

## ‘Relational Privacy’ & Tort

Stuart Hargreaves

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## 'RELATIONAL PRIVACY' & TORT

STUART HARGREAVES\*

### ABSTRACT

This Article argues that the current interpretation given to the four-part invasion of privacy framework by the courts is inadequate in the face of modern privacy challenges. In particular, it struggles with claims for privacy over public matters or other 'non-secret' matters that an individual may nonetheless have some ongoing privacy interest in. This Article suggests that this struggle is the result of the courts adopting a fixed, binary approach to privacy, which is itself grounded in a liberal-individualistic account of autonomy. While this may be a natural response to concerns about limiting the scope of the tort, it is unnecessarily rigid. Feminist legal theory offers a reconstructed account of autonomy grounded in the importance of supportive social contexts rather than the elimination of external influences. This Article argues that the deep philosophical linkages between autonomy and privacy mean that by drawing on this reconstructed account of the former we can improve our approach to the latter. In turn, this points towards a legal regime that protects privacy not by focusing on *a priori* definitions of private places or things, but by focusing on the nature of the harm suffered by the claimant and its impact upon their role in the community. Though the courts have not yet recognized this approach by name, this Article suggests that the seeds of it can be found in the expansion of the breach of confidence action used in some common law jurisdictions to protect privacy interests. This expansion has taken an action previously applicable only in the commercial context, and by focusing on the nature of the harm suffered by the claimant, has expanded privacy protections in a way that may in fact be more responsive to a range of modern privacy claims than the traditional freestanding privacy torts used in the United States and replicas of them elsewhere.

### INTRODUCTION

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\* Assistant Professor, LL.B Programme Director, Assistant Dean (Undergraduate Studies), Faculty of Law, the Chinese University of Hong Kong.

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INTRODUCTION

Tort as a vehicle to protect privacy can be traced to Warren & Brandeis' seminal article that feared an emboldened tabloid press along with new photographic technology might "make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"<sup>1</sup> In these developments they foresaw a growing threat to an individual's "inviolable personality," and so advocated for legal recognition of the right to be "let alone."<sup>2</sup> The ideas contained in "The Right to Privacy" were gradually adopted by the courts and seventy-five years later Prosser argued (critically, it should be noted) that the common law of the United States had subsequently expanded to reveal four distinct privacy-related torts: intrusion upon the plaintiff's solitude, seclusion or private affairs; public disclosure of embarrassing facts about the plaintiff; publicity that places the plaintiff in a false light in the public eye; and appropriation of the plaintiff's name or likeness.<sup>3</sup> While there was (and is) debate as to whether these actions are in fact distinctly related to privacy,<sup>4</sup> this four-part approach is now widespread thanks to its inclusion in the Second Restatement of Torts, which reads:

- (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
- (2) The right of privacy is invaded by[:]

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting *Luke* 12:3).

2. *Id.* at 205.

3. William L. Prosser, *Privacy [A Legal Analysis]*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 107 (Ferdinand David Schoeman ed., 1984).

4. Prosser contended, for instance, that while the American common law had evolved this way, none of these four torts were truly related to a distinct understanding of privacy; rather, each protected separate interests such as mental distress (the intrusion tort), reputation (the disclosure and publicity torts), or property (the appropriation tort). *Id.* at 105. In contrast, Bloustein has argued that invasion of privacy ought to be conceived of as a single dignitary tort. See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 157 (Ferdinand David Schoeman ed., 1984).

- (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
- (b) appropriation of the other's name or likeness, as stated in § 652C; or
- (c) unreasonable publicity given to the other's private life, as stated in § 652D; or
- (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.<sup>5</sup>

Two of these branches—unreasonable intrusion upon the seclusion of another and unreasonable publicity given to another's private life—may in theory apply to a variety of privacy concerns. However, the current approach to protecting privacy under this framework is an impoverished one, flowing from a conceptual dependence upon the metaphor of a boundary that delineates that which is 'public' and that which is 'private.' This *a priori* requirement is ill-suited to a range of modern privacy claims, particularly for those that may have some kind of online aspect to them, in which the lines between what is 'private' and what is 'public' may be heavily blurred. I argue in this Article that this boundary metaphor characterizes the liberal account of *privacy* in tort law because it flows from a very similar metaphor that informs the liberal account of *autonomy*—both imagine the individual protecting his or her 'privacy' or 'autonomy' from the unwanted influence of others with a 'shield' in the form of actionable legal rights. By drawing upon accounts of autonomy that challenge this conventional approach (in particular those found in feminist legal theory), I offer an improved normative account of privacy: 'relational privacy.'

Relational privacy contends a true state of privacy can—paradoxically—only itself be meaningfully achieved within a dense network of relationships. On this account, a privacy loss is something that lessens our ability to engage others or modulate our exposure within this network of relationships. In turn, the most serious privacy losses (and thus the ones that should be legally actionable) are those that significantly impinge upon the ability of the individual to act in an autonomous manner and function as a member of a community in the way they see fit. I argue that privacy understood on this relational basis can provide a superior normative

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5. RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977). It should, of course, be noted that while Restatements are strongly authoritative they are of course not binding; because tort is the domain of state law, not all states have accepted all four elements of Prosser's formulation into their respective common laws.

framework upon which tort protections can subsequently be grafted. Though no courts have explicitly adopted a relational approach to privacy, I conclude by suggesting that the approach taken in some non-U.S. jurisdictions to protecting privacy interests in tort not through a freestanding ‘invasion of privacy’ action but rather by extending the ‘breach of confidence’ action represents the seeds of such an approach.

### I. PRIVACY TORTS & THE METAPHOR OF THE BOUNDARY

At the outset, one must acknowledge that the existing public/private dichotomy that characterizes the current tort framework is essentially a judicial response to an admitted problem. Austin describes the phenomenon of “containment anxiety,” whereby courts resist extension of tort protections for invasions of privacy out of a fear of unduly restricting the legitimate interests of other parties.<sup>6</sup> An invasion of privacy tort that could successfully ground claims for secrecy over *any* activity an individual wished to keep out of the public eye, for instance, would have serious consequences for the constitutionally protected expressive activities of others. The jurisprudence surrounding the existing privacy tort framework reveals some of this ‘anxiety.’ Take, for instance, the unreasonable intrusion upon seclusion branch, under which the interpretation of the courts given to the tort has an important locational aspect:

[The plaintiff's] den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. . . . [While one] takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. . . . [one] does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select.<sup>7</sup>

The defendant need not *physically* penetrate the zone of privacy; even if the defendant is nowhere near the plaintiff at the time the intrusion is alleged to have occurred, the use of certain kinds of equipment—like parabolic microphones—may still violate the plaintiff's privacy rights if the plaintiff was located in an *a priori* private place, such as a bedroom.<sup>8</sup> This logic also means wiretapping a

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6. Lisa M. Austin, *Privacy and Private Law: The Dilemma of Justification*, 55 MCGILL L.J. 165, 167–68 (2010).

7. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

8. *Hamberger v. Eastman*, 206 A.2d 239, 241–42 (N.H. 1964).

telephone conversation can ground a claim for intrusion upon seclusion even if the 'bug' itself is not located within the target's private space.<sup>9</sup> What is important, then, is the location of the plaintiff in some erstwhile private zone, rather than the method used to penetrate that zone.<sup>10</sup> 'Intrusions' are not limited only to the 'physical' variety, but also include 'electronic' intrusions; "[s]imply put intrusion is a physical, electronic or mechanical intrusion into someone's personal life."<sup>11</sup>

The flipside of this approach means that courts have been extremely reluctant to find that any kind of privacy interest has been invaded when the plaintiffs are in public space or otherwise easily accessible by others—in other words, outside the *a priori* determined 'zone of privacy.' In *Gill v. Hearst Publishing Co.*, the plaintiffs sued a newspaper for intrusion upon seclusion after a photograph taken of them in an "affectionate pose" while at an ice cream stand at the Los Angeles Farmers' Market was published.<sup>12</sup> By virtue of being in public the couple had, according to the court, "voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near their place of business. . . . [and thus had] waived their right of privacy."<sup>13</sup> In *Villanova*, a plaintiff sued under the first branch after private investigators used a hidden GPS device to track his movements by car on the orders of his wife as part of their divorce proceedings.<sup>14</sup> The court concluded that even though the placement of the device was done without the plaintiff's knowledge, the consistent tracking of his location was not an intrusion upon his seclusion or solitude because he never drove the car to a secluded location or place that was out of public view.<sup>15</sup> Again, the 'public' aspect of the plaintiff's activities meant no claim for privacy could be sustained.<sup>16</sup> Thus, while a physical intrusion of a private place by the defendant is not necessary to create a cause of action within the first branch of the tort, the plaintiff must still be located in places *a priori* determined to be deserving of a claim to 'seclusion.'<sup>17</sup> Effectively, this is a spatial

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

10. *See id.*

11. Brian Kane, *Balancing Anonymity, Popularity, & Micro-Celebrity: The Crossroads of Social Networking & Privacy*, 20 ALB. L.J. SCI. & TECH. 327, 349 (2010).

12. *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 442 (Cal. 1953).

13. *Id.* at 444.

14. *Villanova v. Innovative Investigations, Inc.*, 21 A.3d 650, 651 (N.J. Super. Ct. App. Div. 2011).

15. *Id.* at 651–52.

16. *Id.* at 656–57.

17. *Id.* at 656.

question dependent on a boundary between public and private places with the result that acting in public essentially dooms any claim to privacy under the first branch of the four-part framework.

A similar spatial emphasis is revealed in the jurisprudence under the third branch of the tort (publicity given to the private life of another). Though a defendant may be liable for the publication of information that “[was] not of legitimate concern to the public,”<sup>18</sup> there is an important escape hatch for defendants in that “there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.”<sup>19</sup> The meaning of ‘public eye’ has been given a broad ambit by the courts. *Puckett*, for instance, involved a dancer at a strip club who was filmed without her consent and had her image broadcast (though not identified by name) as part of a news segment on a particularly notorious bar in Tennessee.<sup>20</sup> She alleged that the broadcast invaded her privacy through the public revelation of private facts, as it revealed to her unknowing friends and family that she was an exotic dancer.<sup>21</sup> In dismissing her appeal, the Sixth Circuit Court of Appeals did not find it necessary to make recourse to the fact that the news segment might have revealed information that was of ‘legitimate concern to the public’ or to any constitutional arguments regarding freedom of the press.<sup>22</sup> Instead, the court simply concluded that since “[the] plaintiff’s activities at the club were open to the public. . . . her claim for public disclosure of private life was properly dismissed by the district court as a matter of law.”<sup>23</sup> So, even though the plaintiff was located in private property, the fact that it was generally open to members of the public (at least, those of the age of majority) was enough to mean it was not deemed a truly ‘private’ location.<sup>24</sup>

The importance of this *a priori* determination of public and private places is further solidified by the interpretation given to the other major containment tool found in both the first and third branches of the tort—that the invasion or publicity be ‘highly offensive to the reasonable person.’ Returning to *Gill*, the court implied there was an important connection between the locational element of the alleged tort (the Farmers’ Market) and whether or not it was an invasion that was, in fact, ‘highly offensive’ to the reasonable

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18. RESTATEMENT (SECOND) OF TORTS § 652D (Am. Law Inst. 1977).

19. RESTATEMENT (SECOND) OF TORTS § 652D cmt. B (Am. Law Inst. 1977).

20. *Puckett v. American Broad. Co. Inc.*, No. 89-6589, 1990 WL 170425, at \*1 (6th Cir. Nov. 6, 1990).

21. *Id.* at \*2.

22. *Id.*

23. *Id.*

24. *Id.*

person.<sup>25</sup> While the plaintiffs were photographed linked arm-in-arm in a fashion that might be considered an intimate gesture, the California Supreme Court ruled that revealing it in the photograph was not found to meet the 'highly offensive' threshold, as it was merely the portrayal of "an incident which may be seen almost daily in ordinary life."<sup>26</sup> In so doing, the court linked the location of the 'incident' and its possible offensiveness; this serves to further privilege the initial spatial question. *Boring* also turned largely on this issue of the lack of 'offensiveness' of things that can be easily seen publicly.<sup>27</sup> After discovering photos of their residence on Google's Street View mapping project despite it being at the end of a private, unpaved road, Aaron and Christine Boring filed suit claiming that Google had "significantly disregarded [their] privacy interests."<sup>28</sup> Though the Borings had failed to state in their brief precisely which privacy interest under the four-part framework was violated, the District Court concluded that the only possible options were intrusion upon seclusion and publicity given to private life, and proceeded accordingly.<sup>29</sup> Regarding the requirement of high offensiveness under both these branches of the tort, the court argued that while many people might resent some of the privacy implications of Street View, only "the most exquisitely sensitive would suffer shame or humiliation."<sup>30</sup> The Borings, the court said, had failed to bring evidence that would demonstrate the reasonable person would be highly offended that images of their house were available online, and even the Borings themselves had not taken the necessary steps (such as requesting a takedown) with Google to begin eliminating the images.<sup>31</sup> The court also suggested that the way in which the Borings had brought suit against Google was evidence that privacy was not their primary concern and that they did not find the images highly offensive or humiliating—truly private people, the court reasoned, would not have begun a lawsuit without obtaining orders to seal the pleadings.<sup>32</sup> By not doing so, information about the Borings (and images of their house) rapidly disseminated through the media once the lawsuit began.<sup>33</sup> The Third Circuit Court of Appeals reached

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25. *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 444–45 (Cal. 1953).

26. *Id.* at 445.

27. *Boring v. Google, Inc.*, 598 F. Supp. 2d 695, 700 (W.D. Pa. 2009), *aff'd* 369 F. App'x 273 (3d Cir. 2010).

28. *Id.* at 699.

29. *Id.*

30. *Id.* at 700.

31. *See id.*

32. *Id.*

33. *Boring*, 598 F. Supp. at 700.



the same determination with regard to both branches of the tort, finding that, “[n]o person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as the result of a vehicle entering into his or her ungated driveway and photographing the view from there. . . . [t]he alleged conduct would not be highly offensive to a person of ordinary sensibilities.”<sup>34</sup> As Strahilevitz suggests, then, the general principle drawn from the American jurisprudence is that “[public matters cannot] provide the plaintiff with a cause of action” when it comes to the invasion of privacy framework.<sup>35</sup> This is true under both the first and third branches of the tort, and operates at both an *a priori* level and as a factor going to the ‘offensiveness’ of the alleged intrusion upon seclusion or publicity given to private facts.

Importantly, this approach resonates *outside* the American context since the United States was the first common law jurisdiction to adopt freestanding (that is, not dependent on another recognized cause of action) privacy torts.<sup>36</sup> The technique of ‘containing’ the tort through requiring any invasion of privacy to be ‘highly offensive’ and the virtual impossibility of public (or publicized) affairs or matters being considered as such has significantly influenced the development of invasion of privacy torts in other jurisdictions. Take for instance *Hosking*, in which the New Zealand Court of Appeal adopted the third branch of the American invasion of privacy framework (including the ‘highly offensive’ threshold test) to address a claim for privacy in public.<sup>37</sup> The plaintiffs (a ‘celebrity couple’) sought to restrain the publication of photographs of the wife and their eighteen-month-old twins taken without their knowledge while in public; the action was brought against both the photographer and the owner of the magazine that had commissioned the photographer and published the photo.<sup>38</sup> Since this was the first time a New Zealand court had recognized an invasion of privacy tort at common law, the issue of containment naturally arose and the Court chose to limit the scope of the tort in two ways. First, the Court required that the information itself was of the type over which an individual had a reasonable

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34. *Boring v. Google Inc.*, 362 F. App’x 273, 279–80 (3d Cir. 2010).

35. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 920 (2005).

36. *Cf. Hosking v. Runtig* [2004] NZCA 34 at [14] (N.Z.) (discussing a review of authorities from other countries).

37. *Id.* at paras. 120, 126–27. In *Hosking*, the New Zealand Court of Appeals also concluded it was unnecessary for them to decide at that moment “whether a tortious remedy should be available in New Zealand law for unreasonable intrusion into a person’s solitude or seclusion” (that is, the first branch of the American privacy tort). *Id.* at para. 118.

38. *Id.* at para. 1.

expectation of privacy; and second, that the disclosure of the information was “highly offensive.”<sup>39</sup> The Court found that “[t]he photographs taken . . . [did] not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day” and therefore publication would not reveal “any fact in respect of which there could be a reasonable expectation of privacy.”<sup>40</sup> Thus, while adopting the ‘reasonable expectation of privacy’ phrasing that is rarely found in the U.S. privacy tort jurisprudence, the New Zealand Court of Appeal nonetheless effectively adopted the first principle’s elimination of public affairs from the ambit of a tort in a fashion that generally matches the approach taken under the third branch of the American framework.

In Canada, the Ontario Court of Appeal has also drawn explicit inspiration from the American privacy tort framework. In *Jones v. Tsige*, the defendant improperly accessed the plaintiff’s financial records (they were co-workers at a bank) on at least 174 occasions over two years.<sup>41</sup> Though no Canadian jurisdiction had previously adopted a freestanding common law privacy tort, Sharpe, J.A., argued that the time had come to do so and that the four-part American approach was a useful starting point.<sup>42</sup> He concluded that the facts in *Jones* lent themselves to consideration under the “intrusion upon seclusion” or into private affairs’ branch.<sup>43</sup> The “key features” of the action in Ontario are now (1) intentional conduct by the defendant, (2) which results in the invasion of the plaintiff’s private affairs without lawful justification, and that (3) a reasonable person would consider the invasion to be highly offensive.<sup>44</sup> Though the facts of *Jones* meant the case did not depend on an *a priori* determination of private *space*, Sharpe, J.A., suggested that the new tort would only apply to a limited number of *a priori* determined private *information*:

Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one’s financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.<sup>45</sup>

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39. *Id.* at para. 42.

40. *Id.* at para. 164.

41. *Jones v. Tsige*, 2012 ONCA 32, paras. 2–3 (Can.).

42. *Id.* at para. 23.

43. *Id.* at para. 21.

44. *Id.* at para. 71.

45. *Id.* at para. 72.

Like its American counterpart, then, the invasion of privacy tort adopted in Ontario uses the question of 'offensiveness' as a means of limiting the scope of the tort, and appears to do so at least in part through the adoption of a similar boundary dividing certain 'private' matters from those that are 'public.' Only invasion into those matters that are preemptively accepted to be 'private' will be considered 'highly offensive,' and the nature or extent of the harm suffered by the plaintiff is relevant only at the stage of determining the quantum of damages.<sup>46</sup>

Though *Jones* marked the first recognition in the Canadian common law of an invasion of privacy tort,<sup>47</sup> four Canadian provinces had previously created privacy torts through statute (British Columbia,<sup>48</sup> Manitoba,<sup>49</sup> Saskatchewan,<sup>50</sup> Newfoundland & Labrador<sup>51</sup>). Unlike the common law version adopted in *Jones*, the statutory torts do not replicate any part of the four-part American framework. Instead they rely upon the looser concept of the plaintiff's 'reasonable expectation of privacy,' which is dependent upon the "nature, incidence and occasion of the . . . conduct [in question]."<sup>52</sup> Though there is no explicit exclusion of activities occurring in public within the text of the statutes, the jurisprudence nonetheless suggests a similar privileging of spatial questions as found in the American cases.<sup>53</sup> Canadian courts have concluded that "there is no reasonable expectation of privacy for actions taking place in public;"<sup>54</sup> a person's reasonable expectation of privacy in his or her own home is ordinarily very high whereas in a public place it is substantially less so;<sup>55</sup> and that "overt actions and behaviours occurring in public are not really 'private' . . . at all."<sup>56</sup> Though other cases under the provincial courts have acknowledged that a claim to privacy might extend to the immediate vicinity of the home, it still does not extend to public space in general.<sup>57</sup>

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46. *Id.* at paras. 71, 87.

47. See also discussion *infra* notes 277–87 and accompanying text.

48. Privacy Act, R.S.B.C. 1996, c. 373 (Can.).

49. The Privacy Act, R.S.M. 1987, c. P.125 (Can.).

50. The Privacy Act, R.S.S. 1978, c. P-24 (Can.).

51. The Privacy Act, R.S.N.L. 1990, c. P-22 (Can.).

52. Privacy Act, R.S.B.C. 1996, c. 373, s.1(1)(3) (Can.). Common phrasing is found in all four of the provincial statutory privacy torts.

53. See *supra* text accompanying notes 7–24.

54. *Milner v. Mfr.'s Life Ins.*, 2005 BCSC 1661, para. 77 (Can.).

55. *Id.* at paras. 76–77.

56. *Druken v. Fewer (R.G.) & Assoc., Inc.*, 1998 CanLII 18731, para. 43 (Can. N.L. S.C.T.D.).

57. See *Wasserman v. Hall*, 2009 BCSC 1318, para. 90 (Can.) (affirming a right to privacy in one's backyard); *Heckert v. 5470 Investments Ltd.*, 2008 BCSC 1298, para. 86 (Can.) (affirming a right to privacy in the hallway of one's apartment building).

The general lack of protection for privacy interests in public under the Canadian provincial statutory torts is confirmed by cases that relate to privacy claims over particular information that has been, for whatever reason, brought into the public realm.<sup>58</sup> For instance, information that has previously been the subject of legal proceedings is also considered to be 'publicly available,' and thus outside the ambit of the tort.<sup>59</sup> This is in some way a parallel to the principle that guides the interpretation of the third branch of the American tort. In *Mohl*, for instance, the plaintiff launched an invasion of privacy claim against the respondent university after it acknowledged to the media that the plaintiff had failed a teaching practicum while registered as a student there.<sup>60</sup> The plaintiff had earlier commenced court actions against the university in an attempt to have the failing mark overturned, leading the Court of Appeal to conclude that "once [a] person starts a court action, matters that were once private can cease to be so."<sup>61</sup> While this result may not seem particularly surprising, what counts as the 'public realm' has been interpreted widely. This was perhaps most striking in *Milton*, in which the plaintiff sought damages under British Columbia's version of the tort after the defendant circulated a nude photo of the plaintiff that she had left in a borrowed jacket.<sup>62</sup> The court concluded that the plaintiff's reasonable expectation of privacy over the photograph was eliminated when she failed to initially ask for the photograph to be returned upon discovering it was in the defendant's possession, and because she had willingly shared the photograph with an unknown developer in Hawaii in order to get prints.<sup>63</sup>

In various jurisdictions, then, we can see a zonal or boundary approach to privacy claims in tort, in which even matters which may have once attracted a privacy interest can no longer ground a claim once they are brought into the public eye. While conceptually relatively easy (and thus no doubt tempting) for the courts to apply, such an approach is nonetheless largely unhelpful in remedying a range of modern privacy losses that increasingly revolve around the kinds of personal information that individuals may choose to share in one context but not another. In the sections that follow, I tie this approach to a similar account of autonomy within liberal thought, and then argue for a reconceived approach that draws from feminist

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58. See *Mohl v. University of British Columbia*, 2009 BCCA 249, para. 19 (Can.); *Mohl v. University of British Columbia*, 2008 BCSC 1234, paras. 12–13 (Can.).

59. See *Mohl*, 2009 BCCA 249, para. 19 (Can.).

60. *Mohl*, 2009 BCCA 249, at para. 5.

61. *Mohl*, 2008 BCCA 1234, at para. 11.

62. *Milton v. Savinkoff*, 1993 CanLII 169, 1–2 (B.C. S.C.).

63. *Id.* at 5–6.

legal theory. Such a reconception, I suggest, can better ground a tort framework that can appropriately respond to a wider range of modern privacy claims.

## II. AUTONOMY, PRIVACY, & THE METAPHOR OF THE BOUNDARY

The value of autonomy is central to liberal thought, in which “[t]o be autonomous . . . is seen by many as the very core of a valuable human existence.”<sup>64</sup> The autonomous actor lies at the heart of liberal individualism writ large: a rational, rights-bearing citizen pursuing her interpretation of the good life.<sup>65</sup> Anderson and Honneth identify autonomy as one of liberalism’s “core commitments,” tracing it to the early modern period of European history during which, they argue, individuals increasingly abandoned social and community bonds in pursuit of their own goals.<sup>66</sup> Yet despite (or perhaps because of) its importance to broad liberal political theory, it remains a contested concept.<sup>67</sup> Indeed, there is probably no universal ideal of ‘autonomy,’ but rather “one concept and many conceptions.”<sup>68</sup> However, Christman notes that while there may indeed be multiple ways to approach autonomy in terms of defining its boundaries, functions, or effects, its conceptual core is that to be autonomous is to have the psychological ability of self-governance.<sup>69</sup> Dworkin concurs, seeing the shared element of diverse approaches to autonomy as a “certain idea of persons [being] self-determining.”<sup>70</sup> Indeed, the etymology of the word itself points to the abstract notion that underpins it: derived from the Greek roots of *autos*, meaning ‘self,’ and *nomos*, meaning ‘law’ or ‘rule,’ autonomy’s literal meaning therefore is “the having or making of one’s own law.”<sup>71</sup> “[T]he notion of autonomy still finds its core meaning in the idea of being one’s own person, directed by considerations, desires, conditions, and characteristics that are not simply imposed externally on one, but are part of what can somehow be considered one’s authentic self.”<sup>72</sup>

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64. John Philip Christman, *Introduction*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 18 (John Christman ed., 1989).

65. *Id.* at 18–19.

66. Joel Anderson & Axel Honneth, *Autonomy, Vulnerability, Recognition, and Justice*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS* 127–28 (John Christman & Joel Anderson eds., 2005).

67. PAUL B. CLARKE, *AUTONOMY UNBOUND* 11 (1999).

68. Gerald Dworkin, *The Concept of Autonomy*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 57 (John Christman ed., 1989).

69. Christman, *supra* note 64, at 5.

70. GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 9 (1988).

71. Joel Feinberg, *Autonomy*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 27 (John Christman ed., 1989).

72. John Christman & Joel Anderson, *Introduction*, in *AUTONOMY AND THE CHALLENGES OF LIBERALISM: NEW ESSAYS* 3 (John Christman & Joel Anderson eds., 2005).

Dworkin believes that autonomy can be thought of (and used) “as a moral, political, and social ideal.”<sup>73</sup> Morally, it suggests that there is some benefit to having individuals choose or adopt their own moral code, and so individuals ought to have the capacity to subject themselves to objective moral principles.<sup>74</sup> Politically, it can be used as a means of arguing against any kind of institutional composition that attempts to impose upon citizens a particular set of ends or values.<sup>75</sup> For example, democratic mechanisms consistent with the value of autonomy likely do not depend on conformity with a particular religious or cultural tradition before allowing participation.<sup>76</sup> Socially, it can be thought of as the idea that one has the ability to choose one’s own conception of the good life.<sup>77</sup> Christman and Anderson, for example, describe personal autonomy as a “trait that individuals can exhibit relative to any aspects of their lives,”<sup>78</sup> while for Raz it is “the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions.”<sup>79</sup>

Christman and Anderson also suggest that in order for the individual to achieve ‘autonomy’ or to be able to govern oneself, what is required is that the individual be able to “act competently” and that those actions stem from desires that are their own.<sup>80</sup> In turn, this requires that two sets of conditions—‘competency conditions’ and ‘authenticity conditions’—be met.<sup>81</sup> To meet the competency conditions, they claim an individual must have the capacity for rational thought, self-control, and self-understanding, and be free from coercion in exercising those capacities.<sup>82</sup> Meeting the authenticity conditions requires the capacity to reflect upon and endorse one’s desires, values, or wishes.<sup>83</sup> Such procedural autonomy can be seen as something approaching an equation of independence (meaning a lack of overt coercion) plus the ability for self-reflection. Dworkin too suggests an account of autonomy based on “procedural independence,” which for him is composed of two things.<sup>84</sup> First, that the individual be free from manipulation or deception in the arrival of their ‘first-order’ desires (those simple desires to do or not to do

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73. DWORKIN, *supra* note 70, at 10.

74. *Id.* at 11.

75. *Id.* at 10.

76. *Id.*

77. *Id.* at 11.

78. Christman & Anderson, *supra* note 72, at 2.

79. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1986).

80. Christman & Anderson, *supra* note 72, at 3.

81. *Id.*

82. *Id.*

83. *Id.*

84. DWORKIN, *supra* note 70, at 20.

things—a wish to travel, a desire to marry, a decision to work as a teacher instead of as a nurse, etc.).<sup>85</sup> Kupfer describes such first-order considerations as those that underlie the decisions that “occupy us in the ordinary course of life.”<sup>86</sup> The second (and crucial) element for Dworkin is the existence of “second-order” actions, or those that are used to reflect upon first-order desires; these second-order capacities parallel the authenticity and competence conditions mentioned above.<sup>87</sup> Second-order actions or judgments involve a degree of critical self-reflection, in which individuals consider the implementation of their first-order desires.<sup>88</sup> This process of consideration enables them to choose which first-order desires to follow and which ones to reject, and in what order.<sup>89</sup> For Dworkin, the key element of autonomy is this critical reflective capacity, along with a secondary capacity to change or at least attempt to change those first-order desires in light of the higher-order reflection.<sup>90</sup> Crittenden also suggests that to be “self-ruled . . . one must be able to step back reflectively from her social context to evaluate critically the norms and standards and ends of that context.”<sup>91</sup> By reflecting in this manner, “persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are.”<sup>92</sup> Richards concurs, suggesting that “[a]utonomy . . . is a complex assumption about the capacities . . . of persons, which enable them to develop, want to act on, and act on higher-order plans of action which take as their self-critical object one’s life and the way it is lived.”<sup>93</sup>

So in the liberal tradition, autonomy is vital—but how is it to be ensured? Primarily by protecting the individual from outside influence.<sup>94</sup> Anderson and Honneth suggest it “increases with the reduction of restrictions . . . [so] individuals realize their autonomy by gaining independence from their consociates.”<sup>95</sup> Fairfield argues that “[a]s a philosophy profoundly committed to human freedom, one of liberalism’s principal concerns [is] to safeguard private life from

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85. *See id.*

86. JOSEPH H. KUPFER, AUTONOMY AND SOCIAL INTERACTION 26 (1990).

87. DWORKIN, *supra* note 70, at 20.

88. *Id.*

89. *Id.*

90. *Id.*

91. Jack Crittenden, *The Social Nature of Autonomy*, 55 REV. OF POL. 35, 43 (1993).

92. DWORKIN, *supra* note 70, at 20.

93. David A.J. Richards, *Rights and Autonomy*, in THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 205 (John Christman ed., 1989).

94. *See* Anderson & Honneth, *supra* note 66, at 128.

95. *Id.*

undue intrusion by public institutions.”<sup>96</sup> For Dworkin, autonomy is dependent upon a “self which is to be respected, *left unmanipulated*, and which is, in certain ways, independent and self-determining.”<sup>97</sup> On the traditional liberal account then, personal autonomy is a quality held by the rational actor, able to act free from outside influences in considering his or her options, determining which of those is the most suitable vehicle for advancing their primary desires, and then acting successfully upon that determination. Friedman’s practical gloss is that “[p]ersonal autonomy involves acting and living according to one’s own choices, values, and identity, within the constraints of what one regards as morally permissible.”<sup>98</sup> The focus on a lack of restrictions (Anderson and Honneth), prevention of intrusion (Fairfield), freedom from manipulation (Dworkin), and acting as one chooses (Friedman) all imply the necessity of a ‘barrier’—in the form of ‘rights’—that protects the individual from the encroachment of the collective. “The tradition[al] . . . [concept of autonomy] sets [it] in opposition to collective power. . . . to shield individuals from the collective, to set up legal barriers around the individual the state cannot cross . . . .”<sup>99</sup>

This account of personal autonomy—both its normative content (growth/protection of the self) and the mechanism by which it is to be guaranteed (a barrier against the collective in the form of legal rights)—deeply informs the liberal account of privacy. Consider, for instance, the idea that privacy can help protect or promote ‘personhood’ or ensure space for necessary self-development. It was at the heart of Warren and Brandeis’ interpretation of the right to privacy, which they justified as necessary in order to protect the individual’s “inviolable personality.”<sup>100</sup> While they did not explicitly define what this personality was, it is suggestive of some vital core of the self.<sup>101</sup> A number of privacy scholars agree with this general notion, though not necessarily using the same phrasing, or entirely agreeing on what precisely the ‘core’ of a person is.<sup>102</sup> Bloustein, for one, believes that “inviolable personality” is “the individual’s independence, dignity and integrity [which] defines man’s essence as a

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96. PAUL FAIRFIELD, *PUBLIC/PRIVATE* 5 (2005).

97. DWORKIN, *supra* note 70, at 11–12 (emphasis added).

98. Marilyn Friedman, *Autonomy, Social Disruption, and Women*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 37 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

99. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 13 (1989).

100. Warren & Brandeis, *supra* note 1, at 205.

101. *See id.*

102. *See, e.g.*, Bloustein, *supra* note 4, at 186–88.



unique and self-determining being”<sup>103</sup> and that “[this] in some sense a spiritual interest rather than an interest in property or reputation.”<sup>104</sup> Fairfield suggests that privacy secures us against “unwanted intrusions into areas of life that . . . profoundly touch on who we are and what meaning our lives hold for us.”<sup>105</sup> Schoeman also believes that, in general, the protection of the self is a desirable thing and that privacy “marks out something morally significant about what it is to be a person.”<sup>106</sup> He argues that privacy allows individuals to express the different dimensions of the self, not in the sense of multiple-personality disorders, but rather in the sense that behaviour is not consistent, and shifts across contexts.<sup>107</sup> Austin, too, argues “we require some respite” from the public gaze not only so that we may act in unconventional ways, but simply in order that we can gather ourselves and subsequently put forth the desired public face.<sup>108</sup>

This ability to withdraw from public gaze helps ensure a “zone . . . that permits (degrees of) unconstrained, unobserved physical and intellectual movement . . . [a] zone [that] furnishes room for a critical, playful subjectivity to develop.”<sup>109</sup> This is the intellectual and emotional space for us to choose which activities or thoughts we wish to share or account for, and which we prefer to keep private, whatever the reason. There is an intimate connection between this space for reflectivity and self-development, which can be hampered in the face of intense social pressure. As Bloustein argues,

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose

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103. *Id.* at 163.

104. HUW BEVERLY-SMITH ET AL., *PRIVACY, PROPERTY AND PERSONALITY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION* 58 (2005).

105. FAIRFIELD, *supra* note 96, at 18.

106. Ferdinand Schoeman, *Privacy and Intimate Information*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 404 (Ferdinand David Schoeman ed., 1984).

107. *Id.*

108. Lisa Austin, *Privacy and the Question of Technology*, 22 L. & PHIL. 119, 146–47 (2003). Austin also notes the limits to this approach, arguing elsewhere that “[i]t is one thing to argue that we need some respite from the public gaze in order to forge an authentic self, and quite another to assert that the particular gaze of a particular other in fact interferes with this project of authenticity.” Austin, *supra* note 6, at 202.

109. Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 195 (2008).

their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.<sup>110</sup>

The ability to withdraw into a zone of privacy therefore helps us to 'be who we want to be,' allowing us room to consider our options before we act—the freedom and space to 'grow into' ourselves. Moore, for example, argues that privacy is a "cultural universal necessary for [our] proper functioning."<sup>111</sup> For Reiman, it "is a social ritual by means of which an individual's moral title to his existence is conferred[,] and by this I take him to mean that privacy helps individuals understand that some aspects of the self are theirs and theirs alone, and this understanding is key to an individual seeing themselves as, in fact, an 'individual.'<sup>112</sup> He goes on to argue that individuals "must also recognize that [they have] exclusive moral right[s] to shape [their] destiny," and privacy violations therefore are those that "penetrate 'the private reserve of the individual'" and destroy the Self.<sup>113</sup> Wasserstrom concurs, suggesting that one plausible conception of what it is to be a person is "the idea of the existence of a core of thoughts and feelings that are [a] person's alone[,] and so enforced disclosure of these thoughts and feelings diminishes personhood; privacy protects against such disclosure."<sup>114</sup>

Clearly then, there is a deep similarity—normatively speaking—in the values of autonomy and privacy within the liberal tradition: both appear aimed at ensuring some level of independence and self-development. But there is *also* a deep conceptual parallel in terms of how those values are to be achieved. Lyon, for instance, notes that "liberal approach [to privacy] . . . tends to conflate privacy [with] resisting intrusion[;]"<sup>115</sup> this also describes the conventional liberal approach to autonomy. For Bennett, "[p]hilosophically, privacy has its roots in liberal individualism, and notions of separation between the state and civil society."<sup>116</sup> Thus, much as a conception of autonomy as independence tends to lead to a focus on shielding the individual

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110. Bloustein, *supra* note 4, at 188.

111. Adam D. Moore, *Toward Informational Privacy Rights*, 44 SANDIEGO L. REV. 809, 817 (2007).

112. Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 310 (Ferdinand David Schoeman ed., 1984).

113. *Id.* at 310, 311 (quoting ERVING GOFFMAN, *ASYLUMS* 29 (1961)).

114. Richard A. Wasserstrom, *Privacy: Some Arguments and Assumptions*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 322 (Ferdinand David Schoeman ed., 1984).

115. DAVID LYON, *THE ELECTRONIC EYE: THE RISE OF SURVEILLANCE SOCIETY* 186 (1994).

116. Colin J. Bennett, *In Defence of Privacy: The Concept and the Regime*, 8 SURVEILLANCE & SOC'Y 485, 486 (2011).

from external restraint through a wall of rights, liberal accounts of privacy have also been based primarily on the idea of a legal barrier protecting the individual from improper interference or access. As Stadler describes it, privacy viewed in this fashion resembles “a kind of bubble that surrounds each person, and the dimensions of this bubble are determined by one’s ability to control who enters it and who doesn’t. Privacy is a personal space; space under the exclusive control of the individual.”<sup>117</sup> Nedelsky also sees privacy as being “closely associated with [a] boundary image[.]”<sup>118</sup> As I have argued, this is also the approach that dominates the courtroom.

Now, it is true that conceptions of privacy reliant upon this boundary idea and its associated public/private dichotomy have faced numerous critiques, to the point where Bennett concludes that the individualistic approach associated with a dichotomous public/private barrier no longer “constitute[s] a paradigmatic understanding of the problem.”<sup>119</sup> Solove, for instance, argues that “[p]rivacy . . . is . . . more complicated” than a division between public and private, and “[m]odern technology poses a severe challenge to [this] traditional binary understanding of privacy.”<sup>120</sup> Gilliom meanwhile suggests that because of privacy’s “roots in . . . individualism, [it] may no longer reflect the complexity and interdependence of our world.”<sup>121</sup> Stadler has also rejected the boundary approach as something that just “doesn’t work.”<sup>122</sup> Nissenbaum’s description of privacy as “contextual integrity” also rejects a strict public/private dichotomy on the grounds that it is unable to sufficiently account for many of the privacy losses that may be caused by the increasing digitization of all areas of life, but particularly those that occur “in public.”<sup>123</sup> She observes that as individuals go about their lives, they are constantly shifting between differing “realms” that “involve[], indeed may even be defined by, a distinct set of norms, which govern[] its various aspects such as roles, expectations, actions, and practices.”<sup>124</sup> The flow of information between these realms is typically governed by

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117. Felix Stadler, *Privacy is Not the Antidote to Surveillance*, 1 SURVEILLANCE & SOC’Y 120, 121 (2002).

118. JENNIFER NEDELSKY, LAW’S RELATIONS 108 (2011).

119. Bennett, *supra* note 116, at 487.

120. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 161, 163 (2007).

121. John Gilliom, *Struggling with Surveillance: Resistance, Consciousness, and Identity*, in THE NEW POLITICS OF SURVEILLANCE AND VISIBILITY 123 (Richard V. Ericson & Kevin D. Haggerty eds., 2006).

122. Stadler, *supra* note 117, at 121.

123. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 119–20 (2004).

124. *Id.* at 137.

“norms of appropriateness” and “norms of distribution.”<sup>125</sup> What matters is not “whether [the] information is appropriate or inappropriate for a given context, but whether its distribution, or *flow*, respects contextual norms of information flow.”<sup>126</sup> When either norm is breached, we ought to see it as a violation of contextual integrity, and thus, privacy.<sup>127</sup> Under this approach, even ‘public’ matters might generate a privacy claim if they inappropriately breach the ‘norms of distribution’ or ‘norms of appropriateness.’<sup>128</sup>

Austin also argues that an account of privacy based upon the ability to present oneself to others need not depend on determining different spheres of public and private life.<sup>129</sup> She suggests that our interest in privacy is not only a claim to be protected from social pressure that results *from* a particular self-presentation, but rather is about “protecting the conditions for self-presentation.”<sup>130</sup> This self-presentation, she says, is an act of “social communication,” and practices that disrupt this communication by denying us the knowledge of who our audience actually is can be understood as a privacy violation (such as surveillance).<sup>131</sup> However, she also argues that violations of ‘privacy as identity’ in this fashion will “occur only when the dissemination of private information also undermines one’s capacity for self-presentation.”<sup>132</sup> Such capacity is undermined, according to Austin, when we are forced to incorporate into our self-presentation this previously private information; “[t]he salient distinction is not between public and private spheres of life, but rather between the types of audiences . . .” to whom we were presenting.<sup>133</sup> This helps explain the value of having certain privacy interests that remain in public, since “changing the identity of one’s audience through surreptitious surveillance or unexpected publication”<sup>134</sup> harms our ability to properly gauge our exposure to those around us, or those unseen.

Altman also focuses on the ability of the individual to regulate his or her exposure.<sup>135</sup> His proposition is that “privacy is . . . an interpersonal boundary process by which a person . . . regulates

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125. *Id.* at 119, 138.

126. *Id.* at 141 (emphasis in original).

127. *Id.* at 138.

128. *Id.* at 138–39.

129. Austin, *supra* note 6, at 207.

130. *Id.* at 210.

131. *Id.* at 204.

132. *Id.* at 205.

133. *Id.* at 205–06.

134. *Id.* at 204.

135. IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOUR* 6, 8 (1975).

interaction with others.”<sup>136</sup> Like Schwartz, then, Altman sees privacy as something that allows a negotiated level of exposure by an individual to the community.<sup>137</sup> Rather than being dependent upon a fixed public/private boundary, then, Altman sees privacy as “a dynamic process involving selective control over a self-boundary.”<sup>138</sup> As noted, under the conventional liberal account, privacy is effectively binary—once you have allowed intrusion into your personal zone, or allowed access to yourself, or relinquished control over your information, then typically claims to privacy based on such conceptions necessarily fail—you no longer have a ‘reasonable expectation of privacy.’<sup>139</sup> Altman rejects this, arguing that privacy “involves a synthesis of being in contact with others and being out of contact with others. [Because the] desire for social interaction or noninteraction changes over time and with different circumstances.”<sup>140</sup> Importantly then, this view of privacy is not *only* about regulating the flow of information, but also about regulating relationships; it is a “dialectic process, which involves *both* a restriction of interaction and a seeking of interaction.”<sup>141</sup> As Steeves argues in her consideration of Altman’s work, “privacy is the boundary between [the] self and [the] other that is negotiated through discursive interaction between two or more social actors.”<sup>142</sup>

Again, this is a useful way of understanding how privacy interests can continue to exist in *public* space. It accepts that by entering into a public area individuals seek (or at least accept) some level of interaction with those around them and therefore have no claim to visual privacy vis-à-vis those immediately present. But it would not, however, automatically deny that any privacy interest can exist once an individual is acting in the public realm—thus, being continually ‘stalked’ or having one’s public movements recorded and archived could still ground a privacy claim, because such actions deny to a putative plaintiff the right to negotiate the boundary between herself and those around her. Likewise, unwanted commercial public

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136. *Id.* at 6 (emphasis omitted). Altman was writing in the context of human behavioral studies on the impact of crowding and notions of personal space, but his ideas have been adopted into the privacy discourse. See, e.g., Valerie Steeves, *Reclaiming the Social Value of Privacy*, in LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY 203 (2009); Leysia Palen & Paul Dourish, *Unpacking “Privacy” for a Networked World*, 5 PRO. OF THE CONF. ON HUM. FACTORS IN COMPUTING SYS. 129, 129 (2003).

137. See ALTMAN, *supra* note 135, at 18.

138. *Id.* at 6.

139. See *supra* notes 5–35 and accompanying text.

140. See ALTMAN, *supra* note 135, at 23.

141. *Id.* at 11 (emphasis added).

142. Steeves, *supra* note 136, at 206.

photography might be interpreted as a privacy loss because the ability of the individual to control his or her exposure to an audience removed temporally and spatially is significantly interfered with. As Altman argues, “it is not the inclusion or exclusion . . . that is vital to self-definition; it is the ability to regulate contact when desired.”<sup>143</sup> It is “[w]hen the permeability of those boundaries is under the control of a person” that both self-development and autonomy are served.<sup>144</sup> But transforming these ideas into statements about when a privacy claim ought to be granted by the law still requires, of course, a solid normative foundation. That is, identifying a privacy *loss* in public cannot alone be the basis for generating a valid legal *claim*; again, ‘containment anxiety’ is a legitimate concern.<sup>145</sup> My complaint is simply that the existing solution to that anxiety is inadequate. Recall that Nissenbaum’s ‘contextual integrity’ approach, for instance, relies on existing norms of appropriateness and distribution to determine when privacy has been breached.<sup>146</sup> A legal regime based on this idea would see actionable breaches of privacy as violations of particular norms. But this means that the framework underpinning it would be dependent upon the presence of particular norms already being in effect that support the desired goals; being tied to practice and convention, this kind of legal regime may not alone have sufficient “prescriptive value or moral authority” to properly grapple with a range of modern privacy claims.<sup>147</sup> The (legal) death of privacy by a thousand cuts, in other words. On the other hand, there is also the opposite risk that a regime grounded in contextual integrity might be overly conservative if it saw privacy violations in *any* new technological means of managing personal information, simply because it was new (and therefore a break in an existing norm of distribution).<sup>148</sup> Similar problems plague Schwartz’s reliance on largely unstated ‘norms’ as the basis of his constitutive approach—he argues for lines between public and private to be drawn and redrawn along different coordinates in order to reflect different “information[al] privacy norms.”<sup>149</sup> Again, without knowing the precise content of these norms, it is difficult to know if Schwartz’s conception will leave us with a relatively robust or relatively weak defense of a range of modern privacy interests. Schwartz seems to argue for a general framework tied to the interests of the democratic community—public accountability requires access to personal information, and bureaucratic rationality

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143. ALTMAN, *supra* note 135, at 50.

144. *Id.*

145. Austin, *supra* note 6, at 170.

146. Niessenbaum, *supra* note 123, at 138.

147. *Id.* at 144.

148. *Id.* at 143–44.

149. Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 834 (1999).

needs it in order to allow administrative structures to function.<sup>150</sup> But this still fails to explain when specific privacy claims ought to be recognized by a legal system, though logically his position implies that it would be justified where it would prevent harm to (or work to protect) general democratic interests. Such an approach, though, has limited relevance when it comes to adjudicating privacy claims that are not a question of the relationship between the citizen and the state.

In sum, while the focus on shifting points of access and the need to create an interface between public and private aspects of life in the above approaches is a welcome departure from the conventional boundary or zonal approaches to privacy, more is needed. Without further normative underpinning they cannot tell us which privacy losses ought to ground legal actions and which should not. It is to that idea I now turn.

### III. THE FEMINIST CRITIQUE OF AUTONOMY: THE RELATIONAL ACCOUNT

While the academe may have in large part rejected the dichotomous approach to privacy, these insights do not appear to have been meaningfully embraced by the courts. As I have suggested, this proves problematic for claims to privacy where at issue is information or activities that in one way or another straddle the barrier between private and public or shift between them. We see that where individuals have chosen not to 'withdraw' into an *a priori* understood zone of privacy or have voluntarily shared some kind of personal information with even one other person, they are typically deemed by the courts to have given up any 'reasonable expectation' of an ongoing privacy interest.<sup>151</sup> I have suggested that this approach is due to a deep conceptual linkage between privacy and conventional accounts of autonomy; if our understanding of autonomy can be improved, this might also tell us something valuable about our approach to privacy.

The individualistic account of autonomy sketched earlier in this Article has come under sustained criticism from a range of scholars, including communitarians who reject the liberal conception of autonomy entirely.<sup>152</sup> But even liberal scholars have acknowledged the

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150. *Id.* at 828.

151. Nissenbaum, *supra* note 123, at 135–36.

152. *See, e.g.*, AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 253 (1993); ELIZABETH FRAZER & NICOLA LACEY, THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE 102 (1993); DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS 4 (1993); Chandran

deep weakness in the individualistic account. Raz, for instance, recognizes that “[a]n autonomous personality can only develop and flourish against a background of biological and social constraints,”<sup>153</sup> and that “[t]he completely autonomous person is an impossibility.”<sup>154</sup> Dworkin too admits “substantive independence . . . [would] make[] autonomy inconsistent with loyalty . . . commitment, benevolence, and love[,]” all of which are important values.<sup>155</sup> Crittenden also advocates for liberals to “jettison from their theories any remnants of atomistic individualism,” though cautions them to “resist the association of autonomy with communal boundaries” that he sees as the defining element of the communitarian approaches to which he does not subscribe.<sup>156</sup> Criticisms of the traditional liberal account are also widespread in feminist legal scholarship, which critiques it as being posited as a ‘universal’ value in theory but in practice one that is highly gendered. Benhabib, for instance, suggests that the “[liberal] tradition, when it considers the autonomous individual . . . implicitly defines [it] as the standpoint of [men].”<sup>157</sup> Griffiths also argues that liberal ideas of autonomy are based upon the “unencumbered [man]. . . free of ties,” whereas women “assert . . . value . . . [in a] social life which is rooted in ties to their family, friends, neighbourhood, culture and family history.”<sup>158</sup> Friedman goes further, arguing that autonomy is “antithetical to women’s interests because it prompts men to desert the social relationships on which many women depend for . . . [their] well-being . . . [and that of] their children.”<sup>159</sup> Barclay concludes that the typical liberal conception of autonomy is “starkly at odds with many women’s experience[s].”<sup>160</sup> Likewise, Code believes that a focus on autonomy that places the importance of free action above all else privileges the interest of men, who are not expected to undertake the same social roles as women.<sup>161</sup>

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Kukathas, *Liberalism, Communitarianism, and Political Community*, in *THE COMMUNITARIAN CHALLENGE TO LIBERALISM* 80–81 (Ellen Frankel Paul et al. eds., 1996).

153. RAZ, *supra* note 79, at 155.

154. *Id.*

155. DWORKIN, *supra* note 70, at 21.

156. Crittenden, *supra* note 91, at 37.

157. Seyla Benhabib, *Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas*, in *FEMINISM, THE PUBLIC AND THE PRIVATE* 86 (Joan B. Landes ed., 1998).

158. MORWENNA GRIFFITHS, *FEMINISMS AND THE SELF: THE WEB OF IDENTITY* 136 (1995).

159. Friedman, *supra* note 98, at 36.

160. Linda Barclay, *Autonomy and the Social Self*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 59 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

161. Lorraine Code, *The Perversion of Autonomy and the Subjection of Women: Discourses of Social Advocacy at Century’s End*, in *RELATIONAL AUTONOMY: FEMINIST*



It is true that some of these feminist critiques seek to abandon autonomy as a value entirely and would fall into the communitarian camp. However, in my view, though there is much truth behind the practical realities of these critiques, on a conceptual level there is nothing about approaching autonomy in a manner that is not starkly individualistic or applied on a gendered basis that is inherently “anti-liberal” or that demands the wholesale rejection of liberalism’s key tenets. Feminist legal theory is a broad church, however, and within it can be found a useful theory that seeks to maintain the ideal of autonomy “without buying into the negatives of liberal legalism.”<sup>162</sup> The idea I wish to consider here—relational autonomy—is perhaps best associated with the scholarship of Nedelsky.<sup>163</sup> She seeks not to abandon the value of autonomy entirely, but rather to improve our understanding of the ways in which it can be nurtured and protected.<sup>164</sup> So, while agreeing with the general thrust of the feminist critique of autonomy, her account remains within the liberal tradition broadly: “Relational views . . . underscore the social embeddedness of selves while not forsaking the basic value commitments of . . . liberal[] justice. [They] underscore the social components of our self-concepts as well as emphasize the role that background social dynamics and power structures play in the enjoyment and development of autonomy.”<sup>165</sup>

Nedelsky accepts, for instance, that “[t]o become autonomous is to come to be able to find and live in accordance with one’s own law.”<sup>166</sup> What she disputes, however, is that it is solely *freedom from external influence* that enables that autonomy.<sup>167</sup> Her relational account therefore does not seek to redefine what autonomy *is* so much as redefine how it can be *achieved*, and is consequently focused on whether individuals in fact have the substantive *capacities* for that autonomy.<sup>168</sup> The central proposition is that the substantive capacity for autonomous decision-making (self-governance) can only come when one is embedded in the right kinds of social environments.<sup>169</sup> In Friedman’s words, “persons are fundamentally social

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PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 184–85 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

162. Susan G. Kupfer, *Autonomy and Community in Feminist Legal Thought*, 22 GOLDEN GATE U. L. REV. 583, 595 (1992).

163. See Nedelsky, *supra* note 99, at 8; NEDELSKY, *supra* note 118, at 3.

164. Nedelsky, *supra* note 99, at 10.

165. John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUDIES 143, 143 (2004).

166. NEDELSKY, *supra* note 118, at 123.

167. *Id.* at 60, 61.

168. Nedelsky, *supra* note 99, at 25.

169. *Id.* at 36.

beings who develop the competency for autonomy through social interaction with other persons.”<sup>170</sup> Joseph Kupfer, likewise, would argue that while the stranded sailor on an island is ‘perfectly autonomous’ under an individualist account, lacking any external restrictions other than the natural world, this misses the point: “[w]ithout the opportunity to be with others, autonomy is empty.”<sup>171</sup> The traditional liberal-individualistic account says Nedelsky, “misses the reality that the capacity for autonomy can only develop and thrive when fostered by constructive relationships, such as those with parents, teachers, friends, and agents of the state.”<sup>172</sup> Thus, she argues, eliminating external restraints is no guarantee of autonomy, since one requires relationships that “provide the support and guidance necessary” for its development.<sup>173</sup> Under the relational accounts, the capacity of the individual for autonomous decision-making is not *automatically* threatened by the relationships it has with ‘the collective’; quite to the contrary, those relationships may at times be vital for that autonomy.<sup>174</sup>

For Nedelsky, the very idea of exercising autonomy as an isolated figure is therefore a misnomer, as “the ‘content’ of one’s own law is comprehensible only with reference to shared social norms, values, and concepts.”<sup>175</sup> Autonomy, she says, “can thrive or wither in adults depending on the structures of relationship they are embedded in.”<sup>176</sup> Thus, per Stoljar and Mackenzie, the most autonomous individuals are *not* in fact those who are most isolated; instead, autonomy is *also* a characteristic of “agents [who are] emotional, embodied, desiring, creative, and feeling.”<sup>177</sup> Nedelsky likewise seeks to replace an understanding of autonomy that focuses on exclusion and the dichotomy between the individual and the collective with one based on the metaphor of ‘childrearing.’<sup>178</sup> That is, children do not achieve autonomy through the increased shedding of familial bonds, but rather grow into autonomous adults as a result of being raised in an appropriate manner by a loving family or community in which bonds and relationships remain an important vehicle through

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170. Friedman, *supra* note 98, at 41.

171. JOSEPH H. KUPFER, AUTONOMY AND SOCIAL INTERACTION 159 (1990).

172. NEDELSKY, *supra* 118, at 167.

173. Nedelsky, *supra* note 99, at 12.

174. *Id.* at 36.

175. *Id.* at 11.

176. NEDELSKY, *supra* note 118, at 39.

177. Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Reconfigured*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 21 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

178. Nedelsky, *supra* note 99, at 12.

which autonomy can be expressed.<sup>179</sup> As Modell explains, “[t]he child’s creative use of solitude requires the presence of the mother in order to affirm the continuity of the self. . . . The private self . . . frees one from dependency, yet requires the other for its continued existence.”<sup>180</sup> Thus, advocating a relational approach to autonomy does not deny that the ‘Self’ is an important construct, but rather argues that it is meaningless without reference to social context, and thus one cannot legitimately protect the ‘autonomous Self’ simply through the elimination of external influences.<sup>181</sup> As Tice and Baumeister argue, “[r]elating to others is part of what the self is *for*. The self is constructed, used, altered, and maintained as a way of connecting the individual [to others].”<sup>182</sup> Kupfer concludes, then, that “[a]utonomy derives its meaning from a social context in that we exercise [it] in relation to others, as social beings.”<sup>183</sup>

The core tenet of relational accounts is therefore that autonomy can only be properly achieved “under socially supportive conditions.”<sup>184</sup> Developing the capacity for autonomy or ensuring its continued exercise requires not simply guarding against certain kinds of overt coercive external restrictions upon individuals, but also the protection of social contexts that assist in our capacity for autonomous thinking and action.<sup>185</sup> The “autonomy-undermining injustices” to which individuals are constantly vulnerable are not only the kinds of *external* interferences against which the individualist conception of autonomy might guard, but also disruptions to social relationships generally.<sup>186</sup> The importance of the social context also means that autonomy is something that can be gained and lost—as one’s social context shifts, so too might one’s capacities to engage in autonomous decision-making and action. This means that the proper social context must continually be nourished, as “people’s . . . capacities for autonomy will vary enormously both across individuals and within a given person across time and across different spheres of . . . life.”<sup>187</sup> Of course, much as there are competing accounts of ‘liberal’ autonomy, so too is the case here; “‘relational autonomy’ . . . does not refer

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179. *Id.*

180. ARNOLD H. MODELL, *THE PRIVATE SELF* 78 (1993).

181. *See id.* at 42.

182. Dianne M. Tice & Roy F. Baumeister, *The Primacy of the Interpersonal Self, in INDIVIDUAL SELF, RELATIONAL SELF, COLLECTIVE SELF* 71 (Constantine Sedikides & Marilynn B. Brewer eds., 2001) (emphasis in original).

183. KUPFER, *supra* note 171, at 159–60.

184. Anderson & Honneth, *supra* note 66, at 130.

185. NEDELSKY, *supra* note 118, at 54–55.

186. Anderson & Honneth, *supra* note 66, at 130.

187. NEDELSKY, *supra* note 118, at 173.

to a single unified conception of autonomy but is rather an umbrella term, designating a range of related perspectives[,]” all of which share the idea that the social context in which an individual is embedded has a dramatic impact upon the chances of a full realization of autonomy.<sup>188</sup> Accounts under this umbrella differ, for instance, as to whether or not a theory of relational autonomy ought to “treat relationality as conceptually . . . necessary to autonomy” rather than just causally necessary.<sup>189</sup> In other words, are “agents . . . intrinsically relational because their identities . . . are constituted by elements of the social context in which they are embedded” or are “agents . . . causally relational because their natures are produced by certain historical and social conditions[?]”<sup>190</sup> To say that relationality is conceptually or constitutively necessary would mean that an individual would *need* to be embedded in specific relationships to be considered autonomous; on that account, social conditions are more than background conditions, and autonomy “cannot be spelled out without direct reference to a person’s social environment.”<sup>191</sup>

In my view, though intuitively appealing, this ‘conceptually necessary’ approach to relationality brings risks. From the perspective of the individual, any given community, after all, is inherently Janus-faced; it can be both a hindrance and a help to the cause of autonomy. We must be cautious about reifying particular kinds of social relations at the expense of the ability of the individual to extricate themselves from damaging social contexts within which they may find themselves—including those that in other contexts or for other individuals may be critically supportive of autonomy, such as family or intimate partners. As Mackenzie argues, while relationships are vital for autonomy, “social relationships that . . . do not recognize their moral equality” can hamper it.<sup>192</sup> Mackenzie notes that capacities for autonomy are “vulnerable to[] our relationships with others in all the different spheres of our lives.”<sup>193</sup> Her argument is

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188. Mackenzie & Stoljar, *supra* note 177, at 4.

189. Andrea C. Westlund, *Rethinking Relational Autonomy*, 24 HYPATIA 26, 27 (2009); see also Marina Oshana, *Autonomy and the Question of Authenticity*, 33 SOC. THEORY & PRAC. 411, 411 (2007); Marina Oshana, *Personal Autonomy and Society*, 29 J. SOC. PHIL. 81, 81 (1998). Oshana’s ‘constructive account’ is in opposition to John Christman’s ‘causal account.’ See Christman, *supra* note 165, at 150–51; JOHN CHRISTMAN, THE POLITICS OF PERSONS: INDIVIDUAL AUTONOMY AND SOCIO-HISTORICAL SELVES 166–67 (2009). Catriona Mackenzie attempts to split the difference between the two approaches. See Catriona Mackenzie, *Relational Autonomy, Normative Authority and Perfectionism*, 39 J. SOC. PHIL. 512, 512 (2008).

190. Mackenzie & Stoljar, *supra* note 177, at 22.

191. Holger Baumann, *Reconsidering Relational Autonomy—Personal Autonomy for Socially Embedded and Temporally Extended Selves*, 30 ANALYSE & KRITIK 445, 448 (2008).

192. Mackenzie, *supra* note 189, at 526.

193. *Id.* at 527.

that the “social character of autonomy” does not demand paternalistic interference to assure that individuals are autonomous, but rather “highlights the positive obligations of social institutions to promote the autonomy of citizens by fostering the social conditions for autonomy.”<sup>194</sup> Nedelsky too accepts that a relational interpretation of autonomy “do[es] not mean . . . that people are determined by their relationships,” or that “all relationships are good,” and that autonomy must allow people “to extricate themselves from bad relationships.”<sup>195</sup> But, though there is no single account of relational autonomy, what is important is the “shared conviction . . . that persons are socially embedded and that . . . [their] identities are formed within the context of social relationships . . . .”<sup>196</sup>

I seek to draw from this relational approach to autonomy, then, the contention that generating and protecting capacities for the development and exercise of autonomy requires not merely the progressive elimination of external influence, but rather the generation and protection of a positive social context in which the individual is embedded. The argument is that a supportive social context is *for most people* necessary for the achievement and maintenance of autonomy, understood as self-governance. While this approach rejects the individualist claim that the elimination of external influences *necessarily* generates or protects the conditions of autonomy, it nonetheless remains alive to traditional liberal concerns regarding the harm that may befall individuals subject to an overbearing community. As I have suggested, there is an important philosophical linkage between approaches to autonomy and privacy. Thus, by drawing from a reconstructed account of autonomy that still remains within the liberal tradition, I intend to likewise offer a reconstructed account of privacy that still has value in a legal system built on liberal ideals. In the next section then, I suggest that the idea of relational autonomy as sketched above can underpin a different approach to privacy that is not dependent upon spatial questions or barrier metaphors and thus, in turn, can better ground a legal approach to privacy in tort that is responsive to a range of modern privacy claims whilst not succumbing to ‘containment anxiety.’

#### IV. RELATIONAL PRIVACY

I am not the first to describe an idea of ‘relational privacy,’ though the conception I advocate for here differs somewhat from

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194. *Id.* at 530.

195. NEDELSKY, *supra* note 118, at 31, 32.

196. Mackenzie & Stoljar, *supra* note 177, at 4.

those that came before. Cohen, for instance, has described 'relational privacy' as "the right not to have one's constitutive identity needs violated or interfered with by the state or by third parties without very compelling reasons indeed."<sup>197</sup> She was writing this within the context of the American jurisprudence surrounding the abortion debate, and was therefore primarily concerned with protecting a woman's zone of "decisional autonomy, inviolability of personality, and a sense of control over one's identity needs."<sup>198</sup> Thus, while she uses the term 'relational privacy,' Cohen still appears to rely upon a conception of autonomy reliant primarily upon the boundary metaphor, seeking to prevent interference in a woman's right to make decisions about her body. Grounded in United States abortion rights debates, this is understandable—feminist theorists have argued that claims to privacy have long been used to subject women to domestic violence by creating a zone into which the state historically was reluctant to tread, whilst simultaneously advancing a belief that privacy (better understood perhaps as 'decisional privacy') is vital to the constitutional protection of abortion rights.<sup>199</sup> Cohen is not, then, arguing that relational privacy is necessary to protect particular social contexts that help create autonomy, but is instead arguing that relational privacy creates a zone of decisional autonomy.

The idea that privacy can protect *relationships* is also not new, though in my view *relational* privacy is not the same thing. Rachels, for instance, argues that privacy is important because it allows for a diversity of relationships.<sup>200</sup> On his account, there is a close connection between our ability to control who has access to us and our ability to both create and maintain a variety of relationships.<sup>201</sup> The ability to maintain an array of relationships on different levels with different kinds of people is, he says, "one of the most important reasons why we value privacy."<sup>202</sup> Schoeman also believes that in addition to protecting aspects of the self, privacy also "marks out something morally significant . . . about what it is to have a close relationship with another [person]."<sup>203</sup> He suggests that entrusting

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197. Jean L. Cohen, *Rethinking Privacy: The Abortion Controversy*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 133, 153 (Jeff Weintraub & Krishan Kumar eds., 1997) (emphasis omitted).

198. *Id.* at 138.

199. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 483 (identifying a 'penumbral' right to privacy within the First Amendment). This later led to a similar approach to the Fourteenth Amendment. *See Roe v. Wade*, 410 U.S. 113, 129 (1973).

200. James Rachels, *Why Privacy is Important*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 290, 292 (Ferdinand David Schoeman ed., 1984).

201. *See id.*

202. *Id.* at 295.

203. Schoeman, *supra* note 106, at 404.

another individual with intimate information about ourselves is a means of conveying to that individual that the information is important to us.<sup>204</sup> By respecting the decision regarding with whom to share these intimacies, we enrich “social and personal interaction by providing contexts for the development of varied kinds of relationships and multiple dimensions of personality.”<sup>205</sup> Reiman, on the other hand, critiques this vision of privacy, suggesting that it improperly creates a market conception of intimacy by positing that levels of intimacy are determined by what we choose to withhold from others.<sup>206</sup> There must be more, says Reiman, to intimate relationships than simply swapping information.<sup>207</sup> I concur: intimate (and non-intimate) relationships are surely about more than simply choosing or declining to swap information, though at the same time it is possible to imagine that such relationships might be furthered or retarded by decisions related to the exclusive sharing of certain kinds of information between partners.

The relational account I advocate here is not about creating a ‘zone’ in which the individual is protected from intrusion in order that they can develop certain kinds of relationships—in effect, that would still be a ‘boundary dependant’ approach. Instead, a proper relational account attempts to gauge the severity of any claimed privacy violation by analyzing the harm it does to the web of relationships any individual finds herself in. Nedelsky has argued that in the context of *informational* privacy what matters is the “direct exploration of the relational dimension of how the circulation of information matters to people.”<sup>208</sup> While she does not explore this idea in detail, the suggestion appears to be that it is not enough to protect privacy simply by shielding the individual from overt external influence or by granting them control over certain kinds of information in certain scenarios. Instead protection of privacy can only be achieved by limiting the adverse impacts of circulation of information, regardless of whether it is ‘sensitive’ or ‘personal’ or whether control over it has been relinquished at some point. I agree, and suggest it meshes well with a paradigm that treats privacy as an ongoing, negotiable relationship between the Self and the Other (whether that is between two individuals, or the individual and the community, or between groups and the community). Much as relational autonomy abandons the idea of a shield from all external influence as the defining characteristic of the achievement of personal autonomy,

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204. *See id.* at 406.

205. *Id.* at 413.

206. Reiman, *supra* note 112, at 305.

207. *See id.*

208. NEDELSKY, *supra* note 118, at 109.

an account of relational privacy abandons the boundary metaphor. Rather than treating privacy as a protective bubble that is always in danger of being 'popped' by an external invasion, this new relational account understands it instead as a field or blanket. The ability to wrap oneself in a 'privacy blanket' implies several things. First, that privacy can be shared—the blanket can be drawn around not only yourself, but also those close to you. Second, that privacy can be taken with you—the blanket is something you can choose to wear at all times, wherever you go. Third, that privacy can be weakened and strengthened over time by different practices—the blanket can become frayed, but can be repaired. Thus, relational privacy accepts not only that privacy has, at times, a role to play both in creating a personal zone of freedom from unwanted outside interference, but *also* that it can be used as a means of protecting one's interactions within a broader community, helping to ensure that the necessary capacities for personal growth and autonomy are properly nourished over time. Privacy is therefore a technique by which one can modulate one's engagement and role within a broader community, and so choosing to engage with others around you does *not* imply that privacy has been totally abandoned.

As I have argued, when translated into legal claims, boundary conceptions of privacy tend to have a difficult time accounting for those modern privacy issues that relate in some way to a sense of maintaining aspect of privacy in public or over information that has been shared with some but over which the holder wishes to maintain a privacy interest. This is because they are dependent on courts establishing where the *a priori* boundary is—there must be some limit to privacy claims, and so the limitation mechanism tends to be a spatial divide between areas that are public and areas that are private or over information associated with that zone. In contrast, a legal regime grounded in a relational approach to privacy could conceivably allow for privacy claims to arise in public space. A privacy loss would be understood as an unwanted reduction in the ability of an individual to negotiate their 'distance' between themselves and other social actors (which we can also describe as 'exposure'). In turn, a *legally actionable* privacy loss would be one that it is so significant that it harms an individual's capacity for autonomy, understood from the relational perspective. This concept still allows for a right to privacy in public that is bounded, rather than being unlimited, and so ought to remain responsive to the traditional concerns about containment. An *unlimited* right to privacy in public, of course, would be implausible—the moment we step outside, we freely share our location, appearance, and behaviours to all those around us. Nothing in this Article argues that the everyday existence of participating in



public life ought to ground a legal claim against simply being ‘watched’ by those also present. But, ‘relational privacy’ argues that the fact that an individual may have been acting ‘in public,’ in full view of others—the spatial question—ought not to be the *only* relevant factor in determining whether there is a valid claim. Instead, the question ought to be looked at from the relational perspective. In other words, did the alleged privacy loss ultimately threaten to harm their autonomy, understood relationally? Did the privacy loss ultimately risk damage to the capacities that allow the individual to act in accordance with their “own choices, values, and identity” in building their role within the community?<sup>209</sup>

#### V. RELATIONAL PRIVACY IN PRACTICE: BREACH OF CONFIDENCE ACTIONS

What would such an approach look like in the context of tort law, then? Rather than adopting a dichotomous approach to the public/private question as a means of determining the validity of the claim, the approach I advocate would focus upon the particular harms suffered by individuals subjected to a privacy loss, and, in particular, considers how their role in the community may be impacted. In my view, the seeds of a relational privacy account can in fact be found in the way in which some jurisdictions are using an expanded breach of confidence action to protect certain kinds of privacy interests, rather than a standalone privacy tort. Historically, a successful breach of confidence action has required proof of three elements: “First, the information itself . . . must ‘have the necessary quality of confidence about it.’ Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”<sup>210</sup>

Typically, such an action was used in a commercial context in order to prevent the release of confidential information.<sup>211</sup> Courts in some common law jurisdictions have in recent years loosened the requirements of the action in order to allow it to incorporate claims of privacy between parties with no prior relationship, let alone a commercial one that would justify the historical interpretation of circumstances importing an obligation of confidence. The first notable use was in *Australian Broadcasting Company v. Lenah Game Meats*,

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209. Friedman, *supra* note 98, at 37.

210. *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] 2 Ch 41 at 47 (Eng.) (quoting *Saltman v. Eng’g Co. v. Campbell Eng’g Co.* [1948] 65 Ch 203, 215).

211. *See id.* at 48.

in which the Australian High Court had to consider an application for an interlocutory injunction to restrain the broadcast of a clandestinely made film of an animal processing facility.<sup>212</sup> One of the arguments (and the only one I will focus on here) adopted by the defendant/appellant meat processor was that a corporation had a right to privacy, and that broadcast by ABC would breach that right.<sup>213</sup> Gleeson C.J. argued that an action for breach of confidence could be sustained to protect private information, even absent a relationship between the parties that imported an obligation of confidence over it, if the disclosure of the information was “highly offensive to a reasonable person of ordinary sensibilities.”<sup>214</sup> In so doing, he also indicated an acceptance that public and private are not always mutually exclusive things:

There is no bright line which can be drawn between what is private and what is not. Use of the term “public” is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.<sup>215</sup>

A majority of the High Court felt it unnecessary to definitively adopt a freestanding privacy tort on the facts before it in *Lenah Game Meats*,<sup>216</sup> instead expanding the breach of confidence action beyond its traditional confines in order to recognize non-commercial privacy interests.<sup>217</sup> In so doing, they incorporated the “highly offensive” test as a means of limiting the scope of the breach of confidence action in the same manner of standalone privacy torts elsewhere.<sup>218</sup>

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212. *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 199 (Austl.).

213. *See id.* at 225.

214. *Id.* at 226.

215. *Id.*

216. The dissenters, however, were willing to consider such adoption. *See id.* at 258 (Gunmow & Haybe JJ, dissenting); *id.* at 279 (Callinan J, dissenting).

217. *See Lenah*, 2008 CLR 199 at 206.

218. *Id.* at 226.

Critically, however, and unlike in the American model, this question was whether or not the impact of the *disclosure* rather than the subject matter itself was offensive.<sup>219</sup> This was important, because it allowed for the effects of the privacy breach to help guide the tort, rather than looking for the existence of an *a priori* determined matter, revelation of which was necessarily “highly offensive.”<sup>220</sup> Indeed, this distinction became relevant in a subsequent lower court case in which the plaintiff brought an action for, *inter alia*, invasion of privacy after being stalked and harassed by the defendant.<sup>221</sup> Skoien J. noted that since the High Court had not foreclosed the development of a freestanding privacy tort in *Lenah Game Meats* he was free to do so, describing it as “a bold . . . [b]ut . . . logical and desirable step” to take.<sup>222</sup> In describing the tort, Skoien J. concluded that an invasion of privacy would have to be a willed act that invaded upon the seclusion or solitude of the plaintiff causing detriment or distress, and the invasion would also have to be undertaken “in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities.”<sup>223</sup> Though adopting in a general sense the first branch of the American privacy tort, Skoien J. nonetheless followed the interpretation of “highly offensive” given in *Lenah Game Meats*, again focusing on the nature and impact of the breach rather than the subject matter.<sup>224</sup> Thus an action for invasion of privacy was sustained for activities (unwanted following, etc.) that largely occurred in *public* places.<sup>225</sup> Such a result would be highly unlikely were similar facts to arise in the American context.

The English common law has long rejected the creation of a standalone privacy tort, perhaps out of the “containment anxiety” spoken of earlier.<sup>226</sup> Even claims for what (from a layperson’s view) seemed to be obvious breaches of privacy had floundered in the English courts. For instance, in *Kaye v. Robertson*, a reporter photographed a television actor (without his consent or knowledge) as he lay recovering in a hospital room following injuries sustained to his head.<sup>227</sup> Indeed, much of the impetus in the English common law to extend the tort of breach of confidence into a vehicle that can create

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219. *See id.*

220. *See id.*

221. *See Grosse v Purvis* [2003] QDC 151 para. 1 (Austl.).

222. *Id.* at ¶ 442.

223. *Id.* at ¶ 444.

224. *See id.*

225. *See id.* at ¶¶ 478–80.

226. Indeed, this rejection explains the long-standing reluctance of most common law jurisdictions other than the United States to adopt a free-standing privacy tort—as discussed, only Canada and New Zealand have chosen to move towards the American model, and have only done so recently and tentatively.

227. *Kaye v. Robertson*, [1991] AC 62 at 64 (Eng.).

suitable remedies for privacy invasions appears to stem from the tabloid press and its relentless pursuit of celebrities or other well-known figures. In *Kaye*, the plaintiff brought suit to restrain publication of the photograph on the ground that it was an invasion of his privacy.<sup>228</sup> Commenting on the inadequacy of the English common law in this situation, Bingham LJ commented:

If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.<sup>229</sup>

As recently as 2003, the House of Lords concluded that no tort of invasion of privacy existed in the English common law, and thus ruled there was no remedy available to two plaintiffs who had unnecessarily been strip-searched before being allowed to visit a relative in prison.<sup>230</sup> Instead, like their Australian counterparts, the English courts have chosen to extend protections for certain kinds of privacy breaches (at least those that would fall under the rubric of 'publicity given to private facts'), by expanding the action of breach of confidence. This expansion was justified thanks to the enactment in 1998 of the *Human Rights Act* (HRA),<sup>231</sup> which effectively incorporated the *European Convention on Human Rights* (ECHR)<sup>232</sup> into domestic English law.<sup>233</sup> Since the ECHR explicitly protects an individual's "right to respect for . . . private and family life,"<sup>234</sup> Butler argues that its incorporation has led the English courts to expand the typical requirements of a breach of confidence action in two key ways.<sup>235</sup> First, an expansion to include not just commercial information but personal information exchanged between individuals in a variety of intimate relationships.<sup>236</sup> Second, a "recognition that the obligation

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228. *See id.* at 62.

229. *Id.* at 70.

230. *See* *Wainwright v. Home Office* [2003] 3 WLR 1137 [35], [52] (Eng.).

231. *See* Human Rights Act 1998, c. 42 (UK).

232. *See* European Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter *European Convention*].

233. Section 6 of the Human Rights Act reads "it is unlawful for a public authority [including a court or tribunal] to act in a way which is incompatible with a Convention right." Human Rights Act 1998, c. 42 § 6 (UK).

234. European Convention, *supra* note 232, at art. 8.

235. Des Butler, *A Tort of Invasion of Privacy in Australia?*, 29 MELB. U. L. REV. 339, 346 (2005).

236. *Id.* *See also* *Prince Albert v. Strange* (1849) 41 Eng. Rep. 1171, 1171; 1 Mac & G 25 (UK) (in which a publisher had obtained copies of private etchings of members of the royal family made in their home); *Stephens v. Avery*, [1988] Ch 449, 449 (UK).

of confidence is not restricted to the original confidante, but may also extend to third parties in whose hands the confidential information may come to reside.”<sup>237</sup> This retooling of the breach of confidence action has been the favoured approach by the English courts to dealing with claims for privacy over personal information:

It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy. In the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act 1998 came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection.<sup>238</sup>

The European Commission of Human Rights has also accepted this, concluding in *Earl Spencer v. United Kingdom* that the applicant had failed to demonstrate that “the remedy of breach of confidence . . . was insufficient or ineffective” in being able to restrain the publication of photographs and private information about his marriage and his wife’s health.<sup>239</sup> In other words, the UK could meet its obligations under the ECHR to guarantee an individual’s “right to respect for . . . private and family life” *without* adopting a free-standing privacy tort.<sup>240</sup> While a detailed discussion of the evolution of the English common law in this area following implementation of the HRA is beyond the scope of this Article,<sup>241</sup> *Campbell v. MGN*<sup>242</sup> is a crucial case that offers an important overview of this approach. In *Campbell*, a well-known model brought suit for invasion of privacy

237. Butler, *supra* note 235.

238. *A. v. B. plc* [2002] EWCA (Civ) 337, [2003] QB 195 at 205–06 (Eng.).

239. *Spencer v. United Kingdom*, [1998] 25 Eur. Comm’n H.R. Dec. & Rep. 105, at 20.

240. European Convention, *supra* note 232, at art. 8.

241. *See, e.g.*, *CTB v. News Group Newspapers Ltd.* [2011] EWHC (QB) 1232 [1] (involving an injunction that was granted preventing a newspaper from publishing the details of claimant’s sexual relationship with a woman to whom he was not married); *Douglas v. Hello Ltd.* [2005] EWCA (Civ) 595 [25] (Eng.) (awarding a celebrity couple damages for having surreptitiously taken and published photographs of their wedding despite the fact that they had agreed to publish different photos from their wedding); *A v. B plc* [2002] EWCA (Civ) 337, [2003] QB 195 at 216 (Eng.); *Theakston v. MGN* [2002] EWHC 137 [1] (Eng.) (granting an injunction to prevent publication of photographs revealing a children’s television presenter engaged in sexual conduct in brothel); *Venables v. New Group Newspapers Ltd.* [2001] Fam 430 [97], [104] (Eng.) (granting injunctions regarding the disclosure of information that could lead to the identification of the killers of a child after they reached the age of majority and were released from prison). *See also* Basil Markesinis et al., *Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMPARATIVE L. 133, 134 (2004) (providing an excellent overview of the evolution of the law in this area).

242. *Campbell v. MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 (Eng.).

after a tabloid newspaper published photographs of her leaving a Narcotics Anonymous meeting.<sup>243</sup> Had this case been brought under the first or third branches of American framework, it is likely that the newspaper would have won, not only on First Amendment grounds but also simply because the photographs were taken of the claimant on a public street. Ultimately, however, a majority of the House of Lords found MGN liable, with the central dispute being whether the newspaper had a duty of confidence with regard to the information (the photographs and details of Campbell's treatment), and if so, whether the claimant's right to privacy under Article 8 of the ECHR was outweighed by the newspaper's competing right to free expression under Article 10.<sup>244</sup>

All of the Lords concluded that the relevant legal framework was one of breach of confidence, bar Lord Nicholls, dissenting, who suggested that the time had come to acknowledge that 'breach of confidence' did not truly describe the cause of action on the facts before him.<sup>245</sup> He argued that even though there was no overarching cause of action for invasion of privacy in English law, the present case nonetheless concerned an aspect of such an invasion, in this case the wrongful disclosure of private facts.<sup>246</sup> He argued that the use of a 'breach of confidence' action to remedy such an invasion was a misleading phrase because that cause of action no longer requires a confidential relationship; instead, "the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential."<sup>247</sup> A better phrase for the tort, he declared, was "misuse of private information";<sup>248</sup> he also noted that this did not exhaust private law privacy interests, but rather it was simply the best descriptor for the action given the particular facts.<sup>249</sup> As to which facts an individual

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243. *Id.* at [2].

244. *Id.* at [83]–[84].

245. *Id.* at [17].

246. *Id.* at [11]–[12].

247. *Id.* at [14].

248. *Campbell*, [2004] UKHL 22, [2004] 2 AC 457 [22] (HL) (appeal taken from Eng.). It should be noted that Lord Nicholls seems to have ultimately won this nomenclature battle. In *OBG Ltd. v. Allan*, [2007] UKHL 21, [2007] Bus LR 1600 [255] (Eng.), he argued that the law of confidence incorporated two distinct causes of action that protected two different interests—privacy and confidential information. In *Vidal-Hall v. Google, Inc.*, [2014] EWHC 13, [2014] QB 201 [64]–[67], this was cited with approval by the Court of Appeal as evidence that 'misuse of private information' was to be treated as a distinct tort from breach of confidence, even though they grew from the same legal concept. However, since the U.K. Supreme Court has not yet pronounced on the nomenclature issue post-*Vidal-Hall*, I will continue to refer to it in the remainder of this Article as a breach of confidence action in the service of privacy interests.

249. *Campbell*, [2004] UKHL 22, [2004] 2 AC 457 [14].

had a right against such misuse, Lord Nicholls declared it to be those in which the person had “a reasonable expectation of privacy.”<sup>250</sup> Interestingly, he rejected the idea that the tort ought to be limited to disclosure of facts that would be ‘highly offensive,’ suggesting that considerations about offensiveness are better considered under matters of proportionality, the later balancing between privacy and free expression. He ultimately concluded that Campbell had no reasonable expectation of privacy in the photographs because “[t]hey conveyed no private information beyond that discussed in the [accompanying] article,”<sup>251</sup> in which she had no reasonable expectation of privacy because of her repeated “assertions in public [i.e. to the media]” that she did not take drugs.<sup>252</sup>

The other Lords all approached the issue from the standpoint of a breach of confidence action, though differing in their implementation. Lord Hoffman, dissenting, began with the premise that under the HRA/ECHR, individuals have an entitlement to privacy that is grounded in their dignity.<sup>253</sup> While there was no freestanding invasion of privacy tort in English law, he said that this entitlement, nonetheless, underlays other causes of action.<sup>254</sup> Lord Hoffman did not explain precisely what the ambit of this right to privacy was, but rather launched into a discussion of the balancing issue between the competing ECHR provisions as part of the initial question of whether a legitimate duty of confidence arose over the details of drug treatments and accompanying photographs.<sup>255</sup> He acknowledged that while a non-celebrity might typically have the benefit of a such a duty because medical treatments were considered private, Campbell did not due to her own use of the media to create an anti-drug image persona, paralleling a portion of Lord Nicholls’ dissent.<sup>256</sup> This was a factor that not only tilted the scales in favour of the newspaper’s Article 10 free expression rights, but also meant that Campbell had abandoned any legitimate privacy interest in the information she may previously have had.<sup>257</sup> Lord Hoffman also argued that the mere fact that the photographs were taken without consent was “not enough to amount to a wrongful invasion of privacy.”<sup>258</sup> Only public photographs that revealed an individual “in a situation of humiliation or severe

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250. *Id.* at [21].

251. *Id.* at [31].

252. *Id.* at [24].

253. *Id.* at [47]–[50].

254. *Id.* at [43], [50].

255. *Campbell*, [2004] 2 UKHL 22, [2004] 2 AC 457 [44]–[53].

256. *Id.* at [56]–[58].

257. *Id.* at [56], [66].

258. *Id.* at [73].

embarrassment . . . [might] be an infringement of . . . privacy.”<sup>259</sup> On the facts before him, Lord Hoffman found that there was nothing humiliating or severely embarrassing about the photographs.<sup>260</sup> The dissent of Lord Hoffman therefore evinces a notably different approach than that found in the American model by looking to the impact on the claimant of the disclosure rather than the nature of the information itself.

The majority agreed with the basis of Lord Hoffman’s approach, if not his ultimate analysis. Lord Hope of Craighead wrote the first of the three separate opinions that together formed the majority in the result, and began by holding that “the details of Miss Campbell’s attendance at Narcotics Anonymous [were] private information which imported a duty of confidence.”<sup>261</sup> He made reference to the American model but concluded its adoption was unnecessary, instead leaning towards a ‘reasonable expectation of privacy’ test to determine whether the necessary quality of confidence existed.<sup>262</sup> For Lord Hope, information is “obviously private” where an individual can “reasonably expect his privacy to be respected.”<sup>263</sup> What is more, in cases where the information was not “obviously private” (or, where there was no reasonable expectation of privacy), the question of whether the disclosure was nonetheless “highly offensive” is not whether the “reasonable man of ordinary susceptibilities” would be offended upon reading about the information (he declares such an approach to be “an error”), but rather how “a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.”<sup>264</sup> Here then, just as in *Lenah Game Meats* (to which Lord Hope also referred), we see an important distinction between the concept of ‘offensiveness’ as it exists within the freestanding American tort and as it exists in an expanded breach of confidence action—the latter appears to focus on the effects of the disclosure rather than on the nature or type of the information.

Unlike Lord Hope, Lady Hale of Richmond rejected the need for a “highly offensive” threshold test entirely, instead adopting what she described as “[an] objective reasonable expectation [of privacy] test [that] is . . . clearer,”<sup>265</sup> still existing within an expanded breach of confidence action.<sup>266</sup> She also suggested, as did Lord Hope, that

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259. *Id.* at [75].

260. *Campbell*, [2004] 2 UKHL 22, [2004] 2 AC 457 [76].

261. *Id.* at [95].

262. *Id.* at [99].

263. *Id.* at [96].

264. *Id.* at [99].

265. *Id.* at [135].

266. *Campbell*, [2004] 2 UKHL 22, [2004] 2 AC 457 [132].



an individual automatically had such an expectation over any situation that “was obviously private,” and went on to conclude that all of the information at issue was “both private and confidential, because it related to an important aspect of Miss Campbell’s physical and mental health.”<sup>267</sup> Thus, while “[t]here is nothing essentially private about . . . [Miss Campbell] going about her business in a public street,”<sup>268</sup> the captioning of the photos that explained she was attending a Narcotics Anonymous meeting meant “these photographs were different,” largely because they might deter her from continuing with an important treatment programme.<sup>269</sup> It was “[t]he risk of harm . . . [that] matter[ed] at this stage, rather than the proof that actual harm [had] occurred.”<sup>270</sup> Thus, though she rejected the need to address the question of whether or not the disclosure was ‘highly offensive,’ her approach nonetheless ultimately focused on the same questions as had Lord Hope’s: the effects (or potential effects) suffered by the claimant as a result of the disclosure.<sup>271</sup> Lord Carswell effectively agreed with both Lord Hope and Lady Hale’s approach on the harm suffered as a result of the disclosure, finding that “[p]ublication of the details of the appellant’s attendance in therapy . . . [constituted] a considerable intrusion into her private affairs,” causing her substantial distress.<sup>272</sup>

The Lords often make reference in *Campbell* to foreign jurisprudence regarding privacy torts, sometimes importing language about reasonable expectations of privacy or disclosure of offensive facts—the expansion of the action to include information as between parties who have *no* pre-existing relationship has required the importation of such limiting devices.<sup>273</sup> But as shown, even where such language is imported, it is never done in the service of giving primacy to spatial/locational questions. The expanded breach of confidence action in *Campbell* and *Lenah Game Meats* represents, then, a different method of protecting privacy in tort law that looks to the nature of the harm suffered by plaintiff as the determining factor, rather than to spatial questions about their location or decision to share information with some but not others. Though Markesinis et al. have described the continued reliance upon the confidence action in *Campbell*, rather than a full development of a tort of invasion of

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267. *Id.* at [147].

268. *Id.* at [154].

269. *Id.* at [155].

270. *Id.* at [157].

271. *Id.* at [134].

272. *Campbell*, [2004] 2 UKHL 22, [2004] 2 AC 457 [169].

273. See also *A v. B plc* [2002] EWCA Civ 337, [2003] Q.B. 195 [11] (Eng.) (suggesting judicial guidelines that considers the reasonableness of a public figure’s expectation of privacy).

privacy, as “incoheren[t]” and nothing more than a “tentative smuggling of privacy rights via the back-door,”<sup>274</sup> it may in fact be a valuable way of responding to the ‘containment anxiety’ problem without reliance on the classic binary approach to privacy interests.

The conception of privacy elucidated in *Campbell*—though not described by the Lords as such—better accords with the ‘relational perspective’ I have advanced. The privacy violation was in part due to removing from the claimant her ability to adequately negotiate the extent of her engagement with the community and act in an autonomous manner. The decision focused not where the privacy loss occurred, but on the impact it had on the claimant in living her life as she saw fit.<sup>275</sup> In *Campbell*, the very name of the treatment programme the claimant entered—Narcotics Anonymous—emphasized the need for addicts to be able to share their experiences with others in treatment with nonetheless an *expectation of privacy* that the information she shared or even her attempts to seek treatment would not be shared beyond that group. The claimant could not pursue treatment for a serious drug addiction alone—she required the support of a group to do so, but in turn needed to be able to share her experience with that group without fear of this information being shared globally. There could be no more obvious demonstration of the importance of relational privacy. The loss of this privacy, then, threatened to have a real impact on her capacity for truly autonomous action and her role in the community. Under the American framework and its associated reliance on the boundary approach, it is likely that her claim would have failed, despite the impact of the privacy loss. But the logic of *Campbell* still allows for privacy claims to be made over ‘public’ matters only in the most serious of circumstances. The majority of the Lords placed significant emphasis on the physical and mental harm that could befall the claimant if she relapsed into drug use if she avoided treatment so as to avoid publicity.<sup>276</sup> Thus, the tort is still sufficiently bounded so as to avoid ‘containment anxiety.’ The advantages of this approach have also been recognized by the Ontario Superior Court of Justice in the recent case of *Doe v. N.D.*<sup>277</sup> The anonymous plaintiff and the defendant, N.D., had at one point been in an intimate relationship that led to the consensual creation of several sexually explicit videos.<sup>278</sup> The defendant then uploaded one of these to a

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274. Markesinis et al., *supra* note 241, at 208.

275. See *Campbell*, [2004] 2 UKHL 22, [2004] 2 AC 457 [89]–[92] (Lord Hope of Craighead).

276. See, e.g., *id.* at [95] (Lord Hope).

277. *Doe 464533 v. N.D.*, 2016 ONSC 541 (Can.).

278. *Id.* at paras. 5–7.

pornographic website without the plaintiff's consent.<sup>279</sup> Upon discovering this, the plaintiff successfully had the video removed from the website, though there was no way to know how many times it had been viewed or downloaded in the three weeks the process took.<sup>280</sup> The court accepted that this led to the plaintiff suffering tremendous harm, finding her to be "emotionally fragile and worried about the possibility that the video may someday resurface and have an adverse impact on her employment, her career, or her future relationships."<sup>281</sup> Stinson J. found that a breach of confidence was made out; for the first time in Canadian law it had been used to support a non-commercial privacy interest:

The third element of the tort, use of the information to the detriment of the party communicating it, is ordinarily considered in commercial circumstances, where the recipient has misused the confidential information for commercial advantage, at the expense or to the detriment of the other party. An essential element in any tort is harm to the plaintiff. I see no rational basis to distinguish between economic harm and psychological, emotional and physical harm, such as was experienced by the plaintiff in the present case. In any event, the possible future adverse impact on the plaintiff's career and employment prospects arising from the possibility that the video may someday resurface, also demonstrates actionable harm.<sup>282</sup>

In so doing, Stinson J. adopted a similar approach to the breach of confidence action as the House of Lords had in *Campbell*—a focus on the harm suffered by the plaintiff and the impact it had or will have upon her ability to lead the life she wishes rather than simply on the nature of the information at issue. Interestingly, Stinson J. also found that a claim could be made out on a version of the second branch of the American four-part framework (publicity given to private facts), applying it for the first time in Ontario (recall that *Jones* dealt only with the first branch—intrusion upon seclusion).<sup>283</sup> However, Stinson J. modified the tort so that, unlike in its American formulation, the issue of offensiveness went to either the act of publication *or* to the nature of the matter.<sup>284</sup> The version found in the Restatement of Torts looks only to the nature of the matter.<sup>285</sup> By making this alteration, much as the Australian High Court did

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279. *Id.* at para. 8.

280. *Id.* at para. 10.

281. *Id.* at para. 14.

282. *Id.* at para. 24.

283. *Doe 464533 v. N.D.*, 2016 ONSC 541, para. 41–48.

284. *Id.* at para. 46.

285. *See id.*

in *Lenah Game Meats*, Stinson J. was able to again incorporate a stronger focus on the impact of the privacy loss on the claimant and her relationships, rather than looking only at the type of material revealed. It is also important to note that the success of this claim under the third branch was dependent on the publicity aspect—the defendant had uploaded the video to a publicly accessible website.<sup>286</sup> The commentary to the Restatement of Torts notes that

“Publicity,” on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public. Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons.<sup>287</sup>

Stinson J. did not give this specific interpretation to the meaning of publicity as it was not necessary to do so, though he did refer directly to other elements of the Restatement’s commentary to explain the history of the action, suggesting future actions under this tort in Ontario will likely hew closely to it.<sup>288</sup> This is problematic for other forms of revenge porn, however. Under such an interpretation, had the defendant shown the video to a group of friends but not allowed them to make copies, then the publicity aspect of the third branch likely would not be made out. The claim would therefore fail, regardless of the emotional harms suffered by the plaintiff. This too, then, is a reflection of a conventional boundary approach to privacy—the requirement for publicity is effectively a tool for the courts to ensure that the material over which a privacy interest is claimed has in fact transgressed the boundary. An expanded breach of confidence action need not suffer from this same defect since it looks more to the harm suffered and thus, in my view, has a greater chance of incorporating a relational account of privacy.

## CONCLUSION

I have argued in this Article that the current interpretation by the courts of the four-part framework found in the Restatement of

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286. *See id.* at para. 47.

287. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. LAW INST. 1965) (emphasis removed).

288. *Doe 464533 v. N.D.*, 2016 ONSC 541, para. 42.

Torts is inadequate in the face of modern privacy challenges that relate to some claim for privacy over public matters or otherwise non-secret matters. This weakness stems from a dichotomous approach to privacy, grounded in a liberal-individualistic account of autonomy.<sup>289</sup> Feminist legal theory, however, offers us a superior account of autonomy that nonetheless preserves its value as traditionally understood in the liberal paradigm.<sup>290</sup> This account is grounded in the importance of supportive social contexts rather than the elimination of external influence in protecting and nourishing autonomy.<sup>291</sup> Because of the deep philosophical linkage between autonomy and privacy, I have argued that the feminist reconstruction of autonomy can significantly improve our account of privacy. This new account—relational privacy—sees privacy losses as things which reduce our ability to negotiate our level of exposure to or desired level of engagement with those around us. In turn, privacy losses that ought to be deemed actionable by the legal system are those where the harms that flow from them can be interpreted as threatening our capacities for autonomous action to such an extent that they in effect damage our place or role within our chosen community. Though the courts have not yet recognized this approach by name, the seeds of it can be found in the expansion of the breach of confidence action used in some common law jurisdictions to protect privacy interests.<sup>292</sup> This expansion has taken an action previously applicable only in the commercial context, and by focusing on the nature of the harm suffered by the claimant/plaintiff, has expanded privacy protections in a way that may in fact be more responsive to a range of modern privacy claims than the traditional freestanding privacy torts used in the United States and replicas of them elsewhere.

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289. See, e.g., Bennett, *supra* note 116, at 486.

290. See, e.g., Kupfer, *supra* note 162, at 595.

291. See NEDELSKY, *supra* note 118, 55.

292. See, e.g., *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (Austl.); *Spencer v. United Kingdom* [1998] 25 EHRR CD 105; *Campbell v. Mirror Group* [2004] UKHL 22, [2004] 2 AC 457 (Eng.).