JUDGING OFFENSIVENESS: A RUBRIC FOR PRIVACY TORTS

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ABSTRACT

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

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

I. INTRODUCTION

"What disturbs men's minds is not events
but their judg[]ments on events[…]"[1]

A divorcing husband peeps through his ex's bedroom window to photograph her intimate moment with her lover.[2] A professor lies to obtain a student's HIV test.[3] Professional associates blast emails calling a colleague a racist, sexual predator, and monster.[4] Protesters display large signs outing the names of women about to undergo an abortion.[5] A company obtains a former employee's Facebook password to surveil him.[6] Co-workers invade a Black employee's workspace to leave a menacing noose.[7] An app surreptitiously collects personal information from

[1] EPICTETUS, EPICTETUS: THE DISCOURSES AND MANUAL, TOGETHER WITH FRAGMENTS OF HIS WRITINGS (P.E. Matheson trans., Clarendon Press 1916) (c. 125 A.D.).
[2] Plaxico v. Michael, 735 So. 2d 1036 (Miss.1999).
[3] Doe v. High-Tech Inst., Inc., 972 P.2d 1060 (Colo. App. 1998).
[4] Conejo v. Am. Fed. Gov't Empl, 377 F. Supp. 3d 16 (D.D.C. 2019).
[5] Doe v. Mills, 536 N.W.2d 824 (Mich. Ct. App. 1995).
[6] Decoursey v. Sherwin-Williams Co., 19-02198-DDC-GEB, 2020 WL 1812266 (D. Kan. Apr. 9, 2020).
[7] Powell v. Verizon, No. 19-8418 (KM) (MAH), 2019 WL 4597575 (D.N.J. Sept. 20, 2019).

children.[8] None of these transgressions find legal redress in U.S. privacy tort law unless a judge and jury legitimize their offensiveness, that is, assess them "highly offensive to a reasonable person."[9]

Offense and offensiveness are at the heart of most privacy violations. In fact, Louis Brandeis and Samuel Warren's visceral feelings of offense can be said to have inspired the creation of the privacy torts.[10] *What is offensiveness in privacy? How should we gauge it?* The approaches and answers to these questions have profound ramifications for privacy and the evolving norms that surround it.

Generally, offense has been described as a "moralized bad feeling" encompassing a wide range of diverse emotions, from simple distaste and annoyance, to disgust, fear, and indignation.[11] In daily life, the "I-know-it-when-I-feel-it" response to offensiveness is instinctual, commonplace, and even satisfactory. Anything can be offensive to someone, somewhere. There is no need for something to be offensive for someone to be offended or genuinely believe that something is offensive.[12] Offense can be mistaken, unreasonable, hypersensitive, or even immoral – and still be desperately felt. As one scholar put it, "anything you choose to do might exasperate me."[13]

Socially, the concept of offensiveness is having a moment. Labeling offensiveness has become an empowering and sometimes controversial rallying cry. Examples abound in contemporary "cancel culture," which is marked by communal calls to boycott public figures and organizations for offensive behavior, often based on racism or misogyny. Studies suggest that people today perceive that others are more likely to take offense and voice it, prompting debates on the chilling nature of the label.[14]

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

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[8] McDonald v. Kiloo ApS, 385 F. Supp. 3d 1022 (N.D. Cal. 2019).

[9] RESTATEMENT (SECOND) OF TORTS, §§ 652B, 652D, 652E (1977). Because it does not include an offensiveness element, the fourth privacy tort, Appropriation of Name or Likeness is not discussed in this Article. *Id.* § 652C (1977).

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

[11] ANDREW SNEDDON, OFFENSE AND OFFENSIVENESS: A PHILOSOPHICAL ACCOUNT 44 (2021).

[12] *Id.* at 26.

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

[14] *See, e.g.*, Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share*, CATO INST.: SURVEY REPORTS (July 22, 2020), https://www.cato.org/publications/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share; *Public Highly Critical of State of Political Discourse in the U.S.: Reactions to Trump's Rhetoric: Concern, Confusion, Embarrassment*, PEW RSCH. CENTER, 68 (June 2019), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/06/PP_2019.06.19_Political-Discourse_FINAL.pdf; Jennifer Harper, *Weary of culture wars: 81% of Americans say people are too easily offended these days*, WASH. TIMES, Apr. 27, 2019, https://www.washingtontimes.com/news/2019/apr/27/81-of-americans-say-people-are-too-easily-offended/.

seclusion, public disclosure of private facts, and false light – require a violation to involve an intrusion or disclosure that is "highly offensive to a reasonable person," a gatekeeping element, offering a tempering moment for judicial discretion and community context-reading.

And yet, offensiveness has often eluded courts. The concept has proven slippery – visceral, expansive, potentially biased, and thus rarely dissected systematically. As a result, courts often forgo its reasoned analysis, apply inconsistent (or no) standards, and harbor contradictions. At a minimum, offensiveness is a reflection of social convention,[15] or, as one court puzzlingly put it, an "objectively-based threshold degree of repugnance."[16] Other courts have looked to the harm caused or invoked public policy.[17] In short, we seem to lack the analytical vocabulary and framework to nail offensiveness beyond vague statements.

Analytical failures threaten both overinclusion and underinclusion.[18] An overinclusive offensiveness standard risks overly imposing moralism and validating irrational sensitivities and idiosyncrasies, undermining the role of law and chilling speech and action.[19] When the offensiveness standard becomes too high a bar, too inflexible, or too outdated to accommodate contemporary invasions of privacy, it risks underinclusion. This could lead to an entrenchment of existing social hierarchies, a perpetuation of biases, a misreading of evolving social or technology norms -- and a gutting of the privacy torts.

As Justice Stevens observed, when he was in high school in the 1930s, *Gone With the Wind*'s famous "Frankly, my dear, I don't give a damn" line shocked the nation, but half a century later, it was not so offensive.[20] Today, our society is undergoing a shift in mores at a faster pace than ever. The legalization of marijuana and same-sex marriage, as well as the increased awareness about systemic racism and misogyny brought about by Black Lives Matter and #MeToo movements, are some important examples of the rapid shift in societal consciousness. Technological innovations complicate the matter, creating new ways of communicating and doing business along with emerging associated norms for acceptable conduct. Recently, the issue of offensiveness has figured in privacy tort cases involving some of the most consequential privacy-

[15] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.10(A)(2) (1993).
[16] Fabio v. Credit Bureau of Hutchinson, Inc., 210 F.R.D. 688, 692 (D. Minn. 2002).
[17] In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 606 (9th Cir. 2020).
[18] *See, e.g.*, Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711, 1764 (2010); Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263 (1993); Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CAL. L. REV. 1805, 1810, 1830, 1850-51 (2010); Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1057-76 (1995); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 961-63 (1989); *cf.* Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2068 (2018) (noting that at least 12% of public disclosure of private facts cases between 2006 and 2016 were dismissed because the court found disclosure was not highly offensive).
[19] *See, e.g.*, J. Angelo Corlett, *Offensiphobia*, 22 J. ETHICS 113, 115 (2018).
[20] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 691 (1986) (Stevens, J. dissenting).

related issues of our day, including data collection,[21] geolocation tracking,[22] revenge porn,[23] sexual harassment,[24] and transgender bathroom access.[25]

Fuzzy logic and inchoate reasoning on offensiveness are too costly for privacy and society, permitting covert and unacknowledged biases to discretely (or in some cases overtly) seep through in determining offensiveness. The biases espoused by courts, several scholars have observed, often lead to discriminatory treatment of women, racial minorities, and other marginalized groups in tort law.[26] And decisions that hold as a matter of law that the no reasonable person would find the conduct or disclosure at issue to be offensive, stigmatize dissenters as unreasonable outcasts unworthy of consideration.[27]

This Article proposes to organize the opaque, chaotic analysis of offensiveness by exposing its analytical and doctrinal inconsistencies and drawing principles from other disciplines (most notable philosophy) to create order. In Part II of this Article, we explore the current state of the offensiveness analysis in privacy torts, studying its approaches and challenges as manifest through decades of case law and scholarship. We join the chorus of privacy scholars who have criticized the loose and unpredictable approaches to determining offensiveness,[28] but we go a step further. Having qualitatively surveyed hundreds of relevant privacy tort cases, we identify and diagnose the analytical traps that courts face when applying the "highly offensive" prong, including misidentifying the offense, misframing the offense, and potentially fatal or biased misapplications of the law. Noticing that many of the cases involved defendants belonging to marginalized groups, it is clear that the effects of these errors in judgment and application have significant ramifications, often determinative of who is entitled to privacy.

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[21] *See, e.g.*, Popa v. Harriet Carter Gifts, Inc., 426 F. Supp. 3d 108 (W.D. Pa. 2019); Manigault--Johnson v. Google, LLC, No. 18-CV-1032, 2019 WL 3006646 (D.S.C. Mar. 31, 2019); Yunker v. Pandora Media, 11-CV-3113, 2013 WL 1282980 (N.D. Cal. Mar. 26, 2013); Low v. LinkedIn Corp., 900 F. Supp. 2d 1010 (N.D. Cal. 2012).

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

[23] *See, e.g.*, Doe v. Peterson, 784 F. Supp. 2d 831 (E.D. Mich. 2011); People v. Bollaert, 248 Cal. App. 4th 699 (Cal. App. Dist. 2016).

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

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

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

[27] Kahan et al., *supra* note 26, at 842, 887.

[28] *See, e.g.*, Campbell v. MGN Ltd. [2004] UKHL 22, [2004] 2 AC (HL) 457 (Appeal taken from Eng.) (UK); Australian Broad. Corp v. Lenah Game Meats Pty Ltd, (2001) 308 CLR 199, [42] (Austl.); Cavico, *supra* note 18; McClurg, *supra* note 18; N.A. Moreham, *Abandoning the "High Offensiveness" Privacy Test*, 4 CAN. J. COMPAR. & CONTEMP. L. 161 (2018); *see also infra* note 183.

Part III takes a broader view, incorporating definitions, concepts, and examples from psychology, philosophy, and cognitive science to give infrastructure to offensiveness. Leading legal scholars and philosophers have long debated the roles of norms and emotions in law.[29] Informed by seminal works in philosophy,[30] we expose various prominent lenses and tests through which to understand offensiveness in law. As the real-life analytical traps converge with lessons from philosophy, a clearer picture begins to emerge regarding the factors relevant to more objectively and fairly assess offensiveness.

Ultimately, Part IV proposes a rubric to guide the offensiveness analysis in privacy torts. The framework analyzes the offensiveness of the privacy violation by listing seven relevant factors that anyone assessing offensiveness should keep in mind to avoid error and bias. Our proposed test rejects simple moralistic conclusions in favor of an emphasis on the wisdom of the crowd and transparency of reasoning. It strives to make explicit the anatomy of the offense to lay bare its sources and identify the interests impinged, while prompting the arbiter to consider contextual factors and avoid cognitive biases. The goal is not to sway the analysis substantively – that is, to render outcomes more, or less, offensive – but rather to organize and guide its process. We then apply this rubric to two case examples to illustrate the resulting analysis.

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

Tackling offensiveness is a daunting and ambitious project. However, given the relatively scant scholarly attention focused on offensiveness and privacy,[31] ignoring it is too costly for privacy and society. Today, it is not only judges and juries engaging in consequential analyses on offensiveness. Policymakers, businesses, universities and schools, journalists, and just about every individual benefit from learning how to think about offensiveness in a structured manner. The significance of a written, guided rubric for decisionmakers cannot be understated. Daniel Kahneman, Oliver Sibony, and Cass Sunstein have compellingly shown that like bias, noise, or inconsistent, unexplained variations in judgments, causes significant errors and undermines

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[29] JOEL FEINBERG, OFFENSE TO OTHERS (1984); HERBERT LIONEL ADOLPHUS HART, LAW, LIBERTY, AND MORALITY (1963) ("No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned. Protection from shock or offence to feelings caused by some public display is, as most legal systems recognise, another matter."); Dan M. Kahan, *The Progressive Appropriation of Disgust*, *in* THE PASSIONS OF LAW 63 (Susan Bandes ed. 2000); JOHN STUART MILL, ON LIBERTY (1859); MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004); Martha Nussbaum, *Secret Sewers of Vice: Disgust, Bodies and the Law*, *in* PASSIONS OF LAW 44 (Susan Bandes ed. 2000); Tatjana Hörnle, *Offensive Behavior and German Penal Law*, 5 BUFF. CRIM. L. REV. 255, 262–63 (2001); von Hirsch, *supra* note 13, at 709.

[30] *See* SNEDDON, *supra* note 11; NUSSBAUM, HIDING FROM HUMANITY, *supra* note 29; FEINBERG, *supra* note 29.

[31] Most privacy scholars have, at one time or another, commented in passing of the elusive nature of the standard and its potential to set the recovery bar too high for victims of privacy invasions. However, to date, in depth treatment has been limited. *See* McClurg, *supra* note 18; Moreham, *supra* note 28; Post, *supra* note 18; Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J. L. & TECH. 1 (2007).

justice.[32] These authors propose that guidelines can reduce the ill effects of noise. In the same vein, this Article describes and deconstructs the judgement errors – both noise and bias -- present in the offensiveness analysis and prescribes guidelines for decisionmakers. So, our objective is vital but realistically modest: to examine the doctrinal, theoretical, and practical realities of offensiveness today in order to extract propositions suitable to guide decisionmakers in the privacy realm.

II. "Offensiveness" in the Privacy Torts

Offensiveness is an element of three of the four privacy torts—intrusion upon seclusion, public disclosure of private facts, and false light publicity. All three torts require that the core of the privacy invasion—that is, the intrusion, the matter disclosed, or the false light—be highly offensive.[33] Although an offended state may have inspired Warren and Brandeis's seminal article,[34] and thus the creation of the torts, it was William Prosser's later development of the torts that introduced offensiveness as a requisite element.[35] In his 1960 California Law Review article, Prosser explained that to be actionable, the core of the privacy violations "must be something which would be offensive or objectionable to a reasonable man."[36] Between Prosser's article and the 1977 Restatement, the offensiveness standard rose from offensive to highly offensive[37]—perhaps as an apologetic compromise that ensured the newly developed torts would not encompass a wide sea of conduct and disclosures. Indeed, as a practical matter, the objective offensiveness standard acts as a gatekeeper against redress for "accidental, misguided, or excusable acts."[38] There is, however, no bright line test for offensiveness.[39] It is instead a fact-intensive, context-specific analysis.

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[32] DANIEL KAHNEMAN, OLIVIER SIBONY & CASS R. SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT (2021).

[33] It bears noting that although the offensiveness standard is the same, the subject of their analysis is different in each of the three torts. In an intrusion claim, the actual intrusion must be highly offensive. RESTATEMENT (SECOND) TORTS § 652B (1977); In a public disclosure of private facts claim, the private matter publicized must be highly offensive. *Id.* § 652D. And in false light publicity claims, the false light in which the plaintiff is placed must be highly offensive. *Id.* § 652E. For ease of reference, we will refer to these as the cores of the privacy violations.

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

[35] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

[36] *Id.* at 391(describing intrusion); *id.* at 396. (using the same language to describe the offensiveness of the matter disclosed in public disclosure of private facts tort); *id.* at 400 (the false light "must be something objectionable to the ordinary reasonable man under the circumstances.").

[37] *See* RESTATEMENT (SECOND) TORTS § 652 (1977).

[38] *In re* Google, Inc. Cookie Placement Consumer Priv. Litig., 806 F.3d 125, 150 (3d Cir. 2015); *see also* Kleinman v. Equable Ascent. No. CV 12-9729 CAS AJWX, 2013 WL 49754, at *3 (C.D. Cal. Jan. 3, 2013) (quoting Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647-48 (Cal. 1994)); Post, *supra* note 18, at 961, 975, 984 (noting the "highly offensive" requirement of the Restatement is meant to limit the redress of privacy to only those transgressions that go beyond the limits of decency); Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-volution for American Employees*, 42 J. MARSHALL L. REV. 83, 101 (2008) (describing the highly offensive standard as a significant limitation on the torts).

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

A. Legal Standards on Offensiveness

Since its inception, the offensiveness analysis has been consistently muddled. Like privacy itself, "nobody seems to have any very clear idea what it [means]."[40] Instead of an appeal to reason, we are engulfed by instinctual conclusions in a "knee-jerk form: 'That violates my privacy!'" [41] or "That's offensive!" But how to legally determine offensiveness, as courts and juries must, is an abstruse task made more difficult in a diverse, pluralistic, and rapidly evolving society.

Despite its difficulty, offensiveness figures prominently – and often confoundingly – in many areas of law, from criminal law (which penalizes morally offensive conduct like prostitution and indecent exposure) to First Amendment inquiries, including obscenity, indecency, school speech, and freedom of religion.[42] The analysis of the concept is central to some causes of action, such as Title VII of the Civil Rights Act of 1964, which requires plaintiffs to show that harassment was both objectively and subjectively offensive.[43] Other areas of law, such as trademark law[44] and the Communications Decency Act,[45] have witnessed offensiveness falling out of favor as a barometer of rectitude.

In privacy tort cases, courts engage in these high-stakes inquiries often deciding offensiveness as a matter of law.[46] Courts in the first instance must determine whether a reasonable person *could*

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

[41] Solove, *Taxonomy*, *supra* note 40, at 480.

[42] *See, e.g.,* American Legion v. American Humanist Ass'n, 139 S.Ct. 2067, 2098-2103 (2019) (Gorsuch, J. concurring) (discussing offended observer standing in First Amendment Establishment Clause cases); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (permitting schools to regulate plainly offensive speech); F.C.C. v. Pacifica Found., 438 U.S. 726, 730-31 (1978) (applying FCC's definition of indecent speech as speech or language that "describe[s] in terms patently offensive, as measured by contemporary community standards for the broadcast medium sexual or excretory activities and organs"); Miller v. California, 413 U.S. 15, 36 (1973) (patently offensive standard in obscenity cases); Cohen v. California, 403 U.S. 15, 18 (1971) (First Amendment protections for offensive speech).

[43] Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986); Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 470 (6th Cir. 2012).

[44] Matal v. Tam, 137 S.Ct. 1744 (2017); Iancu v. Brunetti, 139 S.Ct. 2294 (2019).

[45] Recent proposed amendments to Section 230 of the Communications Decency Act seek to either eliminate or clarify the Act's immunity protection for service provider's removal of "offensive material." *See, e.g.*, Stop the Censorship Act of 2020, H.R. 7808, 116th Cong. (2d Sess. 2020); Stop the Censorship Act, H.R. 4027, 116th Cong. (1st Sess. 2019); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2d Sess. 2020). *See also* DEP'T OF JUST., *Section 230 — Nurturing Innovation or Fostering Unaccountability, Key Takeaways and Recommendations* (June 2020), https://www.justice.gov/file/1286331/download?utm_medium=email&utm_source=govdelivery.

[46] McClurg, *supra* note 18, at 999-1005 (noting upon referring to available empirical data from 1992 that courts' judicial animus for privacy tort cases and propensity to decide elements of the tort as a matter of law rather than allowing them to go to the jury, particularly the factual issue of whether the conduct or disclosure would be highly offensive to a reasonable person).

find the privacy violation to be highly offensive,[47] and the fact finder in the second instance whether a reasonable person *would* find it highly offensive.[48]

To come to these conclusions, courts must ignore factors to which one would customarily appeal when assessing whether something is colloquially offensive: the views of the aggrieved and the harms caused. Unlike other areas of law where the subjective impressions of the aggrieved are considered (such as hostile work environment claims[49] and now-defunct Section 2(a) of the Lanham Act disallowing disparaging or immoral trademarks[50]), the highly offensive standard is meant to be purely objective,[51] asking not whether the aggrieved suffered offense, but rather how the reasonable person—a construct embodying the norms and "moral judgment of the community"[52]—would react.

The offensiveness inquiry is not meant to predict actual human emotion caused by offensive conduct or content but rather to identify those norms that, when violated, would appropriately cause outrage in reasonable individuals.[53] The tort also eschews harm. A privacy harm results from the offense provoked by the invasion, not the actual mental suffering or humiliation it causes the plaintiff.[54] Thus while the observable harm caused to the plaintiff can be an indicator of the type of invasion that might be offensive, it is not determinative of the offensiveness of the invasion.

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

B. Current Approaches to Analyzing Offensiveness

1. Mores-Based Inquiries

The most common approach in assessing offensiveness is a simple look to community mores, rules of civility, and social norms to assess offensiveness. In his seminal article, Prosser posited

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

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

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

[50] Matal v. Tam, 137 S.Ct. 1744 (2017); Iancu v. Brunetti, 139 S.Ct. 2294 (2019).

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

[52] Post, *supra* note 18, at 961 (noting "the reasonable person is only a generic construct without real emotions") (citing FOWLER HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 16.2 (1956)).

[53] *Id.* at 961.

[54] *Id.* at 960-61.

that privacy torts' offensiveness standard necessarily implies "a 'mores' test."[55] As such, courts have held that liability only attaches when privacy invasions defy the tolerable bounds of the "ordinary views of the community"[56] or shock the "community's notions of decency."[57] This requires an often instinctual examination of the community's social conventions and expectations,[58] and a subsequent determination regarding whether the violation was an egregious breach of those established social norms.[59]

2. Offensiveness *Per Se*

Some courts in privacy tort cases seem to take the narrow view of themes that can rise to the level of offensiveness. In public disclosure cases, for example, a few courts have limited highly offensive matters to those that are also highly personal, involving health problems, sexual relationships, and family quarrels.[60] While courts in intrusion cases have not similarly limited the areas upon which intruded can be highly offensive, they have found the element more likely met when the intrusion involves a person's physical home or intimate conduct.[61]

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[55] Prosser, *supra* note 35, at 397, 400.
[56] *Id.* at 397.
[57] Daly v. Viacom, Inc., 238 F. Supp. 2d 1118 (N.D. Cal. 2002) (equating the highly offensive standard with disclosures that are "beyond the limits of decency such that defendant should have realized it would be offensive to persons of ordinary sensibility"); Sipple v. Chronicle Pub. Co., 154 Cal.App.3d 1040, 1048 (Cal. App. Ct. 1984).
[58] *In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 606 (9th Cir. 2020); Opperman v. Path, Inc., 205 F. Supp. 3d 1064, 1079 (N.D. Cal. 2016) (looking to whether the conduct is "consistent with community notions of privacy as they exist at the time"); PETA v. Bobby Berosini, Ltd., 895 P.2d 1269, 1281 (Nev. 1995) (inquiring whether intrusion was "contrary to social conventions and expectations") *overruled on other grounds by* City of Las Vegas Downtown Redevelopment Agency v. Hecht, 940 P.2d 134 (Nev. 1997); *see also* MCCARTHY, *supra* note 15, § 5.10(A)(2) ("The question of what kinds of conduct will be regarded as a 'highly offensive' intrusion is largely a matter of social conventions and expectations.").
[59] *See, e.g.*, *In re* Facebook Internet Tracking Litig., 263 F. Supp. 3d 836, 846 (N.D. Cal. 2017); Carter v. Cnty. Los Angeles, 770 F. Supp. 2d 1042, 1053 (C.D. Cal. 2011); Hernandez v. Hillsides, Inc., 97 Cal. Rptr. 3d 274, 286 (2009).
[60] *See, e.g.*, Paige v. U.S. Drug Enf't Admin., 818 F. Supp. 2d 4 (D.D.C. 2010) (noting that "'highly offensive' matters generally relate to the intimate details of a person's life, sexual relations, and other personal matters" and video of DEA officer accidentally shooting himself in the leg was embarrassing but not highly offensive because it didn't relate to an intimate detail of his private life or his sexual affairs); Karraker v. Rent-A-Center, Inc., 316 F. Supp. 2d 675, 683-84 (C.D. Ill. 2004) (noting that public discussion of a plaintiff's psychological test by discussing in public that he should drink more water, cut down on caffeine and nicotine, be less high strung were "innocuous" and not highly offensive because not exceedingly personal like sexual relations).
[61] *See, e.g.*, Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo.1942); Hamberger v. Eastman, 206 A.2d 239, 241-42 (N.H. 1964); *see also* Pauline T. Kim, *Data Mining and the Challenges of Protecting Employee Privacy Under U.S. Law*, 40 COMP. LAB. L. & POL'Y 405, 412-13 (2019) (noting courts more likely to find conduct offensive where employer surveils or searches areas that impinge on bodily privacy or investigate employees' sex lives, health problems, or workplace bathrooms); David Libardoni, *Prisoners of Fame: How Expanded Use of Intrusion Upon Psychological Seclusion Can Protect the Privacy of Former Public Figures*, 36 B.C. INT'L & COMP. L. REV. 1455, 1463 (2013) (noting plaintiffs' lack of difficulty in proving intrusions into bathrooms, home, and mail are highly offensive); Solove, *Taxonomy*, *supra* note 40, at 555-56 (noting that "[g]enerally, courts recognize intrusion upon seclusion tort actions [] when a person is at home"); Post, *supra* note 18, at 960 (observing "[m]arital bedrooms" are "sacred precincts" in privacy torts regardless of harm that can be deciphered as a result of the invasion) (citing Griswold v. Connecticut, 318 U.S. 479, 485 (1965)).

While helpful to the analysis of a narrow class of cases, this approach is highly restrictive, prohibiting the expansion or interpretation of novel behavior as offensive if it does not intrude into personal or physical space.[62]

3. Factor-based Tests

Courts, most notably California courts, have identified factors and proposed balancing tests to determine offensiveness. The leading test on offensiveness was established in *Miller v. National Broadcasting Company*.[63] The California appellate court listed five factors courts should consider when determining whether an intrusion meets the tort's highly offensive standard: (1) the degree of intrusion, (2) the context, conduct, and circumstances surrounding the intrusion, (3) the intruder's motives and objectives, (4) the setting into which the intrusion occurs, and (5) the expectations of those whose privacy is invaded.[64] *Miller* has been adopted across other jurisdictions[65] and has been used across privacy torts as a gauge of offensiveness.[66]

In *Hill v. National Collegiate Athletic Association*, the California Supreme Court observed, prior to applying *Miller*, that the objective offensiveness analysis involved consideration of (1) the likelihood of serious harm, particularly to the emotional sensibilities of the plaintiff against (2) any countervailing interests based on competing social norms that may render the defendant's conduct inoffensive, such as a legitimate public interest in exposing serious crime or, in that case, the NCAA's interest in restricting the use of controlled substances in college sports.[67] In 2009, the California Supreme Court seemingly combined both *Hill* and *Miller* in *Hernandez v. Hillsides, Inc*. by balancing (1) the degree and setting of the intrusion, which includes the place, time, and scope of the defendant's intrusion, against (2) the defendants' motives, justifications, and related issues.[68]

4. Focus on Outrage

Some jurisdictions opt to assess whether the privacy violation meets the standard of the intentional infliction of emotional distress tort, which conflates a normative analysis with a high level of outrage and intent. The standard limits findings of offensiveness to intrusions "so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency."[69] In these jurisdictions, only intrusions that are "done in a manner to outrage or cause

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[62] Sánchez Abril, *supra* note 31, at 21 (noting that interpreting the Restatement's static list of highly offensive conduct as exhaustive "significantly limit[s] the public disclosure tort's application").
[63] Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 678-79 (Cal. Ct. App. 1986).
[64] *Id.*
[65] *See, e.g.,* Bogie v. Rosenberg, 705 F.3d 603, 612 (7th Cir. 2013); Reed v. Toyota Motor Credit Corp., 459 P.3d 253, 260 (Or. Ct. App. 2020); Stien v. Marriott Ownership Resorts, Inc., 944 P.2d 374, 379 (Ut. Ct. App. 1997).
[66] Four Navy Seals, 413 F. Supp. 2d at 1145 (S.D. Cal. 2005).
[67] Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647-48 (Cal. 1994).
[68] Hernandez v. Hillsides, Inc., 47 Cal. Rptr. 3d 274, 293 (Cal. 2009).
[69] Hammer v. Sorensen, 824 Fed. Appx. 689, 696 (11th Cir. 2020) (applying Florida law); Stoddard v. Wohlfahrt, 573 So.2d 1060, 1062-63 (Fla. Dist. Ct. App. 1991); Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964) ("It is only where the intrusion has gone beyond the limits of decency that liability accrues.").

mental suffering, shame, or humiliation to a person of ordinary sensibilities"[70] meet the highly offensive standard. Other courts similarly require a privacy violation to be "so outrageous that the traditional remedies of trespass, nuisance, intentional infliction of mental distress, etc., will not adequately compensate a plaintiff for the insult to his individual dignity."[71] A few courts in false light cases have also required the false light to be of the kind that would cause the reasonable person to "suffer outrage, mental distress, shame, and humiliation."[72] These are, unsurprisingly, "very high standard[s]."[73]

5. Non-Approach Approaches

In the absence of a test or other source of agreed-upon enlightenment, many jurisdictions opt to assess the trigger with varying descriptors of offensiveness. Some of these reference generalized norms, such as utterly intolerable,[74] beyond all possible bounds of decency,[75] and transgressing social norms.[76] Others evoke a moral judgment, such as objectionable,[77] strongly objectionable,[78] atrocious,[79] shocking the conscience,[80] and extreme in degree.[81] A third grouping distinguishes characteristics of the violations, like unwarranted,[82] obtrusive,[83] repeated with such persistence and frequency as to amount to hounding.[84] Still, others reference the consequences of the violation, such as causing mental anguish,[85] mental suffering, shame, or humiliation,[86] highly

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[69] Popa v. Harriet Carter Gifts, Inc., 426 F. Supp. 3d 108, 122-23 (W.D. Pa. 2019); Haller v. Phillips, 591 N.E.2d 305, 307 (Ohio Ct. App. 1990) (holding that intrusion must be of "such a character as would shock the ordinary person to the point of emotional distress").
[70] Popa, 426 F. Supp. 3d at 122-23; Haller, 591 N.E.2d at 307.
[71] Froelich v. Adair, 516 P.2d 993, 998 (Kan. 1973) (Fromme, J., dissenting); *see also* Neal v. Elect. Arts, Inc., 374 F. Supp. 2d 574, 579 (W.D. Mich. 2005) ("The tort of false light "'rest on an awareness that people who are made to seem pathetic or ridiculous may be shunned' even though they do not have a defamation claim.").
[72] Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 248 (1974).
[73] Martin v. Guevara, 464 Fed. Appx. 407, 411 (5th Cir. 2012).
[74] Popa, 426 F. Supp .3d at 122-23; McIsaac v. WZEW–FM Corp., 495 So. 2d 649, 651 (Ala. 1986); Chicarella v. Passant, 494 A.2d 1109, 1114 (Pa. 1985).
[75] Oppenheim v. I.C. Sys., Inc., 695 F. Supp. 2d 1303, 1310 (M.D. Fla. 2010); Rowell v. King, No. 05-1078, 2005 WL 2099718, at *2 (D. Kan. Aug. 30, 2005).
[76] *In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 601-02 (9th Cir. 2020); Hernandez v. Hillsides, Inc., 97 Cal. Rptr. 3d 274, 285 (Cal. 2009).
[77] Prosser, *supra* note 35, at 390-91.
[78] RESTATEMENT (SECOND) TORTS § 652B cmt. d (1977).
[79] Harrison v. City of Ft. Lauderdale, No. 17-61164-CIV, 2018 WL 9516029, at *6 (S.D. Fla. Dec. 21, 2018); Wright v. Wright, 654 So.2d 542, 544 (Ala. 1995).
[80] Opperman v. Path, 205 F. Supp. 3d 1064, 1078 (N.D. Cal. 2016); Anderson v. Cty. Becker, Civ. No. 08-5687 ADM/RLE, 2009 WL 3164769, at *14 (D. Minn. Sept. 28, 2009).
[81] Oppenheim v. I.C. Sys., Inc., 695 F. Supp. 2d 1303, 1309 (M.D. Fla. 2010).
[82] Gates v. Black Hills Health Care Sys., 997 F. Supp. 2d 1024, 1031-32 (D.S.D. 2014).
[83] Gates, 997 F. Supp. 2d at 1031-32; Magenis v. Fisher Broad., Inc., 798 P.2d 1106, 1110-11 (Or. Ct. App. 1990).
[84] Salcedo v. Hann, 936 F.3d 1162, 1171 (11th Cir. 2019) (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977)).
[85] *Id.*
[86] Popa v. Harriet Carter Gifts, Inc., 426 F. Supp. 3d 108, 122-23 (W.D. Pa. 2019); Buller v. Pulitzer Pub. Co., 684 S.W.2d 473, 481 (Mo. Ct. App. 1984); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235-36 (Minn. 1998).

embarrassing,[87] painful,[88] injuring human dignity and peace of mind,[89] or harmful to the person's reputation.[90] This litany of descriptors, however, provides little guidance and predictability to courts.

Some courts simply decide, with little to no explanation, that the invasion could or could not ever be offensive. As J. Thomas McCarthy noted, "[w]ithout a definition or litmus test of offensiveness, courts must rely on their own intuition on a case by case basis."[91] With little cohesion or guidance, it is no surprise that in many cases courts do not provide much of a basis or explanation for their judgments of offensiveness. At times these visceral decisions involve no head scratching, but other times they do. For example, it certainly seems plausible that a reasonable jury could conclude that videotaping someone with their pants down while having their groin area examined[92] or falsely suggesting they sexually abused a minor[93] might be highly offensive. But it is less clear why other courts determined that no reasonable person could ever conclude that surreptitious surveillance of an ex-employee,[94] disclosure of a woman's breast cancer surgery,[95] or falsely implying someone no longer associates with their race[96] might be highly offensive.

With less structure imposed, the conscious and unconscious biases of decisionmakers are more likely to weigh in the analysis. As others have observed, brute sense impressions are foundations that simply afford no counterargument, privileging the judge's own views on offensiveness.[97]

C. Critical Traps

The way offensiveness is analyzed - through what lens, with what criteria, and with what precision – is critically important. Consider the Supreme Court's recent brush with offensiveness in another legal context, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[98] Phillips, a baker, had refused to make a wedding cake for a same-sex couple, contending that doing so offended his legitimately-held religious beliefs.[99] The Colorado Civil Rights Commission

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[87] Pawlaczyk v. Besser Credit Union, No. 14-cv-10983, 2014 WL 5425576, at *5 (E.D. Mich. Oct. 22, 2014); *see also* Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (equating highly offensive matters with those whose "disclosure would cause emotional distress or embarrassment to a reasonable person").
[88] Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1234-35 (7th Cir. 1993).
[89] Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998).
[90] Welling v. Weinfeld, 866 N.E.2d 1051, 1056 (Ohio 2007).
[91] MCCARTHY, *supra* note 15, at § 5:95; Moreham, *supra* note 28, at 174-77 (noting highly offensiveness test lacks clear application principles making it unpredictable).
[92] Acuff v. IBP, Inc., 77 F. Supp. 2d 914, 927 (C.D. Ill. 1999).
[93] Santillo v. Reedel, 634 A.2d 264 (Pa. 1993).
[94] Scherer Design Grp., LLC v. Schwartz, Civ. No. 18-3540, 2018 WL 3613421, at *3 (D.N.J. July 26, 2018); *see also* Scherer Design Grp., LLC v. Ahead Eng'g LLC, 764 Fed. Appx. 147, 154-55 (3d Cir. 2019) (Ambro, J., dissenting).
[95] Mark v. City of Hattiesburg, No. 2016-CA-01638-COA, 2019 WL 125656, at *6 (Miss. Ct. App. Jan. 8, 2019) (affirming trial court's directed verdict because nothing suggests that a breast cancer diagnosis or surgery could be highly offensive to the reasonable person), *aff'd on other grounds*, Mark v. City of Hattiesburg, 289 So.3d 294 (Miss. 2020).
[96] Arrington v. NY Times Co., 55 N.Y.2d 433, 441-42 (N.Y. 1982).
[97] Kahan et. al, *supra* note xx, at 838.
[98] 138 S.Ct. 1719 (2018).
[99] *Id.* at 1723-24, 1726.

ordered Philips to sell wedding cakes to all customers equally, and Philips appealed, arguing that the Commission's hostility towards his religion violated the Free Exercise Clause.[100] The Supreme Court agreed. The majority's reasoning relied heavily on the fact that the Commission had allowed other bakers to stand in their refusal to create other types of offensive cakes—those with anti-same-sex-marriage messages.[101] The Court held that the Commission regulated based on its own determination of which cake was offensive and which was not.[102]

In her dissent, Justice Ginsburg argued that the bakers' refusals were not comparable – because the source of their offensiveness was different.[103] Ginsburg made a critical distinction about the case and in the process about offensiveness:

> Phillips declined to make a cake he found offensive where the offensiveness was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection was due to the demeaning message the requested product would literally display.[104]

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

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

While the privacy interests each tort seeks to address vary, we reviewed intrusion upon seclusion, public disclosure of private facts, and false light privacy tort cases, focusing on the most recent cases and cases that contained lengthier discussions on the offensiveness of the trigger.[105] We classified cases by tort, whether they disposed of the offensiveness element as a matter of law at the dismissal stage, decided it at summary judgment, or ultimately left it for the trier of fact, and the reason for the court's offensiveness analysis, as well as any standard the court may have applied in reaching its conclusion.

While not all courts get it wrong, we identified the following six analytical traps that plague offensiveness in privacy law. These are not the only analytical missteps courts make in conducting the torts' offensiveness analysis, but they were some of the most frequently observed. While we label these "critical traps," we recognize that some, after years of precedent, form the common law of the state. For example, in Illinois, an intrusion must result in mental anguish and suffering to

[100] *Id.* at 1730-31.
[101] *Id.* at 1731-32.
[102] Masterpiece, 138 S.Ct. at 1731.
[103] *Id.* at 1750 (Ginsburg, J. dissenting).
[104] *Id.* at 1750-51 (Ginsburg, J. dissenting).
[105] Our search captured cases discussing the "highly offensive" element from the last ten years and cases that contained a discussion of the tort's offensiveness prong in with at least six hits.

the plaintiff to be actionable.[106] This element appears to find its origins from a 1977 appellate case that, upon finding there was not a harmful intrusion, also found that the plaintiff's alleged injury and hospitalization after the alleged intrusion were not foreseeable and could not be recovered as damages.[107] While the court did not hold that an intrusion had to cause anguish or suffering to be actionable, it is clear that today, in the state of Illinois, it does.[108] The analytical traps discussed below make the standard unpredictable and unsurmountable, and sometimes meaningless.

1. Misidentifying What Needs to be Offensive

Surprisingly, courts have trouble pinpointing the conduct or material (trigger) that must be judged offensive in each tort. For the tort of intrusion upon seclusion, the elements dictate that it is the act of the invasion itself that must be highly offensive.[109] But intrusion claims are often summarily dismissed if the *content* revealed by the intrusion was not offensive or shameful enough.[110] According to these cases, which deviate from the Restatement and spirit of the tort, an intrusion is not offensive unless it invades matters that "are facially embarrassing and highly offensive if disclosed."[111]

Examples abound. One court found that an employer's intrusion into a former employee's cellphone was not actionable because the employer did not discover anything that was "facially embarrassing and highly offensive if disclosed."[112] Another found that the strength of plaintiffs' intrusion claims against Facebook depended on the nature of the data that was collected from plaintiffs and whether it was, in and of itself, sensitive.[113]

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[106] Similarly, it appears Illinois and Pennsylvania courts require that an intrusion disclose or reveal highly embarrassing, offensive facts in order to meet the offensiveness prong. *See e.g.*, Eash v. Cty. York, 450 F.Supp.3d 568, 580 (M.D. Pa. 2020); Boring v. Google, Inc., 362 Fed. Appx. 273, 278-79 (3d Cir. 2010) (quoting Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 570 Pa. 242, 248 (Pa. 2002)); Cooney v. Chicago Pub. Schl, 407 Ill.App.3d 358, 367 (Ill. Ct. App. 2010).

[107] Bank of Ind. v. Tremunde, 5 Ill. 3d 480, 484 (Ill. Ct. App. 1977).

[108] *See, e.g.*, Vega v. Chisago Park Dist., 958 F.Supp.2d 943, 959 (N.D. Ill. 2013); Busse v. Motorola, Inc., 351 Ill.App.3d 67, 71 (Ill. Ct. App. 2004); Dwyer v. American Express Co., 273 Ill.App.3d 742, 745-46 (Ill. Ct. App. 1995) (noting a necessary element of intrusion is that the intrusion must "cause[] anguish and suffering")

[109] RESTATEMENT (SECOND) TORTS § 652B (1977); Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 207 (2012) ("The intrusion tort penalizes conduct—offensive observations—not revelations."); Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CAL. L. REV. 2007, 2013 (2010) (noting that courts are meant "to focus on the offensiveness of the information gathering in the intrusion context," but not the public disclosure context and "this fine distinction often eludes them").

[110] *See e.g.*, Boring v. Google, Inc., 362 Fed. Appx. 273, 278-79 (3d Cir. 2010) (quoting Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 570 Pa. 242, 248 (Pa. 2002); Eash v. Cty. York, 450 F. Supp. 3d 568, 580 (M.D. Pa. 2020).

[111] Vega v. Chicago Park Dist., 958 F. Supp. 2d 943, 959 (N.D. Ill. 2013).

[112] Kaczmarek v. Cabela's Retail IL, Inc., No. 1-14-3813, 2015 WL 6156352, at *5-6 (Ill. Ct. App. 2015) ("Again, in the context of the tort of invasion of privacy by an intrusion upon seclusion, *private* matters are those 'which are facially embarrassing and highly offensive if disclosed.'") (emphasis in original) (quoting Cooney v. Chicago Pub. Sch., 407 Ill.App.3d 358, 367 (Ill. Ct. App. 2010)).

[113] Heeger v. Facebook, Inc., No. 18-cv-06399 & 18-cv-06793, 2020 WL 7664459, at *7 (N.D. Cal. Dec. 24, 2020) (quoting *In re* Facebook, Inc. Internet Tracking Litig., 957 F.3d 589, 603 (9th Cir. 2020)).

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

2. Misframing the Offense

A woman poses nude in a bathtub for an art book. Years later, a popular magazine of large circulation publishes the picture as a feature titled "Centerfold" without her knowledge and consent. The woman sues, claiming that the image placed her in an unchaste, false light. The court concludes that the alleged violation could not have been offensive because the picture only possibly suggested that "plaintiff bathes when in fact she [might] not."[114]

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

Overextending the frame can overlook the offensiveness of the publicity given to a private matter. For example, in *Haynes v. Alfred A. Knopf, Inc*., a book about the 1960s Great Society identified the plaintiff, a private individual, as a drunk who could not keep a job, an adulterer, and a neglectful husband and father. The court determined that the portrayal was not highly offensive because the focus of the book was not on the plaintiff, as he was just one example of the many African Americans who had migrated North during the period.[115] The court expanded the frame too widely, denying the plaintiff redress simply because the offensive disclosure was buried within a larger narrative.

3. Inserting a Harm Requirement

None of the three privacy torts discussed requires actual harm or injury to prove an invasion of privacy.[116] Unlike palpable harm, offensiveness seems immeasurable. With nothing to point to or grasp, courts sometimes seek to inject an element of injury or harm into the torts' analysis or deny the violations' offensiveness because the plaintiff did not sufficiently allege specific injury or damages.[117]

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[114] McCabe v. Village Voice, Inc., 550 F. Supp. 525, 529 (E.D. Pa. 1982), aff'd 8 F.3d 1222, 1233-35 (7th Cir. 1993) (affirming on newsworthiness grounds based on current state of Illinois common law).
[115] No. 91 C 8143, 1993 WL 68071, at *6 (N.D. Ill. 1993), *aff'd* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993) (affirmed on newsworthiness grounds).
[116] *See* RESTATEMENT (SECOND) TORTS § 652 (1977); *In re* Facebook Internet Tracking Litig., 263 F. Supp. 3d 836, 843 (N.D. Cal. 2017) ("[A] plaintiff need not show actual loss to establish standing for common-law claims of invasion of privacy[.]"); Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, B.U. L. REV. (forthcoming 2022) (noting courts presume the existence of harm in privacy tort law).
[117] *See, e.g.*, Busse v. Motorola, Inc., 351 Ill.App.3d 67, 71 (Ill. Ct. App. 2004); Dwyer v. American Express Co., 273 Ill.App.3d 742, 745-46 (Ill. Ct. App. 1995) (noting a necessary element of intrusion is that the intrusion must "cause[] anguish and suffering").

In *McGreal v. AT&T Corporation*, for example, the district court dismissed a cellphone account holder's intrusion claim when her cellphone call and text log records were inappropriately obtained, because she could prove no ensuing injury.[118] According to the court, intrusion claims required her to show that the invasion caused "anguish and suffering."[119] Another court overturned a five million dollar jury verdict for a couple's intrusion claims because the plaintiffs "sought no medical or psychological assistance for any anguish or suffering."[120] The court seemed particularly skeptical of the wife's claims of harm, because she was "not precluded from any . . . social activity because of her alleged emotional suffering."[121]

Indeed, "[t]o say that a 'mere' privacy invasion is not capable of inflicting an 'actual injury' serious enough is to disregard the importance of privacy in our society."[122] Courts' superimposed harm requirement considerably shrinks the torts' ability to redress offensive invasions, particularly where harm is narrowly construed.[123]

4. Overemphasis on Social Utility of the Trigger

Courts have also tended to place undue weight on the perceived social utility of the trigger tipping the scales against a finding of offensiveness. Social utility can encompass the defendant's motives or the public's potential interest in the information disclosed.[124] At times, any hint of a justification results in quick absolution on offensiveness.[125]

When courts deem defendants are motivated by legitimate purposes, they are apt to find privacy intrusions not offensive.[126] The Supreme Court of Kansas, for example, found a doctor's

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[118] 892 F. Supp. 2d 996, 1015-16 (N.D. Ill. 2012).
[119] *Id.* at 1015; *see also* Manigault-Johnson v. Google, LLC, No. 2:18-cv-1032, 2019 WL 3006646, at *6 (S.C.D. Mar. 31, 2019) (citing to no caselaw but finding that "unadorned they-harmed-me allegation[s] [are] wholly insufficient").
[120] Schmidt v. Ameritech Ill., 329 Ill.App.3d 1020, 1035 (Ill. Ct. App. 2002).
[121] *Id.*
[122] *In re* Facebook, Inc. Consumer Privacy Litig., 402 F. Supp. 3d 767, 786 (N.D. Cal. 2019); *see also* Nayab v. Capital One Bank (USA), N.A., 942 F.3d 480, 491 (9th Cir. 2019) ("Privacy torts do not always require additional consequences to be actionable.") (quoting Braitberg v. Charter Commc'n, Inc., 836 F.3d 925, 930 (8th Cir. 2016)); Ryan Calo, *Privacy Harm Exceptionalism*, 12 COLO. TECH. L. J. 361 (2014) (criticizing privacy harm exceptionalism); Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 768-69 (2007); (observing that limiting privacy harms to "dead bodies" overlooks non-visceral privacy harms that must be addressed even if less sensational than a horror movie).
[123] *See* Pruitt, *supra* note 26, at 972 (discussing how tort law is gendered and compels women "to articulate their injuries in a way that reflect[s] masculine values and interest" in order to obtain a recovery).
[124] *See e.g.*, Jackson v. Mayweather, 10 Cal.App.5th 1240 (Cal. Ct. App. 2017); Godbehere v. Phoenix Newspapers, Inc., 162 Ariz. 335, 343 (Ariz. 1989).
[125] *See* Makdisi, *supra* note 47, at 1011 (noting that where a defendant's interest has some legitimate purpose, conduct not exceeding that purpose "is likely to be construed not highly offensive as a matter of law"); Cavico, *supra* note 18, at 1286, 1320 (noting that where an employer can point to a legitimate, business reason for an intrusion courts are likely not to find liability).
[126] Lord Caswell from the House of Lords observed the same. Campbell v. MGN Ltd. [2004] UKHL [166] [2004] ("It also follows in my opinion that the motives of the respondents in publishing the information, which they claim to have done in order to give a sympathetic treatment to the subject, do not constitute a defence, if the publication of the material . . . revealed confidential material.")

unwarranted disclosure of his patient's suicidal thoughts and history of psychiatric treatment was not highly offensive because she was involved in a custody dispute.[127] The private individual who thwarted President Ford's assassination attempt was outed as gay and sued for the unwarranted publicity. The disclosure was pardoned as inoffensive because, amongst other things, according to the court, the media outlet's motivation was to dispel "the false public opinion that gays were timid, weak and unheroic figures."[128]

Newsworthiness, however unworthy, is also a "get out of jail free" card for the offensiveness analysis. Expansive interpretations of newsworthiness include not just matters in the public's legitimate concern, but also facts offered to the public for amusement.[129] Courts have observed that at "a time when entertainment news and celebrity gossip often seems to matter more than serious policy's discussions[,]" the "publication of [] otherwise intimate facts [are] necessarily [] considered newsworthy."[130] But this expansive interpretation of legitimate public concern seems to read the word "legitimate" out of the standard.[131] Moreover, just because a particular event may be newsworthy, does not mean all possible accompanying facts or images, are necessarily so. Consider the Pittsburgh Steelers football fan who appeared with his pant zipper open in a widely circulated image. The court reasoned that because the football game where the picture was taken was newsworthy, the embarrassing image of his groin was also newsworthy.[132] Similarly, filming of a plaintiff in serious physical distress at a hospital after ingesting a drug named Blue Nitro was deemed newsworthy because the story on Blue Nitro and its increased use were newsworthy.[133] Because nearly any fact, regardless of its independent newsworthiness, can be associated with some broader newsworthy story or societal comment, the newsworthy exception can swallow the offensiveness analysis.[134]

5. Fumbling with Evolving Norms

Apple contends that collecting and disclosing users' unique device identifier number, geolocation, and other personal data is not a breach of social norms because it is a routine commercial activity.[135] Google shares people's viewing history on YouTube, along with other personally identifiable information, to place targeted ads contrary to its own policies.[136] A court

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[127] Werner v. Kliewer, 238 Kan. 289, 295 (Kan. 1985).
[128] Sipple v. Chronicle Pub. Co, 154 Cal.App.3d 1040, 1049 (Cal. Ct. App. 1984).
[129] Shulman v. Grp. W. Prod., Inc., 18 Cal.4th 200, 215 (Cal. 1998); Jackson v. Mayweather, 10 Cal. App. 5th 1240 (Cal. App. Ct. 2017).
[130] Jackson, 10 Cal.App.5th at 1257.
[131] *See* Post, *supra* note 18, at 1004 ("That the public is in fact curious may well be true, but it merely restates the problem.")
[132] Neff v. Time, Inc., 406 F. Supp. 858, 861-62 (W.D. Pa. 1976).
[133] Carter v. Superior Court, No. D038091, 2002 WL 27229, at *4 (Cal. Ct. App. Jan. 10, 2002).
[134] David Anderson, *The Failure of American Privacy Law*, *in* PROTECTING PRIVACY: THE CLIFFORD CHANCE LECTURES, 139-40 (Basil S. Markesinis ed.; Oxford Univ. Press, 1999) (noting "[p]rivacy law in the United States delivers far less than it promises because it resolves virtually all [ ] conflicts in favour of information").
[135] *In re* iPhone Application Litig., 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012).
[136] *In re* Google, Inc. Priv. Policy Litig., 58 F. Supp. 3d 968, 973-74, 987 (N.D. Cal. 2014).

suggests Facebook should argue that automated machine intrusions are less offensive than the human gaze.[137] Are these practices highly offensive to a reasonable person?

Black's Law Dictionary defines "offensive" as "causing displeasure, anger, or resentment; esp. repugnant to the *prevailing sense of what is decent or moral*."[138] The determination of offensiveness cannot be unglued from a look to what society accepts as correct. But what is "decent or moral" and by whose "prevailing" sense? Norms are not always established, pin-pointable observations waiting to be definitively discovered by judges or juries.[139]

Instead, norms (and, by extension, offensiveness) are time, place, generation, and culture specific.[140] Novel social issues and emerging technologies challenge the application of norms, which may not have fully evolved. An application of community norms necessarily requires familiarity with the community at issue.[141] For this, judges must engage in more of a sociological inquiry than a legal one, having "to enter imaginatively into a world that [may] not [be] the[ir] natural habitat."[142] As Lyrissa Barnett Lidsky points out, the inquiry into the plaintiff's community and its norms presents both theoretical and doctrinal difficulties in a heterogeneous society.[143] We are no longer one community, rather a collection of subcommunities espousing values that can diverge from the majority.[144]

In borderline cases, courts that get this right acknowledge when a call is premature and defer to the wisdom of juries, who are better positioned to have a pulse on "the subjective perceptions of a community."[145] Some courts, including the Supreme Court, have observed that the internet's

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[137] *See e.g., In re* Facebook, Inc. Consumer Priv. User Profile Litig., 402 F. Supp. 3d 767, 796 (N.D. Cal. 2019); Low v. LinkedIn Corp., 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012).
[138] *Offensive*, BLACK'S LAW DICTIONARY 1188 (9th ed. 2009).
[139] Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 47 (1996).
[140] Zimmerman, *supra* note 34, at 349 ("Differences of opinion over which subjects are offensive can be found at any moment in history among different geographical regions, or levels of social, economic, or educational status."); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, (2003) (noting that "in all but the most extreme cases, it will be difficult to find a social consensus" on privacy).
[141] RESTATEMENT (SECOND) TORTS § 652D cmt. c (1977) (explaining the offensiveness of any privacy invasion is to be judged based on "the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens"); *see also* Australia Broad. Corp. v. Lenah Game Meats Pty Ltd. (2001) 208 C.L.R. 199, [252] (Austl.) ("Judges sometimes make assumptions about current conditions and modern society as bases for their decisions." "An assumption of such a kind may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question to enable an assumption to be made about it.").
[141] Lidsky, *supra* note 139, at 47.
[142] Douglass v. Hustler Magazine, Inc. 769 F.2d 1128, 1134 (7th Cir. 1985) (determining offensiveness of false light in "the world of nude modeling and (as they are called in the trade) 'provocative' magazines").
[143] *See generally* Lidsky, *supra* note 139.
[144] *Id.* at 3.
[145] Denver Pub. Co v. Bueno, 54 P.3d 898, 903-04 (Colo. 2002).

and new technology's customs and habits are very much in flux, and expectations change while technology is still developing.[146]

But in many instances, courts decide offensiveness as a matter of law.[147] With new issues, some courts are quick to seek analogies to inapplicable normative contexts. For example, in 2019, a court relied on decisions from the 1980s and 1990s involving medical records and phone numbers, to conclude that a defendant's tracking of plaintiff's keystrokes and mouse clicks was not a highly offensive intrusion.[148] Another recent case concluded that disclosure of plaintiffs' income and credit information to third-party marketers could not be highly offensive because it is not akin to disclosing a planned mastectomy.[149]

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

In *In re iPhone Application Litigation*, the court concluded that plaintiffs' allegations that Apple and others violated their privacy by collecting and disclosing their unique device identifier number, geolocation, and other personal data did not amount to an invasion of privacy, because it was a routine commercial activity.[150] The court did not cite to any facts that would suggest the defendants' activity of compiling and disclosing such data was routine or not a breach of social norms.[151] Nor did it explain why it treated the two as mutually exclusive. Instead, the court relied wholly on *Folgestrom v. Lamps Plus*, *Inc*., an earlier brick-and-mortar case finding that a retailer's practice requesting zip codes at checkout to mail customers promotions, while telling them the zip codes were for an internal survey, was not offensive.[152]

The precedent snowballed. On the same basis, many other technology-related intrusions have failed the offensiveness test. When plaintiffs sued Google over its practice of logging and sharing personal identifiable information (including browsing habits, search queries, demographic information, viewing history on YouTube, etc.) to target ads, contrary to its own policies,[153] the

[146] Carpenter v. United States, 138 S.Ct. 2206, 2233 (2018); Opperman v. Path, Inc., 205 F. Supp. 3d 1064, 1079 (N.D. Cal 2016).
[147] McClurg, *supra* note 18, at 999-1005 (noting upon referring to available empirical data from 1992 that courts' judicial animus for privacy tort cases and propensity to decide elements of the tort as a matter of law rather than allowing them to go to the jury, particularly the factual issue of whether the conduct or disclosure would be highly offensive to a reasonable person).
[148] Popa v. Harriet Carter Gifts, Inc., 426 F. Supp. 3d 108, 122-23 (W.D. Pa. 2019) (the cases cited also applied the wrong intrusion standard or had been abrogated).
[149] Bovay v. Sears, Roebuck & Co., No. 1-14-2672, 2016 WL 7665434, at *9 (Ill. Ct. App. Jan. 5, 2016).
[150] *In re* iPhone Application Litig., 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012).
[151] *See id.*
[152] *See id.* (citing Folgestrom v. Lamps Plus, Inc., 195 Cal.App.4th 986, 992 (Cal. Ct. App. 2011)).
[153] *In re* Google, Inc. Priv. Policy Litig., 58 F. Supp. 3d 968, 973-74, 987 (N.D. Cal. 2014).

court found the practice inoffensive.[154] Similarly, placing cookies to track users' browsing histories courts have concluded is inoffensive because it is "part of routine internet functionality[,] can be easily blocked[,]"[155] and can serve a legitimate commercial purpose.[156] Indeed, in *In re Nickelodeon Consumer Privacy Litigation*, the Third Circuit, citing to only one case, noted that "courts have long understood that tracking cookies can serve a legitimate [business] purpose" and is "so widely accepted a part of Internet commerce that it cannot possibly be considered 'highly offensive.'"[157]

It is unclear why the fact that a privacy invasion *may* serve a practical business purpose is dispositive of its offensiveness. All intentional privacy invasions serve some purpose to the defendant, be it commercial or personal, but that should obviously not legitimize them offhand.[158] It is also unclear why the proverbial "but everyone else [in my industry] is doing it" makes the conduct at issue socially acceptable and inoffensive. This creates an incentive to employ an invasive practice on a regular basis.[159]

6. Injecting Bias

A reasonable person could never find an employer's disclosure to the press that its former employees took days off for "female problems" offensive.[160] Nor that a plaintiff engaged in reckless and dishonest conduct if such conduct could be seen as manly.[161] Courts necessarily employ their perception of the reasonable person when determining offensiveness. While this is a necessary gatekeeping function, it becomes problematic when courts project their own biases onto the reasonable person. This projection may be difficult to avoid, given humans' tendency to

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[154] *Id.* at 987-88.
[155] *In re* Facebook Internet Tracking Litig., 263 F. Supp. 3d 836, 846 (N.D. Cal. 2017).
[156] *In re* Nickelodeon Consumer Priv. Litig., 827 F.3d 262, 294 (3d Cir. 2016) (noting that "courts have long understood that tracking cookies can serve legitimate commercial purposes") (citing *In re* DoubleClick Inc. Priv. Litig., 154 F. Supp. 2d 497, 519 (S.D.N.Y. 2001) (noting that defendant's placement of cookies on plaintiff's computers was not "to perpetuate torts on millions of Internet users, but to make money by providing a valued service to commercial Web sites").
[157] *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d at 294; *see also* Popa v. Harriet Carter Gifts, Inc., 426 F. Supp. 3d 108, 122-23 (W.D. Pa. 2019) (noting that the surreptitious gathering of information on the internet may cause concern but "is not enough to give rise to tort liability" that "requires conduct that may outrage or cause mental suffering, shame, or humiliation"); *see also* Note Benjamin Zhu, *A Traditional tort for a Modern Threat: Applying Intrusion Upon Seclusion to Dataveillance Observations*, 89 N.Y.U. L. REV. 2381, 2401 (2014) (observing that intrusions involving data collection are unlikely to meet the tort's offensiveness prong).
[158] *See* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 144-47 (2004) (proposing that where novel practices breach or threaten entrenched norms these should be evaluated by how they promote social and moral values with consideration given to preventing information-based harms and informational inequality).
[159] Jamuna D. Kelley, Note, *A Computer With a View*, 74 BROOK. L. REV. 187, 215-17 (2008) (noting this standard "suggests that when society becomes sufficiently accustomed to a certain surveillance practice, its presence and eventual practice becomes ingrained in the social fabric that any 'reasonable' person is precluded from finding it highly offensive").
[160] Polansky v. Southwest Airlines, 75 S.W.3d 99, 106 (Tex. Ct. App. 2002) (finding disclosure inoffensive because women had publicly alleged a "kaleidoscope of symptoms" resulting from working in a "'sick-building'").
[161] Virgil v. Sports Illustrated, 424 F. Supp. 1286 (S.D. Cal. 1976).

overestimate public agreement with their own attitudes and judgments.[162] This false consensus bias causes individuals to overestimate the extent to which their perception of social norms are shared,[163] which may explain why courts frequently decide offensiveness as a matter of law in privacy cases.[164] Other scholars have similarly warned that judges, legislators, and citizens should be wary of these tendencies to be overconfident in the unassailable correctness of certain perceptions, particularly those impacting women and racial minorities,[165] and the extent to which such perceptions are shared with others.[166] But what does or does not cause offense to a 68-year-old white man (who is the average demographic of the federal judiciary)[167] does not necessarily correlate with what offends the social construct that is the reasonable person.[168]

In *Plaxico v. Michael*, the Mississippi Supreme Court absolved an ex-husband's intrusion into his ex-wife's bedroom to take pictures of her naked and engage in sexual conduct with another woman, because the former couple was in a custody battle.[169] According to the court, because the defendant suspected his wife was in a homosexual relationship and was concerned for the welfare of his minor child, most reasonable people would not find his conduct highly offensive.[170] All of the justices on the court were men. One concurring opinion joined by two other justices believed the majority erred, but only because the ex-husband's conduct could have been offensive to the ex-wife's lover that was not part of the custody dispute.[171] Only one justice would have found the defendant's intrusion highly offensive to both women involved.[172]

Sometimes a plaintiff's prior conduct may trigger biases. Psychologists note that when evaluating conduct or facts decisionmakers are prone to fall into what is termed the culpable

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[162] *See* Robyn M. Dawes, *Statistical criteria for establishing a truly false consensus effect*, 25 J. EXP. SOC. PSY. 1 (1989); Christopher G. Wetzel & Marsha D. Walton, *Developing biased social judgments: The false-consensus effect*, 49 J. PERSONALITY & SOC. PSY. 1352 (1985).

[163] Janneke K. Oostrom et al., *False consensus in situational judgment tests: What would others do?*, 71 J. RES. PERSONALITY 33 (2017); Lee Ross et al., *The "false consensus effect": An egocentric bias in social perception and attribution process*, 13 J. EXPERIMENTAL SOC. PSY. 279 (1977); *see also* Bruce E. Boyden, *Regulating at the End of Privacy*, 2013 U. CHI. LEGAL F. 173, 174 (2013) (arguing judges' perceptions of norms are tied to those prevailing at the time when their identity and self- perceptions in relation to society were formed, which makes it more difficult to objectively assess current privacy norms).

[164] McClurg, *supra* note 18, at 999-1005 (noting courts' propensity to decide offensiveness as a matter of law).

[165] Chamallas, *The Architecture of Bias*, *supra* note 26, at 467, 470.

[166] Kahan et al., *supra* note 26, at 843.

[167] *See Demography of Article III Judges*, 1789-2020, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges (last visited Apr. 23, 2021) (noting that average age of a federal judge in 2020 was 68 years old); *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. AM. PROG., Feb. 13, 2020, https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/#:~:text=The%20Federal%20Circuit%20comprises%20judges,percent%20of%20its%20active%20judges. (last visited Apr. 23, 2021) (noting that in 2019 over 70% of judges on the federal bench were white and women make up only 27% of district court judges).

[168] Lidsky, *supra* note 139, at 41 (noting American society is divided by deep divisions of sex, age, class, religion, etc. "all with somewhat differing norms and expectations of conduct"); Post, *supra* note 18, at 961.

[169] Plaxico v. Michael, 735 So.2d 1036, 1040 (Miss. 1999).

[170] *Id.*

[171] *Id.* at 1041 (McRae J., dissenting).

[172] *Id.* at 1040-41 (Banks J., dissenting).

control model of blame, wherein individuals are more disposed to blame someone if they acted in a manner that contradicts the fact finder's perception of social norms.[173] Similarly, when a plaintiff's behavior confirms a perceived stereotype of her gender or group, the plaintiff's behavior may be attributed to factors within her control, as opposed to situational factors, such as the defendant's conduct, outside her control.[174] In *Jackson v. Mayweather*, for example, the court found that former boxing champion Floyd Mayweather Jr.'s vengeful posts on Facebook and Instagram, after a violent and contentious break-up, that plaintiff had an abortion, "killed [their] twin babies,"[175] and had "extensive cosmetic surgery procedures" were not actionable because plaintiff had in the past "willingly participated in publication of information about her own life and her relationship with Mayweather."[176] Other times courts are simply unable to identify with the plaintiff and why the conduct at issue could offend. For example, another court found that an article that falsely suggested that the plaintiffs, teenage girls, were masculine in nature could not possibly "be objectionable to the ordinary reasonable *man* under the circumstances."[177]

Not all courts project their own biases onto the reasonable person. For example, in a false light claim involving nude pictures of the plaintiff published in *Hustler* magazine without her consent, the plaintiff asserted that one of the pictures where she was with another woman in a suggestive position with accompanying text that said "climatic moments" falsely suggested she was a lesbian.[178] The Seventh Circuit disagreed. It did not think that "*Hustler* was seriously insinuating—or that its readership would think—that [the plaintiff] was a lesbian" because "*Hustler* is a magazine for men" and "[f]ew men are interested in lesbians."[179] The court, however, recognized that a reasonable person or jury viewing the pictures could disagree.[180]

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

D. Abandoning Offensiveness?

Offensiveness, how it operates today, is ineffective. Its current applications are not only muddled, but too narrow for a rapidly changing world. Some scholars have advocated for changes to the standard and its application, such as lowering the "highly offensive" requirement to simply "offensive" to mirror today's sensibilities, at least in some circumstances.[181] Andrew McClurg has

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[173] *See generally* Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSY. BULL. 556 (2009); Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & PSY. 368 (1992).
[174] *See* Chamallas, *The Architecture of Bias*, *supra* note 26, at 484-85 (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1205 (1995)).
[175] 10 Cal. App. 5th at 1257 (Ca. Ct. App. 2017).
[176] *Id.* at 1255.
[177] Fudge v. Penthouse Int'l Ltd., 840 F.2d 1012, 1019 (1st Cir. 1988) (emphasis added).
[178] Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1135 (7th Cir. 1985).
[179] *Id.*
[180] *Id.*
[181] Josh Blackman, Note, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet*, 49 SANTA CLARA L. REV. 313, 363-64

proposed expanding *Miller*'s factors to permit the intrusion tort to apply to conduct occurring in public spaces.[182] Others have been critical of the torts' highly offensive standard and its tendency to be interpreted as setting the bar too high for plaintiffs to recover from legitimate privacy harms.[183]

Disparate areas of law have flirted with abandoning offensiveness, recognizing the common problems of vagueness, subjectivity, overbreadth, and potential bias inherent in the offensiveness analysis. The Supreme Court excised the offensiveness analysis from trademark law when it declared the Lanham Act's prohibition on disparaging and scandalous marks unconstitutional viewpoint discrimination.[184] Critics have attacked Section 230 of the Communications Decency Act, arguing that it grants online service providers too broad of an immunity because offensive material is too subjectively and expansively defined. Justices Gorsuch and Thomas have argued for eliminating the offense as a ticket to standing in an Establishment clause claim. This would, according to the justices, "bring with it the welcome side effect of rescuing the federal judiciary from the sordid business of having to pass aesthetic judgment, one by one, on every public display in this country for its perceived capacity to give offense."[185]

In privacy law, courts and scholars from around the world have also suggested abandoning the concept of offensiveness completely.[186] The High Court of Australia's Chief Judge Gleeson rejected its application in Australia and instead found that the U.S. privacy law's highly offensive prong is simply "a useful practical test" to determine what information or matter is private.[187] One member of the House of Lords observed the "highly offensive" standard was "a recipe for confusion" that can easily bring into account issues that should go more to proportionality and damages.[188] In that case, celebrity fashion model Naomi Campbell filed suit against the owners of a tabloid that published a story about her narcotics addiction.[189] The court was split as to whether the fact that Campbell attended Narcotics Anonymous, the frequency of such attendance, and pictures of her leaving the Narcotics Anonymous meeting in London were private and offensive facts.[190] Two members of the high court concluded it was unnecessary to inquire whether the

(2009) (also noting that California's paparazzi law has adopted the lesser burdensome offensive, as opposed to highly offensive, to the reasonable person standard); Citron, *supra* note 18.

[182] McClurg, *supra* note 18, at 1058-59.

[183] *See, e.g.,* Cavico, *supra* note 18, at 1319-20; Citron, *supra* note 18, at 1850-52; Makdiski, *supra* note 47, at 1010-12; McClurg, *supra* note 18, at 1005-06; Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1919 (2010); Scharf, *supra* note 47, at 1104-05; Lindsey A. Strachan, *Re-Mapping Privacy Law: How the Google Maps Scandal Requires Tort Law Reform*, 17 RICH. J. L. & TECH. 14, 21-22, 29 (2011).

[184] Iancu v. Brunetti, 139 S.Ct. 2294 (2019); Matal v. Tam, 137 S.Ct. 1744 (2017).

[185] American Legion v. American Humanist Ass'n, 139 S.Ct. 2067, 2103 (2019) (Gorsuch, J. concurring).

[186] Campbell v. MGN Ltd [2004] UKHL [21]-[31], [2004] 2 AC 457 (Eng.); Hosking v. Runting [2004] NZCA 34 at [249] & [246]; Moreham, *supra* note 28; Stuart Hargreaves, *"Relational Privacy" & Tort*, 23 WM. & MARY J. WOMEN & L. 433 (2017).

[187] Australian Broad. Corp v. Lenah Game Meats Pty Ltd, (2001) 308 CLR 199, [42] (Austl.).

[188] Campbell v. MGN Ltd [2004] UKHL [22], [2004]

[189] *See id. generally.*

[190] *See id. generally*.

information published was highly offensive when it is clearly private.[191] The standard, according to one of them, is only helpful "in cases where there is room for doubt" as to whether a matter is truly private.[192]

Discussing a comparable offensiveness standard in the context of New Zealand law, Professor N.A. Moreham has argued that the torts' highly offensive element should be eliminated for three reasons. First, there is a lack of clear principles or guidance as to how courts should determine offensiveness because courts oftentimes determine offensiveness with no reasoning or explanation.[193] Even in cases where courts have articulated useful factors to consider, they then fail to apply them.[194] These poorly reasoned decisions make the outcome of the analysis, to the extent any exists, unpredictable.[195] Second, Moreham argues that courts have adopted too narrow of a view of what constitutes highly offensive and have thus left various privacy harms unremedied.[196] Finally, Moreham claims the element is unnecessary because it is duplicative of the plaintiff's reasonable expectation of privacy, as any conduct or matter that is private would be highly offensive if invaded.[197]

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

Abandoning the challenge is not the answer. A reasoned analysis of what offends us and why—and whether it should be allowed—is a fundamental duty of the legal system. It serves to legitimize practices, behaviors, and norms—and deter others from becoming commonplace or accepted. We, however, must begin to articulate clear, reasoned, and fair ways to understand offense because courts are not the only ones making those crucial, norm-setting, and potentially chilling determinations. Increasingly, businesses and other non-legal third parties are facing qualitative decisions in the context of taking down online information or delisting search requests. The European Union's General Data Protection Regulation created a right to be forgotten, putting the burden on online entities to determine the nature of allegedly harmful information online.[198] Policy

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[191] *Id.* at [96], [166].
[192] *Id.* at [94].
[193] Moreham, *supra* note 28, at 174-75.
[194] *Id.*
[195] *Id.* at 178.
[196] *Id.* at 179-86.
[197] *Id.* at 186-89.
[198] *Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data*

and legal teams at technology giants like Facebook are making similar decisions on newsworthiness, offensiveness, and relevance.[199] More than ever, we need to understand offensiveness.

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

III. Conceptualizing Offensiveness

"Offense" refers to unreflective or emotional reactions that are "universally disliked," such as "passing annoyance, disappointment, disgust, embarrassment, and various other disliked conditions such as fear, anxiety, and minor aches and pains" stemming from affronts to sensibilities.[200] Emotional triggers vary: researchers agree that some are universal and others individual-specific.[201] Paul Eckman describes humans as having an "*emotion alert database*, which is written in part by biology, through natural selection, and in part by our individual experience." For example, most humans, no matter the culture, respond to threats or triggers conditioned by natural selection (like snakes and vomit) with fear and disgust. Emotions can also be elicited by idiosyncratic, learned past experiences (like the disdain for nudity in a prudish culture or the resentment bred by racist or misogynistic micro-aggressions in one who has been subject to discrimination).

Offense is not merely a reaction to something offensive, but a tripartite mechanism in which the person (1) suffers a disliked state, (2) makes a concurrent snap judgment that this bad feeling was wrongfully and unjustifiably caused by another's wrongdoing, and (3) is led to resentment towards its source, which serves to reinforce and magnify the unpleasantness.[202]

Offense-induced emotions take over so quickly that we are unaware of the evaluative processes that triggered them.[203] Offense elicits the offended party's bias in a way that impairs their proper judgment on attribution and intensity. When gripped by offense, we enter a refractory state, during which we interpret all input in a way that justifies how we are feeling. We also ignore or discount knowledge or new information that could disconfirm it.[204]

Protection Regulation), art. 17, COM (2012) 11 final (Jan. 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.; *see also* Patricia Sanchez Abril and Jacqueline Lipton, *The Right to be Forgotten: Who Decides What the World Forgets?*, 103 KY. L. J. 363 (2015).

[199] Ben Smith, *Is an Activist's Pricey House News? Facebook Alone Decides*, N.Y. TIMES, Apr. 25, 2021, https://www.nytimes.com/2021/04/25/business/facebook-nypost.html.

[200] FEINBERG, *supra* note 29, at 1.

[201] PAUL ECKMAN, EMOTIONS REVEALED, SECOND EDITION: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE 22 (2003).

[202] FEINBERG, *supra* note 29, at 2; SNEDDON, *supra* note 11, at 53.

[203] ECKMAN, *supra* note 201, at 21.

[204] *Id.* at 39.

In fact, humans are psychologically prone to over-classify or over-designate speech and conduct as offensive for a number of reasons.[205] The reactive feeling of offense is influenced by an "agential bias" or a natural tendency to over-focus on active conduct and under-focus on more passive conduct.[206] This causes people to make mistakes in judging offensiveness because they tend to emphasize the role of thought and choice by the alleged offender and attribute a greater level of intent to their actions.[207]

Moreover, our interests in avoiding offense to promote well-being are complex and prone to being misunderstood, which could also lead us to misjudging the role of the offense in our lives and in the lives of others.[208] Perhaps because of the agential bias, some have warned that legislators tend to overreact to offensiveness, zealously—and disproportionately—finding blamable conduct when it involves a perception of shock or menace to community norms.[209]

All of these states are noisome because they intrude on reluctant victims, trap them, and invite particularly unpleasant reactions, forcing them to take on a feeling or emotion that is unwanted, unpleasant, and thus threatening their autonomy, freedom, and sense of self. What they all have in common is that these affronts cause the aggrieved to feel trapped because they cannot escape without unreasonable inconvenience (or maybe even harm).[210]

Over decades, philosophers have studied and parsed offensiveness and explored the nuances that trouble its analyses. At its core is its tense relationship as the ignored little sibling of harm. While harm is "a wrongful and unexcused invasion into an interest, or resources over which a person has a valid normative claim," philosopher Joel Feinberg concedes that offended parties do not necessarily lose anything upon which they have a stake, making harm more serious.[211] Offense results in nuisance rather than palpable harm.[212] Momentary disgust, exasperation, or even fear do not obviously rise to the level of an invasion of resources, nor are they readily calculable.

Given these prickly hallmarks of offensiveness as a concept, to what should we look in its legal assessment?

In his famous essay On Liberty, John Stuart Mill asserted the harm principle, that is that "the only purpose for which power can be rightfully exercised over any member of a civilized

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[205] SNEDDON, *supra* note 11, at 26.
[206] *Id*. at 54 (citing Soran Reader, *Agency, Patiency, and Personhood*, *in* A COMPANION TO THE PHILOSOPHY OF ACTION, 200-08 (Timothy O'Connor & Constantine Sandis eds. 2010)).
[207] *Id*. at 54, 100.
[208] *Id*. at 93.
[209] FEINBERG, *supra* note 29, at 4-5. ("Any legislator who votes to punish open lewdness or disrespect to the flag with prison terms greater than those provided for genuinely and deliberately harmful acts of battery or burglary must be simply registering his hatred, revulsion, or personal anxiety rather than rationally applying some legislative principle to the facts.").
[210] *Id.* at 5.
[211] *Id.*
[212] *Id.* at 22.

community, against his will, is to prevent harm to others."[213] Since causing offense does not in itself constitute harm, Mill suggested that it would be "tyranny" to make personal feelings of offense the basis for punishment.[214] Nevertheless, Mill went on to suggest that an exception could be made for violations against manners and decency done publicly.[215]

Since Mill, a recognized body of work by penal theorists and philosophers addresses the nature of offensive conduct and seeks philosophical justifications for its penalization or proscription. Legal philosophers, including Joel Feinberg, Martha Nussbaum, Andrew von Hirsch, Louis B. Schwartz, and Tatjana Hörnle, have set out to understand why conduct is offensive, disgusting, or obnoxious, a necessary starting point to make sense of whether the law addresses it justifiably.[216] Other philosophers, such as Andrew Sneddon, have refined the concept of offensiveness in our modern world. While these theorists did not focus on tort law or privacy generally, an analysis of this important body of work is useful in supplying principles and constructs for a thoughtful reconsideration of offensiveness in privacy torts.

What follows are several prominent perspectives to judging offensiveness.[217] We draw lessons along the way that will later inform a reasoned rubric to guide the offensiveness analysis in privacy torts.

A. Offensiveness as Prevailing Mores

Mores have been defined as "strong ideas of right and wrong which require certain acts and forbid others."[218] Traditionally, the rationale for prohibiting and judging offenses was purely self-defining: a straightforward appeal to prevailing mores. Indecency was improper; obscenity was lewd, nuisances were annoying ... and certain behaviors were simply not tolerated as infringements on community standards.

The Prevailing Mores approach bases judgment on generalized, bare moral indignation. The Supreme Court upheld an Indiana statute on nude dancing based on the general notion that public indecency was "*malum in se*" and the statute appropriately reflected "moral disapproval of people appearing in the nude among strangers in public places."[219] In concurrence, Justice Scalia advocated for the propriety of Prevailing Mores:

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[213] JOHN STUART MILL, ON LIBERTY 17 (Project Gutenberg ed. 2011), *available at* https://www.gutenberg.org/files/34901/34901-h/34901-h.htm.
[214] *Id.* at 8.
[215] *Id.* at 186.
[216] It bears noting that these philosophers set out to determine under what conditions and justifications acts triggering offense should be regulated by criminal law. This is a different question from the one we ask here, which is how we gauge offensiveness in the context of a tort. With that said, the penal theorists' important work over the past decades translates well to our own inquiry, focusing our own thinking and analysis.
[217] Andrew von Hirsch, *The Offense Principle in Criminal Law: Affront to Sensibility or Wrongdoing?*, 11 KING'S C.L.J. 81 (2000).
[218] P.B. HORTON & C.L. HUNT, SOCIOLOGY (1968).
[219] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568 (1991).

> Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *"contra bonos mores," i.e.,* immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them) there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."[220]

Judging offensiveness by prevailing mores has been described as "troublesome."[221] Andrew von Hirsch elegantly sums up some of the criticism, asking "[w]hy is the offensive conduct anything more than a breach of prevailing taboos? In a free society, how can the majority be entitled to impose its taboos on unwilling minorities?"[222]

A test that only looks at community standards without further analysis may result in prolonging injustice if those standards are unjust, biased, or immoral.[223] Mores have been used to justify censorship of obscenity, unequal treatment of people based on race or gender, and prohibitions on homosexual sex.[224] Using norms blindly as reflective of offensiveness serves to legitimize and prolong stigmatization.

As Professor Feinberg noted,

> [p]eople take offense – perfectly genuine offense – at many socially useful or even necessary activities, from commercial advertisement to inane chatter. Moreover, bigoted prejudices of a very widespread kind (e.g., against interracial couples strolling hand in hand down the main street of a town in the deep South) can lead onlookers to be disgusted and shocked, even "morally" repelled, by perfectly innocent activities, and we should be loath to permit their groundless repugnance to outweigh the innocence of the offending conduct.[225]

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

B. Offensiveness as Balancing Metric

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[220] *Id.* at 575 (Scalia, J. concurring).
[221] von Hirsch, *Injury*, *supra* note 13, at 700.
[222] *Id.*
[223] NUSSBAUM, HIDING FROM HUMANITY, *supra* note 29, at 33.
[224] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding prohibition of private homosexual sodomy enacted solely on "the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable").
[225] FEINBERG, *supra* note 29**Error! Bookmark not defined.**, at 26.

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

Influenced by John Stuart Mill's harm principle, Feinberg's Offense Principle holds that "criminal law may be used to protect persons from wrongful offense, that is, from their own unpleasant mental states when wrongfully imposed on them by other parties in a manner that violates their rights."[226] What is wrongful offense? For Feinberg, an affront is offensive if the majority of people find it to be so, with no reference to whether people's reactions are reasonable, justifiable, or even morally sound.[227]

But Feinberg does not stop there; rather he acknowledges the nuance and complexity of the concept by creating a structured balancing test inspired by Prosser's tort analysis concerning liability for activities which benefit one party and bother another.[228] Feinberg's test (laid out in Appendix B) weighs the seriousness of the trigger against the reasonableness of the offending party's conduct.[229]

To determine the seriousness of the offense, Feinberg looks to the "intensity and durability of the repugnance produced"—a fleeting nuisance or incessant harassment?[230] Second, he examines the extent to which "repugnance could be anticipated to be the general reaction of strangers to the conduct displayed or represented."[231] The greater the magnitude of dislike for the behavior, the more serious the offense. The third factor is the extent to which the aggrieved could have avoided the trigger. Finally, Feinberg would ask whether or not the aggrieved willingly assumed the risk of being offended.

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

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[226] *Id.* at 68.
[227] *Id.* at 36-37.
[228] WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 573-600 (2d ed. 1955); *see generally* W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS 616-643 (5th ed. 1984).
[229] FEINBERG, *supra* note 29, at 26.
[230] *Id.*
[231] *Id.*

Some have criticized Feinberg's purely factual-psychological metric because "it could be used to make moralistic considerations look like liberal decisions."[232] It also tilts towards favoring the majority's selected social conventions and the status quo. In philosopher Tatjana Hörnle's words, "[o]ne could punish relatively innocuous acts if a sufficiently large number of persons felt offended."[233] A quantitative weighing of interests complicates the protection of minorities. If a racist slur is aimed at a very small minority, very few people are likely to be distressed.[234]

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

C. Offensiveness as Outrage

Philosopher Martha Nussbaum posited that laws should not be based on what some may find disgusting[235] because disgust contains no moral wisdom, is based on potentially mistaken social norms, and has a history of group-based prejudice and exclusion.[236] Rather, Nussbaum argues, *outrage* or *indignation* is a more appropriate and relevant basis for legal judgment."[237]

Nussbaum and other leading philosophers study the role of emotion in law.[238] Because emotions carry moral baggage, Nussbaum contends, they are not worthy of equal dignity. Shame and disgust, for example, are dangerous emotions that almost always fail to give "good guidance for political and legal purposes" for two main reasons.[239] First, shame and disgust are the product of discomfort with our own animal existence and humanity at its most raw. This translates, among other things, into discomfort with the sexuality of women and homosexuals.[240] Unlike other emotions that focus on acts themselves, shame and disgust are always about persons, and thus have

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[232] Harlon L. Dalton, *"Disgust" and Punishment*, 96 YALE L.J. 881, 906-09 (1987); H.J. McCloskey, *Immorality, Indecency, and the Law*, VIII POL. STUD. 370, 370-71 (1965).
[233] Hörnle, *supra* note 29, at 262-63.
[234] *Id.*
[235] Professor Nussbaum couches her argument in terms of disgust, rather than using the more generalized offensiveness.
[236] NUSSBAUM, HIDING FROM HUMANITY, *supra* note 29, at 125.
[237] Nussbaum, *Secret Sewers*, *supra* note 29**Error! Bookmark not defined.**, at 44.
[238] *See, e.g.,* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997); THE PASSIONS OF LAW (Susan A. Bandes ed. 1999); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 733-62 (1998); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law,* 96 MICH. L. REV. 1621 (1998) (reviewing WILLIAM IAN MILLER, ANATOMY OF DISGUST (1997))*;* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law,* 96 COLUM. L. REV. 269 (1996).
[239] NUSSBAUM, HIDING FROM HUMANITY, *supra* note 29, at 122.
[240] James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2700 (2005) (reviewing NUSSBAUM, HIDING FROM HUMANITY, *supra* note 29**Error! Bookmark not defined.**).

the power to deny the equal dignity of others.[241] Second, these emotions are a dangerous basis for legal analysis because they are inherently hierarchical; that is, both emotions "typically express themselves through the subordination of both individuals and groups based on features of their way of life."[242] Their hierarchical nature is evident in the language of disgust historically used to justify "misogyny, anti-Semitism, and loathing of homosexuals."[243]

Outrage or indignation, in contrast, can take a bad act as its target without denying the ultimate value of the person who committed that act.[244] In addition, outrage allows for reasoning that can be publicly shared. We can detect iterations of an outrage test in the language of some courts applying privacy torts, although exposition of their underlying emotions or moral reasoning is usually absent. Professor Blanke similarly observes that outrage is a catalyst for change in both privacy norms and legislation.[245] Indeed some privacy violations have been referred to as outrageous,[246] objectionable[247] or shocking the conscience,[248] and utterly intolerable.[249]

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

D. Offensiveness as Material Harm

Criminal law scholar Louis B. Schwartz argued that conduct triggering offense may be regulated because it does in fact cause harm—psychic harm.[250] Schwartz argued that the psychic affront, however fleeting, can be equated with physical or material harm and this forms the basis for a justification of the prohibition of certain conduct that causes offense. He observed that psychologists would likely agree that the effects of psychic harm could be more acute than physical harm and that, as such, citizens may legitimately demand the state protect psychological, in

[241] NUSSBAUM, *supra* note 29, at 207, 230, 233, 239 (Shame and disgust operate by dismissing, rejecting, or degrading the person who is their target.).
[242] NUSSBAUM, *supra* note 29, at 321.
[243] *Id.* at 75.
[244] *Id.* at 166.
[245] Jordan M. Blanke, *Privacy and Outrage*, 9 CASE W. RES. J. L. & INTERNET 1 (2018).
[246] Hammer v. Sorensen, 824 Fed. Appx. 689, 696 (11th Cir. 2020) (applying Florida law); Oppenheim v. I.C. Sys., Inc., 695 F. Supp. 2d 1303, 1309 (M.D. Fla. 2010); Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964) ("It is only where the intrusion has gone beyond the limits of decency that liability accrues.").
[247] PROSSER, *supra* note 35, at 390-91.
[248] Opperman v. Path, Inc., 205 F. Supp. 3d 1064, 1078 (N.D. Cal. 2016); Anderson v. Cty. Becker, No. 08-5687, 2009 WL 3164769, at *14 (D. Minn. Sept. 28, 2009).
[249]Popa v. Harriet Carter Gifts, Inc., 426 F. Supp. 3d 108, 122-23 (W.D. Pa. 2019); Roe ex rel. Roe v. Heap, No. 03AP-586, 2004 WL 1109849, at *18 (Ohio Ct. App. May 11, 2004); Chicarella v. Passant, 494 A.2d 1109, 1114 (Pa. 1985).
[250] Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 671-73 (1963).

addition, to physical wellbeing.[251] Moral offenses or restraints of that which offends are thus justified when they are flagrant affronts of commonly held notions of morality that cause psychic harm.[252]

If we subscribe to offense as material harm, it stands to reason that the yardstick for offensiveness would be the degree of the ensuing psychic harm. Some courts, such as the jurisdictions adopting the language on intentional infliction of emotional distress,[253] focus on the degree of pain, anguish, and mental distress likely caused as an indicator of whether its trigger is highly offensive.[254]

This approach may result in an exceedingly restrictive view of privacy. Warren and Brandeis expressed concern that privacy harms were too intangible to be recognized as material harm.[255] Privacy scholars have similarly observed that privacy law suffers from too few "dead bodies" or "at least of broken bones and buckets of money," which may prevent courts and fact finders from understanding "the compelling ways that privacy violations can negatively impact the lives of living, breathing human beings beyond simply provoking feelings of unease."[256]

E. Offensiveness as Threat to a Legitimate Interest

Andrew von Hirsch has proposed that neither individual nor widespread offense alone should be enough to consider an act legally objectionable. He also rejects a harm-based approach: The mere fact that words or conduct cause disliked mental states (even to most people) or infringe taboos is not enough to justify proscription. Instead, von Hirsch suggests that a legitimate underlying reason must explicitly accompany the breach of norms. The reasons "should be made explicit and be subjected to critical scrutiny" to avoid bias or unfairness before conduct may be deemed offensive.[257] Simply put, von Hirsch pleads for an explicitly stated justifying underlying

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[251] *Id*. at 671-73; Post, *supra* note 18, at 960 (defining an invasion of privacy as "an injury to personality" that "impairs the mental peace and comfort of the individual and may produce suffering more acute than that produced by mere bodily injury") (quoting Eastman, 206 A.2d at 242); *see also* ROSCOE POUND, JURISPRUDENCE III (1959).
[252] Post, *supra* note 18, at 967; Schwartz, *supra* note 250.
[253] Hammer v. Sorensen, 824 Fed. Appx. 689, 696 (11th Cir. 2020) (applying Florida law); Oppenheim v. I.C. Sys., Inc., 695 F. Supp. 2d 1303, 1309 (M.D. Fla. 2010) (quoting Stoddard v. Wohlfahrt, 573 So. 2d 1060, 1062-63 (Fla. Ct. App. 1991)); Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964) ("It is only where the intrusion has gone beyond the limits of decency that liability accrues."); *see also* Scharf, *supra* note 47, at 1095 (noting courts have equated the level of offensiveness in intrusion causes with the standard required to prove intentional infliction of emotional distress claims).
[254] Popa v. Harriet Carter Gifts, Inc., 426 F. Supp. 3d 108, 122-23 (W.D. Pa. 2019); McIsaac v. WZEW–FM Corp., 495 So. 2d 649, 651 (Ala. 1986); Chicarella v. Passant, 494 A.2d 1109, 1114 (Pa. 1985); Roe ex rel. Roe v. Heap, No. 03AP-586, 2004 WL 1109849, at *18 (Ohio Ct. App. May 11, 2004) (citing Haller v. Phillips, 591 N.E.2d 305 (Ohio Ct. App. 1990) (holding that intrusion must be of "such a character as would shock the ordinary person to the point of emotional distress.")).
[255] *See* Warren & Brandeis, *supra* note 10, at 197-98 (expressing concern that privacy harms that simply resulted in "wounded feelings" might not find redress).
[256] *See* Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. PA. L. REV. 52, 52-62 (2007).
[257] von Hirsch, *The Offense Principle*, *supra* note 217, at 85.

interest. The question then becomes whether the violated interest relates to a right that requires other people to stop their interference.

The offense-plus-reason approach is alluring precisely because it is notoriously hard to describe why certain things are offensive. Because offensiveness hits on an emotional level first, rationality is blocked, and tying reactions to interests without invoking morality or bias, becomes a difficult, but critical challenge.[258] The mental exercise of tying visceral offense to a valid interest and acknowledged right helps both the offended party and the actor understand the behavior and its implications. It also guides the fact-finder with a rational appraisal to assess the relative value of those interests and rights, irrespective of the potential bias or distraction of the offense.

F. Offensiveness as Assault to Symbolic Value

For philosopher Andrew Sneddon, offensiveness is more than a feeling, norm, or interest. He defines offensiveness as an attack on "symbolic value,"[259] or the message sent via a symbol that pertains to values or ways of life[260] or beliefs of well-being, rights, and character traits.[261] Words that offend, he explains, have symbolic value because they insult a way of life. Offense occurs because individuals have self-concerning reasons to protect and promote symbols that make them feel good and diminish those that make them feel bad.[262] Offensive conduct or words pose a symbolic risk to an individual's or group's way of life, well-being, or traits.

For Sneddon, all violations of symbolic value are offensive.[263] An offender's motives do not factor into the equation of whether an act is offensive. Instead, the significance of what is perceived to be offensive and the determination as to whether a remedy should be employed turns on whether: (1) the alleged offensive act, object, utterance, etc. truly pose a symbolic risk; (2) the symbolic risk is significant; (3) the way of living that is implicated can continue in its present form in light of the symbolic risk; (4) the symbolic value or way of living that is being offended is worth preserving; (5) the justification for the offensive act, object, utterance, etc.; (6) the interference with the offensive act, item, utterance, etc. eliminates the risk or provides remedy to the offensive act; and (7) there are other considerations that should limit or prohibit remedial measures to address the offense.[264] (See Appendix B).

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

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[258] FEINBERG, *supra* note 29, at 36 (discussing the difficulty in giving reasons for some feelings of offense).
[259] SNEDDON, *supra* note 11, at 13-14.
[260] *Id.* at 142.
[261] *Id.* at 153 (citing John Shand, *Taking Offense*, 70 ANALYSIS 703, 703 n.1 (2010)).
[262] *Id.*
[263] *Id.* at 180.
[264] *Id.* at 224-43.

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

IV. A Rubric for Judging Offensiveness in Privacy Torts

Informed by offensiveness's pitfalls and interdisciplinary thinking, we now turn to the practical: To elaborate a workable rubric to guide decisionmakers in a reasoned approach to offensiveness. The goal is not to sway the analysis either way, but rather to elucidate assumptions, clarify reasoning, avoid traps leading to error and bias, and make the offensiveness inquiry more rational and transparent.

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

In philosophy, Feinberg and Sneddon propose other offensiveness tests that begin by gauging the seriousness of the trigger.[265] (*See* Appendix B.) Building on Feinberg's test, our rubric considers the intensity of the offense, the relative ease with which the trigger could have been avoided, and the anticipated reaction of strangers to the trigger.[266] The rubric also, like Sneddon, looks to the risk of harm generated by the trigger to determine its seriousness.[267] Our rubric factors the social utility of the trigger, a critical consideration in weighing its justifiability.[268]

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

A. Rubric

[265] FEINBERG, *supra* note 29, at 26; SNEDDON, *supra* note 11, at 226.
[266] FEINBERG, *supra* note 29, at. 26
[267] SNEDDON, *supra* note 11, at 226.
[268] FEINBERG, *supra* note 29, at. 26

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

At the outset, let us reiterate some definitions: The subject of the inquiry as to the *trigger* (the action, matter, implication that set off the alleged offense); the *offense* is the aggrieved's reaction to the trigger. *Offensiveness* is the degree to which the offense is warranted.

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

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

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

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

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

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

Deconstructing the Offense

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

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

Our research reveals that courts sometimes analyze the offensiveness of the wrong aspect of the plaintiff's claim.[269] This first question, thus instructs the jurist or fact finder to identify the tort at hand and ensure it is evaluating the offensiveness of the right behavior or matter. Intrusion upon seclusion, in its most common form as embodied in the Restatement, requires the act of invasion

[269] *See supra* Part III.A.

to be offensive, not the information gleaned as a result of the intrusion. In a public disclosure of private facts claim, it is the content of the private matter disclosed that must be highly offensive, not how the information was obtained. And in a false light claim, the false light in which the plaintiff was placed as a result of the publication must be offensive, not the publication itself.

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

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

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

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

- The identity of the offender
- The relationship between the parties (i.e., an employer, some person or entity with unequal bargaining power, someone with whom the plaintiff had a relationship of trust, a doctor, friend, etc.). Researchers have found that the closer the relationship between the offender and offended party, the more deeply the offense is triggered and felt.[270]
- The relevant social identities of the offended party (i.e., age, gender, race, disability, sexual orientation) [271]
- The magnitude and duration of the offense[272]
- The trigger's foreseeability or element of surprise
- The defendant's intent to offend or cause harm
- Whether the defendant engaged in deceit

[270] Isabella Poggi & Francesca D'Errico, *Feeling Offended: A Blow to Our Image and Social Relationships*, 8 FRONTIERS PSY. 2221 (2018).

[271] *See* Post, *supra* note 18, at 984 (noting that because torts draw on social norms and norms are context specific an inquiry into offensiveness requires an inquiry into the context of a disclosure such as the "social occasions, the purpose, timing, and status of the person who makes the disclosure, the status and purpose of the addressee of the disclosure and so on") (citing ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 31, 40 (1971)); Sonja West, *The Story of Us: Resolving the Face-Off between Autobiographical Speech and Information Privacy*, 67 WAS. & LEE L. REV. 589, 632 (2010) (noting identity of plaintiff and other context can affect offensiveness analysis).

[272] *See* McClurg, *supra* note 18, at 1063 (noting an offense can be magnified or more offensive depending on its magnitude, duration, and "other factors that accentuate its dimensions").

- Whether any intimidating, belittling, threatening conduct, etc. was present

When a plaintiff articulates these or a court can infer them, it makes the claimed offense, regardless of its reasonableness, more digestible. The fact finder should then ask the same question and determine whether they would identify the same or additional factors that contributed to the offense.

It is important to note that at this point, the analysis is agnostic. We are simply listing the situational aggravating factors that contribute to the bigger picture of the offense, which is a critical first step. Later, we can decide whether the factors that aggravate the plaintiff's offense are legitimate or worth validating. Recall the exposition of *Masterpiece Cake*, where Justice Ginsburg distinguished an offense based on a person's homosexual identity from one based on the expression of a political message. Similarly, in *Doe v Boyertown Area School District*, parents of cisgender students complained that the mere presence of transgender students in locker rooms and bathrooms was a highly offensive privacy intrusion.[273] By deconstructing the roots of the trigger—in this case, not a conduct, but rather the gender identity of the alleged "intruder"—the Third Circuit reached the conclusion that the presence of transgender students was not highly offensive to a reasonable person.[274]

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

This question asks the fact finder to consider the harmful consequences that *could* have resulted from the trigger or a similar trigger to the one causing offense in the instant case.[275] For example, a Peeping Tom, illicitly peering into his neighbor's bedroom, could have only observed something mundane, like vacuuming. However, he *could* have also observed exceedingly more private and intimate acts. This question thus attempts to divorce the harm produced from the potential harmfulness of the act itself. These harms may include, as Professors Citron and Solove recently identified: physical, economic, reputational, emotional, relationship, censoring, discriminatory, expectational, loss of control, data quality and integrity, informational, data vulnerability, disturbance, and autonomy harms.[276]

In his comprehensive analysis of offense, philosopher Joel Feinberg classifies six clusters of offended states caused by the blamable conduct of others: (1) affronts to the senses, or an unpleasant experience related to sound, color, or odor (i.e., fingernails grating a chalkboard); (2) disgust and revulsion, which involves a higher order recognition that the subject is wrong or inappropriate (i.e., a person eating a putrid slug); (3) shock to moral, religious, or patriotic sensibilities (i.e., burning a cross or flag); (4) shame, embarrassment, and anxiety (i.e., unconsented-to circulation of nude pictures of oneself); (5) annoyance, boredom, and frustration

[273] Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018).
[274] *Id.* at 537.
[275] Solove, *'I've Got Nothing to Hide,' supra* note 122, at 769 (observing struggles ensuing in recognizing privacy harms that do not result in embarrassment, humiliation, or physical or psychological injury).
[276] Citron & Solove, *supra* note 116.

(i.e., incessant robocalls); and (6) fear, resentment, humiliation, and anger (i.e., threats, taunting, and contemptuous mockery).[277] By classifying the offense within the offended clusters, we gain further understanding of the offense and its potential consequences.

This prong of the rubric recognizes that privacy harms matter regardless of whether the plaintiff can demonstrate a tangible injury.[278] And, similar to Sneddon's scorecard, it directs the fact finder to look not just to the harm caused by the trigger, but to the risk the trigger poses to an individual's way of life or rights.[279] In many instances, the harm is decipherably manifested because it causes either observable physical or psychic harm, such as mental anguish or injury to the plaintiff's reputation. But in other instances, it may instead increase the likelihood of eventual harm, such as the potential use of the aggregation of private data.

This inquiry, like Feinberg, also requires the fact finder to consider the intensity and durability of the potential consequences.

Judging the Offense

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

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

The work of Andrew von Hirsch reminds us to make explicit a legitimate underlying interest implicated by any breach of social norms.[280] In evaluating offensiveness, it is important to understand what legitimate right(s) and/or interest(s) of the aggrieved have been impinged by the trigger or the offense. To be clear, the offense itself, at a minimum, will always implicate the aggrieved's interest in being free from bad feelings. But this is not, on its own without more, an interest that tort law can remedy. As we have established, anything you do can subjectively elicit bad feelings in me.

Instead, we analyze the trigger. This involves a two-part inquiry that first seeks to identify the moral or political interests that are implicated and then assess their legitimacy. Some legitimate privacy interests include autonomy, honor, identity, safety, mental health and welfare, intimacy, exposure, and dignity. Less legitimate interests might include a desire to silence public information, impose your worldview on others, or maintain economic privilege.

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[277] FEINBERG, *supra* note 29, at 10-13.
[278] Post, *supra* note 18, at 964-67.
[279] SNEDDON, *supra* note 11, at 224-43 (looking to symbolic risk and its extent).
[280] von Hirsch, *supra* note 217, at 85.

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

Now we turn to the reasonableness of the offense, with a twist. Much has been written about the inherent subjectivity of offensiveness, which the law rejects. In privacy tort law, requiring the offense to be reasonable filters out personal idiosyncrasies, sensitivities, and fleeting discomfort in favor of what is socially recognized as an offense and thus warranted.[281] As Prosser put it, "[t]he law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive."[282] But judging the reasonableness of offensiveness, like outrage, can be subject to perception of privileged decisionmakers.[283] Indeed, Prosser found no cause for outrage when men advanced explicit and even vulgar solicitations to have sex, which he classified as nothing more than an annoyances, not capable of causing severe distress.[284]

Assessing reasonableness is rife for potential bias. Often, particularly when applying the reasonable *man* standard, courts seem to overlook the trigger's potential offense to a similarly situated plaintiff.[285] Penthouse magazine published a picture of a group of tween girls under the title "Little Amazons Attack Boys," suggesting they were masculine and aggressive in nature. When their parents objected to the false light and their young daughters' appearance in an oversexualized magazine, the court concluded that the characterization could not possibly "be objectionable to the ordinary reasonable *man* under the circumstances."[286] In the name of objectivity and reasonableness, we cannot abandon those in the minority, who are often disproportionately affected by privacy harms.

To circumvent bias, this part of the analysis is meant to place the fact finder in the position of the offended party. To avoid exercising judgment that "is divorced from its context," one noted jurist has suggested that courts should assess whether reasonable similarly situated plaintiffs would

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[281] *See* Boring v. Google, Inc., 362 Fed. Appx 273, 279 (3d Cir. 2010) (finding that a Google StreetView vehicle entering into an ungated driveway and photographing the property was not offensive because "[n]o person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result."); RESTATEMENT (SECOND) OF TORTS § 652B, cmt. d (1977) ("Thus there is no liability for knocking at the plaintiff's door....").

[282] Prosser, *supra* note 35, at 397.

[283] Chamallas, *Discrimination & Outrage*, *supra* note 26, at 2122-23 (noting that courts applying the outrageousness prong of the intentional infliction of emotional distress tort were historically inclined to protect male and white privilege, refusing to find sexual harassment or discriminatory treatment as outrageous).

[284] *Id.* at 2155 (citing William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 889 n. 87 (1939)).

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

[286] Fudge v. Penthouse Int'l., Ltd., 840 F.2d 1012, 1019 (1st Cir. 1988) (emphasis added); *see also* IMM Pub., Inc. v. Lamar Obie Corp., No. CV 09-937-PK, 2010 WL 1838654, at *3 (D. Or. Mar. 30, 2010), report and recommendation adopted, No. 09-937-PK, 2010 WL 1838619 (D. Or. May 6, 2010) (noting court would consider the reasonable person, not the reasonable minority business owner and advocate's interpretation of whether the publicity was highly offensive).

find the trigger offensive.[287] Studies have shown that one of the most effective ways to "debias" people is to induce participants to create a mental model to actively consider alternative perspectives, arguments, and conclusions.[288] Taking a different perspective forces the arbiters to articulate in a conscious manner the assumptions they would otherwise silently, unknowingly, or implicitly make, while respecting the elements of the tort.[289]

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

Joel Feinberg, Martha Nussbaum, Andrew von Hirsch, and others have put forth compelling arguments against a bare appeal to community mores as a basis for finding offensiveness. We all know norms can be mistaken,[290] indeterminate, fluid, and even immoral. And the offensiveness analysis cannot be stripped of its inherently normative roots. However, it is not the role of the judiciary to invent norms but rather to interpret the sense of the community in an honest and just manner, with as much clarity as possible.

Examining the reaction of strangers is Feinberg's barometer for social norms. Feinberg argues that the use of widespread affront is a better indicator because it reflects community standards while limiting legal moralism.[291] Our question 6 borrows this notion from Feinberg while replacing his language of "repugnance" (*see* Appendix A) with Martha Nussbaum's carefully considered metric for offensiveness: outrage. As discussed in Part III, Nussbaum warns of the use of emotions such as shame, disgust, and repugnance as a basis for law because they carry moral baggage without moral reasoning. Outrage, in contrast, as we see in some iterations of offensiveness analyses, is expressly justifiable. Professor Cass Sunstein proposes that judicial humility requires courts to be sensitive to community outrage.[292] Such humility counsels that when a decision could foreseeably provoke such outrage, which functions as a corrective heuristic, it is

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

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

[289] *See* Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39, 44 (2018) (expressing hope tort law will have a #MeeToo moment that will cause the common law to disrupt, rather than reinforce gender inequality); Chamallas, *Architecture of Bias*, *supra* note 26 at 466 (noting that gender and racial bias make their way into the law not explicitly, but rather by the privileged majority's reliance on implicit hierarchies of values); Lidsky, *supra* note 139, at 48 (noting the real problem is that judges "make value choices in an unreflective manner, based on assumptions about community life presumed to be so common they need not be stated"); Lovell Banks, *supra* note 26 (noting the undiscussed prejudicial impact of race, culture, class, and gender in tort cases).

[290] NUSSBAUM, HIDING FROM HUMANITY, *supra* note 29, at 33; Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905, 958 (2005) (noting the greater psychic harms torts may cause racial minorities subjected to constant racism).

[291] FEINBERG, *supra* note 29, at 13; *see also* Blanke, *supra* note 245 at 9 (noting public outrage shapes new privacy norms).

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

at least an indication that the decision might be wrong.[293] Professors Kahan, Hoffman, and Braman argue such humility also requires courts to consider whether privileging their own "obvious" views sends a discriminatory message to outraged members of minority communities.[294]

This question asks judges to engage in a narrower mental exercise compared to a straightforward normative question. It engages the perceived wisdom of the crowd. At later stages in litigation, objective criteria could be invoked as evidence of widely held reactions, which are slightly more measurable than beliefs and values. Objective criteria might include surveys, news stories, studies, similar suits filed where others have alleged the same or similar conduct or content to be offensive, expert testimony or reports, etc.[295]

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

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

Finally, the fact finder is tasked with weighing the trigger's social utility against the plaintiff's privacy interests.[296] While this balancing of interests is not a novel concept,[297] courts often overlook the plaintiff's interest when the defendant can muster a non-nefarious motive for the trigger. The current *Miller* and *Hernandez* offensiveness tests instruct courts to narrowly focus on the defendant's motives, objectives, and justifications.[298] But while a defendant's motives may factor into a trigger's social utility, they are not dispositive. It could be that a defendant has spiteful motives, but the triggering conduct promotes social utility or that a defendant has noble motives,

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[293] *Id.* at 175-78.
[294] Kahan et al., *supra* note 26, at 899.
[295] This evidence, however, is often difficult to gather, and putting the burden on the plaintiff to present it at the pleading stage far exceeds the federal and state pleading standards, which only require a plaintiff to make a short and plain statement of the claim that demonstrates he or she is entitled to relief. *See* Fed. R. Civ. P. 8(a); Fla. R. Civ. P. 1.110; *see also* Lidsky, *supra* note 139, at 7 (noting courts rarely resort to objective criteria such as polls or surveys and instead rely on their visceral feelings and common sense in determining community norms).
[296] *See* Solove, "*I've Got Nothing to Hide*," *supra* note 122, at 763 (noting that "[p]rivacy issues involving balancing societal interests on both sides of the scale").
[297] *See e.g.*, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1234-35 (7th Cir. 1993) (Posner, J.) ("The public has a legitimate interest in sexuality, but that interest may be outweighed in such a case by a the injury to the sensibilities of the persons made use by the author in such a way."); Solove, *Virtues of Not Knowing*, *supra* note 140, at 1058-59 (proposing a balancing approach that weighs the value of the plaintiff's interest against the "value of the use of the information in the context in which it is disclosed"); Strahilevitz, *supra* note 109, at 2032 (observing both Posner and Warren and Brandeis insert a welfarist balancing test on offensiveness that asks whether "the gravity of the harm to the plaintiff's privacy interest [is] outweighed by a paramount public policy interest"); Sprague, *supra* note 38, at 126 (balancing the likelihood of serious harm to the victim with the countervailing interests of the defendant based on competing social norms); West, *supra* note 271, at 629-31 (noting offensiveness prong should "examine the purpose of the disclosure and discern whether the reason for the disclosure was of such minimal social or personal value that it does not justify the harm it has caused").
[298] Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 295 (Cal. 2009); Miller v. Nat'l Broad. Co., 187 Cal. App. 3d 1463, 1483-84 (Cal. Ct. App. 1984).

but the trigger does not promote social utility. This final question thus takes the broader approach embodied in Feinberg's test and Sneddon's scorecard that look respectively to the trigger's social value[299] and positive considerations.[300]

Social utility is not limited to the defendant's motives. It recognizes legitimate public interests in First Amendment rights of speech and access to information and an employer's legitimate interest in maintaining a safe, drug and harassment free work environment, etc. But identifying these as promoting social utility is not the end of the inquiry. Social utility also implicates legitimate public interests in discouraging certain triggering offenses and protecting the public and individuals from the same. The overall social utility of the trigger must then be weighed against the individual rights and interests of the plaintiff identified in question 4. Recalibrating prevents the trigger's social utility from being considered in a vacuum to determine its offensiveness. In making this determination, the fact finder should consider whether the same social utility could be achieved without the triggering offense or at a time, place, or manner that would have minimized or eliminated the offense.[301]

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

B. Testing the Rubric: Two Sample Cases

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

Illustration 1: Intruding Ex.

Upon learning that his ex-wife Ashley is in a relationship with another woman Valeria, Michael files a motion in family court to gain custody of the former couple's six-year-old daughter. To obtain proof of Ashley's relationship, Michael surreptitiously enters her property, perches himself outside the master bedroom, and records Ashley and Valeria having sex. He submits the video to the family court as evidence that Ashley is an unfit mother -- and wins. Upon learning of the video, Valeria feels angry, shamed, and violated by the furtive act. She suffers constant anxiety and insecurity at the thought that someone might be surveilling her at any moment. Valeria sues Michael, claiming intrusion upon seclusion.[302]

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[299] FEINBERG, *supra* note 29, at 26.
[300] SNEDDON, *supra* note 29 at 226.
[301] FEINBERG, *supra* note 29, at 26 (considering "the availability of alternative times and places where the conduct in question would cause less offense").
[302] Based on Plaxico v. Michaels, 735 So. 2d 1036 (Miss. 1999).

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

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

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

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

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

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

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

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

Illustration 2: Triggering Triggers[303]

[303] Based on *In re* Google Assistant Privacy Litig., 457 F.Supp.3d 797 (N.D. Cal. 2020).

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

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

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

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

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

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

6. ***Reaction***: Would strangers be outraged at the notion of a listening device in their homes? Given the news article's alarming tone regarding the practice, the fact that the intrusion occurred in the plaintiff's home, and the plaintiff's and other consumers' complaints, it is foreseeable that the intrusion could be highly offensive. If, however, this is, as the defendant claims, a routine commercial practice that everyone in the industry uses *and* consumers are generally aware these devices constantly listen in and record conversations, it is possible strangers might not be outraged. It is also unclear how strangers might react to the recordings only being analyzed by a machine, as opposed to human beings. Considering the technology's burgeoning state, the plaintiff's potential complaint, and the developing social norms surrounding such

technology, it is difficult to gauge the reaction of strangers at the time of the intrusion without more data and evidence.

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

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

Conclusion

As philosopher Andrew Sneddon put it, "[t]o be offensive, is not to cause offense, but to warrant it."[304] The analysis of offensiveness is a black hole in privacy law. Mostly determined without exposition, it is at once inherently subjective yet measured by reasonableness, contextual yet universalized. Its determination requires an imaginative leap into the time, place, and consciousness of the public at large, amidst shifting normative sands and ill-defined communities. At best, this disorder results in unexplained precedents; at worst, it may render premature, incorrect, or biased results that further disenfranchise already stigmatized and underprivileged victims. In privacy, rapidly evolving social norms, technologies, and related business practices further blur the offensiveness analysis. As of yet, no test or set of principles other than a cacophony of adjectives and generalized factors guide courts in their inquiry.

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

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

[304] SNEDDON, *supra* note 11, at 14.

Appendix A

FRAMEWORKS FROM LAW

THE *MILLER V. NATIONAL BROADCASTING COMPANY* FACTORS

To determine offensiveness, courts should consider:

(1) the degree of intrusion,

(2) the context, conduct, and circumstances surrounding the intrusion,

(3) the intruder's motives and objectives,

(4) the setting into which the intrusion occurs, and

(5) the expectations of those whose privacy is invaded. [305]

THE *HILL V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION* BALANCING TEST

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

(1) the likelihood of serious harm, particularly to the emotional sensibilities of the plaintiff against

(2) any countervailing interests based on competing social norms that may render the defendant's conduct inoffensive, such as a legitimate public interest in exposing serious crime.[306]

THE *HERNANDEZ V. HILLSIDES* BALANCING TEST

To determine offensiveness, courts should balance:

(1) the degree and setting of the intrusion, which includes the place, time, and scope of the defendant's intrusion, against

(2) the defendants' motives, justifications, and related issues.[307]

[305] Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 678-679 (Cal. Ct. App. 1986).
[306] Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647-48 (Cal. 1994).
[307] Hernandez v. Hillsides, Inc., 97 Cal. Rptr. 3d 274, 293 (Cal. 2009).

Appendix B

FRAMEWORKS FROM PHILOSOPHY

JOEL FEINBERG'S OFFENSIVENESS TEST

The seriousness of the offense should be determined by

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

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

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

Most factors can vary in degree or weight, not in absolutes.[308]

ANDREW SNEDDON'S OFFENSIVENESS SCORECARD

a) Is there really a symbolic risk/insult in this act/object/utterance/etc.?
b) What is the extent of the symbolic risk/insult?
c) Can the way of living in question continue in anything like its current form under the present circumstances (assuming that all ways of living are somewhat flexible due to the interpretive contributions of the people who instantiate them)?
d) Is the way of living in question worth continuing in its current form?
e) What considerations, if any, count in favor of the offensive act/item/utterance/etc.?
f) Will interference with the offensive act/item/utterance/etc. remove the risk; will redress for the offensive thing/behavior adequately rectify the insult?
g) Do other values limit or prohibit the performance of feasible measures to address the offensive risk/insult? [309]

[308] FEINBERG, *supra* note 29, at 26.
[309] SNEDDON, *supra* note 11, at 224-43.

Appendix C

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

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