ARTICLES

PROMISES AND PRIVACY: PROMISSORY ESTOPPEL AND CONFIDENTIAL DISCLOSURE IN ONLINE COMMUNITIES

Woodrow Hartzog[*]

"What you see here, what you hear here, when you leave here, let it stay here!!"[1]

Online communities often provide significant support for those who seek it. Yet in order to take advantage of that support, users must frequently disclose sensitive information such as dating profiles, candid thoughts, or even past substance abuse. What happens when other community members fail to keep this potentially harmful information confidential? Traditional remedies will likely fail to protect people when members of an online community violate the confidentiality of other members. In this Article, I contend that promissory estoppel, an equitable doctrine designed to protect those who detrimentally rely on promises, can ensure confidentiality for members of online communities. The application of promissory estoppel via a website's terms of use agreement as a method for protecting disclosure has substantial advantages over tort-based, technological, or contractual remedies. Under the third-party beneficiary doctrine or the concept of dual agency, these agreements could create a safe place to disclose information due to mutual ability to enforce promises of confidentiality.

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* Roy H. Park Fellow, Ph.D. Student, School of Journalism and Mass Communication at the University of North Carolina at Chapel Hill; LL.M., The George Washington University Law School; J.D., Samford University. The author would like to thank Daniel Solove, Ruth Walden, Paul Jones, Dean Smith, Erin Coyle, Chris Hoofnagle, Allyson Haynes, and the participants of the Second Annual Privacy Law Scholars Conference paper workshop.

1. SELF-HELP RESOURCE CENTRE, CONFIDENTIALITY IN SELF-HELP SUPPORT GROUPS 1 (internal quotation marks omitted) (citation omitted), http://www.selfhelp.on.ca/resource/factsheetonconfidentiality.pdf (last visited June 3, 2010).

I. INTRODUCTION

Today, people are disclosing very personal information on a wide array of websites. Commentators frequently argue that people who expose their deep secrets online do not value their privacy.[2] Courts find they have no expectation of privacy.[3]

2. For more analysis, see generally Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887 (2006); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967 (2003); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 920–21 (2005); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000). *See also* Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 77 (2007) ("When faced with the privacy-related risks of the medium, digital immigrants fervently argue, 'if you can't stand the heat, get off of MySpace.'").

3. *See* Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858, 862 (Ct. App. 2009) (holding that school principal did not invade family's privacy by submitting journal entry written by student's sibling for

The unprecedented sharing of private information on the Internet is leading some to herald the demise of privacy.[4]

It is far too facile, however, to conclude that because people are sharing private data online, they should expect no privacy. Many online communities have elaborate privacy settings.[5] Members of various online communities take considerable effort to manage the degree of exposure of their information.[6] Consider Facebook.[7] Many individuals set their privacy settings so that only people they have designated as friends can see their information.[8] People using dating websites often set their profiles only to be visible to other members of the particular online dating community.[9] Members of online support communities for substance abuse problems also expect exposure only to other members of the community.[10]

What happens when information leaks outside these communities? Suppose a person improperly provides others with access to a friend's Facebook profile. Suppose a member of a dating website copies another's dating profile and discloses the information to the general public. Or suppose a member of an online support community for recovering alcoholics reveals the names and other personal information of other members. Should members of an online community be able to expect and legally enforce the confidentiality of their data?

The law will likely fail to protect people when members of an online community violate the confidentiality of other members. According to Andrew McClurg, "[c]ourts and privacy law live in a bygone era to the extent they continue to ignore the impact that revolutionary changes in communication technology have brought and wrought upon privacy."[11] Defamation is inapplicable to the disclosure of private but true

republication in local newspaper); *see also* Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 112–14 (2000) (discussing hesitancy with which courts have applied tort of public disclosure); Volokh, *supra* note 2, at 1057–58 (explaining that parties who contract to maintain confidentiality have reasonable expectation of privacy); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 311–20 (1983) (discussing Supreme Court's protection of truthful speech in modern case law).

4. *See, e.g.*, Eve Fairbanks, *The Porn Identity*, NEW REPUBLIC, Feb. 6, 2006, at 34 (discussing one internet user's experience with innocent Google searches leading to pornographic sites related to her name).

5. *See, e.g.*, MySpace, About Settings, http://www.myspace.com/Modules/ContentManagement/Pages/page.aspx?placement=privacy_settings (last visited June 3, 2010) (describing settings options); *see also* MichaelZimmer.org, How to Adjust Your Facebook Privacy Settings—2009 Edition, http://michaelzimmer.org/2009/08/12/how-to-adjust-your-facebook-privacy-settings-2009/ (last visited June 3, 2010) (describing Facebook privacy settings).

6. *See generally* Emily Christofides et al., *Information Disclosure and Control on Facebook: Are They Two Sides of the Same Coin or Two Different Processes?*, 12 CYBERPSYCHOLOGY & BEHAV. 341 (2009); Zeynep Tufekci, *Can You See Me Now? Audience and Disclosure Regulation in Online Social Network Sites*, 28 BULL. SCI. TECH. & SOC'Y 20 (2008).

7. Facebook, http://www.facebook.com (last visited June 3, 2010).

8. MichaelZimmer.org, *supra* note 5.

9. Jennifer L. Gibbs et al., *Self-Presentation in Online Personals: The Role of Anticipated Future Interaction, Self-Disclosure, and Perceived Success in Internet Dating*, 33 COMM. RES. 152, 153 (2006).

10. *See, e.g.*, Online Intergroup of Alcoholics Anonymous, Privacy Statement, http://www.aa-intergroup.org/privacy.php (last visited June 3, 2010) (explaining that, in addition to traditional formal AA statements regarding privacy, well-established customs on anonymity apply to online environment).

11. McClurg, *supra* note 2, at 929.

information.[12] In theory, the "public disclosure" tort should provide adequate protection for harm suffered as a result of unauthorized disclosure by an online community member.[13] After all, the tort is designed to inhibit widespread disclosures of private information that would be "highly offensive to a reasonable person."[14] However, there is a consensus among scholars that the public disclosure tort is largely ineffective as a remedy for the self-disclosure of private information online.[15] This is due to its status as either obsolete when applied to online communities, inapplicable to many self-disclosures, or unconstitutional when applied to certain types of information.[16]

Unless the law provides protections, members of online communities might always be forced to choose between keeping information offline completely or disclosing it with no assurances that their information will remain confidential. The privacy settings of websites of various online communities would seemingly be for naught if members have no obligation to respect the privacy of other members. Is there a way for the law to ensure confidentiality of information within online communities? Can the law protect people's privacy even when they have revealed their personal data to many other members of an online community?

In this Article, I contend that the law can ensure confidentiality for members of online communities through promissory estoppel. Few scholars have examined the doctrine of promissory estoppel as a method for protecting disclosure online. No literature has considered the doctrine as a potential remedy effectuated through a website's terms of use agreement and made available to all members of the community.

One of the immediate difficulties with using promissory estoppel is that members of online communities have not made agreements between each other. They have merely agreed to the terms of use of the website and community. Suppose Member *A* of an online community discloses the private information of Member *B*. Would Member *B* be able to sue Member *A* for promissory estoppel even though Member *A* never made a direct promise to Member *B*?

In order to allow all users within the community the ability to rely on promises of confidentiality, I propose application of either the third-party beneficiary doctrine or

12. RESTATEMENT (SECOND) OF TORTS § 613 cmt. j (1977).

13. *Id.* §§ 652A-E (1977); *see also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (describing four types of invasion of privacy protected by tort law: intrusion upon seclusion or solitude, public disclosure of embarrassing private facts, publicity placing individual in false light, and appropriation of another's name and likeness).

14. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

15. *See* Abril, *supra* note 2, at 78–81 (showing limited recourse provided by tort law); Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 7–12 (2007) (articulating problems with public disclosure tort); McClurg, *supra* note 2, at 887–88 (showing public disclosure tort does not provide adequate chance of recovery for plaintiffs); Volokh, *supra* note 2, at 1117 (arguing that public disclosure torts are underinclusive).

16. *See* Abril, *supra* note 2, at 78–81 (explaining how "tort law provides limited atonement for cybershame"); Abril, *supra* note 15, at 6–12 (discussing potential inapplicability, obsolescence, and unconstitutionality of privacy torts in internet context); McClurg, *supra* note 2, at 887–88 (explaining possibility that public disclosure tort may be unconstitutional under First Amendment); Volokh, *supra* note 2, at 1117 ("*Florida Star v. B.J.F.* made clear that information privacy speech restrictions are unconstitutional if they are underinclusive with respect to the interest in information privacy.").

the concept of dual agency effectuated through a website's terms of use. Although the implementation of promissory estoppel in this context would be challenging, I conclude that the promissory estoppel theory for confidential disclosure could have positive practical effects and advance both privacy and free speech objectives.

Part II details the history and development of online communities and how established norms of various groups might help establish confidentiality for online disclosures. Part III describes the inadequacy of traditional remedies for harm resulting from dissemination of self-disclosed personal information. Part IV examines the doctrine of promissory estoppel and its potential legal and practical application for safe, controlled disclosure of personal information in online communities. It examines how promissory estoppel could be a mutually held remedy for members of an online community through a website's terms of use agreement. Part V considers the policy and practical implications of this promissory estoppel theory for disclosure.

II. ONLINE COMMUNITIES

Over seventy percent of U.S. adults are online.[17] Many of these individuals are seeking support using the Internet, which often results in the disclosure of personal information. "About 60 million Americans say the internet has played an important or crucial role in helping them deal with at least one major life decision in the past two years."[18] The nature of these requests greatly varies, as users seek assistance regarding careers, medical conditions, schools, financial decisions, and other important topics.[19]

While individuals often turn to search engines, databases, and informational websites for help, they also often turn to what are commonly referred to as online communities. An online community consists of "a group of people who interact via Internet Web sites, chat rooms, newsgroups, email, discussion boards or forums."[20] However, this definition fails to recognize that most online communities consist of people brought together by a common interest or purpose.[21]

Many online communities are closed off in certain ways. For example, the Online Intergroup of Alcoholics Anonymous ("OIAA") provides a forum for members to share information with other members, but not with the public at large.[22] Online dating services such as Match.com allow members to make their profiles visible only to other members.[23] Even online communities with the reputation for broad self-exposure are closed in certain ways. Facebook, for instance, allows members to make their profiles

17. PEW INTERNET & AM. LIFE PROJECT, ADULTS ON SOCIAL NETWORK SITES, 2005–2009 (2009), http://www.pewinternet.org/Infographics/Growth-in-Adult-SNS-Use-20052009.aspx.

18. JEFFREY BOASE ET AL., PEW INTERNET & AM. LIFE PROJECT, THE STRENGTH OF INTERNET TIES, at vii (2006), http://www.pewinternet.org/~/media//Files/Reports/2006/PIP_Internet_ties.pdf.pdf.

19. *Id.*

20. *Virtual Community Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/virtual%20community (last visited June 3, 2010).

21. Indeed, "community" is defined as "a group of people having common interests." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 374 (4th ed. 2000).

22. *See* Online Intergroup of Alcoholics Anonymous, *supra* note 10 (outlining ways AA provides anonymity).

23. *See* Match.com, Privacy Statement, http://www.match.com/registration/privacystatement.aspx (last visited June 3, 2010) (explaining consumer privacy choices).

only available to other members they designate as friends. Other users of Facebook who are not so designated, as well as nonmembers, are unable to view the profile.[24]

Members of these closed communities have not disclosed their personal information to the world. Rather, they have revealed their information to other members of the community based on that community's norms and expectations of confidentiality.

The norms and expectations of confidentiality in these communities are typically established by a terms of use agreement. The terms of use agreement and ability to restrict user access are legally significant. Indeed, these two features might be critical for creating a legitimate safe place to disclose information online, as will be discussed in Part IV. Thus, for this Article, the term "online communities" will refer to websites consisting of users with common interests, the ability to restrict access, and a terms of use agreement.

Most threats to privacy within an online community can be classified into two distinct groups based on the subject of the disclosure: (1) community members posting private information about someone else and (2) community members posting personal information about themselves that is then disseminated outside of the community by another member without authorization.[25] While the first group is certainly worthy of consideration and redress, the scope of this Article is limited to the latter—self-disclosed personal information that could harm the discloser if disseminated beyond the online community.

A. Function and Operation of Online Communities

At their core, online communities are websites designed to enable communication among users with a common interest and promote shared information through the interconnection of their users. The specific definitions, features, and uses of these sites vary,[26] but many scholars agree that online communities serve as a "platform for self-identification, communication and [the] unique ability to mimic human intimacy."[27]

Take social network sites as an example.[28] Potential users enter the community via the creation of a profile, for which the only requirement is a valid e-mail address and access to a computer connected to the Internet.[29]

24. *See* MichaelZimmer.org, *supra* note 5 (describing various levels of privacy settings).

25. It should be noted that these groups are potentially operating in one of two different forums: (1) online communities that restrict access to information to certain users and (2) online communities that do not provide the option of restricting access to information to certain users.

26. *See* danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 210–11 (2008) (introducing variations among websites). For example, one definition for social network sites, which are a type of online community, is "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system." *Id.* at 211.

27. Abril, *supra* note 2, at 74; *see also* Ian Byrnside, Note, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicants*, 10 VAND. J. ENT. & TECH. L. 445, 453–56 (2008) (explaining purpose of social networking sites).

28. Online social networks have seen a meteoric rise in popularity over the past six years. THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, SOCIAL NETWORKING AND ONLINE VIDEOS TAKE OFF:

> A profile is a multimedia collage that serves as one's digital "face" in cyberspace using images, video, audio, and links to other profiles and websites. A high tech cross between a bumper sticker and a diary, digital profiles commonly broadcast personal philosophies and preferences, as well as everything from artistic creations to the mundane details of everyday life.[30]

Perhaps the most significant feature of a profile is that it can typically be designated as viewable by anyone (public) or restricted to certain users (private). "Public profiles are searchable and visible to anyone in cyberspace, while accessibility to private profiles is by invitation only."[31]

These profiles are then connected with other social network site users through an invitation process in order to develop an individualized network of other users. Invitations to become "friends" are extended to real-life contacts, other users within a real-life contact's network, and total strangers. "Through these networks of associated profiles, [social network site] participants can post or exchange photographs and video, send messages to friends instantaneously, join interest groups dedicated to virtually any topic, and leave notes on their friends' profiles that are visible by anyone with access to the profile."[32]

Other online communities such as support groups and discussion forums operate similarly, but without the emphasis on networked connections and/or profile maintenance. OIAA operates a closed and monitored chat group.[33] Yahoo! Groups offers the option of limiting access only to members of the group, and authorized users can post messages, files, announcements, photos, and links, can create conversation threads, and can organize events via an online calendar.[34]

Like their offline counterparts, each online community can develop various normative expectations of conduct including confidentiality. The full impact of online

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INTERNET'S BROADER ROLE IN CAMPAIGN 2008, at 9 (2008), http://people-press.org/reports/pdf/384.pdf. As of 2008, roughly one in five Americans (22%) uses at least one social network site. *Id.* at 9. The Pew Research Center reports that 55% of online teens ages twelve to seventeen have created a profile on a social networking site such as Facebook or MySpace; 47% of online teens have uploaded photos where others can see them, though many restrict access to the photos in some way; and 14% of online teens have posted videos online. AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, TEENS, PRIVACY & ONLINE SOCIAL NETWORKS, at ii–iii, 27–28 (2007), http://www.pewinternet.org/~/media//Files/Reports/2007/PIP_Teens_Privacy_SNS_Report_Final.pdf.pdf. Indeed, as recently as 2006, it could be said that "[i]f MySpace [one of the most popular social network sites] alone were a country and each of its profiles a person, it would be the 12th most populous nation in the world." Abril, *supra* note 2, at 74.

29. Abril, *supra* note 2, at 74.

30. *Id.*

31. *Id.*

32. *Id.*

33. Online Intergroup of Alcoholics Anonymous, OIAA Flyer, http://www.aa-intergroup.org/downloads/PIC.pdf (last visited June 3, 2010).

34. *See* Yahoo! Help: Yahoo! Groups, http://help.yahoo.com/l/us/yahoo/groups/orginal/ownmod/starting/ (providing links to information on how to start groups and restrict access to groups) (last visited June 3, 2010).

communities is difficult to gauge, but it is sufficient to state that they can be immensely effective for users, which encourages disclosure of information.[35]

B. Disclosure of Information in Online Communities

Disclosure of information in order to receive help or support is often the central function of many online communities. Thus, it is no surprise that users often post extremely sensitive information. Indeed, the disclosure of personal information has been classified as necessary for emotional support and positively linked with strength of friendship.[36] This concept of "openness as a friendship development tactic" is one of the primary forces driving self-disclosure online.[37] Privacy law recognizes this as well. Lior Strahilevitz notes that the tort of public disclosure of private facts "seeks to differentiate between those facts whose disclosure promotes intimacy and those whose disclosure does not. . . . [T]he law protects only information that is secret enough so that its disclosure might foster the development of meaningful social bonds."[38]

Disclosure of private information online can lead to very tangible and significant harm beyond the general "juicy" gossip leading to embarrassment or hurt feelings. For example, many employers are now routinely screening applicants' digital traces online, including social network site profiles.[39] One employer "found 'explicit photographs and commentary about [a prospective employee's] sexual escapades, drinking and pot smoking, including testimonials from friends,' in addition to pictures of the applicant 'passed out after drinking.'"[40] The applicant was, unsurprisingly, not considered for the job.[41] This scenario is not uncommon.

Additionally, there have been documented instances in which disclosure of sexual preference, health information (including mental states, STDs, and other infections), political and social affiliations, and even misinterpreted comments and photos have resulted in significant emotional damage, professional and social harm, and other dramatic "offline" consequences.[42] For example, Stacy Snyder, a student teacher, was denied an English degree at least partially due to a photo of her drinking out of a cup

35. For more information on the impact of online communities, see generally HOWARD RHEINGOLD, SMART MOBS: THE NEXT SOCIAL REVOLUTION 172 (2002); HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRIC FRONTIER 312 (MIT Press 2000) (1993); CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS (2008).

36. Irwin Altman et al., *Dialectic Conceptions in Social Psychology: An Application to Social Penetration and Privacy Regulation*, 14 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 107, 109–10 (1981). Altman's "social penetration theory" posits, among other things, that the development of intimate relationships depends on the amount and degree of reciprocal self-disclosure. *Id*. at 109–12.

37. *Id.*

38. Strahilevitz, *supra* note 2, at 930.

39. *See generally* Carly Brandenburg, Note, *The Newest Way to Screen Job Applicants: A Social Networker's Nightmare*, 60 FED. COMM. L.J. 597 (2008); Byrnside, *supra* note 27.

40. Byrnside, *supra* note 27, at 447 (citing Alan Finder, *When a Risqué Online Persona Undermines a Chance for a Job*, N.Y. TIMES, June 11, 2006, at 1).

41. *Id.*

42. *See* Amina Sonnie, *Social Networking Sites: Enter at Your Own Risk*, IEEE-USA TODAY'S ENGINEER ONLINE, Jan.–Feb. 2007, http://www.todaysengineer.org/2007/Jan-Feb/networking.asp (warning professionals that employers may check social networking websites before hiring).

with the caption "Drunken Pirate" that was posted on her MySpace profile.[43] In *Moreno v. Hanford Sentinel, Inc.*,[44] the family of a Berkeley student who wrote an unflattering poem about her hometown on MySpace received death threats and had shots fired at her home.[45]

Many online communities are quite aware of the dangers of unintended disclosure. The Online Intergroup of Alcoholics Anonymous goes to great lengths to promote and foster confidentiality for its members. In its "Anonymity Statement," it provides "[t]he fundamental principles of AA anonymity are not changed when electronic media, such as the Internet, are used to facilitate communication among members. The name 'Alcoholics Anonymous' implies . . . that individuals may retain the degree of privacy they wish regarding their membership in the fellowship . . . ."[46] Regarding communication between members, the group provides:

> A special circumstance of online AA anonymity is that communications that are intended to be private, or only for the use of a known group of recipients, are received either on the addressee's monitor screen or on paper. It is the duty of recipient members to guard the confidentiality of these messages by not sharing them with other persons not addressed by the writer. This article of "netiquette" is widely agreed upon by online users, whether or not they are members of Alcoholics Anonymous, but the topics of AA meetings add a duty and responsibility that online messages remain as private as the sender intends.[47]

These scenarios bring to light the disclosure paradox of online communities: if the posting of such sensitive information can have such dramatic consequences, then why do users, regardless of passive or active cognition of the potential harm, continue to post private information about themselves in online communities? Perhaps online communities function to fulfill the basic human needs for openness as a means to maintain significant personal relationships, and assistance or support for significant life decisions and dilemmas. "We cannot be close to someone without revealing some personal, and often private, information about ourselves. Friendship means sharing, and sharing means relinquishing some privacy."[48] Charles Fried has stated:

> To be friends or lovers persons must be intimate to some degree with each other. Intimacy is the sharing of information about one's actions, beliefs or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.[49]

43. *Would-Be Teacher Denied Degree over 'Drunken Pirate' MySpace Photo Sues University*, FOXNEWS.COM, Apr. 29, 2007, http://www.foxnews.com/story/0,2933,269079,00.html.

44. 91 Cal. Rptr. 3d 858 (Ct. App. 2009).

45. *Moreno*, 91 Cal. Rptr. 3d at 861.

46. Online Intergroup of Alcoholics Anonymous, *supra* note 10.

47. *Id.*

48. Aaron Ben-Ze'ev, *Privacy, Emotional Closeness, and Openness in Cyberspace*, 19 COMPUTERS HUM. BEHAV. 451, 453 (2003).

49. CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 142 (1970).

Clearly, sharing information about how inebriated a user was over the weekend or how much a user loves to smoke pot is not of the highest value to society or interpersonal relations, although such a disclosure arguably has some benefit.[50] However, it is difficult to argue the utility of certain disclosures made while seeking support, particularly among members of groups that are subject to marginalization.[51] For example, those living with HIV who are searching for a support group but have not yet publicly disclosed their condition would most likely benefit emotionally from the ability to share this private information with others online. A research study of HIV-positive individuals found that those interviewed

> were much more likely to have disclosed their HIV status to members of organized support groups than to their relatives and friends. Indeed, a number of HIV-positive interviewees reported that they were reluctant to tell relatives, close friends, and even sexual partners about their HIV-positive status because of the fear of stigmatization, abandonment, homophobia, job loss, or violence.[52]

In another example, Wall Street Journal Senior Technology Editor Julia Angwin recently detailed the struggles of Iraq war veteran Rey Leal.[53] After being discharged from the Marines, he was tormented by the deaths of soldiers in his squad and could not sleep.[54] Upon hearing about the Iraq and Afghanistan Veterans of America group, he got online to find out more and discovered the group's private social network, CommunityofVeterans.org.[55] Angwin wrote:

> Moved by the image of a veteran greeting a soldier returning from Iraq, Mr. Leal signed up for the site. . . . Once he logged in, he posted a question asking if others were having trouble sleeping. Within minutes, veterans from around the country wrote in with empathic responses. "I felt like not only did they understand me, but they embraced me," Mr. Leal recalled. With the help of the online veterans community, Mr. Leal eventually signed up for psychiatric counseling, enrolled in college and starting [sic] sleeping better.[56]

Keith Humphreys, a Professor of Psychiatry and Behavioral Sciences at Stanford University, found that some individuals seeking support are more likely to seek help in an online forum than a face-to-face group.[57] Humphreys surveyed a group of problem drinkers about why they joined an online support group. "[H]e expected to hear about child-care problems or difficulties making time for a face-to-face group. Instead, the

50. *See* Altman et al., *supra* note 36, at 107–12 (explaining that social penetration theory requires intimate disclosures to develop social relationships).

51. Ben-Ze'ev, *supra* note 48, at 457 ("Emotional self-disclosure—especially that which is contrary to accepted moral norms—is more likely to be revealed in online communication.").

52. Strahilevitz, *supra* note 2, at 961 (citing Gene A. Shelley et al., *Who Knows Your HIV Status? What HIV+ Patients and Their Network Members Know About Each Other*, 17 SOC. NETWORKS 189, 203–13 (1995)).

53. Julia Angwin, *Hello, My Name Is USER01*, WALL ST. J., July 7, 2009, at D3.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

top reasons were that the group was available 24 hours a day, seven days a week, and that they didn't feel comfortable speaking in public."[58]

Humphreys also found that online support groups often serve as complements to face-to-face support groups. In a paper studying the effects of internet-based support for alcoholics, Humphreys and his co-authors stated that "[g]iven the potential for such interventions to provide access to problem drinkers underserved by traditional treatment, further research to assess the effectiveness of Internet-based interventions should be a priority."[59]

A simple solution for many seeking to disclose online is anonymity.[60] However, anonymous communication has its limits, particularly for those who seek emotional connections beyond strangers. For example, an individual with a substance abuse problem might feel the need to connect emotionally with a geographically distant but trusted family member or friend that is dealing with a similar issue. In order to achieve the user's purpose, her identity must be revealed to the friend or family member. The same can be said for family or friends planning an intervention online.

Indeed, identification verification can often be crucial for online support communities. "Verified identities are . . . important in support networks where people want to make sure they will be sharing similar experiences. 'People with emotional trauma often feel isolated and like no one understands them.'"[61] For example, Mr. Leal was not allowed to join CommunityofVeterans.org until he sent in a copy of his discharge papers to prove he had served in Iraq.[62]

Although other communication technologies might be available for individuals needing support, such as the telephone, often the superior benefits of online communication (including the convenience of asynchronous communication and ability to better regulate the flow of information) compel the need for safe disclosure of information online.[63] Additionally, online communication serves to help those without access to "face-to-face" meetings. In an article studying the effectiveness of internet-based support for those with substance abuse problems, researchers concluded "the World Wide Web remains an excellent opportunity to potentially provide services for substance abusers who might never access treatment in person because, in absolute terms, the majority of substance abusers do use the Internet."[64]

58. *Id.*

59. John A. Cunningham et al., *Internet and Paper Self-Help Materials for Problem Drinking: Is There an Additive Effect?*, 30 ADDICTIVE BEHAVS. 1517, 1522 (2005).

60. Ben-Ze'ev, *supra* note 48, at 458 ("The great anonymity of cyberspace gives individuals a higher degree of privacy.").

61. Angwin, *supra* note 53 (quoting Keith Humphreys).

62. *Id.*

63. As one scholar notes, "in online relationships, people typically share personal information that they do not share with their intimate offline partners." Ben-Ze'ev, *supra* note 48, at 457. Given the importance of emotional self-disclosure, "online relationships often have a higher degree of intimacy than offline relationships." *Id.*

64. John A. Cunningham et al., *Access to the Internet Among Drinkers, Smokers and Illicit Drug Users: Is It a Barrier to the Provision of Interventions on the World Wide Web?*, 31 MED. INFORMATICS & INTERNET MED. 53, 57 (2006).

Although e-mail, blogs, and video conferencing could all suffice for self-disclosure online, none have the unique traits to serve as a "safe place" for online disclosures like online communities; namely, the potential to increase the amount of control and access users have over information and the fact that all users of online communities assent to the same terms of use.[65]

Recent court decisions highlight the importance of these features. In *Moreno*, the court focused on the "openness" of the Berkeley student's journal entry, stating "[t]he facts contained in the article were not private. Rather, once posted on myspace.com, this article was available to anyone with internet access."[66] In *Burcham v. Expedia, Inc.*,[67] the court validated terms of use agreements for websites and reinforced their importance to online conduct.[68] When combined, terms of use and control over information create a context conducive to legal remedies based on confidence, trust, and reliance.

III. THE FAILURE OF TRADITIONAL REMEDIES TO PROTECT THE SELF-DISCLOSURE OF INFORMATION IN ONLINE COMMUNITIES

A. Tort-Based Remedies

Currently, the traditional remedies for harms resulting from disclosure of information, including the privacy torts, intentional infliction of emotional distress, and defamation, are ineffective in creating a safe place for the self-disclosure of true, personal information in online communities. Three of the four privacy torts (intrusion, false light, and misappropriation) are generally inapplicable to the self-disclosure of personal information.[69] The tort of public disclosure of private facts seemingly should

65. *Cf.* Facebook, Facebook's Privacy Policy, http://www.facebook.com/policy.php (last visited June 3, 2010) (outlining policies and methodologies for controlling access to personal information).

66. Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858, 861 (Ct. App. 2009); *see also* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 425 (Pa. Commw. Ct. 2000). In finding that the discloser of information had no reasonable expectation of privacy in his website, the court noted that the website in question "was not a protected site, meaning that only certain viewers could access the site by use of a known password. As such, any user who happened upon the correct search terms could have stumbled upon [the] web-site." *Id.* at 425.

67. No. 4:07CV1963 CDP, 2009 U.S. Dist. LEXIS 17104 (E.D. Mo. Mar. 6, 2009).

68. *Burcham*, 2009 U.S. Dist. LEXIS 17104, at *7–8 ("In this case, Expedia offers its customers what is known as a 'clickwrap' agreement. A customer must affirmatively click a box on the website acknowledging receipt of and assent to the contract terms before he or she is allowed to proceed using the website. Such agreements have been routinely upheld by circuit and district courts."); *see also* CoStar Realty Info., Inc. v. Field, 612 F. Supp. 2d 660, 669 (D. Md. 2009) (applying *Burcham*).

69. Abril, *supra* note 2, at 79–81. In detailing the reasons the torts are inapplicable to the disclosure of private information on a social network site, Abril states:

> The tort of intrusion upon seclusion addresses harmful information-gathering, but not the subsequent disclosure of its fruits. It would only apply if the information was uncovered in a furtive way from a place within which the plaintiff had a reasonable expectation of privacy, such as a home, hotel room, a tanning booth, or a shopping bag. . . . The tort of false light privacy, a first cousin of defamation that focuses on protecting the plaintiff's peace of mind rather than reputation, requires the injurious publication to have been published with knowledge of its falsity in addition to being false or misleading and highly offensive in nature. . . . Appropriation . . . is uniquely property-

serve as a redress for an individual who has had private, non-newsworthy information disclosed in such a way as to be highly offensive to a reasonable person. However, the disclosure tort in its current form cannot adequately serve as a means to help protect the self-disclosure of private information in online communities.[70] This is due to the inconsistency in defining whether and to what degree self-disclosed information is private, the general difficulty in applying the tort online, and the tort's small rate of success.[71]

Most notably, the tort of public disclosure may be of limited use in situations involving self-disclosure. "Despite the centrality of this issue, the American courts lack a coherent, consistent methodology for determining whether an individual has a reasonable expectation of privacy in a particular fact that has been shared with one or more persons."[72] For example, in Georgia, the disclosure of sensitive information

> to dozens of people, and perhaps even tens of thousands of strangers, does not necessarily render information "public" for the purposes of the . . . [disclosure] tort, but Ohio law governing the same tort holds that a plaintiff's decision to share sensitive information with four coworkers eviscerates her expectation of privacy in that information.[73]

While the Supreme Court has rejected the notion that information ceases to be private the moment it is shared with a second person,[74] the law remains inconsistent in delineating the reasonable expectations of privacy for self-disclosed information.

Additionally, "further clouding the incoherent development of Prosser's privacy torts is the fact that privacy expectations and norms are constantly challenged by technology. As technology evolves, social behavior and ensuing privacy harms, as well as people's tolerance of these harms, change."[75] Our traditional notions of space and

> focused and does not involve a false statement or a shameful disclosure. . . . Hence it would only apply if the plaintiff's information or image were used without his consent for the defendant's commercial purposes.

Id.

70. *Id.* at 79.

71. *Id.*

72. Strahilevitz, *supra* note 2, at 920–21.

73. *Id.* at 921 (citing Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994) (holding that plaintiff's disclosure to approximately sixty individuals—family members, friends, medical personnel, and fellow support group members—that he was living with AIDS did not make the fact of his disease public as a matter of law)).

74. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763–64, 770 (1989). The Court wrote:

> [B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private. According to Webster's initial definition, information may be classified as "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." . . . In sum, the fact that "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information."

Id. (footnotes omitted) (internal quotation marks omitted).

75. Abril, *supra* note 15, at 11.

privacy have shifted dramatically. The legal system is having difficulty keeping up, and at the very least, staying consistent. Part of the blame lies in the architecture of the disclosure tort, which forces judges to determine specific norms and notions of space and privacy that can shift radically depending on the technological context.[76] Also, the damages available for this tort seem to be limited. "[T]he U.S. Supreme Court has never upheld an award of tort damages for the publication of true information based on a privacy theory."[77] As such, the public disclosure tort is unlikely to help protect the private disclosure of information in online communities in a significant way.

The tort of intentional infliction of emotional distress ("IIED") is also unlikely to provide significant recourse.

> This has traditionally been a parasitic tort with more academic hullabaloo than real-world success. Most courts have held that actionable conduct must exceed all reasonable and socially-tolerable bounds of decency. . . . Actionable conduct should "arouse resentment against the actor" on the part of a civilized and decent community member . . . .[78]

This is an exceedingly high barrier. "In an online environment where individuals voluntarily release sex tapes to promote their careers or 'fart their way into the spotlight' for a chance at fleeting cyber-stardom, one may be hard pressed to find 'outrageous!' conduct, much less define 'community member.'"[79] While one can imagine extreme examples that could potentially lead to a successful IIED claim, such a limited scope for recovery leaves the tort undesirable as a general remedy.

Also, as mentioned previously, the tort of defamation is an ineffective remedy for self-disclosure of personal information. Defamation can only serve to protect users when false information is published about them and does not apply to the disclosure of true, private information.[80]

While copyright law could, in some instances, be used to restrict the dissemination of information,[81] it is unlikely to significantly protect disclosure in an online community. Nevertheless, some scholars have argued that it may be the

> only effective legal mechanism to stop further dissemination of embarrassing images online. In the event that the individual who posted an incriminating or shameful photograph or video is not its owner, the owner can send a

76. For example, courts have had extreme difficulty determining how the law should distinguish between speech of public and private concern. Solove, *supra* note 2, at 975.

77. McClurg, *supra* note 2, at 905.

78. Abril, *supra* note 2, at 81.

79. *Id.*

80. See *supra* note 69 and accompanying text for a discussion of how the torts of intrusion, false light, and misappropriation are generally inapplicable to the self-disclosure of personal information.

81. For example, Major League Baseball player Grady Sizemore has seemingly asserted copyright as grounds for the removal of private pictures of himself, taken by himself, that were obtained through laptop theft and posted on a website. Paul Hoynes, *MLB Requesting that Pictures of Cleveland Indians' Grady Sizemore Be Removed from Internet Site*, CLEVELAND.COM, Nov. 30, 2009, http://www.cleveland.com/tribe/index.ssf/2009/11/mlb_requesting_that_pictures_o.html ("The photos posted in the article cited below are the property of Grady Sizemore. They were stolen from a personal computer. We've begun an investigation and request that you immediately remove Mr. Sizemore's property from the posting." (quoting e-mail from MLB's Department of Investigation) (internal quotation marks omitted)).

> takedown notice to the [internet service provider] pursuant to the Digital Millennium Copyright Act.[82]

However, a great deal of private information disclosed online is simply facts and short phrases, which are unprotectable by copyright.[83]

Finally, the tort of breach of confidentiality could be very effective in protecting self-disclosure but is not an ideal solution. Much like promissory estoppel, the tort is a remedy for those who have been harmed by someone who discloses information entrusted to them in confidence.[84] However, the current scope of the tort hinders its potential. "Courts have found the existence of [a duty of confidentiality] by looking to the nature of the relationship between the parties, by reference to the law of fiduciaries, or by finding an implied contract of confidentiality."[85] Thus, most of the contexts for this tort are status-based. Neil Richards and Daniel Solove have found that "[m]ost commonly, the breach of confidentiality tort applies to physicians. Courts have also applied it to banks, hospitals, insurance companies, psychiatrists, social workers, accountants, school officials, attorneys, and employees."[86] According to Richards and Solove, the tort of breach of confidentiality had a "stunted growth in America as it developed in the shadow of the Warren and Brandeis right to privacy."[87] Thus, it has failed to gain the widespread acceptance necessary to serve as an effective remedy for harms resulting from disclosure in online communities.[88]

B. Contractual Remedies

Contracts requiring confidentiality, while playing a pivotal role in the solution proposed in this Article, are not ideal as "stand-alone" solutions for protecting disclosures in an online community. To be certain, contracts of confidentiality provide many more advantages with fewer disadvantages than the tort- and statutory-based remedies previously discussed. Because these contracts require notice and assent for formation, they purportedly preserve the expectations of the parties. Because the terms of a contract must be specific, ambiguity regarding conduct can be removed. Contracts are theoretically formed after a bargained exchange, which, if actually present, should result in mutual satisfaction regarding expectations for performance. Online contracts are commonly enforced by courts and their explicit nature can better aid in the internalization of a user's duties and obligations than can the vague threat of a tort lawsuit looming in the back of a user's mind.[89]

82. Abril, *supra* note 2, at 81 (citing 17 U.S.C. § 512(c)(3) (Supp. 1999)).

83. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) ("No author may copyright his ideas or the facts he narrates.").

84. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 156–58, 180 (2007).

85. *Id.* at 157 (footnote omitted).

86. *Id.* at 157–58 (footnotes omitted).

87. *Id.* at 181.

88. *See id.* (characterizing American confidentiality tort as limited to particular relationships).

89. *See* Am. Online, Inc. v. Booker, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (upholding user agreement as freely negotiated contract).

Professors Patricia Sanchez Abril and Anita Cava have advocated using contracts to enforce confidentiality in the context of online health networks.[90] "Facilitated through available technology, confidentiality agreements between users could assure a higher level of protection for those sharing private and personal information."[91] Professors Abril and Cava assert that "confidentiality agreements are the most reliable vehicles to protect the unwarranted disclosure of private health information."[92]

However, both threats to formation and practical effects of enforcement can render contracts a less desirable remedy for confidential disclosures than the equitable remedy proposed in this Article.[93] First, contract formation is subject to a panoply of requirements, prohibitions, and rules of interpretation that could render many confidentiality agreements unenforceable. For example, legal constructs such as the statute of frauds, the parol evidence rule, consideration,[94] unenforceable contracts with minors and the like all have merit under the bargain theory of contracts in the (largely) commercial context within which most contracts are formed. However, these barriers could serve to frustrate the intent of users who agree to and rely on confidentiality within an online community. For example, the requirement prohibiting minors from entering into contracts is certainly justifiable for complex and significant transactions. However, given the abundance of youths participating in online communities and the relative simplicity of a promise not to disclose the information contained in an online community, does this rationale outweigh the protection of potentially vulnerable users who relied on a promise of confidentiality when disclosing information and might not have even known of a user's minor status?

Due to the nature of the flow of benefits from confidentiality, these typically noncommercial agreements are a poor fit for the bargain theory of contracts. For example, a confidentiality agreement would arguably be less for the benefit of the administrator with whom the agreement is made and more for the members of the

90. Patricia Sanchez Abril & Anita Cava, *Health Privacy in a Techno-Social World: A Cyber-Patient's Bill of Rights*, 6 NW. J. TECH. & INTELL. PROP. 244, 267–68 (2008).

91. *Id.* at 268.

92. *Id.*

93. Professors Abril and Cava also recognize some undesirable aspects of website contracts:

> Many user contracts are written abstrusely or in a legalistic style, dissuading even the most punctilious consumer from taking time out of her online pursuit to carefully read and understand them. This issue is exacerbated when the user is a minor. Further, terms of use and privacy policies vary from website to website, making true understanding of each contract more difficult and impracticable, especially since most users visit several websites a day. Website contracts are built on shifting sands. The professed ability of many operators to change terms of use at any moment and without prior notice leaves users in a constant state of uncertainty about their rights and privacy expectations.

Id. at 267.

94. It is important to note, however, that

> [i]n cases where a reporter is the recipient of confidential information, the courts have generally held consideration to be present [in confidentiality agreements]. Consideration is found in the exchange of promises—the confider offers information, conditioned on confidentiality, and this offer is accepted by the confidant. Consideration to the confider is the promise of confidentiality, while consideration to the confidant is the promise of information.

Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 20–21 (1995).

community. Thus, these agreements seem to be concerned less with bargain and more with reliance.[95] In other words, while the website could be seen as bargaining for confidentiality in order to entice more users to its community, the greater benefit of confidentiality (and risk of reliance) is attributed to the users of the community. Thus, a solution designed to remedy detrimental reliance by the affected parties is perhaps more appropriate than one seeking to confer the benefit of the bargain to parties with a potentially smaller interest in confidentiality.

Additionally, online contracts, such as terms of use agreements, are often confusing and dramatically one-sided.[96] Users of online communities rarely have a true opportunity to negotiate terms of use, rendering such agreements essentially "take-it-or-leave-it" contracts of adhesion.[97] Given the drafter's self-interest, even if online communities incorporated confidentiality agreements, the remainder of the terms of use would still likely favor the website. Enforcement of these one-sided terms could be seen as less desirable for users than the equitable doctrine of promissory estoppel, which provides broad discretion for courts in constructing remedies as justice dictates.

C. Technological Remedies

Certainly technological remedies for protecting information, such as privacy settings, are useful in not only directly restricting what can be viewed, but also in creating an environment of confidentiality.[98] By closing or locking away information, a community member could be seen as communicating a preference for confidentiality for the information contained within.

For example, CaringBridge.org is a service that offers free social network sites aimed at supporting patients and families during critical-illness treatment and recovery. "CaringBridge offers three tiers of privacy. About two-thirds of families opt for the medium tier—which requires people to register before joining or viewing a community. A small portion choose to create customized privacy settings, for instance by creating a list of people who will be allowed to join."[99] These options allow members to feel more comfortable when discussing the highly personal thoughts and experiences related to

95. It should be noted that "courts deciding promissory estoppel claims are still grappling with appropriate boundaries between bargain and reliance and with what role each doctrine should play in contract law." Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 542 (2002).

96. *See generally* Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up To Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173 (2007).

97. *Id.* at 181.

98. M. Ryan Calo has suggested that anthropomorphic technology could play a role in protecting privacy because "humans are hardwired to react to technological facsimiles . . . as though a person were actually present." M. Ryan Calo, *People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship*, 114 PENN. ST. L. REV. 809, 811 (2009). Calo argues that

> [T]he ability of technology to create the sensation of being observed also presents a novel opportunity to enhance privacy. Specifically, placing an apparent agent at the site of data collection can help line up user expectations about how data will be used with the actual practices of the entity collecting that data.

Id. at 848.

99. Angwin, *supra* note 53.

critical illnesses. However, simply maintaining a "closed" or "private" setting cannot, by itself, effectively confer confidentiality. Other community members with access to the information are still free to disclose information seen behind the digital walls.

What might be more troubling, however, are the increasingly common instances of third parties asking or demanding community members to turn over their passwords or directly accessing online communities without authorization in order to collect information on other community members.[100] For instance, a cheerleading coach in Mississippi instructed all the girls on her squad to turn over their Facebook account names and passwords.[101] Cheerleader Mandi Jackson turned them over because she believed she didn't have a choice.[102] "The teacher read messages in the inbox between Jackson and another girl that were riddled with profanity. For that, Jackson claims she was punished, ostracized and no longer allowed to compete in cheer competitions."[103]

Thus, ultimately, technological remedies can only go so far in protecting the self-disclosed information in online communities. In order to provide a more reliable environment for disclosure, a careful balance between incentives to participate and punishment for failure to observe the "rules" of the community must be struck. If the remedy is too effective in meting out punishment for violators, then a chill on speech could occur. Yet if the remedy has no teeth, then it is hardly a reliable remedy at all. Thankfully, equity allows us to balance these interests.

IV. PROMISSORY ESTOPPEL AND ONLINE COMMUNITIES

> *"'Estoppel did not just arise, like the mists of creation; it was born out of conscience and embodied in the law to right wrongs.'"*[104]

Traditional legal remedies cannot adequately form a safe place for the disclosure of personal information within online communities because they are unreliable. I propose that promissory estoppel is the most viable way to achieve this goal. Promissory estoppel has the advantages of the contractual approach to protecting self-disclosure in online communities without the barriers inherent in contract creation and enforcement. In this Part, I first provide a general overview of promissory estoppel and then propose how to apply the doctrine to disclosures in online communities. By utilizing traditional contractual constructs such as the third-party beneficiary doctrine or agency law, websites could effectively enable members to utilize the remedy of promissory estoppel if another member of the online community breaches his or her agreement of confidentiality.

100. *Cf.* Brandenburg, *supra* note 39, at 612–13 (examining Facebook's extensive privacy policy regarding third-party access to private information); Byrnside, *supra* note 27, at 465–66 (discussing Fair Credit Reporting Act's impact on employer access to information on social networking sites).

101. Julie Straw, *Pearl Student Sues After Teacher Logs into Student's Facebook Account*, WLBT 3, July 28, 2009, http://www.wlbt.com/global/story.asp?s=10806760 (last visited June 4, 2010).

102. *Id.*

103. *Id.* Ms. Jackson would go on to bring suit against the coach, other high school staff, and the school district for violating Jackson's constitutional rights to free speech, privacy, and due process. *Id.*

104. Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 64 (1996) (quoting Roseth v. St. Paul Prop. & Liab. Ins. Co., 374 N.W.2d 105, 110–11 (S.D. 1985)).

A. Overview of Promissory Estoppel

The history of promissory estoppel is long and complex, but at its core, promissory estoppel is an equitable doctrine designed to remedy detrimental, yet justifiable, reliance on a promise.[105] Essentially, it "operates to enforce a promise even though the formal requisites of contract are absent."[106] The *Restatement (Second) of Contracts* gives clarity and weight to the doctrine of promissory estoppel, stating that a

> promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[107]

Promissory estoppel is a doctrine arising out of equity law.[108]

Courts have applied, if not explicitly recognized, promissory estoppel as an independent theory of recovery.[109] Many others have used it simply as a remedy to imply a contract in law where none exists,[110] and, in effect, to estop the promisor from denying that a contract was made.[111] Court decisions describe the doctrine as an "'action,'[112] a 'cause of action,'[113] a 'theory,'[114] a 'basis for recovery' and a 'legitimate source of recovery,'[115] an 'alternative theory of recovery,'[116] the 'basis of an action for

105. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (requiring reasonable reliance and detriment to promisee); Crouse v. Cyclops Indus., 745 A.2d 606, 610 (Pa. 2000) ("[T]he doctrine of promissory estoppel is invoked to avoid injustice by making enforceable a promise made by one party to the other when the promisee relies on the promise and therefore changes his position to his own detriment." (citing RESTATEMENT (SECOND) OF CONTRACTS § 90)).

106. Gilles, *supra* note 94, at 33.

107. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

108. *E.g.*, White v. Roche Biomedical Labs., Inc., 807 F. Supp. 1212, 1217 (D.S.C. 1992) (noting that promissory estoppel is equitable doctrine), *aff'd*, 998 F.2d 1011 (4th Cir. 1993); Jarvis v. Ensminger, 134 P.3d 353, 363 (Alaska 2006) (stating promissory estoppel is equitable doctrine); Bicknese v. Sutula, 2003 WI 31, ¶ 13 n.2, 260 Wis. 2d 713, 723 n.2, 660 N.W.2d 289, 294 n.2 (defining promissory estoppel as quasi-contractual or equitable doctrine).

109. *See, e.g.*, Werner v. Xerox Corp., 732 F.2d 580, 582–84 (7th Cir. 1984) (affirming district court grant of promissory estoppel claim); R.S. Bennett & Co. v. Econ. Mech. Indus., Inc., 606 F.2d 182, 186–87 (7th Cir. 1979) (applying Illinois law to find plaintiff stated promissory estoppel claim); Insilco Corp. v. First Nat'l Bank of Dalton, 283 S.E.2d 262, 263 (Ga. 1981) (finding Georgia recognizes doctrine of promissory estoppel); Higgins Constr. Co. v. S. Bell Tel. & Tel. Co., 281 S.E.2d 469, 470 (S.C. 1981) (finding plaintiff stated promissory estoppel claim).

110. *See* Dickens v. Quincy Coll. Corp., 615 N.E.2d 381, 386 (Ill. App. Ct. 1993) (finding promissory estoppel is used to imply contract where none exists); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981) (finding effect of promissory estoppel is used to imply contract in law where none exists in fact).

111. Mead Assocs., Inc. v. Scottsbluff Sash & Door Co., 856 P.2d 40, 42 (Colo. App. 1993).

112. Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Third Parties*, 42 SW. L.J. 931, 939 (1988) (quoting United States v. Iverson, 609 F. Supp. 927, 929–30 (N.D. Ill. 1985)).

113. *Id.* (quoting *Iverson*, 609 F. Supp. at 930; Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274 (Wis. 1965)).

114. *Id.* (quoting *Werner*, 732 F.2d at 582).

115. *Id.* (quoting Allen v. A.G. Edwards & Sons, Inc., 606 F.2d 84, 87 (5th Cir. 1979)).

116. *Id.* (quoting Div. of Labor Law Enforcement v. Transpacific Transp. Co., 137 Cal. Rptr. 855, 859 (Ct. App. 1977)).

damages,'[117] and something under which one can establish a 'prima facie case.'"[118] The requisites for invocation of promissory estoppel are largely consistent throughout state jurisdictions.

Generally, for a successful claim of promissory estoppel, a plaintiff must prove that a clear, definite, or unambiguous promise was made; that the promisor intended to induce reliance on the part of the promisee or should have reasonably expected and foreseen that it would be relied upon by the promisee; "that there was substantial, reasonable or justifiable reliance on the promise by the promisee to his or her detriment; and that the promise must be enforced to prevent injustice."[119] Additionally, the promisee must prove that "the detriment suffered in reliance was substantial in an economic sense, that the loss was or should have been foreseeable by the promisor, and the promisee must have acted reasonably in justifiable reliance on the promise as made."[120] Finally, "[n]o higher specificity is required of a promise to sustain a promissory estoppel than is required to support a contract action."[121] Due to its nature as an equitable remedy leaving many policy determinations to a judge, each element of promissory estoppel must clearly appear and be proven by the party seeking its enforcement.[122]

Promissory estoppel was recently and notably relied upon in the case of *Barnes v. Yahoo!, Inc.*,[123] in which the Ninth Circuit ruled that section 230(c)(1) of the Communications Decency Act (ISP immunity) does not preempt a claim for promissory estoppel where a website promises to take down third-party tortious content and fails to do so.[124] While the case did not deal with self-disclosed information (an ex-boyfriend posted fake, derogatory profiles of Barnes which Yahoo! promised, but failed, to take down), the application of promissory estoppel by the Ninth Circuit demonstrates its potential utility to online communication.

While the doctrine is applied in numerous and diverse situations, it is particularly suited as a remedy for detrimental reliance on promises of confidentiality. An analysis of a very high-profile case involving such a situation will help illuminate its potential relevance in protecting confidential disclosure.

117. *Id.* (quoting Klinke v. Famous Recipe Fried Chicken, Inc., 616 P.2d 644, 646 (Wash. 1980)).

118. *Id.* (quoting Glover v. Sager, 667 P.2d 1198, 1202 (Alaska 1983)).

119. 31 C.J.S. *Estoppel and Waiver* § 117 (2008) (citing Cherokee Metro. Dist. v. Simpson, 148 P.3d 142 (Colo. 2006); Zollinger v. Carrol, 49 P.3d 402 (Idaho 2002); Citiroof Corp. v. Tech Contracting Co., 860 A.2d 425 (Md. Ct. Spec. App. 2004); Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002); Clevenger v. Oliver Ins. Agency, Inc., 237 S.W.3d 588 (Mo. 2007); Crouse v. Cyclops Indus., 745 A.2d 606 (Pa. 2000); Dellagrotta v. Dellagrotta, 873 A.2d 101 (R.I. 2005); Davis v. Greenwood Sch. Dist. 50, 620 S.E.2d 65 (S.C. 2005); Durkee v. Van Well, 654 N.W.2d 807 (S.D. 2002); Bicknese v. Sutula, 2003 WI 31, 260 Wis. 2d 713, 660 N.W.2d 289; Birt v. Wells Fargo Home Mortg., Inc., 75 P.3d 640 (Wyo. 2003)).

120. *Id.*

121. *Id.*

122. *Id.*

123. 570 F.3d 1096 (9th Cir. 2009).

124. *Barnes*, 570 F.3d at 1109.

B. Agreements of Confidentiality and Cohen v. Cowles Media

Promissory estoppel is most commonly applied in, but is not limited to, commercial cases.[125] Indeed, as several cases indicate, promissory estoppel has also been employed as a remedy for the noncommercial plaintiff who detrimentally relied on another's promise of confidentiality.[126] In the high-profile case involving promissory estoppel and agreements of confidentiality, *Cohen v. Cowles Media Co.*,[127] the U.S. Supreme Court suggested, and ultimately the Minnesota Supreme Court held, that promissory estoppel could be successfully invoked to remedy a broken promise of confidentiality for noncommercial actors.[128] An analysis of *Cohen* reveals the framework under which promissory estoppel can be applied to promises of confidentiality over information disclosed in online communities.

Cohen dealt with a breach of a promise of confidentiality made by two Minnesota newspapers to Dan Cohen, a political associate of a gubernatorial candidate, in exchange for the disclosure of allegedly politically scandalous information Cohen possessed regarding a rival gubernatorial candidate.[129] Although the reporters promised anonymity to Cohen, the editors of the paper overruled these promises and published his name as the source of the information in the story about the gubernatorial candidate's past brushes with the law.[130] Although the information Cohen provided was hardly scandalous, the editors felt the real news story was an attempt by one candidate to leak damaging information about another.[131] Cohen was fired the same day the newspaper stories were published, and he brought suit against the media entities claiming breach of contract and fraudulent misrepresentation.[132] The jury found liability on both theories, but the court of appeals only affirmed recovery of the compensatory damages on the basis of a breach of contract.[133]

On appeal, the Minnesota Supreme Court held that an award of damages for breach of contract violated the newspapers' First Amendment free press rights.[134] The court then went on to "consider enforcement of a confidentiality promise under the doctrine of promissory estoppel. Under this theory, the court would consider all aspects

125. Gilles, *supra* note 94, at 39.

126. *See* Ruzicka v. Conde Nast Publ'ns, Inc., 939 F.2d 578, 582–83 (8th Cir. 1991) (discussing promissory estoppel for noncommercial plaintiffs), *vacated*, 999 F.2d 1319 (8th Cir. 1993); Cohen v. Cowles Media Co. (*Cohen II*), 479 N.W.2d 387, 392 (Minn. 1992) (discussing promissory estoppel as remedy when media breaches its promise of confidentiality to source), *on remand from* 501 U.S. 663 (1991); Sirany v. Cowles Media Co., 20 Media L. Rep. (BNA) 1759, 1761–62 (Minn. Dist. Ct. 1992) (discussing promissory estoppel for noncommercial plaintiffs).

127. Cohen v. Cowles Media Co. (*Cohen I*), 501 U.S. 663 (1991), *remanded to* 479 N.W.2d 387 (Minn. 1992).

128. *See Cohen I*, 501 U.S. at 669–70 (noting that First Amendment does not provide members of press with special protection against "law[s] of general applicability" such as doctrine of promissory estoppel); *Cohen II*, 479 N.W.2d at 392 (affirming lower court verdict on grounds of promissory estoppel).

129. *Cohen II*, 479 N.W.2d at 388–89.

130. *Id.*

131. *Id.* at 389.

132. *Id.* at 388–89.

133. *Id.* at 389.

134. *Id.*

of the transaction's substance in determining whether enforcement was necessary to prevent an injustice."[135] Ultimately, the Minnesota Supreme Court rejected a cause of action based on promissory estoppel on First Amendment grounds.[136] Upon a grant of certiorari, the United States Supreme Court "held that the doctrine of promissory estoppel does not implicate the First Amendment. The doctrine is one of general application . . . and its employment to enforce confidentiality promises has only 'incidental effects' on news gathering and reporting."[137]

On remand, the Minnesota Supreme Court again took up Cohen's claim of promissory estoppel in light of the U.S. Supreme Court's decision. As an initial matter, the court found that even though Cohen did not raise the issue of promissory estoppel himself (it was raised by the Minnesota Supreme Court), it would be unfair not to allow Cohen to proceed under the theory because "[p]romissory estoppel is essentially a variation of contract theory, a theory on which plaintiff prevailed through the court of appeals. The evidence received at trial was as relevant to promissory estoppel as it was to contract, and the parties now have briefed the issue thoroughly."[138]

The court relied on the *Restatement (Second) of Contracts* in stating that "[u]nder promissory estoppel, a promise which is expected to induce definite action by the promisee, and does induce the action, is binding if injustice can be avoided only by enforcing the promise."[139] The court then broke the analysis of whether promissory estoppel should be applied into four parts: (1) Was there a clear and definite promise? (2) Did the promisor intend to induce reliance on the part of the promisee, and did such reliance occur to the promisee's detriment? (3) Must the promise be enforced to prevent an injustice? (4) What are the damages?[140]

The court determined that the facts revealed a clear and definite promise by the reporters to treat Cohen as an anonymous source.[141] For the second prong, the court also found that "[i]n reliance on the promise of anonymity, Cohen turned over the court records and, when the promises to keep his name confidential were broken, he lost his job."[142] The court then held that the question of whether the promise must be enforced to prevent an injustice "is a legal question for the court, as it involves a policy decision."[143] Noting that "the test is not whether the promise should be enforced to do justice, but whether enforcement is required to prevent an injustice,"[144] the court held that denying Cohen's claim of promissory estoppel would be unjust.[145]

135. *Id.*

136. *Id.*

137. *Id.* at 389–90 (quoting *Cohen I*, 501 U.S. 663, 669 (1991)).

138. *Id.* at 390.

139. *Id.* at 391.

140. *Id.* at 391–92.

141. *Id.* at 391.

142. *Id.*

143. *Id.* (citing Kramer v. Alpine Valley Resort, Inc., 321 N.W.2d 293, 296 (Wis. 1982); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275 (Wis. 1965)).

144. *Id.*

145. *Id.*

The court reasoned that in view of the newspapers' own admission of the "importance of honoring promises of confidentiality, and absent the showing of any compelling need in this case to break that promise, we conclude that the resultant harm to Cohen requires a remedy here to avoid injustice. In short, defendants are liable in damages to plaintiff for their broken promise."[146] Of critical importance to the proposal in this Article is the balancing test employed by the court for this factor. The court placed a high value on the importance of keeping promises and seemingly would only have justified a broken promise if the newspapers could have proven a compelling need to do so.

In addressing damages, the court found that "'[t]he remedy granted for breach may be limited as justice requires.'"[147] Specifically, the court determined that the damages appropriate for breach of contract were also applicable for promissory estoppel, that is, those damages "'which: (a) arise directly and naturally in the usual course of things from the breach itself; or (b) are the consequences of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made.'"[148] This determination of damages for promissory estoppel is widely accepted by courts, and will be discussed later regarding the advantages and limitations of promissory estoppel.

Although the decision has no precedential value outside Minnesota, *Cohen* is highly instructive on how promissory estoppel can be utilized for broken promises of confidentiality. Although the facts and context of *Cohen* are different than for promises of confidentiality within an online community, the case demonstrates how a court applied facts to the required elements of promissory estoppel. Of critical importance is the necessity for the clear existence of each element. Ambiguity or vagueness for any of the elements is likely fatal to a claim of promissory estoppel. This is particularly true given the opportunity for the intentions of the parties to be clarified in light of the unique attributes of online communities.

C. Can Promises Made via a Terms of Use Agreement Support a Claim for Promissory Estoppel?

Cohen illustrates how promissory estoppel might be used to remedy detrimental reliance on a promise of confidentiality within an "offline" context. But what about our online lives? The issue is riddled with challenges. While the formation of a promise could certainly be conducted through online communications such as e-mail, videoconferencing services, and text messaging, this approach is both tedious and inefficient. It is also unlikely to yield the same benefits or risks from disclosure within online communities. As a result, the application of promissory estoppel for one-on-one electronic communication will not be considered in this Article. Instead, this Article seeks to analyze perhaps the first mass communication media capable of creating a safe place for disclosure online: online communities.

146. *Id.* at 392.

147. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981)).

148. *Id.* (quoting trial court's jury instructions).

An online community's terms of use agreement, which is the most promising aspect of online communities for protecting disclosure, could, at first blush, appear irrelevant. This is largely due to the fact that such agreements are typically between the member and the site owner/administrator, not the member and other members. Consequently, the remedies available to users for breach of that agreement are, barring unique circumstances, only useful in cases involving owner/administrator malfeasance.

So how are the terms of use relevant for protecting disclosure? Certainly, internet users are vulnerable to the potentially nefarious use of personal information by a website owner/administrator. However, with respect to the self-disclosure of personal information (as opposed to behavioral data/demographic information), the truly significant threat to privacy in online communities typically comes not from the website itself, but from other members.[149] While the website itself has an intrinsic motive for keeping disclosures of personal information confidential (member retention), the same is not necessarily true for other members. In the digital realm, it is very difficult to identify the motive or identity of online community members. Even if such information is volunteered, how can such claims be verified?

For example, suppose that as part of the terms of use presented clearly and conspicuously when registering, an online support group for alcoholics requires a promise not to disclose the identity of any other members or the content of any discussion carried out within the group. However, unbeknownst to the members of the group and the administrator, a "troll"[150] has registered as a community member. This troll posts on his own blog an embarrassing story disclosed by one of the community members which details how the member hit rock bottom at a bar before seeking help. The post resulted in great harm to the member who lost his job as a high school teacher.

In this scenario, the identified member would have no claim against the troll (presuming none of the previously identified traditional privacy remedies applied). This is because the confidentiality agreement was between the troll and the website, not the troll and the member. Additionally, the website is unlikely to pursue a claim for breach of confidentiality against the troll, as it is unrealistic to expect a systematic pursuit of all claims against members disclosing confidential information about other members. A website administrator would typically have neither the motivation nor the resources for such a strategy.

But, perhaps, the identified member is not without recourse. If the website administrator were to make a slight change in its terms of use, an injured party could pursue a claim for promissory estoppel. This claim could be based upon the agreement of confidentiality through a recognition of principles entrenched in contract law and promissory estoppel: the third-party beneficiary doctrine and the actual authority bestowed in the website as a dual agent for community members.

149. Indeed, many of the most popular websites already provide self-imposed restrictions on the use of such information. For example, YouTube has clarified that it will remove videos if they violate another's privacy. Out-Law.com, YouTube Clarifies Ban on Privacy Invasions, Harassment and Threats (June 8, 2009), http://www.out-law.com/page-10239.

150. "Internet trolls are people who fish for other people's confidence and, once found, exploit it." *Troll Definition*, NETLINGO, http://www.netlingo.com/word/troll.php (last visited June 6, 2010).

1. Application to Other Members of the Online Community

While the third-party beneficiary doctrine and the concept of dual agency are firmly established in contract and promissory estoppel law, they have yet to be applied to terms of use governing the disclosure of personal information in online communities.

a. Third-Party Beneficiary Doctrine

To begin, "[p]ersons to whom a representation is made or who are intended to be influenced, and their privies, may take advantage of an estoppel. Thus, promissory estoppel may be asserted by third parties."[151] Professors Michael Metzger and Michael Phillips state that the reliance interest at the heart of promissory estoppel "seems to reflect a fairly permanent moral intuition that supports recovery by relying third parties."[152] Upon concluding that promise-induced reliance deserves legal protection, they state that "no obvious reason exists to limit this protection to direct recipients of the promise. As the cases dealing with third-party reliance demonstrate, such reliance is occasionally every bit as real, foreseeable, and reasonable as reliance by promisees. If the goal is to protect reliance, why deny such parties recovery?"[153]

Extension of promissory estoppel to third parties to agreements becomes even more tenable where an actual contract, such as a terms of use agreement, exists. This is because the creation of third-party beneficiaries via contract often serves to eliminate uncertainty regarding the parties' intention to benefit the third party and, consequently, the reasonableness of the third party's reliance. The *Restatement (Second) of Contracts* declares that "[a] promise in contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."[154]

Thus the key regarding application of the third-party beneficiary doctrine seems to be intent. Section 302(1) of the *Restatement* provides the following definition of the term "intended beneficiary":

> Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.[155]

151. 28 AM. JUR. 2D ESTOPPEL AND WAIVER § 129 (2000).

> Indeed, some courts have held that a promissor should reasonably foresee that his or her promise to one person will induce action or forbearance by a third person; the doctrine of promissory estoppel thus protects the third person even though the promise was not made directly to the third person . . . .

Id.

152. Metzger & Phillips, *supra* note 112, at 964.

153. *Id.* at 966.

154. RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

155. *Id.* § 302(1).

In other words, the *Restatement* only allows for third-party recovery if the third party qualifies as a "donee beneficiary" or a "creditor beneficiary."[156] It is important to note that "[t]hird-party beneficiaries who are unable to qualify as donee or creditor beneficiaries are incidental beneficiaries, and cannot recover on the contract."[157]

"Creditor beneficiaries" are unlikely to arise in the context of confidentiality agreements because most members in online communities enter with no preexisting debt, obligation, or duty owed to other community members. Thus, any third party to a terms of use agreement must be recognized as a "donee beneficiary" in order to take advantage of promissory estoppel. A donee beneficiary is created simply "when the promisee intends that the promisor's promise be a gift to the third party."[158]

This intention could easily be manifested with some precatory wording in the terms of use. With language as simple as "for the benefit of the other registered members of this community, user promises not to disclose [whatever the website owner/administrator decides should remain confidential]," the parties to the agreement would clearly and expressly establish an intent to "give" the benefit of confidentiality to the other members of the party. Not only would this language have the legal effect of bestowing a right of enforcement in the promise of confidentiality, but it would also help establish that the member's detrimental reliance on the promise was justified in light of the express intention that the promise of confidentiality was for the benefit of the community member.

b. Agency

Agency law could also be used to bind a member's promise of confidentiality to the other community members. However, such an approach is more unorthodox and likely less desirable than the third-party beneficiary doctrine due to an increased complexity in application. By serving as a dual agent for each member with limited actual authority to secure agreements of confidentiality for other members, the website owner/administrator could act as an intermediary in such a way that each member of the online community would be bound with each other. Such an arrangement could be accomplished by two agreements within the terms of use. The first would be an agreement that the owner/administrator would serve as a special dual agent with extremely limited actual authority only to obtain agreements of confidentiality from other members. The second would be a request for a confidentiality agreement on behalf of all of the other members represented by the owner as a limited dual agent.

As an initial matter, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent

156. Metzger & Phillips, *supra* note 112, at 946.

157. *Id.* Whether incidental beneficiaries can recover under promissory estoppel is beyond the scope of this Article. The solution proposed here is not dependent on resolution of this assertion, which has not received significant support from the courts. *See id.* at 951–59 (discussing courts' rare application of promissory estoppel in cases where third parties seek to recover for their reliance).

158. *Id.* at 946. There appears to be some controversy over whether a third party must *actually* rely on a promise to be considered a beneficiary to a contract, as opposed to merely being the intended recipient of the contracting parties' beneficence. However, because any successful claimant of promissory estoppel must prove actual reliance anyway, analysis of this dispute is beyond the scope of this paper. For a more detailed discussion, see *id.* at 948–50.

shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[159] Agency relationships may be formed through actual authority, which can be created through "written or spoken words or other conduct."[160] "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."[161] Creation of a limited actual authority is routinely accomplished through contracts; terms of use agreements are no different. Because the focus of agency creation is not dependent on the existence of a legal contract but rather on context, promissory estoppel could also draw upon agency doctrine to give other members of the community the benefit of the confidentiality agreement.[162]

Furthermore, representation of multiple adverse principals in the same transaction or "dual agency" is permissible provided the agent does not have a conflict of interest that could result in a breach of the duties that the agent owes to some or all principals.[163] The *Restatement (Second) of Agency* provides that

> [a]n agent who, to the knowledge of two principals, acts for both of them in a transaction between them, has a duty to act with fairness to each and to disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency, except as to a principal who has manifested that he knows such facts or does not care to know them.[164]

Thus, provided the website provides full disclosure in its terms of use, it might be possible for members of online communities to form agreements of confidentiality with *each other* via agency created by the website in the terms of use. However, this option might be less desirable than the third-party beneficiary doctrine. Websites might be hesitant to enter into *any* fiduciary relationship with their members regardless of limitations on liability and scope of authority. Additionally, it is unclear the extent to which a website could serve as an agent for numerous parties without a conflict of

159. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

160. *Id.* § 1.03.

161. *Id.* § 2.01.

162. Indeed, instances of estoppel arise in many contexts throughout the RESTATEMENT (THIRD) OF AGENCY, as a great deal of disputes involve reliance based on context. *See id.* § 2.05, introductory note ("Estoppel, a general principle of broad applicability, protects justifiable and detrimental reliance on promises and factual representations when and to the degree necessary to avoid injustice. . . . The term 'detrimental reliance' is used here to emphasize that estoppel in this context requires that a third party undergo a change of position involving an expenditure of money, or labor, an incurrence of loss, or a subjection to liability."); *id.* § 2.05 (estoppel to deny existence of agency relationship if based on reasonable reliance); *id.* § 3.02 ("A principal may be estopped to assert the lack of such a writing or record when a third party has been induced to make a detrimental change in position by the reasonable belief that an agent has authority to bind the principal that is traceable to a manifestation made by the principal."); *id.* § 4.08 ("If a person makes a manifestation that the person has ratified another's act and the manifestation, as reasonably understood by a third party, induces the third party to make a detrimental change in position, the person may be estopped to deny the ratification.").

163. *Id.* §§ 3.14, 8.03.

164. RESTATEMENT (SECOND) OF AGENCY § 392 (1958).

interest. Such uncertainty, even in the event of full disclosure, could discourage adoption of this tactic.

2. Application to the Elements of Promissory Estoppel

At this point, it becomes necessary to analyze each element of promissory estoppel within the context of promises made via terms of use agreements for online communities. As previously stated, for successful claims of promissory estoppel, most jurisdictions require (1) a promise, (2) an intention to induce promisee reliance by the promisor and actual detrimental reliance by the promisee, and (3) that injustice can only be avoided by enforcement of the promise.[165] It should be noted that this remedy is, of course, dependent on an online community's willingness to add a confidentiality agreement to its online terms of use. However, if such a clause could help create a safe place for disclosure online and thus generate more users without a realized increase in exposure to liability, then it seems axiomatic that at least some online communities would adopt such language.

a. Promises

In order for promissory estoppel to be effective, a plaintiff must prove the existence of a "clear, definite, or unambiguous" promise.[166] "A promise is a manifestation of intent by the promisor to be bound, and is to be judged by an objective standard. It need not be express, but may be implied from conduct and words."[167] While certain scenarios can be dreamt up that might convince a court to find the existence of a promise from conduct alone, implied promises are unlikely to be helpful in attempting to find a systematic remedy for disclosure in online communities. Application of such a standard would be unpredictable. For this and every element of promissory estoppel, a written agreement to keep a confidence seems to be a much more reliable method to preclude any claim that there was not a promise, and it minimizes the chances that a court would deem the promissory language vague or unprovable.[168] Indeed, the ruling in *Cohen* supports the idea that there must be a formal and explicit promise of secrecy for a successful claim of promissory estoppel. In *Cohen*, the court focused on the explicit nature of the promise of confidentiality.[169]

165. See *supra* Part IV.A for a discussion of the requisite elements of a promissory estoppel claim.

166. 31 C.J.S., *supra* note 119, § 117 (citing Citiroof Corp. v. Tech Contracting Co., 860 A.2d 425 (Md. Ct. Spec. App. 2004); Clevenger v. Oliver Ins. Agency, Inc., 237 S.W.3d 588 (Mo. 2007); Filippi v. Filippi, 818 A.2d 608 (R.I. 2003); Davis v. Greenwood Sch. Dist. 50, 620 S.E.2d 65 (S.C. 2005); Birt v. Wells Fargo Home Mortg., Inc., 75 P.3d 640 (Wyo. 2003)).

167. *Id.* (citing Major Mat Co. v. Monsanto Co., 969 F.2d 579 (7th Cir. 1992); Coca-Cola Co. Foods Div. v. Olmarc Packaging Co., 620 F. Supp. 966 (N.D. Ill. 1985); First Nat'l Bank of Cicero v. Sylvester, 554 N.E.2d 1063 (Ill. App. Ct. 1990); Martin v. Scott Paper Co., 511 A.2d 1048 (Me. 1986)).

168. *See* Gilles, *supra* note 94, at 33–37 (discussing potential complexities facing claims of promissory estoppel based on unwritten promises).

169. *Cohen II*, 479 N.W.2d 387, 391 (Minn. 1992) ("'[W]e have, without dispute, the reporters' unambiguous promise to treat Cohen as an anonymous source.'" (quoting Cohen v. Cowles Media Co., 457 N.W.2d 199, 204 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991))).

b. Intended and Detrimental Reliance on Social Network Sites

This requirement contains obligations for both the promisor and the promisee. First, the promisor must have intended to induce reliance on the part of the promisee or should have reasonably expected and foreseen that the promise would be relied upon by the promisee. Context is critical for this determination. For example, a casual commitment by a friend to keep the details of a scandalous night out secret may not rise to the level of promissory estoppel because the friend "would not reasonably expect reliance on her casual comment."[170] Contrast this scenario with that of *Cohen*:

> [T]he Minnesota Supreme Court found that a promise was made, the record revealed that Cohen called reporters to his office and made an explicit demand that they "give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this." The response of the reporters was "prompt and unequivocal agree[ment]," and, having obtained this promise, Cohen handed over the dirt. Thus a plaintiff who wants to be assured of a remedy in promissory estoppel should make sure that she obtains a formal and explicit promise of secrecy, defeating any claim that the defendant did not foresee reliance on the promise.[171]

Gossip, by its nature, begs to be spread, and what quicker, better way to do that than the Internet? Additionally, the very function of online communities is to disseminate information. What we are doing, who we are seeing, and other details of our lives are all routinely shared in online communities. This function cuts against an implied presumption of confidentiality. As a result, any communication of personal information intended to remain private must carry with it an explicit and overriding context of confidentiality.

The second part of this requirement mandates that the promisee reasonably took action in reliance on the promise. Here, a direct reference can be drawn from *Cohen*. "In *Cohen*, the source's unremitting refusal to hand over the documents to any reporter until after a promise of anonymity had been extracted showed indisputable reliance on the promise."[172] The same scenario online would likely yield a similar result; the refusal to disclose personal information until after a promise of confidentiality has been extracted would serve as nearly indisputable reliance on that promise.

Like agency, the determination of whether the reliance was reasonable is dependent on context. While proper analysis of the relationship between community size and reasonableness is a topic for further research, it is sufficient to say that the smaller the online community, the more likely a court would find a reliance on promises of confidentiality reasonable.

In many situations, the request for confidentiality may only be viewed as a desire instead of a necessary precursor to disclosure. Many sources "might speak to a reporter even if their request for confidence is turned down or brushed aside. Equally, friends

170. Gilles, *supra* note 94, at 34.

171. *Id.* at 35 (alteration in original) (footnotes omitted) (quoting Cohen v. Cowles Media Co., 445 N.W.2d 248, 252, 254 (Minn. Ct. App. 1989), *aff'd in part and rev'd in part*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991)).

172. *Id.* at 35–36 (citing *Cohen*, 445 N.W.2d at 252).

may well ask for secrecy but talk even if their request is ignored."[173] In those situations, "neither could state a claim for promissory estoppel: 'since the reliance must have been *induced by* the promise, it cannot consist of action or forbearance that would have occurred in any event.'"[174]

c. Avoiding Injustice by Enforcing Promises in Online Communities

The equitable nature of promissory estoppel is both its strength and its weakness. On the one hand, it is flexible enough to apply to a broad spectrum of situations as justice dictates. On the other hand, this flexibility renders its application difficult to predict. "Even if promise and reliance can be proven, the promise will only be enforced 'if injustice can be avoided only by enforcement of the promise.'"[175] Naturally, courts have inconsistently applied this element since it calls for courts to make policy decisions. "In one newspaper case, a court concluded that no showing of resulting injustice had been made where the paper breached an alleged promise not to run an obituary."[176]

However, the court in *Cohen* treated the breach of a promise of confidentiality quite differently. It began its analysis of the third prong of promissory estoppel by stating, "[a]s has been observed elsewhere, it is easier to recognize an unjust result than a just one, particularly in a morally ambiguous situation."[177] The court then agreed that it would be unjust for the law to approve the breaking of a promise.[178] As previously mentioned, the court reasoned that in view of the newspapers' own admission of the "importance of honoring promises of confidentiality, and absent the showing of any compelling need in this case to break that promise, we conclude that the resultant harm to Cohen requires a remedy here to avoid injustice."[179] This language "absent any compelling need" sets a high bar to overcome in order to justify the breach of a promise of confidentiality.

In light of the decision in *Cohen*, and the general preference by courts to honor clear, unambiguous promises, it is likely that courts could conclude that injustice could be avoided only by enforcement of a promise of confidentiality explicitly made when joining an online community absent a compelling need to break that promise. However, "plaintiffs seeking to rely on promissory estoppel always face uncertainty as to whether a court would perceive that they are entitled to recover as a matter of policy."[180]

D. The Relationship Between Promissory Estoppel and the Terms of Use

Courts often disagree on the proper utilization of promissory estoppel when a bargained-for contract exists covering the same promises. Ultimately, this disagreement

173. *Id.* at 36.

174. *Id.* (quoting E. ALLEN FARNSWORTH, CONTRACTS § 2.19, at 94 (1982)).

175. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981)).

176. *Id.* (citing Sirany v. Cowles Media Co., 20 Media L. Rep. (BNA) 1759, 1761 (D. Minn. 1992)).

177. *Cohen II*, 479 N.W.2d 387, 391 (Minn. 1992).

178. *Id.*

179. *Id.* at 392.

180. Gilles, *supra* note 94, at 37.

is unlikely to play a critical role in the solution proposed in this Article due to a likely similar outcome regardless of treatment because of the consistencies between contract and promissory estoppel in the analyzed context.

However, it is important to note the potential for the coexistence of a contract and promissory estoppel since the promissory estoppel solution proposed is heavily based on the existence of a terms of use contract.

> "Many jurisdictions have developed a rule under which the existence of a bargain contract concerning a subject automatically bars any claim of promissory estoppel relating to the same subject." Although not all jurisdictions adopt such a broad rule, at a minimum, promissory estoppel is unlikely to succeed where the promissory estoppel claim conflicts with the formal bargain.[181]

If a member's justifiable reliance is based on the language in a terms of use agreement, then there seems little reason to suspect an otherwise valid claim of promissory estoppel would conflict with the terms of use proposed in this Article. After all, how could a member justify reliance that conflicts with express terms presented to the member before disclosure if the terms were specific, clear, and conspicuously presented?

Furthermore, the presence of a contract is not dispositive, and "a plaintiff may prevail under [promissory estoppel] even if a contract exists."[182] Courts appear willing to allow promissory estoppel claims even when there is no barrier to recovery under contract law, either in the name of efficiency or if those harmed were unable to negotiate an explicitly reciprocal contract.[183] Given that terms of use are typically non-negotiable contracts of adhesion, courts would be much more likely to allow claims of promissory estoppel notwithstanding a valid contract in the proposed context.

Finally, even if the website owner selected a forum and governing law that do not recognize promissory estoppel, if a remedy is available under contract, users are unlikely to be placed at a significant disadvantage under the proposed solution. The principal effect of having to rely on contract law would remain the same: members could rely on contracts containing promises of confidentiality and would be entitled to remedies if that contract is broken. If any of the prohibitions to contract enforcement or requirements of contract formation described in Part III.B were present such that the contract was unenforceable, promissory estoppel would then be available to the members in the alternative.[184] The problem, then, of fulfilling a user's intentions regarding confidentiality in online communities is not so much legal in nature as it is in finding terms of use that are satisfactory to the members of the community.

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181. Kostritsky, *supra* note 95, at 576 (footnote omitted) (quoting Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 974).

182. *Id.* at 579 (citing Royal Fixture Co. v. Phoenix Leasing, Inc., 891 S.W.2d 553, 554, 556 (Mo. Ct. App. 1995)).

183. *See* Doctors' Co. v. Ins. Corp. of Am., 864 P.2d 1018, 1030 (Wyo. 1993) (allowing defensive assertion of promissory estoppel even in light of contract covering same situation because plaintiff was in most efficient position to assess information that could have prevented its own harm).

184. See *supra* Part III.B for a discussion of the prohibitions to contract enforcement and the requirements of contract formation.

E. Construction of the Confidentiality Agreement

So what would a promise of clear and express agreement of confidentiality look like? One approach could be to request confidentiality for the identities of all members and/or of all posted content within the site. Such an agreement might be desirable for smaller online communities that often deal with highly sensitive information, such as online support groups. Much of the information on those sites is highly specific, generally limited to information related to seeking support, and would likely be considered private under many contexts. While certainly some information might be considered public or unrelated to the purpose of the group, the burden of keeping complete confidentiality over such a defined category of communication would not likely outweigh the greater interest in creating an environment where individuals could seek support for significant life issues.

But what about larger or more "general purpose" online communities?[185] Requiring users to keep all information on the site confidential when only some of it needs to remain private might actually run contrary to both the members' and owners/administrators' desires for the community. In such situations, the ability of members to tag information they wish to disclose in confidence could be desirable. Additionally, this function could be reflected in the community's terms of use, thus giving other members clear notice of the information they are to keep in confidence.

If the request for confidentiality covered only information users tagged as private, the user could easily divide what she wishes to be freely available and what she wishes to protect with explicit promises of confidentiality. Within the communities utilizing a member networking function (such as social network sites), the user could even specify which people have access to the confidential information. The following is a simplified sample of what such a specific agreement could look like:

It is understood and agreed to that other website members may provide certain information that is and must be kept confidential. To ensure the protection of such information and to preserve any confidentiality necessary for the operation of the online community and the well being of its members, it is agreed that

1. The Confidential Information to be disclosed can be described as and includes any information explicitly tagged as "confidential" via the website's information tagging system.

185. The most extreme example would be the social network site Facebook, which recently topped 500 million users worldwide. Facebook, Statistics, http://www.facebook.com/press/info.php?statistics (last visited Sept. 2, 2010). Clearly, it would exceed the boundaries of logic to reasonably expect confidentiality from 500 million members. But what about a limited, restricted network of a member's, say, 150 friends? Analysis of the legal, policy, normative, and plausibility considerations involved in whether promises of confidentiality should be enforced in large online communities will be included in future research and is beyond the scope of this Article. *See generally* Lauren Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. Rev. 1315, 1341–42 (2009) (advocating technological solution whereby members of social networking websites can expressly indicate privacy preferences of posted content and suggesting privacy tort law could evolve to recognize such preferences); James Grimmelmann, *Saving Facebook*, 94 Iowa L. Rev. 1137, 1139–42 (2009) (arguing for "culturally appropriate" outreach efforts to explain risks of posting personal content online as alternative to creating "better" technical controls that ignore actual use patterns).

2. For the benefit of the other website members, Member agrees not to disclose the confidential information obtained from other website members within the website to anyone unless required to do so by law.[186]

While actual confidentiality agreements would of course contain more detail, ideally the agreements would maintain an essence of simplicity so all community members could easily understand their duties of confidentiality. This proposed agreement contains an unambiguous promise, an ascertainable description of what information is to be kept in confidence, and an explicit statement of intent to render all other community members as third-party beneficiaries to the agreement.

V. POLICY CONSIDERATIONS AND PRACTICAL IMPLICATIONS

The use of promissory estoppel to protect self-disclosure in online communities is consistent with many legal and public policy considerations besides privacy. For example, allowing confidential disclosure encourages social experimentation (and subsequent potential failure) by youth who, before the digital era, were often given a safe place to learn how to effectively socialize.[187] Additionally, it could help create a stronger normative culture of confidentiality to protect the well-being of online community denizens. Professor Daniel Solove has asserted that "[p]rivacy, in the form of protection against disclosure, regulates the way people relate to others in society. . . . [I]t promotes one's ability to engage in social affairs, form friendships and human relationships, communicate with others, and associate with groups of people sharing similar values."[188] Yet he warns:

> Social judgment and social norms can impede these practices. People's lives in the public sphere are precarious, for they are constantly subject to the judgment of others and to the sting of social sanctions. It is because people care so much about their public lives, about how others in society regard and treat them, that protection against disclosure is important. Protection against disclosure opens up ways for people to communicate and associate with others without destroying or inhibiting our public roles. Protection against disclosure shields us from the harshness of social judgment, which, if left unregulated, could become too powerful and oppressive.[189]

His conclusion underscores the need to create a safe place for disclosure online. The application of the promissory estoppel theory proposed in this Article helps further this need with comparatively minimized negative impact on free speech.

186. This proposed agreement was modified from a simple confidentiality agreement drafted by patent attorney Gene Quinn and made available at http://www.ipwatchdog.com/simple-confidentiality-agreement (last visited June 6, 2010).

187. *See, e.g.*, Posting of danah boyd to DMLcentral, *Sociality is Learning*, http://dmlcentral.net/blog/danah-boyd/sociality-learning (Nov. 30, 2009, 12:35 EST) (discussing importance and educational value of social media in developing proper social skills of modern teenagers).

188. Solove, *supra* note 2, at 1064.

189. *Id.*

A. Privacy as Control

The promissory estoppel theory for confidential disclosure proposed in this Article is perhaps most effective in furthering one of the most basic principles of informational privacy: control. Alan Westin helped popularize the concept of privacy as control in his book *Privacy and Freedom*.[190] As a general premise, "Westin's theory of privacy speaks of ways in which people protect themselves by temporarily limiting access to themselves by others."[191] More specifically, according to Westin:

> Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.[192]

Westin's theory focuses on the need for privacy to help individuals adjust emotionally to life within a society. "He describes privacy both as a dynamic process (i.e., we regulate privacy so it is sufficient for serving momentary needs and role requirements) and as a non-monotonic function (i.e., people can have too little, sufficient, or too much privacy)."[193] Psychologist Irwin Altman also developed one of the most prominent and widely accepted theories regarding privacy as control. In Altman's book *The Environment and Social Behavior*,[194] he posits that privacy is the "selective control of access to the self."[195]

The proposed promissory estoppel theory completely embraces privacy as control by enabling members of online communities to exercise control over dissemination of information. That control would only exist in a specific context, which makes it all the more valuable to community members and less detrimental to the free flow of information than a broad grant of control over information.

B. Focus on Reliance, Not Bargain

As mentioned in Part III of this Article, promissory estoppel is, to a degree, preferable to contract law because the

> focus of the cause of action shifts from the contract and its terms to considerations of reliance and unfairness. The more the action centers on the unfairness of the defendant's conduct, rather than the bargain struck, the more the plaintiff's real concerns are in confluence with the cause of action.[196]

190. ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).

191. Stephen T. Margulis, *On the Status and Contribution of Westin's and Altman's Theories of Privacy*, 59 J. SOC. ISSUES 411, 412 (2003) (citation omitted).

192. WESTIN, *supra* note 190, at 7.

193. Margulis, *supra* note 191, at 412.

194. IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR (Irvington 1981) (1975).

195. *Id.* at 18 (emphasis omitted).

196. Gilles, *supra* note 94, at 39.

Thus, the injustice of having an online community member reveal information disclosed to him in confidence, such as information about sexual eccentricities, having a communicable disease, or any other sensitive information, is given more weight than in a simple amoral contract dispute. Additionally, as previously mentioned, promissory estoppel is flexible enough to cover a broad spectrum of situations as justice dictates due to its equitable nature.[197]

C. Encourages Speech as Disclosure

Critics of this promissory estoppel theory might assert that its application would discourage speech because it creates a new and potentially significant liability on those who disseminate information. While it is true that members of online communities would be forced to exercise more discretion regarding the content they are exposed to, I propose that the promissory estoppel theory encourages speech in two ways.

First, the creation of a safe place for disclosure online by allowing community members to rely on promises of confidentiality would, ostensibly, help remove previous concerns over privacy and provide a sense of security for members. These concerns might have resulted in some members failing to disclose information. With these barriers removed, the member would be more encouraged to share this information. Thus, increased encouragement to share within a community would seem to promote, rather than discourage speech.

Additionally, the creation of a safe place for disclosure online, over time, could have a positive polarizing effect on speech. Currently, the decision of whether to disseminate personal information based on privacy concerns can be extremely difficult. Given the inconsistent treatment of personal information as public or private, determining potential liability for publication of information can be a shot in the dark.

By directing users to "safe havens" to disclose private information, it is possible that eventually, individuals could better grasp the legal distinctions between confidential information disclosed within online communities and nonconfidential information self-disclosed elsewhere online. Not only would individuals have an easier time deciding if and where to disclose information, but potential republishers of that information would have an easier determination of the public/private nature of the information by examining the context in which it was disclosed.

In other words, individuals would be better equipped to determine whether self-disclosed information was public or private in a normative culture where information individuals wished to keep confidential was posted within protected online communities, and information individuals did not mind further dissemination of was posted elsewhere online. This increased ease in identifying the confidential/nonconfidential nature of self-disclosed information could encourage speech since potential disseminators would have less concern over whether further dissemination of information was contrary to the discloser's intent.

197. See *supra* Part IV.C.2.c for an analysis of the strengths and weaknesses of promissory estoppel.

D. Stronger Normative Culture of Confidentiality

> [T]he law works best when it can hover as a threat in the background but allow most problems to be worked out informally. The threat of the lawsuit helps to keep people in check. Without the lawsuit threat, people who defame other people or invade their privacy can just thumb their nose at any complaints.[198]

By reminding users of the legally binding nature of the agreement, the proposed promissory estoppel theory could have the added benefit of a better internalization of a user's duty of confidentiality, thus ideally decreasing the actual number of breaches of confidence. In other words, by turning implicit assumptions of confidentiality into explicit promises, this solution could help create norms of confidentiality.

Each time an individual registered to be a member of an online community, she would be reminded that she is assuming legal obligations of confidentiality, similar to the agreements she might sign as part of her employment. Internalization of a member's duty of confidentiality would be additionally strengthened by the proposed tagging feature, as the tags would serve as consistent reminders to keep a confidence every time information was accessed. The development of a normative confidential culture would be highly preferable to having to resort to the law. Ideally, if honoring a promise of confidentiality becomes the norm, only extreme disputes would consistently result in litigation.

E. Permissible Under the First Amendment

Many of the remedies for protecting privacy, including the torts of public disclosure of private facts and intentional infliction of emotional distress, have come into conflict with the First Amendment.[199] However, as previously mentioned, the U.S. Supreme Court held in *Cohen I* that the First Amendment does not prohibit a plaintiff from recovering damages under state promissory estoppel law for a breach of a promise of confidentiality in exchange for information.[200] This explicit and on-point ruling gives promissory estoppel an advantage over the disclosure tort, which is subject to greater constitutional restraint as a content-based restriction on speech.[201]

F. Weaknesses of the Promissory Estoppel Theory

The largest weakness of the promissory estoppel theory is the available measure of damages to the injured party. Susan Gilles writes:

> The measure of damages in promissory estoppel cases is the subject of intense debate. The traditional position that the reliance interest defines the scope of the remedy in promissory estoppel conforms to logic: promissory

198. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION 123 (2007).

199. *See generally* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650 (2009) (discussing discrepancies in application of First Amendment in different areas of law); Volokh, *supra* note 2 (discussing First Amendment implications raised by attempting to broaden information privacy).

200. *Cohen I*, 501 U.S. 663, 670 (1991).

201. *See generally*, Volokh, *supra* note 2.

> estoppel allows recovery because of the reliance by the plaintiff, thus damages should be measured in terms of reliance. As recent studies have shown, however, this does not conform with the reality of practice—the courts repeatedly award an expectation measure of damages.[202]

As previously stated, the state supreme court in *Cohen* found that the damages appropriate for breach of contract were also applicable for promissory estoppel; that is, those damages "which: (a) arise directly and naturally in the usual course of things from the breach itself; or (b) are the consequences of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made."[203] Thus, the court in *Cohen* awarded damages based on expectation/contemplation but also allowed for damages based on reliance, i.e., those that "arise directly and naturally" from the breach.

This distinction is of little consequence, however. Tangible and quantifiable damages such as loss of a job, financial damages due to loss of a client/contract, and ejection from certain groups (such as state bar associations) should be recoverable regardless of whether the court awards damages based on reliance or expectation, provided the damage was foreseeable at the time the promise was made or was a natural result of the disclosure of information.[204] For example, if a community member revealed that another member who was part of the armed forces was a homosexual after promising to keep that fact confidential, the other member's expulsion from the military would be a foreseeable and expected consequence of that breach.

However, some of the most common damages resulting from disclosure of confidential information—emotional distress and reputational loss—are generally not available through promissory estoppel claims.[205] This is true whether the court is awarding reliance or expectation damages. "The courts may be more willing to award punitive damages, but a . . . study revealed such awards occurred where the action appeared to sound in tort for misrepresentation, thus conforming to the contractual limitation that punitive damages are only available if the breach constitutes a tort."[206] As a result, the remedies available to a successful promissory estoppel plaintiff are likely generally equal to those offered by pure contract. Finally, because the equitable nature of promissory estoppel renders its application difficult to predict, it is inadequate as a sole remedy.

Yet for advocates of the free flow of information, this limitation on damages could be seen as an effective check on those seeking to restrict speech. Limited damages could result in fewer meritless claims, as many attorneys will be hesitant to file suit with little prospect for a significant recovery. Additionally, such a limited recourse (or small number of lawsuits resulting from such a limited recourse) could help minimize the specter of liability for potential speakers.

202. Gilles, *supra* note 94, at 37 (footnotes omitted).

203. *Cohen II*, 479 N.W.2d 387, 392 (Minn. 1992).

204. For example, the court in *Cohen II* upheld damages awarded at least partially to compensate for loss of Cohen's job. *Id.* at 389, 392.

205. Gilles, *supra* note 94, at 38.

206. *Id.* (footnote omitted).

VI. CONCLUSION

The need for some effective, systematic form of protection for online disclosures will only continue to grow with the meteoric rise in popularity of online communities. Although traditional legal remedies have been ineffective and inconsistently applied to the self-disclosure of information, the unique nature of online communities could give rise to an alternative form of protection. These communities are distinctively suited to serve as a safe-house for information because not only are they a natural forum for those seeking to disclose private or personal information for support or help with major life decisions, but they are also typically governed by a common terms of use agreement for all members.

Within this context, I have proposed the application of the equitable doctrine of promissory estoppel to confidential communications by community members within the website. This could be effectuated through either the third-party beneficiary doctrine or the concept of dual agency to provide each member with an equitable remedy for breaches of confidence by other community members.

Application of this remedy would certainly not occur without the cooperation of the owner/administrator of the online community website. Furthermore, it is unlikely to serve as a panacea for all privacy harms resulting from disclosure online, since it only applies to the self-disclosure of personal information. However, it is supported by strong policy considerations and has the potential for positive practical implications. The use of promissory estoppel to remedy breach of confidentiality agreements is accepted by the courts, notably in the high-profile case of *Cohen v. Cowles Media Co.*[207] The proposed theory of recovery advances privacy as control over personal information, one of the foundations of information privacy law. It focuses on reliance instead of a commercial-based bargain theory. It also encourages speech by offering a safe place for sensitive self-disclosure and an easier process by which potential disseminators of information disclosed within a community can determine the appropriate level of discretion to apply to accessed information.

Ideally, if utilized over a significant period of time, the promissory estoppel remedy could create a stronger normative culture of confidentiality through improved channels of internalization of duties of discretion. Additionally, the solution is likely compliant with the First Amendment as analyzed under the *Cohen* standard. Finally, although the available damages under promissory estoppel are less than in tort, the theory could potentially have an effect on other torts, such as the tort for breach of confidentiality.

It is difficult to predict the full impact that adoption of the promissory estoppel remedy would have on online communities, but the provision of a safe place for users to disclose personal information online would likely promote both speech and the personal well-being of online community denizens.

207. 479 N.W.2d 387 (Minn. 1992).