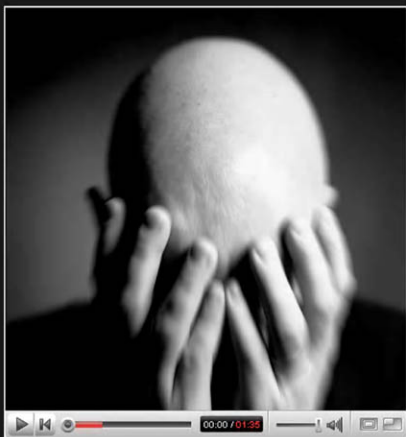


the future of **reputation**

gossip, rumor, and
privacy on the internet



Daniel J. Solove

The Future of Reputation

This page intentionally left blank

The Future of Reputation

Gossip, Rumor, and
Privacy on the Internet

Daniel J. Solove

Yale University Press
New Haven and London

To Papa Nat

A Caravan book. For more information, visit www.caravanbooks.org

Copyright © 2007 by Daniel J. Solove.

All rights reserved.

This book may not be reproduced, in whole or in part, including illustrations, in any form (beyond that copying permitted by Sections 107 and 108 of the U.S.

Copyright Law and except by reviewers for the public press), without written permission from the publishers.

Set in Garamond and Stone Sans types by Binghamton Valley Composition.

Printed in the United States of America by Vail-Ballou Press.

Library of Congress Cataloging-in-Publication Data

Solove, Daniel J., 1972–

The future of reputation : gossip, rumor, and privacy on the Internet / Daniel J. Solove.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-300-12498-9 (cloth : alk. paper) 1. Privacy, Right of.
2. Internet—Law and legislation. 3. Reputation (Law) 4. Libel and slander.
5. Personality (Law) I. Title

K3264.C65S65 2007

342.08'58—dc22

2007013364

A catalogue record for this book is available from the British Library.

The paper in this book meets the guidelines for permanence and durability of the Committee on Production Guidelines for Book Longevity of the Council on Library Resources.

10 9 8 7 6 5 4 3 2 1

Contents

Preface vii

1 Introduction: When Poop Goes Primetime, 1

Part I **Rumor and Reputation in a Digital World**

2 How the Free Flow of Information Liberates and
Constrains Us, 17

3 Gossip and the Virtues of Knowing Less, 50

4 Shaming and the Digital Scarlet Letter, 76

Part II **Privacy, Free Speech, and the Law**

5 The Role of Law, 105

6 Free Speech, Anonymity, and Accountability, 125

7 Privacy in an Overexposed World, 161

8 Conclusion: The Future of Reputation, 189

Notes 207

Index 237

This page intentionally left blank

Preface

The idea for this book came to me soon after I began blogging in May 2005. I found blogging to be enthralling and invigorating. I was fascinated by the thrill of expressing my thoughts to a broad audience yet acutely aware of how people could be hurt by gossip and rumors spreading over the Internet.

In an earlier book, *The Digital Person: Technology and Privacy in the Information Age*, I explored how businesses and the government were threatening privacy by collecting massive digital dossiers of information about people. In that book, it was easy to take sides. I argued that information collection and use were threatening people's freedom and well-being, and that greater protection of privacy was necessary. When it comes to gossip and rumor on the Internet, however, the culprit is ourselves. We're invading each other's privacy, and we're also even invading our own privacy by exposures of information we later come to regret. Individual rights are implicated on both sides of the equation. Protecting privacy can come into tension with safeguarding free speech, and I cherish both values. It is this conflict that animates this book.

Although I advance my own positions, my aim isn't to hold them out as end-all solutions. The purpose of the book is to explore in depth a set of fascinating yet very difficult questions and to propose some moderate compromises in the clash between privacy and free speech. There are no easy answers, but the issues are important, and I believe that it is essential that we wrestle with them.

Many people helped shape the ideas in this book through conversations and helpful comments on the manuscript: danah boyd, Bruce Boyden, Deven Desai, Tom Dienes, Howard Erichson, Henry Farrell, Bill Frucht, Eric Goldman, Marcia Hofmann, Chris Hoofnagle, Orin Kerr, Ray Ku, David Lat, Jennie Meade, Frank Pasquale, Neil Richards, Paul Schwartz, Michael Sullivan, Bob Tuttle, Christopher Wolf, and David Wolitz. My research assistants, James Murphy and Erica Ruddy, provided helpful research and proofreading. A few passages in this book were adapted from my article "The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure," 53 *Duke Law Journal* 967 (2003). My agent, Susan Schulman, believed in this book from the start and helped tremendously in bringing it to fruition. I would also like to thank Michael O'Malley at Yale University Press, who also believed in this project and gave me the opportunity to bring it to life, and Dan Heaton, for his thoughtful editing of the manuscript.

When quoting from blog posts, I have occasionally corrected obvious typos and spelling errors.

Notes

CHAPTER 1. INTRODUCTION

1. Don Park, *Korean Netizens Attack Dog-Shit-Girl*, Don Park's Daily Habit, June 8, 2005, <http://www.docuverse.com/blog/donpark/EntryViewPage.aspx?guid=e5e366f9-050f-4901-98d2-b4d26bedc3e1>.
2. Jonathan Krim, *Subway Fracas Escalates into Test of Internet's Power to Shame*, Wash. Post, July 7, 2005, at D1.
3. Park, *Korean Netizens Attack*, *supra*.
4. As of May 2006, the newspaper with the largest circulation in the United States is USA Today, with a circulation of 2,272,815. Other circulation figures: New York Times, 1,142,464; Chicago Tribune, 579,079; Boston Globe, 397,288. See Katharine Q. Steele, *U.S. Newspaper Circulation Fell 2.5% in Latest Period*, N.Y. Times, May 9, 2006. These are among the largest newspapers. Most have considerably smaller circulations. About half of the top hundred newspapers have circulations under 200,000, and papers close to the bottom of the top hundred list have circulations not much above 100,000. For a useful chart of newspaper circulation figures, see NYU School of Journalism, *The State of Blogging at America's 100 Largest Newspapers*, March 1, 2006, <http://journalism.nyu.edu/pubzone/blueplate/issuet/top100.html>.
5. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 58 (1999).

6. Steve Johnson, *Dog Poop Girl Gets Online Whiplashing*, DoggieNews.com, July 11, 2005, <http://www.doggienews.com/2005/07/dog-poop-girl-gets-online-whiplashing.htm>.
7. <http://www.blogdogs.com/>.
8. <http://www.poopreport.com/>.
9. *Subway Turd Terrorist Gets Dubbed “Dog-Shit-Girl,”* PoopReport.com, June 30, 2005, <http://www.poopreport.com/BMnewswire/1353.html>.
10. Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 914 (1996).
11. See comments to Don Park, *Korean Netizens Attack Dog-Shit-Girl*, Don Park’s Daily Habit, June 8, 2005, <http://www.docuverse.com/blog/donpark/EntryViewPage.aspx?guid=e5e366f9-050f-4901-98d2-b4d26bedc3e1>.
12. Quoted in Jonathan Krim, *Subway Fracas Escalates into Test of Internet’s Power to Shame*, Wash. Post, July 7, 2005, at D1.
13. Samantha Henig, *The Tale of Dog Poop Girl Is Not So Funny After All*, Columbia Journalism Review, July 7, 2005, <http://www.cjrdaily.org/archives/001660.asp>.
14. JOHN BATTELLE, *THE SEARCH* 73–86 (2005). The technology behind Google was developed in 1996, but the company wasn’t created until 1998.
15. Neil Swidey, *A Nation of Voyeurs: How the Internet Search Engine Google Is Changing What We Can Find Out About Each Other and Raising Questions About Whether We Should*, Boston Globe Magazine, Feb. 2, 2003, at 10.

CHAPTER 2. HOW THE FREE FLOW OF INFORMATION LIBERATES AND CONSTRAINS US

1. An early version of the printing press was invented in China in A.D. 600. See PAUL LEVINSON, *THE SOFT EDGE: A NATURAL HISTORY OF THE FUTURE OF THE INFORMATION REVOLUTION* 22 (1997). Gutenberg’s invention sparked mass production of manuscripts in the West.
2. GINI GRAHAM SCOTT, *MIND YOUR OWN BUSINESS: THE BATTLE FOR PERSONAL PRIVACY* 37–38 (1995); ROBERT ELLIS SMITH, *BEN FRANKLIN’S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET* 102–20 (2000).
3. For a discussion of how blogs are transforming journalism, see DAN GILLMOR, *WE THE MEDIA* (2004).
4. Daniel W. Drezner & Henry Farrell, *The Power and Politics of Blogs*, Aug. 2004, at 4, <http://www.danieldrezner.com/research/blogpaperfinal.pdf>.
5. HUGH HEWITT, *BLOG* 37–42 (2005).
6. Drezner & Farrell, *The Power and Politics of Blogs*, *supra*, at 14, 15–16.
7. Jennifer Vogelsong, *For Better or for Worse, Teens Are Leading the Way When It Comes to Journaling Online*, York Daily Record, July 17, 2005.
8. Drezner & Farrell, *The Power and Politics of Blogs*, *supra* (over 10 million blogs in 2004); Carl Bailik, *Measuring the Impact of Blogs Requires More than Counting*, Wall St. Journal Online, May 26, 2005, http://online.wsj.com/public/article/0,,SB111685593903640572-1ZIyf_FU605JAEIW460ycF3fTH4_20060526,00.html?mod-tff_main_tff_top (31.6 million blogs in 2005).
9. David Sifry, *The State of the Blogosphere: August 2006*, Sifry’s Alerts, Aug. 7, 2006, <http://www.sifry.com/alerts/archives/000436.html>.

10. *Id.*
11. <http://www.dailyrotten.com/>.
12. <http://www.wonkette.com/>.
13. <http://gawker.com/>.
14. <http://overheardinnewyork.com>.
15. <http://www.thesuperficial.com>.
16. http://www.thesneeze.com/mt-archives/cat_steve_dont_eat_it.php.
17. <http://www.cryingwhileeating.com>.
18. <http://www.wibsite.com/wiblog/dull/>.
19. <http://belledejour-uk.blogspot.com>. For a discussion of the blog, see Jason Deans, *Channel 4 to Dramatise "Call-Girl" Web Diaries*, *The Guardian*, Jan. 20, 2005, <http://www.guardian.co.uk/print/0,3858,5107415-111748,00.html>.
20. *Web Therapy*, *The Guardian*, Feb. 8, 2005, <http://www.guardian.co.uk/print/0,3858,5121805-111748,00.html>.
21. <http://roughdraft.typepad.com/dotmoms>.
22. Jeffrey Rosen, *Your Blog or Mine?* *N.Y. Times Magazine*, Dec. 19, 2004.
23. Todd Eastham, *Internet Is Bulletin Board for Katrina Victims*, Reuters, Sept. 4, 2005.
24. <http://www.xanga.com/item.aspx?user=ToTo247&tab=weblogs&cuid=261268578>.
25. Kerry Burke, Scott Shifrel & Melissa Grace, *Victim's E-Journal Led to Slay Suspect*, *N.Y. Daily News*, May 17, 2005, <http://www.nydailynews.com/front/story/310320p-265498c.html>.
26. GLENN REYNOLDS, *AN ARMY OF DAVIDS* 44, 92, 95 (2006).
27. *Beantown Becomes Blogtown: At the Democratic Convention, Online Journalism Arrives*, *Wall St. Journal*, July 26, 2004.
28. Donna Smith, *Blogs Seen as Powerful New Tool in U.S. Court Fight*, Reuters, July 8, 2005.
29. REYNOLDS, *ARMY OF DAVIDS*, *supra*, at 9.
30. G. Jeffrey MacDonald, *Teens: It's a Diary. Adults: It's Unsafe*, *Christian Science Monitor*, May 25, 2005.
31. *Id.*
32. Robert J. Samuelson, *A Web of Exhibitionists*, *Newsweek*, Sept. 20, 2006.
33. Giles Turnbull, *The Seven-Year-Old Bloggers*, *BBC News*, June 14, 2004, <http://news.bbc.co.uk/1/hi/magazine/3804773.stm>.
34. *Social Network*, Wikipedia, Feb. 8, 2007, http://en.wikipedia.org/wiki/Social_network.
35. For a general introduction to social networks, see DUNCAN J. WATTS, *SIX DEGREES: THE SCIENCE OF A CONNECTED AGE* (2002); ALBERT-LÁSZLÓ BARABÁSI, *LINKED* (2002); MALCOLM GLADWELL, *THE TIPPING POINT* (2000).
36. WATTS, *SIX DEGREES*, *supra*, at 38–40.
37. JOHN GUARE, *SIX DEGREES OF SEPARATION: A PLAY* (1990).
38. Quoted in Anick Jesdanun, *MySpace Rises as New Online Star*, *Associated Press*, Feb. 12, 2006.
39. Reuters, *Myspace, Seventeen Launch Parents Education Program*, Sept. 24, 2006.
40. Michelle Andrews, *Decoding Myspace*, *U.S. News & World Report*, Sept. 18, 2006.
41. Samuelson, *Web of Exhibitionists*, *supra*.

42. Andrews, *Decoding Myspace*, *supra*.
43. Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks (The Facebook Case)*, ACM Workshop on Privacy in the Electronic Society, Nov. 7, 2005, at §2.1.
44. Judith Donath & danah boyd, *Public Displays of Connection*, 22 *BT Technology Journal* 71, 72 (2004).
45. *Id.*
46. Gross & Acquisti, *Information Revelation*, *supra*, at §2.1.
47. Libby Copeland, *Click Clique: Facebook's Online College Community*, Wash. Post, Dec. 28, 2004.
48. *Id.*
49. Harvey Jones & José Hiram Soltren, *Facebook: Threats to Privacy*, Dec. 14, 2005, at 4, <http://ocw.mit.edu/NR/rdonlyres/Electrical-Engineering-and-Computer-Science/6-805/Fall-2005/8EE6D1CB-A269-434E-BEF9-D5C4B4C67895/ofacebook.pdf>.
50. *Id.* at 14.
51. Gross & Acquisti, *Information Revelation*, *supra*, at §3.3.
52. *Id.*
53. Fred Stutzman, *Student Life on the Facebook*, Jan. 8, 2006, <http://chimprawk.blogspot.com/2006/01/student-life-on-facebook.html>.
54. Seth Kugel, *A Web Site Born in U.S. Finds Fans in Brazil*, N.Y. Times, Apr. 10, 2006, at C1.
55. Anthony Hempell, *Orkut at Eleven Weeks: An Exploration of a New Online Social Network Community*, Apr. 16, 2004, <http://www.anthonyhempell.com/papers/orkut/>.
56. <http://www.orkut.com/About.aspx>.
57. Nandini Vaish, *Netting New Friends: Online Social Networking Is Catching on in India in a Big Way with Some Unusual Results*, India Today, Dec. 4, 2006, at 74.
58. Savita V, *India-Specific e-communities on the Rise*, The Economic Times, Dec. 7, 2006, <http://economictimes.indiatimes.com/articleshow/733381.cms>.
59. <http://www.nexopia.com>; <http://www.piczo.com>.
60. <http://www.adoos.com>.
61. <http://www.passado.com>; Reuters, *Networking Site Passado Plans to Expand*, Dec. 11, 2006.
62. <http://www.bebo.com>; Mark Ward, *Teen Craze Over Networking Sites*, BBC News, Dec. 20, 2006.
63. Sara Kehaulani Goo, *A Search for Ourselves*, Wash. Post, Dec. 20, 2006, at D01.
64. Leo Lewis, *Mixi Prepares to Cater for Flood of Baby Boomers*, Financial Times, Dec. 6, 2006, at 28; Tim Kelly, *Mixi Mixes It Up in Asia*, Forbes, Oct. 16, 2006. Mixi is located at <http://mixi.jp/>.
65. <http://mop.com/>; <http://www.cuspace.com/>.
66. Barbara Grady, *Cyworld Enters MySpace Territory*, San Mateo County Times, Aug. 15, 2006.
67. <http://us.cyworld.com/>.
68. Grady, *Cyworld*, *supra*.
69. Hwang Si-young, *Cyworld Faces Challenges in Overseas Expansion*, Korea Herald, Dec. 10, 2006.

70. *Id.*
71. <http://www.dogster.com/>; <http://www.catster.com/>.
72. <http://www.hamsterster.com/>.
73. Ben McGrath, *Oops*, New Yorker (June 30, 2003).
74. STEVEN L. NOCK, THE COSTS OF PRIVACY: SURVEILLANCE AND REPUTATION IN AMERICA 2 (1993).
75. Proverbs 22:1.
76. WILLIAM SHAKESPEARE, OTHELLO, act II, sc. iii.
77. ARTHUR MILLER, THE CRUCIBLE 133 (Penguin ed. 2003) (originally published in 1953).
78. John Adams, *Discourses on Davila: A Series of Papers on Political History*, in 6 THE WORKS OF JOHN ADAMS 234 (Charles Francis Adams, ed. 1854).
79. C. H. COOLEY, HUMAN NATURE AND THE SOCIAL ORDER (1902); *see also* J. Sidney Shrauger & Thomas J. Schoeneman, *Symbolic Interactionist View of Self-Concept: Through the Looking Glass Darkly*, in THE SELF IN SOCIAL PSYCHOLOGY 25, 25 (Roy F. Baumeister, ed. 1999); ARNOLD M. LUDWIG, HOW DO WE KNOW WHO WE ARE? A BIOGRAPHY OF THE SELF 54 (1997). Dianne M. Tice observes: “In 1902, Cooley proposed the ‘looking glass self’ as a metaphor for how the self-concept is determined by the views of others, and many subsequent theorists and researchers have reconfirmed that other people’s perceptions constitute an important part of the self and exert a strong influence on individuals’ conceptions of themselves.” Diane M. Tice, *Self-Concept Change and Self-Presentation: The Looking Glass Self Is Also a Magnifying Glass*, in THE SELF IN SOCIAL PSYCHOLOGY, *supra*, at 195, 215.
80. NOCK, COSTS OF PRIVACY, *supra*, at 124.
81. FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 26 (1995). For more about trust, *see* TRUST AND RECIPROCITY (Elinor Ostrom & James Walker, eds. 2003); ERIC M. USLANER, THE MORAL FOUNDATIONS OF TRUST (2002); RUSSEL HARDIN, TRUST AND TRUSTWORTHINESS (2002); TRUST IN SOCIETY (Karen S. Cook, ed. 2001); TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS (Diego Gambetta, ed. 1988); ADAM B. SELIGMAN, THE PROBLEM OF TRUST (1997); Helen Nissenbaum, *Securing Trust Online: Wisdom or Oxymoron?*, 81 B.U. L. Rev. 635 (2001).
82. NOCK, COSTS OF PRIVACY, *supra*, at 124.
83. AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 58–89 (2006).
84. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).
85. Associated Press, *The Decline of Manners in the U.S.*, Oct. 14, 2005.
86. FUKUYAMA, TRUST, *supra*, at 310; Pamela Paxton, *Trust In Decline?* Contexts (Winter 2005).
87. Carol A. Heimer, *Solving the Problem of Trust*, in TRUST IN SOCIETY 40, 65 (Karen S. Cook, ed. 2001).
88. NOCK, COSTS OF PRIVACY, *supra*, at 3.
89. MARSHALL McLUHAN, THE GUTENBERG GALAXY 31 (1962) (“The new electronic interdependence recreates the world in the image of a global village.”); *see also* MARSHALL McLUHAN & BRUCE R. POWERS, THE GLOBAL VILLAGE: TRANSFORMATIONS IN WORLD LIFE AND MEDIA IN THE 21ST CENTURY (1989).

90. *Ostrowe v. Lee*, 175 N.E. 505, 506 (N.Y. Ct. App. 1931).
91. The quotation is from Theodore Tilton, husband of Elizabeth Tilton, who had a scandalous extramarital affair with the famous preacher Henry Ward Beecher during the late nineteenth century. Tilton is quoted in RICHARD WIGHTMAN FOX, *TRIALS OF INTIMACY: LOVE AND LOSS IN THE BEECHER-TILTON SCANDAL* 35 (1999).
92. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).
93. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Calif. L. Rev. 691, 694 (1986) (quoting J. HAWES, *LECTURES ADDRESSED TO THE YOUNG MEN OF HARTFORD AND NEW HAVEN* 95 (1828)); see also THOMAS STARKIE, *A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS* (1826).
94. See *id.* at 707–8.
95. *Id.* at 711.
96. Nicholas Emler, *Gossip, Reputation, and Social Adaptation*, in *GOOD GOSSIP* 117, 119 (Robert F. Goodman & Aaron Ben-Ze'ev, eds. 1994)
97. SHAKESPEARE, *OTHELLO*, *supra*, act II, sc. iii, ll. 261–66.
98. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 271 (1983).
99. Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. Rev. 1, 12 (1994).
100. Barbara Mikkelson & David P. Mikkelson, *Tommy Rot*, Urban Legends Reference Pages, May 6, 2006, <http://www.snopes.com/racial/business/Hilfiger.asp>; *Tommy Hilfiger "Racist" Rumor Is Fashionable Again*, About.com, <http://urbanlegends.about.com/library/weekly/aa121698.htm>.
101. ABC News, *Misidentified Bryant Accuser Fires Back*, ABCNews.com, Sept. 30, 2004, <http://abcnews.go.com/GMA/print?id=124910>; Jill Lieber & Richard Willing, *Teen Misidentified as Bryant's Accuser Fights Back*, USA Today, July 28, 2003.
102. ABC News, *Misidentified Bryant Accuser*, *supra*.
103. Lieber & Willing, *Teen Misidentified*, *supra*.
104. Jennifer 8. Lee, *Net Users Try to Elude the Google Grasp*, N.Y. Times, July 25, 2002.
105. Richard A. Posner, *Bad News*, N.Y. Times, July 31, 2005.
106. David Linhardt, *Employers Screen Applicants With Facebook*, University Daily Kansan, Jan. 30, 2006.
107. Alan Finder, *For Some, Online Persona Undermines a Resume*, N.Y. Times, June 11, 2006.
108. *Id.*
109. *Id.*
110. O. Kharif, *Big Brother Is Reading Your Blog*, Business Week Online, Feb. 28, 2006.
111. Bree Sposato, *MySpace Invaders*, N.Y. Magazine, Nov. 21, 2005.
112. Ivan Tribble, *Bloggers Need Not Apply*, Chronicle of Higher Education, July 8, 2005.
113. Associated Press, *Official Sues Students Over MySpace Page*, Sept. 22, 2006.
114. *Heather Armstrong: Bloggers on Blogging*, Rebecca's Pocket (Aug. 2005), <http://www.rebeccablood.net/bloggerson/heatherarmstrong.html>.
115. <http://www.dooce.com>.

116. Heather Armstrong, *I Have Something to Say*, Dooce.com, Feb. 12, 2002, http://www.dooce.com/archives/daily/02_12_2002.html.
117. Heather Armstrong, *Collecting Unemployment*, Dooce.com, Feb. 26, 2002, http://www.dooce.com/archives/daily/02_26_2002.html.
118. Scott Jaschik, *You May Have Been YouTubed*, Inside Higher Ed, Sept. 6, 2006, <http://insidehighered.com/news/2006/09/06/youtube>.
119. Sara Kehaulani Goo, *YouTubers Ponder Google*, Wash. Post, Oct 11, 2006.
120. <http://www.icann-ncc.org/pipermail/discuss/2003-April/006826.html>. The website at this URL has been removed from the Internet.
121. Alan Feuer & Jason George, *Internet Fame Is Cruel Mistress for Dancer of the Numa Numa*, N.Y. Times, Feb. 26, 2005, at A1.
122. *Id.*
123. <http://www.newnuma.com>.
124. The facts about the Little Fatty incident are from Raymond Zhou, *Fatty—The Face That Launched 1,000 Clicks*, China Daily, Dec. 11, 2006, http://www.chinadaily.com.cn/cndy/2006-11/11/content_733158.htm; Clifford Coonan, *The New Cultural Revolution: How Little Fatty Made It Big*, The Independent, Dec. 27, 2006; Jane Macartney, *Face of “Little Fatty” Finds Fame Among China’s Web Users*, The Times, Nov. 21, 2006; Reuters, *“Little Fatty” an Instant Internet Phenomenon in China*, Dec. 8, 2006. To see more of the images, visit <http://www.slideshare.net/debashish/little-fatty-chinas-internet-hero>.
125. The video was posted at http://www.waxy.org/archive/2003/05/13/finding_.shtml.
126. Tu Thanh Ha, *“Star Wars Kid” Cuts a Deal With His Tormentors*, Globe and Mail, April 7, 2006.
127. For more background about the story, see Amy Harmon, *Fame Is No Laughing Matter for the “Star Wars Kid,”* N.Y. Times, May 19, 2003, at C3.
128. *Daily Log: Star Wars Kid*, Waxy.org, Apr. 29, 2003, http://www.waxy.org/archive/2003/04/29/star_war.shtml.
129. Quoted in Stewart Kirkpatrick, *Shame and Misfortune*, The Scotsman, Apr. 29, 2004.
130. Harmon, *Fame Is No Laughing Matter*, *supra*.
131. Amanda Paulson, *Internet Bullying*, Christian Science Monitor, Dec. 30, 2003; Jan Wong, *15 Minutes of Shame*, Globe & Mail, May 7, 2005.
132. Ha, *“Star Wars Kid” Cuts a Deal, supra*; Tu Thanh Ha, *Parents File Lawsuit Over Star Wars Kid Video*, Globe and Mail, July 23, 2003.
133. Ghyslain Raza, Wikipedia, http://en.wikipedia.org/wiki/Ghyslain_Raza.
134. Carl Bailik, *How Big an Internet Star Was the “Star Wars” Kid?* Wall St. Journal Online, Dec. 14, 2006, http://online.wsj.com/public/article/SB116602807064149031-HC7A4Ifkyv8bz__bUCj6CT8PHus_20071215.html. According to one estimate by a U.K. firm, the Star Wars Kid video has been viewed about 900 million times. Bailik casts considerable doubt on these statistics. But it is probably safe to say that the video has been viewed more than 100 million times. On video websites such as YouTube, numerous versions of the video are posted, and the views of them amount to about 100 million. *Id.* Several years ago, Ghyslain’s “lawyer said in a court filing that the video

- was so widely circulated that one Internet site solely dedicated to the two-minute clip recorded 76 million visits by October, 2004.” Ha, “*Star Wars Kid*” *Cuts a Deal*, *supra*.
135. *Only the Very Best Videos of . . . The Star Wars Kid*, Screaming Pickle, <http://screamingpickle.com/humor/legends/StarWarsKid/>.
 136. *Put the Star Wars Kid in Episode III*, <http://www.petitiononline.com/Ghyslain/petition.html>.
 137. http://www.petitiononline.com/mod_perl/signed.cgi?Ghyslain.
 138. *Daily Log: Star Wars Kid TV Tribute Roundup*, Waxy.org, Mar. 20, 2005, http://www.waxy.org/archive/2005/03/20/star_war.shtml.
 139. Marie-Chantale Turgeon, *10 Reasons to Blog*, http://www.meidia.ca/archives/2005/06/10_reasons_to_b.php?l=en.
 140. Eve Fairbanks, *The Porn Identity*, *New Republic*, Feb. 6, 2006.

CHAPTER 3. GOSSIP AND THE VIRTUES OF KNOWING LESS

1. April Witt, *Blog Interrupted*, *Wash. Post Magazine*, Aug. 15, 2004, at W12.
2. *Id.*
3. Jessica Cutler’s blog, *Washingtonienne*, has been taken off the Internet. Archived copies of the blog are still available online. The blog Wonkette has posted an archived copy. See *The Lost Washingtonienne*, Wonkette, <http://www.wonkette.com/archives/the-lost-washingtonienne-wonkette-exclusive-etc-etc-004162.php>. The blog is also reproduced in its entirety in Robert’s legal complaint against Jessica.
4. Julie Bosman, *First With the Scoop, if Not the Truth*, *N.Y. Times*, Apr. 18, 2004.
5. Wonkette is located at <http://www.wonkette.com>. At the time Wonkette linked to Jessica’s blog, it had fewer daily visitors. Although it was already quite popular at the time, its coverage of Jessica’s blog helped to catapult Wonkette to higher levels of popularity.
6. Witt, *Blog Interrupted*, *supra*.
7. Quoted in Wonkette, *Washingtonienne: Eliminated by Process*, May 21, 2004, <http://www.wonkette.com/archives/washingtonienne-eliminated-by-process-009677.php>.
8. Witt, *Blog Interrupted*, *supra*.
9. Ana Marie Cox, *Washingtonienne Speaks!! Wonkette Exclusive!! Must Credit Wonkette!! The Washingtonienne Interview!!* Wonkette, May 21, 2004, <http://www.wonkette.com/politics/media/washingtonienne-speaks-wonkette-exclusive-must-credit-wonkette-the-washingtonienne-interview-9693.php>.
10. <http://www.jessicacutleronline.com/>.
11. Witt, *Blog Interrupted*, *supra*.
12. Ana Marie Cox, *Biography Page*, Ana Marie Cox Website, <http://www.anamarietox.com/bio.html>.
13. In the interest of full disclosure, I have provided advice to Robert’s counsel subsequent to his filing of the lawsuit. Before providing advice, I made it clear that I would continue to publicly express my opinions about the case regardless of whether they were critical of Robert’s positions in the case. The opinions expressed about the case in this book are solely my own.

14. *Internal Affairs: Playboy.com Poses Questions to the Infamous Washington, D.C., Sex Blogger*, Playboy.com, Aug. 31, 2004, http://www.playboy.com/commerce/email/cyberclub/o8_31_04/story/dcintern_pop.html.
15. Witt, *Blog Interrupted*, *supra*.
16. Orin Kerr, *When Professors Read Pseudonymous Student Blogs*, Volokh Conspiracy, Apr. 26, 2005, http://volokh.com/archives/archive_2005_04_24-2005_04_30.shtml#1114540880.
17. Anonymous George Washington University Law School Student, *Hoist By My Own Petard*, Idlegrasshopper, Apr. 20, 2005, <http://idlegrasshopper.blogspot.com/2005/04/hoist-by-my-own-petard.html>.
18. *Former Boston Herald Columnist Fired from Teaching Job*, Associated Press, July 19, 2005.
19. *More Midterm Meltdowns*, The Phantom Professor, Feb. 25, 2005, at http://phantomprof.blogspot.com/2005_05_01_phantomprof_archive.html. This post has been removed from the website.
20. *Office Hours*, The Phantom Professor, May 3, 2005, http://phantomprof.blogspot.com/2005_05_01_phantomprof_archive.html.
21. Scott Jaschik, *The Phantom Professor*, Inside Higher Education, May 11, 2005, <http://www.insidehighered.com/news/2005/05/11/phantom>.
22. *Id.*
23. Colleen McCain Nelson, *SMU Blogger Unmasked, Unemployed*, Dallas Morning News, May 15, 2005.
24. *Id.*
25. Jaschik, *Phantom Professor*, *supra*.
26. *Id.*
27. *Id.*
28. *Id.*
29. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967, 1005–6 (2003); *see also* David Bauder, *Identifying Rape Victims Troubles Media*, Ft. Lauderdale Sun-Sentinel, Aug. 3, 2002, at 3A.
30. Fernanda B. Viegas, *Bloggers' Expectations of Privacy and Accountability: An Initial Survey*, Journal of Computer-Mediated Communication, vol. 10, issue 3 (2005), <http://jcmc.Indiana.edu/vol10/issue3/viegas.html>.
31. Quoted in *id.*
32. Eric Hsu, *Students' Web Sites Put Schools in Quandary*, Bergen (N.J.) Record, July 24, 2005.
33. H. J. Cummins, *When Blogs and Jobs Collide*, Minneapolis Star Tribune, Aug. 14, 2005.
34. Bob Sullivan, *Kids, Blogs, and Too Much Information*, MSNBC.com, Apr. 29, 2005, <http://www.msnbc.msn.com/id/7668788/>.
35. MALCOLM GLADWELL, *THE TIPPING POINT* 7, 9, 30–33, 35, 58–59 (2000).
36. *Id.* at 25.
37. ALBERT-LÁSZLÓ BARABÁSI, *LINKED* 31, 34 (2002).
38. Aaron Ben Ze'ev, *The Vindication of Gossip*, in *GOOD GOSSIP* 1, 22, 24 (Robert F. Goodman & Aaron Ben-Ze'ev, eds. 1994)
39. JÖRG R. BERGMANN, *DISCREET INDISCRETIONS: THE SOCIAL ORGANIZATION OF GOSSIP* 21–22 (1993).

40. KEITH DEVLIN, *THE MATH GENE* 255 (2000).
41. Sally Engle Merry, *Rethinking Gossip and Scandal*, in *REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT* 47 (Daniel B. Klein, ed. 1997).
42. Nicholas Emler, *Gossip, Reputation, and Social Adaptation*, in *GOOD GOSSIP*, *supra*, at 117, 135.
43. KAREN J. BRISON, *JUST TALK: GOSSIP, MEETINGS, AND POWER IN A PAPUA NEW GUINEA VILLAGE II* (1992). When gossip occurs behind people's backs, rumors often "circulate unchecked" and are hard to combat if "diffuse and hidden." *Id.* at 12.
44. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 *Cornell L. Rev.* 291, 333–34 (1983).
45. This argument is frequently raised in support of outing gays. See, e.g., Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 *Wash. U. L.Q.* 1531, 1568 (1995) ("Outers offer up the victim as a 'sacrificial lamb' to portray themselves as purifying redeemers, able to solve the problems of discrimination."). Outing gays, the argument goes, will help alter society's perception of gays by demonstrating that mainstream people or role models are gay. For more background on outing, see John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 *Yale L.J.* 747, 776 (1992) (arguing that outing to establish a person as a gay role model should be outweighed by privacy rights, whereas outing to point out the hypocrisy of public officials should be permitted).
46. BRISON, *JUST TALK*, *supra*, at 112.
47. MARTIN HEIDEGGER, *BEING AND TIME* 158 (Joan Stambaugh, trans. 1996) (originally published in 1953).
48. PATRICIA MEYER SPACKS, *GOSSIP* 4 (1985).
49. BRISON, *JUST TALK*, *supra*, at 12. Professor Cynthia Kierner observes that gossiping was a way to "jockey for social position" in postrevolutionary America. CYNTHIA A. KIERNER, *SCANDAL AT BIZARRE: RUMOR AND REPUTATION IN JEFFERSON'S AMERICA* 64 (2004).
50. Robert Post, *The Legal Regulation of Gossip: Backyard Chatter and the Mass Media*, in *GOOD GOSSIP*, *supra*, at 65, 65.
51. Paul M. Schwartz, *Internet Privacy and the State*, 32 *Conn. L. Rev.* 815, 843 (2000).
52. *Id.* at 842–43.
53. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 232–34 (1981).
54. STEVEN L. NOCK, *THE COSTS OF PRIVACY: SURVEILLANCE AND REPUTATION IN AMERICA II–12* (1993).
55. *Id.* at 124.
56. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8 (2000); see also Lawrence Lessig, *Privacy and Attention Span*, 89 *Geo. L.J.* 2063, 2065 (2001).
57. KAREL ČAPEK, *The Last Judgment*, in *TALES FROM TWO POCKETS* 159–60 (Norma Comrada, trans. 1994) (1929).
58. WILLIAM H. GASS, *FICTION AND THE FIGURES OF LIFE* 45 (1979); see also Georg Simmel, *The Sociology of Secrecy and of Secret Societies*, 11 *American Journal of Sociology* 441, 442 (1906) (we "never can absolutely know another" but form our conception of others based on "fragments").

59. WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 282 (Harvard U. Press edition 1983) (originally published in 1890). Virginia Woolf embraced this pluralistic conception of selfhood in her novel *Orlando*: “Biography is considered complete if it merely accounts for six or seven selves, whereas a person may well have as many as a thousand.” VIRGINIA WOOLF, *ORLANDO: A BIOGRAPHY* (1928).
60. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); see also ALAN WESTIN, *PRIVACY AND FREEDOM* 33 (1967).
61. Roy F. Baumeister, *An Overview*, in *THE SELF IN SOCIAL PSYCHOLOGY* 1, 8 (Roy F. Baumeister, ed. 1999).
62. Quoted in Philip Roth, *In Defense of Intimacy: Milan Kundera’s Private Lives*, *Village Voice*, June 26, 1984, at 42.
63. JOSEPH BENSMAN & ROBERT LILIENFELD, *BETWEEN PUBLIC AND PRIVATE: LOST BOUNDARIES OF THE SELF* 174 (1979).
64. *Id.* at 49.
65. MILAN KUNDERA, *TESTAMENTS BETRAYED* 260–61 (1995).
66. HANNAH ARENDT, *THE HUMAN CONDITION* 22–24 (1958).
67. ARNOLD M. LUDWIG, *HOW DO WE KNOW WHO WE ARE? A BIOGRAPHY OF THE SELF* 49 (1997).
68. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 96 (1963).
69. *Id.*
70. LUDWIG, *HOW DO WE KNOW WHO WE ARE?* *supra*, at 117.
71. THOMAS NAGEL, *CONCEALMENT AND EXPOSURE & OTHER ESSAYS* 7 (2002).
72. GOFFMAN, *STIGMA*, *supra*, at 3, 7–9, 30.
73. SUSAN SONTAG, *ILLNESS AS METAPHOR AND AIDS AND ITS METAPHORS* 38, 143, 6, 58 (1990).
74. Stan Karas, *Privacy, Identity, Databases*, 52 *Am. U. L. Rev.* 393, 427 (2002).
75. Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 *Tex. L. Rev.* 1, 29 (1997).
76. See, e.g., Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *Harv. L. Rev.* 1003 (1995) (reviewing market-based theories of racial discrimination).
77. Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 *Nw. U. L. Rev.* 1497, 1500, 1538 (2002).
78. *R.I.P. Jennicam*, BBC, Jan. 1, 2004, http://news.bbc.co.uk/2/hi/uk_news/magazine/3360063.stm.
79. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 35 (1967).
80. AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 196 (1999).
81. FRED CATE, *PRIVACY IN THE INFORMATION AGE* 30 (1997).
82. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 *Calif. L. Rev.* 957, 968 (1989).
83. Robert C. Post, *Three Concepts of Privacy*, 89 *Geo. L.J.* 2087, 2092 (2001).
84. PETER GAY, *SCHNITZLER’S CENTURY: THE MAKING OF MIDDLE-CLASS CULTURE, 1815–1914*, at 273 (2002).
85. ARNOLD H. MODELL, *THE PRIVATE SELF* 95 (1993).

86. Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 Hofstra L. Rev. 1093, 1112 (2002).
87. JOHN DEWEY, EXPERIENCE AND NATURE 167 (Jo Ann Boydston, ed. 1987) (originally published in 1925); see also JOHN DEWEY, HUMAN NATURE AND CONDUCT 97 (Jo Ann Boydston, ed. 1988) (originally published in 1922) (discussing “the difference between a self taken as something already made and a self still making through action”). As the psychologist Carl Schneider notes, protection against disclosure is similar to the skin of a fruit or the shell of an egg. CARL D. SCHNEIDER, SHAME, EXPOSURE, AND PRIVACY 37 (1992); see also David L. Bazelon, *Probing Privacy*, 12 Gonz. L. Rev. 587, 590 (1977) (“[P]rivacy shelters the emerging individual’s thoughts from public disclosure and control so that the fear of being watched, exposed, ridiculed, or penalized does not crush the seeds of independent thinking before they can mature.”).
88. FRIEDRICH DÜRRENMATT, THE ASSIGNMENT 24 (Joel Agee, trans., Random House 1988).
89. SECRETARY’S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS, U.S. DEPT’ OF HEALTH, EDUCATION & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS (1973), <http://aspe.os.dhhs.gov/datacncl/1973privacy/tocprefacemembers.htm>.
90. See generally T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 Tenn. L. Rev. 287 (1998) (arguing that expunging certain juvenile crimes from a person’s record is a mistake).
91. Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 Mo. L. Rev. 743, 756–57 (1996).
92. See Funk, *Hiding Criminal Pasts*, at 288 (suggesting that state laws permitting the expunging of juvenile criminal records are “grounded on a belief that juveniles will outgrow their reckless youthful behavior”).
93. *People v. Price*, 431 N.W.2d 524, 526 (Mich. Ct. App. 1988).
94. Merry, *Rethinking Gossip and Scandal*, *supra*, at 47.
95. LEORA TANENBAUM, SLUT! GROWING UP FEMALE WITH A BAD REPUTATION xvi, xv (2000).
96. ANITA L. ALLEN, WHY PRIVACY ISN’T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY 2 (2003).

CHAPTER 4. SHAMING AND THE DIGITAL SCARLET LETTER

1. Nate Kushner, *Laura K. Krishna Is Just a Dumb Kid With a Nice Mom*, A Week of Kindness, March 30, 2005, http://www.aweekofkindness.com/blog/archives/2005/03/laura_k_krishna_1.html. Kushner changed Laura’s real last name to Krishna after pleas from Laura and her mother to take the information offline.
2. PZ Myers, *A Plagiarist Gets Her Comeuppance*, Pharyngula, Mar. 29, 2005, http://pharyngula.org/index/weblog/comments/a_plagiarist_gets_her_comeuppance/. Myers’s blog is now located at <http://scienceblogs.com/pharyngula/>.
3. <http://peoriacrackhouse.blogspot.com>.

4. Post of July 22, 2005 by Anonymous, Peoria Crack House, http://peoriacrackhouse.blogspot.com/2005_07_01_peoriacrackhouse_archive.html.
5. Tracy Connor, *Hunt Perv Caught in a Flash*, N.Y. Daily News, Aug. 26, 2005.
6. *Photo Finish for Flashers*, N.Y. Daily News, Aug. 28, 2005.
7. *Man Caught on Camera Phone Flashing Subway Rider*, Associated Press, Sept. 1, 2005.
8. Kevin Poulsen, *Camera Phone Has Life After Theft*, Wired, Aug. 29, 2005, <http://www.wired.com/news/privacy/0,1848,68668,00.html>.
9. *Id.*
10. JohnsGoat, *Long Island Trash . . .*, Long Island Press Electronic Bulletin Board, Aug. 21, 2005, <http://www.longislandpress.com/bb/viewtopic.php?p=2037>. The post and comments have been removed and can no longer be found on the Internet. I have an archive copy of the post and comments on file.
11. Poulsen, *Camera Phone Theft*, *supra*.
12. JohnsGoat, *Long Island Trash*, *supra*.
13. Michael B. Conforti, *To Catch a Thief: Cell Phone Theft Spawns E-Harassment*, Long Island Press, Sept. 1, 2005, http://longislandpress.com/?cp=162&cshow=article&a_id=5538.
14. JohnsGoat, *Long Island Trash*, *supra*.
15. *Id.*
16. *Id.*
17. Jim Heid, *The Apple Store Squatter Saga Continues*, Jim Heid's Macintosh Digital Hub, July 11, 2005, <http://www.macilife.com/2005/07/apple-store-squatter-saga-continues.html>.
18. Steve Rubel, *Is Anyone's Privacy Safe from the Bloggers*, MicroPersuasion, Aug. 3, 2005, http://www.micropersuasion.com/2005/08/is_anyones_priv.html.
19. For background about norms, see ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995); Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv. L. Rev. 1003 (1997); Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997); Cass Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903 (1996); Lior Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 17 Ind. L.J. 1231 (2000); Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in *SOCIAL NORMS* 35, 35 (Michael Hechter & Karl-Dieter Opp, eds. 2001).
20. Richard Weste, *The Booke of Demeanor and the Allowance and Disallowance of Certain Misdemeanors in Companie* (c. 1619). Quoted in NORBERT ELIAS, *THE CIVILIZING PROCESS* 112 (1994).
21. Rachel Metz, *Cell-Phone Shushing Gets Creative*, Wired.com, Jan. 18, 2005, <http://www.wired.com/news/wireless/0,1382,66310,00.html>.
22. Christine Rosen, *Our Cell Phones, Ourselves*, New Atlantis (Summer 2004).
23. *Id.*
24. The commercials are available at <http://icpm.8m.com/>.

25. HENRY DAVID THOREAU, *WALDEN AND OTHER WRITINGS* 113 (Barnes & Noble, Inc. 1993) (originally published in 1854).
26. Alain Corbin, *Intimate Relations*, in *A HISTORY OF THE PRIVATE LIFE*, vol. 4, *FROM THE FIRES OF REVOLUTION TO THE GREAT WAR* 605 (Michelle Perrot, ed., Arthur Goldhammer, trans. 1990); Michelle Perrot, *The Family Triumphant*, *id.* at 143.
27. Anita L. Allen, *Lying to Protect Privacy*, 44 *Vill. L. Rev.* 161, 162 (1991).
28. Metz, *Cell-Phone Shushing*, *supra*. The cards are available at <http://www.coudal.com/shhh.php>.
29. CARL D. SCHNEIDER, *SHAME, EXPOSURE, AND PRIVACY* 22–26 (1992).
30. <http://rudepeople.com>.
31. <http://platewire.com>.
32. Jennifer Saranow, *The Snoop Next Door*, *Wall St. Journal*, Jan. 12, 2007, at W1.
33. <http://flickr.com/photos/uno4300/345254682/>; <http://flickr.com/photos/nojja/205062960/>; <http://flickr.com/photos/caterinal/59500/>.
34. *See, e.g.*, Orn B. Bodvarsson & William A. Gibson, *An Economic Approach to Tips and Service Quality: Results of a Survey*, 36 *Social Science Journal* 137–47 (1999); Orn B. Bodvarsson & William A. Gibson, *Economics and Restaurant Gratuities: Determining Tip Rates*, 56 *Amer. J. Econ. Sociology*, 187–204 (1997); April H. Crusco & Christopher G. Wetzell, *The Midas Touch: The Effects of Interpersonal Touch on Restaurant Tipping*, 10 *Personality & Social Psychology Bulletin* 512–17 (1984); Mary B. Harris, *Waiters, Customers, and Service: Some Tips About Tipping*, 25 *Journal of Applied Social Psychology* 725–44 (1995).
35. Ofer H. Azar, *The Social Norm of Tipping: A Review*, *Journal of Economics*, at 3 (2005) <http://econwpa.wustl.edu:80/eps/othr/papers/0503/0503013.pdf>.
36. <http://www.bitterwaitress.com>.
37. <http://www.bitterwaitress.com/std/index.html?detail=1&id=2135>.
38. <http://www.bitterwaitress.com/std/index.html?detail=1&id=2120>.
39. Katherine Rosman, *Leak Chic: Everybody's an Anonymous Source These Days*, *Wall St. Journal*, Dec. 15, 2005.
40. <http://www.hollabacknyc.blogspot.com>.
41. <http://dontdatehimgirl.com/>.
42. http://dontdatehimgirl.com/about_us/index.html.
43. <http://dontdatehimgirl.com/faqs/>.
44. EDWIN POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS, 1620–1692*, at 200 (1966).
45. Mark Spatz, Comment, *Shame's Revival: An Unconstitutional Regression*, 4 *U. Pa. J. Const. L.* 827, 831 (2002).
46. POWERS, *CRIME AND PUNISHMENT*, *supra*, at 270 (1966); RAPHAEL SEMMES, *CRIME AND PUNISHMENT IN EARLY MARYLAND* 70 (1938).
47. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 40 (1993).
48. FRANCIS WATT, *THE LAW'S LUMBER ROOM* 48, 56 (1898).
49. WILLIAM ANDREWS, *PUNISHMENTS IN OLDENTIME: BEING AN HISTORICAL ACCOUNT OF THE DUCKING STOOL, BRANK, PILLORY, STOCKS, DRUNKARD'S CLOAK, WHIPPING POST, RIDING THE STANG, ETC.* 5 (Research Publications 1990 on microfiche) (originally published in 1881).

50. Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 Vand. L. Rev. 2157, 2169 (2001).
51. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 46, 47 (Barnes & Noble edition, 1998) (originally published in 1850).
52. Barbara Clare Morton, *Bringing Skeletons Out of the Closet and Into the Light: "Scarlet Letter" Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 Suffolk U. L. Rev. 97, 102–4 (2001); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1912–15 (1991).
53. Morton, *Skeletons*, *supra*, at 102–4.
54. Markel, *Shaming Punishments*, *supra*, at 2169.
55. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan, trans., Pantheon edition 1977).
56. Jeff Stryker, *Using Shame as Punishment: Have Sex, Get Infamous*, S.F. Chronicle, Mar. 13, 2005.
57. Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. Chi. L. Rev. 591, 632 (1996).
58. John Borland, *Privacy Jam on California Highway*, CNET, May 13, 2004, http://news.com.com/Privacy+jam+on+California+highway/2100-1038_3-5212280.html.
59. Eugene Volokh, *Appalling Service from Dell, Volokh Conspiracy*, Nov. 23, 2005, <http://volokh.com/posts/1132781578.shtml>.
60. Matthew Fordahl, *Sony to Release Patch to Reveal Hidden Copy-Protection Software*, Associated Press, Nov. 2, 2005.
61. Mark Russinovich, *Sony Rootkits and Digital Rights Management Gone Too Far*, Mark's Sysinternals Blog, Oct. 31, 2005, <http://blogs.technet.com/markrussinovich/archive/2005/10/31/sony-rootkits-and-digital-rights-management-gone-too-far.aspx>.
62. Kim Hart, *Angry Customers Use Web to Shame Firms*, Wash. Post, July 5, 2006, at D1.
63. Lior Jacob Strahilevitz, *"How's My Driving?" for Everyone (and Everything?)*, 81 N.Y.U. L. Rev. 1699, 1708–09 (2006).
64. The programs Strahilevitz recommends are a lot more controlled than much of the online shaming currently taking place.
65. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 230, 235 (2004).
66. *Id.* at 235. For more on shame, see WILLIAM IAN MILLER, *HUMILIATION* (1993); *Shame*, Social Research, vol. 70, issue 4 (Winter 2003).
67. BERNARD WILLIAMS, *SHAME AND NECESSITY* 78 (1993) ("The basic experience connected with shame is that of being seen, inappropriately, by the wrong people, in the wrong condition. It is straightforwardly connected with nakedness.").
68. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 412 (1997).
69. NUSSBAUM, *HIDING FROM HUMANITY*, *supra*, at 234.
70. Ivan Moreno, *Pot Smokers on the Web*, Rocky Mountain News, Apr. 28, 2006, http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_4658379,00.html.
71. http://www.colorado.edu/police/420_Photo_Album/index.htm. The website has been removed from the Internet. I have a copy of the website in my files.

72. H. G. Reza, *When Blame Knocks on the Wrong Door*, L.A. Times, Aug. 25, 2005.
73. <http://www.revengeworld.com>.
74. <http://www.revengeworld.com/About.cfm>.
75. Rebecca Riddick, *Website Encourages Blacklist of Med-Mal Plaintiffs*, Law.com, July 25, 2006, <http://www.law.com/jsp/article.jsp?id=1153744532499>.
76. Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643 (1996).
77. Ofer H. Azar, *The Social Norm of Tipping: Does It Improve Social Welfare?* Journal of Economics, at 4 (2005), <http://econwpa.wustl.edu:80/eps/other/papers/0503/0503013.pdf>.
78. Lawrence E. Mitchell, *Understanding Norms*, 49 U. Toronto L.J. 177, 243 (1999).
79. Borland, *Privacy Jam*, *supra*.
80. <http://www.carpoolcheats.org/>. The website is now completely removed from the Internet. Quotations from the website can be found at Borland, *Privacy Jam*, *supra*.
81. <http://www.christiangallery.com/atrocity/>.
82. Frederick Clarkson, *Journalists or Terrorists?*, Salon.com, May 31, 2001, <http://archive.salon.com/news/feature/2001/05/31/nuremberg/index.html>.
83. Rene Sanchez, *Abortion Foes' Internet Site on Trial*, Wash. Post, Jan. 15, 1999, at A3.
84. Sharon Lerner, *The Nuremberg Menace*, Village Voice, Apr. 4–10, 2001, <http://www.villagevoice.com/news/0114,lerner,23570,1.html>.
85. *Doctor Says Anti-Abortion Web Site Endangered Her Life*, Associated Press, Jan. 8, 1999, <http://www.cnn.com/US/9901/08/abortion.trial.03/>.
86. *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).
87. Strahilevitz, *"How's My Driving?" supra*, at 1708.
88. GUSTAVE LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND I* (1896).
89. Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. Rev. 962, 1004 (2005).
90. Howard W. French, *Online Throngs Impose a Stern Morality in China*, N.Y. Times, June 3, 2006.

CHAPTER 5. THE ROLE OF LAW

1. DAVID BRIN, *THE TRANSPARENT SOCIETY* 8–9 (1998).
2. Quoted in DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 635 (2d ed. 2006).
3. ROBERT ELLIS SMITH, *BEN FRANKLIN'S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET* 108–9 (2000).
4. *Id.* at 108–10.
5. CHARLES DICKENS, *MARTIN CHUZZLEWIT* 318 (Penguin edition 1975) (originally published in 1843–44).
6. GINI GRAHAM SCOTT, *MIND YOUR OWN BUSINESS: THE BATTLE FOR PERSONAL PRIVACY* 37–38 (1995).
7. HENRY JAMES, *THE REVERBERATOR* 62 (1888).

8. Quoted in SMITH, BEN FRANKLIN'S WEBSITE, *supra*, at 117. For an extensive and interesting account of gossip about U.S. presidents and politicians, see GAIL COLLINS, SCORPION TONGUES: GOSSIP, CELEBRITY, AND AMERICAN POLITICS (1998).
9. JANNA MALAMUD SMITH, PRIVATE MATTERS 81 (1997).
10. RICHARD WIGHTMAN FOX, TRIALS OF INTIMACY: LOVE AND LOSS IN THE BEECHER-TILTON SCANDAL 20–21 (1999).
11. JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 162–63 (2d ed. 1997). Other accounts state that Woodhull was motivated by more personal reasons. One commentator concludes that “Woodhull published the story because she was angry at one of Beecher’s sisters, who opposed including her in the suffrage leadership.” COLLINS, SCORPION TONGUES, *supra*, at 68.
12. SMITH, PRIVATE MATTERS, *supra*, at 73–94.
13. FOX, TRIALS OF INTIMACY, *supra*, at 33.
14. Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 Geo. Wash. L. Rev. 1264, 1272 (2004).
15. SMITH, BEN FRANKLIN'S WEBSITE, *supra*, at 124.
16. E. L. Godkin, *The Rights of the Citizen: IV. To His Own Reputation*, Scribner's Magazine (1890); see also E. L. Godkin, *The Right to Privacy*, The Nation, Dec. 25, 1890. For more background about Godkin, see Elbridge L. Adams, *The Right to Privacy and Its Relation to the Law of Libel*, 39 Am. L. Rev. 37 (1905); Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 Ariz. L. Rev. 1 (1979).
17. DON R. PEMBER: PRIVACY AND THE PRESS 21 (1972).
18. See Samuel D. Warren & Louis D. Brandeis, *The Watuppa Pond Cases*, 2 Harv. L. Rev. 195 (1888); Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 Harv. L. Rev. 1 (1889).
19. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).
20. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 383, 423 (1960).
21. James Barron, *Warren and Brandeis, The Right to Privacy*, 4 Harv. L. Rev. 193 (1890): *Demystifying a Landmark Citation*, 13 Suffolk U. L. Rev. 875, 893 (1979).
22. SMITH, BEN FRANKLIN'S WEB SITE, *supra*, at 118–19.
23. Warren & Brandeis, *The Right to Privacy*, *supra*, at 196, 195.
24. SMITH, PRIVATE MATTERS, *supra*, at 76 (1997).
25. *Id.* at 196–97.
26. See Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. (forthcoming Nov. 2007). The article is available online at <http://ssrn.com/abstract=969495>.
27. See *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) (noting that Minnesota was one of the few states that had not recognized the privacy torts, but reversing course and embracing the torts). The only states not recognizing any of the privacy torts are North Dakota and Wyoming. ROBERT M. O'NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 77 (2001).
28. Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?* 31 L. & Contemp. Probs. 326, 327 (1966).

29. Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 Berkeley Tech. L.J. 1207 (2002).
30. John Perry Barlow, *Declaration of the Independence of Cyberspace*, Feb. 18, 1996, <http://homes.eff.org/~barlow/Declaration-Final.html>.
31. David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996).
32. James Grimmelman, *Accidental Privacy Spills: Musings on Privacy, Democracy, and the Internet*, LawMeme, Feb. 19, 2003, <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=938>.
33. Letter of Laurie Garrett, Feb. 17, 2003, in comments to *Could This Be True?* MetaFilter, Feb. 11, 2003, <http://www.metafilter.com/mefi/23493>.
34. Grimmelman, *Accidental Privacy Spills*, *supra*.
35. Michelle Andrews, *Decoding Myspace*, U.S. News & World Report, Sept. 18, 2006.
36. *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).
37. Jennie C. Meade, *The Duel*, <http://www.law.gwu.edu/Burns/rarebooks/exhibits/duel.htm>.
38. BARBARA HOLLAND, *GENTLEMEN'S BLOOD: A HISTORY OF DUELING* 22 (2003).
39. CYNTHIA A. KIERNER, *SCANDAL AT BIZARRE: RUMOR AND REPUTATION IN JEFFERSON'S AMERICA* 40 (2004).
40. Quoted in Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 Hofstra L. Rev. 501, 517 (2004).
41. Quoted in Douglas H. Yarn, *The Attorney as Duelist's Friend: Lessons from the Code Duello*, 51 Case W. Res. L. Rev. 69, 113 (2000).
42. Meade, *The Duel*, *supra*.
43. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, vol. IV, at *199 (1768).
44. C. A. Harwell Wells, Note, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 Vand. L. Rev. 1805, 1807, 1831–32 (2001).
45. KIERNER, *SCANDAL AT BIZARRE*, *supra*, at 39.
46. Quoted in HOLLAND, *GENTLEMEN'S BLOOD*, *supra*, at 3.
47. As Hamilton explained: “The ability to be in the future useful, whether in resisting mischief or effecting good, in those crises of our public affairs which seem likely to happen, would probably be inseparable from a conformity with public prejudice in this particular.” Alexander Hamilton, quoted in Meade, *The Duel*, *supra*.
48. Van Vechten Veeder, *The History and Theory of Defamation*, 3 Colum. L. Rev. 546, 548 (1903).
49. KIERNER, *SCANDAL AT BIZARRE*, *supra*, at 40.
50. Wells, *Anti-Dueling Laws*, *supra*, at 1823.
51. HOLLAND, *GENTLEMEN'S BLOOD*, *supra*, at 3.
52. KIERNER, *SCANDAL AT BIZARRE*, *supra*, at 39, 41.
53. *Id.* at 45.
54. *Id.* at 44, 42, 61.
55. LaCroix, *Dueling*, *supra*, at 511–12, 454, 547–50, 552. Lawrence Lessig notes that al-

- though legal prohibitions on dueling were ineffective, another type of legal sanction “might actually have been more effective.” People engaging in duels were restricted from holding public office. Since holding public office was “a duty of the elite,” the restriction gave gentlemen a reason for “escaping the duel” without “appealing to self-interest or the rules of commoners.” Lessig, however, concedes that “even this sanction was ineffective for much of the history of the old South” because legislatures “would grandfather all duels up to the time of the legislation and would repass the grandfather legislation every few years.” Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 971–72 (1995).
56. Wells, *Anti-Dueling Laws*, *supra*, at 1839.
 57. David S. Parker, *Law, Honor, and Impunity in Spanish America: The Debate Over Dueling, 1870–1920*, 19 Law & Hist. Rev. 311, 319, 325 (2001).
 58. LaCroix, *Dueling*, *supra*, at 515.
 59. JOHN LYDE WILSON, *THE CODE OF HONOR, OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELLING* 6 (1858), quoted in LaCroix, *Dueling*, *supra*, at 559.
 60. LaCroix, *Dueling*, *supra*, at 565.
 61. *Madison v. Yunter*, 589 P.2d 126, 130 (Mont. 1978).
 62. Quoted in Joanne B. Freeman, *Slander, Poison, Whispers, and Fame: Jefferson’s “Anas” and Political Gossip in the Early Republic*, 15 Journal of the Early Republic 25, 31 (1995).
 63. Quoted in *id.* at 30.
 64. Veeder, *History*, *supra*, at 563.
 65. RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* §1:2, at 1–4 (2d ed. 2000).
 66. Veeder, *Defamation*, *supra*, at 548.
 67. Restatement (Second) of Torts §559.
 68. *Id.* at §578.
 69. ZECHARIAH CHAFEE, *GOVERNMENT AND MASS COMMUNICATION* 106–7 (1947).
 70. Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 Geo. L.J. 1519 (1987).
 71. See *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) (finally recognizing a common-law tort action for invasion of privacy, noting that Minnesota remained one of the few holdouts).
 72. Restatement (Second) of Torts §652B.
 73. *Id.* at §652E.
 74. *Id.* at §652C.
 75. *Id.* at §652C comment (c).
 76. *Id.* at §652D.
 77. Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 Nova L. Rev. 289, 289 (2002).
 78. RICHARD A. POSNER, *OVERCOMING LAW* 545 (1995).
 79. *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997).
 80. Mike, *Todd Hollis and Defamation Suits*, Crime & Federalism, June 8, 2006, http://federalism.typepad.com/crime_federalism/2006/06/todd_hollis_and.html.

81. Comment of mtneergal to Robert J. Ambrogi, *Don't Sue Her Boy*, Law.com Inside Opinions: Legal Blogs, June 30, 2006, http://legalblogwatch.typepad.com/legal_blog_watch/2006/06/dontsueherboy.html.
82. Comment of Big Larry to Robert J. Ambrogi, *id.*
83. Laura Parker, *Jury Awards \$11.3M Over Defamatory Internet Posts*, USA Today, Oct. 11, 2006.
84. Jacob A. Stein, *Defamation*, Washington Lawyer (Nov. 2001).
85. Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 857 (2000).
86. Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 Cal. L. Rev. 743, 744 (1986).
87. Jerome A. Barron, *The Search for Media Accountability*, 19 Suffolk U. L. Rev. 789, 789–90 (1985).
88. Lyrrisa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 Wash. L. Rev. 1, 14 (1996).

CHAPTER 6. FREE SPEECH, ANONYMITY, AND ACCOUNTABILITY

1. JOHN MILTON, *AREOPAGITICA* (George H. Sabine, ed. 1954) (originally published in 1644).
2. U.S. CONST. amend. I.
3. *Cohen v. California*, 403 U.S. 15, 24–25 (1971).
4. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).
5. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).
7. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
8. *Id.* at 342.
9. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).
10. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 Neb. L. Rev. 754, 774–75, 763–64 (1999).
11. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974).
12. *Id.* at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring)).
13. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 423 (1960).
14. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 556 (1970).
15. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1050–51 (2000).
16. Laurent B. Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424, 1424 (1962); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 246.
17. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61, 63 (1961) (Black, J., dissenting).
18. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 867 (1960).
19. Elizabeth S. Black, *Hugo Black: A Memorial Portrait*, The Supreme Court Historical Society (1982), http://www.supremecourthistory.org/04_library/subs_volumes/04_c17_j.html.

20. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 943 (1987).
21. See, e.g., *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down a ban on indecent dial-a-porn services under strict scrutiny).
22. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).
23. Volokh, *Freedom of Speech*, *supra*, at 1083–84.
24. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (“We have long recognized that not all speech is of equal First Amendment importance.”). Cass Sunstein has argued that a workable system of free speech depends upon “making distinctions between low and high value speech, however difficult and unpleasant that task may be.” Cass R. Sunstein, *Low Value Speech Revisited*, 83 Nw. U. L. Rev. 555, 557 (1989).
25. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).
26. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).
27. Although the Supreme Court has applied strict scrutiny to restrictions on speech of public concern, it has not done so to restrictions on speech of private concern. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (refusing “to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question.”); *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (noting that the Court has “repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”).
28. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 Cornell L. Rev. 291, 294, 362 (1983).
29. See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 990–1009 (1978) (explaining three theoretical models addressing the scope of First Amendment speech protection); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 Stan. L. Rev. 875 (1994) (asserting and applying two theories relating to the autonomy-based First Amendment doctrine); Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982) (“[F]ree speech ultimately serves only one true value, which I have labeled ‘individual self-realization.’”).
30. Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 Wash. L. Rev. 683, 723 (1996).
31. See Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 Vand. L. Rev. 1609, 1665 (1999) (noting that privacy shapes “the extent to which certain actions or expressions of identity are encouraged or discouraged”).
32. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan. L. Rev. 1373, 1426 (2000); see also ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 44 (1988) (“The value of privacy is, in part, that it can enable moral persons to be self-determining individuals.”); Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 455 (1980) (“Privacy is also essential to democratic gov-

- ernment because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy.”).
33. Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 Geo. L.J. 2381, 2397 (1996).
 34. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 37 (1967).
 35. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26, 154–55 (1960).
 36. Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1411 (1986).
 37. Quoted in John H. Summers, *What Happened to Sex Scandals? Politics and Peccadilloes, Jefferson to Kennedy*, 87 Journal of American History 825, 826 (2000).
 38. As Keith Boone contends: “Privacy seems vital to a democratic society [because] it underwrites the freedom to vote, to hold political discussions, and to associate freely away from the glare of the public eye and without fear of reprisal.” C. Keith Boone, *Privacy and Community*, 9 Soc. Theory & Prac. 1, 8 (1983).
 39. JOHN STUART MILL, *ON LIBERTY* 18 (David Spitz, ed. 1975) (originally published in 1859).
 40. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
 41. Frederick Schauer, *Reflections on the Value of Truth*, 41 Case W. Res. L. Rev. 699, 706 (1991); see also Anita L. Allen, *The Power of Private Facts*, 41 Case W. Res. L. Rev. 757, 766 (1991) (arguing that allocations of power can sometimes be more valuable than the protection of true speech); Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 Geo. L.J. 2029, 2036 (2001) (“The belief that more personal information always reveals more truth is ideology, not fact, and must be recognized as such for informational privacy to have a chance.”). For a critique of Schauer’s position, see Erwin Chemerinsky, *In Defense of Truth*, 41 Case W. Res. L. Rev. 745 (1991).
 42. *Pearse v. Pearse*, 63 Eng. Rep. 950, 957 (Ch. 1846) (Bruce, V.C.).
 43. Restatement (Second) of Torts §652D.
 44. *Id.* at § 652D cmt. d.
 45. *Id.* at § 652D cmt. h.
 46. See *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 837 (C.D. Cal. 1998) (acknowledging the president of Internet Entertainment Group’s estimate that the company would lose one third of its \$1,495,000 subscription revenue without the Bret Michaels and Pamela Anderson sex video).
 47. *Barber v. Time, Inc.* 159 S.W.2d 291, 295 (Mo. 1942).
 48. *Shulman v. Group W. Productions, Inc.*, 955 P.2d 469 (Cal. 1998).
 49. Zimmerman, *Requiem, supra*, at 357 (recognizing the argument that editors of an article have a right to strengthen the force of their evidence by naming names).
 50. *Bonome v. Kaysen*, 32 Media L. Rep. 1520 (Mass. Super. 2004).
 51. *Id.*
 52. <http://underneaththeirrobes.blogs.com/>.
 53. Article III Groupie, *Hotties in the Holding Pen: Untimely SFJ Nominations*, Underneath Their Robes, July 17, 2004, http://underneaththeirrobes.blogs.com/main/2004/06/greetings_welco.html.
 54. Jeffrey Toobin, *SCOTUS Watch*, New Yorker, Nov. 21, 2005, http://www.newyorker.com/talk/content/articles/051121ta_talk_toobin.

55. Jonathan Miller, *He Fought the Law. They Both Won*, N.Y. Times, Jan. 22, 2006, at sec. 14NJ, at 1.
56. Will Baude, *The Other 10 Questions for Article III Groupie*, Crescat Sententia, Aug. 29, 2005, http://www.crescatsententia.org/archives/2005_08_29.html#005865.
57. Comment to Orin Kerr, *Article III Groupie Comes Out of the Closet*, Volokh Conspiracy, Nov. 14, 2005, <http://volokh.com/posts/1131979281.shtml>.
58. Miller, *He Fought the Law*, *supra*.
59. Amanda Lenhart & Susannah Fox, *Bloggers: A Portrait of the Internet's New Storytellers*, Pew Internet & American Life Project, July 19, 2006, <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf>.
60. Talley v. California, 362 U.S. 60 (1960).
61. SMITH, BEN FRANKLIN'S WEB SITE, *supra*, at 41–43.
62. McIntyre v. Ohio Elect. Comm'n, 514 U.S. 334, 342–43 (1995).
63. Gary T. Marx, *Identity and Anonymity: Some Conceptual Distinctions and Issues for Research*, in DOCUMENTING INDIVIDUAL IDENTITY 311, 316, 318 (Jane Caplan and John Torpey, eds. 2001).
64. A. Michael Froomkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & Comm. 395, 408 (1996).
65. ADAM SMITH, THE WEALTH OF NATIONS 854 (Modern Library edition 1994) (originally published in 1776).
66. McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 382 (1995) (Scalia, J. dissenting).
67. <http://harrietmiers.blogspot.com/>.
68. <http://jmluttig.blogspot.com/>.
69. Joyce Pellino Crane, *Internet Bullying Hits Home for Teen: Anonymous Attacks a Growing Concern*, Boston Globe, June 30, 2005.
70. Margaret K. Collins, *Push to Criminalize False Info on Web*, NorthJersey.com, Sept. 20, 2006/.
71. Denise Grady, *Faking Pain and Suffering on the Internet*, N.Y. Times, Apr. 23, 1998, at G1.
72. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 177 (2000).
73. Katharine Q. Seelye, *Rewriting History: Snared in the Web of a Wikipedia Liar*, N.Y. Times, Dec. 4, 2005. Wikipedia is located at <http://en.wikipedia.org/>.
74. Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 Harv. J.L. & Tech. 163 (2006).
75. Alexa.com keeps track of the current most visited websites around the world. See http://www.alexa.com/site/ds/top_500.
76. John Seigenthaler, *A False Wikipedia "Biography"*, USA Today, Nov. 29, 2005, http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm.
77. *Id.*
78. Katharine Q. Seelye, *A Little Sleuthing Unmasks Writer of Wikipedia Prank*, N.Y. Times, Dec. 11, 2005.
79. Seigenthaler, *False Wikipedia "Biography"*, *supra*.
80. Seelye, *A Little Sleuthing*, *supra*.

81. John Seigenthaler, Sr., Wikipedia, Sept. 30, 2006, http://en.wikipedia.org/wiki/John_Seigenthaler_Sr.
82. Simon Freeman, *Wikipedia Hit By Surge in Spoof Articles*, The Times (London), Dec. 15, 2005, <http://www.timesonline.co.uk/article/0,,3-1933568,00.html>.
83. Comment to Daniel J. Solove, *Fake Biographies on Wikipedia*, Concurring Opinions, Dec. 1, 2006, http://www.concurringopinions.com/archives/2005/12/fake_biographie.html.
84. Yuki Noguchi, *On Capitol Hill, Playing WikiPolitics*, Wash. Post, Feb. 4, 2006, at A1.
85. Evan Hansen, *Wikipedia Founder Edits Own Bio*, Wired News, Dec. 15, 2005, <http://www.wired.com/news/culture/0,1284,69880,00.html>.
86. Orin Kerr, *More on Wikipedia (Plus Updates)*, Volokh Conspiracy, Oct. 18, 2004, <http://volokh.com/posts/1098119066.shtml>.
87. Wikipedia, *Wikipedia: Replies to Common Objections*, Dec. 20, 2006, http://en.wikipedia.org/wiki/Wikipedia:Replies_to_common_objections.
88. Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. Miami L. Rev. 991, 1028, 1032, 1044 (2004).
89. The Electronic Frontier Foundation, a digital rights organization, created a manual to help people better protect themselves from being traced. Electronic Frontier Foundation, *How to Blog Safely (About Work or Anything Else)*, Apr. 6, 2005, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php>.
90. Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks (The Facebook Case)*, ACM Workshop on Privacy in the Electronic Society, Nov. 7, 2005, at §4.2.
91. Michael Barbaro & Tom Zeller, Jr., *A Face Is Exposed for AOL Searcher No. 4417749*, N.Y. Times, Aug. 9, 2006, at A1.
92. See *Talley v. State of California*, 362 U.S. 60, 64 (1960).
93. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1994).
94. See, e.g., *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Dendrite International, Inc. v. John Doe No. 3*, 775 A.2d 756 (N.J. Super. A.D. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).
95. In some cases, courts have required that people demonstrate that their case is strong enough to defeat a summary judgment motion. The plaintiff “must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the plaintiff’s control*.” See *Doe v. Cahill*, 884 A.2d 451, 462–63 (Del. 2005).
96. The facts are taken from the complaint in *Clifton Swiger v. Allegheny Energy, Inc.* (E.D. Pa.).
97. The facts in this section are taken from *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Zeran v. America Online, Inc.*, 958 F. Supp. 1124 (E.D. Va. 1997); and *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714 (10th Cir. 2000).
98. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).
99. 47 U.S.C. §230(c)(1).
100. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).
101. *Id.*
102. *Barnes v. Yahoo! Inc.*, 2005 WL 3005602 (D. Oregon 2005).

103. The Digital Millennium Copyright Act, 17 U.S.C. §512.
104. *Carafano v. MetroSplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).
105. Appellants Reply Brief, *Carafano v. MetroSplash.com, Inc.* No. 02-55658, 2003 WL 22023295 (Feb. 11, 2003).
106. *Carafano v. MetroSplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003).
107. The facts are taken from Jori Finkel, *The Case of the Forwarded E-mail*, Salon.com, July 13, 2001, http://archive.salon.com/tech/feature/2001/07/13/museum_security_net_work/index.html; *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).
108. *Batzel v. Smith*, 333 F.3d 1018, 1035 (9th Cir. 2003).
109. *Id.* at 1038, 1040 (Gould, J. dissenting).

CHAPTER 7. PRIVACY IN AN OVEREXPOSED WORLD

1. Jerome Burdi, *Burning Man Gets Hot over Steamy Videos*, Court TV, Aug. 26, 2002, <http://archives.cnn.com/2002/LAW/08/26/ctv.burning.man/>.
2. Evelyn Nieves, *A Festival with Nudity Sues a Sex Web Site*, N.Y. Times, July 5, 2002. Burning Man's suit was filed before the Video Voyeurism Prevention Act was introduced. Among the claims were intrusion, appropriation, public disclosure, breach of contract, and trespass.
3. *Id.*
4. *Gill v. Hearst Pub. Co.*, 253 P.2d 441 (Cal. 1953).
5. Restatement (Second) of Torts §652D (comment c).
6. *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935, 939 (Mass. App. 1979).
7. *Penwell v. Taft Broadcasting*, 469 N.E.2d 1025 (Ohio App. 1984).
8. <http://www.earthcam.com/>.
9. <http://flickr.com/>.
10. *YouTube Serves Up 100 Million Videos a Day Online*, Reuters, July 16, 2006.
11. <http://en.wikipedia.org/wiki/Moblog>.
12. Katie Dean, *Blogging + Video = Vlogging*, Wired.com, July 13, 2005, <http://www.wired.com/news/digiwood/0,1412,68171,00.html>.
13. Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. Rev. 989, 1041–42 (1995).
14. *Nader v. General Motors Corp.*, 255 N.E.2d 765, 772 (N.Y. App. 1970) (Briete, J. concurring).
15. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 Wash. L. Rev. 119, 144–45 (2004).
16. McClurg, *Privacy Law*, *supra*, at 1041–43.
17. Marcia Chambers, *Colleges: Secret Videotapes Unnerve Athletes*, N.Y. Times, Aug. 9, 1999, at D4.
18. CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE* (2000).
19. See, e.g., La. Rev. Stat. Ann. §14:283; N.J. Stat. Ann. §2C:18-3; N.Y. Penal Law §250.45.
20. RCW 9A.44.115.

21. *Washington v. Glas*, 54 P.3d 147 (Wash. 2002)
22. 18 U.S.C. §1801.
23. Quoted in Anick Jesdanun, *Facebook Feature Draws Privacy Concerns*, Associated Press, Sept. 7, 2006.
24. Dave Wischnowsky, *Facebook Alienates Users*, Chicago Tribune, Sept. 8, 2006.
25. Peter Meredith, *Facebook and the Politics of Privacy*, Mother Jones, Sept. 14, 2006.
26. Quoted in Jesdanun, *Facebook Feature*, *supra*.
27. Wischnowsky, *Facebook Alienates Users*, *supra*.
28. Mark Zuckerberg, *An Open Letter from Mark Zuckerberg: Creator of Facebook*, Sept. 8, 2006. The letter appeared on the Facebook website when users logged in. It has since been removed.
29. Bruce Schneier, *Lessons from the Facebook Riots*, Wired, Sept. 21, 2006.
30. Lisa Lerer, *How Not to Get a Job*, Forbes, Oct. 13, 2006.
31. *The Greatest CV Ever Filmed*, Oct. 10, 2006, http://www.metro.co.uk/weird/article.html?in_article_id=20878&in_page_id=2&expand_rue.
32. Paul Tharp, *Wannabe Banker's Video Resume Backfires*, N.Y. Post, Oct. 12, 2006.
33. Michael J. de la Merced, *A Student's Video Résumé Gets Attention (Some of It Unwanted)*, N.Y. Times, Oct. 21, 2006.
34. Comments to Andrew Ross Sorkin, *The Resume Mocked Around the World*, DealBook, Oct. 19, 2006, <http://dealbook.blogs.nytimes.com/2006/10/19/the-resume-mocked-around-the-world-vayner-speaks/>.
35. Interview with Aleksey, Rita Cosby Live, MSNBC, Oct. 23, 2006.
36. *Creepy Orwellian Trance of Aleksey Vayner Fails to Generate Fun*, IvyGate Blog, Nov. 20, 2006, http://ivygateblog.com/blog/2006/11/creepy_orwellian_trance_of_aleksey_vayner_fails_to_translate_into_fun.html.
37. *Douchebag Hall of Fame: The Inevitable Charter Member*, Gawker, Oct. 16, 2006, <http://www.gawker.com/news/douchebag-hall-of-fame/douchebag-hall-of-fame-the-inevitable-charter-member-207845.php>.
38. Interview with Aleksey on ABC, *20/20*, Dec. 29, 2006.
39. Merced, *Student's Video Résumé*, *supra*.
40. “Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.” Hippocratic Oath, quoted in DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 350 (2d ed. 2006).
41. MARK TWAIN, *THE AUTOBIOGRAPHY OF MARK TWAIN* xxxv (Charles Neider, ed.).
42. *Hammonds v. AETNA Casualty & Surety Co.*, 243 F. Supp. 793, 801 (D. Ohio 1965).
43. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
44. Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 Wm. & Mary L. Rev. 583, 592 (1987); GLEN WEISSENBERGER, *FEDERAL EVIDENCE* §501.6, at 205–9 (1996).
45. *In re Grand Jury*, 103 F.3d 1140, 1146 (3d Cir. 1997) (“The overwhelming majority of all courts—federal and state—have rejected such a privilege.”).
46. *See, e.g., State v. DeLong*, 456 A.2d 877 (Me. 1983) (refusal to testify against father); Port

- v. Heard, 594 F. Supp. 1212 (S.D. Tex. 1984) (refusal to testify against son); United States v. Jones, 683 F.2d 817 (4th Cir. 1982) (refusal to testify against father in grand jury).
47. In re A&M, 61 A.2d 426 (N.Y. 1978).
48. The Supreme Court has held that in Fourth Amendment law, people lack a reasonable expectation of privacy when they trust others with their information. See, e.g., Smith v. Maryland, 442 U.S. 735, 744 (1979) (a person “assumes the risk that the [phone] company [will] reveal to the police the numbers he dialed.”). Undercover agents are not regulated by the Fourth Amendment because people assume the risk of betrayal. See Hoffa v. United States, 385 U.S. 293, 302 (1966); Lewis v. United States, 385 U.S. 206, 210–11 (1966).
49. Nader v. General Motors, Inc., 225 N.E.2d 765, 770 (N.Y. 1970).
50. See, e.g., Argyll v. Argyll [1967] 1 Ch. 302 (1964) (spouse liable for breach of confidence); Stephens v. Avery, [1988] 1 Ch. 449 (1988) (friend liable for breach of confidence); Barrymore v. News Group Newspapers, [1997] F.S.R. 600 (1997) (lover liable for breach of confidence).
51. Barrymore, *supra*, at 602.
52. *Id.* at 600, 601.
53. Douglas v. Hello! Ltd, [2003] 3 All Eng. Rep. 996.
54. Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. (forthcoming Nov. 2007). The article is available online at <http://ssrn.com/abstract=969495>.
55. BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (July 1735) quoted in JOHN BARTLETT, BARTLETT’S FAMILIAR QUOTATIONS 309:15 (Justin Kaplan, ed., Little Brown, 16th ed. 1992).
56. Times Mirror Co. v. Superior Court, 244 Cal. Rptr. 556 (Cal. Ct. App. 1988).
57. Y.G. v. Jewish Hospital, 795 S.W.2d 488 (Mo. Ct. App. 1990).
58. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. 1994).
59. Duran v. Detroit News, Inc., 504 N.W.2d 715 (Mich. Ct. App. 1993).
60. Fisher v. Ohio Department of Rehabilitation and Correction, 578 N.E.2d 901 (Ohio Ct. Cl. 1988).
61. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. Chi. L. Rev. 919 (2005).
62. *Id.* at 952, 967.
63. Joanne B. Freeman, *Slander, Poison, Whispers, and Fame: Jefferson’s “Anas” and Political Gossip in the Early Republic*, 15 Journal of the Early Republic 25, 33 (1995).
64. *Id.*
65. Giannecchini v. Hospital of St. Raphael, 780 A.2d 1006 (Conn. Super. 2000).
66. Dr. Laura Schlessinger, *Men Leave Because Liberal Feminism Gives Permission*, New Orleans Times Picayune, July 11, 1999, at E7; *Dr. Laura’s Anti-Female Rant*, N.Y. Post, Sept. 14, 2006.
67. Patrizia DiLucchio, *Dr. Laura, How Could You?*, Salon.com, Nov. 3, 1998, <http://archive.salon.com/21st/feature/1998/11/03feature.html>.
68. *Id.*
69. Polly Sprenger, *Dr. Laura Drops Her Suit*, Wired, Dec. 15, 1998, <http://wired-vig.wired.com/news/politics/0,1283,16843,00.html>.

70. Marcus Errico, *Dr. Laura Dishes on Nude Photos*, E Online, Nov. 4, 1998, <http://www.eonline.com/print/index.jsp?uuid=3159acbo-ee3e-454a-ab74-ac7f972390c6&content Type=newsStory>.
71. DiLucchio, *Dr. Laura*, *supra*.
72. 17 U.S.C. §102(a).
73. Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 Stan. L. Rev. 1201, 1203 (2002).
74. Lawrence Lessig, *Privacy as Property*, 69 Social Research 247, 250 (2002).
75. Zittrain, *What the Publisher Can Teach the Patient*, *supra*, at 1206–12.
76. *See, e.g.*, LAWRENCE LESSIG, *THE FUTURE OF IDEAS 107–11* (2001); Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 Berkeley Tech. L.J. 539, 567 (2003) (“[C]onsumer copying does little to reduce the incentives for creation because, for the most part, the creation of music is not funded by the sale of copies of that music.”); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 Cal. L. Rev. 113, 124–25 (1999) (“[G]ranting property rights to original creators allows them to prevent subsequent creators from building on their works, which means that a law designed to encourage the creation of first-generation works may actually risk stifling second-generation creative works.”); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 295 (1996) (“An overly expanded copyright also constitutes a material disincentive to the production and dissemination of creative, transformative uses of preexisting expression.”).
77. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (declaring that copyright is “compatible with free speech principles.”).
78. Restatement (Second) of Torts §652C.
79. Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 Cardozo Arts & Ent. L.J. 213, 223 (1999).
80. *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68, 70 (Ga. 1905).
81. *Id.* at 80.
82. William Prosser, *Privacy*, 48 Cal. L. Rev. 383, 406 (1960).
83. *Paulsen v. Personality Posters, Inc.*, 299 NYS2d 501 (1968).
84. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122 (1968).
85. *See Hosking v. Runting*, [2004] NZCA 34, at [46] (“As the law currently stands, a successful action requires information that is confidential, communication of that information to another in circumstances importing an obligation of confidence and unauthorised use or disclosure.”); *International Corona v. Lac Minerals*, [1989] 2 S.C.R. 574 (stating elements of breach-of-confidentiality tort); *ABC v. Lenah*, [2004] HCA 63, at [34] (discussing the breach-of-confidentiality tort).

CHAPTER 8. CONCLUSION

1. Google keeps a cache of old versions of websites, so even after a name is removed from a website, it still exists in Google’s cache and is accessible to a person doing a search. But the cache is refreshed at regular intervals, so it will eventually disappear. There is also a project called the Internet Archive that saves old versions of the Internet. *See* <http://>

- www.archive.org. But information can be removed from the Internet Archive upon request. See Frequently Asked Questions, <http://www.archive.org/about/faqs.php>.
2. ReputationDefender, <http://www.reputationdefender.com/>. For more about the company, see Ellen Nakashima, *Harsh Words Die Hard on the Web*, Wash. Post, Mar. 7, 2007, at A1.
 3. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 62, 54, 5 (1991).
 4. Tracey Meares, *Drugs: It's a Question of Connections*, 31 Val. L. Rev. 579, 594 (1997).
 5. John H. Summers, *What Happened to Sex Scandals? Politics and Peccadilloes, Jefferson to Kennedy*, 87 *Journal of American History* 825, 825 (2000).
 6. *Id.* at 835.
 7. *Id.* at 842.
 8. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 134 (1992) (“When the press avoided reporting on the sexual liaisons of John Kennedy, however, it engaged in a paternalistic decision that the behavior was not probative of Kennedy’s fitness for public life.”); Jeffrey B. Abramson, *Four Criticisms of Press Ethics, in DEMOCRACY AND THE MASS MEDIA* 229, 234 (Judith Lichtenberg, ed. 1990) (“There was also the nonreporting of the love lives of Lloyd George, Franklin Roosevelt, Dwight Eisenhower, John Kennedy, and Martin Luther King, Jr.”).
 9. See Ellen O’Brien, *Chelsea Comes of Age, but Not Before Our Eyes*, Boston Globe, Sept. 4, 1994, at 1; Joan Ryan, *Clintons Let Go—Chelsea Enters Stanford*, S.F. Chron., Sept. 20, 1997, at A1; see Howard Kurtz, *First Daughter’s Privacy No Longer Off Limits*, Chi. Sun-Times, Nov. 27, 1998, at 32 (“For six years the media followed an unspoken pact to avoid coverage of Chelsea Clinton, allowing the president’s daughter to grow up outside the harsh glare of publicity.”).
 10. Ryan, *Clintons Let Go, supra*.
 11. See, e.g., Gail Collins, *The Children’s Crusade*, N.Y. Times, May 1, 2001, at A23 (arguing that “it’s always news when the offspring of important elected officials break the law,” but noting that when “there’s no legal issue involved, it’s a judgment call”); Joanne Ostrow, *Don’t Beat About the Bush Kids*, Denver Post, June 10, 2001, at K1 (questioning whether “the media [went] overboard in reporting Jenna Bush’s recent underage drinking citation”).
 12. David Bauder, *Identifying Rape Victims Troubles Media*, Sun-Sentinel (Ft. Lauderdale), Aug. 3, 2002, at 3A; Richard Roeper, *Case Shows Absurdity of Media’s Rape ID Policy*, Chi. Sun-Times, Aug. 5, 2002, at 11.
 13. See *id.* (“So the media were tripping all over themselves trying to stick to policy—but hardly anyone questioned whether the policy itself is outdated.”); Chris Frates, *L.A. Radio Show Names Bryant’s Accuser*, Denver Post, July 24, 2003, at B1.
 14. J. M. Balkin, *How Mass Media Simulate Political Transparency*, 3 *Cultural Values* 393, 402 (1999).
 15. JOHN STUART MILL, *ON LIBERTY* 11 (Norton edition, David Spitz, ed. 1975) (originally published in 1859).
 16. Anita L. Allen, *Coercing Privacy*, 40 *Wm. & Mary L. Rev.* 723, 737 (1999).
 17. Harvey Jones & José Hiram Soltren, *Facebook: Threats to Privacy*, Dec. 14, 2005, at 20–21,

- <http://ocw.mit.edu/NR/rdonlyres/Electrical-Engineering-and-Computer-Science/6-805-Fall-2005/8EE6D1CB-A269-434E-BEF9-D5C4B4C67895/o/facebook.pdf>.
18. *Id.* at 20.
 19. Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks (The Facebook Case)*, ACM Workshop on Privacy in the Electronic Society, Nov. 7, 2005, at §4.4.
 20. Emily Nussbaum, *My So-Called Blog*, N.Y. Times Magazine, Jan. 11, 2004.
 21. Marie-Chantale Turgeon, *10 Reasons to Blog*, http://www.meidia.ca/archives/2005/06/10_reasons_to_b.php?l=en.
 22. Electronic Frontier Foundation, *How to Blog Safely (About Work or Anything Else)*, May 31, 2005, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php>.
 23. Quoted in Brian Leiter, *Top Law School Warns Students: Watch What You Post!* Sept. 1, 2005, http://leiterlawschool.typepad.com/leiter/2005/09/top_law_school_.html.
 24. Nussbaum, *So-Called Blog*, *supra*.
 25. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 5–6, 236 (1999); Joel R. Reidenberg, *Rules of the Road for Global Electronic Highways: Merging Trade and Technical Paradigms*, 6 Harv. J. L. & Tech. 287, 296 (1993); see also Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 Tex. L. Rev. 553 (1998).
 26. LESSIG, *CODE*, *supra*, at 5–6, 236. For a discussion of how physical architecture can influence behavior, see Neal Kumar Katyal, *Architecture as Crime Control*, 111 Yale L.J. 1039 (2002).
 27. Jones & Soltren, *Facebook*, *supra*, at 6.
 28. Gross & Acquisti, *Information Revelation*, *supra*, at §3.5.
 29. Jones & Soltren, *Facebook*, *supra*, at 20.
 30. Judith Donath & danah boyd, *Public Displays of Connection*, 22 BT Technology Journal 71, 78 (2004).
 31. Conversation with Chris Hoofnagle, December 2006.
 32. Fair Credit Reporting Act, 15 U.S.C. §1681b(b).
 33. Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook*, Privacy Enhancing Technologies Workshop (PET), 2006, §4.4, at 13.
 34. Michelle Andrews, *Decoding Myspace*, U.S. News & World Report, Sept. 18, 2006.
 35. JORGE LUIS BORGES, *The Library of Babel*, in *COLLECTED FICTIONS* 112, 112, 115 (Andrew Hurley, trans. 1998) (story originally published in 1941).
 36. JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 65–93 (2005).
 37. *Id.* at 252.
 38. *Id.* at 254.
 39. ALBERT-LÁSLÓ BARABÁSI, *LINKED* 164–65 (2002). For more about search engines, see Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 Clev. St. L. Rev. 115 (2006).
 40. Ellen Lee, *Social Sites Becoming Too Much of a Good Thing*, S.F. Chron., Nov. 2, 2006 at A1 (discussing creation of Facebook); BATTELLE, *SEARCH*, *supra*, at 77–90.

Index

Note: Boldface page numbers refer to illustrations.

- Abortion doctors, 100–101
Above the Law, 139
Absolutism, 127–28, 191
Accessibility of information, and privacy, 169–70, 191
Accountability: and reputation, 31–32; and norm violations, 33; and anonymity, 139, 140–42, 143, 146, 148–49
Acquisti, Alessandro, 26–27, 197
Actual malice, 126
Adams, John, 30, 118
AIDS, 70, 141
Allegheny Energy Service, 148–49
Allen, Anita, 74, 85, 197
Alternative dispute resolution, 124, 192
American Coalition of Life Activists (ACLA), 100
Anderson, Pamela, 132, 183
Anonymity: and sexual assault victims, 36, 59, 195; in blogs, 59, 139, 141, 147, 149–50; and shaming, 92, 101; and authoritarian approach to privacy law, 113; in lawsuits, 120, 121, 148; and privacy/free speech balance, 136–46, 191; and accountability, 139, 140–42, 143, 146, 148–49; virtues of, 139–40; and openness, 142–46; law of, 146–49; traceable anonymity, 146–47, 149; expectations of, 165
AOL, 150–53
Apple Story Lady, 83–84
Appropriation tort, 119, 162, 186–87
Arbitration, 124, 192
Arendt, Hannah, 68
Armstrong, Heather, 39
Article III Groupie, 136–39, 137
Australia, 188
Autonomy, 130, 132, 134, 160
Azar, Ofer, 99

Ballance, Bill, 183–84
Barabási, Albert-László, 62
Barlow, John Perry, 110–11
Barron, Jerome, 122
Barrymore, Michael, 175
Battelle, John, 204–5
Batzel, Ellen, 157–59
Beecher, Henry Ward, 107, 212n91
Ben Ze’ev, Aaron, 63
Berstein, Carl, 134
Bitter Waitress, 87–88, 90
Black, Hugo, 127–28
Blackstone, William, 114

- Blogger (website), 20, 21
- Blogsphere: as norm-enforcing tool, 6; norms of, 9, 194–96; size of, 21; error-correction machinery of, 37, 195; democratizing nature of, 48–49; and ethics, 59, 195; and linking, 62; and customer complaints, 93; and defamation law, 121
- Blogs (Web logs): and privacy, 1–2, 191, 198–99; circulation of, 2; instant gratification of blogging, 5; dissemination of information on, 11; mainstream media distinguished from, 19–20, 23–24, 194–96, 199–200; and self-expression, 19, 49; interactive nature of, 20–21, 149–50; requirements for, 20–21; increase in posts, 21, 22; types of, 21–23; and journalism, 23–24; as diaries, 24, 59, 198–99; employers' monitoring of, 38; and sex, 50–54; and gossip, 51, 52, 59, 181; anonymity in, 59, 139, 141, 147, 149–50; and linking, 61–62, 78; and ethics, 69; immunity for bloggers, 153–54, 159, 160, 191; variations of, 164
- Boone, Keith, 228n38
- Borges, Jorge Luis, 204
- Boston University, 55–56
- boyd, danah, 27, 202
- Boyden, Bruce, 144
- Brandeis, Louis: and privacy, 108–9, 190; and privacy law, 109–10, 113, 119–20; and tort remedies, 110, 113; and public disclosure, 128, 129, 162; and appropriation, 162; and confidentiality law, 176
- Branding, 91, 95
- Brandt, Daniel, 144, 147
- Brazil, 28
- Breach-of-confidentiality tort, 175–76, 188, 234n85
- Brin, David, 105
- Brin, Sergey, 9
- Brison, Karen, 64, 65
- Bryant, Kobe, 36–37, 195
- Burning Man Festival, 161–62, 167–68, 231n2
- Burr, Aaron, 115, 115
- Bush, George W., 195, 235n11
- Büyükkökten, Orkut, 28
- Canada, 28, 188
- Čapek, Karel, 67
- Carafano, Christianne, 155–57
- Cardozo, Benjamin, 33
- Carpool Cheats, 99–100
- Cate, Fred, 72
- Cell phone cameras, 33, 80, 164, 166, 168
- Cell phone thief, 80–83, 82, 94
- Cell phone use, norms of, 85, 86, 166
- Censorship: and authoritarian approach to privacy law, 112–13; and privacy/free speech balance, 131; and blogs, 199
- Children, 24, 197, 200, 204
- China, 28–29, 43–44, 101–2
- Citizen journalism, 8, 9
- Cleveland, Grover, 107, 194
- Clinton, Bill, 194–95
- Clinton, Chelsea, 195, 235n9
- Cohen, Julie, 130
- College life, and blogs, 54–58
- Commercial speech, 128
- Communications Decency Act (CDA), Section 230, 152–54, 155, 156–59, 191
- Concurring Opinions, 61–62, 62
- Confidentiality: and privacy law, 170–83, 187, 191, 193; and risk of betrayal, 173–76; breach-of-confidentiality tort, 175–76, 188, 234n85; and social networks, 176–81; extension of liability for

- breach of, 181–82; dangers of too much confidentiality, 182–83; and control, 184
- Consumer Action, 93–94
- Context: and personal information, 66–67; and complicated self, 68–70; and privacy, 72, 165; and reputation, 74
- Control: Internet's potential for, 4–5; social control, 6, 32, 65, 72; of reputation, 11, 33–35, 189; of personal information, 29, 170, 184–86, 188; of gossip, 65; of Internet shaming, 94, 96, 101–2; and privacy law, 183–87, 188, 191; and appropriation tort, 186–87
- Cooley, C. F., 30–31
- Cooter, Robert, 98
- Copyright Act, 185
- Copyright law, 155, 184, 185–86, 188, 234n76
- Corporations, shaming of, 93–94, 95
- Coudal, Jim, 86
- Cox, Ana Marie, 52, 53–54
- Cremers, Tom, 157–58
- Customer service, and shaming, 93–94
- Cutler, Jessica, 50–54, 74, 124, 130–31, 134–36, 139, 173, 214n13
- Cyworld, 28–29
- Daily Rotten, 21
- Damages, limits to, 122, 124, 154, 155, 192
- Day, Benjamin, 106
- DealBook, 171–72
- Declaration of Independence of Cyberspace, 110–11
- Defamation. *See* Reputation
- Defamation law: and personal information, 113; history of, 116; and reputation, 116, 117, 118, 120, 121, 122; and rumors, 118, 158–59; false light compared to, 119; and blogs, 120–21, 191; and threat of lawsuits, 123; limitation in scope of, 125, 126; and Section 230 immunity, 152, 154, 155, 156, 157, 158, 191
- Democracy, and privacy/free speech balance, 130–31, 132, 160, 228n38
- Democratic National Convention (2004), 24, 53–54
- Dewey, John, 73
- Diaries, blogs as, 24, 59, 198–99
- Dickens, Charles, 106
- Disclosure, 74. *See also* Public disclosure
- Discrimination, 70
- Doctors Know Us, 98
- Dog poop girl, 1–2, 3, 5–8, 49, 78, 92, 94, 168
- Donath, Judith, 27, 202
- Don't Date Him Girl, 89–90, 121
- Dooood, 39–40
- DotMoms, 23
- Douglas, Michael, 175
- Draplin, Aaron, 86
- Drezner, Daniel, 19–20
- Dueling, 114–17, 115, 190, 224–25n55
- Due process, and shaming, 96–98
- Dürrenmatt, Friedrich, 73
- EarthCam, 164, 164
- Eastman Kodak Company, 107–8, 108
- Edison, Thomas, 107
- Electronic Frontier Foundation, 199, 230n89
- Eliot, George, 140
- Ellickson, Robert, 193–94
- Emerson, Thomas, 127
- Emler, Nicholas, 63

- Employment: and information on Internet, 38–40, 190, 203; and disease, 70–71
- Encyclopaedia Britannica*, 145
- England, 174–76, 188
- Epstein, Richard, 35
- Escobar, Pablo, 178, 180
- Etiquette, 84–85, 92
- Etzioni, Amitai, 71
- Europe, 28, 87, 114, 120
- Facebook, 24, 27, 38, 169–70, 197, 198, 201, 204, 205
- Fairbanks, Eve, 49
- False light, 119
- Farrell, Henry, 19–20
- First Amendment: and censorship, 113; and defamation law, 118, 125, 126; and privacy law, 119–20; and absolutism, 127–28; balancing approach, 128–29; and Seigenthaler, 143; and anonymous speech, 148; and copyright laws, 186
- Fiss, Owen, 131
- Flickr, 87, 164
- Fourth Amendment, 233n48
- Fox News, 97
- France, 114
- Franklin, Benjamin, 131, 140, 176
- Freedom: effect of free flow of information on, 4, 17, 65–66; of Internet, 4–5, 6, 17; and privacy/free speech balance, 12; and reputation, 30
- Freeman, Joanne, 181
- Free speech: and defamation law, 118, 119; and privacy law, 119; good versus bad speech, 125–29, 227n24; threats to, 125; private versus public concern, 128–29, 227n27; value of, 129–30; and individual autonomy, 130; and anonymity, 140. *See also* First Amendment; Privacy/free speech balance
- Friedman, Lawrence, 72–73, 91
- Friend Space, 26
- Friendster, 24, 38, 202
- Fukuyama, Francis, 31
- Garrett, Laurie, 111–12
- Gass, William, 67
- Gawker, 22, 172
- Gay, Peter, 72
- Gays, outing gays, 216n45
- General Motors, 174
- George Washington University, 54–55
- Georgia, 113
- Germany, 28
- Gladwell, Malcolm, 60–61, 63, 89
- Global village, 33, 37
- Godkin, E. L., 107–8, 109, 110
- Goffman, Erving, 68, 69, 70
- Google: unforgiving memory of, 8; as search engine, 9–13, 48, 204–5; search prompt of, 10; and information fragments preserved on Internet, 17, 33; and social network site profiles, 27; and YouTube, 40; and background checks, 41, 190, 203; and Wikipedia, 145; and gossip, 181; cache of old versions of websites, 234n1
- Gossip: on Internet, 4, 11–12, 33, 59–60, 62–63, 74, 75, 113, 124, 176, 181–82, 190; history of, 11, 13, 33, 60, 65, 74, 105, 108, 216n49; and reputation, 32, 63–64, 181, 189, 190; and blogs, 51, 52, 59, 181; good/bad qualities of, 63–65, 74, 205; and rumors, 64; and truth, 64–65; and privacy, 109; and privacy law, 112, 127; and dueling, 114, 116; newsworthiness of, 132; and speaking about one's life, 134; and Section

- 230 immunity, 159; and social networks, 179, 180; written versus oral gossip, 181; and mainstream media, 194; and self-exposure problem, 196
- Gould, Judge Ronald, 158–59
- Greif, Avner, 31
- Grimmelmann, James, 112
- Gross, Ralph, 26–27, 197
- Guare, John, 25
- Gutenberg, Johann, 18, 208n1
- Hamilton, Alexander, 115, 115, 116, 140, 224n47
- Harrison, Benjamin, 194
- Hawthorne, Nathaniel, 11, 91
- Hearst, William Randolph, 106
- Heidegger, Martin, 64
- Henry, O. (pseud. William Sydney Porter), 140
- Henry IV, king of France, 114
- Hilfiger, Tommy, 36
- Hippocratic Oath, 173, 232n40
- Holla Back NYC, 89
- Holmes, Oliver Wendell, Jr., 131
- Hoofnagle, Chris, 203
- Horsley, Neal, 100–101
- “How’s My Driving?” programs, 94, 101
- Hurricane Katrina, 23, 122
- Identifying information, and newsworthiness, 133–34
- Identity: and reputation, 31, 33; and second chances, 73; shame’s effect on, 94–95
- India, 28
- Individual autonomy, 130, 132, 134, 160
- Information: permanence and searchability of, 4, 7–8, 17, 33, 42, 165; dissemination of, 11; consequences of information fragments, 17, 38, 67, 96; and privacy law, 17, 112–13, 125, 161; and forms of media, 18; control of, 35, 184–86; quality of, 35–38, 41; less versus more information, 65–73; and defamation law, 117; and First Amendment, 127; identifying information, 133–34; accessibility of, 169–70, 191. *See also* Personal information
- Instapundit, 23
- Internet: and privacy, 1–2, 110; free dimensions of, 4–5, 6, 17; gossip on, 4, 11–12, 33, 59–60, 62–63, 74, 75, 113, 124, 176, 181–82, 190; permanence and searchability of information on, 4, 7–8, 11, 33, 42, 165; rumors on, 4, 11, 118, 124; shaming on, 4, 6, 11, 78–83, 92–99, 101–2, 168, 190, 195; details about lives on, 9–10; and reputation, 30, 74; and global village, 33; quality of information on, 35–38, 41, 48; and error correction, 37, 123, 124, 192; linking function of, 61–62, 78; legal approaches to privacy law, 110–13, 196; and defamation law, 118; and traceable anonymity, 146; interactivity of, 149; consequences of exposure, 198, 199–200; architecture of, 200–204; extent of, 204–5. *See also* Blogosphere; Blogs (Web logs)
- Internet Entertainment Group, 183–84
- Internet protocol, 143, 144, 147, 148
- Intrusion upon seclusion, 119
- Italy, 28, 114
- Jackson, Andrew, 114
- James, Henry, 106
- James, William, 68–70
- Japan, 28

- Jay, John, 140
- Jefferson, Thomas, 181
- JenniCam, 71
- “John Doe” lawsuits, 120, 121, 148
- Johnson, David, 111
- Johnson, Samuel, 115
- Journalism: citizen journalism, 8, 9; and blogs, 23–24; ethics of, 36, 59, 78, 194, 195; yellow journalism, 106–7, 108, 109. *See also* Mainstream media
- Judgments: and context, 66–67; rational and irrational judgment, 70–71
- Juvenile records, expungement of, 73
- Kahn, Jonathan, 186
- Kansas City, Missouri, 92
- Kaysen, Susanna, 135–36
- Kennedy, John F., 142, 194, 235n8
- Kennedy, Robert, 142–43
- Kerr, Orin, 54–55, 145
- Kierner, Cynthia, 115, 116, 216n49
- Kirk, Rita, 58
- Kodak camera, 107–8, 108, 109
- Kozinski, Alex, 137–38
- Kundera, Milan, 68
- Kushner, Nate, 76–78
- LaCroix, Alison, 116
- Lat, David, 138–39
- Law: role in privacy/free speech balance, 12, 13, 120–23, 125, 190–96; and reputation, 34; and norms, 84, 196, 205; and shaming, 92, 94, 96, 98; of anonymity, 146–49; and confidentiality, 174–76; limits of, 193–94, 196; norms compared to, 193–94; and self-exposure problem, 196–200. *See also* Defamation law; Privacy law
- Lawsuits: and role of law, 113, 120–23, 190, 191; and reputation disputes, 115, 116, 117, 122; “John Doe” lawsuits, 120, 121, 148; threat of, 120, 123, 152, 190; and exhausting informal mechanisms, 123–24, 154, 190, 191–92. *See also* Tort remedies
- Le Bon, Gustave, 101
- Lessig, Lawrence, 4, 185, 200, 224–25n55, 234n76
- Letterman, David, 71
- Libel, 118, 122, 126
- Lidsky, Lyriisa, 122
- Liner, Elaine, 57–58
- Literacy, 18
- Little Fatty, 43–44, 44
- LiveJournal, 24
- Local government, and shaming, 78–79
- Looking glass self, 31, 211n79
- Love, Courtney, 39
- Lucas, George, 48, 186
- Ludwig, Arnold, 69
- Luttig, J. Michael, 141
- Madison, James, 140
- Maghribi traders, 31–32
- Mainstream media: and blog stories, 2; size and scope of, 18–19; blogs distinguished from, 19–20, 23–24, 194–96, 199–200; journalistic ethics of, 36, 59, 78, 194, 195; error-correction machinery of, 37, 78; and Star Wars Kid, 46–47; and Washingtonienne, 53; blogs as rivals to, 61; and JenniCam, 71; limits of expression within, 91; and norm enforcement, 97; and Article III Groupie, 138; norms of, 194–96
- Malkin, Michelle, 52
- Marital communication, 174
- Marketplace of ideas, and privacy/free speech balance, 131–32

- Massachusetts, 92
 Masterson, Chase, 155–57
 Matchmaker.com, 156–57
 McClurg, Andrew, 165
 McKinley, William, 194
 McLuhan, Marshall, 33
 McNealy, Scott, 105
 Meares, Tracey, 194
 Media. *See* Mainstream media
 Mediation, 124, 192
 Medical malpractice, 98
 Meehan, Martin, 144–45
 Meiklejohn, Alexander, 130–31
 Men, women's websites for shaming, 89–90
 Merry, Sally Engle, 74
 MetaFilter, 111–12
 Michaels, Bret, 132, 183
 Miers, Harriet, 141
 Milgram, Stanley, 25
 Mill, John Stuart, 131, 196
 Miller, Arthur, 30
 Milton, John, 125
 Minnesota, 223n27, 225n71
 Mitchell, Lawrence, 99
 Moblogs (mobile weblogs), 164
 Modell, Arnold, 72
 Moon hoax, 106
 Movable type, 18–19, 18, 19, 19
 Murdock, Rupert, 26
 Museum Security Network, 157–58
 MySpace, 24, 26–27, 28, 38, 39, 141, 200, 201, 204

 Nader, Ralph, 174
 Nagel, Thomas, 69
 Newspapers, history of, 18, 106–7, 108, 109
 Newsworthiness test, 129, 132–36
 New York City subway flasher, 80, 83, 92, 94, 168
New Yorker, 30, 138
New York Post, 171
New York Times, 144, 147, 171, 195

New York Times v. Sullivan (1964), 126
 New Zealand, 188
 Nissenbaum, Helen, 165
 Nock, Steven, 30, 32
 Norms: and privacy, 2, 49, 71, 72, 167, 169, 193; enforcement of, 6–7, 9, 12, 64, 85–87, 95, 97, 98–99, 189; of blogosphere, 9, 194–96; history of, 13, 85; and reputation, 31, 116; changing of, 32, 65, 85; and shaming, 32, 83–90, 92, 94, 102; and gossip, 63–64, 65; and public versus private self, 69; and law, 84, 196, 205; internalization of, 98–99; and Internet users, 110–11; and middle-ground approach to privacy law, 113; development of, 122; and context, 165; of confidentiality, 179; law compared to, 193–94; and outing gays, 216n45
 North Dakota, 223n27
 Nuremberg Files, 100–101
 Nussbaum, Martha, 94–95, 96

 Oakland, California, 92
 Openness: of Internet, 111; and anonymity, 142–46; and default settings, 201

 Page, Larry, 9
 Park, Don, 1, 2, 6, 8, 11
 Parker, David, 117
 Patient-physician confidentiality, 173, 174
 Peoria Crack House, 79–80, 83
 Personal email, exposure of, 2, 29–30
 Personal information: exposure of, 2, 29; on social network websites, 24, 26, 27; control of, 29, 170, 184–86, 188; and reputation, 30, 189; less versus more of, 65–73;

Personal information (*continued*)

and shaming, 79; and defamation law, 113; speaking about one's life, 134–36; suppression of, 182; and self-exposure problem, 196–200, 203–4

Phantom Professor, The, 56–58, 56

Pharyngula, 77

Planned Parenthood, 101

PlateWire, 86–87

Politics, 20, 24, 59, 130–31, 144–45

Porter, William Sydney (Henry, O.), 140

Posner, Richard, 35, 37, 66, 120, 138

Post, David, 111

Post, Robert, 34, 65, 72

Poulson, Kevin, 81

Prisons, and shaming, 92

Privacy: and blogs, 1–2, 191, 198–99; and Internet, 1–2, 110; and norms, 2, 49, 71, 72, 167, 169, 193; conception of, 4, 7–8, 11; expectations of, 7–8, 49, 165, 166, 167, 168, 169, 177, 178, 180, 197, 233n48; and public places, 7–8, 12–13, 161–70; and Google searches, 9–11; and reputation, 35, 72, 114–20; and ethics of mainstream media, 36, 59; posting of private information online, 37–38; and establishment of trust, 66; public versus private self, 68–70; and societal scrutiny, 71–72; and context, 72, 165; and second chances, 72–73, 218n87; threats to, 105–8; and yellow journalism, 106–7, 108, 109; and gossip, 109; and accessibility of information, 169–70, 191; self-exposure problem, 196–200; nuanced view of, 198–99. *See also* Privacy law

Privacy/free speech balance: concep-

tion of, 4; and Internet's rapid spread of information, 11; role of law in, 12, 13, 120–23, 125, 190–96; tension in, 12, 142, 190, 205; history of, 13; and control of reputation, 35; blogs' role in, 58; and authoritarian approach to privacy law, 113, 120; and privacy invasion, 119–20; and absolutism, 127–28, 191; and newsworthiness test, 129, 132–36; and public-disclosure test, 129–32; and democracy, 130–31, 132, 160, 228n38; and individual autonomy, 130, 132, 160; and marketplace of ideas, 131–32; and anonymity, 136–46, 191; and harmful speech, 149–59

Privacy law: role for, 12, 13, 120–24, 125, 190–96; and information, 17, 112–13, 125, 161; history of, 108–10; and new technology, 109, 110, 163–66, 169, 205; authoritarian approach to, 110, 112–13, 190, 196, 200, 203; libertarian approach to, 110–12, 154, 190; middle-ground approach to, 110, 113, 120, 154, 190; and reputation, 117, 119–20; public disclosure of private facts, 119, 126–27, 128, 129, 132–36, 162–63; and strict scrutiny, 128, 227n27; and Section 230 immunity, 155, 156, 191; and public places, 161–70, 187, 188, 193; binary understanding of privacy, 162–63, 166, 167, 169, 170, 184, 190; and video voyeurism, 166–68; and confidentiality, 170–83, 187, 191, 193; and control, 183–87, 188, 191

Private citizens, and defamation law, 126

Prosser, William, 109, 127, 187

- Prostitution solicitation, 92
- Pseudonymous speech, 146
- Public debate, 20, 126, 131
- Public disclosure, of private facts, 119, 126–27, 128, 129, 132–36, 162–63
- Public figures, 126, 194
- Public places: and privacy, 7–8, 12–13, 161–70; social network websites as, 26, 27; and public roles, 68; and privacy law, 161–70, 187, 188, 193
- Public versus private self, 68–70
- Pulitzer, Joseph, 106
- Putnam, Robert, 32, 141
- Randolph, John, 115
- Randolph, Richard, 115–16
- Randolph, William, 116
- Rehabilitation, 73, 95
- Reidenberg, Joel, 200
- Reingold, Howard, 8–9
- Reputation: threat to control of, 4; control of, 11, 33–35, 189; and personal information on Internet, 30, 189; and accountability, 31–32; and trust, 31–32, 66, 116; and gossip, 32, 63–64, 181, 189, 190; fragility of, 34, 36–37, 49; and rumors, 34, 36–37, 74, 189, 190; and privacy, 35, 72, 114–20; and shaming, 94, 95–96; and dueling, 114, 115–17; and defamation law, 116, 117, 118, 120, 121, 122; and privacy law, 117, 119–20; and public disclosure of private facts, 135; and anonymity, 140, 141, 144, 145–46, 150; and privacy/free speech balance, 160; and confidentiality, 182; and public figures, 194
- ReputationDefender, 192
- Responsibility: and shaming, 6–7; and role of law, 124; for harmful speech, 149–59
- Restatement of Torts, 132, 163
- Revenge World, 98
- Revere, Paul, 61
- Reynolds, Glenn, 23–24
- Rhode Island, 92
- Ringley, Jennifer, 71
- Rosen, Jeffrey, 66–67
- Rudeness, 32, 94
- Rude People, 86
- Rumors: on Internet, 4, 11, 118, 124; history of, 11, 105; and reputation, 34, 36–37, 74, 189, 190; and gossip, 64; and libertarian approach to privacy law, 112; and dueling, 114, 116; and defamation law, 118, 158–59; and anonymity, 140, 141, 144; and Section 230 immunity, 159; and privacy/free speech balance, 193
- Russinovich, Mark, 93
- Sand, George, 140
- Sanger, Larry, 145
- Scalia, Antonin, 140–41
- Schlessinger, Dr. Laura, 183–84
- Schneider, Carl, 218n87
- Schneier, Bruce, 170
- Schwartz, Paul, 65
- Scott, Sean, 130
- Screaming Pickle, The, 47–48
- Secrecy, 173, 177, 178, 179
- Section 230 immunity, 152–54, 155, 156–59, 191
- Seigenthaler, John, 142–44, 145, 146, 147
- Seigenthaler, John (son), 143
- Self-conception, and reputation, 31, 211n79
- Self-exposure problem, 196–200, 203–4
- Selfhood, 68–70, 73, 217n59
- Sex: and blogs, 50–54; and norms, 85; and reputation, 116; and individual autonomy, 130; and speak-

Sex (continued)

- ing about one's life, 135, 136; and mainstream media, 194
- Sexual assault, and journalistic ethics, 36, 59, 195
- Shakespeare, William, 30, 34
- Shaming: on Internet, 4, 6, 11, 78–83, 92–99, 101–2, 168, 190, 195; and extent of punishment, 7, 95–96; history of, 11, 13, 78, 90–92, 105; function of, 12, 205; and norm enforcement, 12, 85–87, 90; and norms, 32, 83–90, 92, 94, 102; and alienation, 94–95; and reputation, 94, 95–96; and lack of due process, 96–98; and vigilantism, 99–101, 102; and privacy law, 123; and Section 230 immunity, 159; and privacy/free speech balance, 193
- Shannon, Mark, 151
- SHHH card, 86, 86
- Six degrees of separation, 25–26
- Slander, 118, 126
- Slashdot, 62
- Small village, global village compared to, 32, 33, 37
- Smith, Adam, 140
- Smith, Bob, 157–58
- Smith, Robert Ellis, 107
- Smolla, Rodney, 119–20
- Snap camera, 107–8, 109
- Social control, 6, 32, 65, 72
- Social epidemics, 60–61
- Social networks, 25, 26, 60–61, 63, 176–81, 180, 202
- Social network websites: dissemination of information on, 11, 193; personal information shared on, 24, 26, 27; concept of, 25–26; and social ties, 26–28; as worldwide phenomenon, 28–29; employers' use of, 38; and self-expression, 49; and authoritarian approach to privacy law, 113; and confidentiality requirements, 192; architecture of, 200–204; default settings of, 200–201, 201; and socialization, 200; concept of “friend,” 202–3
- Sontag, Susan, 70
- Sony BMG, 93
- Sorkin, Andrew, 171–72
- South, dueling in, 114, 116–17
- Southern Methodist University, 56–58
- South Korea, 28
- Spacks, Patricia Meyer, 65
- Spain, 28
- Star Wars Kid, 44–48, 45, 49, 98, 124, 213–14n134
- Stigma, 70
- Strahilevitz, Lior, 94, 178–80, 221n64
- Strict scrutiny, 128, 227n27
- Summers, John, 194
- Sunstein, Cass, 6, 227n24
- Superficial, 22
- Surveillance cameras, 163–64
- Tabloids, 106, 195
- Taft, William Howard, 194
- Taiwan, 28
- Tanenbaum, Leora, 74
- Teacher, Jim, 24
- Technorati, 21, 22
- Teenagers, 21, 24, 39, 42, 196–97, 198, 204
- Telephone, 107. *See also* Cell phone use
- Thomas, Clarence, 172
- Thoreau, Henry David, 85
- Tice, Dianne M., 211n79
- Tilton, Elizabeth, 107, 212n91
- Tilton, Theodore, 107, 212n91
- Tipping, norms of, 87–89, 99
- Tipping point, and gossip, 60–61, 62

- Toobin, Jeff, 138
- Tort remedies: for privacy invasion, 110, 113, 119–20, 127, 129–30, 132, 225n71; for defamation, 118, 126; appropriation tort, 119, 162, 186–87; breach-of-confidentiality tort, 175–76, 188, 234n85. *See also* Lawsuits
- Traceable anonymity, 146–47, 149
- Trust: and reputation, 31–32, 66, 116; decline in, 32; and quality of information, 35; and background checks, 41; establishment of, 66; and second chances, 73; and anonymity, 141, 145; and confidentiality, 175, 176
- Truth: and gossip, 64–65; determination of, 66; and public versus private self, 68–69; and defamation law, 118, 126, 127; and public disclosure of private facts, 119, 126–27; and privacy/free speech balance, 131, 132
- Twain, Mark, 140, 173–74
- UBS, 170–73
- Underground Newspaper, 59–60
- Underneath Their Robes, 136–39
- United Kingdom, 28
- University of Colorado, 96–97
- Upskirt photos, 166, 167
- U.S. Constitution, 113. *See also* First Amendment; Fourth Amendment
- U.S. Supreme Court, 34, 118, 126, 127–29, 139, 148, 227n27, 233n48
- Vengeance, and shaming, 98
- Video voyeurism, 166–68
- Video Voyeurism Prevention Act, 167, 231n2
- Vigilantism, and shaming, 99–101, 102
- Vlogs (video blogs), 164
- Volokh, Eugene, 93, 127, 128
- Volokh Conspiracy, The, 54–55, 93
- Voltaire, 140
- Voyeur Video, 162, 231n2
- Wales, Jimmy, 142, 145
- Warren, Samuel: and privacy, 108–9, 190; and privacy law, 109–10, 113, 119–20; and tort remedies, 110, 113; and public disclosure, 128, 129, 162; and appropriation, 162; and confidentiality law, 176
- Warshavsky, Seth, 184
- Washington, 167
- Washingtonienne, 50–53, 124, 130–31, 136, 139, 173, 214n3
- Waxy.org, 46, 48
- Westin, Alan, 71
- Wikipedia, 47, 142–46, 143
- Wilson, John Lyde, 117
- Wilson, Woodrow, 194
- Winfrey, Oprah, 36
- Witchcraft, 34
- Wonkette, 22, 52–54, 139, 214nn3, 5
- Woodhull, Victoria, 107, 223n11
- Woodward, Bob, 134
- Woolf, Virginia, 217n59
- Wyoming, 223n27
- Xanga, 24
- Yahoo! chat rooms, 154–55
- Yahoo! message boards, 148–49
- Yellow journalism, and privacy, 106–7, 108, 109
- YouTube, 39–40, 164, 171, 213n134
- Zeran, Kenneth, 150–53
- Zeta-Jones, Catherine, 175
- Zimmerman, Diane, 64, 129
- Zittrain, Jonathan, 185
- Zuckerberg, Mark, 27, 169

About the Author

Daniel J. Solove is associate professor, George Washington University Law School, and an internationally known expert in privacy law. He is frequently interviewed and featured in media broadcasts and articles, and he is the author of *The Digital Person: Technology and Privacy in the Information Age*. He lives in Washington, D.C., and blogs at the popular law blog <http://www.concurringopinions.com>.