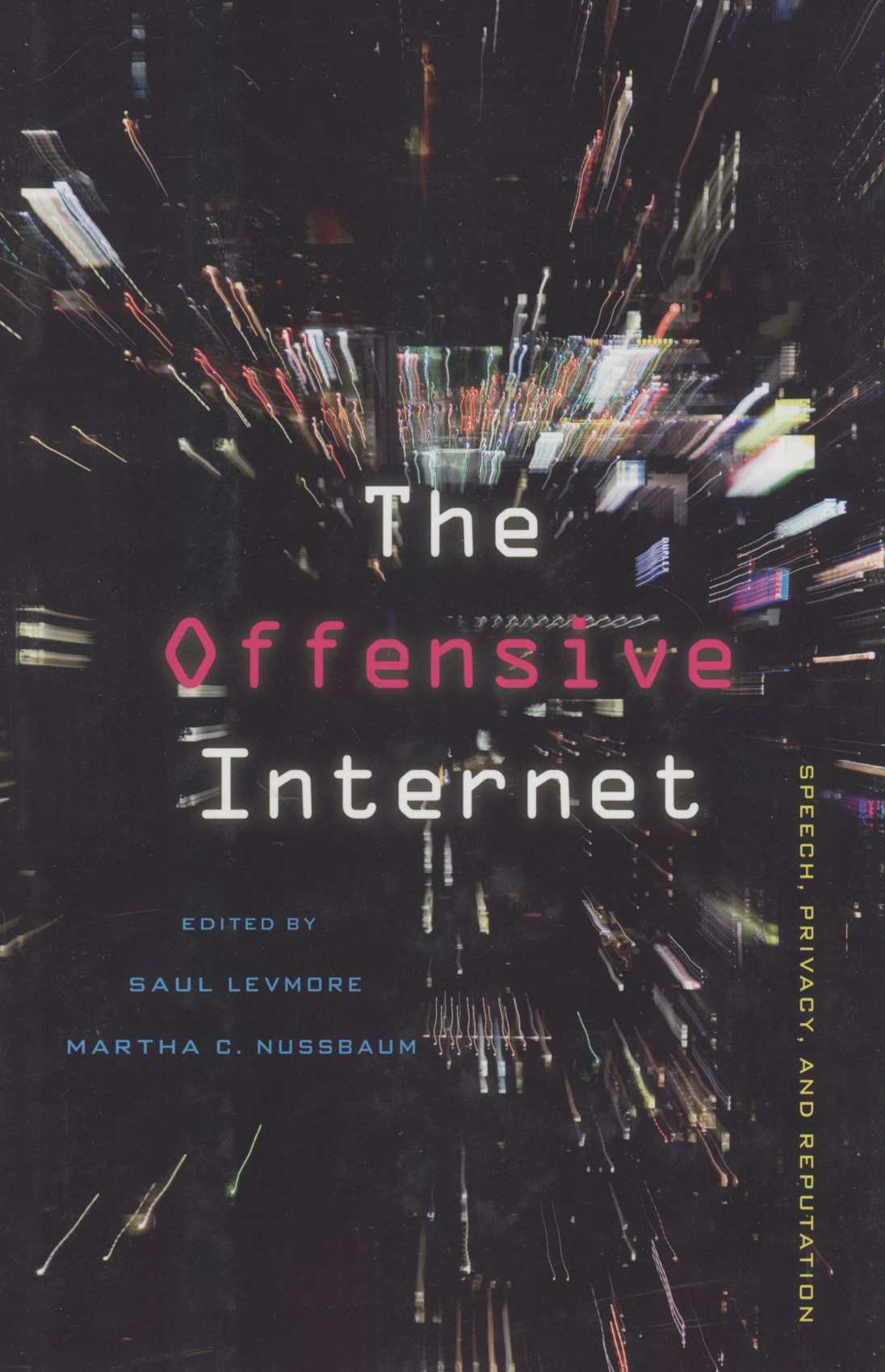
The Offensive Internet
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SPEECH, PRIVACY, AND REPUTATION

The Offensive Internet

Speech, Privacy, and Reputation

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Introduction

SAUL LEVMORE AND MARTHA C. NUSSBAUM

In many ways the Internet has succeeded in remaking us as inhabitants of a small village. No one is a stranger either in the village or on the Internet; in both settings the savvy citizen knows how to process information. The Internet may be offensive to some, as the title of this book warns, but it benefits far more than it offends the well-informed. If we know something of American history, and now wish to know whether Betsy Ross really made that first flag, the Internet allows us to work our way through noisy websites to the few that seem ably written and reliable. Similarly, we can, as never before, find a hotel on some vacation island that serves our preferences, even as many competitor hotels exaggerate their own qualities, and even as amateur reviewers carry on about the manner in which they were wronged at the reception desk. But no medium, and certainly not one with such low entry barriers, can protect the ignorant except perhaps with extraordinary regulation and consumer protection. If we wish to learn how to pronounce names in Korean, we can visit what seems like a terrific website, but must hope that the site does not mislead, for most of us cannot there distinguish fidelity from fraud. In the case of pronunciation, as opposed to hotel quality, it is unlikely that someone profits by misleading those who search for information, so we tend to trust the website. In all these things, the Internet is a valuable medium for a far-flung world. In the days when one's reach could extend no farther than one's own village, gossip and experience protected, or at least covered, the terrain. Social norms and some legal rules worked to create an atmosphere, or market of sorts, in which one could operate reasonably well. In a more cosmopolitan world, the Internet helps re-create the world of the village, where one learned to trust here and to avoid there. If one needed shoes to be repaired, there was good information about the village shoemakers; if one needs a

camera today, there is excellent information on the Internet. In both places, self-promotion and misleading information can be overcome. The key tool in the village was personal experience, or what we might now call repeat play, while on the Internet it is the fact of numerous, communicative players.

In the absence of personal experience, it is especially difficult to become well-informed about people. In the village and on the Internet one can ask about a shoemaker or a camera, and in both cases a great deal of information will be forthcoming from people who have experienced those services or that item. But information about the shoemaker's character is somewhat more difficult to obtain because reputations are often deservedly—or undeservedly—made or broken by one or two important events. If one defrauds another or heroically rescues someone from a fire, life in the village will be far worse or much better, as this episode comes to be known. If honor is claimed where it is undeserved, or honesty is misreported as fraud by a competitor, our hero must hope that the truth will win out because of repeat or multiple play. If one does evil, one must try to recover by doing good, and eventually reputations can be redeemed. But the tendency of some humans to harass others, and even to inflict emotional harm, casts some doubt on the reliability of reputations. If one tries to escape the past by moving to another village, it is likely that the newcomer will be mistrusted. In the village, every longtime resident knows whom to ask about a third party, but in the cosmopolitan world it is rare to find but one degree of separation between an employer and an applicant, or a landlord and prospective tenant. "Googling" a target is therefore the best one can do, though that is more like asking a randomly chosen person for a reference. In contrast, a village elder or other known source likely has personal knowledge of the target and also some reputation of his or her own.

Googling, like other Internet searching strategies, is fraught with peril. In the first place, it is cheap to slur someone on the Internet, for it can be done with a few keystrokes, with complete anonymity, and—as we will see repeatedly in this book—with no fear that the Internet forum provider on whose website the slur is found will somehow be held responsible for incorrect, mean-spirited, or defamatory statements. And yet someone who searches a name and finds a slur might rationally decline to hire or trust that named person because there is no reason to take a risk when there are so many other, untainted applicants or contacts. In the village, one might make further inquiries, and one might discover that the source of the slur is the prob-

lem. On the Internet it is very difficult to do so. Inasmuch as positive information on the Internet is often a product of self-presentation, such positive information is unlikely to offset even a single negative revelation or fabrication in the mind of the inquirer. Moreover, as Cass Sunstein explores in the essay "Believing False Rumors," certain kinds of false rumors spread especially well on the Internet because of social cascades and group polarization.

The speed with which reputations can be made and altered is just one way in which the Internet has changed everything. It is surely the case that most of the changes are for the better but, sadly, the Internet is a curse when one is the subject of negative information, whether self-presented, and then indelible, or communicated by others. And yet the Internet has changed nothing, which is to say it has returned us to the world of the village. In both settings, we wonder what can be done about irrepressible information that is not to our liking. We are drawn to horror stories of bullying, harassment, and sordid pasts, real or not. It is this question that dominates the present volume. The Internet can be offensive to many of its users and an absolute nightmare for those who cannot escape harassment on it.

One reaction to false information is to regulate the providers of information. In the village, an unfavorable credit report disciplined borrowers, but an unfair credit report presented a serious flaw in the social and economic fabric. It could be overcome by experience, as others vouched for the unfairly maligned debtor. Eventually, perhaps because information traveled far beyond the village, fair credit reporting became a part of law, and law sought to protect individuals from false disclosures and even from mere errors in their records. This is the analogy that Frank Pasquale suggests to us in his essay "Reputation Regulation: Disclosure and the Challenge of Clandestinely Commensurating Computing." Pasquale encourages us to develop a "Fair Reputation Reporting Act." He takes aim at employers, and others who use information: asking them to explain the nature and source of information they use is like asking banks to disclose their lending decisions. In the world of credit it has been important to provide consumers with access to the intermediaries who collect information and sell it to lenders. It is possible that the analogy demands that we think of forcing Internet forum providers to disclose their sources and to give those who have unfavorable reputations the chance to correct misinformation. If so, we would have a very different cyberspace, because anonymity is at present a common feature in that domain.

Providers of false information on the Internet can also be regulated with rules drawn from tort law, much as defamation and other law came to the village. Anupam Chander, in "Youthful Indiscretion in an Internet Age," would regulate the Internet, like the village, with a narrowly drawn tort meant to deter the public disclosure of information plainly meant to be private. Danielle Citron's "Civil Rights in Our Information Age" shares Chander's sense that hurtful (and "low-value") speech on the Internet disproportionately affects women, and she advances the idea of cyberspace civil rights law. Martha Nussbaum's essay "Objectification and Internet Misogyny" also focuses on suits brought by injured victims. Her inquiry into the source of the attacks on victims leads to a call for the success of suits by women who are assaulted, but it suggests that the problems reflected in these Internet episodes will not truly be solved without large-scale social change. All three of these authors presumably favor the presence of similar legal tools in the village, where assaults may be met with social sanctions but where they can, in modern times, be treated with legal remedies as well.

Regulation can take the form of advance instructions, or structural change, rather than the availability of punitive or compensatory remedies following a harm. One possibility is to rely on private institutions more than law itself. Just as employers can create safe work environments, whether encouraged to do so by law or not, other institutions can play a role in controlling harassment and other ills. Karen Bradshaw and Souvik Saha, in "Academic Administrators and the Challenge of Social Networking Websites," concentrate on what schools might do to influence behavior on social-networking sites. Educational and other institutions are often able to exert extraordinary and extralegal influence over their constituents, though it must be said that the "offensive Internet" reaches well beyond where schools, churches, and employers may choose to go.

More of our authors look not to educators but to Internet forum providers as the means of combating the offensive Internet. They may well be the best problem solvers, or least cost avoiders, because their reach is coextensive with the Internet. Brian Leiter, in "Cleaning Cyber-Cesspools: Google and Free Speech," makes progress with the observation that search engines, like that managed by Google, influence the construction of cyberspace cesspools by the means with which they array sites in response to a search request. Daniel Solove's essay "Speech, Privacy, and Reputation on the Internet" is more anxious about invasions of privacy than the facts of harassment, but

he too is inclined to lessen the problem not with a tort but with instructions to forum providers. He recommends, as do other authors in this volume, a notice-and-takedown policy, of the kind found in copyright law. A provider would be informed that something offensive was in the air, and the provider could or should then remove the offensive communication—though there would be sanctions against those who abused the notice-and-takedown policy. Saul Levmore takes a similar tack in "The Internet's Anonymity Problem," but is more inclined to think the problem can be solved by eliminating much of the anonymity that reigns on the Internet. With the exception of Solove, we might say that these authors seek to reform the Internet so that it is yet more like the village. Old solutions are sometimes appropriate for new problems.

Old solutions will probably not do if the Internet's problem is truly new and different. Ruben Rodrigues's "Privacy on Social Networks: Norms, Markets, and Natural Monopoly" argues that social-networking sites have such substantial natural monopolies—because users want to be where everyone else is also located—that the normal remedy of exit, from where one finds one's privacy invaded for instance, is too costly. If this is so, it is important to emphasize that much of the offense on the Internet takes place on blogs or on other sites that do not have this natural monopoly feature. The larger question is, of course, whether understanding the novelty of the Internet is the key to combating its offenses.

Speech

Thus far, we have thought about the offensive Internet from the perspective of defending one's reputation, or discouraging harassing attacks on it. The promise of our title, however, is that the importance and value of speech should also be taken into account. The balance between valuable speech and offensive speech is hardly a novel one, peculiar to the Internet. Our authors refer to speech that harasses, bullies, threatens, defames, invades privacy, and inflicts reputational damage as well as emotional distress. But non-Internet speech also does these things. When we consider how to prevent such damages, or to remedy them once they have occurred, we immediately have to consider the possibility that our proposals will place unjustifiable limits on free speech. But what is freedom of speech? Why is it valuable? And what types of harm might be sufficient to justify its regulation? These are general human questions but if our purpose is to think about directions

for legal regulation, we ought to think in the context of the First Amendment, which constrains limitations on speech.

According to a popular misconception, freedom of speech is an absolute, and the First Amendment protects all speech from any type of government regulation. We often hear any proposal to limit or regulate speech described, without further argument, as censorship or as "a violation of the First Amendment." But the absolutist view of the First Amendment is implausible, and it has never prevailed. Regulation of speech is uncontroversially constitutional with respect to threats, bribery, defamatory statements, fighting words, fraud, copyright, plagiarism, and more. What courts have said is that the First Amendment, properly understood, does not protect these forms of speech. Moreover, few people would defend the position that the "marketplace of ideas" should be trusted to sort out the problems posed by fraud, bribery, and their cousins.

One question, then, is whether offensive speech on the Internet deserves First Amendment protection. The answer is far from obvious, and cannot be arrived at by treating the First Amendment as self-explanatory. It calls for patient work with both legal doctrine and more general theories of speech. A good starting place is Geoffrey Stone's essay "Privacy, the First Amendment, and the Internet," which presents a broader normative account of First Amendment protections than do our other essays. But before getting to details, it is useful to step back and ask whether disparate approaches—as collected in this volume—can connect on the question of Internet offense. Why might abstract philosophical analysis as well as law-and-economics approaches illuminate difficult legal issues about speech?

The First Amendment is concise and abstract: "Congress shall make no law abridging the freedom of speech." But what is "abridging," and what sort of "freedom" is protected for what sorts of "speech"? The difficulty and indeterminacy of these questions can be appreciated from the evident fact that our understanding of what the First Amendment protects has changed over the years. For much of our history, for example, it was generally agreed that the First Amendment did not protect the political speech of dissidents during wartime. Today that sort of speech would seem to most interpreters (and to the public) to lie right at the heart of the First Amendment's protections. When judges or legal thinkers grapple with the difficult issues posed by the constitutional text, it is natural for them to look for help in other theoretical understandings of free speech that offer more in the way of analysis and rationale.

If the interpreter is an "originalist," who believes that the Constitution should best be interpreted in keeping with the public meaning of its text at the time of the Founding, he or she might look at philosophical theories to determine what the public culture of that time thought about speech. Temporally, such an inquiry might not be strictly limited to the time of the Founding, because the First Amendment was not incorporated—that is, applied to those other (nonfederal) acts—until after the Civil War. For the meaning of the Bill of Rights at the time of incorporation, we might therefore look at mid-nineteenth-century ideas. Later philosophical theories might also be considered, insofar as they render explicit ideas that were already part of the public culture at an earlier time. Thomas Scanlon's theory of free speech—based, as it is, on Kantian ideas of autonomy and respect that were highly influential by the late eighteenth century—and Alexander Meiklejohn's theory, which conceives of protected speech as that which contributes to democratic deliberation—and which almost certainly has strong historical antecedents—would probably both pass this test.

The non-originalist is even more interested in philosophical theories. An interpreter of a disputed text might simply try to arrive at a deeper understanding of goals and purposes that animate the text. But philosophical theory is unlikely to be conclusive. These theories are ahistorical and transnational, while drafters and judges inhabit a particular legal tradition and must consider relevant precedents and conventions. They cannot simply ask what is best, but rather ask what is best justified in light of the available text, precedents, and history. Theories are sometimes most useful where these materials leave room for fine distinctions.

One difficult area of our First Amendment doctrine concerns the category of "low-value speech." As Geoffrey Stone points out, our tradition has recognized that some speech is of "high value" and deserves very strong protection. That sort of speech can be regulated only in very narrow circumstances, where it is "likely to produce a clear and present danger of a serious substantive evil." Terminiello v. Chicago, 337 U.S. 1, 3 (1949). But the Supreme Court regards other forms of speech as of "low value," less deserving of protection. If the low-value speech inflicts harm, regulation is often permitted. Unfortunately, the line between these categories has not been well drawn. Theories of the First Amendment here come into play. John Deigh, Brian Leiter, and Danielle Citron agree on the theories of free speech that are particularly useful for constitutional interpreters to ponder, along with the materials already noted. Each of these theories focuses on a different

core value: truth, autonomy, and democratic deliberation. A short introduction to these theories is useful for readers embarking on this volume.

For John Stuart Mill, the main point of free speech protections is to help society arrive at the truth. When speech is restricted, people may fail to discover the errors embedded in their current ways of thinking. Even if their opinions are true, they may be incomplete, and suppressed material may help citizens reach a more comprehensive understanding. And even if the suppressed opinions are false, they may help people by sharpening their understanding of the true views and preventing lazy or complacent endorsement. On Mill's view of speech, speech that is not part of an argument aimed at truth—purely emotive speech, bullying speech, and speech that does not make truth-claims at all—deserves no particular protection.

The second prominent theory of speech focuses on autonomy; we owe people access to a wide range of opinions because we respect them as free beings who are entitled to make their own choices. Restriction of speech stifles awareness of options and in this way threatens autonomy. Within this view, speech that itself diminishes autonomy by insulting, denigrating, or intimidating others is ripe for regulation rather than protection.

Finally, there is again Alexander Meiklejohn's influential account of the First Amendment, which holds that the key purpose underlying a system of free speech is the preservation of the sort of open debate that is a necessary part of democracy. Meiklejohn's view, which has had great influence on legal doctrine, is that political speech, whether in public settings or simply on matters of political interest, is at the core of the First Amendment. Other forms of speech—including commercial speech and perhaps artistic expression—are less important for the First Amendment, and can be more readily regulated.

These three theories are binary in that they identify a category of high-value speech worthy of serious protection, and thus also identify, if only by elimination, all other speech as low value. In reality, things are not so convenient, and theories of free speech sometimes recognize additional categories. For example, artistic speech will often be regarded as more important than threatening speech or bribery, but not nearly as important as recognizable political speech. Most of the authors in this volume are content to proceed with the understanding that offensive speech on the Internet is, for the most part, not of the high-value sort. Deigh and Leiter demonstrate that none of the major philosophical theories gives us reason to

think that repeated slurs, or cyber bullying, are high-value speech. And, as a matter of law, harmful non-newsworthy speech about private figures (for most of the cyber bullying is of classmates and neighbors rather than celebrities) has not been held to deserve First Amendment protection. There is, to be sure, room to argue about what is newsworthy, or relevant to political discourse, and Geoffrey Stone, for one, fears that we risk endangering free speech if we understand low-value speech to include most of the communications discussed in this volume, simply because it invades privacy or inflicts emotional distress. Under that last view, the low-value category should be restricted to threats, bribery, and only a very few other, narrowly constructed subcategories. Citron and Solove disagree. Citron points out that the Court has upheld enhanced penalties for crimes expressing hatred, denying that the expressive aspect of that activity is protected by the First Amendment, so long as the law is framed broadly and does not involve discrimination on the basis of the ideas expressed. Both point out that bullying, harassment, and hate speech deter or suppress valuable speech, so the net result of intelligent government regulation may well be *more* valuable speech. This is certainly the majority position of our authors. All of our authors think that speech on the Internet may be regulated at least as much as speech in other venues and media, and many take particular aim at one section of the Communications Decency Act, which has been interpreted to immunize the operators of websites and blogs against liability for comments posted by others. A withdrawal of that immunity could, without constitutional difficulty, restore the symmetry between website operators and publishers of newspapers, who can of course be sued for damages if they publish defamatory material.

Privacy

If a focus on reputation and then on the First Amendment reminds us that the Internet presents old problems in new clothing, then a spotlight on privacy clarifies the novelty of the Internet. A bit of information once thought confidential may now blanket the globe with the help of the Internet; a false and defamatory accusation about a person may become a constituent part of that person's Internet identity, where it affects relationships and employment opportunities for all time. A romantic breakup can lead to retaliation on the Internet, where details of a sexual relationship can injure one of the party's reputations and mental equanimity. How should law respond to these

new, or at least more intense, threats to privacy, and are these responses consistent with free speech requirements?

Privacy can refer to a number of distinct ideas, or interests. There is the value of *seclusion,* which is the right to be beyond the gaze of others. There is *intimacy,* in which one chooses with whom to share certain information and experiences. There is also the interest in *secrecy,* which is to information as seclusion is to the physical person. And then there is *autonomy,* which is the set of private choices each person makes. These ideas are not unconnected. Thus, sexual relationships—a constant topic of offensive communications on the Internet—are often kept from prying eyes in ways that reflect all four of these interests. In the realm of sex, autonomy is probably the most controversial, but we can at least surmise that those who insist on a right of autonomy in this sphere often do so because they think that sexual choices are particularly intimate and self-defining.

The four privacy interests, or meanings, can also diverge. A married couple might value intimacy and seclusion, but not resist the inference that they are engaging in sexual activity with one another. The lack of secrecy does not mean they welcome others into their bedrooms or intimate conversations. And then a secret and secluded relationship may have no intimacy, as might be the case between a client and a commercial sex worker. There is even more divergence when we add to seclusion the special zone that we call home, though this is not a well-articulated idea in law. Even in the home the government is likely to have every right to police such things as domestic violence and child abuse. In any event, if the privacy interest, and perhaps the special treatment of the home, is understood to involve an element of autonomy, then there may be room for its expansion to other zones, including the Internet.

All four of these notions of privacy make appearances in these essays, though it is not always clear which privacy interest an author holds most dear. The confusion is found in constitutional law itself, and may simply derive from the fact that we use the word "privacy" to mean so many things. When we say that medical information and financial records are private, we refer to autonomy or a version of secrecy, because the information is obviously known to some strangers, is maintained in a non-secluded place, and is not normally an important ingredient of intimacy. Solove argues that we have overindulged the secrecy aspect of privacy, and have therefore been deficient in protecting information that people have communicated to a small circle of intimates. He observes a generational shift, such that a