note 36, at 198 (further suggesting that one “generally retains the power to fix the limits of the publicity which shall be given [his thoughts]”); id. at note 2 (“It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.”) (quoting Yates, J.).

\textsuperscript{52} See Richards & Solove, supra note 17, at n. 61 (“Prosser believed that the press coverage surrounding the wedding of Warren’s daughter had inspired the [Right to Privacy] article, although subsequent scholarship has proven that this could not actually have been the case.”) (citing Don R. Pember, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 24 (1972); Amy Gajda, What If Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage That Led to the “Right to Privacy,” 2008 Mich. St. L. Rev. 35, 38-39 (2008); Ken Gormley, One Hundred Years of Privacy, 1992 Wis. L. Rev. 1335, 1348-49 (1992)).

\textsuperscript{53} Warren & Brandeis, supra note 36, at 215.

\textsuperscript{54} Warren & Brandeis, supra note 36, at 214. Elsewhere in The Right to Privacy, Warren and Brandeis asserted that “the law must...protect those persons with whose affairs the community has no legitimate concern” and “all persons, whatsoever their position or station” from having information “made public against their will.” Id. at 214-15 (emphases added).

\textsuperscript{55} Solove, supra note 1, at 1001 (describing Warren and Brandeis’s public versus private distinction as a “newsworthiness test” based on whether a matter “is of public or general interest”).
about a person who seeks no such office or position would be “private.”56 Combining these first two prongs of Warren & Brandeis’s private versus public distinction (the nature of the information and the aspirations of the person), one gets the following summation of the “no privacy in public” rule: “[T]he matters of which the publication should be repressed may be described as those which concern the private life, habits, acts and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested...and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.”57

Third, Warren & Brandeis briefly defined private versus public in the spatial sense, but only through a metaphor and without actual mention of the word “public.” Specifically, they declared: “The common law has always recognized a man’s house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?”58 By referring to a “man’s house as his castle,” Warren and Brandeis appear to draw a line between what a man does within his own home and what he does outside of that particular zone of privacy.59 Interestingly, Warren and Brandeis did not mention this

56 Warren & Brandeis, supra note 36, at 215 (“To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.”); id. (“Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications.”). This type of distinction appears to mirror the public figure versus private figure distinction in defamation law that lives on despite having been chipped away at via various rulings suggesting that whomever or whatever is worthy of press attention automatically loses private figure status. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964) (holding that public figure plaintiff must show that defamatory statement was made with “actual malice”); Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974) (distinguishing “all purpose” public figures, such as a current mayor, from “limited” purpose public figures, such as a crime victim); Solove, supra note 1, at 1008-1010 (chronicling and critiquing the “public versus private figure” distinction); Christopher Russell Smith, Dragged into the Vortex: Reclaiming Private Plaintiffs’ Interests in Limited Purpose Public Figure Doctrine, 89 IOWA L. REV. 1419, 1422 (2004) (suggesting that, under lower courts’ recent applications of the public figure doctrine, “a private plaintiff may be found to be a public figure even though he or she has little or no involvement in [a] controversy”).

57 Warren & Brandeis, supra note 36, at 216.

58 Warren & Brandeis, supra note 36, at 220.

59 The concept of a man’s home as his castle—and, thus, a place worthy of protection from intrusion by the government and private individuals—often is referred to as the Castle
spatial sense of private versus public until the last few lines of their article, and, unlike the other two prongs of public versus private, mentioned it without citation to any source. Thus, Warren and Brandeis acknowledged the value in exposure of certain information shared in public, yet they yearned for additional legal protection for some information and actions shared in public. For them, the “public” part of the “no privacy in public” distinction referred to the person, to the nature of the information about the person, and to the person’s physical location when the information was shared.

2. Public versus Private in Prosser’s Privacy Torts

In the many decisions and voluminous commentary to follow Warren and Brandeis’s article, no person was more influential than William Prosser, primarily through his treatise, Handbook on the Law of Torts, and his 1960 California Law Review article, Privacy. In these and other works, Prosser shaped a disorganized set of privacy-related cases into four tort-based causes of action one could use to defend the right to privacy defined by Warren and Brandeis. The four torts included: (i) intrusion

Doctrine. The Castle Doctrine has been used in various contexts, including cases involving Fourth Amendment search and seizure issues, homicide cases involving self-defense, and privacy cases. Many trace the origin of the Castle Doctrine to English Common Law, and, more specifically, to Sir Edward Coke in Semayne’s Case. See Nicholas J. Johnson, Self-Defense?, 2 J.L. ECON. POL’Y 187, 199 (2006). In Semayne’s Case, Lord Coke stated, “For a man’s house is his castle, & domus sua cuique est tutissimum refugium; for where shall a man be safe, if it be not in his house?” See David I. Caplan and Sue Wimmershoff-Caplan, Postmodernism and the Model Penal Code v. the Fourth, Fifth and Fourteenth Amendments and the Castle Privacy Doctrine in the Twenty-First Century, 73 UMKC L. REV. 1073, 1090 (2005) (citations omitted).

At least one scholar has suggested that, at its core, Warren and Brandeis’s binary distinction between the public and the private was a distinction between conduct or spaces associated with men, which were considered public, and those more traditionally associated with women, which made up the private sphere. See Neil M. Richards, The Puzzle of Brandeis, Privacy, and Speech, 63 VANDERBILT L. REV. __, *10 (forthcoming 2010).

Although this article focuses on the four privacy torts originally crafted by William Prosser, other torts also involve privacy interests. See Solove, supra note 1, at 971-73 (noting torts such as breach of confidentiality for disclosures by physicians and banks as well as statutory restrictions on the disclosure of certain records).

See William L. Prosser, HANDBOOK OF THE LAW OF TORTS (1st ed. 1941); William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960); see also Richards & Solove, supra note 17, at *1 (anointing Prosser as “privacy law’s chief architect”); id. at *9-19 (chronicling history of Prosser’s “influence over the development of tort privacy”).

See Richards & Solove, supra note 17, at 1 (noting that Prosser “was engaged with tort privacy throughout his career, from his earliest torts scholarship in the 1940s until his death in 1972”). In the 60 years preceding his article, privacy as a tort theory had struggled
upon the plaintiff’s seclusion, (ii) public disclosure of embarrassing private
facts, (iii) false light publicity, and (iv) appropriation. The Restatement of
Torts, with Prosser as its chief reporter, adopted this four-pronged approach
to privacy; courts and legislatures implemented it as well. All of these
sources of law reflect, to some degree, Prosser’s own skepticism about the
coherence, wisdom and utility of the privacy torts. This skepticism, in
turn, stunted the torts’ growth and prevented them from evolving to clearly
cover more modern privacy concerns.

Prosser’s primary concern about the reach of these torts was that
they provided “a power of censorship over what the public may be
permitted to read, extending very much beyond that which they have always
had under the law of defamation.” Given this concern over restricting the
public’s access to truthful information, Prosser “sought to limit [his privacy
torts’] capacity for growth [and] succeeded.” He did this growth-limiting
in part by refusing to allow privacy to mean more than his four torts. One
specific tactic he used to purposefully stunt the growth of his own creations
was to emphasize the “no privacy in public” distinction in the torts’
elements and their suggested applications.

Prosser’s use of the public versus private dichotomy at first appears
to model that of Warren and Brandeis’s first and second prongs discussed
above. In Handbook, he states that none of the privacy torts restricts or
punishes the publication of information “of public interest of a legitimate
class of persons’ likenesses without permission and a handful of state statutes purporting to protect additional uses as well. Id. at 5-8 (citations omitted).

64 Prosser, Privacy, supra note 62, at 389. Prosser’s efforts have been characterized as
“tak[ing] a mess of hundreds of conflicting cases and reduc[ing] them to a scheme of four
related but distinct tort actions.” Richards & Solove, supra note 17, at, at 2.

65 Richards & Solove, supra note 17, at 3.

66 Id. at 6-7.

67 Id.

68 See id. at 13 (quoting Prosser, Privacy, supra note 62, at 423).

69 See Richards & Solove, supra note 17, at 17-18.

70 See Richards & Solove, supra note 17, at 18. G. Edward White concisely
summarized the Prosser-led progression as follows: “A classification made seemingly for
convenience (1941) had been expanded and refined (1955), hardened and solidified (1960
and 1964, when the ‘common features’ of privacy were declared), and finally made
synonymous with ‘law’ (1971). Prosser’s capacity for synthesis had become a capacity to
create doctrine. One began an analysis of tort privacy by stating that it consisted of ‘a
complex of four wrongs,’ and implicitly, only those wrongs. See G. EDWARD WHITE, TORT
LAW IN AMERICA: AN INTELLECTUAL HISTORY, 176 (expanded ed. 2003) (excerpted in
Richards & Solove, supra note 17, at 18-19)).

71 See PROSSER, HANDBOOK, supra note 62, at 1050 (cited in Richards & Solove,
word public to describe the nature of the information and perhaps the identity of the person—and not the physical space in which the information is shared. However, Prosser effectively neutralizes other privacy torts by using “public” in the spatial sense. This is most pronounced in the publicity to private facts tort, which suggests no liability “when the defendant merely gives further publicity to information about the plaintiff that is already public” or for “what the plaintiff himself leaves open to the public eye.”

Similarly, in the intrusion upon seclusion tort, an invasion of one’s personal physical area, or its equivalent, is required. Implicit in this element is that there must be some legitimately secluded space in which the other party is intruding—a private, versus public, space. Under the Restatement, one only has an intrusion claim if the intrusion occurs in the home or other traditionally secluded place, such as a hotel room. The spatial part of the private versus public distinction also is evident in the cases interpreting the intrusion and other privacy torts. Ultimately, Prosser’s version of the public versus private distinction’s effect on the privacy torts, as reflected in

supra note 17, at 11).

72 See supra notes 54-57 and accompanying text (documenting Warren and Brandeis’s approaches to the public versus private distinction).

73 See Restatement (Second) of Torts § 652D cmt. b (1977).

74 See Restatement (Second) of Torts § 652B (1977); see also Stien v. Marriott Ownership Reports, Inc., 944 P.2d 374 (2007) (rejecting invasion of privacy claim based on video footage of employees later shown at company party).

75 See Restatement (Second) of Torts § 652D cmt. b (1977) (suggesting that invasion may be by physical intrusion into hotel room or home or other examination such as of one’s mail, wallet, or bank account); id. at cmt. e (“Nor is there liability for observing him or even taking his photograph while he is walking on the public highway.”); id. at Illustrations 6 and 7 (distinguishing drunken behavior on public street from having one’s skirt blown over her head to reveal underwear).

76 See, e.g., Dietmann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968) (alleged intrusion into plaintiff’s home); Newcomb Hotel, Inc. v. Corbett, 108 S.E. 309 (Ga. Ct. App. 1921) (alleged intrusion into plaintiff’s hotel room); see also Lyrisa Barnett Lidsky, Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It, 73 Tulane L. Rev. 173, 204 (1998) (“Intrusion is designed to protect an individual’s sphere of privacy, whether spatial or psychological…..”); SOLOVE, UNDERSTANDING PRIVACY 164 (“U.S. courts recognize intrusion-upon-seclusion tort actions only when a person is at home or in a secluded place. This approach is akin to courts recognizing a harm in surveillance only when it is conducted in private, not in public.”). Prosser’s influence on case law is well-documented; thus, the many privacy tort cases need not be further re-examined here. Rather, it is sufficient to note that the private versus public distinction also is evident in the cases interpreting Prosser’s torts. See Richards & Solove, supra note 17, at 20 (“Based on our familiarity with several hundred privacy tort cases from the 1960s to the present, the overwhelming majority of courts have adopted wholesale the specific language of either the Restatement or Prosser’s other works in defining the privacy torts.”); SOLOVE, UNDERSTANDING PRIVACY 161-62, 164 (reviewing cases).
the Restatement, is as follows: “There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public.”

3. Public versus Private in Fourth Amendment Cases

Perhaps the clearest and most familiar application of the public versus private distinction in the spatial sense is in criminal search and seizure cases. In its simplest form, the Fourth Amendment’s exclusionary rule blocks the use of evidence obtained during a warrantless search of an area in which the defendant had both a subjective expectation of, and an objectively reasonable expectation of, privacy. In determining whether one’s expectation of privacy is objectively reasonable, the Supreme Court has said that “in the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.” Thus, one focus of the reasonableness inquiry is on the location in which the search was conducted and, more specifically, its proximity to the defendant’s home. Even a search of one’s home by electronic means may

77 See Restatement (Second) of Torts § 652D cmt. c. (1977). However, as acknowledged in Part III.D, exposures of certain aspects of a person, even if captured in public, likely involve a different balance of interests and thus are less worthy of protection. See infra notes 274-80 and accompanying text; see Restatement (Second) of Torts § 652B, cmt. c (“Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.”).

78 See Katz v. U.S., 389 U.S. 347 (1967). In order to be protected from a warrantless search under the exclusionary rule, one must pass Katz’s two-part test: (i) the person must “[first] have exhibited an actual (subjective) expectation of privacy, and (ii) “second,…the expectation [must] be one that society is prepared to recognize as ‘reasonable.’” Katz, 389 U.S. at 361 (Harlan J., concurring). The practical effect of the Katz decision was to require the government to get a warrant before wiretapping a phone and recording the content of conversations. However, in Smith v. Maryland, government recording of the numbers dialed by the phone via “pen registers” did not require a warrant because the person using the phone “voluntarily conveyed numerical information to the telephone company.” Smith v. Maryland, 442 U.S. 735, 743-44 (1979).

79 See Kyllo v. United States, 533 U.S. 27, 37 (2001); see also United States v. Dunn, 480 U.S. 294, 300 (1987) (“[T]he Fourth Amendment protects the curtilage of a house and that the extent of the curtilage is determined by…whether the area harbors the ‘intimate activity associated with the “sanctity of a man’s home and the privacies of life.”’” (quoting Boyd v. U.S., 116 U.S. 616, 630 (1886))).

80 See Payton v. New York, 445 U.S. 573, 590 (1980) (“[T]he Fourth Amendment has drawn a firm line at the entrance to the house.”). Although it is true that the Katz majority declared that “the Fourth Amendment protects people, not places,” Katz, at 582, “what protection it affords to those people…generally…requires reference to a ‘place.’” Katz, at 516 (Harlan, J., concurring). In other words, whether one’s expectation of privacy is
be deemed to invade someone’s reasonable expectation of privacy in a physical space.\textsuperscript{81} Ultimately, if the government conducts a warrantless search of a person’s private space—most often, his home—then the evidence obtained in that search cannot be used, because the person had a reasonable expectation of privacy in such space.\textsuperscript{82}

As the search location moves away from the inside of one’s home, the objective reasonableness of the privacy expectation grows more remote.\textsuperscript{83} For example, the Supreme Court has endorsed warrantless searches of one’s property from an aircraft in public air space and of one’s garbage bags placed at the curb.\textsuperscript{84} This is because as the search moves away from a person’s home, it becomes more likely that the person has voluntarily consented to having the information made available to others.\textsuperscript{85}

The Supreme Court also has stated that no one has a reasonable expectation of privacy in something done in “plain view” or in an “open field.”\textsuperscript{86} Similarly, under the third party doctrine, sharing information with
a third party defeats claims to privacy in that information later. For example, one has no reasonable expectation of privacy in an email after it is delivered to its intended recipient. Thus, if the conduct or information was shared in a public or quasi-public place, or with someone else even in a private place, then it most likely may be collected and used against a defendant because he has no reasonable expectation of privacy in something shared in public. Together, these limitations on one’s reasonable expectation of privacy in the warrantless search context have led some scholars to equate privacy under the Fourth Amendment with “total secrecy.”

II. DEMANDS FOR A RIGHT TO OBSCURITY

Synthesizing the “no privacy in public” rule from all of the above-summarized sources, Daniel Solove insightfully stated as follows: “According to the prevailing view of the law, if you’re in public, you’re exposing what you’re doing to others, and it can’t be private. If you really want privacy, you must take refuge in your own home.” Although I do not fully agree that the “no privacy in public” rule currently goes that far, for the purposes of this Article, let us assume that it does. That is, let us assume that the current meaning of the “no privacy in public” rule is that one generally has no privacy or obscurity interest in another person’s truthful account of what one did or said in the presence of another person fields. The distinction between the latter and the house is as old as the common law.”

87 See Smith v. Maryland, 442 U.S. at 743-44 (“[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”); see generally, Orin S. Kerr, Defending the Third Party Doctrine, 24 BERKELEY TECH. L.J. 1229 (2009) (summarizing and defending doctrine); see also Solove, UNDERSTANDING PRIVACY 139-40 (critiquing third party doctrine).

88 See Rehberg v. Paulk, 598 F.3d 1268, 1281-82 (11th Cir. 2010) (“A person also loses a reasonable expectation of privacy in emails, at least after the email is sent to and received by a third party.”) (citations omitted).

89 See Daniel J. Solove, Conceptualizing Privacy, 90 CALIF. L. REV. 1087, 1107 (2002) (“In a variety of legal contexts…[p]rivacy is thus viewed as coextensive with the total secrecy of information.”); William J. Stuntz, Privacy’s Problem and the Law of Criminal Procedure, 93 MICH. L. REV. 1016, 1021-22 (1995) (reviewing search and seizure cases and concluding that “the [key] question…is whether what the police did was likely to capture something secret” and suggesting that “privacy-as-secrecy dominates the case law”); see also Julie E. Cohen, Surveillance: Privacy, Visibility, Transparency, and Exposure, 75 U. CHI. L. REV. 181, 190 (2008) (documenting how “the U.S. legal system purports to recognize an interest in spatial privacy”).

90 See Solove, FUTURE OF REPUTATION 163; Solove, UNDERSTANDING PRIVACY 110.
outside of the person’s home or equivalent location. This prospect of constant potential for exposure outside of the home has led Solove and others to critique the “no privacy in public” rule as a “binary understanding of privacy” that is both antiquated and inadequate. The rule purportedly is antiquated because of recent technological developments regarding the collection, distribution and indexing of information that threaten obscurity in ways not anticipated when the rule first emerged. Next, the rule is inadequate, practically speaking, because it bars people from preventing, or recovering for, perceived obscurity harms caused by more tech-savvy exposure.

91 But see supra Part IV.D (chronicling special cases to which this generalization does not and should not apply).
92 See SOLOVE, FUTURE OF REPUTATION 7 (“Under existing notions, privacy is often thought of in a binary way—something is either private or public. According to the general rule, if something occurs in a public place, it is not private.”); Danielle Keats Citron, Fulfilling Government 2.0’s Promise with Robust Privacy Protections, 78 GEO. WASH. L. REV. 822, 827 (2010) (“A public/private binary also may not accord with our lived experiences—individuals routinely carve out zones of privacy in so-called public spaces.”); Lipton, supra note 17, at 929-41 (chronicling alleged gaps in current law that fail to protect one’s public conduct from capture by handheld cameras and later distribution); SOLOVE, FUTURE OF REPUTATION 163 (concluding that the secrecy versus privacy paradigm in the law “has limited the recognition of privacy violations”); SOLOVE, UNDERSTANDING PRIVACY 111.
93 See, e.g., Cohen, supra note 89, at 191-92 (critiquing emphasis on public visibility when defining privacy invasions given current surveillance infrastructures); Kevin Werback, Sensors and Sensibilities, 28 CARDOZO L. REV. 2321 (2007) (chronicling perceived threat to privacy in public caused by rising ubiquity and usage of camera phones and other “pervasive sensors”); Erwin Chemerinsky, Rediscovering Brandeis’s Right to Privacy, 45 BRANDEIS L.J. 643, 656 (2007) (calling for the Supreme Court to recognize a privacy interest in the reporting of truthful information because “[t]echnology that Warren and Brandeis never could have imagined…presents unprecedented risks to informational privacy”); Abril, supra note 45, at 5 (“New technologies have enabled novel social situations that generate privacy harms and concerns that were unforeseeable” before); Andrew Lavoie, Note: The Online Zoom Lens: Why Internet Street-Level Mapping Technologies Demand Reconsideration of the Modern-Day Tort Notion of ‘Public Privacy’, 43 GA. L. REV. 575 (2009).
94 See e.g., SOLOVE, FUTURE OF REPUTATION 166 (“[M]erely assessing whether information is exposed in public or to others can no longer be adequate to determining whether we should protect it as private”); Amy Gajda, Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press, 97 CALIF. L. REV. 1039, 1041 (2009) (demonstrating how “growing anxiety about the loss of personal privacy in contemporary society has given new weight to claims of injury from unwanted public exposure”) (citing ANITA ALLEN, PRIVACY LAW AND SOCIETY 6 (2007)); Cohen, supra note 89, at 191 (concluding that “prevailing legal understandings of spatial privacy” are inadequate because they do not recognize the spatially harmful alteration of “the spaces and places of everyday life”).
Given these dual problems of antiquity and inadequacy, scholars have suggested that a new, more nuanced rule is necessary—one that would recognize claims of privacy in public. In crafting the proper rule, Daniel Solove suggests that lawmakers conduct a pragmatic balancing of harms and benefits that is better equipped to consider technological developments and their associated privacy harms. Others implicitly have endorsed this approach. This Part more carefully reviews these tech-based attacks on the “no privacy in public” rule and its suggested balancing test replacement, setting up the Part III critique of these arguments as an ill-advised call to protect a mythical right to obscurity.

A. Technology’s Alleged Threat to Obscurity

In The Future of Reputation, Daniel Solove declares that “modern technology poses a severe challenge to the traditional binary understanding of privacy.” For Solove and like-minded commentators, the “no privacy in public” rule simply is inadequate in today’s tech-savvy information marketplace. Most concerning is the three-sided, sinister combination of collection, distribution and indexing technologies. In the Obscurity

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95 SOLOVE, FUTURE OF REPUTATION 7, 161 (suggesting a need for “a more nuanced view of privacy”); Chemerinsky, supra note 93, at 656 (suggesting that it is “time to rediscover Warren and Brandeis’s right to privacy” because of “unprecedented risks to informational privacy”); Abril, supra note 45, at 4-6 (criticizing courts’ “reliance on physical space” as one of the “linchpins” in privacy because “physical space…no longer is relevant in analyzing many modern online privacy harms”); Lipton, supra note 17.

96 See infra notes 119-31 and accompanying text.

97 See, e.g., Lipton, supra note 17, at 943 (summarizing Solove’s harm balancing approach and concluding that it “may be the right approach – at least for the present time”).

98 See infra notes 174-273 and accompanying text.

99 SOLOVE, FUTURE OF REPUTATION 163.

100 SOLOVE, FUTURE OF REPUTATION 166 (opining that because of technological advances, “merely assessing whether information is exposed in public or to others can no longer be adequate to determining whether we should protect it as private”); Lipton, supra note 17, at 930-33 (arguing that current tort laws are inadequate to protect personal privacy interest in conduct shared in public given new technologies such as Facebook, MySpace, YouTube and Flickr); Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373, 1379 (2000) (arguing that private means both “not public” and “not common-owned”); Werback, supra note 93, at 2324-30 (noting threats from various new camera types); see also SOLOVE, UNDERSTANDING PRIVACY 4-5 (collecting late 20th century scholars’ statements regarding technology’s alleged threat to privacy).

101 SOLOVE, FUTURE OF REPUTATION 17 (“Often, technology is involved in various privacy problems because it facilitates the gathering, processing and dissemination of information.”); Paul M. Schwartz, Privacy and Democracy in Cyberspace, 52 VAND. L. REV. 1607, 1621-41 (1999) (describing supposed “privacy horror show” in cyberspace that
Problem scenario, we supposedly are wielding these technologies against ourselves and our fellow citizens. If we do not do something about the Obscurity Problem, “[w]e’re heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search.” In this doomsday scenario, “[w]e will be forced to live with a detailed record beginning with childhood that will stay with us for life wherever we go, searchable and accessible from anywhere in the world.” In other words, the concern is for the person’s sudden and perhaps permanent loss of obscurity.

Victims of the antiquated “no privacy in public” rule are those that shared information or conduct in public with a small group of people, only to have that information exposed and exploited by technology. The people who have had their obscurity taken away from them via mass internet-distribution of things they did or said in public, to or with at least

“result[s] from the generation, storage and transmission of personal data”); Jacqueline D. Lipton, Digital Multi-Media and the Limits of Privacy Law, 42 CASE W. RES. J. INT’L L. 551, 553 (2010) (suggesting that “the ability of new digital devices such as cell phone cameras to transmit information wirelessly and globally raises important new challenges for privacy laws”); Cohen, supra note 100, at 1374 (suggesting new informational privacy concerns given “rise of a networked society” that facilitates the rapid search, distribution and connection of one’s personal information).

102 SOLOVE, FUTURE OF REPUTATION 164 (describing how “[a]rmed with cell phone cameras, everyday people can snap up images, becoming amateur paparazzi”); Lipton, Paparazzi, supra note 17 (collecting privacy concerns associated with private citizens’ reporting of public conduct by fellow citizens); Marcy Peek, The Observer and the Observed: Re-imagining Privacy Dichotomies in Information Privacy Law, 8 NW. J. TECH & INTELL. PROP. 51, (2009) (describing how the fact that “we are all watching each other” alters the privacy analysis); While Solove and Lipton use the term “paparazzi” to describe citizens who use technology to collect and report on their fellow citizens, I prefer the less pejorative term, “citizen journalists.” See supra notes 41-42 and accompanying text. As discussed in Part III, I suggest that before we vilify ourselves further, we need to more thoroughly consider the benefits of paparazzi- or citizen-led exposure in the aggregate. See infra notes 217-269 and accompanying text.

103 SOLOVE, FUTURE OF REPUTATION 106-110; see also Peek, supra note 102, at 56-57 (describing how “the aggregation of ‘observing’ technology enables the private and public sector to create a near perfect picture of the full spectrum of a person’s day and a person’s life”).

104 SOLOVE, FUTURE OF REPUTATION 7 (differentiating online exposures because they involve “taking an event that occurred in one context and significantly altering its nature—by making it permanent and widespread”); DANIEL J. SOLOVE, THE DIGITAL PERSON 1-7 (2004) (discussing threat of “digital dossiers”); Lipton, supra note 17, at 927 (suggesting that new privacy concerns are triggered now that the Internet “makes the dissemination of video…practically instantaneous and potentially global in scope”).

105 SOLOVE, UNDERSTANDING PRIVACY 96 (suggesting that “disclosing people’s secrets…often affects a few unfortunate individuals” whose “lives are ruined for very little corresponding change in social norms”).
one other person, include:

- Dog Poop Girl, who refused to clean up her pet dog’s excrement on a subway train in South Korea;\(^{106}\)
- Numa Numa Guy, who lip-synched and waved his arms in front of his webcam to the tune of a Moldovan pop song;\(^{107}\)
- Star Wars Kid, who performed a series of “Jedi” physical maneuvers, wielding a golf-ball retrieving stick as lightsaber-like weapon;\(^{108}\)
- Laura K., a college student who propositioned and paid a part-time blogger/actor to write a paper for her regarding Hinduism;\(^{109}\)
- Jonas Blank, a law firm summer associate whose profanity-laced email came across as a mockery of his employers and work;\(^{110}\)
- Robert, whose sexual exploits and difficulties were blogged about by his partner, Jessica Cutler, also known as “Washingtonienne;’;\(^{111}\)
- Geoffrey Peck, whose attempt to cut his wrists was captured by a surveillance camera;\(^{112}\)
- Todd, whose allegedly bad dating behavior was shared on the “don’t date him girl” website;\(^{113}\) and
- Michael, who wrote about his time in juvenile detention without

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\(^{106}\) SOLOVE, FUTURE OF REPUTATION 1-4; Lipton, supra note 17, at 921.

\(^{107}\) SOLOVE, FUTURE OF REPUTATION 44-48. Numa Numa Guy, also known as Gary Brolsma, later went on to make more videos, which he posted online; one featured “Star Wars Kid” in a cameo appearance.

\(^{108}\) SOLOVE, FUTURE OF REPUTATION 42. The original less-than-2-minute video of Star Wars Kid was posted to the Internet by a high-school acquaintance of its star without the Kid’s express consent. Thus, there is some question regarding whether his performance was done “in public,” and, as a result, falls outside the scope of the “no privacy in public” rule. Someone else later edited the video to include Star Wars music and visual effects, which increased the original video’s popularity.


\(^{110}\) See SOLOVE, FUTURE OF REPUTATION 29-30 (citing Ben McGrath, Oops, THE NEW YORKER, June 30, 2003).

\(^{111}\) SOLOVE, FUTURE OF REPUTATION 134-35; West, supra note 255, at 597-600.

\(^{112}\) See SOLOVE, UNDERSTANDING PRIVACY 195. Initially, an English court found no privacy violation in this case “because the plaintiff’s ‘actions were already in the public domain,’ and revealing the footage ‘simply distributed a public event to a wider public.’” Id. However, the European Court of Human Rights instead disagreed, concluding that there was a privacy violation because the person was not a public figure, while emphasizing “the [systemic] recording of the data” and the “permanent nature of the record.” Peck v. United Kingdom, Application No. 44647/98 (ECHR 2003).

\(^{113}\) See SOLOVE, FUTURE OF REPUTATION 121.
considering that such information would be available to later acquaintances via a Google search of his name.114

The emerging consensus appears to be that the above-listed people were victimized via exposure that went beyond what they expected at the time that they shared the information with at least one other person.115 Concern over this widespread exposure has led some scholars to call for legal protections for “information that has been shared to a few others, but is still not generally known.”116 The concern is not about the person’s privacy, necessarily, because the information was shared with others, sometimes in a public place. Rather, the concern is for the exposed person’s loss of obscurity.117 Ultimately, the “no privacy in public” rule is labeled obsolete because it does not protect a person’s perceived right to obscurity.118

B. Suggested Pragmatic Balancing to Protect Obscurity

To protect obscurity, some suggest that “[t]he law should begin to recognize some degree of privacy in public.”119 Defining exactly when the

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114 See Solove, supra note 1, at 1055.
115 See SOLOVE, FUTURE OF REPUTATION 170 ("Privacy can be violated not just by revealing previously concealed secrets, but by increasing the accessibility to information already available."); Chemerinsky, supra note 93, at 656 (suggesting additional privacy protections are needed given the that “the Internet makes [personal information] potentially available to many”); Lipton, supra note 17, at 927 (arguing that current exposures are more harmful because the coupling of cameras and the Internet “makes the dissemination of video…practically instantaneous and potentially global in scope”).
116 Richards, supra note 60, at 51 (criticizing Warren and Brandeis’s division between public and private as “the dominant question in privacy law”); see also Cohen, supra note 100, at 1379 (suggestions that some information may no longer be a secret but still worthy of privacy protection because it is not commonly known).
117 See SOLOVE, FUTURE OF REPUTATION 7 (“People who act inappropriately might not be able to escape into obscurity anymore; instead, they may be captured in pixels and plastered across the Internet.”); Citron, supra note 92, at 835 (endorsing social-media researcher’s concern that people “‘live by security through obscurity’”).
118 Wide circulation of information also was part of what motivated Warren and Brandeis’s call for a right to privacy. See Warren & Brandeis, supra note 36, at 196 (“Even gossip apparently harmless, when widely and persistently circulated, is potent for evil.”).
119 See SOLOVE, FUTURE OF REPUTATION 169; Lipton, supra note 17, at 930-33 (suggesting that current tort laws are insufficient to protect privacy from picture-taking and other technological advances); Cohen, supra note 89, at 181 (arguing that person’s privacy interest “is not negated by the fact that people in public spaces expect to be visible to others present in those spaces”).
law should do so has proven difficult; however, one recently-crafted approach appears promising. In his latest book, Understanding Privacy, Daniel Solove constructs a “new understanding” of privacy, in which he urges us to “understand privacy as a set of protections against a plurality of distinct but related problems.”

The problem-based approach is an offshoot of the more general theory of pragmatism, which other scholars explicitly and implicitly endorse.

Under Solove’s proposed approach, the first step is to identify whether a potential privacy problem exists. After identifying the problem, the next step is to analyze the “different types of harms created by [the] privacy proble[m].” When tabulating the harms, we are to consider them in the aggregate versus with respect to only a single person, i.e., we are to calculate the “value of privacy...in terms of its contribution to society” as well as to the individual exposed. After identifying the privacy problem and valuing the harm caused, we are to “assess...the value of any conflicting interests.” Finally, we perform a balancing “to determine which prevails.” If the harms to privacy are greater than the

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120 See Solove, Understanding Privacy 168 (describing “The Difficulties of Recognizing Privacy in Public”); Warren & Brandeis, supra note 36, at 214 (“To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task...”).

121 Solove, Understanding Privacy 171.

122 See, e.g., Strahilevitz, Reunifying, supra note 35, at 21 (including whether “the gravity of the harm to the plaintiff’s privacy interest [is] outweighed by a paramount public policy interest” as a third element in his proposed privacy tort); Solove, Understanding Privacy 46-47 (acknowledging pro-pragmatism scholars such as William James, John Dewey, George Herbert Mead, Richard Rorty, Richard Posner, and Cornell West). Although legal scholars generally do not agree as to the proper definition of, or application of, pragmatism and the law, see Michael Sullivan & Daniel Solove, Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism, 113 Yale L.J. 687 (2003) (critiquing Richard Posner’s use of pragmatism), for the purposes of this article, pragmatism essentially means analyzing privacy “in specific contextual situations” versus universal absolutisms. Solove, Understanding Privacy 47.

123 Solove suggests that a problem arises when, aided by technology, people, businesses, and governments engage in “activities that disrupt other activities that we value and thus create a problem.” Solove, Understanding Privacy 189.

124 Id. at 174. Categories of harm include physical injuries, financial losses and property harms, reputational harms, emotional and psychological harms, relationship harms, vulnerability harms, chilling effects, and power imbalances. Id. at 174-79.

125 Id. at 173; Id. at 173-74 (“[W]hen privacy protects the individual, it does so because it is in society’s best interest. Individual liberties should be justified in terms of their social contribution.”).

126 Id. at 183.

127 Id. at 183.
value\textsuperscript{128} of the conflicting interests, the law should protect them at the expense of those interests.\textsuperscript{129} On the other hand, if the conflicting interests are greater, then they should win at the expense of privacy—and no reform is necessary.\textsuperscript{130} The latter is the position of this Article with respect to citizen journalists’ exposure of statements or actions shared in public, \textit{i.e.}, the Obscurity Problem.\textsuperscript{131}

III. HOW THE BENEFITS OF EXPOSURE OUTWEIGH OBSCURITY HARMS

This Part applies the above-described pragmatic balancing test to the Obscurity Problem.\textsuperscript{132} The Obscurity Problem category encompasses situations such as Dog Poo Girl and Robert, listed in Part II.A, and Officer Walsh, as shared in the Introduction.\textsuperscript{133} Presently, many scholars contend that affording some “privacy in public” to these and similar individuals is desirable in order to eliminate or at least minimize the Obscurity Problem.\textsuperscript{134} Essentially, they appear to argue that sometimes society’s interest in keeping truthful information within an individual’s own, sole control is greater than the public’s interest in knowing, possessing and using that same truthful information, even if the information initially was shared in public.

To test these scholars’ hypothesis regarding the Obscurity Problem, the pragmatic balancing approach described in Part II.B requires us to catalog the societal harms triggered by the Obscurity Problem and then compare those harms to the positive benefits of the associated exposure.\textsuperscript{135}

\textsuperscript{128} \textit{Id.} at 10 (“The value of privacy in a particular context depends upon the social importance of the activities that it facilitates.”).

\textsuperscript{129} \textit{Id.} at 183. Solove acknowledges that value assigned to harms will vary across cultures, even among supposedly similar groups—Americans and Europeans. \textit{Id.} at 185. In those cases, public policy then should “effectively redress the harms caused by the problems” via “individual enforcement mechanisms.” \textit{Id.} at 179. Solove further suggests that the law should permit recovery of “true liquidated damages without requiring proof of any specific individual harm.” \textit{Id.} at 181.

\textsuperscript{130} For an example of the balance tipping in this direction, see, e.g., \textit{id.} at 48 (“Few would contend that when a crime victim tells the police about the perpetrator, it violates the criminal’s privacy.”). \textit{See also id.} at 189 (“The way to address privacy problems is to reconcile conflicts between activities.”).

\textsuperscript{131} \textit{See supra notes} 40-42 and accompanying text (defining the “Obscurity Problem”).

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{See supra notes} 2-8, 106, 111 and accompanying text.

\textsuperscript{134} \textit{See, e.g.}, Solove, \textit{supra} note 89, at 1109-1116 (collecting scholarship regarding privacy as “control over personal information” and acknowledging that some information falls outside the scope of “what society deems appropriate to protect”); Lipton, \textit{supra} note 17, at 930-33; Cohen, \textit{supra} note 89 at 181.

\textsuperscript{135} \textsc{Solove, Understanding Privacy} 187 (“Protecting privacy requires careful
Toward this end, Part III.A documents the alleged privacy-related harms of the Obscurity Problem, and shows how they have been overstated. Part III.B then documents the benefits of exposure in this type of situation, and shows how they have been overlooked or undervalued. In Part III.C, I suggest that overstating the harms and understating the benefits of the Obscurity Problem has resulted in an unnecessary call for changing the “no privacy in public” rule in all cases other than those special cases discussed in Part III.D. I later conclude that, in the clash between citizen exposure of public conduct versus obscurity, exposure should win.

A. Harms from the Obscurity Problem

Each privacy problem involves a combination of harms. The Obscurity Problem reportedly triggers two key harms. First, the Obscurity Problem harms the exposed person’s emotional and psychological well being. I call this the “dignity” harm. For example, when Dog Poop Girl found out that her picture and criticism of her conduct were posted all over the Internet, she felt undignified and attacked. Robert, whose sexual preferences and proclivities were shared in a blog post, experienced similar kinds of emotional harm. Second, an Obscurity Problem, or even just the balancing because neither privacy nor its countervailing interests are absolute values.”); see id. at 84 (“As I have sought to define it, privacy involves protection against a plurality of kinds of problems. Articulating the value of privacy consists of describing the benefits of protecting against these problems.”).

136 See infra notes 140-216 and accompanying text.

137 See infra notes 217-269 and accompanying text. As noted below, one scholar who has begun demonstrating the many societal benefits of more truthful information being available about everyone is Lior Jacob Strahilevitz. See generally Strahilevitz, Reputation Nation, supra note 33; but see id. at 1677 (“More information is not always better. Nor is it always worse.”).

138 See infra notes 270-80 and accompanying text.

139 See infra notes 281-85 and accompanying text.

140 See SOLOVE, UNDERSTANDING PRIVACY 173 (showing that privacy’s value “varies across different contexts depending upon which form of privacy is involved and what range of activities are imperiled by a particular problem”).

141 Id. at 175-76.

142 Solove also discusses the reputational harm; however, defamation law generally recognizes a reputational harm only from false or misleading information. The Obscurity Problem, in contrast, only involves exposure of truthful statements or actions.

143 The harm to dignity also may lead to secondary harms of changed choices and paths in life, such as when Dog Poop Girl dropped out of college. Lipton, supra note 17, at 921 (citing JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET – AND HOW TO STOP IT 211 (2008)).

144 See supra note 111 and accompanying text.
threat of one, allegedly harms one’s relationship security, which, in turn, leads to speech-related chilling effects. I call this the “thinking space” harm. For example, knowing that one’s thoughts may be recorded and later exposed to the world—like what happened to now-Justice Sotomayor’s “wise Latina” speech—may discourage people from speaking their minds and prevent the promotion of good ideas. In sum, the Obscurity Problem is perceived as harmful because it harms one’s personal emotions and chills one’s intellectual discourse, both of which threaten society as a whole. Each of these two categories of harm is discussed in more detail below.

1. Harm to Dignity

As detailed above, two aspects of the Obscurity Problem tend to cause harm to one’s psyche—the sharing of information with many more people than originally anticipated and the ease of access to that information over a long period of time. The target of the exposure is subjected to “unwanted notoriety” which “can result in embarrassment, humiliation, ...

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145 SOLOVE, UNDERSTANDING PRIVACY 176-77.
146 SOLOVE, UNDERSTANDING PRIVACY 178; id. at 109 (There “may be a widespread chilling effect when people are generally aware of the possibility of surveillance but are never sure if they are watched at any particular moment.”).
147 See Charlie Savage, A Judge’s View of Judging Is on the Record, N.Y. TIMES, A-21, May 14, 2009 (describing video recording of speech by then Judge Sotomayor in which she stated her “hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life” and documenting the associated uproar upon release of the video following her nomination to the Supreme Court).
148 Interestingly, these harms appear to dovetail with the harms that most concerned Warren and Brandeis, i.e., specific harm to the “feelings and personalities of individuals” and general harms to “the level of public discourse in the press” and a “lowering of social standards and morality.” Warren & Brandeis, supra note 36 at 196; see also Richards, supra note 60, at 8.
149 SOLOVE, UNDERSTANDING PRIVACY 145-46 (“The harm of disclosure is not so much the elimination of secrecy as it is the spreading of information beyond expected boundaries. People often disclose information to a limited circle of friends, and they expect the information to stay within this group.”) (citation omitted); Cohen, supra note 100, at 1379 (suggesting difference between publicly known and commonly known information); Chemerinsky, supra note 98, at 656 (arguing that Internet exposure is different due to larger audience); Lipton, supra note 17, at 927 (arguing that current exposures are more harmful because of publication that is “global in scope”). Sometimes this “increased accessibility” is described as a harm in and of itself. SOLOVE, UNDERSTANDING PRIVACY 151 (describing the “harm of increased accessibility”).
150 See SOLOVE, UNDERSTANDING PRIVACY 157 (quoting Roberson v. Rochester Folding Box Co., 64 N.E. 442, 449 (N.Y. 1902) (Gray, J., dissenting)).
stigma and reputational harm.” These feelings generally could be characterized as a loss in dignity.

The mere possibility of subsequent over-distribution also purportedly affects one’s emotions, causing “feelings of anxiety and discomfort.” Similarly, the possibility of information collection, even if not actually conducted, leads to a perceived loss of solitude. The fear that a person’s personal zone of public space may be intruded upon, “makes her feel uncomfortable and uneasy.” Perhaps some of these anxious feelings are due to the purportedly permanent nature of the information on the Internet. Ultimately, these threats may cause one to feel like she has lost control over her entire self.

151 See Solove, Understanding Privacy 147, 160 (opining that exposure “often creates embarrassment and humiliation” especially if it involves “information about our bodies and health” or information society deems “animal-like or disgusting”).

152 See Solove, Understanding Privacy 148 (“We protect against the exposure of these bodily aspects because this protection safeguards human dignity as defined by modern society. Dignity is a part of being civilized; it involves the ability to transcend one’s animal nature.”); see also Warren & Brandeis, supra note 36 at 195 (suggesting that “modern enterprise and invention have, through invasions upon his privacy, subjected [man] to mental pain and distress, far greater than could be inflicted by mere bodily injury”).

153 Solove, Understanding Privacy 108 (“[P]eople expect to be looked at when they ride the bus or subway, but persistent gawking can create feelings of anxiety and discomfort.”).

154 Solove, Understanding Privacy 163 (“[I]ntrusion can cause harm even if no information is involved [because] intrusion often interferes with solitude—the state of being alone or able to retreat from the presence of others.”).

155 Solove, Understanding Privacy 162; see Warren & Brandeis, supra note 36, at 195 (defining “right to be let alone”); Olmstead v. U.S., 277 U.S. 438, 478 (1928) (suggesting that “right to be let alone” is “the most comprehensive of rights and the right most valued by civilized men”) (Brandeis, J., dissenting).

156 The Internet and related technologies reportedly escalate the harm of the exposure because they “transform gossip into a widespread and permanent stain.” Solove, Future of Reputation 181; see also Solove, supra note 1, at 969 (“Without warning, anyone can broadcast another’s unguarded moments…of youthful awkwardness to an audience of millions” and, via Internet archives, “ensure that embarrassing material follows a victim for life”).

157 Solove, Understanding Privacy 145.

158 Solove, supra note 1, at 1053. (“One of the values of protecting privacy is facilitating growth and reformation.”); id. at 1054 (acknowledging that “[e]veryone has done things and regretted them later” and suggesting that “[i]t is a great value in allowing individuals the opportunity to wipe the slate clean” in order to “further society’s interest in providing people with incentives and room to change and grow”).

159 Solove, Understanding Privacy 153 (in discussion of blackmail, concluding
and give others an inaccurate\textsuperscript{160} picture of her.

2. Harm to Thinking Space

The second category of harm allegedly caused by the Obscurity Problem involves more than realized or feared internal feelings of lost dignity; rather, it involves changed behavior of individuals, which, in turn, causes harm to society as a whole. In particular, the failure to protect people from the Obscurity Problem reportedly threatens to harm their expressive activities and the personal relationships that foster such activities.\textsuperscript{161} Depriving someone of “breathing space” in public, it is argued, also deprives him of his “freedom of thought,”\textsuperscript{162} whether alone or with others,\textsuperscript{163} which also triggers First Amendment freedom of association concerns.\textsuperscript{164}

With respect to the need for individual “thinking space,” scholars have stated that obscurity “preserve[s] space for new ideas to develop.”\textsuperscript{165}

\textsuperscript{160} Many claim that this kind of exposure is inaccurate because it is incomplete. Solove, supra note 1, at 1036 (endorsing Jeffrey Rosen’s observation that “[p]rivacy protects us from being misdefined and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge”); Lipton, supra note 17, at 927-29 (discussing harmful misinterpretation that occurs when one’s image is taken out of context); Jeffrey Rosen, The Unwanted Gaze Prologue (2000) (“[W]hen intimate information is removed from its original context and revealed to strangers, we are vulnerable to being misjudged on the basis of our most embarrassing… tastes and preferences.”).

\textsuperscript{161} Solove, Understanding Privacy 78 (“Privacy problems impede certain activities, and the value of privacy emerges from the value of preserving these activities.”); Rosen, supra note 160, at 8 (“In order to flourish, the intimate relationships on which true knowledge of another person depends need space as well as time: sanctuaries from the gaze of the crowd in which slow mutual self-disclosure is possible.”) (cited in Solove, Understanding Privacy 79-80).

\textsuperscript{162} Richards, supra note 60, at 40; Solove, Understanding Privacy 169.

\textsuperscript{163} This argument appears supported by an emerging scholarly effort to draw a line around, and better protect, “intellectual privacy.” See generally Neil M. Richards, Intellectual Privacy, 87 Tex. L. Rev. 387 (2008). To define when intellectual privacy interests are at stake, one asks “whether the information being sought is relevant to the activities of thinking, reading and discussion safeguarded by the First Amendment.” If the answer is “yes,” then a higher level of protection should result. Richards, supra note 60, at 52-53.


\textsuperscript{165} Richards, supra note 60, at 46; Richards, supra note 163, at 412-416 (arguing that
Without some privacy in public, people will lose the “moments for intellectual and spiritual contemplation” that privacy in public provides. The actual or threatened loss of obscurity chills not only political but also creative expression because people wish to avoid having their ideas “prematurely leaked to the world, where harsh judgments might crush them.” A sense of private space in public also reportedly is crucial to intellectual relationships with others, especially political ones. Specifically, “[p]ublic surveillance can have chilling effects that make people less likely to associate with certain groups, attend rallies, or speak at meetings.” Privacy and obscurity allegedly “underwrit[e] the freedom to vote, to hold political discussions, and to associate freely away from the glare of the public and without fear of reprisal.” Further, whether individually or in groups, “protection against disclosure also facilitates the reading and consumption of ideas.” This is because disclosure, coupled with the perceived permenancy of the Internet “attaches informational baggage to people” so that a thought exposed once will be associated with that person permanently. Ultimately, as “a tool of social control,” the Obscurity Problem purportedly “cause[s] [a] person to alter her behavior [through] self-censorship and inhibition,” thus reducing the number of helpful

Spatial privacy is necessary for thought development).

166 SOLOVE, UNDERSTANDING PRIVACY 79 (citing material from Joseph Bensman and Arnold Simmel); Cohen, supra note 100, at 1377 (“We must carve out protected zones of personal autonomy, so that productive expression and development can have room to flourish.”)

167 SOLOVE, UNDERSTANDING PRIVACY 143 (opining that the mere “risk of disclosure can prevent people from engaging in activities that further their own self-development” and “inhibit people from associating with others”); id. (quoting Gerstein for principle that “intimate relationships simply could not exist if we did not [have] privacy for them”); Richards, supra note 163, at 403 (“In a world of widespread public and private scrutiny, novel but unpopular ideas would have little room to breathe…and original ideas would have no refuge in which to develop.”)

168 SOLOVE, UNDERSTANDING PRIVACY 80.

169 SOLOVE, UNDERSTANDING PRIVACY 112.

Solove, supra note 1, at 993-94 (concluding that “without privacy, people might not communicate many ideas” and that threat of disclosure “probably will not end all conversations, but it will alter what is said”); Richards, supra note 60, at 46 (suggesting that in order to “govern themselves,” citizens need “space [free] from state scrutiny of their beliefs, thoughts, and emotions”).

170 See Solove, supra note 1, at 992 (citing Julie E. Cohen, A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace, 28 CONN. L. REV. 981, 1012-13 (1996)).

171 SOLOVE, UNDERSTANDING PRIVACY 124.
activities for society.\footnote{Id.}{173}

3. How the Obscurity Problem Harms are Overstated

Simply and perhaps harshly stated, the primary alleged harms of an Obscurity Problem are that: (i) it makes some people think twice before they share their thoughts or actions with others in public, and (ii) it makes the exposed person feel bad about himself, sometimes for a very long time. Both harms have been overstated and thus are ripe for critique.

a. Private Thinking Space in Public is Unnecessary and Already Available

The first harm—previously described as the destruction of perceived “thinking space”—is overstated because it is based on a false assumption. Namely, this harm assumes that a public yet somewhat secure space, absolutely free from later reporting by anyone of what has transpired there, is necessary for thought development and free association, especially political thought and association.

As an initial matter, freedom of thought and expression in private are not affected by the “no privacy in public” rule; it is only when one shares a thought with others that it potentially becomes exposed and leads to a loss of obscurity for the thought and speaker.\footnote{Also, as others have noted, societies with less spatial privacy than we enjoy today apparently were able to think and write just fine. \textit{See} Posner, supra note 16, at 407 (showing how “history does not teach that privacy is a precondition to creativity or individuality” because “these qualities have flourished in societies…that had much less privacy than we in the United States have today”).}{174} Further, it is unclear how possible exposure of thoughts or ideas is a disincentive to thought production and association; if anything, the potential for a huge and immediate audience tends to encourage sharing and debate. Some seem to fear that if we let regular people report what they see and hear to millions of others at the click of a button, no one will say the important things that need to be said. Again, this seems counterintuitive. Many individuals and groups seek out exposure and publicity for their ideas, not hide from them. Their reasons for doing so presumably range from egotism or vanity to more utilitarian reasons, such as the fact that speaking with someone else about your thoughts often improves them or the fact that making one’s ideas known helps them to spread and gain favor. Regardless of the precise reason that people share ideas with others, it simply cannot be said with convincing authority that people generally need a public yet private...
incubator for their secret camaraderie and thoughts. Further, encouraging some people to pause before they share a thought may result in beneficial self-censorship. Thus, the “thinking space” harm likely has been overstated and obscurity is not a necessary prerequisite for thought generation and association.

Various legal sources support the idea that the lack of public-yet-private thinking space is an acceptable lack of obscurity rather than a serious harm. Perhaps the most recent and direct challenge to the idea that lack of thinking space in public is a serious harm comes from the Supreme Court in its recent decision, Doe v. Reed. In Doe, the Supreme Court held that state disclosure of the names and addresses of those who sign petitions in support of ballot referenda does not categorically violate the petition signers’ First Amendment speech rights. In challenging the state statute requiring such disclosure, the signers of an anti-gay rights petition had argued that disclosing their names and addresses would chill speech, expose them to harassment and deprive them of privacy for their thoughts. This argument tracks that of privacy scholars who suggest that little to no obscurity will chill expression and thought development.

The Doe v. Reed Court rejected this argument in an 8-1 decision.

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175 See Posner, supra note 16, at 408-09. Daniel Solove has acknowledged that not all observation of one’s thinking violates privacy. SOLOVE, UNDERSTANDING PRIVACY 86-87 (“Suppose I peek through your window and see that you are reading a book by Rousseau. I learned information about your consumption of ideas, which ultimately involves information about your identity. Without more details, however, it is hard to see how my snooping rises to the level of kidnapping.”).


177 561 U.S. ___ (2010) (slip op.).

178 Doe v. Reed, 561 U.S. at *2. Before reaching its ultimate holding, the court determined that the signing of the petition was an expressive act, 561 U.S. *7, and that disclosure requirements are subject to “exacting scrutiny,” under which a “sufficiently important governmental interest” must be found. 561 U.S. *8. In Doe, the Court ruled that the state’s interest in preserving the integrity of its electoral process was sufficient. Id. at *8-10.


180 560 U.S. at *12.

181 560 U.S. at *12. The Court left the door open to an “as applied” challenge if
Specifically, the Court found that the state law was a constitutional disclosure requirement that “may burden the ability to speak, but [does] not prevent anyone from speaking.” In so finding, the court rejected a call for more privacy for activities deemed “intellectual,” at least when they have a lawmaking effect. In sum, because the Supreme Court recently has rejected the “I need obscurity in order to think and express my views” argument, at least in part, the lack of such obscurity carries much less weight as a possible harm caused by the Obscurity Problem.

Another convincing legal reality that undermines the perceived lack of thinking space harm is that there already are adequate methods to obtain legal protection for one’s ideas and thoughts when necessary—namely, confidentiality or nondisclosure agreements. Thus, if secrecy of publicized thought is valuable enough to someone, it can be obtained via an express agreement prior to or after it is shared. Given these readily

petitioners could show that disclosure would, as applied to their particular case, cause enough harm to their First Amendment rights and personal safety (citing Buckley v. Valeo, 424 U.S. 1, 74 (1976), Citizens United v. FEC, 558 U.S. ___ (2010) (slip op., at 54), and McConnell v. FEC, 540 U.S. 93, 198 (2003)). The holding also may be limited to actions that, like petition signing, have a “legal effect” similar to legislation. 560 U.S. at 7 n.1 (addressing dissent of Justice Scalia).

See Richards, supra note 60, at 47 (suggesting that Supreme Court’s alleged regard for intellectual privacy “holds a much greater degree of promise to better understand and resolve modern problems of privacy”); see also id. at 46-47 (characterizing Warren and Brandeis’s style of privacy as “a jurisprudential dead end” given conflict with First Amendment).

Justice Scalia was most skeptical of the urged need for thinking space, stating as follows: “[H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously... and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.” Doe, 560 U.S. at *10 (Scalia, J., concurring) (citations omitted)


available legal options, one cannot legitimately insist that a default right to obscenity is necessary in order for society to develop thought; accordingly, the “thinking space” harm has been overstated.

Sunshine laws and the benefits they have produced also call into question the need for privacy in public in order to facilitate thought development. One subset of sunshine laws generally requires governmental policy-related meetings to be open to the public and, in many cases, recorded, and even posted on a website. Similarly, many federal and state agencies require that people meeting with agency officials file a written notice describing what was discussed. Further, our nation has a history of open town meetings. If those most directly responsible for making public policy decisions do not need privacy in public, then it is at least questionable whether those with a more remote role need such absolute privacy either.

Finally, much of the most justifiable fear regarding deprivation of thinking space is triggered only when the state is the one collecting the information or when the information collection is a constant, pervasive


Many of these laws are so-named because Warren Brandeis, years after co-authoring The Right to Privacy, famously stated that “sunshine [is] the best of disinfectants.” LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1914).

See generally Daxton R. Stewart, Let the Sunshine In, Or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws, 15 COMM. L. & POL’Y 265 (2010) (reviewing current status of sunshine laws at federal and state level including enforcement of and relief under such laws).


See James Assaf, Note, Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings, 40 CASE W. RES. L. REV. 227, 229-30 (1990) (documenting existence of sunshine laws in all 50 states requiring public access to local government meetings) (citations omitted).

The Obscurity Problem involves neither state-based nor constant surveillance. State surveillance is not directly involved because it is “Little Stranger,” and not Big Brother, that is collecting the information. When it is one’s fellow citizens versus one’s government officials doing the exposing, freedom of association and related issues arguably are off the table. Second, arguments regarding surveillance’s potential to chill expression are most persuasive when the surveillance is constant, versus intermittent. With the Obscurity Problem, surveillance is only occasional. Thus, it again appears that concerns over having one’s ideas exposed have been exaggerated and the alleged “thinking space” harm has been overstated.

b. Dignity Harm is Temporary, Refutable and Unquantifiable

The second harm most often associated with the Obscurity Problem is a loss of dignity or other emotional harm felt by the person exposed and by persons who fear such exposure. I do not question that some people subjected to the Obscurity Problem suffer some emotional harm that causes them sincere pain. However, scholars documenting this harm and relying upon this harm to justify obscurity protections in public—at the expense of

192 See Richards, supra note 60, at *55 (concluding that Brandeis was most concerned when privacy protection was threatened “principally [by] the state rather than the press”); but see Richards, supra note 163 (documenting threats to thinking space from intrusions by private entities).

193 SOLOVE, UNDERSTANDING PRIVACY 133; see also M. Ryan Calo, The Boundaries of Privacy Harm, 86 IND. L.J. ___, *30-33 (forthcoming 2011) (reviewing Solove’s references to Orwell and Kafka and suggesting that lack of privacy is better viewed as a contributor to societal harms than as a separate and distinct harm in itself).

194 See Calo, supra note 193, at *29 (suggesting that harm to privacy is best measured by multiplying “the degree of aversion” to the privacy intrusion by “the extent of [the] surveillance” and thus finding more harm when “the extent of the surveillance is enormous”); 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, 327-34 (2009) (distinguishing harms from constant or ever-present surveillance, labeled “omniveillance,” from lesser harms caused by occasional photographs).

195 See SOLOVE, UNDERSTANDING PRIVACY 80-81 (discussing critics of the need for privacy for intellectual thought, including professors Hannah Arendt, Yao-Huai Lu, Richard Posner and Richard Epstein).

196 Supra notes 142-60 and accompanying text (discussing dignity harm and acknowledging that it includes other related harms such as increased anxiety); see Calo, supra note 193, at *17 (documenting examples of dignity harm under the label of “subjective harm”).

197 Supra notes 142-60 and accompanying text.
the benefits detailed below—have overstated or mischaracterized the harm in at least three ways.

First, scholars have overstated the dignity harm by making largely unsubstantiated claims regarding its permanence. For example, as noted above, some claim that the Obscurity Problem makes one a “prisoner of his recorded past,” suggesting that once one is exposed, one permanently drags around the exposed information like a tattoo or like a ball and chain around one’s neck. However, a cursory “where are they now”-style Internet search for the most oft-cited victims of the Obscurity Problem reveals that many were not damaged as much as one initially would think and others that initially were harmed have returned to or risen to positions objectively better than before the exposure. For example, “Star Wars Kid,” now a young adult, serves as President of a conservation society while studying for his law degree at McGill. Jonas Blank, the law firm associate whose profanely critical email traveled around the world, was hired full-time by the same top law firm he criticized. Countless others had their fifteen minutes of undignified fame fade even before or shortly after rising to the pitied status of “example used in privacy scholar’s work.” Further, the average shelf-life of any documented dignity harm likely will fade even more rapidly as more people are exposed, i.e., as the democratization of exposure expands. This is because the increased

198 SOLOVE, FUTURE OF REPUTATION 94 (“One of the chief drawbacks of Internet shaming is the permanence of its effects…Being shamed in cyberspace is akin to being marked for life.”). In part, this argument appears to suggest that we should be more afraid of information when it is more permanent, a suggestion that also could support limiting hardcover books because they are more durable and longer-lasting than paperbacks.

199 SOLOVE, UNDERSTANDING PRIVACY 145; see SOLOVE, FUTURE OF REPUTATION 94 (suggesting that being exposed for public conduct via the Internet is “similar to being forced to wear a digital scarlet letter or being branded or tattooed”).

200 Supra notes 105-15 and accompanying text.

201 See Alex Pasternack, After Lawsuits and Therapy, Star Wars Kid is Back, MOTHERBOARD, (June 1, 2010), http://www.motherboard.tv/2010/6/1/after-lawsuits-and-therapy-star-wars-kid-is-back.

202 The law firm, Skadden, Arps, Slate, Meagher & Flom, LLP, offered Mr. Blank a full-time position with the firm, which he accepted. He now works at a different New York City law firm. See David Lat, Our Favorite Skadden Associate Moves On, ABOVE THE LAW, (Mar. 30, 2007), http://abovethelaw.com/2007/03/our-favorite-skadden-associate-moves-on/.

203 See Schwartz, supra note 7, at 1444-45 (discussing how Solove’s depictions of exposed individuals perhaps perpetuates the very harm he identifies as troubling).

204 See Aaron Perzanowski, Comment, Relative Access to Corrective Speech: A New Test for Requiring Actual Malice, 94 CALIF. L. REV. 833, 833-34 (2006) (referencing “the democratization of the means of mass communication spurred by modern technology” as reason to question the public figure doctrine in defamation law).
amount of information available about individuals, and the ever-decreasing window of time during which a single piece of information remains in the public’s collective interest, makes any one exposure less and less noticeable. 205 In sum, as more information about more people is made available in a shorter and shorter news cycle, the staying power of any one exposure is limited and the supposed permanence of the dignity harm grows ever more questionable. 206

Scholars’ apparent failure to recognize the ease and effectiveness of responding to an exposure also results in an overstatement of the dignity harm. After the exposure, some serious emotional damage may have been done; however, that does not mean that it cannot be mitigated. Every alleged victim of an exposure has the opportunity to post a reply and many are quite effective. 207 Even Dog Poo Girl posted an online apology. 208 Additionally, exposure on the Internet unleashes a mob of eager fact-checkers, raring to go and expose the initial citizen journalist as a fraud. For example, when Department of Agriculture official Shirley Sherrod was falsely “exposed” for saying, on tape, that she purposefully refused to help a farmer of a different race than her own, further nigh-immediate exposure—posting of and commentary regarding the entire tape—revealed that she in fact did help the farmer and that she learned a great lesson regarding race and class in society. 209 In this respect, exposing the information to a large mass of people simultaneously helped improve the accuracy of the information. This automatic “right to reply” has not always been available (simply put, not everyone owned a newspaper) but now, the very technology some vilify is the same technology that empowers a reply. 210

205 See Gloria Franke, Note, The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role?, 79 S. Cal. L. Rev. 945, (noting “democratization of celebrity” and the power of the Internet to ‘empowe[r] the formerly voiceless’”) (citation omitted).

206 I suspect that some exposed persons, like the public at large, subjectively do not experience the harm others project upon them. See, e.g., Eric Goldman, The Privacy Hoax, FORBES, Oct. 14, 2002 (discussing how consumer behavior regarding privacy demonstrates a lack of sincere interest in personal privacy and, on that basis, questioning the need for additional government regulation).

207 See Lauren Gelman, Privacy, Free Speech, and “Blurry-Edged” Social Networks, 50 B.C. L. Rev. 1315, 1315-16 (2009) (“For the first time in history, the economics of publishing place the individual speaker on even ground with institutional speakers” such that “any person can tell her story to the world”).


210 See Perzonowski, supra, note 204, at 836 (contrasting the difficulty of responding
And, most importantly, every reply reduces the harm associated with the exposure and loss of obscurity.211

Finally, the dignity harm often is overstated because it cannot be quantified. Emotional harm is inherently subjective.212 The only one who accurately can quantify the harm is the person affected, and there is no direct way for the rest of us to get inside her head and feel the harm in the same way she feels it. This difficulty has led, at least in part, to the law’s skepticism of emotional harm, especially when the alleged harm was caused by the sharing of truthful information. For example, a privacy tort plaintiff must be able to point to a specific harm, such as a reputational loss, versus mere “hurt feelings,” in order to obtain damages.213 The Supreme Court, too, has expressed a reluctance to limit speech based on its potential to hurt feelings.214 Although it remains possible to assess the harm on an objective basis, assuming a rational, reasonable audience,215 the currently unquantifiable nature of emotional harm makes the dignity harm a weak leg on which to support a right to obscurity.216 Further, to the extent it can be quantified, the dignity harm likely is offset by the emotional benefits of exposure, as discussed below.

211 The reporting of, and replies to, more reputation-related information in turn likely will lead to more complete and more accurate assessments of an individual’s actual qualities. See Strahilevitz, supra note 33, at 1670-75 (chronicling developments leading to “reputation revolution”).

212 See Calo, supra note 193, at *14-20 (describing various subjective harms).

213 See Richards, supra note 60, at 1345 (“[A] hallmark of modern American First Amendment jurisprudence is that hurt feelings alone cannot justify the suppression of truthful information or opinion.”).


216 Richards, supra note 60, at 50 (“As Brandeis himself implicitly recognized later in life, a tort-based conception of privacy protecting against purely emotional harm must remain exceptional in a constitutional regime dedicated to speech, publicity, and disclosure.”)
B. Benefits of Exposure

Just as we must “value privacy on the basis of the range of activities it protects” we also must consider the range of activities that protecting privacy would impede, i.e., the range of activities precluded by the privacy protections themselves. Many scholars initially identify some of these benefits of exposure of public conduct or information. However, they often end up underestimating the benefits because they neglect to recognize some benefits at all, neglect to aggregate the benefits that they do recognize, and, ultimately, fail to return to these benefits when conducting the pragmatic balance they urge. This section remedies these past omissions by recognizing, categorizing, aggregating and balancing the many benefits of the kind of exposures involved in the Obscurity Problem.

1. Governmental Accountability Benefits

This Article opened with the following quote: “When it comes to privacy and accountability, people always demand the former for themselves and the latter for everyone else.” We tend to demand the most accountability from our government officials. Daniel Solove claims that “dog poop girl would have been just a vague image in a few people’s memories if it hadn’t been for the photo entering cyberspace and spreading around faster than an epidemic.” While this may be true, and may be deemed a net gain for society in that one instance, this does not mean that legally preventing or discouraging exposures of people’s public behavior

217 Solove, Understanding Privacy 98-99.
218 See Solove, Understanding Privacy 123, 187 (acknowledging that identification “can reduce fraud and enhance accountability” and that “many privacy problems emerge as a result of efficacious activities, much as pollution is an outgrowth of industrial production”).
219 My categorization of these exposure benefits is a preliminary and perhaps less sophisticated attempt to do what Daniel Solove does for privacy harms in Understanding Privacy. Some of these benefits have speech elements and thus relate to many First Amendment arguments already made elsewhere. However, in the instant context of a pragmatic balancing of harms and benefits, it is more appropriate to discuss them in non-speech terms, and perhaps mention the benefit’s connection to the First Amendment in passing, just as pro-privacy scholars have done. In this respect, a benefit’s relationship with the First Amendment increases its weight in the balance, but does not change its existence. Or, more concisely, one could consider the First Amendment as a thumb on the scale pushing down in favor of exposure.
220 See supra note 1.
221 See supra notes 187-191 and accompanying text.
222 Solove, Future of Reputation 8.
always results in a net gain for society. Recall the police brutality story from the Introduction involving Officer Walsh. Do we want events like that to be “vague image[s] in a few people’s memories?” Of course not, because exposure of such images holds our government officials accountable, inspires public debate and often leads to real policy changes. However, such benefits could be sacrificed in that situation and others like it if the person who videotaped the event did not post it to YouTube because he had a legal duty to protect the obscurity of Officer Walsh or of other people at the scene.

In trying to prevent harm suffered by the Dog Poop Girls of the world, we risk losing exposure of public behavior that should be further seen, heard, discussed, and addressed. Consider the many recent exposures of public officials at public events with other people nearby about which we may not have learned (or at least not seen) if the law protected people’s obscurity in public:

- Anti-gay comments made by candidate for New York Governor, Carl Paladino, in a meeting with religious leaders;
- Then Governor of South Carolina Mark Sanford’s emails to the woman with whom he was having an extra-marital affair, and suggestions to his staff to account for his absences during these affairs by falsely stating that he was “hiking the Appalachian trail;”
- The reference by George Allen, a candidate for Virginia’s U.S. Senate seat, to an opponent’s aide as “Macaca,” which many interpreted as a racist statement equating the aide to a Macaque monkey;
- Then Senate Majority Leader Trent Lott’s birthday party statement suggesting that had civil-rights opponent and fellow Senator Strom Thurmond been elected president in 1948, on a pro-segregation
platform, “we wouldn’t have had all these problems over the years;” and
- Pictures posted on a website by Ninth Circuit Judge Alex Kozinski, depicting nude women painted to look like farm animals.

Any one of these or similar exposures of public conduct or statements may have been precluded or at least “chilled” if the law recognized a right to obscurity. As a result, the helpful discussions and consequences these exposures motivated may not have occurred. Thus, there is a risk that providing a general right to obscurity would sacrifice significant governmental accountability benefits. In the end, “keeping pertinent information about public affairs out of the hands of the public is equally problematic,” regardless of whether the information’s source is a “citizen journalist” or a more traditional journalist.

2. Behavioral-Improvement Benefits

There also is significant value in continuing to apply the “no privacy in public” rule to everyone instead of applying it only to public officials. Just as the possibility of getting caught and punished acts as a deterrent to crime, the possibility of getting exposed for public statements or behavior acts as a deterrent to criminal and non-criminal but still objectively-undesirable behavior. Daniel Solove calls this type of exposure “norm policing,” but this term is too pejorative for something that holds so much potential for benefitting society. Solove claims that “[w]e do not view the victims [of exposure] as blameworthy, and there is little social value in their suffering.” I disagree. This alleged suffering, in the form of lost dignity and lost obscurity, can lead to significant social value—and even save lives.

In Order Without Law, Robert Ellickson discussed the behavioral

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229 Phillippe Naughton, LA Obscenity Trial Halted Over Judge Alex Kozinski’s Online Porn, THE TIMES (June 12, 2008), http://www.timesonline.co.uk/tol/news/world/us_and_americas/article4122560.ece.

230 See Strahilevitz, Reunifying, supra note __ at 12.

231 See generally Paul H. Robinson & John M. Darley, The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best, 91 GEO. L.J. 949 (2003); SOLOVE, FUTURE OF REPUTATION, 80-81, 92 (“Internet shaming has many benefits. Without shaming, people like the dog poop girl, the subway flasher, and the creep who harasses women in the street would often go unpunished. In a world of increasingly rude and uncivil behavior, shaming helps society maintain its norms of civility and etiquette.”).

232 See Solove, Taxonomy, supra note 42, at 538.
benefits of exposure.\textsuperscript{233} In a more recent and more specific study, Lior Jacob Strahilevitz demonstrated how additional exposure of people’s reckless driving habits could reduce deaths on our highways—the number one cause of death among those aged fifteen to twenty-nine.\textsuperscript{234} Strahilevitz first showed how protecting motorist obscurity leads to rude, dangerous and even life-threatening behavior.\textsuperscript{235} Next, he demonstrated how reducing driver obscurity through exposure by fellow citizens, and holding drivers accountable for their actions, has led to better and safer driving among some “exposed” groups and promises such benefits for society should the exposed groups be expanded.\textsuperscript{236} Indeed, Strahilevitz has shown how facilitating closeness and more “norm policing” may work better than the tort system itself as a way of curtailing and punishing bad behavior.\textsuperscript{237}

Fewer people cutting us off or tailgating us may save lives. On a more abstract level, additional exposure, and less obscurity, promise to increase happiness as well, on the highways and elsewhere.\textsuperscript{238} Fewer instances of other bad behavior may make life more enjoyable in various other contexts—primarily those in which obscurity authorizes and perhaps encourages objectionable behavior.\textsuperscript{239} For example, exposing poor tippers online has made servers who felt cheated feel better simply by reporting them; such exposure, in turn, may make patrons more courteous and more generous. Similarly, exposure of unruly hotel, sports stadium or airport.

\textsuperscript{233} Robert C. Ellickson, \textit{Order without Law: How Neighbors Settle Disputes} (1991); see Schwartz, \textit{supra} note 7, at 1440-42 (explaining how Ellickson’s work is pro-disclosure in part because it recognizes that “if the law can help reputational information circulate more freely, people will work harder to maintain the good opinion of others”).


\textsuperscript{235} Strahilevitz, \textit{supra} note 234 at 1705 (reviewing highway safety studies and concluding that “[t]he problems associated with urban and suburban driving are, by and large, creatures of motorist anonymity.”).

\textsuperscript{236} Id. at 1708-12.

\textsuperscript{237} Id. at 1724-26.

\textsuperscript{238} Strahilevitz demonstrated how exposure of drivers would increase happiness—an increase that likely would offset any other type of emotional harm suffered by the exposed drivers. \textit{Id.} at 1702 (“Recent economic research has placed commuting at the very bottom of the happiness index, easily ranking as the least pleasurable major life activity in which Americans engage.”); \textit{Id.} at 1729 (“While the costs associated with driver deaths and injuries are quite substantial, they may well be dwarfed by the sheer unhappiness associated with commutes to and from work.”); \textit{Id.} at 1730 (discussing economists’ studies regarding the value of happiness).

\textsuperscript{239} See Julie E. Cohen, \textit{Privacy, Visibility, Transparency, and Exposure}, 75 U. Chi. L. Rev. 181 (2008) (“Maybe we don’t want people to litter or spread germs, or to drive aggressively, and if the potential for exposure reduces the incidence of those behaviors, so much the better.”).
patrons could make visiting such places more enjoyable for all.240 If the potential for getting exposed for saying something extremely harmful to someone else actually changes someone’s behavior—and prevents the harm that would have been caused—then this changed behavior is a benefit of the “no privacy in public” rule and is another benefit supporting the rule’s retention.

3. Criminal Deterrence, Reporting and Integrity Benefits

The fruits of exposure can be even more beneficial to society when it is a criminal act, versus happiness-reducing rudeness, that is subject to exposure. Louis Brandeis’s suggestion that sunlight is the best disinfectant permeates popular culture and legal discourse.241 Often forgotten, however, is the second part of Brandeis’s sunlight quote: “[and] electric light the most efficient policeman.”242 As Brandeis suggested, exposure that leads to reduced obscurity for would-be criminals can be quite efficient at deterring crime, improving the integrity of the criminal justice system, and increasing the reporting of crimes, as discussed below.

As Daniel Solove has conceded, “social control can beneficial...[f]or example, surveillance can serve as a deterrent to crime...”243 In Great Britain, a government surveillance program using closed circuit cameras reportedly has reduced street crimes in some areas by over fifty percent or more.244 Although the Obscurity Problem includes, by definition, only exposure by private persons versus governments, it is possible if not likely that private exposure has a similar, albeit less comprehensive, deterrent effect on crime as more comprehensive, government-led surveillance would have. Further, if Britain’s CCTV is any indication, the crime-deterring effects come burdened with minimal “thinking space” or other harms.245 The increased feeling of safety then

240 Strahilevitz, supra note 234, at 1763.
242 BRANDEIS, supra note 187, at 92.
243 Solove, supra note 42, at 493-94
245 See SOLOVE, UNDERSTANDING PRIVACY 108 (acknowledging that Britain’s CCTV, “is widely perceived as ‘a friendly eye in the sky, not Big Brother but a kindly and watchful uncle or aunt.’”). I am unaware of any reports that the amount of productive thought coming out of Britain has declined since the time the cameras have been in use.
improves citizen well-being across the board, leading to additional self-liberty, not less.\textsuperscript{246}

For the many crimes that will occur despite the presence of citizen journalists, exposure of public conduct likely will continue to assist in the reporting of crimes as well as in the apprehension and prosecution of the correct perpetrators. For example, citizens have used their cell phone cameras to expose drivers involved in “hit and run” accidents in ways that led to their eventual arrest.\textsuperscript{247} Similarly, some citizens reluctant to report crimes in-person have been willing to report crimes via cell phone text messages including photographs of the alleged perpetrators.\textsuperscript{248} Additionally, New York City residents now may report crimes via uploading their pictures or videos to a government website.\textsuperscript{249} The freedom to expose others’ public actions even empowers some gutsy citizens to record and report the very criminals that have hurt them.\textsuperscript{250}

More broadly, social networks, chock-full of reports regarding others’ activities and whereabouts, have been and could continue to be harnessed to locate and track criminals or lost children.\textsuperscript{251} These same networks of citizen journalists and their exposures provide reliable and truthful alibis for the wrongly-accused, thereby improving the integrity of

\textsuperscript{246} As one commentator has noted, “[a]rguments that claim that an open society must accept a certain amount of crime fail to recognize that individual liberties are often sacrificed when an individual’s safety and security are forfeited.” \textsc{Dennis Bailey}, \textit{The Open Society Paradox} 71 (2004) (discussing how use of DNA could have caught a rapist and reduced other liberty-related harms such as those suffered by women who stayed indoors, bought guns, and endured needless fear and anxiety).


\textsuperscript{251} See Taking Pictures of Police Officers in Public Is Not a Crime, PoliceCrimes.com (July 24, 2010), http://www.policecrimes.com/forum/viewtopic.php?f=26&t=9148 (“Even in potential terrorism cases, the presence of lots of ordinary folks carrying cameras actually enhances public security. In the hours after the failed Times Square car-bomb attempt, officials…sought out home movies shot by tourists.”)
the system and ensuring that the right person eventually is caught.\footnote{252} Further, replacing notoriously unreliable eyewitness testimony with more reliable evidence of exposures documented via still- and video-cameras also improves reliability.\footnote{253} Ultimately, the presence and use of what amounts to millions of mobile, citizen-directed security cameras could vastly improve the integrity and reliability of the criminal justice system, leading to improved safety and liberty for all citizens.

4. Emotional and Therapeutic Benefits

Although privacy scholars carefully have identified the emotional harms associated with the Obscurity Problem, they have not fully accounted for the emotional benefits associated with exposure. A person who exposes another’s public behavior via distributing a video or story online often does so because sharing her take on the behavior with others makes her feel better. Some describe the emotional benefit of sharing a story via a personal blog as providing “a new kind of intimacy, a sense that they are known and listened to.”\footnote{254} For intensely personal autobiographical speech, the emotional benefits to the speaker are even more pronounced and heartfelt.\footnote{255} In fact, even the performance of “Numa Numa Guy” has been

\footnote{252} See, e.g., Damiano Beltrami, His Facebook Status Now? “Charges Dropped,” NY TIMES, FG/CH NEWS (Nov. 11, 2009), http://fort-greene.thelocal.nytimes.com/2009/11/11/his-facebook-status-now-charges-dropped/ (documenting use of Facebook posting as alibi and broader trend that “Web communications including photos and videos are providing evidence in legal battles ranging from murder trials to employment lawsuits”).

\footnote{253} The unreliability of traditional eyewitness testimony has been well-documented. See, e.g., Brandon L. Garrett, Judging Innocence, 108 COLUM. L. REV. 55, 60 (2008) (showing that 79% of rape or murder exonerees in expansive study were convicted based on incorrect eyewitness testimony).

\footnote{254} See Emily Nussbaum, My So-Called Blog, NY TIMES, Technology (Jan. 11, 2004), available at http://www.nytimes.com/2004/01/11/magazine/my-so-called-blog.html (reviewing phenomenon of adolescent blogs and concluding that “[E]xposure may be painful at times, but it’s all part of the process of ‘putting it out there,’ risking judgment and letting people in.”); Posner, supra note 16, at 400 (noting how “[a]nyone who has ever sat next to a stranger on a airplane or a ski lift knows the delight that people take in talking about themselves to complete strangers”)

described as a reason to promote webcam recordings because his video exhibited pure emotional enjoyment of a song.\textsuperscript{256} Thus, silencing one person to protect the obscurity of another likely ends up sacrificing the emotional interests of the one silenced.

Exposure of public conduct also leads to emotional benefits for people similarly situated to the exposed person. When someone is exposed in public for supposedly shameful conduct—such as alcoholism—it often leads other people who engage in that conduct to feel connected and no longer alone. This powerful emotional benefit is why memoirs—a genre likely made impossible by a duty to protect others’ obscurity—are so powerful.\textsuperscript{257} In turn, the readers of such truthful stories experience emotional benefits as well.

Exposure even can help change the social norm that made a person feel “different” in the first place, and, in doing so, end the hypocrisy.\textsuperscript{258} As Daniel Solove has said, “Privacy allows society to maintain norms on the surface while transgressions occur in secret. Society can maintain the fiction that its norms are being followed while deviant conduct is hidden behind the veneer.”\textsuperscript{259} Even if the norm does not change, the exposure could lead to other emotional benefits such as forgiveness.\textsuperscript{260} Exposing people’s public actions and statements also brings certain issues, previously hidden at the expense of a certain segment of society, into public debate.\textsuperscript{261} In all of these ways, the increased pride, self-esteem, confidence and other emotional benefits likely offset dignity harms to the one being exposed or to people fearing exposure.\textsuperscript{262}

\textsuperscript{256} See Douglas Wolk, The Syncher, Not the Song: The Irresistible Rise of the Numa Numa Dance, \textit{The Believer} (June/July 2006), http://believermag.com/issues/200606/?read=article\_wolk (“Brolsma’s video singlehandedly justifies the existence of webcams” because “[i]t’s a movie of someone who is having the time of his life, wants to share his joy with everyone, and doesn’t care what anyone else thinks”). Perhaps the positive feelings associated with exposure were part of his motivation for starting his own NumaNetwork on YouTube.

\textsuperscript{257} See West, \textit{Story of Me}, supra note 255 at 919-20 (chronicling recent increase in memoirs).

\textsuperscript{258} See SOLOVE, \textit{UNDERSTANDING PRIVACY} 144 (discussing Zimmerman and acknowledging that “more disclosures about people’s private lives might change hypocritical social norms that societies proclaim in public but flout in private”).

\textsuperscript{259} Solove, \textit{UNDERSTANDING PRIVACY} 96.

\textsuperscript{260} See Posner, supra note 16, at __ (“If ignorance is the prerequisite of trust, equally knowledge, which privacy conceals, is the prerequisite of forgiveness.”).

\textsuperscript{261} For example, some feminist scholars have argued that over-insistence on privacy kept many women’s rights issues hidden from public scrutiny. SOLOVE, \textit{UNDERSTANDING PRIVACY} 81-82.

\textsuperscript{262} See Bailey, supra note 246, at 204 (“Interpersonal relationships will in fact be better if there is less of a concern for privacy. After all, forthrightness, honesty and candor are,
5. Deception Prevention Benefits

One reason some people vilify the Obscurity Problem is that they have something to hide and depend upon others’ ignorance regarding this “something” in order to maintain their personal and professional relationships. Revealing this information may “correct misapprehensions that the individual is trying to exploit, as when a worker conceals a serious health problem from his employer or a prospective husband conceals his sterility from his fiancée.” Thus, exposing truthful facts about a person that he purposefully hides from others acts as a “deception prevention” device, which many view as a net benefit for society.

Preventing deception leads to other societal benefits, both directly and indirectly, such as ensuring that one does not hire an irresponsible person to take care of one’s children. Knowing more about someone also can help people make decisions based on real information rather than relying on inaccurate stereotypes. If we know more about people, and observe them benefitting society despite their past behavior, perhaps we will learn to be more forgiving and less judgmental. Legally barring or

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263 Richard A. Posner, The Economics of Justice 260-61 (1981) (concluding that “[p]eople conceal past criminal acts not out of bashfulness but precisely because potential acquaintances quite sensibly regard a criminal past as negative evidence of the value of cultivating an acquaintance with the person”). Expanding this thought to non-criminal activities, people conceal past social behavior (e.g., a keg stand) not out of bashfulness but precisely because potential acquaintances (e.g., employers or first dates) quite sensibly regard a poor social choice in the past as negative evidence of the value of dating, employing, or spending time with such a person.

264 Posner, supra note 263 at 233.

265 Posner, supra note 16, at __; Bailey, supra note 246, at 184 (“[T]he more privacy we have, the less likely we are able to trust someone. Knowing something about a person helps you make a reasonable judgment about whether to trust him or her.”) (discussing legal philosophy of Michael Froomkin).

266 See Fred Cate, Privacy in the Information Age 29 (1997) (“What parent would not want to know if her child’s babysitter had been convicted for child abuse? Similarly, what storeowner would not want to know whether his physician had a history of malpractice? What man or woman would not want to know if a potential sexual partner had a sexually transmitted disease? What airline would not want to know if its pilots were subject to epileptic seizures? Yet the interest in not disclosing that information is precisely what privacy protects.”).

267 Strahilevitz, supra note 33, at 1684-88 (suggesting ways in which reputational information can replace race as proxy and thus reduce discrimination based on race).

268 In this way, a digital dossier, which Daniel Solove invites us to fear, is a good thing, not a bad thing. The dossier documents the positive as well as the negative. Perhaps
punishing the exposure of such information lets the deception and poor decisionmaking continue in the interest of protecting a mythical right to obscurity.\textsuperscript{269}

\section*{C. Moving Towards the Proper Balance}

The purpose of Parts III.A and III.B was to begin aggregating the collective harms of the Obscurity Problem versus the collective benefits of exposing public conduct, pursuant to the balance described in Part II.B. In Part III.A, I showed that scholars appear to oppose the full democratization of exposure because they believe that it harms the emotional and intellectual interests of those exposed and of society as a whole. I then showed how these harms are overstated and how suggested reforms amount to a call for protection of one’s mythical right to obscurity. In Part III.B, I showed how efforts to curb the Obscurity Problem, if not carefully drawn, could sacrifice significant social value often overlooked or not properly valued.

Although further aggregation and discussion of benefits and harms should be done before drawing ultimate conclusions, a preliminary balancing appears to show that the benefits of exposing public conduct outweigh the supposed harms of the Obscurity Problem. A good starting point for the balancing is to compare apples to apples—to compare emotional harms to emotional benefits. Parts III.A and B show that for every exposed or potentially exposed person emotionally harmed or threatened by an exposure, there is at least one person emotionally benefitted via the same exposure, whether it is the person doing the exposing, the person exposed or the person receiving the exposed information. Assuming for balancing purposes that the number of people emotionally harmed or benefitted, and the degree to which they are so harmed or benefitted, is relatively equal, these harms and benefits perhaps

\begin{itemize}
\item it even would be quite liberating to not have to live two lives, one private, and one public, as one philosopher suggests. \textit{See Richard A. Wasserstrom, Privacy: Some Arguments and Assumptions, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, AN ANTHOLOGY, Ferdinand D. Schoeman, ed. (Cambridge Univ. Press 1984) at 331} (“[An] emphasis upon the maintenance of a private side to life [leads to a] dualistic, unintegrated life that renders the individuals who live it needlessly vulnerable, shame ridden, and lacking in a clear sense of self [versus] the more open, less guarded life of the person who has so little to fear from disclosures of self….”).
\item Richard Posner equates some emphases on privacy as fraud. Posner, \textit{supra} note 16, at __ (“An analogy to the world of commerce may help to explain why people should not—on economic grounds, in any event—have a right to conceal material facts about themselves. We think it wrong (and inefficient) that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people ‘sell’ themselves as well as their goods.”).
\end{itemize}
balance each other out. \textsuperscript{270}

The only harm then left on the side of those arguing that the “no privacy in public” rule is inadequate is the harm associated with intrusion into one’s thinking space. \textsuperscript{271} Although it is difficult to quantify this harm, assigning it a precise value is not necessary. One also need not agree with me that this harm has been overstated. \textsuperscript{272} Rather, one need only balance the thinking space value—whatever it may be—against the value of the non-emotional benefits identified in Part III.B. \textsuperscript{273} These include Governmental Accountability Benefits, Behavioral-Changing Benefits, Crime-Related Benefits, and Deception Prevention Benefits. To me, the choice is clear—I gladly will sacrifice the perceived lack of confidential thinking space in public in exchange for more accountability for my government officials, for more crime prevention and reporting, for more responsible and safe behavior from my fellow citizens, and for more truthful information about the people I encounter.

\textbf{D. Special Cases}

As shown above, a pragmatic balance generally appears to favor retention of the “no privacy in public” rule. However, the balance may tip the other way in a small set of special cases distinguishable because they involve the exposure of a body part or bodily activity that society generally regards as “private” even when the person ventures into “public.” This special category includes exposures such as publishing a photograph of a woman’s bare bottom taken in a shopping center when a gust of air blows up her skirt, \textsuperscript{274} publishing a photograph of a teenager’s genitals taken during an athletic event, \textsuperscript{275} or publishing a photograph of someone going to the bathroom taken through the gap in a restaurant bathroom stall. \textsuperscript{276} Under a

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  \item \textsuperscript{270} Admittedly, this cannot be assessed as a perfect balance without a more detailed inquiry that assigns some value to each side in particular situations. Other interests not specifically mentioned, such as those based on the First Amendment, also must be considered.
  \item \textsuperscript{271} See supra notes 161-73 and accompanying text.
  \item \textsuperscript{272} See supra notes 174-95 and accompanying text.
  \item \textsuperscript{273} See supra notes 217-69 and accompanying text.
  \item \textsuperscript{274} Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964).
  \item \textsuperscript{275} McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 905 (Tex. App. 1991).
  \item \textsuperscript{276} Autopsy photos, which often involve grisly bodily exposures, also likely would fall into this category. For a thorough discussion of why such photos deserve special privacy protection, see JON L. MILLS, PRIVACY: THE LOST RIGHT (2008). Prosser also acknowledged that “a difference may at least be found between a harmless report of a private wedding and the morbid publication of the picture of a deformed child.” Richards & Solove, supra note 17, at 10 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF
strict application of the “no privacy in public” rule that I defend above, these exposures would appear acceptable because the information collected and re-published initially was shared in a public place (i.e., a shopping mall, a soccer stadium or a restaurant).

A more careful inquiry, however, suggests that these bodily exposures instead deserve special treatment under the pragmatic balancing test given the comparatively greater harms and comparatively fewer benefits they trigger. On the harm side, exposures of one’s body parts or bodily functions often have been considered particularly harmful to personal dignity, and thus worthy of special legal protection in other contexts. On the benefits side, the possible benefits flowing from such exposures are minimal because exposing someone’s body parts or bodily functions generally does not improve governmental or personal accountability, deter crime, or prevent deception.

As Richard Posner has stated, “because the individual’s desire to suppress the photograph [of a body part] is not related to misrepresentation in any business or social market place, there is no basis for a presumption that the social value of disclosure exceeds that of concealment.”

Consider the example of Robert, whose sexual preferences and behaviors were described by his one-time lover in her blog. Although having one’s sexual preferences exposed to others is far from ideal for most people, the pragmatic balance would shift significantly in Robert’s favor should Ms. Cutler have sought to describe or publish a photograph of Robert’s genitals. The latter exposure likely would fall into the special cases category described here because the benefits to society of sharing the

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277 See also Lance Rothenberg, Comment, Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space, 19 AM. U.L. REV. 1127 (2000) (calling upon the criminal law to penalize voyeurs who surreptitiously record the private body parts of persons in public).

278 California and Louisiana already have adopted “video voyeur” statutes recognizing a privacy-based protection against recorded intrusions “under or through the clothing” of a person even if that person is in public. Cal. Penal Code 647(k)(2); La. Rev. Stat. Ann. 283(A)(1); see Rothenberg, supra note 277 (discussing California and Louisiana statutes and the real-life privacy violations that motivated them).

279 Rather, the little information provided by exposing the “offensive or embarrassing characteristics of [an] individual” provide little to no discreditable information, and, thus, do not “serve the prevention-deception goal.” Posner, supra note 16, at 413; see id. at 400 (“Some private information that people desire to conceal is not discreditable. In our culture, for example, most people do not like to be seen naked, quite apart from any discreditable fact that such observation might reveal.”).


281 Supra note 111 and accompanying text.
information would be exceptionally low (knowing precisely what Robert’s genitals look like does not help one judge whether he is a good or bad person), while the harms to Robert’s dignity would be exceptionally high (knowing that anyone, anywhere can pull up a picture of one’s genitals could be particularly harmful to one’s dignity and other emotional interests). A similar approach could be used to justify restrictions on publishing the name of a rape victim or on publishing autopsy photos because such exposures “caus[e] distress to the victim’s family while providing no information useful to people contemplating transactions with her (since she was dead) or with her family.” Ultimately, these body part or bodily function exposures likely are less worthy of protection because they provide no useful reputational information regarding the individual exposed, and therefore are distinguishable from all other types of exposures of information shared in public.

IV. CONCLUSION

The rhetoric regarding technology’s assault on privacy has peaked at predictable points in time, most often when appreciation of a certain technology’s beneficial uses has not yet caught up to the fears regarding its negative uses. One common tactic is to describe technology as a new, more harmful type of privacy invasion, thus inspiring fear. “We shall soon be nothing but transparent heaps of jelly to each other,” warned an interviewer of the inventor of an early predecessor to the X-ray. “[T]he latest advances in photographic art have rendered it possible to take pictures

282 Posner, supra note 16, at 414. Similarly, consider the exposure of Dog Poop Girl’s behavior—her refusal to clean up her dog’s excrement on a subway train—versus an exposure involving Dog Poop Girl’s own body parts or bodily functions. Publishing a photograph of Dog Poop Girl’s bare bottom taken while she was going to the bathroom is inherently different than publishing the photograph of her refusing to clean up her dog’s excrement because the former “could convey no information enabling her friends and acquaintances to correct misapprehensions about her character which she might have engendered” while the latter would help friends and acquaintances to decide whether she was a good, respectful person or not. Id.

283 Id. at 416.

284 Fears about online privacy are particularly amusing to some critics who work in the technology business. See, e.g., Sarah Stirland, Mr. McNealy Gets Starry-Eyed, RED HERRING, Sept. 1, 1999 (“You can go and find a mailbox right now, open the door to a tin box, tin door, no lock, with unencrypted information in English, sealed in a paper-thin envelope with spit, yet people are worried about online privacy.”) (quoting Scott McNealy of Sun Microsystems).

surreptitiously," gasped Warren and Brandeis.\footnote{286} Fear of these supposed harms then is used to justify some type of new legal restriction or remedy.\footnote{287} At present, the fear is inspired by stories of lives allegedly ruined by public information being shared with millions and warnings that “you, too, could be Dog Poop Girl, and have your life ruined” due to a short lapse in judgment.\footnote{288} The new legal restriction or remedy demanded is a supposedly necessary change to the “no privacy in public” rule in order to protect people’s obscurity.

Critics of the “no privacy in public” rule suggest that its time has passed and that one now needs some amount of privacy in public—in other words, a right to obscurity—in order to function in society. However, as the initial harms versus benefits balance detailed above shows, the “no privacy in public” rule likely remains valid, useful and beneficial to society, even one as technologically-advanced as our own, in all but a very few special cases. This is because the current and future lack of a right to obscurity leads to many positive societal benefits—accountability for our public officials and ourselves, better crime prevention and reporting, and more information about the people with whom we engage in important personal and business transactions. Ultimately, I believe that a potential loss in obscurity is a small price to pay for these benefits, and that the “no privacy in public” generally remains valid. At the very least, before we decide to restrict the flow of truthful, public information in the interest of protecting Dog Poop Girl’s mythical right to obscurity, we need to better understand what it is we are sacrificing by doing so.

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\footnote{286}{See Warren & Brandeis, supra note 36, at 195, 211 (“Instantaneous photographs...have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”); id. at 196 (“[M]odern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”). Even the concept of the white pages in the phone book once triggered irrational privacy fears. Bailey, supra note 246, at 172-73.}

\footnote{287}{As Coleridge famously stated, “In politics, what begins in fear usually ends in folly.”}

\footnote{288}{See, e.g., Solove, FUTURE OF REPUTATION 48 (“Whether you like it or not, whether you intend it or not, the Internet can make you an instant celebrity. You could be the next Star Wars Kid.”); Solove, THE FUTURE OF REPUTATION 2 (“Like the dog poop girl, you could find photos and information about yourself spread around the Internet like a virus.”); Solove, supra note 1, at 969 (“Without warning, anyone can broadcast another’s unguarded moments or times of youthful awkwardness to an audience of millions.”)}