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Judging Offensiveness: A Rubric for Privacy Torts

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JUDGING OFFENSIVENESS: A RUBRIC FOR PRIVACY TORTS*

PATRICIA SÁNCHEZ ABRIL** & ALISSA DEL RIEGO***

How do we judge whether a violation of someone’s privacy is offensive? Currently, U.S. tort law requires privacy violations be “highly offensive to a reasonable person” to afford redress. However, our research reveals that there is no effective analysis—or rhyme or reason—to determine what conduct, disclosure, or implication is offensive. Our review of hundreds of privacy tort cases concludes that the ambiguity of the offensiveness prong has created opportunity for both significant legal errors and thriving biases, which often lead to discriminatory and neglectful treatment of women, racial minorities, and other marginalized groups. This is particularly alarming because the offensiveness analysis figures prominently in not only the most consequential privacy-related cases of our day, including data collection, geolocation tracking, revenge porn, sexual harassment, and transgender bathroom access, but also in corporate boardrooms, universities and schools, and policymaking bodies.

This Article argues that we must develop a systematic mechanism to judge offensiveness, if the concept is to continue as a gatekeeper for privacy violations. Despite the concept’s social significance and pervasiveness, alarmingly few legal scholars have written about offensiveness vis-à-vis privacy and its effects in entrenching social privilege and questionable norms. This Article seeks to fill this gap in privacy law with a view towards informing legal reform (including the upcoming Restatement (Third) of Torts) and providing guidelines for an unbiased analysis for judges and other decision-makers who must increasingly decide whether an alleged invasion of privacy is offensive. Guided by social science and philosophy, the Article proposes a factor-based rubric to guide decision-makers in determining whether conduct or content is highly offensive in the privacy context.

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INTRODUCTION

“It is not events that disturb people, it is their judgements concerning them.”¹

A divorcing husband peeps through his ex’s bedroom window to photograph her intimate moment with her lover.² A professor lies to obtain a student’s HIV test.³ Professional associates blast emails calling a colleague a racist, sexual predator, and monster.⁴ Protesters display large signs outing the names of women about to undergo an abortion.⁵ A company obtains a former employee’s Facebook password to surveil him.⁶ Coworkers invade a Black employee’s workspace to leave a menacing noose.⁷ An app surreptitiously collects personal information from children.⁸ Victims of these transgressions cannot find redress in U.S. privacy law unless a judge and jury legitimize their offensiveness, that is, assess them to be “highly offensive to a reasonable person.”⁹

Offense and offensiveness are at the heart of most privacy violations. In fact, it was the visceral feelings of offense felt by two notable jurists—Louis Brandeis and Samuel Warren—that can be said to have inspired the creation of privacy torts.¹⁰ In response to the privacy invasions of the day, their impactful law review article aired their outrage, discussing the “overstepping in every direction the obvious bounds of propriety and of decency.”¹¹ But rooting privacy torts in a feeling as obvious yet nebulous as offense provides as many questions as it does answers. *What is offensiveness in privacy? How should we gauge it?* The approaches and answers to these questions have profound ramifications for privacy and the evolving norms surrounding it.

1. EPICTETUS, DISCOURSES AND SELECTED WRITINGS (Robert Dobbin ed. & trans., Penguin Books 2008) (n.d.).

2. *Plaxico v. Michael*, 96-CA-00791-SCT (¶ 8), 735 So. 2d 1036, 1038 (Miss. 1999) (en banc).

3. *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1064 (Colo. App. 1998).

4. *Conejo v. Am. Fed’n of Gov’t Emps., AFL-CIO*, 377 F. Supp. 3d 16, 22 (D.D.C. 2019).

5. *Doe v. Mills*, 536 N.W.2d 824, 827 (Mich. Ct. App. 1995).

6. *Decoursey v. Sherwin-Williams Co.*, No. 19-02198-DDC-GEB, 2020 WL 1812266, at *2 (D. Kan. Apr. 9, 2020).

7. *Powell v. Verizon*, No. 19-8418 (KM) (MAH), 2019 WL 4597575, at *2 (D.N.J. Sept. 20, 2019).

8. *McDonald v. Kiloo APS*, 385 F. Supp. 3d 1022, 1029–30 (N.D. Cal. 2019).

9. RESTATEMENT (SECOND) OF TORTS, §§ 652B, 652D(a), 652E(a) (AM. L. INST. 1977) [hereinafter SECOND RESTATEMENT]. Because it does not include an offensiveness element, the fourth privacy tort—appropriation of name or likeness—is not discussed in this Article. *Id.* § 652C.

10. Curiously, Warren and Brandeis’s seminal article did not use the term “offensiveness” in discussing privacy and invasions of the same. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

11. *Id.* at 196.

Generally, offense has been described as a “moralized [bad] feeling” encompassing a wide range of diverse emotions, from simple distaste and annoyance, to disgust, fear, and indignation.¹² In daily life, the “I-know-it-when-I-feel-it” response to things that offend or disgust is instinctual and commonplace.¹³ Anything can be offensive to someone, somewhere. There is no need for something to be objectively offensive for someone to be offended or genuinely believe that something is offensive.¹⁴ Offense can be mistaken, unreasonable, hypersensitive, or even immoral—and still be desperately felt. As one scholar put it, “[A]nything you choose to do might exasperate me.”¹⁵

Culturally, the concept of offensiveness is having a moment. Labeling something as offensive has become an empowering and sometimes controversial rallying cry. Examples abound in contemporary “cancel culture,” which is marked by communal calls to boycott public figures and organizations for offensive behavior, often based on racism or misogyny.¹⁶ Studies suggest that people today perceive others to be more likely to take offense and voice it, prompting debates on the chilling nature of the label.¹⁷

Even though it is obvious when felt and pervasive in social discourse, offensiveness in privacy tort law is a concept in crisis—and this crisis can have profound ramifications for determining who is entitled to privacy protection. Privacy invasions are intensely context-specific, often complex, potentially subjective, and reliant on surrounding norms. Three privacy torts—intrusion

12. ANDREW SNEDDON, OFFENSE AND OFFENSIVENESS: A PHILOSOPHICAL ACCOUNT 44 (2021).

13. See DEBRA LIEBERMAN & CARLTON PATRICK, OBJECTION: DISGUST, MORALITY AND THE LAW 14 (2018) (“[P]eople routinely make decisions based on their ‘gut,’ they ‘listen to their heart,’ and they act on their ‘feelings’—often without any ability to account for how or why those intuitions were produced.”).

14. SNEDDON, *supra* note 12, at 26.

15. Andrew von Hirsch, *Injury and Exasperation: An Examination of Harm to Others and Offense to Others*, 84 MICH. L. REV. 700, 709 (1986) [hereinafter von Hirsch, *Injury*].

16. Kelly Sadler, *Top 10 Recent Examples of Cancel Culture*, WASH. TIMES (Feb. 16, 2021), <https://www.washingtontimes.com/news/2021/feb/16/top-10-recent-examples-cancel-culture/> [https://perma.cc/9U7Z-VP22]; Pippa Norris, *Cancel Culture: Myth or Reality?*, POL. STUD., Aug. 11, 2021, at 1, 2. See generally ALAN DERSHOWITZ, CANCEL CULTURE: THE LATEST ATTACK ON FREE SPEECH AND DUE PROCESS (2020) (discussing cancel culture’s potential effects on democracy and due process).

17. See, e.g., Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They’re Afraid To Share*, CATO INST. (July 22, 2020), <https://www.cato.org/publications/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share> [https://perma.cc/DQS9-K3QK (staff-uploaded archive)]; PEW RSCH. CTR., PUBLIC HIGHLY CRITICAL OF STATE OF POLITICAL DISCOURSE IN THE U.S.: REACTIONS TO TRUMP’S RHETORIC: CONCERN, CONFUSION, EMBARRASSMENT 68 (2019), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/06/PP_2019.06.19_Political-Discourse_FINAL.pdf [https://perma.cc/39N2-XCQB]; Jennifer Harper, *81% of Americans Say People Are Too Easily Offended These Days*, WASH. TIMES (Apr. 27, 2019), <https://www.washingtontimes.com/news/2019/apr/27/81-of-americans-say-people-are-too-easily-offended/> [https://perma.cc/W7X3-NFPV (staff-uploaded archive)].

upon seclusion, public disclosure of private facts, and false light—require an action that is “highly offensive to a reasonable person.”¹⁸ This requirement acts as a gatekeeping element, offering a tempering moment for judicial discretion and community context-reading.

And yet, offensiveness has often eluded courts. The concept has proven slippery—visceral, expansive, potentially biased, and thus rarely dissected systematically. As a result, courts often forgo its reasoned analysis, apply inconsistent (or no) standards, and harbor contradictions. At a minimum, offensiveness is a reflection of social convention¹⁹ or, as one court puzzlingly put it, an “objectively-based threshold degree of repugnance.”²⁰ Other courts have looked to the harm caused or invoked by public policy.²¹ In short, we seem to lack the analytical vocabulary and framework to nail offensiveness beyond vague statements.

Analytical failures threaten both over-inclusion and under-inclusion.²² An overinclusive offensiveness standard risks overly imposing moralism and validating irrational sensitivities and idiosyncrasies, undermining the role of law and chilling speech and action.²³ When the offensiveness standard, conversely, becomes too high a bar, too inflexible, or too outdated to accommodate contemporary invasions of privacy, it risks under-inclusion. This could lead to an entrenchment of existing social hierarchies, a perpetuation of biases, a misreading of evolving social or technology norms—and a gutting of the privacy torts.

As Justice Stevens observed, when he was in high school in the 1930s, *Gone with the Wind*'s famous “[f]rankly, my dear, I don’t give a damn” line shocked the nation, but half a century later, it was not so offensive.²⁴ Today, our society is undergoing a shift in mores at a faster pace than ever. The legalization of marijuana and same-sex marriage, as well as the increased awareness about systemic racism and misogyny brought about by Black Lives Matter and

18. SECOND RESTATEMENT, *supra* note 9, §§ 652B, 652D(a), 652E(a).

19. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.10(A)(2) (1993).

20. *Fabio v. Credit Bureau of Hutchinson, Inc.*, 210 F.R.D. 688, 692 (D. Minn. 2002).

21. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 606 (9th Cir. 2020).

22. *See, e.g.*, Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1764 (2010); Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1267–84 (1993); Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1810, 1830, 1850–51 (2010); 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, 1057–76 (1995); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 961–63 (1989); *cf.* Scott Skinner-Thompson, *Privacy’s Double Standards*, 93 WASH. L. REV. 2051, 2068 (2018) (noting that at least 12% of public-disclosure-of-private-facts cases between 2006 and 2016 were dismissed because the court found disclosure was not highly offensive).

23. *See, e.g.*, J. Angelo Corlett, *Offensophobia*, 22 J. ETHICS 113, 115 (2018).

24. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 691 (1986) (Stevens, J., dissenting).

#MeToo movements are some important examples of the rapid shift in societal consciousness. Technological innovations complicate the matter, creating new ways of communicating and doing business along with emerging associated norms for acceptable conduct. Recently, the issue of offensiveness has figured in privacy tort cases involving some of the most consequential privacy-related issues of our day, including data collection,²⁵ geolocation tracking,²⁶ revenge porn,²⁷ sexual harassment,²⁸ and transgender bathroom access.²⁹

Fuzzy logic and inchoate reasoning on offensiveness are too costly for privacy and society, permitting covert and unacknowledged biases to discretely (or in some cases overtly) seep through in determining offensiveness. The biases espoused by courts, several scholars have observed, often lead to discriminatory treatment of women, racial minorities, and other marginalized groups in tort law.³⁰ And decisions that hold as a matter of law that no reasonable person would find the conduct or disclosure at issue to be offensive stigmatize dissenters as unreasonable outcasts unworthy of consideration.³¹

This Article proposes to organize the opaque, chaotic analysis of offensiveness by exposing its analytical and doctrinal inconsistencies and drawing principles from other disciplines (most notably philosophy) to create order. In Part I of this Article, we explore the current state of the offensiveness analysis in privacy torts, studying its approaches and challenges as manifest through decades of case law and scholarship. We join the chorus of privacy scholars and courts who have criticized the loose and unpredictable approaches

25. See, e.g., *Popa v. Harriet Carter Gifts, Inc.*, 426 F. Supp. 3d 108, 111 (W.D. Pa. 2019); *Manigault-Johnson v. Google, LLC*, No. 2:18-CV-1032-BHH, 2019 WL 3006646, at *1 (D.S.C. Mar. 31, 2019); *Yunker v. Pandora Media, Inc.*, No. 11-CV-03113 JSW, 2013 WL 1282980, at *1 (N.D. Cal. Mar. 26, 2013); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1016 (N.D. Cal. 2012).

26. See, e.g., *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 809–12 (N.D. Cal. 2020); *In re Vizio, Inc., Consumer Priv. Litig.*, 238 F. Supp. 3d 1204, 1212 (C.D. Cal. 2017).

27. See, e.g., *Doe v. Peterson*, 784 F. Supp. 2d 831, 835 (E.D. Mich. 2011); *People v. Bollaert*, 248 Cal. App. 4th 699, 704 (Cal. Ct. App. 2016).

28. See, e.g., *Aguinaga v. Sanmina Corp.*, No. 3:97-CV-1026-G, 1998 WL 241260, at *1 (N.D. Tex. May 4, 1998); *Pearson v. Kancilia*, 70 P.3d 594, 596 (Colo. App. 2003).

29. See, e.g., *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3d Cir. 2018).

30. See, e.g., SCOTT SKINNER-THOMPSON, *PRIVACY AT THE MARGINS* 1 (2021); Taunya Lovell Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 *MISS. L. REV.* 443, 444–46 (1992); Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 *CORNELL L. REV.* 575, 575 (1993); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 *LOY. L.A. L. REV.* 1435, 1436–37 (2005); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 *U. PA. L. REV.* 463, 463–66 (1998) [hereinafter Chamallas, *The Architecture of Bias*]; Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 *WM. & MARY L. REV.* 2115, 2115–16 (2007) [hereinafter Chamallas, *Discrimination and Outrage*]; Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 *HARV. L. REV.* 837, 841–42 (2009); Lisa R. Pruitt, “On the Chastity of Women All Property in the World Depends”: *Injury from Sexual Slander in the Nineteenth Century*, 78 *IND. L.J.* 965, 972 (2003).

31. Kahan et al., *supra* note 30, at 887.

to determining offensiveness,³² but we go a step further. Having qualitatively surveyed hundreds of relevant privacy tort cases, we identify and diagnose critical traps courts face when applying the “highly offensive” prong, including misidentifying the offense, mis-framing the offense, and potentially fatal or biased misapplications of the law. It is clear that the effects of these errors in judgment and application have significant ramifications, often determinative of who is entitled to privacy.

Part II takes a broader view, incorporating definitions, concepts, and examples from psychology, philosophy, and cognitive science to give infrastructure to offensiveness. Leading legal scholars and philosophers have long debated the roles of norms and emotions in law.³³ Informed by seminal works in philosophy,³⁴ we expose various prominent lenses and tests through which to understand offensiveness in law. As the real-life analytical traps converge with lessons from philosophy, a clearer picture begins to emerge regarding the factors relevant to assess offensiveness more objectively and fairly.

Ultimately, Part III proposes a rubric to guide the offensiveness analysis in privacy torts. The framework analyzes the offensiveness of the privacy violation by listing seven relevant factors that anyone assessing offensiveness should keep in mind to avoid error and bias. Our proposed test rejects simple

32. See, e.g., *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 AC (HL) 457, [¶ 22] (appeal taken from Eng.) (UK); *Austl Broad Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, ¶ 42 (Austl.); Cavico, *supra* note 22, at 1267–84; McClurg, *supra* note 22, at 1057–76; N.A. Moreham, *Abandoning the “High Offensiveness” Privacy Test*, 4 CANADIAN J. COMPAR. & CONTEMP. L. 161, 161 (2018).

33. See generally JOEL FEINBERG, OFFENSE TO OTHERS (1985) (questioning how principles of harm and offense should be understood and applied); H.L.A. HART, LAW, LIBERTY, AND MORALITY 47 (1963) (“No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned. Protection from shock or offence to feelings caused by some public display is, as most legal systems recognise, another matter.”); Dan M. Kahan, *The Progressive Appropriation of Disgust*, in THE PASSIONS OF LAW 63, 63 (Susan A. Bandes ed., 1999) (discussing role of disgust in the law and how accounts of disgust are typically “found in socially conservative defenses of public morals offenses”); JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., Yale University Press 2003) (1859) (articulating the famous philosophical tenet known as the “harm principle,” or the idea that the mere offense is not enough to justify government intervention); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004) [hereinafter NUSSBAUM, HIDING FROM HUMANITY] (critiquing the role that shame and disgust play in the law); Martha C. Nussbaum, *Secret Sewers of Vice: Disgust, Bodies and the Law*, in PASSIONS OF LAW 44 (Susan A. Bandes ed., 1999) [hereinafter Nussbaum, *Secret Sewers*] (arguing that disgust has no legal relevance); Tatjana Hörnle, *Offensive Behavior and German Penal Law*, 5 BUFF. CRIM. L. REV. 255 (2001) (applying Feinberg’s model of offense to German penal theory); von Hirsch, *Injury*, *supra* note 15 (analyzing Feinberg’s definitions of “harm” and “offense” and articulating underlying rationales for these definitions).

34. See generally SNEDDON, *supra* note 12 (exploring the nature of offense); NUSSBAUM, HIDING FROM HUMANITY, *supra* note 33 (analyzing the complex relationship between offense and disgust); FEINBERG, *supra* note 33 (exploring the distinction between the offense, profound offense, and obscene).

moralistic conclusions in favor of an emphasis on the wisdom of the crowd and transparency of reasoning. It strives to make explicit the anatomy of the offense to lay bare its sources and identify the interests impinged, while prompting the arbiter to consider contextual factors and avoid cognitive biases. The goal is not to sway the analysis substantively—that is, to render outcomes more, or less, offensive—but rather to organize and guide its process. We then apply this rubric to three case examples to illustrate the resulting analysis. Part IV concludes.

At the outset, it is helpful to define some terms. We refer to the source of the offense as the *trigger*. The trigger is different depending on the privacy tort alleged. It can be conduct (in intrusion claims), content (disclosure claims), or implication (false light claims). The *offense* is the aggrieved party's reaction to the trigger. The law provides that the offense must be reasonable. *Offensiveness* refers to the degree of the offense, including a judgment on whether offense is warranted.

Tackling offensiveness is a daunting and ambitious project. However, given the relatively scant scholarly attention focused on offensiveness and privacy,³⁵ ignoring it is too costly for privacy and society. Today, it is not only judges and juries engaging in consequential analyses of offensiveness. Policymakers, businesses, universities and schools, journalists, and just about every individual benefit from learning how to think about offensiveness in a structured manner. The significance of a written, guided rubric for decision-makers cannot be understated. Daniel Kahneman, Oliver Sibony, and Cass Sunstein have compellingly shown that like bias, noise, or inconsistent, unexplained variations in judgments, cause significant errors and undermine justice.³⁶ These authors propose that guidelines can reduce the ill effects of noise. In the same vein, this Article describes and deconstructs the judgment errors—both noise and bias—present in the offensiveness analysis and prescribes guidelines for decision-makers. So, our objective is vital but realistically modest: to examine the doctrinal, theoretical, and practical realities of offensiveness today in order to extract propositions suitable to guide decision-makers in the privacy realm.

35. Most privacy scholars have, at one time or another, commented in passing of the elusive nature of the standard and its potential to set the recovery bar too high for victims of privacy invasions. However, to date, in-depth treatment has been limited. See McClurg, *supra* note 22, at 995–96; Moreham, *supra* note 32, at 169–72; Post, *supra* note 22, at 965–68; Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 40–44 (2007).

36. DANIEL KAHNEMAN, OLIVIER SIBONY & CASS R. SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT 3–5 (2021).

I. “OFFENSIVENESS” IN THE PRIVACY TORTS

Offensiveness is an element of three of the four privacy torts—intrusion upon seclusion, public disclosure of private facts, and false light publicity.³⁷ All three torts require that the core of the privacy invasion—that is, the intrusion, the matter disclosed, or the false light—be highly offensive.³⁸ Although an offended state may have inspired Warren and Brandeis’s seminal article,³⁹ and thus the creation of the torts, it was William Prosser’s later developments that introduced offensiveness as a requisite element.⁴⁰ In his 1960 *California Law Review* article, Prosser explained that to be actionable, the core of the privacy violations “must be something which would be offensive or objectionable to a reasonable man.”⁴¹ Between Prosser’s article and the 1977 Restatement, the offensiveness standard rose from offensive to highly offensive⁴²—perhaps as an apologetic compromise that ensured the newly developed torts would not encompass a wide sea of conduct and disclosures. Indeed, as a practical matter, the objective offensiveness standard acts as a gatekeeper against redress for “accidental, misguided, or excusable acts.”⁴³ There is, however, no bright-line test for offensiveness.⁴⁴ It is instead a fact-intensive, context-specific analysis.

37. SECOND RESTATEMENT, *supra* note 9, §§ 652B, 652D(a), 652E(a).

38. It bears noting that although the offensiveness standard is the same, the subject of each analysis is different in the three torts. In an intrusion claim, the actual intrusion must be highly offensive. *Id.* § 652B. In a public-disclosure-of-private-facts claim, the private matter publicized must be highly offensive. *Id.* § 652D. And in false-light-publicity claims, the false light in which the plaintiff is placed must be highly offensive. *Id.* § 652E. For ease of reference, we will refer to these as the cores of the privacy violations.

39. *See* Warren & Brandeis, *supra* note 10, at 195–97; Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 295 (1983) (observing Warren and Brandeis’s primary standard to have been the personal tastes and preferences of the individual plaintiff, and they, therefore, did not require that the actionable information be especially intimate, or particularly offensive by objective standards).

40. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 396–97 (1960).

41. *Id.* at 390–91 (describing intrusion); *id.* at 396 (using the same language to describe the offensiveness of the matter disclosed in public-disclosure-of-private-facts tort); *id.* at 400 (“The false light . . . must be something that would be objectionable to the ordinary reasonable man under the circumstances.”).

42. *See* SECOND RESTATEMENT, *supra* note 9, §§ 652B, 652D(a), 652E(a).

43. *In re* Google Inc. Cookie Placement Consumer Priv. Litig., 806 F.3d 125, 150 (3d Cir. 2015); *see also* Kleiman v. Equable Ascent, No. CV 12-9729 CAS AJWx, 2013 WL 49754, at *3 (C.D. Cal. Jan. 3, 2013) (quoting Hill v. Nat’l Collegiate Athletic Ass’n, 865 P.2d 633, 647–48 (Cal. 1994)); Post, *supra* note 22, at 961, 975, 984 (noting the “highly offensive” requirement of the Restatement is meant to limit the redress of privacy to only those transgressions that go beyond the limits of decency); Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-volution for American Employees*, 42 J. MARSHALL L. REV. 83, 101 (2008) (describing the highly offensive standard as a significant limitation on the torts).

44. Lothar Determann & Robert Sprague, *Intrusive Monitoring: Employee Privacy Expectations Are Reasonable in Europe, Destroyed in the United States*, 26 BERKELEY TECH. L.J. 979, 1006 (2011).

A. *Legal Standards on Offensiveness*

Since its inception, the offensiveness analysis has been consistently muddled. Like privacy itself, “nobody seems to have any very clear idea what it [means].”⁴⁵ Instead of an appeal to reason, we are engulfed by instinctual conclusions in a “knee-jerk form: “That violates my privacy”⁴⁶ or “that’s offensive!” But legally determining offensiveness, as courts and juries must, is an abstruse task made more difficult in a diverse, pluralistic, and rapidly evolving society.

Despite its difficulty, offensiveness appears prominently—and often confoundingly—in many areas of law, from criminal law (which penalizes morally offensive conduct like prostitution and indecent exposure) to First Amendment inquiries, including obscenity, indecency, school speech, and freedom of religion.⁴⁷ The analysis of the concept is central to some causes of action, such as Title VII of the Civil Rights Act of 1964, which requires plaintiffs to show that harassment was both objectively and subjectively offensive.⁴⁸ Other areas of law, such as trademark law⁴⁹ and the Communications Decency Act,⁵⁰ have witnessed offensiveness fall out of favor as a barometer of rectitude.

45. Judith Jarvis Thompson, *The Right to Privacy*, in PHILOSOPHICAL DIMENSION OF PRIVACY: AN ANTHOLOGY 272 (Ferdinand David Shoeman ed., 1984); Daniel Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 479–80 (2006) [hereinafter Solove, *Taxonomy*].

46. Solove, *Taxonomy*, *supra* note 45, at 480.

47. *See, e.g.*, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2098–103 (2019) (Gorsuch, J. concurring) (discussing offended observer standing in First Amendment Establishment Clause cases); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (permitting schools to regulate plainly offensive speech); *FCC v. Pacifica Found.*, 438 U.S. 726, 731–32 (1978) (applying FCC’s definition of indecent speech as speech or language that “describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs”); *Miller v. California*, 413 U.S. 15, 36 (1973) (applying the patently offensive standard in obscenity cases); *Cohen v. California*, 403 U.S. 15, 18 (1971) (noting the First Amendment protections for offensive speech).

48. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (1964) (codified as amended in scattered sections of 42 U.S.C.); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 470 (6th Cir. 2012).

49. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

50. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in 47 U.S.C. §§ 230, 560–61). Recent proposed amendments to § 230 of the Communications Decency Act seek to either eliminate or clarify the Act’s immunity protection for service provider’s removal of “offensive material.” *See, e.g.*, Stop the Censorship Act of 2020, H.R. 7808, 116th Cong. (2d Sess. 2020); Stop the Censorship Act, H.R. 4027, 116th Cong. (2019); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020); *see also* DEP’T OF JUST., SECTION 230—NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 11–25 (2020) [hereinafter DEP’T OF JUST., SECTION 230 NURTURING], https://www.justice.gov/file/1286331/download?utm_medium=email&utm_source=govdelivery [https://perma.cc/82AF-4U6A].

In privacy tort cases, courts often engage in these high-stakes inquiries by deciding offensiveness as a matter of law.⁵¹ Courts must first determine whether a reasonable person *could* find the privacy violation to be highly offensive.⁵² If the court does determine that a reasonable person *could* find the violation highly offensive, a factfinder then determines whether a reasonable person *would* find it highly offensive.⁵³

To come to these conclusions, courts must ignore the subjective factors to which one would customarily appeal when assessing whether something is colloquially offensive: the views of the aggrieved and the harms caused. Unlike other areas of law where the subjective impressions of the aggrieved are considered (such as hostile work environment claims⁵⁴ and now-defunct § 2(a) of the Lanham Act disallowing disparaging or immoral trademarks⁵⁵), the highly offensive standard is meant to be purely objective,⁵⁶ asking not whether the aggrieved suffered offense, but rather how the reasonable person—a construct embodying the norms and “moral judgment of the community”⁵⁷—would react. The offensiveness inquiry thus is not meant to predict actual human emotion caused by offensive conduct or content, but rather to identify those norms that, when violated, would appropriately cause outrage in reasonable individuals.⁵⁸

The tort also eschews harm. A privacy harm results from the offense provoked by the invasion, not the actual mental suffering or humiliation it causes the plaintiff.⁵⁹ Thus while the observable harm caused to the plaintiff can

51. McClurg, *supra* note 22, at 999–1005 (noting, referring to empirical data from 1992, courts’ judicial animus for privacy tort cases and their propensity to decide elements of the tort as a matter of law, rather than allowing them to go to the jury, particularly the factual issue of whether the conduct or disclosure would be highly offensive to a reasonable person).

52. Boring v. Google Inc., 362 F. App’x 273, 279 (3d Cir. 2010); Polansky v. Sw. Airlines Co., 75 S.W.3d 99, 105 (Tex. App. 2002); Miller v. Nat’l Broad. Co., 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986); *see also* June Mary Z. Makdisi, *Genetic Privacy: A New Intrusion Tort?*, 34 CREIGHTON L. REV. 965, 992 (2001); Rebecca L. Scharf, *Drone Invasion: Unmanned Aerial Vehicles and the Right to Privacy*, 94 IND. L.J. 1065, 194–95 (2019).

53. *See, e.g.*, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1234 (7th Cir. 1993) (public disclosure of private facts); Braun v. Flynt, 726 F.2d 245, 253 (5th Cir. 1984) (false light); Swarouth v. Mut. Serv. Life Ins. Co., 632 N.W.2d 741, 745 (Minn. Ct. App. 2001) (intrusion upon seclusion).

54. Under Title VII, for harassment to be actionable it “must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998).

55. Lanham Act, ch. 540, 60 Stat. 427, 428–29 (1946) (repealed); Matal v. Tam, 137 S. Ct. 1744, 1751 (2017); Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019).

56. *But see* Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-thinking Supreme Court Gay Rights Jurisprudence*, 12 L. & SEXUALITY 119, 128–29 (2003) (arguing highly offensive element in privacy torts is actually a subjective judgment determined by the mores of a specific community).

57. Post, *supra* note 22, at 961 (quoting FOWLER HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 16.2 (1956)); *see also id.* (“[T]he reasonable person is only a generic construct without real emotions.”).

58. *Id.*

59. *Id.* at 960–61.

be an indicator of the type of invasion that might be offensive, it is not determinative of the offensiveness of the invasion.

How do courts do this? Over a century has now passed since the inception of the privacy torts and half a century since the Restatement's introduction of the offensiveness standard. Throughout that time, courts have developed various ways of approaching offensiveness.

B. *Current Approaches to Analyzing Offensiveness*

This section discusses the different approaches courts have employed to assess offensiveness. These include mores-based inquiries, categorizing certain conduct or content as necessarily offensive, applying factor-based tests, focusing on the outrage produced by the trigger, and less targeted approaches that resort to descriptors or unexplained findings of offensiveness.

1. Mores-Based Inquiries

The most common approach in assessing offensiveness is a simple look to community mores, rules of civility, and social norms. In his seminal article, Prosser posited that privacy torts' offensiveness standard necessarily implies "a 'mores' test."⁶⁰ Courts applying a mores test have held that liability only attaches when privacy invasions defy the tolerable bounds of the "ordinary views of the community."⁶¹ Courts have also held that such liability attaches when privacy invasions shock the "community's notions of decency."⁶² This requires an often instinctual examination of the community's social conventions and expectations⁶³ and a subsequent determination regarding whether the violation was an egregious breach of those established social norms.⁶⁴

60. Prosser, *supra* note 40, at 400.

61. *See id.* at 397 (interpreting *Sidis v. F-R Publ'g Corp.*, 34 F. Supp. 19, 25 (S.D.N.Y. 1938), *aff'd*, 113 F.2d 806 (2d Cir. 1940)).

62. *Sidis*, 113 F.2d at 809; *see also* *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 444 (Cal. 1953) ("It is only where the intrusion has gone beyond the limits of decency that liability accrues."); *Sipple v. Chron. Publ'g Co.*, 154 Cal. App. 3d 1040, 1048-49 (1984) ("In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores.");

63. *See, e.g., In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 606 (9th Cir. 2020), *cert. denied sub nom. Facebook, Inc. v. Davis*, 141 S. Ct. 1684 (2021); *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1079 (N.D. Cal. 2016) (looking to whether the conduct is "consistent with community notions of privacy as they existed at the time"); *PETA v. Bobby Berolini, Ltd.*, 895 P.2d 1269, 1281 (Nev. 1995) ("The question of what kinds of conduct will be regarded as a 'highly offensive' intrusion is largely a matter of social conventions and expectations." (quoting MCCARTHY, *supra* note 19, § 5.10(A)(1))), *overruled on other grounds by City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 940 P.2d 134 (Nev. 1997).

64. *See, e.g., In re Facebook Internet Tracking Litig.*, 263 F. Supp. 3d 836, 846 (N.D. Cal. 2017); *Carter v. County of Los Angeles*, 770 F. Supp. 2d 1042, 1053 (C.D. Cal. 2011); *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1073 (Cal. 2009).

2. Offensiveness *Per Se*

Some courts in privacy tort cases seem to take the narrow view of themes that can rise to the level of offensiveness. In public disclosure cases, for example, a few courts have limited highly offensive matters to those that are also highly personal, involving health problems, sexual relationships, and family quarrels.⁶⁵ While courts in intrusion cases have not similarly limited the areas upon which intrusions can be highly offensive, they have found the element more likely to be met when the intrusion involves a person's physical home or intimate conduct.⁶⁶

While helpful to the analysis of those narrow classes of cases, the offense *per se* approach is highly restrictive, prohibiting the expansion or interpretation of novel behavior as offensive if it does not intrude into personal or physical space.⁶⁷

3. Factor-Based Tests

Courts, most notably California courts, have identified factors and proposed balancing tests to determine offensiveness. The leading test on offensiveness was established in *Miller v. National Broadcasting Company*.⁶⁸ The California appellate court listed five factors courts should consider when determining whether an intrusion meets the tort's highly offensive standard: (1) "the degree of intrusion," (2) "the context, conduct, and circumstances surrounding the intrusion," (3) "the intruder's motives and objectives," (4) "the

65. See, e.g., *Paige v. U.S. Drug Enf't Admin.*, 818 F. Supp. 2d 4, 17 (D.D.C. 2010) (noting that "highly offensive" matters generally relate to the intimate details of a person's life, sexual relations, and other personal matters" and video of DEA officer accidentally shooting himself in the leg was embarrassing but not highly offensive because it did not relate to an intimate detail of his private life or his sexual affairs); *Karraker v. Rent-A-Ctr., Inc.*, 316 F. Supp. 2d 675, 683–84 (C.D. Ill. 2004), *aff'd in part, rev'd in part and remanded*, 411 F.3d 831 (7th Cir. 2005) (noting that public discussion of the results of a plaintiff's psychological test, namely that plaintiff should drink more water, cut down on caffeine and nicotine, and be less high strung was "innocuous" and not highly offensive because it was not "exceedingly personal," unlike "discussions about sexual practices").

66. See, e.g., *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942); *Hamberger v. Eastman*, 206 A.2d 239, 241–42 (N.H. 1964); see also Pauline T. Kim, *Data Mining and the Challenges of Protecting Employee Privacy Under U.S. Law*, 40 COMP. LAB. L. & POL'Y J. 405, 412–13 (2019) (noting courts are more likely to find conduct offensive where employer surveils or searches areas that impinge on bodily privacy or investigate employees' sex lives, health problems, or workplace bathrooms); David Libardoni, *Prisoners of Fame: How Expanded Use of Intrusion Upon Psychological Seclusion Can Protect the Privacy of Former Public Figures*, 36 B.C. INT'L & COMP. L. REV. 1455, 1463 (2013) (noting plaintiffs' lack of difficulty in proving intrusions into bathrooms, homes, and mail are highly offensive); Solove, *Taxonomy*, *supra* note 45, at 555 (noting that "[g]enerally, courts recognize intrusion upon seclusion tort actions only when a person is at home or in a secluded place"); Post, *supra* note 22, at 960 (observing "[m]arital bedrooms" are "sacred precincts" in privacy torts regardless of harm that can be deciphered as a result of the invasion (quoting *Griswold v. Connecticut*, 318 U.S. 479, 485 (1965))).

67. Sánchez Abril, *supra* note 35, at 21 (noting that interpreting the Restatement's static list of highly offensive conduct as exhaustive "significantly limit[s] the public disclosure tort's application").

68. 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

setting into which [the intrusion occurs],” and (5) “the expectations of those whose privacy is invaded.”⁶⁹ *Miller* has been adopted across other jurisdictions⁷⁰ and has been used across privacy torts as a gauge of offensiveness.⁷¹

In *Hill v. National Collegiate Athletic Association*,⁷² the California Supreme Court observed, prior to applying *Miller*, that the objective offensiveness analysis involved consideration of (1) the likelihood of serious harm, particularly to the emotional sensibilities of the plaintiff, against (2) any countervailing interests based on competing social norms that may render the defendant’s conduct inoffensive, such as a legitimate public interest in exposing serious crime or, in that case, the NCAA’s interest in restricting the use of controlled substances in college sports.⁷³ Then, in 2009, the California Supreme Court seemingly combined the balancing tests from both *Hill* and *Miller* in *Hernandez v. Hillsides, Inc.*⁷⁴ by weighing (1) the degree and setting of the intrusion, which includes the place, time, and scope of the defendant’s intrusion, against (2) the defendants’ motives, justifications, and related issues.⁷⁵

4. Focus on Outrage

Some jurisdictions opt to assess whether the privacy violation meets the standard of the intentional-infliction-of-emotional-distress tort, which conflates a normative analysis with a high level of outrage and intent. The standard limits findings of offensiveness to intrusions “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.”⁷⁶ In these jurisdictions, only intrusions that are done “in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary

69. *Id.* at 679.

70. *See, e.g.*, *Bogie v. Rosenberg*, 705 F.3d 603, 612 (7th Cir. 2013); *Reed v. Toyota Motor Credit Corp.*, 459 P.3d 253, 260 (Or. Ct. App. 2020); *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 379 (Utah Ct. App. 1997).

71. *Vasquez v. Trinity Mission Health*, No. 2:11-CV-01002-EJF, 2013 WL 4095157, at *20 (D. Utah Aug. 13, 2013) (applying *Miller* to false light claim); *cf.* *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1145 (S.D. Cal. 2005) (using *Miller* to discuss offensiveness prong of plaintiff’s public disclosure of private facts claim).

72. 865 P.2d 633 (Cal. 1994).

73. *Id.* at 647–48.

74. 211 P.3d 1063 (Cal. 2009).

75. *Id.* at 1072.

76. *Stoddard v. Wohlfahrt*, 573 So. 2d 1060, 1062–63 (Fla. Dist. Ct. App. 1991) (quoting *Ponton v. Scarfone*, 468 So. 2d 1009, 1011 (Fla. Dist. Ct. App. 1985)); *see also* *Hammer v. Sorensen*, 824 F. App’x 689, 696 (11th Cir. 2020) (quoting *Stoddard*, 573 So. 2d at 1062–63) (holding that the conduct would not be “highly offensive to a reasonable person, as Florida law construes that phrase,” because “Florida law equates the ‘highly offensive to a reasonable person’ element from the intrusion-upon-seclusion cause of action with the ‘outrageousness’ element of the intentional-infliction-of-emotional-distress cause of action”); *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1964) (“It is only where the intrusion has gone beyond the limits of decency that liability accrues.”); *Haller v. Phillips*, 591 N.E.2d 305, 307 (Ohio Ct. App. 1990) (holding that intrusion must be of “such a character as would shock the ordinary person to the point of emotional distress”).

sensibilities”⁷⁷ meet the highly offensive standard. Other courts similarly require a privacy violation to be “so outrageous that the traditional remedies of trespass, nuisance, intentional infliction of mental distress, etc., will not adequately compensate a plaintiff for the insult to his individual dignity.”⁷⁸ A few courts in false-light cases have also required the false light to be of the kind that would cause the reasonable person to “suffer outrage, mental distress, shame, and humiliation.”⁷⁹ These are, unsurprisingly, “very high standard[s].”⁸⁰

5. Non-approach Approaches

In the absence of a test or other source of agreed-upon enlightenment, many jurisdictions opt to assess the trigger with varying descriptors of offensiveness. Some of these reference generalized norms, such as “utterly intolerable,”⁸¹ “beyond all possible bounds of decency,”⁸² and “egregious breach of . . . social norms.”⁸³ Others evoke a moral judgment, such as “objectionable,”⁸⁴ “strongly object[ionable],”⁸⁵ “atrocious and utterly intolerable,”⁸⁶ “shock[ing] the conscience,”⁸⁷ and “extreme in degree.”⁸⁸ A third grouping distinguishes characteristics of the violations, like “unwarranted,”⁸⁹ “highly obtrusive,”⁹⁰ and “repeated with such persistence and frequency as to amount to a course of hounding.”⁹¹ Still, others reference the consequences of the violation, such as causing “mental anguish and suffering,”⁹² “humiliation or

77. *Popa v. Harriet Carter Gifts, Inc.*, 426 F. Supp. 3d 108, 122 (W.D. Pa. 2019).

78. *Froelich v. Adair*, 516 P.2d 993, 998 (Kan. 1973) (Fromme, J., dissenting); *see also* *Douglass v. Hustler Mag.*, 769 F.2d 1128, 1134 (7th Cir. 1985) (“The false-light tort, to the extent distinct from the tort of defamation . . . rests on an awareness that people who are made to seem pathetic or ridiculous may be shunned, and not just people who are thought to be dishonest or incompetent or immoral.”).

79. *Cantrell v. Forest City Publ’g Co.*, 419 U.S. 245, 248 (1974).

80. *Martin v. Guevara*, 464 F. App’x 407, 411 (5th Cir. 2012).

81. *McIsaac v. WZEW–FM Corp.*, 495 So. 2d 649, 651 (Ala. 1986).

82. *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1310 (M.D. Fla. 2010); *Rowell v. King*, No. 05-1078, 2005 WL 2099718, at *2 (D. Kan. Aug. 30, 2005).

83. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601–02 (9th Cir. 2020) (quoting *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1067 (Cal. 2009)).

84. Prosser, *supra* note 40, at 391.

85. SECOND RESTATEMENT, *supra* note 9, § 652B, cmt. d.

86. *Harrison v. City of Fort Lauderdale*, No. 17-61164-CIV, 2018 WL 9516029, at *6 (S.D. Fla. Dec. 21, 2018), *aff’d sub nom.* *Harrison v. Davidson Hotel Co., LLC*, 806 F. App’x 684 (11th Cir. 2020); *Wright v. Wright*, 654 So. 2d 542, 544 (Ala. 1995).

87. *Opperman v. Path*, 205 F. Supp. 3d 1064, 1078 (N.D. Cal. 2016); *Anderson v. County of Becker*, No. 08-5687 ADM/RLE, 2009 WL 3164769, at *14 (D. Minn. Sept. 28, 2009).

88. *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1309 (M.D. Fla. 2010).

89. *Gates v. Black Hills Health Care Sys.*, 997 F. Supp. 2d 1024, 1031–32 (D.S.D. 2014).

90. *Magenis v. Fisher Broad., Inc.*, 798 P.2d 1106, 1110–11 (Or. Ct. App. 1990).

91. *Salcedo v. Hann*, 936 F.3d 1162, 1171 (11th Cir. 2019) (quoting SECOND RESTATEMENT, *supra* note 9, § 652B, cmt. d).

92. *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984).

shame,”⁹³ “highly embarrassing,”⁹⁴ or “injur[ing] . . . human dignity and peace of mind.”⁹⁵ This litany of descriptors, however, provides little guidance and predictability to courts.

Finally, some courts simply decide, with little to no explanation, that the invasion could or could not ever be offensive. As J. Thomas McCarthy noted, without “a definition or litmus test of offensiveness,” courts must rely on their own “intuition” on a “case by case basis.”⁹⁶ With little cohesion or guidance, it is no surprise that in many cases courts do not provide much of a basis or explanation for their judgments of offensiveness. At times these visceral decisions involve no head scratching, but other times they do. For example, it certainly seems plausible that a reasonable jury could conclude that videotaping someone with their pants down while having their groin area examined⁹⁷ or falsely suggesting they sexually abused a minor⁹⁸ might be highly offensive. But it is less clear why other courts determined that no reasonable person could ever conclude that surreptitious surveillance of an ex-employee,⁹⁹ disclosure of a woman’s breast cancer surgery,¹⁰⁰ or falsely implying someone no longer associates with their race¹⁰¹ might be highly offensive.

With less structure imposed, the conscious and unconscious biases of decision-makers are more likely to weigh into the analysis. As others have observed, brute sense impressions are foundations that simply afford no counterargument, privileging the judge’s own views on offensiveness.¹⁰²

C. *Critical Traps*

The way offensiveness is analyzed—through what lens, with what criteria, and with what precision—is critically important. Consider the Supreme Court’s

93. *Popa v. Harriet Carter Gifts, Inc.*, 426 F. Supp. 3d 108, 122 (W.D. Pa. 2019); *Buller v. Pulitzer Publ’g Co.*, 684 S.W.2d 473, 482 (Mo. Ct. App. 1984).

94. *Pawlaczyk v. Besser Credit Union*, No. 14-CV-10983, 2014 WL 5425576, at *5 (E.D. Mich. Oct. 22, 2014); *see also Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 378 (Colo. 1997) (equating highly offensive matters with those whose “disclosure would cause emotional distress or embarrassment to a reasonable person”).

95. *Michaels v. Internet Ent. Grp., Inc.*, 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998).

96. MCCARTHY, *supra* note 19, § 5:95; Moreham, *supra* note 32, at 174–77 (noting highly-offensiveness test lacks clear application principles, making it unpredictable).

97. *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914, 927 (C.D. Ill. 1999).

98. *Santillo v. Reedel*, 634 A.2d 264, 265 (Pa. 1993).

99. *Scherer Design Grp., LLC v. Schwartz*, No. 18-3540, 2018 WL 3613421, at *3 (D.N.J. July 26, 2018); *see also Scherer Design Grp., LLC v. Ahead Eng’g LLC*, 764 F. App’x 147, 154–55 (3d Cir. 2019) (Ambro, J., dissenting).

100. *Mark v. City of Hattiesburg*, 2016-CA-01638-COA (¶ 31) (Miss. Ct. App. 2019) (en banc) (affirming trial court’s directed verdict because nothing suggests that a breast cancer diagnosis or surgery could be highly offensive to the reasonable person), *aff’d on other grounds*, 2016-CT-01638-SCT, 289 So. 3d 294 (Miss. 2020).

101. *Arrington v. N.Y. Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982).

102. Kahan et al., *supra* note 30, at 841–42.

recent brush with offensiveness in another legal context in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.¹⁰³ Phillips, a baker, had refused to make a wedding cake for a same-sex couple, contending that doing so offended his legitimately-held religious beliefs.¹⁰⁴ The Colorado Civil Rights Commission ordered Phillips to sell wedding cakes to all customers equally, and Phillips appealed, arguing that the Commission's hostility towards his religion violated the Free Exercise Clause.¹⁰⁵ The Supreme Court agreed with Phillips.¹⁰⁶ The majority's reasoning relied heavily on the fact that the Commission had allowed other bakers to stand in their refusal to create other types of offensive cakes—those with anti-same-sex-marriage messages.¹⁰⁷ The Court held that the Commission regulated based on its own determination of which cake was offensive and which was not.¹⁰⁸

In her dissent, Justice Ginsburg argued that the bakers' refusals were not comparable—because the source of their offensiveness was different.¹⁰⁹ Ginsburg made a critical distinction about the case and in the process about offensiveness:

Phillips declined to make a cake he found offensive where the offensiveness was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection was due to the demeaning message the requested product would literally display.¹¹⁰

By parsing the source of the offense (rather than simply the fact of the offense or its intensity), Ginsburg unraveled the underlying issues, more clearly justifying her conclusion.

Inspired by Ginsburg's surgical approach to offensiveness, we undertook a project to assess the state of the "highly offensive" prong in the three relevant privacy torts. We carefully analyzed the exposition of offensiveness, inquiring whether and to what extent the court engaged with the concept of offensiveness and assessing how the court's reasoning justified its conclusions.

While the privacy interests each tort seeks to address vary, we reviewed intrusion-upon-seclusion, public-disclosure-of-private-facts, and false-light privacy tort cases, focusing on the most recent cases and cases that contained

103. 138 S. Ct. 1719 (2018).

104. *Id.* at 1723–24, 1726.

105. *Id.* at 1730–31.

106. *Id.* at 1727–32.

107. *Id.* at 1731–32.

108. *Id.* at 1731.

109. *Id.* at 1750 (Ginsburg, J., dissenting).

110. *Id.* at 1750–51.

lengthier discussions of the offensiveness of the trigger.¹¹¹ We classified cases by tort, whether they disposed of the offensiveness element as a matter of law at the dismissal stage, decided it at summary judgment, or ultimately left it for the trier of fact, and by the reason for the court's offensiveness analysis, as well as any standard the court may have applied in reaching its conclusion.

While not all courts get it wrong, we identified six analytical traps that plague the offensiveness analysis in privacy law. These are not the only analytical missteps courts make in conducting the torts' offensiveness analysis, but they were some of the most frequently observed. While we label these "critical traps," we recognize that some, after years of precedent, form the common law of the state. For example, in Illinois, an intrusion must result in mental anguish and suffering to the plaintiff to be actionable.¹¹² This element appears to find its origins from a 1977 appellate case that, upon finding there was not a harmful intrusion, also found that the plaintiff's alleged injury and hospitalization after the alleged intrusion were not foreseeable and could not be recovered as damages.¹¹³ While the court did not hold that an intrusion had to cause anguish or suffering to be actionable, it is clear that today, in the state of Illinois, it does.¹¹⁴ The analytical traps discussed below make the standard unpredictable and unsurmountable, and sometimes meaningless.

1. Misidentifying What Needs To Be Offensive

Surprisingly, courts have trouble pinpointing the conduct or material (trigger) that must be judged offensive in each tort. For the tort of intrusion upon seclusion, the elements dictate that it is the act of the invasion itself that must be highly offensive.¹¹⁵ But intrusion claims are often summarily dismissed

111. Our search on legal databases yielded all privacy tort cases from 2011–2021 that included mention of the "highly offensive" element. To narrow our analysis to the more substantive discussions of the element, we limited our sample to cases in which the words "offensive" or "offensiveness" appeared at least six times in the text.

112. *E.g.*, *Melvin v. Burling*, 490 N.E.2d 1011, 1013–14 (Ill. App. Ct. 1986). Similarly, it appears Illinois and Pennsylvania courts require that an intrusion disclose or reveal highly embarrassing, offensive facts in order to meet the offensiveness prong. *See, e.g.*, *Eash v. City of York*, 450 F. Supp. 3d 568, 580 (M.D. Pa. 2020); *Boring v. Google, Inc.*, 362 F. App'x 273, 278–79 (3d Cir. 2010) (quoting *Pro Golf Mfg., Inc. v. Trib. Rev. Newspaper Co.*, 809 A.2d 243, 248 (Pa. 2002)); *Cooney v. Chi. Pub. Schs.*, 943 N.E.2d 23, 32 (Ill. App. Ct. 2010).

113. *Bank of Ind. v. Tremunde*, 365 N.E.2d 295, 298 (Ill. App. Ct. 1977).

114. *See, e.g.*, *Vega v. Chi. Park Dist.*, 958 F. Supp. 2d 943, 959 (N.D. Ill. 2013); *Busse v. Motorola, Inc.*, 813 N.E.2d 101, 1017 (Ill. App. Ct. 2004); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1354 (Ill. App. Ct. 1995) (noting a necessary element of intrusion is that the intrusion must "cause[] anguish and suffering").

115. SECOND RESTATEMENT, *supra* note 9, § 652B; Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 207 (2012) ("The intrusion tort penalizes conduct—offensive observations—not revelations."); Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2013 (2010) (noting that courts are meant "to focus on the offensiveness of the information

if the *content* revealed by the intrusion was not offensive or shameful enough.¹¹⁶ According to these cases, which deviate from the Restatement and spirit of the tort, an intrusion is not offensive unless it invades matters that “are facially embarrassing and highly offensive if disclosed.”¹¹⁷

Examples abound. One court found that an employer’s intrusion into a former employee’s cellphone was not actionable because the employer did not discover anything that was “facially embarrassing and highly offensive if disclosed.”¹¹⁸ Another found that the strength of plaintiffs’ intrusion claims against Facebook depended on the nature of the data that was collected from plaintiffs and whether it was, in and of itself, sensitive.¹¹⁹

Such reasoning is troubling because, regardless of the offensiveness of the intrusion, the plaintiff is denied redress if the intrusion does not unveil a highly offensive fact or matter. For example, a plaintiff would have no cause of action against a Peeping Tom who mechanically peered into her bathroom but only observed her brushing her teeth.

2. Mis-framing the Offense

A woman poses nude in a bathtub for an art book.¹²⁰ Years later, a popular magazine of large circulation publishes the picture as a feature titled “Centerfold” without her knowledge and consent.¹²¹ The woman sues, claiming that the image placed her in an unchaste, false light.¹²² The court, a white male senior district court judge, concludes that the alleged violation could not have been offensive.¹²³ Specifically, the court stated that it had “difficulty in discerning ‘the [offensive] false light’ in which plaintiff was placed, if any” by being “photographed in a bathtub”; the picture, according to the court, only possibly suggested that “plaintiff bathes when in fact she [might] not.”¹²⁴ The plaintiff, however, clearly took offense not to the suggestion that she bathed, but rather that she would willingly pose nude for a widely circulated magazine. By construing the plaintiff’s offense too narrowly, the court applied its offensiveness analysis to the wrong trigger.

gathering in the intrusion context,” but not the public disclosure context and “this fine distinction often eludes them”).

116. See, e.g., *Boring*, 362 F. App’x at 278–80; *Cooney*, 943 N.E.2d at 32.

117. *Vega*, 958 F. Supp. 2d at 959 (quoting *Cooney*, 943 N.E.2d at 32).

118. *Kaczmarek v. Cabela’s Retail IL, Inc.*, 2015 IL App (1st) 143813-U, ¶ 29 (quoting *Cooney*, 943 N.E.2d at 32).

119. *Heeger v. Facebook, Inc.*, 509 F. Supp. 3d 1182, 1193–94 (N.D. Cal. 2020).

120. *McCabe v. Vill. Voice, Inc.*, 550 F. Supp. 525, 527 (E.D. Pa. 1982).

121. *Id.* at 527–28.

122. *Id.* at 528.

123. *Id.* at 529.

124. *Id.*

When determining offensiveness, courts sometimes miss the forest for the trees by failing to properly frame the violation in context. This can occur when the trigger is framed too narrowly (as in the case above) or when the trigger is framed too broadly.

Overextending the frame can overlook the offensiveness of the publicity given to a private matter. For example, in *Haynes v. Alfred A. Knopf, Inc.*,¹²⁵ a book about the 1960s Great Society identified the plaintiff, a private individual, as a drunk who could not keep a job, an adulterer, and a neglectful husband and father.¹²⁶ The court determined that the portrayal was not highly offensive because the focus of the book was not on the plaintiff, as he was just one example of the many African Americans who had migrated to the North during the period.¹²⁷ The court expanded the frame too widely, denying the plaintiff redress simply because the offensive disclosure was buried within a larger narrative.

3. Inserting a Harm Requirement

None of the three privacy torts discussed require actual harm or injury to prove an invasion of privacy.¹²⁸ Unlike palpable harm, offensiveness seems immeasurable. With nothing to point to or grasp, courts sometimes seek to inject an element of injury or harm into the torts' analysis or deny the violations' offensiveness because the plaintiff did not sufficiently allege specific injury or damages.¹²⁹

In *McGreal v. AT&T Corporation*,¹³⁰ for example, the district court dismissed a cellphone account holder's intrusion claim when her cellphone call and text log records were inappropriately obtained, because she could prove no ensuing injury.¹³¹ According to the court, intrusion claims required her to show that the invasion caused "anguish and suffering."¹³² Another court overturned a

125. No. 91 C 8143, 1993 WL 68071 (N.D. Ill. 1993), *aff'd*, 8 F.3d 1222 (7th Cir. 1993) (affirmed on newsworthiness grounds).

126. *Id.* at *1.

127. *Id.* at *6.

128. See SECOND RESTATEMENT, *supra* note 9, §§ 652B, 652D, 652E; *In re Facebook Internet Tracking Litig.*, 263 F. Supp. 3d 836, 843 (N.D. Cal. 2017) ("[A] plaintiff need not show actual loss to establish standing for common-law claims of invasion of privacy."); Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 810 (2022) (noting that courts "presume the existence of harm" in privacy tort law).

129. See, e.g., *Busse v. Motorola, Inc.*, 813 N.E.2d 1013, 1017 (Ill. App. Ct. 2004); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1354 (Ill. App. Ct. 1995) (noting a necessary element of intrusion is that the intrusion must "cause[] anguish and suffering").

130. 892 F. Supp. 2d 996 (N.D. Ill. 2012).

131. *Id.* at 1015–16.

132. *Id.* at 1015 (quoting *Burns v. Masterbrand Cabinets, Inc.*, 874 N.E.2d 72, 77 (Ill. App. Ct. 2007)); see also *Manigault-Johnson v. Google, LLC*, No. 2:18-cv-1032, 2019 WL 3006646, at *6 (D.S.C. Mar. 31, 2019) (citing to no case law but finding that "unadorned they-harmed-me allegation[s] [are] wholly insufficient").

five million dollar jury verdict for a couple's intrusion claims because the plaintiffs "sought no medical or psychological assistance for any anguish or suffering."¹³³ The court seemed particularly skeptical of the wife's claims of harm, because "she was not precluded from any work or social activity because of her alleged emotional suffering."¹³⁴

Indeed, "[t]o say that a 'mere' privacy invasion is not capable of inflicting an 'actual injury' serious enough is to disregard the importance of privacy in our society."¹³⁵ Courts' superimposed harm requirement considerably shrinks the torts' ability to redress offensive invasions, particularly where harm is narrowly construed.¹³⁶

4. Overemphasis on Social Utility of the Trigger

Courts have also tended to place undue weight on the perceived social utility of the trigger tipping the scales against a finding of offensiveness. Social utility can encompass the defendant's motives or the public's potential interest in the information disclosed.¹³⁷ At times, any hint of a justification results in quick absolution of the trigger's offensiveness.¹³⁸

When courts find defendants are motivated by legitimate purposes, they tend to find privacy intrusions not offensive.¹³⁹ The Supreme Court of Kansas, for example, found a doctor's unwarranted disclosure of his patient's suicidal thoughts and history of psychiatric treatment not highly offensive because she

133. *Schmidt v. Ameritech Ill.*, 768 N.E.2d 303, 309, 316, 321 (Ill. App. Ct. 2002).

134. *Id.* at 316.

135. *In re Facebook, Inc. Consumer Priv. Litig.*, 402 F. Supp. 3d 767, 786 (N.D. Cal. 2019); *see also* *Nayab v. Cap. One Bank (USA), N.A.*, 942 F.3d 480, 491 (9th Cir. 2019) ("Privacy torts do not always require additional consequences to be actionable." (quoting *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017))); Ryan Calo, *Privacy Harm Exceptionalism*, 12 COLO. TECH. L.J. 361, 361 (2014) (criticizing privacy harm exceptionalism); Daniel J. Solove, *"I've Got Nothing To Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 768–69 (2007) [hereinafter Solove, *"I've Got Nothing to Hide"*] (observing that limiting privacy harms to "dead bodies" overlooks non-visceral privacy harms that must be addressed even if less sensational than a horror movie).

136. *See* *Pruitt*, *supra* note 30, at 972 (discussing how tort law is gendered and compels women "to articulate their injuries in a way that reflect[s] masculine values and interest" in order to obtain a recovery).

137. *See, e.g.*, *Jackson v. Mayweather*, 217 Cal. Rptr. 3d 234, 240–42 (Cal. Ct. App. 2017); *Godbehere v. Phx. Newspapers, Inc.*, 783 P.2d 781, 789 (Ariz. 1989).

138. *See* *Makdisi*, *supra* note 52, at 1011 (noting that where a defendant's interest has some legitimate purpose, conduct not exceeding that purpose "is likely to be construed not highly offensive as a matter of law"); *Cavico*, *supra* note 22, at 1286, 1320 (noting that where an employer can point to a legitimate, business reason for an intrusion, courts are likely not to find liability).

139. Lord Carswell from the House of Lords observed the same. *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 AC (HL) 457, [¶ 166] (appeal taken from Eng.) (UK) (Carswell, L., dissenting) ("It also follows in my opinion that the motives of the respondents in publishing the information, which they claim to have done in order to give a sympathetic treatment to the subject, do not constitute a defence, if the publication of the material . . . revealed confidential material.").

was involved in a custody dispute.¹⁴⁰ In another case, the private individual who thwarted President Ford's assassination attempt was outed as gay and sued for the unwarranted publicity.¹⁴¹ The disclosure was pardoned as inoffensive because, among other things, according to the court, the media outlet's motivation was to dispel "the false public opinion that gays were timid, weak and unheroic figures."¹⁴²

Newsworthiness, however unworthy, is also a "get out of jail free" card for the offensiveness analysis. Even if the disclosure of a private fact is offensive, it cannot be actionable if the fact is of legitimate public concern (i.e., newsworthy).¹⁴³ While individuals' privacy must be balanced against the First Amendment right to disseminate news and information,¹⁴⁴ the balance always tips in favor of disclosure if the standard is simply circularly descriptive—it was published because it was newsworthy.¹⁴⁵ Some courts have found that "newsworthiness is not limited to 'news,'" but rather also extends to facts given to the public for purposes of "amusement or enlightenment."¹⁴⁶ Indeed, courts have observed that "at a time when entertainment news and celebrity gossip often seem to matter more than serious policy discussions, . . . the publication of . . . otherwise intimate facts [are] necessarily . . . considered newsworthy."¹⁴⁷ But this expansive interpretation of legitimate public concern seems to read the word "legitimate" out of the standard.¹⁴⁸

Moreover, just because a particular event may be newsworthy, does not mean all possible accompanying facts or images are necessarily so. Consider the Pittsburgh Steelers football fan who appeared with his pants zipper open in a widely circulated image.¹⁴⁹ The court reasoned that because the football game where the picture was taken was newsworthy, the embarrassing image of his groin was also newsworthy.¹⁵⁰ Similarly, the filming of a plaintiff in serious physical distress at a hospital after ingesting a drug called Blue Nitro was deemed newsworthy because the story on Blue Nitro and its increased use was

140. *Werner v. Kliewer*, 710 P.2d 1250, 1256 (Kan. 1985).

141. *Sipple v. Chron. Publ'g Co.*, 201 Cal. Rptr. 665, 666–67 (Cal. Ct. App. 1984).

142. *Id.* at 670.

143. *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998).

144. *Id.*

145. *Id.* at 480–81.

146. *Jackson v. Mayweather*, 217 Cal. Rptr. 3d 234, 250 (Cal. Ct. App. 2017). *But see* *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1974) (finding that "a morbid and sensational prying into private lives for its own sake" is not sufficient for newsworthiness).

147. *Jackson*, 217 Cal. Rptr. 3d at 250.

148. *See Post*, *supra* note 22, at 1004 ("That the public is in fact curious may well be true, but it merely restates the problem.").

149. *Neff v. Time, Inc.*, 406 F. Supp. 858, 858 (W.D. Pa. 1976).

150. *Id.* at 861–62.

newsworthy.¹⁵¹ Because nearly any fact, regardless of its independent newsworthiness, can be associated with some broader newsworthy story or societal comment, the newsworthy exception can swallow the offensiveness analysis.¹⁵²

5. Fumbling with Evolving Norms

Novel social issues and emerging technologies challenge courts' application of norms that have not fully evolved. Apple contends that collecting and disclosing users' unique device identifier number, geolocation, and other personal data is not a breach of social norms because it is a routine commercial activity.¹⁵³ Google shares people's viewing history on YouTube, along with other personally identifiable information, to place targeted ads contrary to its own policies.¹⁵⁴ One court suggests Facebook should argue that automated machine intrusions are less offensive than the human gaze.¹⁵⁵ Are these practices highly offensive to a reasonable person?

Black's Law Dictionary defines "offensive" as "causing displeasure, anger, or resentment; esp., repugnant to the *prevailing sense of what is decent or moral*."¹⁵⁶ The determination of offensiveness cannot be unglued from a look to what society accepts as correct. But what is "decent or moral" and by whose "prevailing" sense? Norms are not always established, articulable observations waiting to be definitively discovered by judges or juries.¹⁵⁷

Instead, norms (and, by extension, offensiveness) are time, place, generation, and culture specific.¹⁵⁸ An application of community norms necessarily requires familiarity with the community at issue.¹⁵⁹ For this, judges

151. *Carter v. Superior Ct. of San Diego Cnty.*, No. D038091, 2002 WL 27229, at *4 (Cal. Ct. App. Jan. 10, 2002).

152. David A. Anderson, *The Failure of American Privacy Law*, in *PROTECTING PRIVACY: THE CLIFFORD CHANCE LECTURES* 139, 139–41 (Basil S. Markesinis ed., 1999) ("Privacy law in the United States delivers far less than it promises because it resolves virtually all . . . conflicts in favour of information, candour, and free speech.").

153. *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012).

154. *In re Google, Inc. Priv. Pol'y Litig.*, 58 F. Supp. 3d 968, 973–74, 987 (N.D. Cal. 2014).

155. *In re Facebook, Inc. Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 796 (N.D. Cal. 2019); see *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012).

156. *Offensive*, BLACK'S LAW DICTIONARY 1188 (11th ed. 2019) (emphasis added).

157. Lyrisa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 47 (1996).

158. Zimmerman, *supra* note 39, at 349 ("Differences of opinion over which subjects are offensive can be found at any moment in history among different geographical regions, or levels of social, economic, or educational status."); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1026 (2003) [hereinafter Solove, *The Virtues of Knowing Less*] (noting that "in all but the most extreme cases, it will be difficult to find a social consensus" on privacy).

159. SECOND RESTATEMENT, *supra* note 9, § 652D, cmt. c (explaining the offensiveness of any privacy invasion is to be judged based on "the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens"); see also *Austl Broad Corp v Lenah Game*

must engage in more of a sociological inquiry than a legal one, having “to enter imaginatively into a world that [may] not [be] the[ir] natural habitat.”¹⁶⁰ As Lyrisa Barnett Lidsky points out, the inquiry into the plaintiff’s community and its norms presents both theoretical and doctrinal difficulties in a heterogeneous society.¹⁶¹ We are no longer one community, rather a collection of subcommunities espousing values that can diverge from the majority.¹⁶²

In borderline cases, thoughtful courts acknowledge when a call is premature and defer to the wisdom of juries, who are better positioned to understand “the subjective perceptions of a community.”¹⁶³ Some courts, including the U.S. Supreme Court, have observed that the internet and new technology’s customs and habits are very much in flux, and expectations change while technology is still developing.¹⁶⁴

But in many instances, courts decide offensiveness as a matter of law.¹⁶⁵ With new issues, some courts are quick to seek analogies to inapplicable normative contexts. For example, in 2019, a court relied on decisions from the 1980s and 1990s involving medical records and phone numbers, to conclude that a defendant’s tracking of plaintiff’s keystrokes and mouse clicks was not a highly offensive intrusion.¹⁶⁶ Another recent case concluded that disclosure of plaintiffs’ income and credit information to third-party marketers could not be highly offensive because it is not akin to disclosing a planned mastectomy.¹⁶⁷

Equally troubling results ensue when courts are too quick to call norms in flux—without analysis, which often results in faulty reasoning and bad precedent. A string of technology-related cases holds that business practices, if routine, cannot be highly offensive to a reasonable person. The underlying logic, one must guess, is since the practice has become commonplace, it is acceptable to society, and therefore fits within the prevailing sense of what is decent or moral. This slippery logic, however, assumes that consumers are

Meats Pty Ltd (2001) HCA 63, ¶ 252 (Austl.) (“Judges sometimes make assumptions about current conditions and modern society as bases for their decisions. . . . An assumption of such a kind may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question to enable an assumption to be made about it.”).

160. *Douglass v. Hustler Mag., Inc.* 769 F.2d 1128, 1134 (7th Cir. 1985) (determining offensiveness of false light in “the world of nude modeling and (as they are called in the trade) ‘provocative’ magazines”).

161. See generally Lidsky, *supra* note 157 (analyzing the difficulty courts face in defining “offensiveness” based on community values and norms).

162. *Id.* at 1.

163. *Denver Publ’g Co. v. Bueno*, 54 P.3d 898, 903–04 (Colo. 2002).

164. *Carpenter v. United States*, 138 S. Ct. 2206, 2233 (2018); *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1079 (N.D. Cal 2016).

165. *McClurg*, *supra* note 22, at 999–1005.

166. *Popa v. Harriet Carter Gifts, Inc.*, 426 F. Supp. 3d 108, 122–23 (W.D. Pa. 2019) (relying on cases that applied the wrong intrusion standard or had been abrogated).

167. *Bovay v. Sears, Roebuck & Co.*, 2017 IL App (1st) 142672-U, ¶ 46.

knowledgeable about such practices, explicitly accept them, and have a forum to object to them.

In *In re iPhone Application Litigation*,¹⁶⁸ the court concluded that plaintiffs' allegations of Apple and others violating their privacy by collecting and disclosing their unique device identifier number, geolocation, and other personal data did not amount to an invasion of privacy because it was a routine commercial activity.¹⁶⁹ However, the court did not cite to any facts that would suggest the defendants' activity of compiling and disclosing such data was routine, nor did it explain why the activity was not a breach of social norms.¹⁷⁰ The court also failed to explain why it treated the two as mutually exclusive.¹⁷¹ Instead, the court relied wholly on *Folgelstrom v. Lamps Plus, Inc.*,¹⁷² an earlier brick-and-mortar case finding that a retailer's practice of requesting zip codes at checkout to mail customers promotions, while telling them the zip codes were used for an internal survey, was not offensive.¹⁷³

The precedent snowballed. Many other technology-related intrusions have failed the offensiveness test on the same basis. When plaintiffs sued Google over its practice of logging and sharing personal identifiable information (including browsing habits, search queries, demographic information, viewing history on YouTube, etc.) to target ads, contrary to its own policies,¹⁷⁴ the court found the practice inoffensive.¹⁷⁵ Similarly, courts have concluded that placing cookies to track users' browsing histories is inoffensive because it is "part of routine internet functionality[,] can be easily blocked,"¹⁷⁶ and can serve a legitimate commercial purpose.¹⁷⁷ Indeed, in *In re Nickelodeon Consumer Privacy Litigation*,¹⁷⁸ the Third Circuit, citing to only one case, noted that "courts have long understood that tracking cookies can serve legitimate [business] purposes" and are "so widely accepted a part of Internet commerce that it cannot possibly be considered 'highly offensive.'"¹⁷⁹

168. 844 F. Supp. 2d 1040 (N.D. Cal. 2012).

169. *Id.* at 1063.

170. *See id.*

171. *See id.*

172. 125 Cal. Rptr. 3d 260 (Cal. Ct. App. 2011).

173. *See In re iPhone Application Litig.*, 844 F. Supp. 2d at 1063 (citing *Folgelstrom*, 125 Cal. Rptr. 3d at 265).

174. *In re Google, Inc. Priv. Pol'y Litig.*, 58 F. Supp. 3d 968, 973–74, 987 (N.D. Cal. 2014).

175. *Id.* at 987–88.

176. *In re Facebook Internet Tracking Litig.*, 263 F. Supp. 3d 836, 846 (N.D. Cal. 2017).

177. *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 294 (3d Cir. 2016) (citing *In re DoubleClick Inc. Priv. Litig.*, 154 F. Supp. 2d 497, 519 (S.D.N.Y. 2001)) (noting that defendant's placement of cookies on plaintiff's computers was not "to perpetuate torts on millions of Internet users, but to make money by providing a valued service to commercial Web sites").

178. 827 F.3d 262 (3d Cir. 2016).

179. *Id.* at 294; *see also* *Popa v. Harriet Carter Gifts, Inc.*, 426 F. Supp. 3d 108, 122–23 (W.D. Pa. 2019) (noting that the surreptitious gathering of information on the internet may cause concern but "is not enough to give rise to tort liability" that "requires conduct that may outrage or cause mental

It is unclear why the fact that a privacy invasion *may* serve a practical business purpose is dispositive of its offensiveness. All intentional privacy invasions serve some purpose to the defendant, be it commercial or personal, but that should not legitimize them offhand.¹⁸⁰ It is also unclear why the proverbial “but everyone else [in my industry] is doing it” makes the conduct at issue socially acceptable and inoffensive. The practical business purpose rationale creates an incentive to employ an invasive practice on a regular basis.¹⁸¹

6. Injecting Bias

Courts employ their perception of the reasonable person when determining offensiveness. However, it becomes problematic when courts project their own biases on to the reasonable person.

Could a reasonable person ever find it offensive for a firm to tell the press that its former employee missed work for “female problems”? One court found it inoffensive.¹⁸² Would a reasonable person consider public revelations that a private person ate insects, hurt themselves to collect unemployment, and engaged in reckless and dishonest conduct to be offensive? One court determined that no reasonable juror would find those disclosures offensive because they portrayed the male plaintiff as a “tough, aggressive maverick, an archetypal character occupying a respected place in the American consciousness.”¹⁸³

The projection of bias is difficult to avoid, given humans’ tendency to overestimate public agreement with their own attitudes and judgments.¹⁸⁴ This false consensus bias causes individuals to overestimate the extent to which their

suffering, shame, or humiliation”); Benjamin Zhu, Note, *A Traditional Tort for a Modern Threat: Applying Intrusion upon Seclusion to Dataveillance Observations*, 89 N.Y.U. L. REV. 2381, 2401 (2014) (observing that intrusions involving data collection are unlikely to meet the tort’s offensiveness prong).

180. See Helen Nissenbaum, *Privacy As Contextual Integrity*, 79 WASH. L. REV. 119, 144–47 (2004) (proposing that where novel practices breach or threaten entrenched norms these should be evaluated by how they promote social and moral values with consideration given to preventing information-based harms and informational inequality).

181. Jamuna D. Kelley, Note, *A Computer with a View*, 74 BROOK. L. REV. 187, 215–17 (2008) (noting this standard “suggests that when society becomes sufficiently accustomed to a certain surveillance practice, its presence and eventual practice becomes ingrained in the social fabric that any ‘reasonable’ person is precluded from finding it highly offensive”).

182. *Polansky v. Sw. Airlines*, 75 S.W.3d 99, 106 (Tex. Ct. App. 2002) (finding disclosure inoffensive because women had publicly alleged a “kaleidoscope of symptoms” resulting from working in a “sick-building”).

183. *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1288–89 (S.D. Cal. 1976).

184. See Robyn M. Dawes, *Statistical Criteria for Establishing a Truly False Consensus Effect*, 25 J. EXPERIMENTAL SOC. PSYCH. 1, 1 (1989); Christopher G. Wetzel & Marsha D. Walton, *Developing Biased Social Judgments: The False-Consensus Effect*, 49 J. PERSONALITY & SOC. PSYCH. 1352, 1352 (1985).

perception of social norms are shared,¹⁸⁵ which may explain why courts frequently decide offensiveness as a matter of law in privacy cases.¹⁸⁶ Other scholars have similarly warned that judges, legislators, and citizens should be wary of these tendencies to be overconfident in the unassailable correctness of certain perceptions, particularly those impacting women and racial minorities,¹⁸⁷ and the extent to which such perceptions are shared with others.¹⁸⁸ Because what does or does not offend a sixty-eight-year-old white man (who is the average demographic of the federal judiciary)¹⁸⁹ does not necessarily correlate with what offends the social construct that is the reasonable person.¹⁹⁰

In *Plaxico v. Michael*,¹⁹¹ the Mississippi Supreme Court absolved an ex-husband's intrusion into his ex-wife's bedroom to take pictures of her naked and engaged in sexual conduct with another woman, because the former couple was in a custody battle.¹⁹² According to the court, because the defendant suspected his wife was in a homosexual relationship and was concerned for the welfare of his minor child, most reasonable people would not find his conduct highly offensive.¹⁹³ All of the justices on the court were men. One dissenting opinion joined by two other justices believed the majority erred, but only because the ex-husband's conduct could have been offensive to the ex-wife's lover, who was not part of the custody dispute.¹⁹⁴ Only one justice would have found the defendant's intrusion highly offensive to both women involved.¹⁹⁵

185. Janneke K. Oostrom, Nils C. Köbis, Richard Ronay & Myckel Cremers, *False Consensus in Situational Judgment Tests: What Would Others Do?*, 71 J. RSCH. PERSONALITY 33, 36 (2017); Lee Ross, David Greene & Pamela House, *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Process*, 13 J. EXPERIMENTAL SOC. PSYCH. 279, 285–86 (1977); see also Bruce E. Boyden, *Regulating at the End of Privacy*, 2013 U. CHI. LEGAL F. 173, 174–82 (2013) (arguing judges' perceptions of norms are tied to those prevailing at the time when their identity and self-perceptions in relation to society were formed, which makes it more difficult to objectively assess current privacy norms).

186. McClurg, *supra* note 22, at 999–1005 (noting courts' propensity to decide offensiveness as a matter of law).

187. Chamallas, *The Architecture of Bias*, *supra* note 30, at 467, 470.

188. Kahan et al., *supra* note 30, at 843–54.

189. See FED. JUD. CTR., *Demography of Article III Judges, 1789–2020*, <https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges> [<https://perma.cc/MUN4-7TU5>] (noting that average age of a federal judge in 2020 was 68 years old); CTR. FOR AM. PROGRESS, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS 3 (2020), <https://www.americanprogress.org/article/examining-demographic-compositions-u-s-circuit-district-courts/> [<https://perma.cc/7S3M-UBZS>] (click on "Download" dropdown; then click on "Report" hyperlink) (noting that in 2019 over 70% of judges on the federal bench were white and women make up only 27% of district court judges).

190. See Lidsky, *supra* note 157, at 41 (noting American society is deeply divided by sex, age, class, religion, etc. "all with somewhat differing norms and expectations of conduct"); Post, *supra* note 22, at 961.

191. 96-CA-00791-SCT, 735 So. 2d 1036 (Miss. 1999) (en banc).

192. *Id.* ¶¶ 16–17, 735 So. 2d at 1040.

193. *Id.* ¶ 16, 735 So. 2d at 1040.

194. *Id.* ¶ 24, 735 So. 2d at 1041 (McRae, J., dissenting).

195. *Id.* ¶¶ 20–23, 735 So. 2d at 1040–41 (Banks, J., dissenting).

Sometimes a plaintiff's prior conduct may trigger biases. Psychologists note that when decision-makers are evaluating conduct or facts, they are prone to fall into what is termed the culpable control model of blame, wherein individuals are more likely to blame someone if they acted in a manner that contradicts the factfinder's perception of social norms.¹⁹⁶ Similarly, when a plaintiff's behavior confirms a perceived stereotype of her gender or group, the plaintiff's behavior may be attributed to factors within her control, as opposed to situational factors, such as the defendant's conduct, outside her control.¹⁹⁷ In *Jackson v. Mayweather*,¹⁹⁸ for example, the court found that former boxing champion Floyd Mayweather Jr.'s vengeful posts on Facebook and Instagram, after a violent and contentious break-up, that plaintiff had an abortion, "killed [their] twin babies,"¹⁹⁹ and had "extensive cosmetic surgery procedures" were not actionable because plaintiff had in the past "willingly participated in publication of information about her own life and her relationship with Mayweather."²⁰⁰ Other times, courts are simply unable to identify with the plaintiff and why the conduct at issue could offend. For example, another court found that an article that falsely suggested that the plaintiffs, teenage girls, were masculine in nature could not possibly "be objectionable to the ordinary reasonable *man* under the circumstances."²⁰¹

Not all courts project their own biases onto the reasonable person. For example, one plaintiff brought a false-light claim that alleged that nude pictures of herself published in *Hustler* magazine without her consent, where she was with another woman in a suggestive position with accompanying text that said "climactic moments," falsely suggested she was a lesbian.²⁰² The Seventh Circuit disagreed.²⁰³ It did not think that "*Hustler* was seriously insinuating—or that its readership would think—that [the plaintiff] [was] a lesbian" because "*Hustler* is a magazine for men" and "[f]ew men are interested in lesbians."²⁰⁴ The court, however, recognized that a reasonable person or jury viewing the pictures might disagree.²⁰⁵

196. See generally Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCH. BULL. 556 (2009) (analyzing the conditions that encourage and mitigate blame when harmful events occur); Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCH. 368 (1992) (analyzing "the perceived blameworthiness of an action on judgment of its causal impact on a harmful outcome").

197. See Chamallas, *The Architecture of Bias*, *supra* note 30, at 484–85.

198. 217 Cal. Rptr. 3d 234 (Cal. Ct. App. 2017).

199. *Id.* at 241–42.

200. *Id.* at 242–51.

201. *Fudge v. Penthouse Int'l Ltd.*, 840 F.2d 1012, 1019 (1st Cir. 1988) (emphasis added).

202. *Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1135 (7th Cir. 1985).

203. *Id.* at 1135.

204. *Id.*

205. *Id.*

Given the morass that is offensiveness and courts' propensity to fall into the various critical traps outlined above, should privacy law simply abandon or replace its offensiveness prong?

D. *Abandoning Offensiveness?*

As it stands today, the legal operation of offensiveness is ineffective. Its current applications are not only muddled, but too narrow for a rapidly changing world. Some scholars have advocated for changes to the standard and its application, such as lowering the "highly offensive" requirement to simply "offensive" to mirror today's sensibilities, at least in some circumstances.²⁰⁶ Andrew McClurg has proposed expanding *Miller's* factors to permit the intrusion tort to apply to conduct occurring in public spaces.²⁰⁷ Others have criticized the torts' highly offensive standard and its tendency to set the bar too high for plaintiffs to recover from legitimate privacy harms.²⁰⁸

Disparate areas of law have flirted with abandoning offensiveness, recognizing the common problems of vagueness, subjectivity, overbreadth, and potential bias inherent in the offensiveness analysis. The Supreme Court excised the offensiveness analysis from trademark law when it declared the Lanham Act's prohibition on disparaging and scandalous marks as unconstitutional viewpoint discrimination.²⁰⁹ Critics have attacked § 230 of the Communications Decency Act, arguing that it grants online service providers too broad of an immunity because offensive material is too subjectively and expansively defined.²¹⁰ The First Amendment's Establishment Clause has been used to remove religious symbols, speech, and conduct from government property or events that may offend non-adherents of the religion.²¹¹ In fact, most Establishment Clause suits are brought by plaintiffs who are offended by

206. Josh Blackman, Note, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet*, 49 SANTA CLARA L. REV. 313, 363–64 (2009) (noting that California's paparazzi law has adopted the less burdensome offensive requirement, as opposed to the highly-offensive-to-a-reasonable-person standard); Citron, *supra* note 22, at 1850–52.

207. McClurg, *supra* note 22, at 1058–59.

208. See, e.g., Cavico, *supra* note 22, at 1319–23; Citron, *supra* note 22, at 1850–52; Makdisi, *supra* note 52, at 1005–06, 1010–12; Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1919 (2010); Scharf, *supra* note 52, at 1104–05; Lindsey A. Strachan, *Re-mapping Privacy Law: How the Google Maps Scandal Requires Tort Law Reform*, 17 RICH. J.L. & TECH. 1, 14 (2011).

209. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019); *Matal v. Tam*, 137 S. Ct. 1744, 1764–65 (2017).

210. See Michael D. Smith & Marshall Van Alstyne, *It's Time To Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), <https://hbr.org/2021/08/its-time-to-update-section-230> [<https://perma.cc/A5KX-XANL> (dark archive)]; DEP'T OF JUST., SECTION 230 NURTURING, *supra* note 50, at 4.

211. William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 352 (1991).

a religious display or religious practice.²¹² Justices Gorsuch and Thomas have argued for eliminating the offense as a ticket to standing in an Establishment Clause claim.²¹³ This would, according to the Justices, “bring with it the welcome side effect of rescuing the federal judiciary from the sordid business of having to pass aesthetic judgment, one by one, on every public display in this country for its perceived capacity to give offense.”²¹⁴

In privacy law, courts and scholars from around the world have also suggested abandoning the concept of offensiveness completely.²¹⁵ The High Court of Australia’s Chief Judge Gleeson rejected its application in Australia and instead found that the U.S. privacy law’s highly offensive prong is simply “a useful practical test” to determine what information or matter is private.²¹⁶ One member of the United Kingdom’s House of Lords observed the “highly offensive” standard was “a recipe for confusion” that can easily bring into account issues that should go more to proportionality and damages.²¹⁷ In that case, celebrity fashion model Naomi Campbell filed suit against the owners of a tabloid that published a story about her narcotics addiction.²¹⁸ The court was split as to whether the fact that Campbell attended Narcotics Anonymous, the frequency of such attendance, and pictures of her leaving the Narcotics Anonymous meeting in London were private and offensive facts.²¹⁹ Two members of the high court concluded it was unnecessary to inquire whether the information published was highly offensive when it is clearly private.²²⁰ The standard, according to one of them, is only helpful “in cases where there is room for doubt” as to whether a matter is truly private.²²¹

Discussing a comparable offensiveness standard in the context of New Zealand law, Professor N.A. Moreham has argued that the torts’ highly

212. See, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074 (2019) (noting plaintiffs claimed they were “offended by the sight of the memorial [which included a display of a Latin cross] on public land”); *Town of Greece v. Galloway*, 572 U.S. 565, 572 (2014) (explaining that plaintiff found the town board meeting prayers offensive); *Salazar v. Buono*, 559 U.S. 700, 707 (2010) (noting plaintiff’s claim that he was “offended by the presence of a religious symbol on federal land”); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 209 (1963) (presenting expert testimony that school’s day begin with prayer that often included readings from the New Testament were offensive to Jewish students).

213. See *Am. Legion*, 139 S. Ct. at 2098 (Gorsuch, J., concurring) (Thomas, J., joining in the concurrence).

214. *Id.* at 2103.

215. *Campbell v. MGN Ltd* [2004] UKHL 22, [2004] 2 AC (HL) 457, [¶¶ 21–31] (appeal taken from Eng.) (UK); *Hosking v. Runting* [2004] NZCA 34, [2005] 1 NZLR 1 at [246], [249] (N.Z.); Moreham, *supra* note 32, at 162; Stuart Hargreaves, ‘Relational Privacy’ & Tort, 23 WM. & MARY J. WOMEN & L. 433, 435 (2017).

216. *Austl Broad Corp v Lenah Game Meats Pty Ltd* (2001) 308 CLR 199 ¶ 42 (Austl.).

217. *Campbell*, [2004] UKHL 22, [¶ 22].

218. See *id.* [¶¶ 1–9].

219. See *id.* [¶¶ 23, 36].

220. *Id.* [¶¶ 96, 166].

221. *Id.* [¶ 94].

offensive element should be eliminated for three reasons. First, there is a lack of clear principles or guidance as to how courts should determine offensiveness because courts oftentimes determine offensiveness with no reasoning or explanation.²²² Even in cases where courts have articulated useful factors to consider, they then fail to apply them.²²³ These poorly reasoned decisions make the outcome of the analysis, to the extent any exists, unpredictable.²²⁴ Second, Moreham argues that courts have adopted too narrow of a view of what constitutes highly offensive and have thus left various privacy harms unremedied.²²⁵ Finally, Moreham claims the highly offensive element is unnecessary because it is duplicative of the plaintiff's reasonable expectation of privacy, as any conduct or matter that is private would be highly offensive if invaded.²²⁶

Moreham's arguments are compelling, but do not support the complete abandonment of the troubled analysis. Although offensiveness lacks clear principles or guidance, scholarly and judicial attention can find a remedy. Acknowledgment of offensiveness's pitfalls and a better elucidated rubric for its analysis can lead the way. The fact that courts have construed offensiveness narrowly, although damaging, is a symptom of its historical conundrum and a criticism of courts' super-imposition of a harm requirement. And it is too swift to conclude that a reasonable expectation of privacy subsumes the offensiveness analysis. For example, a person keeping a caged pet ferret in the privacy of their home might have a reasonable expectation of privacy in their ferret ownership status if they let no one into their house and the ferret never leaves the house, but disclosure of the same would not be highly offensive.

Abandoning the challenge is not the answer. A reasoned analysis of what offends us and why—and whether it should be allowed—is a fundamental duty of the legal system. It serves to legitimize practices, behaviors, and norms—and deters others from becoming commonplace or accepted. We must begin to articulate clear, reasoned, and fair ways to understand offense because courts are not the only ones making those crucial, norm-setting, and potentially chilling determinations. Increasingly, businesses and other nonlegal third parties are facing qualitative decisions in the context of taking down online information or delisting search requests. The European Union's General Data Protection Regulation created a right to be forgotten, putting the burden on online entities to determine the nature of allegedly harmful information

222. Moreham, *supra* note 32, at 174–75.

223. *Id.* at 175.

224. *Id.* at 177.

225. *Id.* at 179–86.

226. *Id.* at 186–89.

online.²²⁷ Policy and legal teams at technology giants like Facebook are making similar decisions on newsworthiness, offensiveness, and relevance.²²⁸ More than ever, we need to understand offensiveness.

But how can we conceive offensiveness given the human biases, confusion surrounding harm, knotty critical thinking, and entanglements with social mores? The next section pivots to examine approaches to the legal regulation of offensiveness from a philosophical lens. Although offensiveness in the realm of privacy torts has not been extensively studied, it is instructive to analyze the ways in which noted philosophers have framed offensiveness in other contexts.

II. CONCEPTUALIZING OFFENSIVENESS

Conceptualizing offensiveness involves a study of the concept through both philosophical and psychological lenses and an analysis of the concept's prominent perspectives.²²⁹ These perspectives will later inform a reasoned rubric to guide the offensiveness analysis in privacy torts.

“Offense” refers to unreflective or emotional reactions that are “universally disliked,” such as “[p]assing annoyance, disappointment, disgust, embarrassment, and various other disliked conditions such as fear, anxiety, and minor (‘harmless’) aches and pains” stemming from affronts to sensibilities.²³⁰ Emotional triggers vary: researchers agree that some are “universal” and others “individual-specific.”²³¹ Paul Eckman describes humans as having an “*emotion alert database*, which is written in part by our biology, through natural selection, and in part by our individual experience.”²³² For example, most humans, no matter the culture, respond to threats or triggers conditioned by natural selection (like snakes and vomit) with fear and disgust. Emotions can also be elicited by idiosyncratic, learned past experiences (like the disdain for nudity in a prudish culture or the resentment bred by racist or misogynistic microaggressions in one who has been subject to discrimination).

227. *Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 51–53, COM (2012) 11 final (Jan. 25, 2012), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0011&from=EN> [<https://perma.cc/Z5X8-Q8ZE>]; see also Patricia Sánchez Abril and Jacqueline D. Lipton, *The Right To Be Forgotten: Who Decides What the World Forgets?*, 103 KY. L.J. 363, 365 (2015).

228. Ben Smith, *Is an Activist's Pricey House News? Facebook Alone Decides*, N.Y. TIMES (Apr. 25, 2021), <https://www.nytimes.com/2021/04/25/business/facebook-nypost.html> [perma.cc/C4FG-KFEB].

229. See generally Andrew von Hirsch, *The Offense Principle in Criminal Law: Affront to Sensibility or Wrongdoing?*, 11 KING'S COLL. L.J. 78 (2000) [hereinafter von Hirsch, *The Offense Principle*] (analyzing the basis for prohibiting offensive conduct).

230. FEINBERG, *supra* note 33, at 1.

231. PAUL ECKMAN, *EMOTIONS REVEALED* 21–22 (2d ed. 2003).

232. *Id.* at 29.

However, offense is not merely a reaction to something offensive. Offense is a tripartite mechanism in which the person (1) suffers a disliked state, (2) makes a concurrent snap judgment that this bad feeling was wrongfully and unjustifiably caused by another's wrongdoing, and (3) is led to resentment towards its source, which serves to reinforce and magnify the unpleasantness.²³³

As a result of this tripartite judgment, strong emotions are unleashed. Offense-induced emotions take over so quickly that we are unaware of the evaluative processes that triggered them.²³⁴ Offense elicits the offended party's bias in a way that impairs their proper judgment on attribution and intensity. When gripped by offense, we enter a "refractory state," during which we interpret all input in a way that justifies how we are feeling.²³⁵ We also ignore or discount knowledge or new information that could disconfirm it.²³⁶

In fact, humans are psychologically prone to overclassify or over-designate speech and conduct as offensive for a number of reasons.²³⁷ The reactive feeling of offense is influenced by an "agential bias" or a natural tendency to over-focus on active conduct and under-focus on more passive conduct.²³⁸ This causes people to make mistakes in judging offensiveness because they tend to emphasize the role of thought and choice by the alleged offender and attribute a greater level of intent to their actions.²³⁹

Moreover, our interests in avoiding offense to promote well-being are complex and prone to being misunderstood, which could also lead us to misjudging the role of the offense in our lives and in the lives of others.²⁴⁰ Perhaps because of the agential bias, some have warned that legislators tend to overreact to offensiveness, zealously—and disproportionately—finding blamable conduct when it involves a perception of shock or menace to community norms.²⁴¹

All of these offended states are noisome because they intrude on reluctant victims, trap them, and invite particularly unpleasant reactions. These unwitting victims are then forced to take on a feeling or emotion that is unwanted, unpleasant, and thus threatening to their autonomy, freedom, and sense of self. What these affronts all have in common is that they cause the

233. FEINBERG, *supra* note 33, at 2; SNEDDON, *supra* note 12, at 53.

234. ECKMAN, *supra* note 231, at 21.

235. *Id.* at 39.

236. *Id.*

237. SNEDDON, *supra* note 12, at 54–55.

238. *Id.* at 55.

239. *Id.*

240. *Id.* at 92.

241. FEINBERG, *supra* note 33, at 5 ("Any legislator who votes to punish open lewdness or disrespect to the flag with prison terms *far* greater than those provided for genuinely and deliberately harmful acts of battery or burglary must be simply registering his hatred, revulsion, or personal anxiety rather than rationally applying some legislative principle to the facts.")

aggrieved to feel “trapped” because they cannot escape without unreasonable inconvenience (or maybe even harm).²⁴²

Over decades, philosophers have studied and parsed offensiveness and explored the nuances that trouble its analyses. At its core is its status as the ignored little sibling of harm. While harm is “a wrongful and unexcused invasion of interest,”²⁴³ philosopher Joel Feinberg concedes that offended parties do not necessarily lose anything upon which they have a stake, making harm more serious.²⁴⁴ Offense results in nuisance rather than palpable harm.²⁴⁵ Momentary disgust, exasperation, or even fear do not obviously rise to the level of an invasion of resources, nor are they readily calculable.

Given these prickly hallmarks of offensiveness as a philosophical concept, how should we assess it legally?

In his famous essay *On Liberty*, John Stuart Mill asserted the harm principle, which states: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”²⁴⁶ Since causing offense does not in itself constitute harm, Mill suggested that it would be “tyranny” to make personal feelings of offense the basis for punishment.²⁴⁷ Nevertheless, Mill went on to suggest that an exception could be made for violations against manners and decency done publicly.²⁴⁸

Since Mill, a recognized body of work by penal theorists and philosophers has developed—addressing the nature of offensive conduct and seeking philosophical justifications for its penalization or proscription. Legal philosophers, including Joel Feinberg, Martha Nussbaum, Andrew von Hirsch, Louis B. Schwartz, and Tatjana Hörnle, have set out to understand why conduct is offensive, disgusting, or obnoxious—a necessary starting point to make sense of whether the law addresses it justifiably.²⁴⁹ Other philosophers, such as Andrew Sneddon, have refined the concept of offensiveness in our modern world. While these theorists did not focus on tort law or privacy generally, an analysis of this important body of work is useful in supplying principles and constructs for a thoughtful reconsideration of offensiveness in privacy torts.

242. *Id.*

243. von Hirsch, *Injury*, *supra* note 15, at 702 (citing Feinberg).

244. FEINBERG, *supra* note 33, at 2–3.

245. *Id.* at 5.

246. JOHN STUART MILL, *supra* note 33, at 80.

247. *See id.* at 76–80.

248. *Id.* at 160.

249. It bears noting that these philosophers set out to determine under what conditions and justifications acts triggering offense should be regulated by criminal law. This is a different question from the one we ask here, which is how we gauge offensiveness in the context of a tort. With that said, the penal theorists’ important work over the past decades translates well to our own inquiry, focusing our own thinking and analysis.

What follows are several prominent perspectives on judging offensiveness. We draw lessons along the way that will later inform a reasoned rubric to guide the offensiveness analysis in privacy torts.

A. *Offensiveness As Prevailing Mores*

Mores have been defined as “strong ideas of right and wrong which require certain acts and forbid others.”²⁵⁰ Traditionally, the rationale for prohibiting and judging offenses was purely self-defining: a straightforward appeal to prevailing mores. Indecency was improper; obscenity was lewd; nuisances were annoying; and certain behaviors were simply not tolerated as infringements on community standards.

The Prevailing Mores approach bases judgment on generalized, bare moral indignation. The Supreme Court upheld an Indiana statute on nude dancing based on the general notion that public indecency was “malum in se,” or evil in itself,²⁵¹ and the statute appropriately reflected “moral disapproval of people appearing in the nude among strangers in public places.”²⁵² In concurrence, Justice Scalia advocated for the propriety of Prevailing Mores:

Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, “*contra bonos mores*,” i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate “morality.”²⁵³

Judging offensiveness by prevailing mores has been described as “troublesome.”²⁵⁴ Andrew von Hirsch elegantly sums up some of the criticism, asking “[w]hy is the offensive conduct anything more than a breach of prevailing taboos? In a free society, how can the majority be entitled to impose its taboos on unwilling minorities?”²⁵⁵

A test that only looks at community standards without further analysis may result in prolonging injustice if those standards are unjust, biased, or immoral.²⁵⁶ Mores have been used to justify censorship of obscenity, unequal

250. PAUL B. HORTON & CHESTER L. HUNT, *SOCIOLOGY* 59 (1968).

251. *Malum in se*, BLACK’S LAW DICTIONARY 959 (11th ed. 2019).

252. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991).

253. *Id.* at 575 (Scalia, J., concurring).

254. von Hirsch, *Injury*, *supra* note 15, at 706.

255. *Id.*

256. See NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 33, at 33.

treatment of people based on race or gender, and prohibitions on homosexual sex.²⁵⁷ Using norms blindly as reflective of offensiveness serves to legitimize and prolong stigmatization.

As philosopher Joel Feinberg noted,

[p]eople take offense—perfectly genuine offense—at many socially useful or even necessary activities, from commercial advertisement to inane chatter. Moreover, bigoted prejudices of a very widespread kind (e.g., against interracial couples strolling hand in hand down the main street of a town in the deep South) can lead onlookers to be disgusted and shocked, even “morally” repelled, by perfectly innocent activities, and we should be loath to permit their groundless repugnance to outweigh the innocence of the offending conduct.²⁵⁸

A bare appeal to prevailing mores or community norms—the “everybody-is-not-doing-it” shortcut to judging behavior—is thus unsatisfactory in a diverse, pluralistic society aiming for tolerance and progress.

B. *Offensiveness As Balancing Metric*

Imagine yourself captive as a rider on a public bus. Your fellow riders emit disgusting smells, eat nasty foods, copulate publicly, yell racist remarks, and show off Nazi symbols. Feinberg’s famous thought experiment of a disastrous bus ride with this cast of characters puts the reader in the position of assessing which act is most vile and most likely to be ruled offensive.

Influenced by John Stuart Mill’s harm principle, Feinberg’s offense principle holds that “criminal law may be used to protect persons from *wrongful offense*, that is, from their own unpleasant mental states when wrongfully imposed on them by other parties in a manner that violates their rights.”²⁵⁹ What is wrongful offense? For Feinberg, an affront is offensive if the majority of people find it to be so.²⁶⁰ However, Feinberg’s analysis focuses on how the general public would react, as opposed to the substance of their reaction.²⁶¹ Meaning, he makes no reference to whether people’s reactions are reasonable, justifiable, or even morally sound.²⁶²

257. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding prohibition of private homosexual sodomy enacted solely on “the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable”).

258. FEINBERG, *supra* note 33, at 25–26.

259. *Id.* at 68.

260. *See id.* at 35 (defining the magnitude of the offense as a function of the “extent,” meaning “[t]he more widespread the susceptibility to a given kind of offense, the more serious is a given instance of that kind of offense”).

261. *See id.* at 36–37 (“[T]he seriousness of an offense is determined by . . . [t]he magnitude of the offense, which is a function of its intensity, duration, and extent.”).

262. *See id.*

But Feinberg does not stop there; rather he acknowledges the nuance and complexity of the concept by creating a structured balancing test inspired by Prosser's tort analysis concerning liability for activities which benefit one party and bother another.²⁶³ Feinberg's test (laid out in Appendix B) weighs the seriousness of the trigger against the reasonableness of the offending party's conduct.²⁶⁴

To determine the seriousness of the offense, Feinberg looks to the "intensity and durability of the repugnance produced"²⁶⁵—a fleeting nuisance or incessant harassment? Second, he examines "the extent to which repugnance could be anticipated to be the general reaction of strangers to the conduct displayed or represented."²⁶⁶ The greater the magnitude of dislike for the behavior, the more serious the offense. The third factor is the extent to which the aggrieved could have avoided the trigger.²⁶⁷ Finally, Feinberg would ask whether the aggrieved willingly assumed the risk of being offended.²⁶⁸

In the second part of the test, Feinberg looks to the reasonableness of the offending party's conduct.²⁶⁹ This is assessed by first looking at the conduct's social impact, as measured by "its personal importance to the actors themselves and its social value generally" (with deference to free speech).²⁷⁰ Then by looking to "the availability of alternative times and places where the conduct in question would cause less offense."²⁷¹ And finally, by asking "the extent, if any, to which the offense is caused with spiteful motives" or intentionally.²⁷² Feinberg proposes balancing the weight of the first part of the test (seriousness of the offense) against the second set of factors (reasonableness of the offending party's conduct).²⁷³

One could argue that purely factual-psychological metrics like Feinberg's can be used to mask what should be moral judgments, making them look like liberal decisions.²⁷⁴ This approach also tilts towards favoring the majority's

263. WILLIAM PROSSER, *HANDBOOK OF THE LAW OF TORTS* 573–600 (2d ed. 1955). See generally PROSSER AND KEETON *ON THE LAW OF TORTS* 616–43 (W. Page Keeton ed., 5th ed. 1984) (discussing Prosser's tort analysis theory).

264. FEINBERG, *supra* note 33, at 26.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. See Harlon L. Dalton, "Disgust" and Punishment, 96 *YALE L.J.* 881, 889 n.40 (1987) (critiquing Feinberg's "liberal" approach as influencing "ostensibly neutral judgements"); H.J. McCloskey, *Immorality, Indecency, and the Law*, VIII *POL. STUD.* 366, 370–71 (1965) ("And the liberal, paradoxically if not absurdly, sums prepared to favour banning such conduct *qua* its being offensive, although not *qua* its immorality—even though it is its immorality which makes it offensive!").

selected social conventions and the status quo. In philosopher Tatjana Hörnle's words, "[o]ne could punish relatively innocuous acts if a sufficiently large number of persons felt offended."²⁷⁵ A quantitative weighing of interests complicates the protection of minorities: "If a racist slur is aimed at a very small and unpopular minority, very few people are likely to be distressed."²⁷⁶

Feinberg's test incorporates tort-like reasoning and simultaneously accounts for the complexity and nuance of offense. It limits legal moralism by focusing on public reaction rather than the substance of the public's objection. It also filters out idiosyncratic conduct that offends only those with abnormal susceptibilities. Although we can detect traces of Feinberg's test in California's *Miller-Hill-Hernandez* trilogy of offensiveness tests, Feinberg's model, developed before *Miller*, is a clearer, more detailed, and surgical approach.

C. *Offensiveness As Outrage*

Philosopher Martha Nussbaum posited that laws should not be based on what some may find disgusting²⁷⁷ because disgust contains no moral wisdom, is based on potentially mistaken social norms, and has a history of group-based prejudice and exclusion.²⁷⁸ Rather, Nussbaum argues, *outrage* or *indignation* is a more appropriate and relevant basis for legal judgment.²⁷⁹

Nussbaum and other leading philosophers study the role of emotion in law.²⁸⁰ Because some emotions carry moral baggage, Nussbaum contends, they are not worthy of equal dignity. Shame and disgust, for example, are dangerous emotions that almost always fail to give "good guidance for political and legal purposes" for two main reasons.²⁸¹ First, shame and disgust are the product of discomfort with our own animal existence and humanity in its rawest form. This translates, among other things, into discomfort with the sexuality of women and homosexuals.²⁸² Unlike other emotions that focus on acts themselves, shame and disgust are always about persons and thus have the power to deny the equal

275. Hörnle, *supra* note 33, at 262.

276. *Id.* at 262–63.

277. Professor Nussbaum couches her argument in terms of disgust, rather than using the more generalized offensiveness.

278. NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 33, at 125.

279. Nussbaum, *Secret Sewers*, *supra* note 33, at 44.

280. See generally JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989) (exploring the role of emotion in law); WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997) (same); THE PASSIONS OF LAW (Susan A. Bandes ed. 1999) (same); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 733–62 (1998) (same); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) (reviewing WILLIAM IAN MILLER, *ANATOMY OF DISGUST* (1997)); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (same).

281. NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 33, at 122.

282. See generally James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698 (2005) (reviewing NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 33).

dignity of others.²⁸³ Second, these emotions are a dangerous basis for legal analysis because they are inherently hierarchical; that is, both emotions “typically express themselves through the subordination of both individuals and groups based on features of their way of life.”²⁸⁴ Their hierarchical nature is evident in the language of disgust historically used to justify “misogyny, anti-Semitism, and loathing of homosexuals.”²⁸⁵

Outrage or indignation, in contrast to shame and disgust, can take a bad act as its target without denying the ultimate value of the person who committed that act.²⁸⁶ In addition, outrage allows for reasoning that can be publicly shared. We can detect iterations of an outrage test in the language of some courts applying privacy torts, although exposition of their underlying emotions or moral reasoning is usually absent. Professor Jordan Blanke similarly observes that outrage is a catalyst for change in both privacy norms and legislation.²⁸⁷ Indeed some privacy violations have been referred to as outrageous,²⁸⁸ objectionable,²⁸⁹ or shocking the conscience.²⁹⁰

Although elaborated in the context of criminal law, Nussbaum’s body of work serves as a critical reminder that a reasoned inquiry into the emotion behind the offensiveness logic reveals its moral (or immoral) foundation, bringing us a step closer to understanding its proper determination.

D. *Offensiveness As Material Harm*

Criminal law scholar Louis B. Schwartz argued that conduct triggering offense may be regulated because it does in fact cause harm—psychic harm.²⁹¹ Schwartz argued that the psychic affront, however fleeting, can be equated with physical or material harm and this forms the basis for a justification of the prohibition of certain conduct that causes offense.²⁹² He observed that psychologists would likely agree that the effects of psychic harm could be more acute than physical harm and that, as such, citizens may legitimately demand

283. NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 33, at 230 (explaining that shame and disgust operate by dismissing, rejecting, or degrading the person who is their target).

284. *Id.* at 321.

285. *Id.* at 75.

286. *Id.* at 166.

287. Jordan M. Blanke, *Privacy and Outrage*, 9 CASE W. RES. J.L. TECH. & INTERNET 1, 9 (2018).

288. *Hammer v. Sorensen*, 824 F. App’x 689, 696 (11th Cir. 2020) (applying Florida law); *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1309 (M.D. Fla. 2010); *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1964) (“It is only where the intrusion has gone beyond the limits of decency that liability accrues.”).

289. Prosser, *supra* note 40, at 391.

290. *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1078 (N.D. Cal. 2016); *Anderson v. City of Becker*, No. 08-5687, 2009 WL 3164769, at *14 (D. Minn. Sept. 28, 2009).

291. Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 671–73 (1963).

292. *Id.*

that the state protect psychological, in addition to physical, well-being.²⁹³ In this view, laws prohibiting acts that offend are justified because the offense causes psychic harm.²⁹⁴

If we subscribe to offense as material harm, it stands to reason that the yardstick for offensiveness would be the degree of the ensuing psychic harm. Some courts, such as the jurisdictions adopting the language on intentional infliction of emotional distress,²⁹⁵ focus on the degree of pain, anguish, and mental distress likely caused as an indicator of whether its trigger is highly offensive.²⁹⁶

This approach may result in an exceedingly restrictive view of privacy. Warren and Brandeis expressed concern that privacy harms were too intangible to be recognized as material harm.²⁹⁷ Privacy scholars have similarly observed that privacy law suffers from too few “dead bodies”²⁹⁸ (or “at least of broken bones and buckets of money”)²⁹⁹ which may prevent courts and factfinders from understanding “the compelling ways that privacy violations can negatively impact the lives of living, breathing human beings beyond simply provoking feelings of unease.”³⁰⁰

E. *Offensiveness As Threat to a Legitimate Interest*

Andrew von Hirsch has proposed that neither individual nor widespread offense alone should be enough to consider an act legally objectionable.³⁰¹ He also rejects a harm-based approach: the mere fact that words or conduct cause disliked mental states (even to most people) or infringe taboos is not enough to justify proscription.³⁰² Instead, von Hirsch suggests that a legitimate underlying

293. *Id.* at 672; *see also* Post, *supra* note 22, at 960 (defining an invasion of privacy as “an injury to personality” that “impairs the mental peace and comfort of the individual and may produce suffering more acute than that produced by mere bodily injury” (quoting *Hamberger*, 206 A.2d at 242)).

294. Schwartz, *supra* note 291, at 671–73; Post, *supra* note 22, at 967.

295. *Hammer v. Sorensen*, 824 F. App’x 689, 696 (11th Cir. 2020) (applying Florida law); *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1309 (M.D. Fla. 2010) (quoting *Stoddard v. Wohlfahrt*, 573 So. 2d 1060, 1062–63 (Fla. Ct. App. 1991)); *Hamberger*, 206 A.2d 242 (“It is only where the intrusion has gone beyond the limits of decency that liability accrues.”); *see also* Scharf, *supra* note 52, at 1095 (noting courts have equated the level of offensiveness in intrusion causes with the standard required to prove intentional-infliction-of-emotional-distress claims).

296. *Popa v. Harriet Carter Gifts, Inc.*, 426 F. Supp. 3d 108, 122–23 (W.D. Pa. 2019); *McIsaac v. WZEW–FM Corp.*, 495 So. 2d 649, 651 (Ala. 1986); *Chicarella v. Passant*, 494 A.2d 1109, 1114 (Pa. 1985); *Roe ex rel. Roe v. Heap*, 10th Dist. Franklin No. 03AP-586, 2004-Ohio-2504, ¶ 82 (citing *Haller v. Phillips*, 591 N.E.2d 305, 307 (Ohio Ct. App. 1990)) (holding that intrusion must be of “such a character as would shock the ordinary person to the point of emotional distress”).

297. *See* Warren & Brandeis, *supra* note 10, at 197–98 (expressing concern that privacy harms that simply resulted in “wounded feelings” might not find redress).

298. Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. PA. L. REV. ONLINE 52, 52 (2007).

299. *Id.* at 62.

300. *Id.* at 52.

301. von Hirsch, *The Offense Principle*, *supra* note 229, at 79.

302. *Id.* at 80–82.

reason must explicitly accompany the breach of norms. The reasons “should be made explicit” and “be subjected to critical scrutiny” to avoid bias or unfairness before conduct may be deemed offensive.³⁰³ Simply put, von Hirsch pleads for an explicitly stated and justified underlying interest. The question then becomes whether the violated interest relates to a right that requires other people to stop their allegedly offensive interference.

The offense-plus-reason approach is alluring precisely because it is notoriously hard to describe why certain things are offensive. Because offensiveness hits on an emotional level first, rationality is blocked, and tying reactions to interests without invoking morality or bias becomes a difficult, but critical challenge.³⁰⁴ The mental exercise of tying visceral offense to a valid interest and acknowledged right helps both the offended party and the actor understand the behavior and its implications. It also guides the factfinder with a rational appraisal to assess the relative value of those interests and rights, irrespective of the potential bias or distraction of the offense.

F. *Offensiveness As Assault to Symbolic Value*

For philosopher Andrew Sneddon, offensiveness is more than a feeling, norm, or interest.³⁰⁵ He defines offensiveness as an attack on “symbolic value,”³⁰⁶ which is the message sent via a symbol that pertains to values, ways of life,³⁰⁷ or beliefs of well-being, rights, and character traits.³⁰⁸ Words that offend, he explains, have symbolic value because they insult a way of life.³⁰⁹ Offense occurs because individuals have self-concerning reasons to protect and promote symbols that make them feel good and diminish those that make them feel bad.³¹⁰ Offensive conduct or words pose a symbolic risk to an individual’s or group’s way of life, well-being, or traits.

For Sneddon, all violations of symbolic value are offensive.³¹¹ An offender’s motives do not factor into the equation of whether an act is offensive. Instead, the significance of what is perceived to be offensive and the determination as to whether a remedy should be employed turns on: (1) if the alleged offensive act, object, utterance, etc. truly poses a symbolic risk; (2) if the symbolic risk is significant; (3) if the way of living that is implicated can

303. *Id.* at 85.

304. FEINBERG, *supra* note 33, at 36 (discussing the difficulty in giving reasons for some feelings of offense).

305. SNEDDON, *supra* note 12, at 14.

306. *Id.*

307. *Id.* at 142.

308. *Id.* at 153.

309. *Id.* at 152–53.

310. *See id.* at 152–53 (using the American flag as an example of a symbol with conflicting emotions attached to it).

311. *Id.* at 180.

continue in its present form in light of the symbolic risk; (4) if the symbolic value or way of living that is being offended is worth preserving; (5) the justification for the offensive act, object, utterance, etc.; (6) if the interference with the offensive act, item, utterance, etc. eliminates the risk or provides remedy to the offensive act; and (7) if there are other considerations that should limit or prohibit remedial measures to address the offense.³¹²

Sneddon's test or scorecard, as he terms it, although well-articulated and defended, is too esoteric for a practical-minded legal audience. It also focuses too heavily on the aggrieved's subjective perception of offense, a perspective expressly rejected by the tort's focus on the reasonable person. However, Sneddon's contribution is in thinking of offense as an attack on symbolic value or a threat to a way of life. For many privacy harms, that threat is autonomy, security, intimacy, or control over information.

Philosophers offer us various lenses with which to understand and even test offensiveness. They challenge us to look beyond the visceral, to understand the biases behind emotions, and not to discount offensiveness when it does not result in palpable harm. Their work uniformly rejects a bare, blind reliance on community standards and reminds us that the well-accepted norms of the majority can be unjust, biased, and immoral. Instead, they seek for the underlying risks, threats, and legitimate interests implicated to validate offensiveness beyond the "it is what it is." Perhaps most importantly, philosophy offers us models for tests that distill the many relevant factors that may contribute to offense or work to excuse it.

III. A RUBRIC FOR JUDGING OFFENSIVENESS IN PRIVACY TORTS

Informed by the critical traps we have identified and psychological and philosophical perspectives, we now turn to the practical: creating a workable rubric to guide decision-makers in a reasoned approach to offensiveness. The goal is not to sway the analysis either way, but rather to elucidate assumptions, clarify reasoning, avoid traps leading to error and bias, and make the offensiveness inquiry more rational and transparent.

The *Miller-Hill-Hernandez* trilogy of factor-based tests is a good starting point to inform the rubric.³¹³ They are designed to identify highly offensive conduct within the context of the intrusion tort. At their core, the three attempt to balance the gravity of the intrusion against the defendant's legitimate interests. Like these courts, we recognize that context is at the heart of the offensiveness analysis. Our rubric borrows these concepts but is specifically designed to also address offensiveness in disclosure and false-light claims. By

312. *Id.* at 224–43; *see infra* Appendix B.

313. *See infra* Appendix A.

providing more detail, our rubric identifies other relevant considerations left vague by these tests.

In philosophy, Feinberg and Sneddon propose other offensiveness tests that begin by gauging the seriousness of the trigger.³¹⁴ Building on Feinberg's test, our rubric considers the intensity of the offense, the relative ease with which the trigger could have been avoided, and the anticipated reaction of strangers to the trigger.³¹⁵ The rubric also, like Sneddon's, looks to the risk of harm generated by the trigger to determine its seriousness.³¹⁶ Our rubric factors the social utility of the trigger, a critical consideration in weighing its justifiability.³¹⁷

Standing on the shoulders of these courts and philosophers, we add to the analysis by factoring in additional inquiries to avoid the frequent critical traps revealed by our research.

A. *Rubric*

This inquiry-based rubric tasks courts *first* with deconstructing and understanding the privacy invasion at issue and the source of its offense and *second* with judging the invasion's offensiveness.

At the outset, let us reiterate some definitions: the *trigger* is the action, matter, or implication that set off the alleged offense, the *offense* is the aggrieved's reaction to the trigger, and *offensiveness* is the degree to which the offense is warranted.

The first part of the test *deconstructs the offense* by:

- (1) identifying the trigger that must be judged as highly offensive;
- (2) properly framing the offense within its context; and
- (3) understanding the potential consequences of the trigger and the ensuing offense.

The second part of the tests attempts to *judge the offensiveness* and determine whether any mitigating factors justify it, by examining:

- (4) the privacy interests, rights, and risks implicated by the trigger;
- (5) the reasonableness of the offense from the perspective of a similarly situated individual;
- (6) the foreseeability at the time of the offense that the trigger would outrage strangers; and

314. FEINBERG, *supra* note 33, at 26; SNEDDON, *supra* note 12, at 226; *see infra* Appendix B.

315. FEINBERG, *supra* note 33, at 26.

316. SNEDDON, *supra* note 12, at 226.

317. FEINBERG, *supra* note 33, at 26 (stating that the seriousness of the offense should be weighed against the "social value" of the offending party's conduct, "remembering always the enormous social utility of unhampered expression").

(7) the trigger's social utility.

While recognizing the practicalities of shorter tests, like the *Miller-Hill-Hernandez* trilogy factor-based tests, the rubric is more expansive to ensure the factfinder laboriously takes apart the offense, considers all relevant information, and confronts any biases in articulating and passing judgment on the offense.

This rubric is elaborated in Part A and then put into practice in a series of examples in Part B.

* * *

Deconstructing the Offense

The first three inquiries are meant to assist the court or factfinder in understanding the nature of the offense and its potential harm. This rubric is a step-by-step analysis aimed at deconstructing the offense at issue and the source of its offensiveness while avoiding the critical traps discussed in Part I. The rubric also explicitly disassociates harm from the analysis and instead looks to the potential consequences of the offense alleged.

1. Conduct or Content? *According to the elements of the tort pleaded, what is the trigger (intrusion, matter disclosed, false light) that must be judged highly offensive?*

Our research reveals that courts sometimes analyze the offensiveness of the wrong aspect of the plaintiff's claim.³¹⁸ This first question thus instructs the jurist or factfinder to identify the tort at hand and ensure it is evaluating the offensiveness of the right behavior or matter. Intrusion upon seclusion, in its most common form as embodied in the Restatement, requires the act of invasion itself to be offensive, not the information gleaned because of the intrusion.³¹⁹ In a public-disclosure-of-private-facts claim, it is the *content* of the private matter disclosed that must be highly offensive, not *how* the information was obtained. And in a false-light claim, the false light in which the plaintiff was placed because of the publication must be offensive, not the publication itself.

2. Context Framing: *In one sentence, what is the trigger? What factor or combination of factors could have conspired to make the trigger allegedly offensive?*

The offensiveness analysis goes invariably awry when courts or litigants fail to properly identify and frame the trigger or source of the offense. Leaving out relevant contextual facts, for example, causes what would otherwise be an offensive invasion or disclosure to appear innocuous.

318. See *supra* Part II.A.

319. SECOND RESTATEMENT, *supra* note 9, § 652B.

Decision-makers also ought to inquire about the factors—explicit or implicit—that contributed to the offense. Sometimes seemingly innocuous events can be elevated to highly offensive based on a combination of contributing contextual factors. Although the privacy torts demand that the subjective impressions of the aggrieved be put to the side, engaging in a deep contextual analysis regarding the identities, relationships, and circumstances around the offense allows us to properly understand whether the ensuing composite sketch would be offensive to a reasonable person. What other factors may be driving the conclusion of offensiveness?

The following is a non-exhaustive list of possible factors that may make a particular action particularly offensive to a plaintiff. Factors may include:

- The identity of the offender;
- The relationship between the parties (i.e., an employer, a person or entity with unequal bargaining power, a person with whom the plaintiff had a relationship of trust, a doctor, a friend, etc.);³²⁰
- The relevant social identities of the offended party (i.e., their age, gender, race, disability, sexual orientation, etc.);³²¹
- The magnitude and duration of the offense;³²²
- The trigger's foreseeability or element of surprise;
- The defendant's intent to offend or cause harm;
- Whether the defendant engaged in deceit; or
- Whether any intimidating, belittling, threatening conduct, etc. was present.

When a plaintiff articulates these or a court can infer them, it makes the claimed offense, regardless of its reasonableness, more digestible. Moreover, requiring the court and factfinder to identify the trigger in one sentence ensures both a succinct and clear evaluation of what the plaintiff specifically has identified as the trigger of their offense and found to be offensive. The

320. Researchers have found that the closer the relationship between the offender and offended party, the more deeply the offense is triggered and felt. See generally Isabella Poggi & Francesca D'Errico, *Feeling Offended: A Blow to Our Image and Social Relationships*, 8 FRONTIERS PSYCH. 1 (2018) (discussing how the feeling of offense extends beyond honor and public image to close relationships and challenges to our personal value).

321. See Post, *supra* note 22, at 984 (noting that because torts draw on social norms and norms are context specific, an inquiry into offensiveness requires an inquiry into the context of a disclosure such as: “[T]he social occasion, the purpose, timing, and status of the person who makes the disclosure, the status and purposes of the addressee of the disclosure and so on” (citation omitted)); Sonja R. West, *The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy*, 67 WASH. & LEE L. REV. 589, 632 (2010) (noting identity of plaintiff and other context can affect offensiveness analysis).

322. See McClurg, *supra* note 22, at 1063 (noting an offense can be magnified or more offensive depending on its magnitude, duration, and “other factors that accentuate its dimensions”).

factfinder should then ask the same question and determine whether they would identify the same or additional factors that contributed to the plaintiff's offense.

It is important to note that at this point, the analysis is agnostic. We are simply listing the situational aggravating factors that contributed to the plaintiff's offense, which is a critical first step. Later, we can decide whether the factors that aggravate the plaintiff's offense are legitimate or worth validating. Recall the exposition of *Masterpiece Cake*, where Justice Ginsburg, in her dissent, distinguished an offense based on a person's homosexual identity from one based on the expression of a political message.³²³ Similarly, in *Doe v. Boyertown Area School District*,³²⁴ parents of cisgender students complained that the mere presence of transgender students in locker rooms and bathrooms was a highly offensive privacy intrusion.³²⁵ By deconstructing the roots of the trigger—in this case, not conduct, but rather the gender identity of the alleged “intruder”—the Third Circuit reached the conclusion that the presence of transgender students was not highly offensive to a reasonable person.³²⁶

3. Consequences: *Keeping in mind that actual harm is not required as an element of the torts, what are the current and potential consequences of the type of trigger and offense alleged?*

This question asks the factfinder to consider the harmful consequences that *could* have resulted from the trigger or a similar trigger to the one causing offense in the instant case.³²⁷ For example, a Peeping Tom, illicitly peering into his neighbor's bedroom, could have only observed something mundane, like vacuuming. However, he *could* have also observed exceedingly more private and intimate acts. This question thus attempts to divorce the harm produced from the potential harmfulness of the act itself. These harms may include, as Professors Citron and Solove recently identified: physical, economic, reputational, emotional, relationship, censoring, discriminatory, expectational, loss of control, data quality and integrity, informational, data vulnerability, disturbance, and autonomy harms.³²⁸

In his comprehensive analysis of offense, philosopher Joel Feinberg classifies six clusters of offended states caused by the blamable conduct of others: (1) affronts to the senses, or an unpleasant experience related to sound, color, or odor (i.e., fingernails grating a chalkboard); (2) disgust and revulsion,

323. See *supra* text accompanying notes 109–10.

324. 897 F.3d 518 (3d Cir. 2018).

325. *Id.* at 525.

326. *Id.* at 537.

327. Solove, “*I’ve Got Nothing to Hide*,” *supra* note 135, at 769 (observing struggles ensuing in recognizing privacy harms that do not result in embarrassment, humiliation, or physical or psychological injury).

328. Citron & Solove, *supra* note 128, at 831.

which involves a higher order recognition that the subject is wrong or inappropriate (i.e., a person eating a putrid slug); (3) shock to moral, religious, or patriotic sensibilities (i.e., burning a cross or flag); (4) shame, embarrassment, and anxiety (i.e., unconsented-to circulation of nude pictures of oneself); (5) annoyance, boredom, and frustration (i.e., incessant robocalls); and (6) fear, resentment, humiliation, and anger (i.e., threats, taunting, and contemptuous mockery).³²⁹ By classifying the offense within the offended clusters, we gain further understanding of the offense and its potential consequences.

This prong of the rubric recognizes that privacy harms matter regardless of whether the plaintiff can demonstrate a tangible injury.³³⁰ And, similar to Sneddon's scorecard, it directs the factfinder to look not just to the harm caused by the trigger, but to the risk the trigger poses to an individual's way of life or rights.³³¹ In many instances, the harm is decipherably manifested because it causes either observable physical or psychic harm, such as mental anguish or injury to the plaintiff's reputation. But in other instances, it may instead increase the likelihood of eventual harm, such as the potential use of the aggregation of private data.

This inquiry, like Feinberg's offense principle, also requires the factfinder to consider the intensity and durability of the potential consequences.

Judging the Offense

Upon understanding the trigger, the plaintiff's offense, and the trigger's potentially harmful effects, the factfinder is better equipped to judge the trigger's offensiveness. This necessarily involves an identification and evaluation of the rights implicated, a mindful assessment of the reasonableness of the offense, a consideration of the outraged reaction of strangers, and, finally, a potentially forgiving look at the trigger's social utility. Throughout, we frame questions to serve as checks and balances on potentially encroaching biases.

4. Rights: *What interest or right did the trigger impinge?*

The work of Andrew von Hirsch reminds us to make explicit a legitimate underlying interest implicated by any breach of social norms.³³² In evaluating offensiveness, it is important to understand what legitimate right(s) and/or interest(s) of the aggrieved have been impinged by the trigger or the offense. To be clear, the offense itself, at a minimum, will always implicate the aggrieved's interest in being free from bad feelings. But this is not, on its own

329. FEINBERG, *supra* note 33, at 10–13.

330. Post, *supra* note 22, at 964–67.

331. SNEDDON, *supra* note 12, at 224–43 (looking to symbolic risk and its extent).

332. von Hirsch, *The Offense Principle*, *supra* note 229, at 85.

without more, an interest that tort law can remedy. As we have established, anything you do can subjectively elicit bad feelings in me.

Instead, we analyze the trigger. This involves a two-part inquiry that first seeks to identify the moral or political interests that are implicated and then assesses their legitimacy. Some legitimate privacy interests include autonomy, honor, identity, safety, mental health and welfare, intimacy, exposure, and dignity. Less legitimate interests or ones that should not weigh heavily in favor of the plaintiff as a matter of public policy might include a desire to silence public information, hide misconduct in the workplace, impose a personal worldview on others, or maintain economic privilege.

5. Reasonableness: *Putting yourself in the place of a similarly situated plaintiff, could the offense be reasonable?*

Now we turn to the reasonableness of the offense, with a twist. Much has been written about the inherent subjectivity of offensiveness, which the law rejects. In privacy tort law, requiring the offense to be reasonable filters out personal idiosyncrasies, sensitivities, and fleeting discomfort in favor of what is socially recognized as an offense and thus warranted.³³³ As Prosser put it, “[t]he law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive.”³³⁴ But judging the reasonableness of offensiveness, like outrage, can be subject to the perception of privileged decision-makers.³³⁵ Indeed, Prosser found no cause for outrage when men advanced explicit and even vulgar solicitations to have sex, which he classified as nothing more than an “annoyance[.]” not capable of causing severe distress.³³⁶

Assessing reasonableness is rife for potential bias. Often, particularly when applying the reasonable *man* standard, courts seem to overlook the trigger’s potential offense to a similarly situated plaintiff.³³⁷ *Penthouse* magazine

333. See *Boring v. Google, Inc.*, 362 F. App’x 273, 279 (3d Cir. 2010) (finding that a Google StreetView vehicle entering onto an ungated driveway and photographing the property was not offensive because “[n]o person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result”); SECOND RESTATEMENT, *supra* note 9, § 652B, cmt. d (“Thus there is no liability for knocking at the plaintiff’s door.”).

334. Prosser, *supra* note 40, at 397.

335. Chamallas, *Discrimination and Outrage*, *supra* note 30, at 2122–23 (noting that courts applying the outrageousness prong of the intentional-infliction-of-emotional-distress tort were historically inclined to protect male and white privilege, refusing to find sexual harassment or discriminatory treatment as outrageous).

336. *Id.* at 2155 (quoting William Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 888 (1939)).

337. See Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 20–25 (1988) (noting the “reasonable man” standard, which later evolved to the “reasonable person” standard, has its roots in a legal system and culture that is focused on male-centered norms that does not recognize women as reasonable and arguing the standard should change to one of adequate care); Lucinda M. Finley, *A Break in the Silence: Including Women’s Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 57–65 (1989) (discussing persisting gender bias in the “reasonable person” standard).

published a picture of a group of tween girls under the title “Little Amazons Attack Boys,” suggesting they were masculine and aggressive in nature.³³⁸ When their parents objected to the false light and their young daughters’ appearance in an oversexualized magazine, the court concluded that the characterization could not possibly “be objectionable to the ordinary reasonable *man* under the circumstances.”³³⁹ In the name of objectivity and reasonableness, we cannot abandon those in the minority, who are often disproportionately affected by privacy harms.

Acknowledging that we cannot eliminate personal or structural bias with a certainty, we propose a mental model of reframing the question to reduce it where possible. This part of the analysis is meant to place the factfinder in the position of the offended party. To avoid exercising judgment that “is divorced from its context,” one noted jurist has suggested that courts should assess whether reasonable similarly situated plaintiffs would find the trigger offensive.³⁴⁰ Studies have shown that one of the most effective ways to “debias” people is to induce participants to create a mental model to actively consider alternative perspectives, arguments, and conclusions.³⁴¹ Taking a different perspective forces the arbiters to articulate in a conscious manner the assumptions they would otherwise silently, unknowingly, or implicitly make, while respecting the elements of the tort.³⁴²

338. *Fudge v. Penthouse Int’l, Ltd.*, 840 F.2d 1012, 1014 (1st Cir. 1988).

339. *Id.* at 1019 (emphasis added) (internal quotations omitted) (quoting tit. 9 R.I. GEN. LAWS ANN. § 9-1-28.1(a)(4)(B) (Westlaw through 2022 Legis. Sess.)); see also *IMM Publ’ns, Inc. v. Lamar Obie Corp.*, No. CV 09-937-PK, 2010 WL 1838654, at *3 (D. Or. Mar. 30, 2010), *report and recommendation adopted*, No. 09-937-PK, 2010 WL 1838619 (D. Or. May 6, 2010) (noting court would consider the reasonable person, not the reasonable minority business owner and advocate’s interpretation of whether the publicity was highly offensive).

340. *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 AC (HL) 457, [¶¶ 98–99] (UK); see also Tigran Palyan, Comment, *Common Law Privacy in a Not So Common World: Prospects for the Tort of Intrusion upon Seclusion in Virtual Worlds*, 38 SW. L. REV. 167, 189–90 (2008) (arguing the reasonable avatar standard should be applied for intrusion claims in virtual worlds to properly gauge the offensiveness of the alleged conduct).

341. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 543–44 (2004).

342. See Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39, 44 (2018) (expressing hope tort law will have a #MeToo moment that will cause the common law to disrupt, rather than reinforce, gender inequality); Chamallas, *Architecture of Bias*, *supra* note 30, at 466 (noting that gender and racial bias make their way into the law not explicitly, but rather by the privileged majority’s reliance on implicit hierarchies of values); Lidsky, *supra* note 157, at 48 (noting the real problem is that judges make “value choices . . . in an unreflective manner, based on assumptions about community life presumed to be so common they need not be stated”); Banks, *supra* note 30, at 443 (noting the undiscussed prejudicial impact of race, culture, class, and gender in tort cases).

6. Reaction: *To what extent could it be anticipated, at the time of the offense, that the reaction of strangers to the trigger would be one of outrage? Why?*

Joel Feinberg, Martha Nussbaum, Andrew von Hirsch, and others have put forth compelling arguments against a bare appeal to community mores as a basis for finding offensiveness. We all know norms can be mistaken, indeterminate, fluid, and even immoral.³⁴³ And the offensiveness analysis cannot be stripped of its inherently normative roots. However, it is not the role of the judiciary to invent norms, but rather to interpret the sense of the community in an honest and just manner, with as much clarity as possible.

Examining the reaction of strangers is Feinberg's barometer for social norms. Feinberg argues that the use of widespread affront is a better indicator because it reflects community standards while limiting legal moralism.³⁴⁴ Our Question 6 borrows this notion from Feinberg while replacing his language of "repugnance"³⁴⁵ with Nussbaum's carefully considered metric for offensiveness: outrage. As discussed in Part II, Nussbaum warns of the use of emotions, such as shame, disgust, and repugnance, as a basis for law because they carry moral baggage without moral reasoning. Outrage, in contrast, as we see in some iterations of offensiveness analyses, is expressly justifiable. Professor Cass Sunstein proposes that judicial humility requires courts to be sensitive to community outrage.³⁴⁶ Such humility counsels that when a decision could foreseeably provoke such outrage, which functions as a corrective heuristic, it is at least an indication that the decision might be wrong.³⁴⁷ Professors Kahan, Hoffman, and Braman argue humility also requires courts to consider whether privileging their own "obvious" views sends a discriminatory message to outraged members of minority communities.³⁴⁸

This question asks judges to engage in a narrower mental exercise compared to a straightforward normative question. It enlists the perceived wisdom of the crowd. At later stages in litigation, objective criteria could be invoked as evidence of widely held reactions, which are slightly more measurable than beliefs and values. Objective criteria might include surveys,

343. NUSSBAUM, HIDING FROM HUMANITY, *supra* note 33, at 33; Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905, 959 (2005) (noting that torts may cause greater psychic harms to racial minorities subjected to constant racism).

344. FEINBERG, *supra* note 33, at 14; *see also* Blanke, *supra* note 287, at 9 (noting public outrage shapes new privacy norms).

345. *See infra* Appendix A.

346. Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 155 (2007).

347. *Id.* at 175–78.

348. Kahan et al., *supra* note 30, at 899.

news stories, studies, similar suits filed where others have alleged the same or similar conduct or content to be offensive, expert testimony or reports, etc.³⁴⁹

On the other hand, if strangers do not have a uniform or clear hypothetical reaction of outrage, or if the arbiter does not have enough information to imagine a result due to incipient norms, the matter should be left to a jury to decide. The jury can then consider evidence, such as expert reports, surveys, and other data otherwise unavailable at the pleading stage.

7. Recalibrating: *What is the social utility of the trigger and how does it measure against the plaintiff's privacy?*

Finally, the factfinder is tasked with weighing the trigger's social utility against the plaintiff's privacy interests.³⁵⁰ While this balancing of interests is not a novel concept,³⁵¹ courts often overlook the plaintiff's interest when the defendant can muster a non-nefarious motive for the trigger. The current *Miller* and *Hernandez* offensiveness tests instruct courts to narrowly focus on the defendant's motives, objectives, and justifications.³⁵² But while a defendant's motives may factor into a trigger's social utility, they are not dispositive. It could also be that a defendant has spiteful motives, but the triggering conduct promotes social utility or that a defendant has noble motives, but the trigger does not promote social utility. This final question thus takes the broader approach embodied in Feinberg's test and Sneddon's scorecard that look respectively to the trigger's social value³⁵³ and positive considerations.³⁵⁴

349. This evidence, however, is often difficult to gather, and putting the burden on the plaintiff to present it at the pleading stage far exceeds the federal and state pleading standards, which only require a plaintiff to make a short and plain statement of the claim that demonstrates he or she is entitled to relief. See FED. R. CIV. P. 8(a); FLA. R. CIV. P. 1.110(b); see also Lidsky, *supra* note 157, at 7 (noting courts rarely resort to objective criteria such as polls or surveys and instead rely on their visceral feelings and common sense in determining community norms).

350. See Solove, "I've Got Nothing to Hide," *supra* note 135, at 763 (noting that "[p]rivacy issues involve balancing societal interests on both sides of the scale").

351. See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1235 (7th Cir. 1993) ("The public has a legitimate interest in sexuality, but that interest may be outweighed in such a case by the injury to the sensibilities of the persons made use of by the author in such a way."); Solove, *Virtues of Knowing Less*, *supra* note 158, at 1058–59 (proposing a balancing approach that weighs the value of the plaintiff's interest against the "value of the use of the information in the context in which it is disclosed"); Strahilevitz, *supra* note 115, at 2032 (observing that Posner, Warren, and Brandeis insert a welfarist balancing test on offensiveness that asks whether "the gravity of the harm to the plaintiff's privacy interest [is] outweighed by a paramount public policy interest"); Sprague, *supra* note 43, at 126 (balancing the likelihood of serious harm to the victim with the countervailing interests of the defendant based on competing social norms); West, *supra* note 321, at 629–31 (noting offensiveness prong should "examine the purpose of the disclosure and discern whether the reason for the disclosure was of such minimal social or personal value that it does not justify the harm it has caused").

352. See *Hernandez v. Hillside, Inc.*, 47 P.3d 1063, 1080 (Cal. 2009); *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986).

353. FEINBERG, *supra* note 33, at 26.

354. SNEDDON, *supra* note 12, at 226.

Social utility is not limited to the defendant's motives. It recognizes legitimate public interests in First Amendment rights of speech and access to information and an employer's legitimate interest in maintaining a safe, drug and harassment free work environment, etc. But identifying these as promoting social utility is not the end of the inquiry. Social utility also implicates legitimate public interests in discouraging certain triggering offenses and protecting the public and individuals from the same. The overall social utility of the trigger must then be weighed against the individual rights and interests of the plaintiff identified in Question 4. Recalibrating prevents the trigger's social utility from being considered in a vacuum to determine its offensiveness. In making this determination, the factfinder should consider whether the same social utility could be achieved without the triggering offense or at a time, place, or manner that would have minimized or eliminated the offense.³⁵⁵

In addition to assisting the judiciary in determining whether, as a matter of law, the conduct or disclosure at issue *could* be highly offensive, this rubric also aids plaintiffs to plead their privacy tort claims in a clearer way. Moreover, the rubric can be tailored as jury instructions to assist the factfinder in concluding whether the privacy invasion is sufficiently offensive under the reasonable person standard. Outside the legal process, the rubric is applicable to decision-makers wishing to clarify the legitimacy of offensiveness complaints across contexts.

B. *Testing the Rubric: Three Sample Cases*

Applying the rubric to distinct fact patterns illustrates how its various inquiries can help courts tackle the privacy torts' offensiveness analysis. The three illustrations below are loosely based on documented cases, where courts, faced with similar scant factual allegations, were tasked with determining whether the trigger was sufficiently offensive to survive dismissal and proceed to a jury.

Illustration 1: Intruding Ex

Upon learning that his ex-wife Ashley is in a relationship with another woman named Valeria, Michael files a motion in family court to gain custody of the former couple's six-year-old daughter. To obtain proof of Ashley's relationship, Michael surreptitiously enters her property, perches himself outside the master bedroom, and records Ashley and Valeria having sex. He submits the video to the family court as evidence that Ashley is an unfit mother—and wins. Upon learning of the video, Valeria feels angry, shamed, and violated by the furtive act. She suffers constant anxiety and insecurity at

355. FEINBERG, *supra* note 33, at 26 (considering “the availability of alternative times and places where the conduct in question would cause less offense”).

the thought that someone might be surveilling her at any moment. Valeria sues Michael, claiming intrusion upon seclusion.³⁵⁶

1. *Conduct or Content?*: In cases of intrusion upon seclusion, the court must find the conduct of the intrusion to be highly offensive to a reasonable person. Since Valeria is not suing for public disclosure of private facts, the content of the video does not have to be analyzed.

2. *Context Framing*: Defendant trespassed to secretly peer through plaintiff's bedroom window and film her and her partner naked, having sex. Factors that could have potentially aggravated the offense include its setting: a bedroom in a private dwelling, the intimate conduct plaintiff was engaged in during the intrusion, the plaintiff's vulnerable, naked state, the identity of the defendant as her lover's ex, his motives for spying and taking the picture, plaintiff's element of surprise and lack of awareness of his presence, and the defendant's implication that the women's sexuality affected Ashley's fitness as a mother.

3. *Consequence*: Plaintiff suffered anxiety and lived with incessant unease that she might be surveilled. The fact that the recording exists also presents a risk of further harm, should it be further disseminated.

4. *Rights*: Plaintiff's right to seclusion, security, dignity, and intimacy were invaded.

5. *Reasonableness*: Most reasonable people—men and women alike—would object to being secretly filmed while having sex.

6. *Reaction*: Would strangers react with outrage at the notion of being surreptitiously filmed while having sex? Given the vast majority of case law and examples from the Restatement that suggest a person is most entitled to seclusion in their own private residence and when engaging in private, intimate acts, it is foreseeable that most strangers would be outraged.

7. *Recalibrating*: The defendant's motives in gaining custody of his minor child, however rationalized, do not absolve his conduct of trespassing and intrusion into a private dwelling and bedroom. Nothing in the fact pattern suggests that this is a matter of public concern. Ashley's conduct was not illegal and there is no indication that the child was endangered by her mother's actions. Moreover, the defendant could have sought evidence about his wife's fitness as a mother through proper channels of discovery.

Based on the analysis above, the defendant's conduct could be deemed highly offensive to a reasonable person.

356. Based on *Plaxico v. Michaels*, 96-CA-00791-SCT, 735 So. 2d 1036 (Miss. 1999) (en banc).

Illustration 2: Triggering Triggers

Jasmine purchases an Alfred smart device manufactured by Smart Electronics for her home. Upon calling out the trigger name “Alfred,” the device performs specified commands, which include operating smart lights, changing the room temperature, and performing simple internet searches. Unbeknownst to Jasmine, the smart device is constantly recording sounds and conversations, not just trigger commands. Alfred’s lengthy manual and privacy policy indicate that the device may be actively listening and recording to improve the smart device’s technology. Upon learning of this surveillance functionality from an alarming news article, Jasmine is outraged and worried about the content of Alfred’s recordings. She files suit, along with other purchasers of the device, against Smart Electronics. Smart Electronics moves to dismiss the case. It argues that the Alfred’s listening and recording cannot possibly be deemed highly offensive because the information collected is only analyzed by automated machines and the practice is common in the industry.³⁵⁷

1. *Conduct or Content*: The intruding conduct must be analyzed, not the content of the conversations, noises, or silences surveilled and recorded.

2. *Contextual Framing*: Defendant’s intrusion consists of listening to and recording all the plaintiff’s conversations and sounds. Factors that could have potentially aggravated the offense include the location of the recording (plaintiff’s home) and the plaintiff’s lack of knowledge and control over the recordings. The court may want to know how often the Alfred was recording, whether the recordings are deleted after being analyzed by a machine, and the location of the Alfred in the plaintiff’s home, etc.

3. *Consequence*: Plaintiff’s conversations, sounds, noises, and silences have been recorded and are being preserved in some format for an unknown period of time. It is unknown how Smart Electronics will later use this information, though it claims it is currently only being examined by computers. It is also unknown what conversations, noises, sounds, and silences remain recorded. These recordings could also later be shared with or sold to other third parties. Depending on the identity of those third parties and their use, the recordings could cause further harm.

4. *Rights*: Plaintiff’s right to seclusion, security, control, and intimacy were invaded.

5. *Reasonableness*: Most reasonable people—women and men, purchasers and non-purchasers of the Alfred—would object to being secretly recorded.

6. *Reaction*: Would strangers be outraged at the notion of a constantly recording listening device in their homes? Given the news article’s alarming tone regarding the practice, the fact that the intrusion occurred in the plaintiff’s

357. Based on *In re Google Assistant Priv. Litig.*, 457 F.Supp.3d 797 (N.D. Cal. 2020).

home, and the plaintiff's and other consumers' complaints, it is foreseeable that the intrusion could be highly offensive. If, however, this is, as the defendant claims, a routine commercial practice that everyone in the industry uses *and* consumers are generally aware these devices constantly listen in and record conversations, it is possible strangers might not be outraged. It is also unclear how strangers might react to the recordings being analyzed only by a machine, as opposed to human beings. Considering the technology's burgeoning state, the plaintiff's potential complaint, and the developing social norms surrounding such technology, it is difficult to gauge the reaction of strangers at the time of the intrusion without more data and evidence.

7. *Recalibrating*: Defendant claims to be using the Alfred to listen and record plaintiff and other consumers for legitimate business reasons—to improve the quality and effectiveness of its product. Do these commercial motives justify the degree of the intrusion into plaintiff's home, conversations, noises, and silences and trump her rights to seclusion, intimacy, and security? Could the defendant have improved the quality and effectiveness of its product through other, less intrusive means? Is the public best served by allowing smart device manufacturers to continue such business practices?

Given the nascent nature of the technology and the inability to determine the reaction of strangers, whether the intrusion is highly offensive or not should be developed by more evidence than is available at the dismissal stage and should ultimately be determined by a jury.

Illustration 3: Debts and Diagnosis

Guillermo's son, Felipe, was born with cryptorchidism, a condition affecting the testicles. When Felipe was seven, he had a successful surgery to correct the issue at Mammoth Pediatric Hospital ("Mammoth"). Although most of the cost of the surgery was covered by Guillermo's insurance, Guillermo could not pay the additional \$8,398.54 in charges not covered by his insurance. Subsequently, the hospital transferred the debt to Priority Collection Services ("Priority"). To collect the debt, Priority partnered with various third-party vendors, who generated collection letters. Priority electronically sent the following information: Guillermo's full name, address, status as a debtor, the \$8,398.54 owed, the procedure to correct Felipe's cryptorchidism diagnosis, and Felipe's full name. One of the vendors subsequently sent Guillermo a "dunning" letter that included all of this information. After the mail-person misdelivered the letter, a nosy neighbor opened it, read it, and revealed his discovery to Guillermo. Guillermo was ashamed and feared that the disclosure will cause Felipe to suffer from shame, depression, low self-esteem, or other

issues. Guillermo sued Priority for public disclosure of private facts on behalf of himself and his minor son Felipe.³⁵⁸

1. *Conduct or Content?*: In cases of public disclosure of private facts, the court must find the matter publicized to be highly offensive to a reasonable person. Since Guillermo is not suing for intrusion upon seclusion, the manner in which the information was obtained by the defendant is not relevant.

2. *Context Framing*: Priority disclosed to various third-party companies that Guillermo owed a sizeable amount of money to Mammoth resulting from Felipe's surgery to repair cryptorchidism. Factors that could potentially have aggravated Guillermo's offense include the sensitive and potentially embarrassing nature of his son's medical condition and treatment and the fact that sensitive information about a minor was shared. Furthermore, it does not seem necessary to have included Felipe's treatment or condition in the letter to notify Guillermo of the debt and attempt to collect on the same.

3. *Consequence*: Plaintiff suffered emotional stress and fears the potential of future revelations. The fact that this information is now being stored electronically by multiple companies, which at least some employees also have access to, makes it more likely that it could be further disseminated. It has already been accidentally disseminated to Guillermo's neighbor, which caused Guillermo mental anguish. Further disclosure, or potential therefor, could be damaging to both Guillermo and his son's mental health and his son's intimacy.

4. *Rights*: Plaintiffs' right to dignity, ability to control the destination of sensitive financial and medical information, mental health, and honor were implicated because of Priority's disclosures.

5. *Reasonableness*: Most reasonable people would object to having extensive information shared about their financial indebtedness and would strongly object to having information disclosed about a potentially embarrassing medical condition and treatment of the same. And most reasonable people—parents and non-parents alike—would not want a minor child's medical information shared without consent.

6. *Reaction*: Would strangers react with outrage at the notion of having their debt, source of debt, and child's urological medical condition disclosed? The vast majority of case law and examples from the Restatement suggest it would be offensive to have certain embarrassing financial and medical information disclosed.³⁵⁹ It is unclear whether the disclosure to certain third-

358. Based on *Hunstein v. Preferred Collection & Mgmt. Serv., Inc.*, 994 F.3d 1341 (11th Cir. 2021), *opinion vacated and superseded on rehearing*, 17 F.4th 1016 (11th Cir. 2021), *rehearing en banc granted*, *opinion vacated*, 17 F. 4th 1103 (11th Cir. 2021).

359. See, e.g., *Johnson v. K mart Corp.*, 723 N.E.2d 1192, 1197 (Ill. App. Ct. 2000) (finding disclosure of employee's health problems the kind of information the disclosure of which would be highly offensive); *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903–04 (Ill. App. Ct. 1990) (finding disclosure of plaintiff's mastectomy highly offensive); SECOND RESTATEMENT, *supra* note 9, § 652D,

party employees of Guillermo's indebtedness is enough to foresee outrage in strangers, but certainly it would be foreseeable that strangers would be outraged by the disclosure of a minor child's medical condition and surgery, particularly one involving genitals.

7. *Recalibrating*: Although Priority's motives are valid (recovering a debt), it neither required nor justified disclosing a minor's diagnosis or the nature of the medical procedure. Moreover, nothing in the fact pattern suggests that this is a matter of public concern.

Based on the analysis above, Priority's disclosures of Guillermo's son's diagnosis and the nature of his medical procedure were highly offensive, but it is unclear whether Priority's disclosure of Guillermo's indebtedness status and the amount of debt would be highly offensive to a reasonable person, given its disclosure was limited to those who needed the information to generate a letter. The issue should thus be decided by a jury.

CONCLUSION

As philosopher Andrew Sneddon put it, "[t]o be offensive is not to cause offense but to warrant it."³⁶⁰ The analysis of offensiveness is a black hole in privacy law. Mostly determined without exposition, it is at once inherently subjective yet measured by reasonableness, contextual yet generalized. Its determination requires an imaginative leap into the time, place, and consciousness of the public at large, amid shifting normative sands and ill-defined communities. At best, this disorder results in unexplained precedents; at worst, it may render premature, incorrect, or biased results that further disenfranchise already stigmatized and underprivileged victims. In privacy, rapidly evolving social norms, technologies, and related business practices further blur the offensiveness analysis. As of yet, no test or set of principles other than a cacophony of adjectives and generalized factors guides courts in their inquiry.

By carefully analyzing the current doctrinal landscape, we diagnosed critical traps inherent to the offensiveness analysis. It is our hope that courts, litigants, and other decision-makers heed our warning and become attentive to the concept's propensity to confound in cognizable ways. Next, we drew from philosophy, where offense and offensiveness have long been studied, for a better understanding of the offensiveness analysis. Philosophers offer us principles and definitional lenses with which to organize offensiveness while avoiding systemic injustice and legal error.

cmt. b, illus. 7 (example of publication of photograph taken of medical condition of plaintiff's child was highly offensive).

360. SNEDDON, *supra* note 12, at 14.

Borrowing these concepts and schemas, we proposed a practical-minded rubric to guide decision-makers. Each element of the rubric is designed to divorce the analysis from its critical traps and biases, while staying true to the spirit and letter of the privacy torts. More than ever, amid rapid social change and offensiveness outcries, our society craves rational guides to analyze the enigma that is offensiveness. Moral and social progress, as well as privacy, depend on it.

APPENDIX A

Frameworks from Law

The *Miller v. National Broadcasting Company* Factors

To determine offensiveness, courts should consider:

- (1) the degree of intrusion;
- (2) the context, conduct, and circumstances surrounding the intrusion;
- (3) the intruder's motives and objectives;
- (4) the setting into which the intrusion occurs; and
- (5) the expectations of those whose privacy is invaded.³⁶¹

The *Hill v. National Collegiate Athletic Association* Balancing Test

In addition to the *Miller* factors, courts should balance:

- (1) the likelihood of serious harm, particularly to the emotional sensibilities of the plaintiff, against
- (2) any countervailing interests based on competing social norms that may render the defendant's conduct inoffensive, such as a legitimate public interest in exposing serious crime.³⁶²

The *Hernandez v. Hillsides* Balancing Test

To determine offensiveness, courts should balance:

- (1) the degree and setting of the intrusion, which includes the place, time, and scope of the defendant's intrusion, against
- (2) the defendants' motives, justifications, and related issues.³⁶³

361. *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 678–79 (Cal. Ct. App. 1986).

362. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 647–48 (Cal. 1994).

363. *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1079 (Cal. 2009).

APPENDIX B

Frameworks from Philosophy

Joel Feinberg's Offensiveness Test

The seriousness of the offense should be determined by:

- (1) the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated to be the general reaction of strangers to the conduct displayed or represented (conduct offensive only to persons with an abnormal susceptibility to offense could not count as very offensive);
- (2) the ease with which unwilling witnesses can avoid the offensive displays; and
- (3) whether or not the witnesses have willingly assumed the risk of being offended.

These factors should be weighed as a group against the reasonableness of the offending party's conduct as determined by:

- (1) its personal importance to the actors themselves and its social value generally, remembering always the enormous social utility of unhampered expression in those cases where expression is involved;
- (2) the availability of alternative times in places where the conduct in question would cause less offense; and
- (3) the extent, if any, to which the offense is caused with spiteful motives.

Most factors can vary in degree or weight, not in absolutes.³⁶⁴

Andrew Sneddon's Offensiveness Scorecard

- a) Is there really a symbolic risk/insult in this act/object/utterance/etc.?
- b) What is the extent of the symbolic risk/insult?
- c) Can the way of living in question continue in anything like its current form under the present circumstances (assuming that all ways of living are somewhat flexible due to the interpretive contributions of the people who instantiate them)?
- d) Is the way of living in question worth continuing in its current form?
- e) What considerations, if any, count in favor of the offensive act/item/utterance/etc.?

364. FEINBERG, *supra* note 33, at 26–27.

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f) Will interference with the offensive act/item/utterance/etc. remove the risk; will redress for the offensive thing/behavior adequately rectify the insult?

g) Do other values limit or prohibit the performance of feasible measures to address the offensive risk/insult?³⁶⁵

365. SNEDDON, *supra* note 12, at 224–43.

APPENDIX C

Part I: Deconstructing the Offense

CONTENT OR CONDUCT?	<i>According to the elements of the tort pleaded, what is the trigger that must be judged highly offensive?</i>	Intrusion upon seclusion: act of intrusion Public disclosure: content of the private matter disclosed False light: false light in which the plaintiff was placed
CONTEXT FRAMING	<i>In one sentence, what is the trigger? What factor or combination of factors conspired to make the invasion offensive?</i>	Identity of the offender Relationship between the parties Relevant social identities of the offended party Magnitude and duration of the offense Trigger's foreseeability or element of surprise Defendant's intent to offend or cause harm Defendant's use of deceit Intimidating, belittling, threatening conduct
CONSEQUENCES	<i>Keeping in mind that actual harm is not required as an element of the torts, what are the current and potential consequences of the trigger alleged?</i>	

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Part II: Judging the Offense

RIGHTS	<i>What interest or right did the trigger impinge?</i>	Autonomy? Intimacy? Identity? Dignity? Others?
REASONABLE -NESS	<i>Putting yourself in the place of a similarly situated plaintiff, could the offense be reasonable?</i>	
REACTION	<i>To what extent could it be anticipated, at the time of the offense, that the reaction of strangers would be one of outrage to trigger and why?</i>	
RECALIBRAT -ING	<i>What is the social utility of the trigger and how does it measure against the plaintiff's privacy?</i>	Does the public or defendant have countervailing rights, such as freedom of speech or access to information? Does defendant have justifying motives and does the trigger serve the public interest? Could the countervailing interest have been satisfied through other less invasive means?

