A Digital Space of One's Own: Rethinking Children's Online Privacy

Stephanie Belmer*

Abstract

This paper rereads the tort of intrusion upon seclusion, as it was adopted by the Ontario Court of Appeal in *Jones v Tsige*, to include a fuller account of online privacy. It proposes that the Court's stress on informational privacy forfeits a more dynamic and "spatialized" conception of privacy harm. This paper develops a relational account of spatial privacy using the work of Iris Marion Young, Virginia Woolf, and Jennifer Nedelsky based on three features—embodied habits, narrative, and experimentation—to supplement the informational reading of privacy in *Jones.* While Jones is not a case about young people, this paper nonetheless takes the Court's emphasis on digital technology as an invitation to reflect on young people's privacy. Using different accounts of young people's online experience, it proposes that while privacy is certainly transformed by the online world, its basic spatial features have not changed as dramatically as the Court in *Jones* suggests.

Keywords: Tort of intrusion upon seclusion, informational privacy, digital technology, cyberbullying

Résumé

Cet article propose une relecture du délit d'atteinte à la vie privée, tel qu'il a été adopté dans l'affaire *Jones* c *Tsige* de la Cour d'appel de l'Ontario, afin d'inclure une description plus complète de la vie privée en ligne dans notre compréhension de ce type de délit. Nous suggérons que l'accent mis par la Cour sur la protection des renseignements personnels implique de renoncer à une conception plus dynamique et « spatialisée » de l'atteinte à la vie privée. Cet article développe une approche relationnelle de la vie privée spatiale en utilisant les travaux d'Iris Marion Young, Virginia Woolf et Jennifer Nedelsky basés sur trois caractéristiques – les

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habitudes incarnées, le récit et l'expérimentation – afin de compléter l'interprétation informationnelle de la vie privée dans l'affaire *Jones*. Bien que *Jones* ne soit pas une affaire concernant les jeunes, cet article utilise l'accent mis par la Cour sur la technologie numérique comme une invitation à penser à la vie privée des jeunes. En nous appuyant sur différents récits de l'expérience en ligne des jeunes, nous proposons que, si la vie privée est certainement transformée par le monde en ligne, ses caractéristiques spatiales de base n'ont pas changé aussi radicalement que le suggère la Cour dans l'affaire *Jones*.

Mots-clés: Délit d'atteinte à la vie privée, protection des renseignements personnels, vie privée des enfants, technologie numérique, cyberintimidation

Introduction

I used to ask my Ethics students, ranging in age from seventeen to twenty, about the right to privacy. I recounted to them the case of a woman who was photographed, naked, by a police officer after she was assaulted. The police officer later circulated these photos without her consent.[1] I asked the students to compare how different theoretical models—such as deontology and utilitarianism—would respond to the story differently. How would each defend the right to privacy? Would it change anything if she didn't know the photos were circulated? Is the viewing pleasure of the police officers a relevant factor? I was never satisfied with the conversation. I don't think my students were either. And when I tried to open things up, asking my students about privacy in other contexts, they clammed up or tuned out. This class became an anecdote for me. Young people these days, I would say, just don't care about privacy.

In doing research for this paper, I realized that I was asking the wrong questions. The terms of the dilemma were too stark and the conversation too abstract. Traditional philosophical approaches tend to subsume the question of privacy under a different set of concerns: for Kant, the autonomy of a person; for Bentham and Mill, the aggregate happiness overall. Either way, the woman at the centre of this appeal, Ms. Angelynn York, was harmed. The first question for us as a class should have been: What caused Ms. York's harm? Why do you think this act was so upsetting to her? How would you feel if you had your privacy violated in this way? What effects would such a violation have on your own life? Starting there could have begun a conversation with my students about why privacy is worth protecting in the first place. By centring the discussion on an abstract right, I made it hard for their own personal sense of privacy to emerge. And I bored them. Education initiatives across the country are teaching young people about their right to privacy and the various ways in which it can be compromised online.[2] But rarely do we stop to ask what privacy means for young people and how its contours have changed online, if at all.

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1 See *York v Story*, quoted in James Rachels, *The Elements of Moral Philosophy*, 7th ed. (New York: McGraw Hill, 2008), 113–114.

2 See Jane Bailey, "Canadian Legal Approaches to 'Cyberbullying' and Cyberviolence," (September 20, 2016) Ottawa Faculty of Law Working Paper No 2016-37, 13–33.

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What follows is a modest attempt to broaden the conversation around privacy in Canadian tort law. I reread the tort of intrusion upon seclusion, as it was adopted by the Ontario Court of Appeal in *Jones v Tsige*,[3] to include a fuller account of online privacy. By adopting from Charter jurisprudence an interest in informational privacy,[4] I argue that the Court unduly limits what it means to be intruded upon in a cyber context. I propose that the Court's stress on information ignores a more fundamental, "spatialized" dimension of online privacy harm. By spatialized, I mean something other than the territorial zone of privacy developed in a constitutional context. Rather than protecting against trespass into a person's private places—whether conceived of as a home, briefcase, or computer[5]—I consider online privacy as protecting a relational sense of space grounded in habits and everyday practices, through which people foster relationships with others and develop narratives about themselves.[6]

While *Jones* is not a case about young people, I nonetheless take the Court's emphasis on digital technology as an invitation to reflect on young people's privacy. I select *Jones* despite cases that followed it,[7] both because *Jones* is the most extensive discussion of intrusion upon seclusion in Canadian private law and because it explicitly addresses cyber-harassment as a novel technological harm. Using different accounts of young people's online experience, I propose that a historically older notion of privacy, namely its basic spatial features, persist, even in an online world.

I end with a reflection on the recent cyberbullying initiative in Nova Scotia,[8] which I argue suffers from a related misapprehension of Internet harm. Here, young people are explicitly addressed; however, their spatial privacy is again not sufficiently explored or acknowledged. In the earlier version of the Act, which was later repealed, one even finds the opposite recommendation: a fuller intrusion upon young people's privacy is justified in the name of protecting them from harm.

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3 2012 ONCA 32 [*Jones*].

4 See *ibid* at para 41. Deserving further research is the question of whether the division between three spheres of privacy often referred to in s 8 jurisprudence—the informational, territorial, and personal—has inadvertently narrowed courts' visions of what privacy is and how it can be harmed. See *R v Dyment*, [1988] 2 SCR 417, [1988] SCJ No 82 at paras 19–22; *R v Tessling*, 2004 SCC 67 at paras 20–23.

5 In the s 8 context, courts have recognized that computers and cell phones engage more important privacy interests than physical repositories like a cabinet or a drawer in a desk. However, the explanation for why tends to focus on the information being held there, whether in terms of a computer's storage capacity or the inability to limit a search to a single device. See *R v Vu*, 2013 SCC 60 at paras 40–45; *R v Fearon*, 2014 SCC 77 at para 51 [*Fearon*]. An important exception is Justice Karakatsanis's dissenting opinion in *Fearon*, where, citing Lisa Austin's work on privacy and technology, the Court extends privacy interests to an individual's inner life and their capacity for self-representation. See *Fearon* at para 114–15; Lisa Austin, "Privacy and the Question of Technology," *Law & Philosophy* 119, no. 22 (2003): 146–47; Lisa Austin, "Control Yourself, or at Least Your Core Self," *Bulletin of Science, Technology & Society* 30 (2010): 26.

6 Like Austin, I reimagine the self in privacy law as more relational than the informational subject with a "biographical core" often assumed by courts. In a later project I will consider how my recasting of the self in space complements Austin's argument that privacy protects individuality as the freedom to be distinct and to preserve an authentic inner life. See Austin, *supra* note 5.

7 See, especially, *Jane Doe 464533 v ND*, 2016 ONSC 54 and *Jane Doe 72511 v NM*, 2018 ONSC 6607.

8 See *Cyber-safety Act*, SNS 2013, c 2 [*Cyber-safety Act* 2013]; *Intimate Images and Cyber-protection Act* SNS 2017, c 7 [*Cyber-protection Act* 2017].

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I. The Tort of Intrusion in the Digital Era

> It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right to privacy that has been protected for hundreds of years…[9]

The Ontario Court of Appeal, in *Jones v Tsige* in 2011, adopted the tort of intrusion upon seclusion into Canadian common law. The Court in *Jones* was only confirming what lower courts had already recognized as a common law right to privacy; before *Jones*, however, there had been no appellate decision supporting such a right and no consensus on what it consisted of.[10] In what follows, I take *Jones* as an opportunity to reflect more broadly on what it means to be intruded upon online.

The facts in *Jones* are fairly straightforward. Ms. Jones and Ms. Tsige worked at the same bank. They did not know each other personally, but Ms. Tsige was in a relationship with Ms. Jones's former husband. For reasons that remain unclear, Ms. Tsige used her banking privileges to access Ms. Jones's banking records and personal information at least 174 times over a period of four years. Ms. Tsige did not distribute the information nor did she record it. Ms. Jones brought forward a claim for invasion of privacy, which failed at the trial level but succeeded upon appeal.

One of the tort's requirements—adopted from American tort law scholar William L. Prosser's delineation in 1964—is that the invasion of a person's privacy must be intentional and highly offensive to a reasonable person. A close look at how the story is told by the Ontario Court of Appeal helps to explain why and how they decide Ms. Jones's claim meets this threshold.

The Court makes two small but noteworthy changes to the factual account given by the lower Court, where Ms. Jones's claim failed. Unlike the trial judge, they qualify Ms. Tsige's actions as "surreptitious" and they remove "tombstone" as a descriptor of Ms. Jones's personal information. First, to read that Ms. Tsige "had been *surreptitiously* looking at Jones's banking records"[11] in the second paragraph (the Superior Court omits any such qualifier), one has the impression that Ms. Tsige intentionally intruded—without authorization—into Ms. Jones's affairs. Second, the two courts present the nature of the information being intruded upon in different ways. The Superior Court downplays the private nature of Jones's information, describing it as "typical" and "tombstone."[12] "Tombstone" is often used in Art History for wall text information, e.g., title, artist name, medium, etc.,

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9 *Jones*, *supra* note 3 at para 68.

10 See *Saccone v Orr* (1981), 34 OR (2d) 317, [1981] OJ No 3132 (Co Ct); *Roth v Roth* (1991), 4 OR (3d) 740, [1991] OJ No 1301 (Gen Div). For cases that refused to strike pleadings making invasion of privacy claims, see, especially, *Somwar v McDonald's Restaurants of Canada Ltd* (2006), 79 OR (3d) 172 (SCJ); *Burnett v Canada* (1979), 23 OR (2d) 109 (HCJ); *Shred-Tech Corp v Viveen*, 2006 OJ No 4893 (Ont SCJ); *Nitsopoulos v Wong* (2008), 298 DLR (4th) 265 (Ont SCJ). See also John D. R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens," *McGill Law Journal* 42 (1997): 355–399.

11 *Jones*, *supra* note 3 at para 2 (italics mine).

12 *Jones v Tsige* 2011 ONSC 1475 at para 18 [*Jones ONSC*].

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and stands in contrast to more detailed biographical information meant to draw out a personal narrative about the artist and their work. By calling the information "tombstone," the Superior Court made the information seem basic, even public, akin to what may be included on a gravestone. On the contrary, the Court of Appeal describes Ms. Jones's information as "confidential"[13] and "personal."[14] The story told by the Court primes the (reasonable) reader to accept the following conclusion: "Any person in Jones's position would be profoundly disturbed by the significant intrusion into her highly personal information."[15]

Beyond highlighting the intentional and highly offensive nature of Ms. Tsige's act, these small factual changes also emphasize how central *information* would be for this new tort. Moving from fact to principle, the Court of Appeal draws on Charter jurisprudence to support this point, singling out informational privacy—as opposed to territorial or personal privacy—as the primary interest at stake.[16] Finally, in its own restatement of the tort, the Court narrows the focus to emphasize an intrusion upon information as opposed to the person themselves: "the defendant must have invaded, without lawful justification, the plaintiff's *private affairs or concerns*."[17] By comparison, the original American version is defined in the Restatement (Second) as follows: "One who intentionally intrudes, physically or otherwise, upon the seclusion of *another or his private affairs or concern*s."[18]

A possible reason for the Court of Appeal's narrower focus is an effort to assuage the fear, which also motivated Prosser, that the tort would swallow other doctrines whole.[19] But I think the main reason that the Court focuses seclusion on information—and not "another"—is its desire to adapt an old tort, grounded in the rise of photography in the nineteenth century, to a rapidly expanding technological field. As the Court explains: "For over 100 years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially… The Internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information."[20] The Court's narrowing of intrusion upon seclusion to informational privacy aligns with its larger narrative: when a world shifts online, informational harm is the primary concern.

Looking carefully at the story told by the Court of Appeal in *Jones*, a tension emerges between the Court's stated aim—to create a new tort in response to

13 *Jones*, *supra* note 3 at para 7.
14 *Ibid.*
15 *Ibid.*
16 *Ibid* at paras 41, 66.
17 *Ibid* at para 71 (italics mine).
18 Quoted in *Jones*, *supra* note 3 at paras 19, 70. Note that some lower courts, when citing Jones, cite to the paragraph reiterating the Restatement and thus miss the Court of Appeal's subtle reformulation of the American tort. See, e.g., *Alberta Health Services v Johnston* 2023 AJ No 373 at para 69; *Farrell v Canada* (Attorney General), [2023] OJ No 995 at para 200; *Benison v McKinnon,* [2021] AJ No 1430 at para 9.
19 See William L. Prosser, "Privacy" *California Law Review* 48 (1960): 383–423 at 401.
20 *Jones*, *supra* note 3 at para 67.

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increased technological overreach into people's affairs—and the facts themselves. Rather than illustrate the need to respond to personal information threats online, the facts are fairly low tech—and thus present a limited occasion by which to rethink privacy within a digitally enhanced reality. Ms. Tsige had access to Ms. Jones's records because they worked together, not because of some inherent weakness in the bank's database or because Ms. Jones had unwittingly given consent to third-party data miners. Moreover, the fact that Ms. Jones's banking records were online does not really change, substantially, the story being told. Arguably, Ms. Jones's claim would not be that different if Ms. Tsige had intercepted her mail or spied on her movements or read her diary. Motivated by what appears to be some mix of jealousy, obsession, and revenge, Ms. Tsige intruded upon Ms. Jones's seclusion—for old-fashioned reasons if not in an old-fashioned way.

In the next section, I conceive of the privacy harm addressed in *Jones* not solely as a breach of information but of personal space. I suggest that while Ms. Tsige may have pried into Ms. Jones's private information, she caused *harm* by repeatedly invading Ms. Jones's sense of space.

II. Three Dimensions of Relational Space

> The whole of the mind must lie wide open if we are to get the sense that the writer is communicating his experience with perfect fullness. There must be freedom and there must be peace. Not a wheel must grate, not a light glimmer. The curtains must be close drawn.[21]

Speaking to an audience of women writers, Virginia Woolf's lecture, *A Room of One's Own*, presents a person caught up in a world of constant motion. The early chapters follow her as she walks and lunches and travels until she arrives, finally, to a room within which she can sit and think and write. Surrounded by books, stilled and with the curtains drawn, Woolf sets her narrative in motion. Woolf's most basic assumption is that a person cannot fully engage the world if they have no space within which they can gather themselves and their things.

I find the origins for Woolf's assumption in the growing preoccupation with personal freedom and private spaces in nineteenth century Europe and North America. Peter Galison and Martha Minow describe augmenting privacy as the "socio-spatial background"[22] of the nineteenth century, ultimately giving rise to Samuel D. Warren and Louis D. Brandeis's well-known defense of "the right to be let alone" in 1890.[23] Architectural trends of wealthier homes pointed to more radical divisions between sacred bedrooms and public living rooms on display. Hygienic innovations made private homes increasingly impervious to foul odours, pestilent water, and dirty air. And technological developments like the modern camera and the penny press drove people to find spaces secluded from the public

[21] Virginia Woolf, *A Room of One's Own* [1929] (New York: Albatross Publishers, 2015), 103.

[22] Peter Galison and Martha Minow, "Our Privacy, Ourselves in the Age of Technological Intrusions," in *Human Rights in the 'War on Terror,'* ed. Richard Ashby Wilson (Cambridge: Cambridge University Press, 2005), 258–294.

[23] See Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890–1891): 193.

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eye.[24] To Galison and Minow, herein marked the broadening of privacy and of the self, who would begin to "car[e] for this zone of privacy"[25] as if it were an aesthetic creation—collecting curiosities, family photographs, and other mementos. While this shift contained within it forces of conformism and oppression, it also held the promise of a new kind of personal freedom: "a sense of individual self, capable of free choice, experimentation, and self-invention."[26] Below I will return to this personal freedom—which I take to be a creative power to reimagine oneself and one's relations with others.

I also distinguish my understanding of spatial privacy from Warren and Brandeis's in significant ways. While Warren and Brandeis underscored the inviolable self, sealed off (with their possessions) from others, I open the door to thinking about a *sense* of space unmoored from a fixed location. I do not imagine a "man's house as his castle,"[27] cut off or "impregnable"[28] to the outside world. Nor do I imagine a sealed chamber, where individuals cordon themselves off to develop and grow. Traditional legal readings of private space—often imagined by courts as a fortress or sanctuary or refuge[29]—have too rarely considered whom such a reading protects and whom it excludes.[30]

In contrast to this traditional view, I attribute three relational features to the space protected by privacy: One, that this space emerges in relation to one's physical environment, through habits and everyday practices. Two, that this space is an active one and emerges through storytelling. And three, that this space is structured by and generative of relations with other beings. Though cursory, my contention is that the potential harms addressed by privacy law might be better appreciated through a closer reckoning with each of these dimensions of personal space.

The first dimension concerns physical space. This feature I take from Iris Marion Young's argument on privacy in seniors' homes, although I think her description applies to other spaces as well. In Young's account, a person makes themselves at home in a space when the objects among which they dwell are imbued with their habits. These things "support and display"[31] who a person is, reminding them of their bodily rhythms, activities, desires, and tastes. More than a simple

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24 Galison and Minow, 279.
25 *Ibid.*
26 *Ibid* at 285.
27 Warren and Brandeis, *supra* note 23 at 220.
28 *Ibid.*
29 Linda McClain provides an in-depth analysis of these fortress-like images in her essay "Inviolability and Privacy: The Castle, the Sanctuary, and the Body," *Yale Journal of Law & the Humanities* 7, no. 1 (1995): 195–241.
30 By protecting the home, privacy law has often shielded men from the watchful state while furthering the vulnerability of many women and children. See, especially, Anita L. Allen and Erin Mack, "How Privacy Got Its Gender," *North Illinois University Law Review* 10 (2000): 441, 442; Catharine MacKinnon, "Reflections on Sex Equality under Law," *Yale Law Journal* 100 (1991): 1281–1328; Martha Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights," *Harvard Women's Law Journal* 9 (1996): 1–24; and Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).
31 Iris Marion Young, "A Room of One's Own: Old Age, Extended Care, and Privacy," in *On Female Experience: 'Throwing Like a Girl' and Other Essays* (Oxford: Oxford University Press, 2005) at 157–170.

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storage space, Young explains, "[t]he home… is the special arrangement of my and our things as a material support for and mirror of the life activity of the dwellers."[32] The way you move through this space becomes viscerally familiar and almost unconscious; it's what allows me to walk to the bathroom through my darkened room without bumping into things or to flip the light switch without groping around on the wall. For Young, such a space, individually arranged and inhabited, provides a sense of rootedness against the eroding forces of time—or what Young and others have described as "ontological security."[33]

By way of illustration, Young recounts her stepfather's experience as he transitioned from his cottage in Massachusetts to an extended-care facility, at eighty-six years old. Despite ailing health, her stepfather lived as long as possible in his cottage, feeling comfortable and secure among the many objects and mementos gathered over the course of his life. After moving into the seniors' residence, she witnessed his continued unease, living in a room with three beds, the door always open, no space for his objects, and constant intrusions by residents and staff. There was no individuated space at all, even within the common rooms, because the staff erased, daily, all traces of particular habits and personal things. Young's stepfather had no way to see himself reflected in the "time-space paths"[34] created by his bodily movements and treasured possessions; he had no place to carve out as his own.

The second feature I attribute to space is a narrative quality. Worn-in furniture and precious things are more than physical markers of a self; they also carry stories of a life lived with other people. Letters and photographs and trinkets are made invaluable by the memory they hold of a person no longer living or of a childhood moment or of a time spent with friends. Young attributes to these possessions a literary power: these objects get affirmed and reaffirmed through storytelling, when trusted others are engaged in a narrative thread.[35] Even the physical space of one's home carries within it the reminders of visitors and parties and conversation. This may be why I find staying in a stranger's apartment both unsettling and seductive; when another person's things and habits are on display, I am able to imagine their life in such intimate detail that it feels like stepping out of my story and into theirs.

The capacity to weave stories out of a space and its things can be easily compromised, however, by an intrusive presence or even an unwelcome comment or stare. Young's stepfather's primary concern was not that his personal items would be stolen—he could have kept these locked up somewhere if he wanted to. It was that he did not feel comfortable taking out his objects because he felt he was being watched by people he had not invited in.[36] Young explains: "The things that had meaning in his cottage as the materialization of his achievements and relationships would have lost their meaning in such a public and anonymous space. So he preferred not to have them."[37] To Young, without his things, and without the

[32] *Ibid.*
[33] *Ibid* at 159.
[34] *Ibid.*
[35] *Ibid* at 158–159.
[36] *Ibid* at 161–162.
[37] *Ibid* at 162.

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relations that accompanied them, her stepfather's very "sense of personhood"[38] seemed to diminish. His objects seemed to belong elsewhere, in his home where the stories were once told.

Personal narratives tend to reify over time. As I get older, certain stories get told and retold, furrowing the same tracks repeatedly until I sometimes find it difficult to imagine other possible paths. When this happens, the long-worn habits become an impediment to change, often entrenching me (and others I live in relation with) in a particularly uninspiring and inflexible trajectory. But personal space can dislodge a person from their own reifying tendencies, by facilitating new relational paths. Nedelsky, in her book *Law's Relations,* clearly elucidates this point in her description of the human ability "to make themselves who they are."[39] This third feature borrows heavily from Nedelsky's concept of relational autonomy, which she describes as a capacity to question relational norms and forge new relational possibilities. While my interest is relational privacy and not relational autonomy, I think the two track very similar interests. Nedelsky suggests as much in a brief passage on relational privacy, in which she cites Virginia Woolf's *A Room of One's Own*.[40] Despite Nedelsky's deep reticence towards any hint of spatial boundaries, I take her reference to Woolf as an indication that relational autonomy does require some sense of one's own space, provided autonomy's primary reliance on relationships is not obscured.

What I appreciate in Woolf (and what I think Nedelsky may appreciate as well) is that her "room of one's own" does not cut a person off from the world but creates the possibility of new relationships. Denying women such spaces, Woolf argues, limits their relational capacity. According to Woolf, it was not a coincidence that Jane Austen, George Eliot, and the Brontë sisters all wrote novels despite great variation in interest and talent. Working out of common sitting areas with no money or freedom to travel and denied the sustained concentration of a quiet space, they were limited to the personal relations that they could observe, in snatches, around them.[41]

Contemporaries of Woolf, by contrast, along with Woolf herself, could imagine new relations, for instance between women, that had never existed before in print (or, perhaps, at all). Reading Mary Carmichael, for instance, Woolf stops short at the line "Chloe liked Olivia." This statement was shockingly new; relationships between women were simply not the subject of novels. And, Woolf claims, such relationships could not even exist before Mary Carmichael found the space to imagine them and write them down. Woolf provides a compelling description of what I think Nedelsky means when she describes the capacity to forge new relational paths: "For if Chloe likes Olivia and Mary Carmichael knows how to

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38 *Ibid* at 166.

39 Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011), 31.

40 Nedelsky writes: "A classic invocation of this value [of relational privacy] and how it needs relations that support it is Virginia Woolf's essay *A Room of One's Own*" (*ibid* at 385, n 35).

41 Woolf speculates that with a room of her own and money to sustain her, Charlotte Brontë would never have written in the novel form to begin with. Likewise, George Eliot, with her "capacious mind" would have probably ended up a biographer or historian (Woolf, *supra* note 21 at 67–71).

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express it she will light a torch in that vast chamber where nobody has yet been. It is all half lights and profound shadows like serpentine caves where one goes with a candle peering up and down, not knowing where one is stepping."[42] I would add that this capacity to bring new relations into existence was made possible by Mary Carmichael's sense of personal space, or, in Woolf's words, a room of her own. To return to the quote with which I started this section, Woolf and Mary Carmichael, unlike other women before them, could retreat into the stillness of their space and thereby let their minds "lie wide open" to new and challenging interpellations.

Arguably, the spatial conception of privacy I describe only goes so far in the face of digital-era information technology. When it comes to data mining or DNA sequencing without one's knowledge, it is not clear how or which space is being intruded upon. The same point is true of earlier technologies and the kinds of intrusions they enabled, such as the vulnerability of telephone calls to eavesdroppers or personal mail to spies. Courts have long recognized that such intrusions do more than trespass on a person's private *places*, touching instead people themselves.[43] In my view, the Court in *Jones* was too quick to narrow digital intrusions to informational harm. An older paradigm of private space still persists online, although it is perhaps more difficult to see. As Galison and Minow put it, "here are worlds neither eternal in their structure nor changeable at the drop of a hat."[44] These worlds reflect, in other words, cumulative more than isolated phenomena.

Julie Cohen makes a compelling argument on the relationship between online and offline spaces as existing more on a continuum than as two separate universes. She makes it possible to see how the analog experiences I describe above are overlaid by experiences online. Various apps track and store my movements as I move about the city, for instance; my coffee habit is not just a drink but also data to sell. My experiences online "remain stubbornly localized"[45]: even at my most disembodied, reduced to so many bits of information, physical qualities persist. "Attention to embodied reality," Cohen writes, "forces an appreciation of the fact that the transition to the virtual is always partial, equivocal, and unstable… the embodied self cannot simply be assumed away."[46] I am still a body grounded in concrete space when I check my email or take the bus or buy things online. Echoing Young, Cohen accepts that human beings participate in an "everyday spatial practice"[47] through which they situate themselves, as bodies, in the world. These practices do not disappear when a person goes online.

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42 Woolf, *supra* note 21 at 84.

43 For a careful examination of the tensions underpinning the distinction between people and places in privacy law, see Eric H. Reiter, "Privacy and the Charter: Protection of People or Places," *Canadian Bar Review* 88, no. 1 (2009): 119–146. As Reiter points out, despite courts' stated intention to emphasize the person, what is often decisive is the kind of place or the type of information that led the privacy interest to be engaged (see Reiter at 121–133). My own argument fills out this connection between personhood and privacy not through a s 7 analysis, as Reiter's does, but through a re-examination of personal privacy and space.

44 Galison and Minow, *supra* note 22 at 284.

45 Julie Cohen, "Cyberspace as/and Space," *Columbia Law Review* 107, no. 1 (2007): 210–256 at 244.

46 *Ibid.*

47 *Ibid* at 213.

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By narrowing its focus to information, the Court in *Jones* missed an opportunity to consider a spatial dimension to privacy that makes a person's information worth securing in the first place. Ms. Tsige may not have read Ms. Jones's physical mail or trailed her as she moved about town. But in an age of digitalized payment, she could watch what Ms. Jones bought, where she shopped, and whatever other daily habits were recorded by her transactions. This helps to explain why an intrusion into something that seems so trivial, like banking or "tombstone" information, inspires such strong language. In Ms. Jones's words, her sense of privacy in her banking records has been "irreversibly destroyed."[48] According to the Court's description, "Jones was understandably very upset"[49] by the intrusion, which to a reasonable person is "highly offensive" and the source of "distress, humiliation or anguish."[50] Ms. Jones may have felt, like Young's stepfather, that her space was suddenly public and that she could no longer inhabit her world unobserved.

III. Finding Children's Privacy Online

> LuvPunk12 as a chatroom handle was a nascent performance, an exploration of a future self. I was a young body: Black, female-identifying, femme, queer. There was no pressing pause, no reprieve; the world around me never let me forget those identifiers. Yet online I could be whatever I wanted. And so my twelve-year-old self became sixteen, became twenty, became seventy. I aged. I died. Through this storytelling and shapeshifting, I was resurrected. I claimed my range.[51]

Artist Legacy Russell's exalted description of her online freedom suggests significant differences from earlier experiences of analog space. Her power to self-invent and forge new kinds of relations, for instance, appears untethered from her physical world and thus almost boundless in its scope. But as should be clear by now, I think this difference is often overplayed. As I will show, the experimentation and playfulness described by Russell echo the three dimensions of relational space I set out above. *Where* individuals seek a sense of their own space has shifted in a digital world; but *why* they seek it has not significantly changed.

In this section, I take the Court's treatment of cyberspace as especially consequential for so-called "digital natives."[52] I show that young people repeatedly express a desire to protect their online spaces from others (especially their parents), precisely to protect the three spatial features set out in Section II: embodied habits, narrative, and experimentation. But such spatial dimensions are harder to discern —much less easy to protect—when the tort of intrusion for the digital age is seen through the lens of informational privacy. To illustrate this point, I end this

[48] *Jones*, *supra* note 3 at para 7.
[49] *Ibid* at para 90.
[50] *Ibid* at para 89.
[51] Legacy Russell, *Glitch Feminism: A Manifesto* (New York: Verso, 2020), 13.
[52] Credit goes to Marc Prensky for popularizing this term for people who grew up after digital technologies became widespread. See Marc Prensky, "Digital Natives, Digital Immigrants," *On the Horizon* 9, no. 5 (October 2001): 1.

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section by considering Nova Scotia's recent cyberbullying initiative, which was created with young people in mind. Drawing from the expanded conception of intrusion presented in Section II, I show how the Act initially—and tellingly—neglected privacy on two fronts: in its description of cyberbullying harms and in its portrayal of the parent–child relationship.

By limiting online privacy to the protection of information, *Jones* creates confusion over the distinction between public and private space. As we saw in Section I, Ms. Jones's information was deemed confidential by the Court of Appeal —as opposed to "tombstone" at the trial level—which allowed the Court to describe Ms. Tsige's persistent snooping as a highly offensive intrusion. Because these were Ms. Jones's banking records, to call them private was easy to do. However, the difference between the public and the private when online is often much more subtle than that: if a person shares some information with friends on social media, does that mean it can't be intruded upon by someone outside their chosen circle? I think the emphasis on information oversimplifies these scenarios, and this is especially clear when looking at the online experiences of young people. The information they put on social media may not be as obviously secured as Ms. Jones's banking records, but they can still feel that their privacy is invaded when this information is seen by the uninvited. The tort of intrusion, when read as informational privacy, is incapable of addressing these subtleties.

Seventeen-year-old Bly Lauritanio-Werner illustrates this confusion over the public and the private in a National Public Radio episode about her mother reading her online diary.[53] Bly had locked her journal entries so that only her friends could access them, but her mother read one when it was left open on Bly's screen. Her mother felt that she could read Bly's diary because it was posted online: "you publish it and it's for general viewing," she says, "therefore I feel I'm part of the general public, so I could view it."[54] Bly is clearly exasperated by her mother's defense that the Internet is a public place. "It's not like I do anything to be ashamed of," she says, "but a girl needs her privacy. I do online journals so I can communicate with my friends. Not so my mother could catch up on the latest gossip of my life."[55] danah boyd discusses this episode in order to highlight the ways in which teens "achieve privacy in public."[56] boyd notes that teenagers continually seek out spaces that their parents are not aware of in order to do so. "Much to many adults' surprise," boyd writes, "teens aren't looking to hide; they just want privacy."[57] My emphasis is slightly different from boyd's; whereas she is interested in privacy as a process through which young people express their agency, I am interested in drawing out the material, spatial basis presupposed by that agency. In the case of Bly, her agency depended on her feeling secure from her mother's intrusions into her online space. With more time, it would be interesting to ask how and why Bly's

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53 See Bly Lauritanio-Werner, "The Effort To Keep an Online Diary Private," *All Things Considered* (July 24 2006), NPR Youth Radio, www.npr.org/templates/story/story.php?storyId=5579002.

54 *Ibid.*

55 *Ibid.*

56 danah boyd, *It's Complicated: The Social Lives of Networked Teens* (New Haven: Yale University Press, 2014), 59.

57 *Ibid.*

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online diary, left open to her friends, differs from the traditional diary secreted away for no one to see.[58] In either case, I think there is a similar concern with privacy: by reading her diary, Bly's mother made it difficult for Bly to feel secure enough to share her thoughts with her friends. And this affected her relationship with her mother: Bly no longer trusted her mother to stay out of Bly's affairs.

These features of Bly's personal space are left out when this incident is read through an informational lens. It also becomes difficult to read this as an intrusion at all. Like Bly's mother, a court may find that by putting her diary online and sharing it with her friends, Bly made her information public to begin with; anything Bly does seems to be open for her mother to see.

There is a technological dimension to my argument: when seen as a de facto public space in which one's information is always already shared, there is a tendency to treat the Internet as a space of hazard and risk, especially for young people.[59] These risks include old-fashioned ones like bullying or sexual predation. And they also include some unique to or at least deepened by the online world, such as a loss of data privacy to corporate trackers or lifelong reputational damage from intimate information posted and shared. Faced with these potential harms, there is a persistent sense among adults that young people don't know what's good for them and that their online behaviour must be supervised and controlled.[60]

I think the emphasis on protecting young people's information—both by courts and by adults concerned about the young people in their lives—loses sight of why these spaces are sought after to begin with. How else to explain that young people, knowing the risks, continue to share all kinds of deeply personal experiences online? And when young people are asked about their privacy, they repeatedly express a desire to find privacy from their parents. Informational privacy is usually not their main concern.[61]

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58 For a more developed discussion of this shift to a networked online space, see, especially, boyd, *supra* note 56; Julie Cohen, "Power/play: Discussion of Configuring the Networked Self," *Jerusalem Review of Legal Studies* 6, no. 1 (2012): 137–149; Daniel J. Solove, *Understanding Privacy* (Cambridge: Harvard University Press, 2008); Helen Nissenbaum, *Privacy in Context* (Stanford: Stanford University Press, 2010); Ari Ezra Waldman, *Privacy as Trust: Information Privacy for an Information Age* (Cambridge: Cambridge University Press, 2018).

59 See, especially, Veronica Barassi, "Datafied Citizens in the Age of Coerced Digital Participation," *Sociological Research Online* 24, no. 3 (2019): 414–429; Shoshana Zuboff, *The Age of Surveillance Capitalism* (New York: Public Affairs, 2019); Deborah Lupton and Ben Williamson, "The Datafied Child: The Dataveillance of Children and Implications for Their Rights," *New Media & Society* 19, no. 6 (2017): 780–794.

60 For an extensive discussion of the anxiety around the digital and young people, see Amanda Third, Philippa Collin, Lucas Walsh, and Rosalyn Black, *Young People in Digital Society: Control Shift* (London: Palgrave Macmillan, 2019), 2–4.

61 For research showing children's primary desire to seek privacy from their parents online—and the methods they use to achieve it—see boyd, *supra* note 56 at 54–76; Sonia Livingstone, *The Class: Living and Learning in the Digital Age* (New York: NYU Press, 2016), 94–95; Sonia Livingstone, *Children's Data and Privacy Online: Growing up in a Digital Age, An Evidence Review* (LSE Media and Communications, December 2018), 18–23; Mizuko Ito, Heather A. Horst, Matteo Bittanti, and danah boyd, *Living and Learning with New Media: Summary of Findings from the Digital Youth Project* (Cambridge: MIT Press, 2009), 39–40, 76–78; Mary Madden, Amanda Lenhart, Sandra Cortesi, Urs Gasser, Maeve Duggan, Aaron Smith, and Meredith Beaton, "Teens, Social Media, and Privacy," (May 21 2013) *PEW Research Centre*, 17, 38, 44–45, 49–50, 67 https://www.pewresearch.org/internet/2013/05/21/teens-social-media-and-privacy-2/.

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Even as I recognize that the nature of space takes on new forms in a digital environment, I think what people—young people included—gain from a sense of privacy online is not that different from the three features I outlined above.

As I have already indicated in Section II, one's bodily habits create familiarity with a space even in a digitized environment. This can be as simple as the way I make any desktop my own by cluttering it with a thousand files and switching up the wallpaper with various photos of my child or dog. To take a more nuanced example, Legacy Russell speaks to the power of her chatroom handle, "LuvPunk12," to ground her in her newly experimenting self. She explains its origin story as follows: "I chose the name when I spotted *LUV PUNK!* on a candy-apple-red heart-shaped sticker adhered to a phone booth outside of my apartment building. I was twelve. I peeled it off and stuck it to my Trapper Keeper, wearing it as a badge of pride. It became a rooted reminder of home as I transitioned in and out of spaces beyond the East Village that often felt alienating to me."[62] Russell's physical sticker—grounding her in space even as she moved around—is reincarnated in a digital mode. As a chatroom handle, merging with the offline in the form of a sticker on her bag, it grounds Russell in a sense of her own space—even as she "claims her range" online, "[creating] new selves" and "slipping in and out of digital skins."[63]

Russell's description brings me to the second feature of space outlined in Section II: a sense of space, I argued there, facilitates storytelling about one's life. In Bly's case, her journal is a way of communicating with her friends. In it, she feels secure enough to share an "online rant" about her mother and her mother's boyfriend. Like Young's stepfather described in Section II, Bly wants a space in which she can write and communicate with friends without feeling watched by someone she has not invited in. She continues to be upset even after she locks her diary, not trusting her mother to stay out of it. Her mother's intrusion changes the nature of the space and, with it, Bly's sense of comfort when narrating her life. Her space is suddenly public and visible rather than private and selectively shared.

When her mother does read her journal, Bly accuses her of doing so to "catch up on the latest gossip" about her life. A private rant meant for her circle of friends becomes, in her mother's hands, a piece of gossip—something to spread around, casual and unconstrained. Bly's distinction gets at something Warren and Brandeis already feared in their early description of privacy. The daily papers made gossip-mongering a bustling trade, with private spaces more easily intruded upon by snapshot photography and other mechanical means.[64] As I pointed out above, there are many problems with Warren and Brandeis's account of privacy as domestic and solitary. But their account of gossip is helpful in showing that contemporary concerns about digital space are not entirely new; the leakage of the private into the public, brought on by technological change, was already a nineteenth-century fear.

Finally, I think a sense of online space preserves the capacity to experiment with new and unconventional relations. Bly implies as much when she says, defensively,

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62 Russell, *supra* note 51 at 1.
63 *Ibid.*
64 Warren and Brandeis, *supra* note 23 at 196.

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that "it's not like I do anything to be ashamed of," as if she needs to prove she has nothing to hide.[65] Shame is an important tool of social conformity; it is precisely an escape from the power of shame that allows experimentation with new relations to emerge. This was true of Mary Carmichael when she wrote of relations between women against the expectations of a literary patriarchy. This is also true for young people when they seek out spaces online.

What I am advocating for is a conception for personal space that accommodates not just the risks of online experience but also its benefits and freedoms. A fuller reading of intrusion upon seclusion includes the way in which a sense of space shores up the possibility of an experimenting self. Legacy Russell provides the best description I have found of this power. In what Russell calls "Away from the Keyboard" (or AFK), she describes struggling to fit into a heteronormative environment as a black, queer teenager, feeling "exhausted by social mores, tired of being told to take up less space, being seen and not heard, systematically erased, edited out, ignored. All I wanted to do was move. But in the light of daytime, I felt trapped, always shifting uneasily under the weight of incessant white heteronormative observation."[66] Feeling constantly surveilled, seen only through the constructs of race and gender, she felt she had no space of her own in her AFK environment. She describes finally being seen, as a body and as a self, when she went online. "For my body, then," she writes, "subversion came via digital remix, searching for those sites of experimentation where I could explore my true self, open and ready to be read by those who spoke my language. Online, I sought to become a fugitive from the mainstream, unwilling to accept its limited definition of bodies like my own."[67] In her online space, Russell's movements became so many glitches in the system, a "machinic mutiny."[68] Echoing Woolf but also going beyond her particular feminism, Russell's "hard-fought for rooms"[69] provide "shelter, safety, futurity"[70] in which a person forges new relations resistant to gender, race, and class.

Young people appear to seek out online spaces for reasons like those observed by Woolf: they desire freedom from the pressures and conventions of their social world. But the opportunities for privacy afforded by cyberspace are obscured when online privacy is read through informational terms and/or when digital technology is portrayed as public from the start. Such a narrow reading of technology is in some ways the symptom of a generational gap. Admittedly, wariness towards young people is nothing new,[71] but the generational gap in knowledge and ease with

[65] For a different take, see Daniel Solove, "'I've Got Nothing to Hide' and Other Misunderstandings of Privacy," *San Diego Law Review* 44 (2007): 745–772.
[66] Russell, *supra* note 51 at 2.
[67] *Ibid.*
[68] *Ibid* at 4.
[69] *Ibid* at 5.
[70] *Ibid* at 4.
[71] Ranging from Victorian era anxieties over children's unfettered sexuality to contemporary moral panics about teenage pregnancy and vandalism, children are often portrayed, whether by parents, the public, or in legislation, as in need of supervision and control. See, especially, Jo Bridgeman, "Caring for Children: Risks and Responsibility in the Law of Tort," in *Law and Childhood Studies,* ed. Michael Freeman (Oxford: Oxford University Press, 2012); Stevi Jackson and Sue Scott, "Risk

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digital technologies may exacerbate a historical tendency to fear young people as unruly and strange. In any case, such legal decisions shape how privacy is understood (or overlooked) in other civil liability contexts where young people are the focus. The absence of young people's privacy is particularly evident, in my view, in the recent cyberbullying initiative in Nova Scotia.

Nova Scotia first introduced the *Cyber-safety Act*[72] in 2013 in response to growing concern about the destructive effects of cyberbullying on young people. Rehtaeh Parsons' death by suicide earlier that year, attributed to cyberbullying she experienced after images of her alleged rape at a party were circulated online, prompted swift legislative action.[73] The initial Act was struck down after a Charter challenge in 2015[74] and was ultimately replaced by the *Intimate Images and Cyber-protection Act* in 2017. Both versions, particularly in their approach to what interests the Act serves to protect, would in my view benefit from a broadened conversation around privacy along the lines I outline above. For instance, the earlier incarnation of the Act, from 2013, does not include privacy harm as a possible effect of cyberbullying.[75] And while the 2017 version goes much further in recognizing the privacy interests of young people online, by protecting them against intimate images being circulated without their consent, the later Act still does not include privacy harm as a possible effect of cyberbullying in general.[76] And yet privacy is crucial for building resilience and fostering constructive relationships in the ways I have already outlined. When a person is bullied online, their sense of online (and offline) space—where they can communicate with trusted others, feel secure, build up new relations—is particularly at risk, especially if the spaces where they once felt safe are now intruded upon.

In a broader sense, the absence of privacy in these initiatives reveals how the private law shapes and takes shape from broader social norms and fears. An influential report by the Nova Scotia Task Force on Bullying and Cyberbullying in 2012,[77] for instance, is careful to point out that bullying is not a new phenomenon. But the Internet is said to worsen things in overwhelmingly negative ways, e.g., in its constancy, its removal of inhibition, and its challenge to respectful human

Anxiety and the Social Construction of Childhood," in *Risk and Sociocultural Theory: New Directions and Perspectives* (Cambridge: Cambridge University Press, 1999), 86–107; Nicholas Bala and Sanjeev Anand, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2015), 7–36, 197–212. For a piece of legislation that imposes liability on parents for property damage and economic loss caused by their children, see Ontario's *Parental Responsibility Act, 2000*, SO 2000, c 4.

72 *Cyber-safety Act* 2013, *supra* note 8.

73 See Jane Bailey, "Time to Unpack the Juggernaut?: Reflections on the Canadian Federal Parliamentary Debates on 'Cyberbullying,'" *Dalhousie Law Journal* 37, no. 2 (2014): 672–73; A. Wayne MacKay, "Forum Topic: An Update in the Law of Privacy Law as an Ally or Enemy in the War on Cyberbullying," *University of New Brunswick Law Journal* 66 (2015): 3–51.

74 See *Crouch v Snell*, 2015 NSSC 340.

75 The *Cyber-safety Act* includes "fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation" (*supra* note 8 at para 3(1)(a)).

76 The *Cyber-protection Act* 2017, *supra* note 8, narrows the 2013 Act's list somewhat to include "harm to another individual's health or well-being" (para 3(c)).

77 See A. Wayne MacKay, *Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (Nova Scotia: Task Force on Bullying and Cyberbullying, 2012).

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relationships.[78] The Internet is ultimately presented as boundless and undisciplined: "The cyber-world provides bullies with a vast unsupervised public playground, which challenges our established methods of maintaining peace and order."[79]

While it is hard to disagree with the report's efforts to promote relationships of responsibility and respect between human beings, the report's assumptions about the Internet, that it is an unsupervised place without controls, makes it difficult to see how young people would find the space to create any healthy relationships online, with trusted peers or with their parents. The report does not seem that interested in exploring how young people, on their own terms, could do so. Instead, older people, namely parents, are called upon to monitor what their children do online and to set a good example. The report compares using the Internet to driving a car or using a loaded gun: in their view, children need "digital training wheels"[80] and proper "digital hygiene"[81] before they can navigate the "big wild world of the Internet"[82] on their own. And the parent is called upon to model behaviour for the child: "The adult–child relationship is the key to protecting children from bullying. Norms come from adult attitudes, and when there are insufficient protections and no clear rules in place, bullying may actually be encouraged through lack of intervention."[83] The report doesn't go as far as to suggest that parents should be held liable in lieu of their children,[84] but it certainly lays the groundwork for imagining parents as direct supervisors of their children's online activities.

The 2013 *Cyber-safety Act* did precisely that: it made the parent jointly and severally liable if they are deemed not to have reasonably supervised the child when they allegedly engaged in cyberbullying. Reasonable supervision is explained as "*direct* supervision of the parent *at the time* when the defendant engaged in the activity"[85] or, if direct supervision is impossible, the Court considers whether the parent "[made] reasonable arrangements for the supervision of the defendant."[86] To me, imagining the parent as a constant supervisor—lest they face allegations of cyberbullying themselves—reveals a deeper misconception about cyberspace and young people's privacy. Cyberspace is vilified as a dangerous playground in which any child might transform into a bully. Meanwhile, the privacy that children consistently ask for from their parents is precisely what they may be denied.

Legal initiatives such as these inevitably shape the way that parents and children understand responsibility and harm. For instance, parents can feel inadequate if they do not surveil their children in the right ways. danah boyd dubs this tendency towards surveillance as "intensive parenting."[87] boyd cites a mother from

78 *Ibid* at 5–9.
79 *Ibid* at 12.
80 *Ibid* at 31.
81 *Ibid.*
82 *Ibid.*
83 *Ibid* at16.
84 See *ibid* at 32.
85 *Cyber-safety Act* 2013, *supra* note 8 at para 22(g) (italics mine).
86 *Ibid* at para 22(h).
87 boyd, *supra* note 56 at 72.

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New York named Christina who openly admits to tracking everything her children do online: "Annoying or not, I do it and will always do it. It's MY computer. I also log in and check their history, and track where they go, who they talk to… everything. I'm a mom. It is my responsibility to protect them… If my girls don't like spying, they're free to not use the computer."[88] Christina suggests here that her children have no right to use *her* computer unless they accept that everything they do is surveilled. It is as if before a child reaches the age of majority, their online space is owned by the parent (as is their privacy). Children still seek out privacy in online spaces, e.g., by using language and/or finding sites their parents do not understand or by performatively sharing edited versions of their life to throw their parents off.[89] But despite these efforts, they are inevitably shaped by a sense of being surveilled. Ultimately, they are infantilized; state law treats them as vulnerable and in need of protection while not holding them accountable for their actions if they end up causing harm.

I would like to end by considering how privacy and its corresponding freedoms emerge through a difficult negotiation with other important relations in our lives, including and especially with our parents. Parents, too, need to come to terms with their children developing in unexpected and what appear sometimes to be undesirable ways.[90] Writer and scholar Sara Ahmed describes the importance of reckoning with such discomfort and risk. As certain modes of behaviour become the well-trodden tendencies of a social collective—she describes, for instance, how childbearing and heterosexuality come to seem compulsory—a sense of one's own space helps to interrogate these norms in their assumptions and values. But Ahmed makes clear that carving out one's space, against convention, is very often a painful and unsettling process.[91] "Not to inhabit a norm," writes Ahmed, "can be experienced as not dwelling so easily where you rise."[92] Young people often create a "scene of breakage"[93]: they break with the direction imagined for them by others—their parents, teachers, friends—and thus find themselves uncomfortably at odds with the world around them. Ahmed rereads Woolf's room of one's own as a function of willfulness[94]: to retreat from others' expectations and imagine a different path is, first and foremost, an achievement of one's will.

I turn to Ahmed to draw out the way that a parent's expectations for their child's futurity can weigh a child down, pressing them into some image of the good life they have not chosen. Against these expectations, a child finds their own direction, seeking out alternative spaces in which to express their developing sense of self. This challenge—of the child carving out a sense of personal space against a parent's

88 *Ibid.*
89 See *ibid* at 74.
90 For a recent study of the challenges of parenting in a digital era, see Sonia Livingstone and Alicia Blum-Ross, *Parenting for a Digital Future: How Hopes and Fears about Technology Shape Children's Lives* (Oxford: Oxford University Press, 2020).
91 Sara Ahmed, *Living a Feminist Life* (Durham, N.C.: Duke University Press, 2017), 41–56.
92 *Ibid* at 115.
93 *Ibid* at 167.
94 Ahmed writes: "Virginia Woolf (1920) wrote of a room of one's own, a room we have to fight for. We can think of feminism as having to fight to acquire a will of one's own" (*ibid* at 74).

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persistent meddling, now most often online—expresses perhaps most clearly my point that a sense of space only emerges through relations with others. A child's "misattunement"[95] with their parents' vision produces a critical disorientation for both parent and child, which in turn opens them up to the possibility of a different way of being.

Conclusion

One way of addressing privacy harm is to ask what privacy facilitates, wherever it can be found. Privacy is not simply something a person has, as if a person has privacy one day and then loses it another. But when Courts read privacy through an informational lens, they give the impression that privacy is a kind of data set, which an individual can give up or have taken away.

To return to the example I laid out at the very beginning of this article: Ms. Flynn's case demonstrates the limits of reading privacy harm as an informational concern. If I were to teach this example in the future, I would not take these photographs simply as private objects circulating without Ms. Flynn's consent—although of course they are also that. These photographs were not wrongly used simply because they revealed information about Ms. Flynn, in this case, details about her naked body. Rather, I would begin by asking students how they would feel to have someone intrude upon their private life in this way, how their sense of personal space may be compromised: here, Ms. Flynn's body was made to feel foreign to her, her very self-narrative compromised, and her trust in others broken. Such harm goes far beyond the orbit captured by informational harm.

I present above a fuller account of privacy's integral role in how a person embodies the world, narrates their experience, and experiments with new relationships. I argue that to understand the benefits of online experiences—the range of their private freedoms—is also to understand the possible harms when they are intruded upon. There are subtleties not acknowledged or made legible through the language of information. Personal space and freedom are historical terms whose currency outlives the technological revolutions of these last decades. Likewise, their privation must be responded to as such.

In a digitalized environment, children seek out opportunities to experiment, take risks, communicate with their friends, without feeling the pressure of adult norms. According to legal scholar and professor Shauna Van Praagh: "Cyberspace can be conceptualized as a new terrain for play—play in which young people take risks, learn from mistakes, sometimes get hurt and sometimes hurt others."[96] I have tried to show that such extensions of analog experience into the digital are necessary if we are to avoid demonizing cyberspace at young people's expense. By reconceptualizing personal space and privacy, I offer a more precise rendering of how we might conceive of the harms made available by online experience. Not the

[95] *Ibid* at 41.
[96] Shauna Van Praagh, "Taking Play Seriously: Reflections on Resilience and Responsibility," in *Youth at the Crossroads of Family, Community, Law and Society*, ed. Pierre Noreau (Montreal: Éditions Thémis, 2021), 222.

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novel harms of online technology but rather the harms newly inscribed upon a historical self, whose freedoms require constant reappraisal. As Jeannette Winterson writes, "what we risk reveals what we value."[97] My contention is that our privacy laws must know this too.

Stephanie Belmer
Faculty of Law, McGill University, Montréal, Canada
stephbelmer@gmail.com

[97] Jeannette Winterson, *The Passion* (New York: Grove Atlantic, 2007), 43.

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