

# Indiana Law Review

Volume 54

2021

Number 3

## NOTES

### THE DISCLOSURE TORT IN INDIANA: HOW A CONTEMPORARY TWIST COULD REVIVE A DORMANT REMEDY

ABBY DEMARE\*

#### INTRODUCTION

The precise contours of “privacy” are all but clear.<sup>1</sup> Arguably, it delineates a sphere of life dedicated to the contemplation of intimate, perhaps highly sensitive, matters. In reality, however, it seems that privacy is a matter of tangible concern, resolved and understood in relation to physical structures and dwellings.<sup>2</sup> Nonetheless, breaches to intangible spheres and facets of private life are just as real, and notably, harmful. And perhaps more crucially, the intangibles—our intimate thoughts or sensitive medical information—store most, if not all, of our private information.<sup>3</sup>

Fortunately, victims of intangible privacy breaches can obtain recovery in a

---

\* J.D. Candidate, 2021, Indiana University Robert H. McKinney School of Law; B.A. 2018, Furman University – Greenville, South Carolina. Thank you to my faculty advisor, Professor Gerard Magliocca, for his insight and guidance throughout the note-writing process.

1. See generally Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1099-1123 (2002) (examining different conceptions of privacy); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (arguing that individuals desire privacy to promote autonomy, emotional release, self-evaluation, and a space for protected communication).

2. See, e.g., U.S. CONST. amend. IV (providing that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”); *Katz v. United States*, 389 U.S. 347, 351 (1967) (providing that the Fourth Amendment protects the private status of “people, not places”); RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977) (proposing four privacy torts, still in effect today).

3. See, e.g., Nuala O’Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN REL. (Jan. 30, 2018), <https://www.cfr.org/report/reforming-us-approach-data-protection> [<https://perma.cc/P68M-WST6>] (contending that “[a] more comprehensive legal framework is needed: one that offers a mix of incentives for better security practices, disclosures, and individual protections”); cf. Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CAL. L. REV. 805, 854 (2016) (arguing that each of us has a “digital curtilage” that protects our data and private information, and that like physical curtilage, it could enjoy Fourth Amendment protection).

multitude of ways.<sup>4</sup> In fact, the majority of states have enacted privacy-related statutes, regulations, and many even recognize a robust class of privacy torts,<sup>5</sup> one of which is the tort of public disclosure of private facts.<sup>6</sup> This tort covers a unique harm: injuries resulting from the unauthorized disclosure of fundamentally private, yet fully true, information.<sup>7</sup>

Superficially, imposing liability for the dissemination of true information conflicts with the First Amendment's free speech clause.<sup>8</sup> But two of the disclosure tort's elements—"newsworthiness" and "highly offensive"<sup>9</sup>—address First Amendment concerns and strike the necessary balance between protecting free speech and deterring unlawful dissemination of sensitive information.<sup>10</sup> At bottom, the disclosure tort embraces the following principle: in the absence of a legitimate purpose, the unauthorized access and dissemination of an individual's most sensitive information is not only unnecessary, but reprehensible.

In the state's seminal disclosure case, *Doe v. Methodist Hospital*, the Indiana Supreme Court declined to recognize the tort<sup>11</sup>—despite decades of support and recognition from the lower courts. In fact, Indiana remains one of five states that refuses to fully endorse the tort.<sup>12</sup> This Note argues that Indiana must crystallize the viability of the disclosure tort and, in so doing, adopt a "publicity" element cognizant of and responsive to contemporary challenges.

Part I of this Note considers the birth of the disclosure tort by way of examining its theoretical roots. Part II dissects the disclosure tort's four elements: private facts, publicity, highly offensive, and newsworthiness. Part III explores the viability of the disclosure tort in Indiana by way of examining *Doe v. Methodist Hospital*,<sup>13</sup> along with pre- and post-*Doe* case law. After considering the existence of the disclosure tort pre- and post-*Doe*, Part IV will argue that Indiana must revive the disclosure tort and, in so doing, reconceptualize the tort's "publicity" element in a way that comports with the text of the Restatement yet

---

4. See STEPHEN P. MULLIGAN & CHRIS D. LINEBAUGH, CONG. RESEARCH SERV., R45631, DATA PROTECTION LAW: AN OVERVIEW (2019) (providing an exhaustive review of information privacy law at the tort, state, and federal levels).

5. *Id.* at 36-37.

6. Hereinafter referred to as the "disclosure tort."

7. RESTATEMENT (SECOND) OF TORTS § 652D.

8. See, e.g., Erwin Chemerinsky, *Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts*, 11 CHAP. L. REV. 423 (2007); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983); Jared A. Wilkerson, *Battle for the Disclosure Tort*, 49 CAL. W. L. REV. 231, 266-67 (2013).

9. RESTATEMENT (SECOND) OF TORTS § 652D cmt. c-d.

10. See Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 161-64 (1996) (contemplating the different newsworthiness tests).

11. *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 682 (Ind. 1997).

12. See, e.g., *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 703 (N.Y. 1993); *Brunson v. Ranks Army Store*, 73 N.W.2d 803, 806 (Neb. 1955); *Doe*, 690 N.E.2d at 682; *Hall v. Post*, 372 S.E.2d 711, 712 (N.C. 1988); *Evans v. Sturgill*, 430 F. Supp. 1209, 1213 (W.D. Va. 1977).

13. *Doe*, 690 N.E.2d at 681.

retains the spirit of the tort. Lastly, Part IV argues that the common law framework, as compared to a statutory scheme, is best-equipped to address disclosure-related harms.

#### I. THEORETICAL UNDERPINNINGS: THE BIRTH OF THE DISCLOSURE TORT

In “The Right to Privacy,” Samuel Warren and Louis Brandeis argued that it was time for courts to recognize a “more general right of the individual to be let alone.”<sup>14</sup> Warren and Brandeis identified that without a “right to privacy,”<sup>15</sup> the experience of privacy was largely reliant upon fervent hope and good fortune.<sup>16</sup> In essence, Warren and Brandeis called for the protection of intangible life: “thoughts, sentiments, and emotions.”<sup>17</sup>

Both at the time of its publication and in the years that followed, “The Right to Privacy” generated considerable discussion regarding the extent to which the legal system recognized privacy threats and resulting harms.<sup>18</sup> Largely, however, courts were reluctant to fully endorse the article’s substantive argument—recognition of the right to be left alone and a path of recourse for resulting violations.<sup>19</sup>

William Prosser observed that Warren and Brandeis’ proposal was largely unworkable for courts.<sup>20</sup> As a general principle, courts prefer to assess the legality of a claim when equipped with a rule or standard.<sup>21</sup> With this in mind, Prosser reimagined Warren and Brandeis’ proposal by delineating four, distinct sub-torts: (1) public disclosure of embarrassing private facts, (2) intrusion upon seclusion or solitude, (3) depiction of another in a false light, and (4) appropriation of another’s image for commercial gain.<sup>22</sup> While the sub-torts share a home under the “right to privacy” umbrella, each signifies a different privacy invasion, thereby addressing related, yet fully unique harms.<sup>23</sup>

In 1977, the Restatement (Second) of Torts adopted all four of Prosser’s

---

14. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

15. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 384 (1960) (discussing that for Warren and Brandeis, a right to privacy was “essential to the protection of private individuals against the outrageous and unjustifiable infliction of mental distress”).

16. *Id.*

17. *See* Warren & Brandeis, *supra* note 14, at 205.

18. Prosser, *supra* note 15, at 386 (observing that for decades, plaintiffs asserted invasion of privacy claims, and that the “right of privacy” was recognized “by the overwhelming majority of the American courts”).

19. *Id.* at 384-85.

20. *Id.*

21. *See generally* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644 (2014).

22. *See* Prosser, *supra* note 15, at 389.

23. *Id.* (noting further that despite their differences, each reinforces the right “to be let alone”) (quoting THOMAS M. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888)).

proposed privacy torts.<sup>24</sup> Suffice it to say, the very existence and further development of privacy tort law rests upon Warren and Brandeis' theoretical exploration of this so-called "right to privacy" and Prosser's related scholarship—which, in many respects, brought "The Right to Privacy" to life.

## II. DISSECTING THE DISCLOSURE TORT

### *A. The Disclosure Tort*

The disclosure tort provides a remedy for the unauthorized disclosure of private information when it reaches, or is sure to reach, the public.<sup>25</sup> The Restatement defines the disclosure tort as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.<sup>26</sup>

As is customary when asserting tort claims, failure to meet the requisite threshold for each of the tort's four elements—publicity, private facts, highly offensive, and newsworthiness—results in a failure to state a claim.<sup>27</sup> The Restatement's comments elucidate when a particular element is satisfied; however, many states have devised their own standards for the tort's elements. The following sub-sections dissect the disclosure tort by way of examining each element through the lens of the Restatement and notable state court interpretations.

*1. Publicity.*—Under the Restatement, satisfaction of the "publicity" element requires a showing that the matter was communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."<sup>28</sup> The Restatement further provides that "it is not an invasion . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons."<sup>29</sup> The "public at large" requirement effectively renders disclosures made to one person, two people, and generally small groups of people non-actionable.<sup>30</sup> Conversely, disclosures made by a mass media entity generally satisfy the "publicity" threshold with ease.<sup>31</sup>

---

24. RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977).

25. *Id.*

26. *Id.* § 652D. For a more in-depth discussion of the other privacy sub-torts, see Prosser, *supra* note 15.

27. See FED. R. CIV. P. 12(b)(6) and state equivalents.

28. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (further noting that for purposes of the disclosure tort, "publicity" is not synonymous with "publication").

29. *Id.*

30. *Id.*

31. *Id.* (noting that disclosures made by media platforms presumptively give publicity

David Elder, a privacy torts scholar, observes that many courts applying the Restatement's conception of publicity do so "in a knee-jerk fashion without analyzing . . . whether legitimate, or even compelling, reasons of public policy justify imposition of liability for egregious but limited disclosures."<sup>32</sup> In fact, many disclosure claims fail precisely because plaintiffs are unable to satisfy the Restatement's "publicity" showing.<sup>33</sup> A few courts share Elder's frustration concerning the Restatement's version of publicity. For example, in *Beaumont v. Brown*, the Michigan Supreme Court extended recognition to disclosures—when sufficiently private and offensive—when made to a "particular public."<sup>34</sup> For the court in *Beaumont*, too many disclosure claims fall prey to a "numbers game."<sup>35</sup>

Other courts have similarly rejected a numbers-oriented test for the publicity element, emphasizing that the facts of a particular case should be awarded greater weight when assessing whether disclosure of private information will survive under the tort.<sup>36</sup> In *Kinsey v. Macur*, a California appellate court reasoned that the extent to which a disclosure is given actionable "publicity" is inextricably tied to personally curated spheres of privacy, providing that claimants have a "right to define [their own] circle of intimacy."<sup>37</sup>

The Court of Appeals for the District of Columbia Circuit has adopted what might be the most liberal conception of "publicity" under the tort.<sup>38</sup> In *McSurely v. McClellan*, the court provided that "proof of disclosure to a very limited number of people when a special relationship exists between the plaintiff and the 'public' to whom the information has been disclosed" may be actionable under the disclosure tort.<sup>39</sup> In this particular case, the court found that the plaintiff and

---

considering their audience is generally the public at large).

32. DAVID A. ELDER, *PRIVACY TORTS* § 3:3 (2002 & Supp. 2019) (discussing the publicity requirement of the disclosure tort). Elder is critical of the Restatement's conception of "publicity," explaining, "[T]his unconscionable, ill-considered and artificial limitation was adopted in the pre-Internet age. Disclosures to a small number of people can now result in almost immediate dissemination on social media." *Id.* (citation omitted).

33. *Id.*

34. *Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977) ("An invasion . . . is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be . . . a particular public such as fellow employees, club members, church members, family, or neighbors, if the person were not a public figure.").

35. *Id.*

36. *See Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 377-80 (Colo. 1997) (providing, in pertinent part, that "there is no threshold number, which constitutes 'a large number' of persons"); *see also Karch v. BayBank FSB*, 794 A.2d 763, 774 (N.H. 2002) (reasoning that the trier of fact is in the best position to determine whether a disclosure of private information is sufficiently public).

37. *Kinsey v. Macur*, 165 Cal. Rptr. 608, 612 (Ct. App. 1980) (quoting *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 37 (Cal. 1971)).

38. *See McSurely v. McClellan*, 753 F.2d 88, 112-13 (D.C. Cir. 1985).

39. *Id.* at 112.

her spouse shared a special relationship.<sup>40</sup> The “special relationship” test has also gained traction in other courts, such as an Iowa federal court<sup>41</sup> and a Wisconsin appellate court.<sup>42</sup> Cases involving disclosures of sexually explicit content, such as images or videos, have also found the “special relationship” test particularly useful in their analyses of the publicity element.<sup>43</sup>

Although the principal inquiry under the publicity element is to determine whether the disclosure of private information was given unwanted publicity, a corresponding inquiry is the medium by which the information was made public.<sup>44</sup> Communications of private matters orally, by movie or television,<sup>45</sup> by radio broadcast,<sup>46</sup> and photographs<sup>47</sup> have been recognized under the tort. Ostensibly, disclosures made online and on various social-media platforms would also seem to suffice under the tort.<sup>48</sup>

2. *Private Facts*.—Under the disclosure tort, the information disclosed must be both factually true and privately held.<sup>49</sup> Accordingly, there will be no liability where a defendant “merely gives further publicity to information about the plaintiff[’s life] that is already public”<sup>50</sup> or where the matter is in plain or public

---

40. *Id.* at 112-13.

41. *See Hill v. MCI WorldCom Commc’ns, Inc.*, 141 F. Supp. 2d 1205, 1211-13 (S.D. Iowa 2001).

42. *See Pachowitz v. Ledoux*, 666 N.W.2d 88, 95-97 (Wis. Ct. App. 2003).

43. *See Peterson v. Moldofsky*, No. 07-2603-EFM, 2009 WL 3126229, at \*5 (D. Kan. Sept. 29, 2009) (highlighting the simplicity with which disclosures of sexually explicit content can be made to, at least in theory, “over a billion people”).

44. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (Am. Law Inst. 1977); *see also* Prosser, *supra* note 15, at 392-98.

45. *See, e.g., Tyne ex rel. Tyne v. Time Warner Entm’t Co.*, 204 F. Supp. 2d 1338, 1341 (M.D. Fla. 2002) (applying Florida law), *aff’d*, 425 F.3d 1363 (11th Cir. 2005); *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123-24 (N.D. Cal. 2002) (applying California law).

46. *See, e.g., Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845, 845-46 (N.D. Cal. 1939); *Wilson v. Grant*, 687 A.2d 1009, 1015 (N.J. Super. Ct. App. Div. 1996).

47. *See Daily Times Democrat v. Graham*, 162 So. 2d 474, 477 (Ala. 1964); *Zieve v. Hairston*, 598 S.E.2d 25, 30 (Ga. Ct. App. 2004).

48. *See C. Calhoun Walters, Comment, A Remedy for Online Exposure: Recognizing the Public-Disclosure Tort in North Carolina*, 37 CAMPBELL L. REV. 419, 439 (2015).

49. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b; *see also* Prosser, *supra* note 15, at 392-98.

50. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (discussing that, as a general rule, there is no liability when a plaintiff exposes him or herself to the public eye and a matter retrieved from such exposure is given further publicity); *see also* ELDER, *supra* note 32, § 3:5 (discussing that plaintiffs do not enjoy a reasonable expectation of privacy regarding matters properly situated in the public domain). Elder lists the following as examples of public record information: arrests, convictions, names and identities, profession, child’s name, ancestry, age, address, phone number, description of business activities, parental and marital status, deceased status, ownership and value of registered or recorded property, spouse’s suicide, civil filings and judgments, parent’s status as gay and HIV positive, and bankruptcy. *Id.*

view.<sup>51</sup> Furthermore, there is no liability where the information disclosed is a matter of public record.<sup>52</sup> Conversely, information that is not a matter of public record, such as income tax returns, enjoys a private status under the tort.<sup>53</sup>

By and large, courts encounter little difficulty when differentiating between private and public information. As a general rule, sexual relations and habits, financial information, debts, intimate anatomical parts, and gender corrective surgery are “private facts” under the disclosure tort.<sup>54</sup> Some courts, however, are less willing to recognize a matter as sufficiently private when the plaintiff, him or herself, publicized the matter—either directly or indirectly.<sup>55</sup> In such cases, courts may interpret the plaintiff’s disclosure as a waiver of his or her right to assert a disclosure claim in the event the matter is disseminated to an even larger audience.<sup>56</sup> The rationale is that once exposed to the public, the plaintiff does not enjoy the “right to choose the forum in which [the matter] was displayed.”<sup>57</sup> Put differently, the plaintiff had the opportunity not to disclose or to limit the disclosure; once disclosed, further publication of the content is beyond the scope of protection.

Situations in which the plaintiff chooses to disclose otherwise private information to a select group tend to implicate the degree to which the information was truly private. Nevertheless, some courts are willing to offer protection in the event the plaintiff created a clear and identifiable “zone of privacy,”<sup>58</sup> the boundaries of which suffered an unanticipated breach due to the defendant’s disclosure. To elaborate, a plaintiff’s zone of privacy is not diminished by virtue of it being shared but is instead redefined and reconstructed to include this new, personally curated audience.<sup>59</sup> Thus, if the defendant disclosed the information to those clearly situated outside the plaintiff’s zone of privacy, the information can still enjoy a “private” status.<sup>60</sup>

---

51. ELDER, *supra* note 32, § 3:5 (discussing the private facts requirement).

52. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (discussing that the following types of information are generally public record and thus not private: date of birth, marriage status, military record, license to practice medicine or law, driver’s license, and pleadings in a lawsuit); *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (formally recognizing the public-records exception).

53. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b; Prosser, *supra* note 15, at 392-98.

54. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b; Prosser, *supra* note 15, at 392-98; *see also* ELDER, *supra* note 32, § 3:5.

55. *See* ELDER, *supra* note 32, § 3:5.

56. *Id.*

57. *See* Brewer v. Hustler Magazine, Inc., 749 F.2d 527, 530 (9th Cir. 1984).

58. *See* Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 499-500 (Ga. Ct. App. 1994) (Beasley, J., concurring).

59. *Id.* at 500. The concurrence further explains, “The fact that plaintiff had brought selected people into the protected zone of privacy . . . did not necessarily erase the zone’s borders. . . . [T]he zone reserved was a fairly confined one, bounded by a relatively small expanse of private or discrete disclosure, as distinct from general public knowledge.” *Id.*

60. *See* ELDER, *supra* note 32, § 3:5.

Some courts support the proposition that individuals have the right to define the boundaries of their private lives.<sup>61</sup> Under this perspective, plaintiffs can demonstrate that a particular piece of information enjoyed a “limited privacy” status by showing that it was only accessible to a select few.<sup>62</sup> Here, the overarching consideration is whether the disclosure in question was made to a completely unexpected and unauthorized audience.<sup>63</sup>

3. *Highly Offensive*.—Upon demonstrating that private information was given unwanted publicity, the plaintiff must then prove that the matter disclosed was “highly offensive to the ordinary reasonable man.”<sup>64</sup> To this end, courts inquire into the accepted customs and the social mores of the plaintiff’s community; however, courts tend to defer to the jury, as fact-finder, to make the final determination.<sup>65</sup> The Restatement underscores that absolute privacy is unattainable; thus, the overarching goal of the disclosure tort is not to remedy every privacy disruption suffered by the plaintiff, even if it was the result of an unauthorized disclosure or seemingly private information.<sup>66</sup> Instead, the core interest of the tort is to provide a remedy for those disclosures which produce shame or humiliation to the person of ordinary sensibilities.<sup>67</sup>

Disclosures of indecent photographs and videos, psychiatric and medical information, as well as information concerning an individual’s sexual conduct, orientation, or status as victim of sexual assault are generally deemed “highly offensive” under the tort.<sup>68</sup> Conversely, disclosures of merely embarrassing or mildly offensive material are generally unlikely to satisfy the “highly offensive” element, as such disclosures do not “seriously offend [someone] of normal sensibilities.”<sup>69</sup>

4. *Newsworthiness*.—The fourth and final element of the tort asks whether the information disclosed was newsworthy. To satisfy the newsworthiness element, plaintiffs must demonstrate that the information disclosed was beyond the scope of public concern.<sup>70</sup> The fundamental function of the newsworthiness element is to ensure that a defendant’s First Amendment rights are properly weighed against the plaintiff’s privacy interest so as to prevent a “chilling effect” on free speech.<sup>71</sup>

Under the Restatement, the relative “newsworthiness” of a disclosure is based largely upon the “mores of the community.”<sup>72</sup> Courts following the Restatement

---

61. *Id.*

62. *Id.*

63. *Id.*

64. RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (Am. Law Inst. 1977).

65. *See id.*

66. *Id.*

67. *Id.*

68. *See* ELDER, *supra* note 32, § 3:6 (discussing the highly offensive requirement).

69. *Id.*

70. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. d.

71. *Id.*

72. *Id.* at cmt. g; *see also* Virgil v. Time, Inc., 527 F.2d 1122, 1128-30 (9th Cir. 1975)



approach tend to impose liability where the disclosure is tantamount to “a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.”<sup>73</sup> In effect, disclosures of private information may be actionable in one state but non-actionable in another by virtue of those states maintaining different, and perhaps conflicting, standards of decency.<sup>74</sup> Courts have developed numerous tests to assess the newsworthiness of a disclosure<sup>75</sup>: (1) leave it to the press,<sup>76</sup> (2) customs and conventions,<sup>77</sup> (3) nexus test,<sup>78</sup> (4) status-of-the-plaintiff,<sup>79</sup> (5) nature of the information,<sup>80</sup> and (6) California’s balancing approach.<sup>81</sup>

The “leave it to the press” approach, also known as “defer-to-the-media,” operates under the presumption that the matter disclosed is one within the realm of public concern.<sup>82</sup> For purposes of determining whether the matter is sufficiently newsworthy, courts following this approach tend to conflate matters of “public concern” with disclosures of which there might be a “public interest.”<sup>83</sup> The “leave it to the press” approach, therefore, is perhaps the most liberal lens through which to examine the newsworthiness of a disclosure and, accordingly, renders many disclosures of private information unactionable under the tort.

The “nexus” approach is essentially an extension of the Restatement’s newsworthiness model. In short, courts following this approach consider whether there is a nexus between the matter disclosed and a matter of legitimate public concern.<sup>84</sup> In contrast to the “leave it to the press” approach, “public interest” does not render a matter newsworthy. Instead, there must be an identifiable relationship between the disclosure and the matters with which the public is generally—and properly—concerned.<sup>85</sup>

For some courts, the newsworthiness element requires an inquiry into the

---

(discussing, as a matter of first impression, that “newsworthiness” determinations should be reserved for the jury, as such are in the best position to assess “community mores”); ELDER, *supra* note 32, § 3:17 (“some [r]evelations may be so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.”).

73. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h.

74. See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 564 (6th ed. 2018).

75. *Id.*; see also Dendy, *supra* note 10.

76. See ELDER, *supra* note 32, § 3:17 (discussing the newsworthiness element).

77. See *Virgil*, 527 F.2d at 1129 (applying the “customs and conventions of the community” approach to determine if the information was newsworthy).

78. See SOLOVE & SCHWARTZ, *supra* note 74.

79. See ELDER, *supra* note 32, § 3:17.

80. *Id.*

81. *Id.*

82. See Zimmerman, *supra* note 8, at 353.

83. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1003 (2003) [hereinafter Solove, *The Virtues of Knowing Less*].

84. See ELDER, *supra* note 32, § 3:17.

85. *Id.*

“status of the individual.”<sup>86</sup> Here, the relative “newsworthiness” of a disclosure hinges upon whether the plaintiff is a private or public person.<sup>87</sup> Moreover, courts adhering to the “status of the individual” approach presume that when the plaintiff is a public figure or public official, the information is likely one of public concern,<sup>88</sup> but only insofar as the matter disclosed has no legitimate relationship to the community at large.<sup>89</sup>

Rather than focusing on the private or public status of the plaintiff, the “nature of the information” approach examines the content of the disclosure.<sup>90</sup> The fundamental question for proponents of this model is whether the matter disclosed is one that contributes to “democratic self-governance.”<sup>91</sup> If a matter disclosed fails to facilitate any meaningful political disclosure, it is not of public concern and, therefore, is disqualified of any “newsworthy” status.<sup>92</sup> To illustrate, the “leave it to the press” approach is conceivably the most permissive newsworthy model while the “nature of the information” approach is likely the most stringent.

Under the California approach, courts consider three factors to determine if a matter disclosed is sufficiently “newsworthy:” (1) social value, (2) depth of the intrusion, and (3) status of the plaintiff.<sup>93</sup> Additionally, the California model includes a “decency limitation” which mirrors the Restatement model, as it calls for a “reasonable person” inquiry—whether the reasonable person in the plaintiff’s community would find a conflict between the community mores and the content of the disclosure.<sup>94</sup>

### *B. Viability of the Disclosure Tort*

A majority of states recognize the disclosure tort—either explicitly or implicitly.<sup>95</sup> But despite garnering widespread recognition, the following five

---

86. Solove, *The Virtues of Knowing Less*, *supra* note 83, at 1008.

87. See ELDER, *supra* note 32, § 3:17.

88. Critics of this approach note that proponents of the “status of the plaintiff” model treat public figures and public officials the same when, in fact, they are two entirely different categories of individuals, serving and functioning in the public sphere in very different ways. See Solove, *The Virtues of Knowing Less*, *supra* note 83, at 1009-10.

89. See ELDER, *supra* note 32, § 3:17.

90. Solove, *The Virtues of Knowing Less*, *supra* note 83, at 1010-11.

91. *Id.* at 1010.

92. *Id.*

93. See ELDER, *supra* note 32, § 3:17.

94. *Id.*

95. See, e.g., *Crippen v. Charter Southland Hosp., Inc.*, 534 So. 2d 286, 288 (Ala. 1988); *Rutledge v. Phoenix Newspapers, Inc.*, 715 P.2d 1243, 1246 (Ariz. Ct. App. 1986); *McMullen v. McHughes Law Firm*, 454 S.W.3d 200, 209 (Ark. 2015); *Floyd v. Koenig*, 274 S.W.3d 339, 341 (Ark. Ct. App. 2008); *Urbaniak v. Newton*, 277 Cal. Rptr. 354, 358-59 (Ct. App. 1991); *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 377 (Colo. 1997); *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317, 1328-29 (Conn. 1982); *Spence v. Cherian*, 135 A.3d 1282, 1287-88 (Del.

states have not yet endorsed the tort: New York, Nebraska, North Carolina, Virginia, and Indiana.<sup>96</sup> Although an inquiry into each state's respective rationale for rejecting the tort could be illuminating, this Note is centrally concerned with the reasons for which Indiana has declined to endorse the tort, which is the focus of the following section.

### III. THE DISCLOSURE TORT IN INDIANA

Indiana courts generally examine disclosure claims through the lens of *Doe v. Methodist Hospital*, the state's seminal disclosure case.<sup>97</sup> In *Doe*, former Chief Justice Randall T. Shepard held that "[t]he facts and the complaint in this particular case do not persuade us to endorse the sub-tort of disclosure."<sup>98</sup> Yet, at the time, the tort's viability was far from an open question.<sup>99</sup> In fact, numerous decisions from the Indiana Court of Appeals reveal that the disclosure tort was a fully available cause of action in the decades prior to *Doe*.<sup>100</sup>

---

Super. Ct. 2016); *Vassiliades v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc.*, 492 A.2d 580, 587 (D.C. 1985); *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003); *Zieve v. Hairston*, 598 S.E.2d 25, 30 (Ga. Ct. App. 2004); *Wilson v. Freitas*, 214 P.3d 1110, 1120 (Haw. Ct. App. 2009); *Baker v. Burlington N., Inc.*, 587 P.2d 829, 832 (Idaho 1978); *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 901 (Ill. App. Ct. 1990); *Yoder v. Smith*, 112 N.W.2d 862, 864 (Iowa 1962); *Werner v. Kliewer*, 710 P.2d 1250, 1256-57 (Kan. 1985); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981); *Jaubert v. Crowley Post-Signal, Inc.*, 375 So. 2d 1386, 1390-91 (La. 1979); *Rush v. Maine Sav. Bank*, 387 A.2d 1127, 1128 (Me. 1978); *Klipa v. Bd. of Educ.*, 460 A.2d 601, 607-08 (Md. Ct. Spec. App. 1983); *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 682 (Mass. 2005); *Doe v. Mills*, 536 N.W.2d 824, 828 (Mich. Ct. App. 1995); *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn. 1998); *Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990); *St. Anthony's Med. Ctr. v. H.S.H.*, 974 S.W.2d 606, 609-10 (Mo. Ct. App. 1998); *State v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 42 P.3d 233, 240 (Nev. 2002); *Karch v. BayBank FSB*, 794 A.2d 763, 773-74 (N.H. 2002); *Rumbauskas v. Cantor*, 649 A.2d 853, 857-58 (N.J. 1994); *Fernandez-Wells v. Beauvais*, 983 P.2d 1006, 1008 (N.M. Ct. App. 1999); *Killilea v. Sears, Roebuck & Co.*, 499 N.E.2d 1291, 1294-95 (Ohio Ct. App. 1985); *Eddy v. Brown*, 715 P.2d 74, 77-78 (Okla. 1986); *Marleau v. Truck Ins. Exch.*, 37 P.3d 148, 154 (Or. 2001); *Burger v. Blair Med. Assocs., Inc.*, 964 A.2d 374, 380 (Pa. 2009); 5 R.I. GEN. LAWS ANN. § 5-37.3-4 (West 2020); *McCormick v. England*, 494 S.E.2d 431, 437-38 (S.C. Ct. App. 1997); *Provencio v. Paradigm Media, Inc.*, 44 S.W.3d 677, 683 n.23 (Tex. App. 2001); *Judge v. Saltz Plastic Surgery, P.C.*, 367 P.3d 1006, 1013-14 (Utah 2016); *Hearst Corp. v. Hoppe*, 580 P.2d 246 (Wash. 1978) (en banc); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 85 (W. Va. 1983); *Hillman v. Columbia Cty.*, 474 N.W.2d 913, 919-20 (Wis. Ct. App. 1991).

96. See *supra* note 12.

97. *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 683 (Ind. 1997).

98. *Id.* at 693.

99. See *infra* Section III.A.

100. See, e.g., *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755 (Ind. 1946); *Patton v. Jacobs*, 78 N.E.2d 789 (Ind. App. 1948); *Cont'l Optical Co. v. Reed*, 86 N.E.2d 306 (Ind. App. 1949); *Near*

*A. Pre-Doe: Recognition of the Disclosure Tort*

The disclosure tort was first recognized in *Continental Optical Co. v. Reed*, a 1949 Indiana Court of Appeals decision.<sup>101</sup> In brief, Reed argued that Continental Optical's unauthorized publication of his photograph—which captured him working as a lens grinder—constituted an unlawful use of his “likeness for commercial purposes.”<sup>102</sup> Upon review, the panel found that “independent of property rights, contracts, reputation and physical integrity, there is a legal right called the right of privacy, the invasion of which gives rise to a cause of action.”<sup>103</sup> A step further, the panel articulated that this “right of privacy” included claims for any of the following privacy violations:

[t]he unwarranted appropriation or exploitation of one's personality, *the publicizing of one's private affairs with which the public has no legitimate concern*, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility.<sup>104</sup>

This definition—namely, the portion concerning the publication of private affairs—is the functional equivalent of the language used to define the disclosure tort under the Restatement.<sup>105</sup> Thus, starting with *Continental Optical Co.*, the “right to privacy” in Indiana encompassed the very essence of the disclosure tort as found in the Restatement.<sup>106</sup>

*Continental Optical Co.* was the first, but surely not the last time the Indiana Court of Appeals considered the disclosure tort. In *Near East Side Community*

---

*E. Side Cmty. Org. v. Hair*, 555 N.E.2d 1324 (Ind. Ct. App. 1990); *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991); *Nobles v. Cartwright*, 659 N.E.2d 1064 (Ind. Ct. App. 1995); *Watters v. Dinn*, 666 N.E.2d 433 (Ind. Ct. App. 1996); *Ellis v. Luxbury Hotels, Inc.*, 666 N.E.2d 1262 (Ind. Ct. App. 1996).

101. *Cont'l Optical Co.*, 86 N.E.2d at 308; *see also* Prosser, *supra* note 15, at 387 (referring to *Cont'l Optical Co.* as a case in which Indiana extended recognition to the invasion of privacy tort).

102. *Cont'l Optical Co.*, 86 N.E.2d at 308.

103. *Id.*; *see also* Warren & Brandeis, *supra* note 14 (arguing that a right of privacy should be recognized as something separate and distinct from other privacy related rights).

104. *Cont'l Optical Co.*, 86 N.E.2d at 308 (emphasis added) (internal citation and quotation marks omitted).

105. *Cf.* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW. INST. 1977) (using substantially similar language to define the disclosure tort: “One who gives *publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy*, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) *is not of legitimate concern to the public.*” (emphases added)).

106. *See generally* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 963 (1964) (positing that the four essential torts embodied by the invasion of privacy tort share the same interest in common: protection of individual dignity).

*Organization v. Hair*, a 1990 decision, the Indiana Court of Appeals considered another privacy-related claim.<sup>107</sup> There, the panel reiterated that “Indiana recognizes the tort of invasion of privacy”<sup>108</sup> and cited the Restatement’s model with favor.<sup>109</sup> Additionally, the panel noted that the tort consists of *four* different causes of action, including the “unreasonable publicity given to the other’s private life.”<sup>110</sup> Here, the Indiana Court of Appeals not only affirmed the viability of all four privacy torts, but specified that claims involving the unauthorized disclosure of private life were, likewise, actionable.<sup>111</sup>

Thereafter, the Indiana Court of Appeals continued to contemplate privacy-related claims, and notably those involving the unauthorized disclosures of private information.<sup>112</sup> Take, for example, the panel’s decision in *Nobles v. Cartwright*. In *Nobles*, the cognizability of the disclosure tort was, quite simply, a non-issue.<sup>113</sup> In fact, the central inquiry in *Nobles* concerned the substance of the tort—its “newsworthiness” element.<sup>114</sup> To this end, the panel observed that Indiana courts had yet to adopt a particular test.<sup>115</sup> Ultimately, finding no issue with the tort itself, the panel adopted the “nexus” test to assess the newsworthiness of the disclosure.<sup>116</sup>

In sum, pre-*Doe* case law is permeated with invasion of privacy claims, including those involving allegations of unauthorized disclosures of private information. Between 1949 and 1996, the Indiana Court of Appeals routinely affirmed the viability of the disclosure tort by way of expressly accounting for its substance under the general invasion of privacy tort, or by analyzing the disclosure tort, specifically.<sup>117</sup> Thus, the viability of the disclosure tort pre-*Doe* was far from an open question. Rather, it was a settled question of law.

#### B. *Doe v. Methodist: Departure from the Disclosure Tort*

After decades of recognition, the disclosure tort suffered its unseemly demise in *Doe v. Methodist Hospital*. While working as a letter carrier for the U.S. Postal Service, Doe was rushed to a nearby hospital for a suspected heart attack.<sup>118</sup> In the

---

107. *Near E. Side Cmty. Org. v. Hair*, 555 N.E.2d 1324 (Ind. Ct. App. 1990).

108. *Id.* at 1334.

109. See RESTATEMENT (SECOND) OF TORTS § 652D.

110. *Near E. Side Cmty. Org.*, 555 N.E.2d at 1334-35.

111. *Id.* at 1335.

112. See, e.g., *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991); *Watters v. Dinn*, 666 N.E.2d 433 (Ind. Ct. App. 1996); *Ellis v. Luxbury Hotels, Inc.*, 666 N.E.2d 1262 (Ind. Ct. App. 1996).

113. See *Nobles v. Cartwright*, 659 N.E.2d 1064, 1064 (Ind. Ct. App. 1995).

114. *Id.* at 1074.

115. *Id.* at 1075.

116. *Id.* at 1077.

117. See RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW. INST. 1977).

118. *Doe v. Methodist Hosp.*, 639 N.E.2d 683, 684 (Ind. Ct. App. 1994), *vacated*, 690 N.E.2d 681 (Ind. 1997).

ambulance, Doe informed the paramedics that he was HIV positive.<sup>119</sup> Previously, Doe had disclosed this information to a small group of friends, some of whom were his co-workers.<sup>120</sup>

One of Doe's co-workers, Cameron, called his wife—a nurse at the hospital—to check on Doe's condition; during this conversation, Cameron's wife disclosed that Doe was HIV positive.<sup>121</sup> Thereafter, Cameron informed some of Doe's co-workers of this newly discovered information, including Duncan.<sup>122</sup> Duncan shared this information with two other co-workers, Saunders and Oakes. Oakes was previously informed about Doe's HIV status, but Saunders was not.<sup>123</sup>

Following this unfortunate sequence of events, litigation ensued. Principally, Doe asserted a disclosure claim against Duncan for disclosing his HIV status to two of their co-workers.<sup>124</sup> The Indiana Court of Appeals affirmed summary judgment for Duncan, reasoning that—as a matter of law—Duncan did not give unreasonable publicity to Doe's HIV status.<sup>125</sup> Notably absent from the Indiana Court of Appeals' holding was any indication that Doe's disclosure claim failed because the tort did not exist in Indiana.<sup>126</sup> Rather, the panel simply found that Doe did not satisfy the tort's publicity element.<sup>127</sup>

Judge Edward Najam dissented from the panel's decision.<sup>128</sup> Judge Najam argued that an inquiry into the “publicity” element should be reserved for the jury, as it is ultimately a question of fact; further, the majority blindly relied upon the Restatement's conception of “publicity.”<sup>129</sup> That is, the panel never explored alternative interpretations of publicity,<sup>130</sup> such as the one embraced in *Beaumont v. Brown*.<sup>131</sup> There, the Michigan Supreme Court adopted the “special relationship” test, under which plaintiffs may satisfy the “publicity” element upon showing the existence of a special relationship between the plaintiff and the

---

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* Doe also sued Cameron and the hospital for invasion of privacy and for violation of statutory duties of confidentiality, but these issues were not considered at the appellate level.

125. *Id.* at 686. The trial court granted Duncan's motion for summary judgment. In pertinent part, Oakes was already aware of Doe's HIV status. And although Saunders was not aware of this information, the matter was not given unreasonable “publicity” on account of its disclosure to one, unauthorized person.

126. *Id.*

127. *Id.*

128. *Id.* at 686-87 (Najam, J., dissenting).

129. *Id.* at 686 (discussing that while “many jurisdictions require disclosure to the public at large,” other jurisdictions employ different standards); *see also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. LAW. INST. 1977).

130. *Doe*, 639 N.E.2d at 686.

131. *Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977).

unpermitted recipient(s).<sup>132</sup>

Doe then filed a petition for transfer with the Indiana Supreme Court.<sup>133</sup> The Court granted transfer, but ultimately affirmed summary judgment for Doe's co-worker, Duncan.<sup>134</sup> Chief Justice Shepard authored the Court's plurality opinion which, albeit historically rich, operated from a particularly flawed premise: The disclosure tort was a new, unresolved issue of law.<sup>135</sup> Treating it as such, Chief Justice Shepard studied the reasons to adopt the tort, but found none sufficiently persuasive.<sup>136</sup>

As an initial point, Chief Justice Shepard rightly observed that following the publication of "The Right to Privacy,"<sup>137</sup> state courts were reluctant to recognize something like a right to privacy.<sup>138</sup> Nevertheless, the Restatement (Second) of Torts adopted the invasion of privacy tort; under the Restatement, the tort encompassed four distinct sub-torts.<sup>139</sup> And thereafter, the majority of states adopted all four privacy sub-torts.<sup>140</sup> As far as Chief Justice Shepard was concerned, Indiana "never directly confronted disclosure as an actionable invasion of privacy."<sup>141</sup> But Indiana courts previously confronted and, more crucially, recognized the disclosure tort.<sup>142</sup> So, upon what grounds does the Chief Justice's assertion rest?

Examining *State ex rel. Mavity v. Tyndall*, Chief Justice Shepard observed that the Indiana Supreme Court "recognized breach of privacy as tortious . . . [but] did not consider the different forms of invasion that courts have since delineated."<sup>143</sup> However, two years after *Mavity*, the Indiana Court of Appeals considered *Continental Optical Co.*, in which the court curated a definition for the invasion of privacy tort, noting with particularity that the unauthorized disclosure of private information—the very substance of the disclosure tort—gave rise to an actionable claim for invasion of privacy.<sup>144</sup> In fact, and conveniently absent from Chief Justice Shepard's evaluation, *Continental Optical Co.* pointed to *Mavity* as support for recognizing the tort.<sup>145</sup> Chief Justice Shepard celebrated *Mavity* for its precedential value and, in particular, as a basis for supporting the

---

132. *Id.*

133. *Doe v. Methodist Hosp.*, 690 N.E.2d 681 (Ind. 1997).

134. *Id.* at 693.

135. *Id.* at 685.

136. *Id.* at 686-92.

137. *See Warren & Brandeis*, *supra* note 14.

138. *See Prosser*, *supra* note 15.

139. *See* RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW. INST. 1977).

140. *Prosser*, *supra* note 15, at 386-87.

141. *Doe*, 690 N.E.2d at 685.

142. *See supra* Section III.A.

143. *Doe*, 690 N.E.2d at 685; *see also State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755, 755 (Ind. 1946).

144. *Cont'l Optical Co. v. Reed*, 86 N.E.2d 306, 308 (Ind. App. 1949); *see* RESTATEMENT (SECOND) OF TORTS § 652D.

145. *Cont'l Optical Co.*, 86 N.E.2d at 308.

invasion of privacy tort in Indiana.<sup>146</sup> Nevertheless, the invasion of privacy tort as articulated by the Indiana Court of Appeals *expressly incorporated* the disclosure tort.<sup>147</sup> Thus, by the plurality's own—perhaps inadvertent—admission, Indiana not only contemplated, but recognized the disclosure tort prior to *Doe*.

Further, Justice Brent Dickson—who produced a concurring opinion—vehemently rejected the Chief Justice's characterization.<sup>148</sup> Justice Dickson observed that Indiana courts had consistently discussed and extended recognition to disclosure claims, whether asserted as a distinct claim or under the greater invasion of privacy umbrella.<sup>149</sup> In light of this historical backdrop, Justice Dickson contended that the plurality was “mistaken in its discourse questioning the cognizability of [the] tort under Indiana law.”<sup>150</sup>

Despite concluding that the disclosure tort had no basis in Indiana law, Chief Justice Shepard entertained public policy support for the tort; namely, the protection from reputational harm<sup>151</sup> and prevention of unneeded emotional distress.<sup>152</sup> Chief Justice Shepard conceded that truthful disclosures *can* inflict just as much harm as false ones.<sup>153</sup> But still, recognition of something like “truthful defamation” was untenable due to an apparent conflict with a libel provision found in the Indiana Bill of Rights.<sup>154</sup> In a defamation suit, defendants can escape civil liability by showing that the information is true.<sup>155</sup> For Chief Justice Shepard, the Indiana Constitution was “not lacking in ambiguity”<sup>156</sup> concerning its support for this defense, further providing that the “truth-in-libel provision of the 1851 Indiana Constitution commands real caution” when considering proposals that would effectively impose liability for the disclosure of truthful information.<sup>157</sup>

---

146. In his opinion, the Chief Justice provides a definition of the invasion of privacy tort, which again, includes the operative language of the disclosure tort: “The unwarranted appropriation or exploitation of one’s personality, *the publicizing of one’s private affairs with which the public has no legitimate concern*, or the wrongful intrusion into one’s private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilit[ies].” *Doe*, 690 N.E.2d at 685-86 (emphasis added) (quoting *Cont’l Optical Co.*, 86 N.E.2d at 308).

147. See RESTATEMENT (SECOND) OF TORTS § 652D; see also *supra* Section III.A.

148. *Doe*, 690 N.E.2d at 693-95 (Dickson, J., concurring) (agreeing that *Doe*’s claim was not actionable but disagreeing that the disclosure tort is not viable in Indiana).

149. *Id.* at 694.

150. *Id.* at 693.

151. *Id.* at 686 (majority opinion).

152. *Id.* at 692 (finding that emotional injuries were already protected in Indiana under outrage claims, the Chief Justice could not “discern anything special about disclosure injuries” to induce support of the tort under Indiana law).

153. *Id.* at 687.

154. See IND. CONST. art. 1, § 10.

155. *Id.*

156. *Doe*, 690 N.E.2d at 687.

157. *Id.* at 691.



Despite Chief Justice Shepard's qualms, however, the Indiana Constitution contains no provision that explicitly or implicitly denounces recognition of the disclosure tort.<sup>158</sup> Justice Dickson helpfully illuminated that, notwithstanding this truth-in-libel provision, nothing in the Indiana Constitution should be read to suggest that harms resulting from unauthorized, yet truthful, disclosures are beyond the scope of legal redress.<sup>159</sup> Simply put, "the Indiana Constitution does not appear to create any impediment to the cognizability of the common law tort of invasion of privacy by public disclosure of private facts."<sup>160</sup>

Interestingly, and unlike the Indiana Court of Appeals panel, Chief Justice Shepard entertained alternative conceptions of the tort's publicity element, including the particular public standard.<sup>161</sup> If examined through the Restatement's lens, Chief Justice Shepard found that Doe's claim would fail because one of the individuals to whom Duncan disclosed Doe's HIV status was already aware of this fact, and, as is widely understood, "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public."<sup>162</sup> Further, Doe would also fail under the particular public standard because the only remaining recipient of the disclosure, Saunders, was not one someone with whom Doe shared a "special relationship."<sup>163</sup> To conclude, Chief Justice Shepard bluntly asserted:

Indiana recognizes a number of the claims described generically as invasion of privacy. The version of these torts involving disclosure of truthful but private facts encounters a considerable obstacle in the truth-in-defense provisions of the Indiana Constitution. The facts and the complaint in this particular case do not persuade us to endorse the sub-tort of disclosure.<sup>164</sup>

At bottom, Chief Justice Shepard's analysis of pre-*Doe* case law is, at best, incomplete, and, at worst, misleading. His contention that the tort was not previously considered is mistaken,<sup>165</sup> as it fails to apprehend that the principal difference between the invasion of privacy tort and the disclosure tort is one of form, not substance.<sup>166</sup> Further, and to echo Justice Dickson, the plurality opinion suffers from the failure to consider the extent to which private information enjoys

---

158. *See id.* at 694-95 (Dickson, J., concurring) (emphasizing that recognition of the disclosure tort is not prohibited by the Indiana Constitution).

159. *Id.*

160. *Id.* at 695.

161. *Id.* at 692 (majority opinion) (citing *Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977)).

162. *Id.* at 693 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. LAW. INST. 1977)).

163. *Id.*

164. *Id.*

165. *See supra* Section III.A.

166. *See* RESTATEMENT (SECOND) OF TORTS § 652D (revealing how the very substance of the disclosure tort was embraced under the greater invasion of privacy umbrella).

a genuinely secure status in our digital era.<sup>167</sup> Lastly, even if plaintiffs encounter little success establishing a claim under the tort, formal recognition under Indiana law is still valuable for purposes of “deterrence and accountability.”<sup>168</sup>

### *C. Post-Doe: Rejection, Reluctance, and Recognition*

Since *Doe*, Indiana courts have struggled to provide a clear stance regarding the disclosure tort’s viability. Many post-*Doe* decisions suggest that the tort is viable,<sup>169</sup> while others are much less clear.<sup>170</sup> For instance, in *Allstate Insurance Co. v. Dana Corp.*, the Indiana Supreme Court noted that “[t]he extent to which the tort of invasion of privacy is recognized in Indiana is not yet settled.”<sup>171</sup> Yet, in *Doe*, the court only rejected the disclosure tort, not the invasion of privacy tort as a whole.<sup>172</sup>

Several Indiana decisions unequivocally represent that the disclosure tort is not viable in Indiana.<sup>173</sup> In *Felsher v. University of Evansville*, the court clarified that it had decided “not to recognize a branch of the [invasion of privacy] tort involving the public disclosure of private facts.”<sup>174</sup> According to Chief Justice Loretta Rush, *Felsher* seemingly “closed the door to disclosure claims in Indiana.”<sup>175</sup>

Ironically, however, in *Walgreen Co. v. Hinchy*, the Indiana Court of Appeals considered the merits of a disclosure claim, and even endorsed the “particular public” standard for the tort’s publicity element.<sup>176</sup> The panel reasoned that “[t]his

---

167. See THERESA M. PAYTON & THEODORE CLAYPOOLE, *PRIVACY IN THE AGE OF BIG DATA: RECOGNIZING THREATS, DEFENDING YOUR RIGHTS, AND PROTECTING YOUR FAMILY* 7-8 (2014); see also *Doe*, 690 N.E.2d at 693-95 (Dickson, J., concurring).

168. *Doe*, 690 N.E.2d at 695.

169. See, e.g., *Pohle v. Cheatham*, 724 N.E.2d 655 (Ind. Ct. App. 2000); *Ledbetter v. Ross*, 725 N.E.2d 120 (Ind. Ct. App. 2000); *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958 (Ind. Ct. App. 2001); *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042 (Ind. Ct. App. 2004); *H.D. v. BHC Meadows Hosp. Inc.*, 884 N.E.2d 849 (Ind. Ct. App. 2008); *Vargas v. Shepherd*, 903 N.E.2d 1026 (Ind. Ct. App. 2009); *J.H. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 19 N.E.3d 811 (Ind. Ct. App. 2014); *Walgreen Co. v. Hinchy*, 21 N.E.3d 99 (Ind. Ct. App. 2014).

170. See, e.g., *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001); *Felsher v. Univ. of Evansville*, 755 N.E.2d 589 (Ind. 2001); *Munsell v. Hambright*, 776 N.E.2d 1272 (Ind. Ct. App. 2002); *Robbins v. Trs. of Ind. Univ.*, 45 N.E.3d 1 (Ind. Ct. App. 2015); *Mataranglo v. Meijer Stores Ltd. P’ship*, 77 N.E.3d 264 (Ind. Ct. App. 2017).

171. *Allstate Ins. Co.*, 759 N.E.2d at 1056-57.

172. *Doe*, 690 N.E.2d at 693.

173. See, e.g., *Felsher*, 755 N.E.2d at 593; *Meury v. Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233 (Ind. Ct. App. 1999); *Westminster Presbyterian Church v. Cheng*, 992 N.E.2d 859 (Ind. Ct. App. 2013); *Farr v. New Life Assocs., P.C.*, 55 N.E.3d 397 (Ind. Ct. App. 2016).

174. *Felsher*, 755 N.E.2d at 593.

175. *F.B.C. v. MDwise, Inc.*, 131 N.E.3d 143, 144 (Ind. 2019) (mem.) (Rush, C.J., dissenting).

176. *Walgreen Co. v. Hinchy*, 21 N.E.3d 99, 112 (Ind. Ct. App. 2014) (discussing that using the “particular public” conception of publicity for a jury instruction was proper).

Court has repeatedly held that the ‘particular public’ standard included in *Beaumont* is to be applied in this State as well.<sup>177</sup> Yet in the cases cited to substantiate this assertion, the *Beaumont* publicity standard garnered no such recognition; that is, none formally adopted the “particular public” standard.<sup>178</sup> Still, *Walgreen Co.* suggests that the disclosure tort remains a viable cause of action in Indiana.

In 2019, the Indiana Court of Appeals considered a disclosure claim in the case of *F.B.C. v. MDwise*.<sup>179</sup> There, the plaintiff’s sensitive medical information was submitted to an online insurance portal, accessible to both the plaintiff and her husband.<sup>180</sup> The portal disclosed that the plaintiff had recently been tested for several sexually transmitted diseases.<sup>181</sup> Citing *Felsher* and *Doe*, the panel dismissed the plaintiff’s claim, reasoning that the disclosure tort was not a viable cause of action in Indiana.<sup>182</sup> Writing for the dissent, Judge L. Mark Bailey suggested that, in light of the “ubiquity of digital data” and the access it affords to unknown third parties, Indiana *would* recognize the tort if presented with the opportunity.<sup>183</sup> As an additional point, Judge Bailey suggested that in the event the tort is more formally recognized, Indiana should consider adopting the “particular public”<sup>184</sup> conception of the tort’s publicity element.<sup>185</sup>

Although the Indiana Supreme Court voted to deny transfer of *F.B.C. v. MDwise, Inc.*, Chief Justice Rush’s dissenting memorandum<sup>186</sup> indicates that the disclosure tort could experience a new life in the future. Echoing Judge Bailey, the Chief Justice reasoned that formal recognition of the tort would, at the very least, deter individuals from disseminating private information without authorization.<sup>187</sup> Chief Justice Rush additionally noted that the ease of access to information further supports recognition of the tort.<sup>188</sup> Nevertheless, if presented

---

177. *Id.* (citing *Vargas v. Shepherd*, 903 N.E.2d 1026, 1031 (Ind. Ct. App. 2009); *Munsell v. Hambright*, 776 N.E.2d 1272, 1283 (Ind. Ct. App. 2002)).

178. *See Vargas*, 903 N.E.2d at 1031. Here, *Vargas* merely asked the court to adopt the “particular public” standard. However, the court never explicitly recognized this standard. *See also Munsell*, 776 N.E.2d at 1283 (noting that in *Doe*, the court considered alternative conceptions of the publicity element, including the “particular public.” But, again, the court never explicitly endorsed this conception of the tort’s publicity element. Instead, the court stipulates that even under a “looser standard” such as the particular public, *Munsell*’s claim would still fail).

179. *F.B.C. v. MDwise, Inc.*, 122 N.E.3d 834 (Ind. Ct. App.), *trans. denied*, 131 N.E.3d 143 (Ind. 2019).

180. *Id.* at 836.

181. *Id.*

182. *Id.* at 837.

183. *Id.* at 839 (Bailey, J., dissenting).

184. *See Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977).

185. *F.B.C.*, 122 N.E.3d at 839.

186. *F.B.C. v. MDwise, Inc.*, 131 N.E.3d 143, 143-45 (Ind. 2019) (mem.) (Rush, C.J., dissenting).

187. *Id.* at 145.

188. *Id.*

with the opportunity to adopt the tort in the future, the Restatement's model appears to be the Chief Justice's top candidate.<sup>189</sup>

Peculiarly, in the very same year, a panel for the Indiana Court of Appeals remanded a case involving the unauthorized disclosure of private medical information, noting that it would not discuss the merits of the plaintiff's disclosure claim, but that she was nonetheless "free" to use the tort—and its underlying theory—to pursue her claim at the trial level.<sup>190</sup> But most recently, in *Community Health Network, Inc. v. McKenzie*, the Indiana Court of Appeals considered a case involving a medical records coordinator's unauthorized access of private patient information.<sup>191</sup> Relying on an oversimplified historical analysis, the panel reasoned that "Community cannot be held vicariously liable for a tort that has yet to be recognized."<sup>192</sup> To this end, the panel relied upon cases in which the disclosure tort received harsh treatment,<sup>193</sup> but neglected any consideration of those in which it garnered recognition.<sup>194</sup>

#### IV. REVIVING THE DISCLOSURE TORT IN INDIANA

[T]here is a part of the life of every person who has come to years of discretion, within which the individuality of that person *ought to reign uncontrolled either by any other individual or by the public collectively*. That there is, or ought to be, some space in human existence thus entrenched around, and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call into question . . . .<sup>195</sup>

Unlike related causes of action, the disclosure tort appreciates the ramifications associated with the dissemination of private, yet fundamentally true, information.<sup>196</sup> To echo Warren and Brandeis, it embraces the notion that we have

---

189. *Id.* Chief Justice Rush noted that she is not inclined to adopt the particular public standard, as embraced in *Beaumont*.

190. *Henry v. Cmty. Healthcare Sys. Cmty. Hosp.*, 134 N.E.3d 435, 439 n.4 (Ind. Ct. App. 2019).

191. *Cmty. Health Network, Inc. v. McKenzie*, 150 N.E.3d 1026, 1030-32 (Ind. Ct. App. 2020).

192. *Id.* at 1045.

193. *Id.* at 1044-45 (citing *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 693 (Ind. 1997); *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 (Ind. 2001); *F.B.C. v. MDwise, Inc.*, 122 N.E.3d 834, 836-37 (Ind. Ct. App. 2019)).

194. *See supra* Section III.A.

195. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 943 (W.J. Ashley ed., Longmans, Green, & Co. 7th ed. 1909) (1848) (emphasis added).

196. *Compare* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977) (delineating the cause of action for unauthorized disclosures of true information), *with id.* § 558 (delineating the cause of action for defamation, which requires—in part—the publication of a false statement).

the right to be left alone.<sup>197</sup> But more specifically, that our private information is worthy of protection. The extent to which such protection exists in Indiana is, quite simply, unclear. Thus, although wrongful disclosures continue to ensue—now with greater stealth and sophistication—the path for recovery is slim, if not entirely unavailable.

If presented with the opportunity, the Indiana Supreme Court should revive the disclosure tort and crystallize its viability under law. In sum, proper recognition of the tort would not only deter unauthorized disclosures of private information, but also promote greater cognizance concerning the methods through which unauthorized parties gain access and exploit slivers of our private lives. Critics will likely argue that the disclosure tort undermines our First Amendment guarantee to free speech. But rest assured, the disclosure tort is not interested in chilling or regulating all unauthorized disclosures. Working in tandem, the “newsworthiness” and “highly offensive” elements strike a proper and fully necessary balance between the protection of speech and privacy. Further, some might argue that the disclosure tort is incapable of addressing contemporary challenges. Indeed—but only if the court retains a traditional interpretation of the Restatement’s publicity element—reconceptualizing this element could give new life to the disclosure tort, one desperately needed in our digital age. Lastly, despite statutory reform and corresponding remedies, the common law framework is best suited for the collection and contemplation of disclosure claims.

#### *A. Striking the Balance*

Seemingly, the disclosure tort is an affront to the First Amendment.<sup>198</sup> As sweeping as it may seem, however, certain categories of speech do not enjoy First Amendment protection.<sup>199</sup> These categories are the careful byproduct of a balancing test, whereby the interests in protecting speech are weighed against a competing, perhaps equally crucial, interest.<sup>200</sup> Moreover, if the disclosure tort is reprehensible on First Amendment grounds, it is not merely because it regulates

---

197. Warren & Brandeis, *supra* note 14, at 205.

198. See Chemerinsky, *supra* note 8, at 423 (arguing, in part, that “the tort of public disclosure of private facts is objectionable under the First Amendment”); U.S. CONST. amend. I (providing, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press”).

199. See, e.g., *Miller v. California*, 413 U.S. 15, 36 (1973) (holding that obscenities do not enjoy First Amendment protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that “fighting words” do not enjoy First Amendment protection); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that child pornography does not enjoy First Amendment protection); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (holding that “true threats” do not enjoy First Amendment protection); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that speech that incites imminent lawless action does not enjoy First Amendment protection).

200. See Solove, *The Virtues of Knowing Less*, *supra* note 83, at 981-82 (providing that “the balancing approach has largely prevailed”).

a particular type of speech.<sup>201</sup> But rather, because the competing interest—in this case, the preservation of privacy—does not warrant regulation.

Fortunately, these interests are not mutually exclusive. Thus, the more pertinent question is not whether protection can extend to both interests, but how to balance them when a conflict arises. As it turns out, the disclosure tort was constructed with cognizance of such a potentiality. In fact, two elements—highly offensive and newsworthiness—exist to strike this very balance.

Functioning like a filter, the disclosure tort’s “highly offensive” element retains only the most egregious disclosures for further consideration.<sup>202</sup> In brief, the “highly offensive” classification attaches to disclosures most likely to offend our ordinary, commonly shared sensibilities.<sup>203</sup> Underlying this assessment is an interest in preserving a simple grain of decency within our respective communities.<sup>204</sup> But even if “highly offensive,” the inquiry continues; to strike the balance, courts must then consider the matter’s relative “newsworthiness.”<sup>205</sup>

Courts utilize different tests to determine whether a disclosure is newsworthy, and thus unactionable.<sup>206</sup> Take, for example, the “logical nexus” test.<sup>207</sup> Under this test, mere “public interest” does not prevail, but rather the central concern is whether an identifiable relationship “exist[s] between the complaining individual and the matter of legitimate public interest.”<sup>208</sup> If such a nexus exists, then the matter is likely newsworthy. However, under the “nature of the information” test, the relative newsworthiness of the information depends upon its contribution—or lack thereof—to the meaningful exchange of ideas.<sup>209</sup> Both tests are less than ideal for balancing purposes. The former is disposed to protect unsavory speech at the expense of privacy, while the latter is driven by a content-heavy assessment, which is presumptively offensive to the First Amendment.<sup>210</sup>

Among the tests available, the “community mores approach” strikes the proper balance between the protection of speech and privacy interests.<sup>211</sup> Under this approach, the “newsworthiness” of a disclosed matter is based on whether it

---

201. *Id.* at 986 (explaining some categories of speech are not protected under the First Amendment); *cf.* *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (recognizing the public records exception, but notably, declining to hold that the First Amendment prohibits the imposition of liability for the publication of truthful, yet private, information).

202. RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (AM. LAW INST. 1977).

203. *See supra* Section II.A.3.

204. *Id.*

205. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d.

206. *See supra* Section II.A.4.

207. *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980); *see also Dendy, supra* note 10, at 162 (discussing the “logical nexus” test).

208. *See Dendy, supra* note 10, at 162 (quoting *Campbell*, 614 F.2d at 397).

209. *See ELDER, supra* note 32, § 3:17 (discussing the “nature of the information” test).

210. *See Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 102 (1972) (holding that the ordinance in question was unconstitutional because it authorized a content-based regulation of speech that was not justified by a substantial government interest).

211. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975).

is a legitimate public interest.<sup>212</sup> This assessment is guided by the following considerations:

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. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a *morbid and sensational prying into private lives for its own sake*, with which a reasonable member of the public, with decent standards, would say that he had no concern.<sup>213</sup>

Principally, the community mores approach defers to members of the community rather than a detached and disinterested court. Customs and norms, as they exist and evolve, are eminently instructive, as they reflect our boundaries; namely, the scope of legitimate public interest, as understood by the members of our community.<sup>214</sup> The community mores approach also emphasizes that access does not warrant consumption of private information.<sup>215</sup> Conflating access with entitlement results in the “morbid and sensational prying into private lives for [their] own sake.”<sup>216</sup> Quite simply, unbridled curiosity does not justify the dissemination of a neighbor’s intimate information. Instead, it erodes communal trust and any sliver of decency left remaining.

In sum, the community mores approach ensures that remedy is reserved for disclosures of an inherently indecent and intolerable kind.<sup>217</sup> Namely, the kind that would, if granted First Amendment protection, undercut a fundamental objective of the free speech clause: to encourage the *meaningful* exchange of ideas.<sup>218</sup> As John Stuart Mill wisely articulated, “the appropriate region of human liberty . . . [is] doing as we like, . . . without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.”<sup>219</sup> As applied here, the

---

212. *Id.* at 1129.

213. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (AM. LAW INST. 1977) (emphasis added).

214. *Virgil*, 527 F.2d at 1130.

215. *Id.* at 1129.

216. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h.

217. Dendy, *supra* note 10, at 161-62 (reasoning that “[t]he result of a community mores test combined with judicial scrutiny is a standard, according to the *Virgil* court, that is respectful of individual’s privacy interests without offending the First Amendment”).

218. See Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 962 (1968) (arguing that “speech necessary for an effective and meaningful democratic dialogue by and large does not require references to the intimate activities of named individuals”).

219. JOHN STUART MILL, ON LIBERTY 26-27 (2d ed. 1859) (introducing the “harm principle”); see also Piers Norris Turner, “Harm” and Mill’s Harm Principle, 124 ETHICS 299 (2014) (summarizing Mill’s harm principle and further noting that notwithstanding its theoretical value,

dissemination of an individual's sensitive information, guided by no rhyme, reason, or legitimate purpose, is not only wrong but inherently harmful. Any tolerance thereof results in the erosion of our zones of privacy—which exist not to restrict the freedom exercised by others, but to delineate a sphere within which we can exercise our freedom to consider and discuss matters of private concern. Simply, disseminating an individual's intimate information produces no foundation upon which to engage in meaningful discourse. “Speech” so lacking in value should not reap the benefits of First Amendment protection.<sup>220</sup>

Much like our right to free speech, privacy is worthy of protection; and indeed, these interests can coexist. Moreover, the interest in preserving the private status of intimate information is not only reasonable, but desirable—both at an individual and collective level. With First Amendment fears alleviated, the Indiana Supreme Court should welcome the revival of the disclosure tort and, in so doing, reconceptualize the tort's publicity element.

### *B. Reconceptualizing Publicity*

If the Indiana Supreme Court formally adopts the tort, it would likely retain the Restatement's version of the publicity element.<sup>221</sup> Under the Restatement, the publicity element is satisfied when:

the [private] matter is . . . communicat[ed] . . . to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication . . . . It is one of a communication that reaches, or is sure to reach, the public.

Thus it is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.<sup>222</sup>

Traditionally understood, disclosures that reach only a few people are not actionable under the Restatement.<sup>223</sup> That is, the “public at large” language

---

Mill's harm principle is rather limited as to what constitutes a harm, and namely one which warrants legal intervention); Mark Strasser, Lawrence, *Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285 (2006) (examining Mill's harm principle); R. George Wright, *A Rationale from J. S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149.

220. Cf. Solove, *The Virtues of Knowing Less*, *supra* note 83, at 979-80 (contemplating whether unauthorized disclosures of private information constitute “speech,” as traditionally understood).

221. See *F.B.C. v. MDwise, Inc.*, 131 N.E.3d 143, 145 (Ind. 2019) (mem.) (Rush, C.J., dissenting) (demonstrating preference for the Restatement's version of the publicity element, as opposed to the particular public model).

222. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. LAW INST. 1977).

223. *But see id.* § 577 cmt. b (providing that “[i]t is enough that [a defamatory matter] is communicated to a *single* individual other than the one defamed” (emphasis added)).



generally controls analysis.<sup>224</sup> Paradoxically, however, the Restatement suggests that even if a private matter is not announced to the public at large, it can achieve actionable publicity when disseminated “to so many persons” such that “the matter must be regarded as substantially certain to become one of public knowledge.”<sup>225</sup> Implicitly, this portion of the Restatement legitimizes inquiry into disclosures that, albeit limited in their initial reach, are likely to spread and reach an unintended audience.

Perhaps, therefore, a reconceptualized interpretation of the publicity element would invite, rather than discourage, inquiry into limited disclosures—particularly those which occur in the digital arena—as such can compromise the security of private information, leaving it vulnerable to further attack and exploitation.

In the digital context, it is well-understood that the manner in which information—private and otherwise—is stored and shared can reflect the ease with which it can be assessed, and also the scope of its shareability.<sup>226</sup> Superficially, the Restatement rejects inquiry into the manner of information storage and dissemination.<sup>227</sup> But such an interpretation rests upon traditional, and largely antiquated, notions regarding the management of private information. And if not that, then pure lack of depth; in other words, at the time the tort was introduced, technological advancements of contemporary caliber were not within the realm of consideration.

To contextualize this issue, consider the following phenomenon—which is hardly enlightening. Today, the suspected and unsuspected enjoy unregulated access to our private information, the result of which is increased shareability of our data to unknown parties.<sup>228</sup> This is largely—if not solely—because of the manner in which information is stored and shared.<sup>229</sup> Put simply, rather than using a physical hard-drive to secure private information, users—and companies that

---

224. *Id.* § 652D cmt. a; *see also supra* Section II.A.1.

225. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

226. *See generally* WORLD ECON. FORUM, UNLOCKING THE VALUE OF PERSONAL DATA: FROM COLLECTION TO USAGE (2013), [http://www3.weforum.org/docs/WEF\\_IT\\_UnlockingValuePersonalData\\_CollectionUsage\\_Report\\_2013.pdf](http://www3.weforum.org/docs/WEF_IT_UnlockingValuePersonalData_CollectionUsage_Report_2013.pdf) [<https://perma.cc/4KKN-P4RM>]; *see also* Shaun B. Spencer, *The Surveillance Society and the Third-Party Privacy Problem*, 65 S.C. L. REV. 373 (2013) (discussing the shareability of information stored in a digital server).

227. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (providing that “[t]he difference is not one of the *means* of communication . . . . It is one of a communication that reaches, or is sure to reach, the public.” (emphasis added)).

228. *See generally* Spencer, *supra* note 226; Omer Tene, *Privacy: The New Generations*, 1 INT’L DATA PRIVACY L. 15 (2011) (discussing the increased usage of digital devices and connection to digital networks); Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Opening Remarks at FTC PrivacyCon (Jan. 12, 2017), <https://www.ftc.gov/public-statements/2017/01/opening-remarks-ftc-chairwoman-edith-ramirez-privacycon> [<https://perma.cc/9NWW-4XSU>].

229. Spencer, *supra* note 226, at 398-400 (discussing how slivers of our personal lives—whether in whole or part—are being uploaded to digital servers, such as a cloud).

acquire our private information—utilize a cloud to store personal data.<sup>230</sup> To be clear, using a cloud—or analogous methods—for storage purposes is not inherently problematic. But the accessibility, and resulting shareability of the data, is.<sup>231</sup> Once a user or another party—authorized or not—makes the initial, digital disclosure, “sharing becomes the default. . . . The end result of all of this cloud-based sharing is that we are uploading substantial portions of our lives to third parties.”<sup>232</sup>

In a nutshell, this is the “third party privacy problem.”<sup>233</sup> Frankly, however, this is only one of several examples of how private information can reach an entirely unintended audience by way of an initial, limited disclosure.<sup>234</sup> With that in mind, for some, the surest way to protect private information is, quite frankly, not to share it with anyone; or alternatively, only to share it within a controlled, highly secure environment. But as it turns out, a heightened sense of control actually encourages individuals to share *more* of their sensitive information.<sup>235</sup> Social media platforms vest control in their users; the user decides when to make the initial publication and with whom it will be shared.<sup>236</sup> Consequently, users find greater comfort in sharing private information—but only insofar as they retain control over this initial publication.<sup>237</sup> This sense of control, however, does not extend to accessibility nor shareability of the information once released.<sup>238</sup> So, while users have control over the *initial* publication of their private information, in all reality, they possess very little—if any at all—over the extent to which it can be accessed and subsequently shared.<sup>239</sup>

We cannot turn back the clocks and restore old habits as it relates to the management of our private information. And indeed, several judges recognize the

---

230. *Id.* (noting that examples include tax records, financial information, personal communications, personal thoughts, intimate photographs, and more).

231. *Id.* at 400.

232. *Id.* (citations omitted).

233. *See id.* at 374 (explaining that this problem arises “when the information becomes available beyond the subject and his or her confidants”).

234. *See generally* Jay P. Kesan & Carol M. Hayes, *Liability for Data Injuries*, 2019 U. ILL. L. REV. 295 (discussing the various ways in which unauthorized parties can obtain access to our private information and calling for a duty to secure data within the digital context).

235. *See generally* Laura Brandimarte et al., *Misplaced Confidences: Privacy and the Control Paradox*, 4 SOC. PSYCHOL. & PERSONALITY SCI. 340 (2012).

236. *See id.* (discussing how web-based platforms vest users with control over the management and initial publication of their information).

237. *Id.* at 344-45 (finding that the “strong feeling of control” over information publication may increase the satisfaction in posting it).

238. *Id.* at 346 (finding that “[t]he paradoxical policy implication of these findings” is that Web 2.0 applications, by giving greater freedom and power to reveal and publish personal information, may lower the concerns that people have “regarding the actual accessibility and usability of information”).

239. *Id.*

precarious state in which our private information is situated.<sup>240</sup> Thus, the court's unwillingness to consider the merits of limited, digital disclosures is not due to a lack of awareness—at least entirely. Instead, the more likely culprit is how it decides to interpret the Restatement's text—specifically, the publicity element. As a whole, courts tend to assess the merits of a disclosure claim through the lens of the “public at large” analysis,<sup>241</sup> when in fact, the Restatement invites further inquiry; namely, when the private matter is situated in a compromised state, such that it is “substantially certain to become [something] of public knowledge.”<sup>242</sup> As applied to the digital context, the manner in which the private matter was initially disclosed—or perhaps stored—can inform whether it is “sure to reach[] the public.”<sup>243</sup> Accordingly, a reconceptualized understanding of the Restatement's publicity element actually invites the court to consider limited, digital disclosures, as such—depending upon the facts of the particular case<sup>244</sup>—can surely reach a larger, unauthorized audience.

To be clear, this is not a call to increase the breadth of liability for unauthorized disclosures. Rather, the call of this Note is two-fold. First, the disclosure tort must be treated as a viable cause of action under Indiana law. Second, upon formal recognition of the tort, the court should reconsider how the publicity element is generally understood and applied. To this end, the court should remain *open* to considering limited disclosures, but primarily those which manifest within the digital arena. In short, an inquiry into the manner through which private information was initially disclosed can, depending upon the facts of the particular case, reveal whether the matter is “substantially certain to become [something] of public knowledge.”<sup>245</sup> The benefit of a reconceptualized publicity element is in its capacity to adapt to contemporary innovation and the attendant challenges—such as those arising in the digital realm. Ultimately, the disclosure tort is rendered forceless only insofar as antiquated concepts remain the lens through which we assess contemporary problems.

---

240. *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 695 (Ind. 1997) (Dickson, J., concurring) (emphasizing that “our ever-increasing population and the growing technological opportunities [invite more] invasive scrutiny into others' lives”); *F.B.C. v. MDwise, Inc.*, 131 N.E.3d 143, 145 (Ind. 2019) (mem.) (Rush, C.J., dissenting) (reasoning that formal recognition of the tort would, at the very least, deter Hoosiers from accessing and disseminating private information without permission); *F.B.C. v. MDwise, Inc.*, 122 N.E.3d 834, 839 (Ind. Ct. App. 2019) (Bailey, J., dissenting) (emphasizing the importance of the disclosure tort in light of the “ubiquity of digital data”).

241. *See supra* Section II.A.1.

242. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. LAW INST. 1977).

243. *Id.*

244. *Doe*, 690 N.E.2d at 686 (Najam, J., dissenting) (arguing that the inquiry of the publicity element is fact-sensitive, and as such, should be reserved for the jury).

245. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

*C. Deficiencies in a Statutory Scheme*

Perhaps restoring and revising the disclosure tort is superfluous in light of recent and forthcoming privacy-related legislation. Like other states, Indiana offers protection for a multitude of privacy harms under statute.<sup>246</sup> However, the disclosure tort covers a unique harm, and notably one unaccounted for by all other forms of recourse. Moreover, disclosure claims are diverse and constantly evolving. Due to its inherent flexibility, the common law framework, as compared to a statutory scheme, is best-suited to collect disclosure claims and supply related remedies.

Statutory remedies are necessary but not sufficient. As briefly mentioned, existing forms of recourse fall short in addressing the harms attendant to the wrongful disclosure of private information. Take, for example, the HIPAA Security rule.<sup>247</sup> Akin to the disclosure tort, HIPAA covers the unauthorized disclosures of true, yet fundamentally private information.<sup>248</sup> Nevertheless, HIPAA does provide a private cause of action for victims of privacy breaches.<sup>249</sup> Consequently, the unfortunate byproduct is that sometimes, victims of unauthorized disclosures of sensitive medical information<sup>250</sup> “obtain no relief no matter how severe the HIPAA violation.”<sup>251</sup> If duly recognized, however, victims could sue under the disclosure tort and recover for injuries related to the breach of their sensitive medical information.<sup>252</sup> But without this option, a simple technicality prevents victims of legitimate disclosure harms from obtaining a well-deserved recovery.

Indiana recently passed legislation that holds disseminators of “revenge porn” civilly and criminally liable.<sup>253</sup> At its core, the statute signifies that Indiana does, in fact, detest unauthorized disclosures of intimate information.<sup>254</sup> However, it is

---

246. See, e.g., IND. CODE § 32-36-1-1 (West 2020) (Indiana Right of Publicity Act); *id.* § 34-46-4-1 (Shield Law); *id.* § 34-7-7-1 (Anti-SLAPP Statute); *id.* § 4-1-10 (SSN Disclosure); *id.* § 24-4-14 (Data Disposal law); *id.* § 4-1-11 (Breach Notification); *id.* § 24-5-24 (Consumer Report Security Freeze law); *id.* § 24-4-9-1 (Disclosure of Security Breach); *id.* § 24-4-14-1 (Persons Holding Consumer’s Personal Information).

247. 45 C.F.R. §§ 160.300-552 (2020).

248. *Id.*

249. *Id.*

250. See *What Is Considered Protected Health Information Under HIPAA?*, HIPAA J. (Apr. 2, 2018), <https://www.hipaajournal.com/what-is-considered-protected-health-information-under-hipaa/> [<https://perma.cc/6W2J-SQW8>] (delineating the different types of “protected health information”).

251. See SHARONA HOFFMAN, *ELECTRONIC HEALTH RECORDS AND MEDICAL BIG DATA: LAW AND POLICY* 76 (Cambridge Univ. Press 2016).

252. *Id.*; see also *Henry v. Cmty. Healthcare Sys. Cmty. Hosp.*, 134 N.E.3d 435, 438 (Ind. Ct. App. 2019) (discussing that other courts use the HIPAA standard of care when assessing tort claims involving a breach of the duty of confidentiality owed by medical professionals).

253. IND. CODE § 35-45-4-8 (West 2020).

254. The private information covered an “intimate image,” which includes “a photograph,

likely that plaintiffs encounter difficulty in establishing liability when a third-party dissemination is involved.<sup>255</sup> In short, plaintiffs can only assert claims against third parties if the individual knew or should have known that the individual depicted did not consent to the dissemination of the content; and seemingly, the burden is on the plaintiff to establish knowledge.<sup>256</sup> Undoubtedly, the revenge porn statute represents a pivotal step toward greater protection of privacy rights and enjoyment thereof. However, the third-party privacy problem appears to dawdle beneath the surface,<sup>257</sup> complicating recovery efforts, perhaps even for the most deserving victims.

In all, disclosure claims are wide-ranging, quite often complex, and increasingly digital in nature. Accordingly, the legal framework within which plaintiffs assert disclosure claims must be flexible. That is, it must be durable enough to withstand societal change, ensuing challenges, and our digital reality. The disclosure tort, and common law framework, specifically, are well-suited for such a task. Each element of the tort addresses a specific consideration, but textually, each is crafted with a healthy level of generality. This welcomes diverse fact-sets, which allows courts to consider lurking threats to personal and communal privacy. And as courts delve deeper in the merits of disclosure claims, it can reveal noteworthy patterns regarding the manner in which private information is commonly exploited, and correspondingly, who appears most vulnerable to such exploitations. In so doing, courts can play a larger role in exposing the most cunning, perhaps even sophisticated, threats to individual privacy. But only once exposed can we properly identify those who seek to undermine our experience and expectation of privacy.

---

digital image, or video: (1) that depicts: (A) sexual intercourse; (B) other sexual conduct; or (C) exhibition of the uncovered buttocks, genitals, or female breast; of an individual; and (2) taken, captured, or recorded by: (A) an individual depicted in the photograph, digital image, or video and given or transmitted directly.” IND. CODE § 35-45-4-8(c). Suffice it to say, the disclosure of intimate photographs and videos is an egregious violation of privacy. Nevertheless, one’s privacy can suffer from other—fully legitimate—forms of invasion. *See supra* Section II.A.1-4 for examples; *see also* Dan Carden, ‘Revenge Porn’ Victims Gain Ability to Sue Intimate Image Distributors for Civil Damages, NORTHWEST IND. TIMES (Apr. 20, 2019), [https://www.nwitimes.com/news/local/govt-and-politics/revenge-porn-victims-gain-ability-to-sue-intimate-image-distributors/article\\_97832dd9-2acc-5442-8465-b3ab6bf15382.html](https://www.nwitimes.com/news/local/govt-and-politics/revenge-porn-victims-gain-ability-to-sue-intimate-image-distributors/article_97832dd9-2acc-5442-8465-b3ab6bf15382.html) [<https://perma.cc/3TSZ-CL5C>].

255. The law is relatively new, so at this time, the relative success of third-party revenge porn claims is largely unknown.

256. IND. CODE § 35-45-4-8(d); *see also* Brandon Smith, *Bills Penalizing Revenge Porn Become Law*, IND. PUB. MEDIA, (May 3, 2019) <https://indianapublicmedia.org/news/bills-penalizing-revenge-porn-become-law.php> [<https://perma.cc/LXF9-MG8X>] (quoting Indiana Senator Aaron Freeman, “If you’re surfing the web and you find an image that you, then, repost, that is not covered in this bill and that is not a crime.”).

257. *See generally* Spencer, *supra* note 226.

## CONCLUSION

Indiana's treatment of the disclosure tort has been varied and vexing.<sup>258</sup> Nevertheless, it is not too late for the courts to formally adopt the tort. In fact, this Note calls for a simple revival. To this end, the Restatement's model remains a worthy candidate, but only if reconceptualized to comport with our highly digitized reality. Admittedly, privacy—whether considered conceptually or experientially—differs greatly from times of Warren and Brandeis.<sup>259</sup> But the harms resulting from invasions to personal privacy have all but withered. Thus, the disclosure tort deserves recognition—and perhaps now more than ever.

---

258. *See supra* Sections III.A-C.

259. *See* Warren & Brandeis, *supra* note 14. Warren and Brandeis published their article in 1890.