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**THE PRIVACY-PROOF PLAINTIFF:  
BUT FIRST, LET ME SHARE YOUR #SELFIE**

*Joshua M. Greenberg\**

*The Internet, and social media in particular, provides the means by which billions of users may interact with one another in the new “global village” and shape and disseminate messages beyond the boundaries of the traditional community. As more of our interpersonal interactions take place through social media, our online presence becomes a manifestation of our existential selves, subject to the same reputational and privacy risks as in the real world. This Note explores the effect on our privacy interests when we use social media platforms without restraint by electing to share private information with hundreds or thousands of “friends” and second, third, and fourth degree connections. By applying the principles of the libel-proof plaintiff doctrine to privacy law, this Note argues that there is a point at which broad self-exposure negates a reasonable expectation of privacy such that consent to disclosure crosses a threshold and extinguishes the right to privacy for the entire range of issues disclosed.*

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## INTRODUCTION

Param Sharma, whose 396,000 Instagram followers know him as @ItsLavishBitch,<sup>1</sup> has been dubbed “Instagram’s Richest Teen.”<sup>2</sup> His ostentatious Instagram account, which often refers to followers as “peasants,” is rich with photos of Sharma’s “\$150,000 diamond-studded watch,”<sup>3</sup> Louis Vuitton accessories, Rolls-Royce and Bentley cars, and endless stacks of cash.<sup>4</sup> In July and August of 2014, Sharma attained even greater public notoriety—and ridicule—for his over-the-top, pretentious postings after he spent ninety days in California’s Santa Rita Jail “for failing to make a reasonable effort to find the original owner of an iPhone that he sold on Craigslist.”<sup>5</sup> A similar online provocateur is Chai Yan Leung, daughter of C.Y. Leung, Chief Executive of Hong Kong, who received backlash after posting the following on her publicly available Facebook page: “This is actually a beautiful necklace bought at Lance Crawford (yes- funded by all you [Hong Kong] taxpayers!! So are all my beautiful shoes and dresses and clutches!! Thank you so much!!!!).”<sup>6</sup>

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<sup>1</sup> @ItsLavishBitch, INSTAGRAM (Feb. 16, 2015, 7:30 PM), <http://instagram.com/itslavishbitch>.

<sup>2</sup> Myles Tanzer, *Instagram’s Richest Teen Jailed For Selling iPhone On Craigslist*, BUZZFEED (Sept. 11, 2014, 4:29 PM), <http://www.buzzfeed.com/mylestanzer/instagrams-richest-teen-is-jailed-for-selling-iphone-on-crai#1m323x9>. Part of ItsLavishBitch’s mystique is that nobody knows why Sharma has so much money or if it is even a real account. See *Who’s Behind ItsLavishBitch, Instagram’s Richest Troll?*, DIGITAL TRENDS (Nov. 5, 2014), <http://www.digitaltrends.com/social-media/who-is-instagram-its-lavish-bitch/>.

<sup>3</sup> @ItsLavishBitch, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Tanzer, *supra* note 2. Sharma was likely convicted under CAL. PENAL CODE § 485 (West 2014) (“One who finds lost property . . . and who appropriates such property to his own use . . . without first making reasonable and just efforts to find the owner and to restore the property to him, is guilty of theft.”).

<sup>6</sup> Alan Van, *Spoiled Daughter of Hong Kong’s Leader Thanks Taxpayers For Funding Her Luxurious Life*, NEXTSHARK (Oct. 10, 2014, 4:16 PM), <http://nextshark.com/spoiled-daughter-of-hong-kongs-leader-thanks-tax-payers-for-funding-her-luxurious-life/>. Chai Yan Leung’s Facebook page has since been deleted or hidden.

The handful of viral music sensations who have risen to notoriety on Vine,<sup>7</sup> including Shawn Mendes<sup>8</sup> and Sage the Gemini,<sup>9</sup> prove that social media can do more than just breed contempt for characters like Sharma and Leung. Mendes, who first went viral with his six-second cover of Justin Bieber's "As Long As You Love Me," now boasts 3.7 million followers on Vine.<sup>10</sup> Mendes is represented by Island Records and recently released a single, entitled "Life of the Party." The single "sold 148,000 copies in its first week and reached No. 24 on the Billboard Hot 100, making him the youngest artist ever to enter the top 25 of the chart with his first release."<sup>11</sup> Sage the Gemini, who has also signed with a record label, "enjoyed a reported 583% spike in single sales last summer after his song 'Gas Pedal' appeared in numerous dance videos on the social network [Vine]."<sup>12</sup> Record label executives point out that, just as MySpace and YouTube served as a springboard for several celebrity artists such as Colbie Callait and Justin Bieber, respectively, Vine may be the next frontier for cultivating and scouting musical talent.<sup>13</sup>

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<sup>7</sup> See Regge Ugwu, *How Vine Became The Music Industry's Next Great Hope*, BUZZFEED (Sept. 14, 2014, 12:16 PM), <http://www.buzzfeed.com/reggieugwu/how-vine-became-the-music-industrys-next-great-hope#3d0xj6v>. Vine is a website and smartphone application that allows users to upload videos no longer than six seconds, which Vine then endlessly loops. The service is relatively new to the world of social media but has taken it by storm, seeing an average of 100 million visitors each month within less than two years of its launch. *Id.*

<sup>8</sup> Shawn Mendes, VINE (Oct. 3, 2014, 7:18 PM), <https://vine.co/u/937830842749816832>.

<sup>9</sup> Sage the Gemini, VINE (Oct. 3, 2014, 7:19 PM), <https://vine.co/u/938080540966412288>.

<sup>10</sup> Ugwu, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see also Christine Erickson, *15 People Made Famous by the Internet in 2012*, MASHABLE (Nov. 15, 2014), <http://mashable.com/2012/11/15/internet-famous-people-2012/> (listing fifteen people who gained notoriety through the Internet and social media); Beverly Jenkins, *5 Stars Who Were Discovered By The Internet*, ABOUT ENTERTAINMENT, <http://humor.about.com/od/bestofthebest/tp/5-Stars-Who-Were-Discovered-By-The-Internet.htm> (last visited March 3, 2015) (discussing Justin Bieber's use of social media to rise to stardom).

What do @ItsLavishBitch, Chai Yan Leung, Shawn Mendes, and Sage the Gemini have in common? All four, by their own exposure and self-promotion, have leveraged their online presence into notoriety and small-scale celebrity. All four epitomize what it means to belong to the “‘Look at Me’ generation.”<sup>14</sup> To this, journalist Emily Nussbaum says, “In essence, every young person in America has become, in the literal sense, a public figure. And so they have adopted skills that celebrities learn in order not to go crazy: enjoying the attention instead of fighting it—and doing their own publicity before somebody does it for them.”<sup>15</sup> Nussbaum’s evaluation prompts the primary argument of this Note: there are some people who have availed themselves to the public to such an extent, whether on social media platforms or elsewhere in the “public eye,” that they have consented to widespread disclosure to the point where further exposure would be only marginally injurious to such persons’ right to privacy.

The circumstances that give rise to this consent to widespread disclosure are best understood through the lens of social media. The Internet, and social media in particular, exists in large part to reach far beyond the physical and symbolic boundaries of the traditional community. Every user has equal capacity and potential to shape and disseminate his message to as small or large a circle as he chooses.<sup>16</sup> As Marshall McLuhan anticipated as early as the

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<sup>14</sup> THE PEW RESEARCH CENTER, FOR THE PEOPLE & THE PRESS, HOW YOUNG PEOPLE VIEW THEIR LIVES, FUTURES AND POLITICS: A PORTRAIT OF “GENERATION NEXT” 1 (2007), available at <http://www.people-press.org/files/legacy-pdf/300.pdf>. This 2007 study from the Pew Research Center dubbed “Generation Next,” those aged 18–25, the “Look at Me” generation because of their connection to profile-based social media sites on which Generation Next-ers share personal information and photos. *Id.* See also Stephanie Rosenbloom, *Generation Me vs. You Revisited*, N.Y. TIMES (Jan. 17, 2008), [http://www.nytimes.com/2008/01/17/fashion/17narcissism.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/01/17/fashion/17narcissism.html?pagewanted=all&_r=0).

<sup>15</sup> Emily Nussbaum, *Say Everything*, N.Y. MAGAZINE (Nov. 3, 2008), <http://nymag.com/news/features/27341/>.

<sup>16</sup> See, e.g., DANAH BOYD, IT’S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS 10–13 (2014).

Four affordances, in particular, shape many of the mediated environments that are created by social media . . . . They are:

1960s, our technological world has become a “global village,”<sup>17</sup> in which “people scattered across the globe can now all congregate together in cyberspace to share ideas and information.”<sup>18</sup> While the Internet has become the dominant means of spreading information, of course it is not the only place where one can disseminate private information. However, this Note will argue that, in some respect, social media has become the new town square of this “global village.”

It is not just the Look at Me generation that has become inextricably linked with social media. A recent survey by the Pew Research Center found that 73% of the 6,010 American adults surveyed use a social networking site<sup>19</sup> and that Facebook far outshines competing social media platforms in number of users.<sup>20</sup> In 2013, “57% of all American adults and 73% of all those ages 12–17”<sup>21</sup> had a Facebook account, amounting to a total of 1.39 billion monthly active Facebook users.<sup>22</sup> Unsurprisingly, with many users acknowledging social media platforms as public spaces—as opposed to private spaces<sup>23</sup>—there is a growing trend

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persistence: the durability of online expressions and content;  
 visibility: the potential audience who can bear witness;  
 spreadability: the ease with which content can be shared; and  
 searchability: the ability to find content.

*Id.*

<sup>17</sup> MARSHALL McLuhan, *THE GUTENBERG GALAXY* 31 (1962).

<sup>18</sup> DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 33 (2007).

<sup>19</sup> MEAVE DUGGAN & AARON SMITH, PEW RESEARCH CENTER, *SOCIAL MEDIA UPDATE 2013 1* (2013), available at [http://www.pewinternet.org/files/2013/12/PIP\\_Social-Networking-2013.pdf](http://www.pewinternet.org/files/2013/12/PIP_Social-Networking-2013.pdf). Respondents self-identified as frequent users. *Id.*

<sup>20</sup> *Id.* The Pew Research Center’s survey of 1,445 Internet users ages 18 and older found that 71% use Facebook, 22% use LinkedIn, 21% use Pinterest, 18% use Twitter, and 17% use Instagram. *Id.*

<sup>21</sup> Aaron Smith, *6 new facts about Facebook*, PEW RESEARCH CENTER (Feb. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/02/03/6-new-facts-about-facebook/>.

<sup>22</sup> *Newsroom*, Facebook, <http://newsroom.fb.com/company-info/> (last visited March 3, 2015).

<sup>23</sup> See DANAH BOYD, *WHY YOUTH (HEART) SOCIAL NETWORK SITES: THE ROLE OF NETWORKED PUBLICS IN TEENAGE SOCIAL LIFE* 7–9 (David Buckingham ed., 2007), available at <http://www.danah.org/papers/>

among social scientists and legal theorists to conceptualize normative social behaviors on the Internet and social media so that the law may accurately reflect users' standards for conduct and expectations of privacy in the online community. Nearly half of surveyed adult Facebook users indicate that "the ability to share with many people at once" is a major reason for using the service,<sup>24</sup> which supports the conclusion that "profile owners typically anticipate further disclosure" of the content they post.<sup>25</sup> Many users are deliberate in the way they maintain their respective online personas by developing their own acceptable privacy standards, filtering what they post, monitoring what others post about them, and curating away items that are not acceptable for public exhibition (for example, by untagging<sup>26</sup> photos).<sup>27</sup> Users seem to

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WhyYouthHeart.pdf (referring to social media platforms as "networked publics"); Jacquelyn Burkell et al., *Facebook: Public Space, or Private Space?*, 17 INFO., COMM. & SOC'Y 974, 983 (2014) ("[S]ocial network participants enter into online social spaces with the assumption that the information posted there is available to a broad and ill-defined audience with no clear boundaries. As such, it appears that online social information is treated as 'public' as opposed to 'private.'").

<sup>24</sup> Smith, *supra* note 21.

<sup>25</sup> Burkell et al., *supra* note 23, at 980–83. Burkell's qualitative study concluded that, "Even though most of our participants acknowledged creating boundaries around their Facebook profile through a friends list (only one had a totally open profile), they all tailored their Facebook profile to appeal to a much larger audience, as their practices indicate . . . . In very limited circumstances, information found on Facebook is considered too personal to be shared, but such boundaries appear to be exceptions to a general rule that Facebook is a public space." *Id.* at 983.

<sup>26</sup> "A tag [or tagging] links a person, Page or place to something you post, like a status update or a photo." *Glossary of Terms*, FACEBOOK, <https://www.facebook.com/help/www/219443701509174/> (last visited March 3, 2015). However, there are only two ways to truly remove a photo from Facebook: the tagged individual can either request that the person who posted the photo delete it from Facebook, without a guarantee that he will actually remove it, or report the photo to Facebook, which may or may not take administrative action and remove the photo. *What if I don't like something I'm tagged in?*, FACEBOOK, <https://www.facebook.com/help/196434507090362> (last visited March 3, 2015). So while untagging a photo will not expunge it from the Internet, the subject of the photo may still distance himself from it and no longer give it publicity.

<sup>27</sup> Burkell et al., *supra* note 23, at 980. 41% of adult Internet users report

acknowledge and consent to “online social networks as public venues,”<sup>28</sup> where a “public disclosure . . . allows discussion within and beyond the social connections to whom it is explicitly disclosed.”<sup>29</sup> The privacy-proof plaintiff doctrine rests on the understanding that a social media profile unencumbered by privacy settings or viewing restrictions is a public forum and, therefore, posting private information by the profile-owner constitutes consensual disclosure.

Kitty Ostapowicz, a New York City blogger, was quoted in *New York* magazine as saying, “Yeah, I am naked on the Internet . . . . But I’ve always said I wouldn’t ever put up anything I wouldn’t want my mother to see.”<sup>30</sup> Suppose that after the article was published, Kitty’s nude photos went viral.<sup>31</sup> By her own

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they have deleted or edited something they previously posted online and 21% report asking someone else to remove content posted about them. LEE RAINIE ET AL., PEW RESEARCH CENTER, ANONYMITY, PRIVACY, AND SECURITY ONLINE 4 (2013), available at [http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP\\_AnonymityOnline\\_090513.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_AnonymityOnline_090513.pdf). A survey of social media users ages 12 to 17 found “59% have deleted or edited something that they posted in the past; 53% have deleted comments from others on their profile or account; [and] 45% have removed their name from photos that have been tagged to identify them.” MARY MADDEN ET AL., PEW RESEARCH CENTER, TEENS, SOCIAL MEDIA, AND PRIVACY 8–9 (2013), available at [http://www.pewinternet.org/files/2013/05/PIP\\_TeensSocialMediaandPrivacy\\_PDF.pdf](http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf); see also MARY MADDEN, PEW RESEARCH CENTER, PRIVACY MANAGEMENT ON SOCIAL MEDIA SITES (2012), available at [http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP\\_Privacy\\_management\\_on\\_social\\_media\\_sites\\_022412.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Privacy_management_on_social_media_sites_022412.pdf) (analyzing conceptions of privacy on social media sites by demographic and users manage their online reputations and personas).

<sup>28</sup> Burkell et al., *supra* note 23, at 982.

<sup>29</sup> *Id.*

<sup>30</sup> Nussbaum, *supra* note 15.

<sup>31</sup>

Viral events are a naturally occurring, emergent phenomenon facilitated by the interwoven collection of websites that allow users to host and share content (YouTube, Instagram, Flickr), connect with friends and people with similar interests (Facebook, Twitter), and share their knowledge (Wikipedia, blogs). Collectively, these sites have formed a social infrastructure that we refer to as social media. In this new information ecosystem, an individual can share information that can flash across our digitally supported social networks



admission, Kitty acknowledges the public nature of the forum on which she posted the photos and seems to expect others to view and appreciate her blog posts.<sup>32</sup> What right to privacy, if any, does Kitty retain? This Note argues that Kitty would be privacy-proof, a plaintiff who could not bring suit under a theory of invasion of privacy because, by her own actions, she consented to the disclosure and “has thrown away all or part of his or her privacy and, hence, no significant additional privacy remains to be lost.”<sup>33</sup> In a common law system that predicates protection of one’s right to privacy on reasonable expectations,<sup>34</sup> a plaintiff should be estopped, or prevented, from asserting a privacy claim where the plaintiff consented to the invasion of privacy by self-exposure or self-publication. The privacy-proof plaintiff doctrine is derived from the libel-proof plaintiff doctrine,<sup>35</sup> which holds where one’s reputation has been so damaged by his own actions, he will be prevented from recovering damages for further defamation by others if determined to be only marginally injurious to that plaintiff’s name.<sup>36</sup>

Part I of this Note considers the law of defamation—generally and on the Internet—and the libel-proof plaintiff doctrine as

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with a speed and reach never before available to the vast majority of people. It can go viral.

KARINE NAHON & JEFF HEMSLEY, *GOING VIRAL 2* (2013).

<sup>32</sup> Nussbaum, *supra* note 15.

<sup>33</sup> Nicholas Gerbis, *The Privacy-Proof Plaintiff: A Theoretical Exploration of a Potential Legal Doctrine* 19 (unpublished manuscript) (on file with the Journal of Law and Policy).

<sup>34</sup> For tortious disclosure of private, embarrassing facts,

[T]he facts disclosed to the public must be private facts, and not public ones. Certainly no one can complain when publicity is given to information about him which he himself leaves open to the public eye . . . since this amounts to nothing more than giving publicity to what is already public and what any one present would be free to see.

William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 394–95 (1960); *see also* *Katz v. United States*, 389 U.S. 347, 351 (1967) (grounding the concept of legal protections based on a “reasonable expectation of privacy”).

<sup>35</sup> Gerbis, *supra* note 33, at 1–2.

<sup>36</sup> ROBERT TRAGER ET AL., *THE LAW OF JOURNALISM AND MASS COMMUNICATION* 204 (3d ed. 2012).

foundational to the privacy-proof plaintiff concept. Part II traces the common law growth of the right to privacy in tort and constitutional law as a means to protect individual dignity. Part III discusses the effect of explicitly or implicitly welcoming others into one's private affairs. Specifically, Part III.A discusses consent to disclosure, a complete defense to the privacy torts, and Part III.B takes a comparative approach to the way the law deals with self-disclosure regarding the right of publicity and the case of the voluntary public figure. Part IV explains who may be privacy-proof, proposes a common law framework for the doctrine, and addresses how we might square the privacy-proof plaintiff doctrine with our interest in maintaining control over our public image through, for example, the right to be forgotten. Part V concludes.

## I. DEFAMATION AND THE LIBEL-PROOF PLAINTIFF

“Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial.” – Cassio, *Othello*<sup>37</sup>

The libel-proof plaintiff doctrine provides the framework and public policy footing for the privacy-proof plaintiff doctrine, specifically that a plaintiff may not recover where there is no damage to his reputation or privacy interest.<sup>38</sup> This section will provide background on the two defamation torts—libel and slander, discuss the safe harbor provision of the Communications Decency Act of 1996 and how these torts apply in the online context, and, finally, examine the libel-proof plaintiff doctrine and introduce how it might be adapted for the four privacy torts.

### A. Defamation

Defamation refers generally to false communications about another person that cause such reputational damage that the community thinks less of him or third persons dissociate from

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<sup>37</sup> WILLIAM SHAKESPEARE, THE TRAGEDY OF OTHELLO, THE MOOR OF VENICE act 2, sc. 3.

<sup>38</sup> Gerbis, *supra* note 33, at 1–2.

him.<sup>39</sup> Under the umbrella of defamation sit the torts of libel and slander. Libel and slander differ primarily in the defamation's mode of transmission: the law of libel covers written defamatory statements, while the law of slander is associated with spoken defamation.<sup>40</sup> Both torts "developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements."<sup>41</sup> In suits for libel and slander, the burden rests on the plaintiff to prove that the defendant negligently<sup>42</sup> published a false, defamatory statement of fact concerning the plaintiff.<sup>43</sup> Tort damages are awarded to plaintiffs on a sliding scale and apportioned relative to the harm caused to the plaintiff. Under the view of the Restatement (Second) of Torts, any successful libel or slander plaintiff may recover general damages;<sup>44</sup> a plaintiff does not need to show that the defamatory falsehoods caused a particular harm or injury.<sup>45</sup> Defamation law plays a key role in the

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<sup>39</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>40</sup> RESTATEMENT (SECOND) OF TORTS §§ 568, 575 (1977).

<sup>41</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990).

<sup>42</sup> While the culpability requirement for libel or slander against a private person is negligence, courts impose a heightened standard of actual malice for public officials and public figures to prevail in a defamation suit. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1975).

<sup>43</sup> RESTATEMENT (SECOND) OF TORTS §§ 558, 575 cmt. a, 613 (1977). *See also* TRAGER ET AL., *supra* note 36, at 146–47 (discussing the plaintiff's burden of proof).

<sup>44</sup> RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1977).

<sup>45</sup> *Id.* § 569.

Damages for libel and slander *per se* . . . were granted without special proof because the judgment of history was that the content of the publication itself was so likely to cause injury and because "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed."

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 372–73 (1974) (White, J., dissenting) (quoting RESTATEMENT OF TORTS § 621 cmt. a (1938)). However, a minority of states differentiate strict liability libel *per se* from libel *per quod*, for which plaintiffs must introduce "extrinsic facts to explain how the words were damaging." BRUCE W. SANFORD, *LIBEL AND PRIVACY* 4-20–4-21 (2d ed. 2004);

protecting privacy, for “[i]f privacy is understood as an individual’s ability to have some control over the self-image she projects to society, then the ability to prevent the spread of false information about oneself is essential for this sort of control.”<sup>46</sup>

When a person is defamed on the Internet, a question commonly arises as to whether the Internet service provider (or ISP) or forum website has or should have certain affirmative obligations as a matter of law to monitor content and be held liable as a distributor.<sup>47</sup> Section 230 of the Communications Decency Act of 1996 immunizes “interactive computer service[s]” from suits based on defamatory material posted by third party “information content provider[s].”<sup>48</sup> Thus, Section 230 precludes lawsuits that

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50 AM. JUR. 2D *Libel and Slander* § 145 (2014); TRAGER ET AL., *supra* note 36, at 154–55. Courts have not identified what constitutes libel *per se* as decisively as they have for slander *per se*. The four categories of slander *per se* are instructive in identifying what may qualify as libel *per se*: accusations of (1) criminality, (2) having “a loathsome disease,” (3) conduct “incompatible with [one’s] business, trade, profession, or office,” and (4) moral turpitude, or sexual misconduct. RESTATEMENT (SECOND) OF TORTS § 570 (1977); 3 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 535 (2d ed. 2011). Libel *per se* is *prima facie* evidence of defamation and the Restatement (Second) of Torts reflected “a trend toward limiting *per se* libels to those where the defamatory nature of the publication is apparent on its face, i.e., where the defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement.” *Gertz*, 418 U.S. at 374. This is distinguished from libel *per quod*, which, “does not appear to be defamatory, but knowledge of additional information would damage the plaintiff’s reputation.” TRAGER ET AL., *supra* note 36, at 155; *see also* DOBBS ET AL., *supra*. Thus, in cases of libel *per quod*, many states “require proof of special injury in the form of material or pecuniary loss.” *Gertz*, 418 U.S. at 374; *see also* DOBBS, *supra*. However, this *per se/per quod* distinction is the minority approach, at least in the pleading stage. Media Law Resource Ctr., 50-STATE SURVEY 2012-13 MEDIA LIBEL LAW 1403–10 (2012). The traditional view of libel remains that any successful libel plaintiff may recover general damages. DOBBS ET AL., *supra*, at 228.

<sup>46</sup> DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 183 (Vicki Bean et al. eds., 4th ed. 2011).

<sup>47</sup> *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Jones v. Dirty World Entm’t. Recordings LLC*, 755 F.3d 398, 402 (6th Cir. 2014).

<sup>48</sup> Communications Decency Act of 1996 § 230, 47 U.S.C. § 230 (2014). An interactive computer service provides the technological framework, enabling access to Internet services and websites in the operational sense, whereas an information content provider “is responsible, in whole or in part, for the creation

seek to hold an ISP or website liable for its role as a publisher of defamatory falsehoods.<sup>49</sup>

When applying this safe harbor provision of the Communications Decency Act, courts distinguish user-generated content that is simply displayed on the website from content that the website operator created, either in whole or in part. For example, in *Zeran v. America Online, Inc.*, a once-anonymous message board poster sued AOL because the service provider declined to remove a user-generated post that publicized the plaintiff's contact information and encouraged others to harass him for posting offensive content.<sup>50</sup> The Fourth Circuit affirmed the district court's dismissal of Zeran's complaint and held that Section 230 protected AOL, in part because of the financial burden and infeasibility of requiring "service providers to screen each of their millions of postings."<sup>51</sup> The Fourth Circuit also deferred to Congress' policy decision to afford intermediaries statutory immunity in order to prevent imposing tort liability on passive distributors for other parties' harmful or offensive messages.<sup>52</sup>

It is important to note, however, that Section 230's protections only extend to service providers that are "not also the information content provider of the content at issue."<sup>53</sup> Therefore, the court's inquiry will often center on whether the service provider materially contributed to the injurious content by, most often, exercising

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or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(2), (3).

<sup>49</sup> *Zeran*, 129 F.3d at 330 ("Lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."); see also *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008) (ruling that MySpace.com was not negligent in failing to screen communications between the underage plaintiff and her rapist because the claims were "directed toward MySpace in its publishing, editorial, and/or screening capacities," and, thus, MySpace was protected under 47 U.S.C. § 230).

<sup>50</sup> *Zeran*, 129 F.3d at 329–30.

<sup>51</sup> *Id.* at 331.

<sup>52</sup> *Id.* at 330–31.

<sup>53</sup> *Jones*, 755 F.3d at 408 (holding that a failure to materially contribute to editorial conduct immunizes a publisher under Section 230 even where content has been provided).

some degree of editorial function.<sup>54</sup> In *Jones v. Dirty World Entertainment Recordings, LLC*, the Sixth Circuit found a gossip website did not materially contribute to libelous allegations posted on its site, even though it selected which submissions to publish and provided commentary on them.<sup>55</sup> A former Cincinnati Bengals cheerleader and schoolteacher was the subject of several defamatory comments posted on TheDirty.com, which accused her of promiscuity and having two sexually transmitted infections.<sup>56</sup> Rejecting the lower court's ruling that simple encouragement is tantamount to a material contribution,<sup>57</sup> the Sixth Circuit held TheDirty.com's later comments were not actionable and its publication procedures did not amount to "developing" the libelous content.<sup>58</sup> For a service provider or website to lose its immunity under the safe harbor provision, it must add to, develop, or somehow further the defamatory content, not simply engage in traditional editorial functions,<sup>59</sup> "such as deciding whether to publish, withdraw, postpone or alter content."<sup>60</sup>

Section 230 of the Communications Decency Act has proven favorable to passive participants in cases of defamation on the

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<sup>54</sup> See, e.g., *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC (Roommates)*, 521 F.3d 1157, 1167–68 (9th Cir. 2008); *Jones*, 755 F.3d at 408.

<sup>55</sup> *Jones*, 755 F.3d at 415–17.

<sup>56</sup> *Id.* at 401–06.

<sup>57</sup> *Id.* at 413–15.

<sup>58</sup> *Id.* at 416 ("[T]he CDA bars claims lodged against website operators for their editorial functions, such as the posting of comments concerning third-party posts, so long as those comments are not themselves actionable.").

<sup>59</sup> *Id.* at 409–13. The Court relied on the Ninth Circuit's interpretation of material contribution:

[W]e interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.

*Roommates*, 521 F.3d at 1167–68.

<sup>60</sup> *Jones*, 755 F.3d at 407 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

Internet.<sup>61</sup> But whether libel or slander occur online or interpersonally, the key inquiry always comes back to whether the defendant publicized an injurious falsehood about the plaintiff.<sup>62</sup> Defamation law's fundamental assumption, however, is that the plaintiff possesses a reputational interest worthy of protection.

### B. *The Libel-Proof Plaintiff*

The libel-proof plaintiff doctrine is a defense to libel actions<sup>63</sup> which holds that a plaintiff may not recover where his reputation has been so damaged by previous negative publicity or criminal conviction because, in society's estimation, he is incapable of being further defamed.<sup>64</sup> Under these circumstances, the libel-

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<sup>61</sup> See, e.g., *Roommates*, 521 F.3d at 1167–68 (explaining the material development test); *Jones*, 755 F.3d at 408.

<sup>62</sup> RESTATEMENT (SECOND) OF TORTS §§ 558, 568, 575 (1977).

<sup>63</sup> The libel-proof plaintiff doctrine is just one of many defenses to libel actions. For an extensive discussion on defenses, see Charles Delafuente, 22 AM. JUR. *Proof of Facts* 3D § 305 (2014). Defenses to libel actions include, but are not limited to, truth of the matter, consent, fair comment and criticism, and opinion. *Id.* One of the elements of a libel claim is that the defendant made “a false and defamatory statement.” RESTATEMENT (SECOND) OF TORTS § 558(a) (1977) (emphasis added). “[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation.” RESTATEMENT (SECOND) OF TORTS § 583 (1977). Criticism of a person or institution in the public eye is protected so long as the commentary was “the honest expression of opinion on matters of legitimate public interest based on a true or privileged statement of fact.” TRAGER ET AL., *supra* note 36, at 191. Courts generally apply the test from *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), to assess whether speech constitutes opinion protected under the First Amendment. TRAGER ET AL., *supra* note 36, at 193–94; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (“Under the First Amendment there is no such thing as a false idea.”).

<sup>64</sup> Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909 (1985). “While the doctrine has been invoked most frequently on the basis of criminal convictions, the doctrine is not limited to plaintiffs with criminal records.” *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 353 (S.D.N.Y. 1998) (considering the plaintiff libel-proof as a result of his numerous racketeering, drug, and fraud convictions and indictments). See also, e.g., *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987) (considering the plaintiff libel-proof with respect to his adultery despite him not

proof doctrine maintains that a defamation suit is incapable of surviving the threshold requirement of reputational harm.<sup>65</sup> Libel-proof status is not one easily conferred and has been described as “a forlorn and ignominious status,”<sup>66</sup> reflecting society’s repudiation of the libel-proof individual.

The Second Circuit first established the libel-proof plaintiff doctrine in 1974 in *Cardillo v. Doubleday & Co.*<sup>67</sup> Robert Cardillo brought a libel action against the authors and publishers of *My Life in the Mafia*, the memoir of a high-ranking mobster in the Patriarca crime family.<sup>68</sup> Cardillo claimed that the book falsely alleged that he was involved in mob activity and helped plan a bank robbery.<sup>69</sup> The Second Circuit affirmed the lower court’s dismissal, but on different grounds,<sup>70</sup> holding that “as a matter of law [Cardillo] is . . . libel-proof, *i.e.*, so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations.”<sup>71</sup> The court recounted Cardillo’s multiple felony convictions, for which he was sentenced to twenty-one years in prison, and remarked, “[w]ith Cardillo himself having a record and relationships or associations like these, we cannot envisage any jury awarding, or court sustaining,” anything more

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having been charged or convicted of the crime of adultery).

<sup>65</sup> SANFORD, *supra* note 45, at 7-118–7-119 (“The libel-proof doctrine is based on the recognition that in order for a defamation plaintiff to recover damages, he must have a reputation that is capable of sustaining injury due to the publication at issue.”).

<sup>66</sup> RODNEY A. SMOLLA, LAW OF DEFAMATION 9-42.1 (2d ed. 1999).

<sup>67</sup> *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1974). *See also The Libel-Proof Plaintiff Doctrine*, *supra* note 64 at 1909–14 (discussing the origins and development of the libel-proof plaintiff doctrine).

<sup>68</sup> *Cardillo*, 518 F.2d at 639. *See also* MIKE STANTON, THE PRINCE OF PROVIDENCE: THE RISE AND FALL OF BUDDY CIANCI, AMERICA’S MOST NOTORIOUS MAYOR 411 (2004) (detailing Cardillo’s association with the Patriarca crime family).

<sup>69</sup> *Cardillo*, 518 F.2d at 640.

<sup>70</sup> *Id.* at 639. The district court dismissed the suit on First Amendment grounds, whereas, on appeal, the circuit court held Cardillo had no cognizable injury to his reputation because, again, he was devoid of a reputation. *Id.*

<sup>71</sup> *Id.*



than nominal damages.<sup>72</sup> The ruling in *Cardillo* provided two key factors to evaluate whether a plaintiff is libel-proof: first, whether the plaintiff has little to no esteem in the community and, second, whether the incremental damage to the plaintiff's reputation by the libel complained of was so marginal that it cannot be quantified into some meaningful remedy.

However, courts have been cautious to deem plaintiffs libel-proof and have limited the doctrine's application. One jurisdiction has even rejected it outright.<sup>73</sup> Not two years after the Second Circuit explicated the doctrine, it made clear in *Buckley v. Littell* that the libel-proof doctrine "is a limited, narrow one."<sup>74</sup> The Second Circuit rejected Franklin Littell's assertion that William F. Buckley, Jr., a conservative author and public figure, was libel-proof by virtue of his controversial political opinions.<sup>75</sup> The court distinguished Buckley and others with polarizing political views from the habitual criminal in *Cardillo* to say that the libel-proof doctrine should be limited to those to who truly cannot rebut defamatory comment and criticism because of some prior bad act.<sup>76</sup> The Second Circuit has continued to reaffirm the doctrine's restraint, stating in a later case, "few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements, even if their damages cannot be quantified and they receive only nominal damages."<sup>77</sup>

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<sup>72</sup> *Id.* at 640. The Fourth Circuit affirmed the district court's dismissal on Doubleday's motion for summary judgment. *Id.*

<sup>73</sup> *E.g.*, *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986). Then-Judge Antonin Scalia rejected the libel-proof plaintiff doctrine, doubting the court's ability to "determin[e] that someone's reputation had been 'irreparably' damaged—*i.e.*, that *no* new reader could be reached by the freshest libel." *Id.* at 1568. Scalia went on to state, "it is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity." *Id.*

<sup>74</sup> *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

<sup>75</sup> *Id.* at 888–89.

<sup>76</sup> *Id.*

<sup>77</sup> *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987).

When courts do apply the libel-proof plaintiff doctrine, they do so based on either an issue-specific or incremental approach.<sup>78</sup> Under the issue-specific libel-proof plaintiff doctrine, courts narrowly consider “plaintiffs who had tarnished reputations regarding particular issues prior to the defendant’s statement on that issue [to be] libel-proof *with respect to the issue*.”<sup>79</sup> In contrast, the incremental libel-proof doctrine focuses on the alleged libel in relation to the totality of the plaintiff’s previously damaged reputation to ask whether the alleged libel could have tarnished his already poor reputation.<sup>80</sup> The issue-specific approach evaluates the effect of libelous statements on a particular subject matter relating to the plaintiff, or a dimension of the plaintiff’s personality. The incremental approach considers the libelous quality of what the plaintiff objected to compared to the accompanying defamation he has tolerated or his overall, pervasive bad reputation. Whether a court will utilize the issue-specific or the incremental approach varies by jurisdiction rather than the facts of a given case.

A California district court employed the issue-specific approach and held that a plaintiff was libel-proof regarding his alleged financial exploitation of his romantic partners. In *Wynberg v. National Enquirer, Inc.*, Henry Wynberg brought a libel action against a national tabloid for running an article that implied he took advantage of actress Elizabeth Taylor and her fortune over the course of their relationship.<sup>81</sup> The court detailed Wynberg’s extensive criminal history—which included convictions for prostitution, sexual encounters with minors, fraud, and various drug charges—and noted his “reputation for taking advantage of

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<sup>78</sup> *The Libel-Proof Plaintiff Doctrine*, *supra* note 64, at 1910. Compare *Wynberg v. Nat’l Enquirer, Inc.*, 564 F. Supp. 924 (C.D. Cal. 1982) (taking the issue-specific approach in applying the libel-proof plaintiff doctrine), with *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981) (taking the incremental approach in applying the libel-proof plaintiff doctrine).

<sup>79</sup> *The Libel-Proof Plaintiff Doctrine*, *supra* note 64, at 1911 (emphasis added).

<sup>80</sup> *Id.* at 1912–13.

<sup>81</sup> *Wynberg*, 564 F. Supp. at 925.

women generally, and of Miss Taylor specifically.”<sup>82</sup> Adopting the issue-specific approach, the court explained, “an individual who engages in certain anti-social or criminal behavior and suffers a diminished reputation may be libel-proof as a matter of law, as [the alleged libel] relates to that specific behavior.”<sup>83</sup> These allegations did little to harm Wynberg’s already irreparably damaged reputation relating to his unscrupulous past with women. However, whether an individual’s predicate “anti-social or criminal behavior” quashes his reputational interest is highly contextual and fact-specific.<sup>84</sup>

Alternatively, a New York district court adopted the incremental scheme in *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*<sup>85</sup> In *Simmons*, a dealer of Seabring-Vanguard cars challenged an inaccurate statement in *Consumer Reports* about the CitiCar’s exemption from federal safety standards.<sup>86</sup> The court found the alleged libel:

Could not harm [the plaintiffs] in any way beyond the harm already caused by the remainder of the article . . . . Given the abysmal performance and safety evaluations detailed in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of the misstatement.<sup>87</sup>

The incremental approach puts much more weight on the context in which the allegedly defamatory statements were made. The court concluded that the challenged statements that cast doubt on the CitiCar’s design and safety were minimally injurious in relation to the more critical, unchallenged statements by a safety expert who referred to the vehicles as “extremely dangerous and unsafe” and “wholly unsuited for transportation on the public

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<sup>82</sup> *Id.* at 928.

<sup>83</sup> *Id.*

<sup>84</sup> *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

<sup>85</sup> *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981).

<sup>86</sup> *Id.* at 745.

<sup>87</sup> *Id.* at 750–51.

highway.”<sup>88</sup> The challenged statements could not have been damaging when considering the true statements, which called CitiCar’s safety record into question.

The case of Howard K. Stern, Anna Nicole Smith’s former domestic partner, demonstrates the narrow scope of this doctrine.<sup>89</sup> A New York district court judge ruled that while Stern was the “subject of critical discussion on tabloid television” surrounding Smith and her death in 2007, the criticism did not render him immune to further defamation as a result of additional false allegations.<sup>90</sup> The court reasoned “[t]hat [even though] someone has been falsely called a thief in the past does not mean he is immune from further injury if he is falsely called a thief again.”<sup>91</sup> Prior false accusations that Stern somehow facilitated Anna Nicole Smith’s death, which certainly damaged Stern’s reputation, did not render him immune to subsequent libelous allegations that he was a drug user, had a sexual relationship with the father of Smith’s child, and pimped Smith.<sup>92</sup> This holding makes clear that only a truthful prior bad act or public matter may serve to eliminate a party’s right to recover for defamation. Had the allegations that Stern was involved in Smith’s death been true or had Stern been prosecuted in connection with Smith’s death, he would likely be considered libel-proof on the incremental theory based on these prior bad acts.<sup>93</sup> However, libel that begets more libel is insufficient to deprive a plaintiff of this tort action.<sup>94</sup>

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<sup>88</sup> *Id.* at 744–45, 750.

<sup>89</sup> *Stern v. Cosby*, 645 F. Supp. 258, 270 (S.D.N.Y. 2009). In this case, Cosby had libeled Smith and Stern in her book, *Fame and Miss Fortune: Secrets from Inside the Anna Nicole Smith Media Storm*, writing, among other things, that Stern was gay and had slept with Larry Birkhead, the father of Smith’s daughter; Stern and Smith abused illegal drugs; Stern had pimped Smith; Stern was a thief; and Stern had motive to kill Smith. *Id.* at 267–68.

<sup>90</sup> *Id.* at 270.

<sup>91</sup> *Id.* at 270–71.

<sup>92</sup> *Id.* at 266–70.

<sup>93</sup> “Suppose, for example, that an individual is identified in an article as a thief, child molester, and tax evader. If all of those charges are true, does it make any difference if the articles also falsely identifies the individual as a kidnapper?” TRAGER ET AL., *supra* note 36, at 204.

<sup>94</sup> *Stern*, 645 F. Supp. at 270–71.

This line of cases, from *Cardillo* to *Stern*, forms a doctrine that—though limited in its application—illustrates that “[r]ights are not immutable. They may be signed away, rescinded or suspended . . . .”<sup>95</sup> Consider the benefit personality or reputation confers on each individual person in the context of a utility scale. The *tabula rasa*,<sup>96</sup> he who is untainted by societal judgment, enjoys the full utility of his reputation. As life goes on, we expend a util<sup>97</sup> here, a util there, but most of us do not deplete the value of our reputations. “As the amount of reputation remaining approaches zero, the possibility of harm—and the amount of recoverable damages—also approaches zero.”<sup>98</sup> Of course we have varying sensitivities to what we each wish to keep private and make public, however, there is an objective usefulness or value to one’s reputation and privacy, which, as a matter of public policy, we protect with defamation and privacy laws. There are no damages to be recovered where there is no reputational interest to be injured. This too can be said for one’s right to privacy—privacy loses its utility as private facts are made public; as more private information is made public, the need for privacy protections lessens because there is objectively less to protect. To allow recovery for one of the privacy torts, courts must be sure the value of the plaintiff’s privacy has not dissipated and the possibility of harm is real.

The proposed test in Part IV of this Note conforms more closely to the issue-specific approach to determine whether a plaintiff has become privacy-proof. As a matter of public policy, society views privacy rights as preserving the value of personhood. Thus, loss of privacy is more palatable and consistent with our

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<sup>95</sup> Gerbis, *supra* note 33, at 25.

<sup>96</sup> First conceptualized by Aristotle, the mind as a *tabula rasa* (“blank slate”) is attributed to John Locke, who wrote that we are each born with minds untainted and our understanding of the world comes from sensory experiences and human constructs. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. 1–2 (n.p. 1689).

<sup>97</sup> In economics, a “util” is the hypothetical unit used to measure added or diminished consumer usefulness or satisfaction (i.e., utility). JOHN BLACK ET AL., A DICTIONARY OF ECONOMICS, “util” (3d ed. 2009).

<sup>98</sup> Gerbis, *supra* note 33, at 17–18.

liberal sensibilities when limited to specific, contoured subject matter rather than treating “one’s reputation [as] a monolith, which stands or falls in its entirety.”<sup>99</sup>

## II. THE RIGHT TO PRIVACY

Privacy rights emerged, in large part, from common law as society became more complex, technology became more advanced, and our concept of personhood and natural law became more sophisticated and enlightened. Thus, the development of a coherent doctrine that constitutes “the right to privacy” was largely an exercise in mosaic jurisprudence.<sup>100</sup> In their seminal article *The Right to Privacy*, Samuel Warren and Louis Brandeis reviewed 150 years of privacy-oriented case law and are considered the first to conclude that the law ought to provide a cause of action to protect privacy.<sup>101</sup> Seventy years later, William Prosser took note of how the law developed around Warren and Brandeis’ right to privacy and expanded on the doctrine by defining four fundamental privacy torts later adopted by the Restatement (Second) of Torts: intrusion, public disclosure of private facts, false light, and

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<sup>99</sup> *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *rev’d on other grounds*, 477 U.S. 242 (1986).

<sup>100</sup> The mosaic theory of the law assembles case law and legal doctrine to evidence a larger, Gestaltist picture of some legal or public policy issue—here, cases which were protective of privacy, though not necessarily fitting cleanly within the traditional trespass framework, incidentally created a new cause of action for invasion of privacy. Justice Samuel Alito’s concurrence in *United States v. Jones* took this approach to the Fourth Amendment, stating the Court “need not identify with precision the point at which the tracking of [Jones’] vehicle became a search,” rather than law enforcement’s actions, taken together over the course of four weeks, constituted a search. 132 S. Ct. 945, 964 (2012) (Alito, J., concurring). The mosaic theory has also appeared in the discussions of the effect of bulk data (metadata) collection on privacy. *E.g.*, *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 750 (S.D.N.Y. 2013).

<sup>101</sup> Samuel L. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). One of Warren and Brandeis’ first observations in surveying this case law was that privacy issues had been shoehorned into property and defamation actions, though the injuries were distinct and begged for their own cause of action. *Id.* at 193–205.

appropriation.<sup>102</sup> In addition to doctrinal evolutions in tort law, constitutional law cases that address procedural and substantive due process have rounded out privacy law by creating a cause of action for a right to privacy exercisable against the government as opposed to private individuals.<sup>103</sup> Taking these developments together, Daniel Solove has offered six general headings by which to categorize modern legal conceptions of privacy:

(1) the right to be let alone—Samuel Warren and Louis Brandeis’s famous formulation for the right to privacy; (2) limited access to the self—the ability to shield oneself from unwanted access by others; (3) secrecy—the concealment of certain matters from others; (4) control over personal information—the ability to exercise control over information about oneself; (5) personhood—the protection of one’s personality, individuality, and dignity; and (6) intimacy—control over, or limited access to, one’s intimate relationships or aspects of life.<sup>104</sup>

All six functions of privacy law come into play in considering the lengths to which a potentially privacy-proof plaintiff has gone to retain his privacy: has he shielded himself against unwelcome curiosity? Is his life an open book or has he kept certain private facts known to only a select few? Has he used social media sites’ various self-help controls to limit personal information to a tailored circle of friends, family, acquaintances, or similar connections?

The remainder of this section will trace the growth of this bundle of rights—from Warren and Brandeis to Solove—to present the common policy thread that runs through this body of law: that the right of the individual to be secure in his private affairs is of the utmost importance. Yet this right is not absolute, especially when it is devalued or voluntarily discarded.

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<sup>102</sup> Prosser, *supra* note 34, at 389; *see also* RESTATEMENT (SECOND) OF TORTS § 652A (1977).

<sup>103</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>104</sup> Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1092 (2002).

*A. Doctrinal Beginnings with Warren and Brandeis*

Common law once limited tort actions to instances of “physical interference with life and property, for trespass *vi et armis*.”<sup>105</sup> Warren and Brandeis argued that this limitation failed to protect an evolved understanding of personal rights, namely that the right to life includes the right “to be let alone”<sup>106</sup> and that property rights safeguard both the “intangible, as well as tangible.”<sup>107</sup> At that time, a plaintiff whose sense of privacy and peace of mind had been violated sustained no actual damages and, thus, was without legal remedy under the tort principle *damnum abseque injuria*, “a loss or damage without injury.”<sup>108</sup> For example, the law prevented a plaintiff from recovering in an action for misappropriation of likeness against someone who used, and widely circulated in an advertisement, the plaintiff’s portrait because the court found there was no legal injury.<sup>109</sup> However, Warren and Brandeis suggested that the law should reflect a more sophisticated view of privacy based on “inviolate personality,” a liberal understanding of individual dignity.<sup>110</sup>

The impetuses for Warren and Brandeis’ article—advances in technology and society’s prying curiosities—continue to plague our ability to remain private and differ only by the technology of the modern era. Warren and Brandeis wrote *The Right to Privacy* at a time when “[i]nstantaneous photographs and newspaper enterprise ha[d] invaded the sacred precincts of private and

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<sup>105</sup> Warren & Brandeis, *supra* note 101, at 193. Trespass *vi et armis* (“by force and arms”) was “an action for damages resulting from an intentional injury to person or property, especially if by violent means.” “Trespass,” BLACK’S LAW DICTIONARY (9th ed. 2009). Warren and Brandeis write, at common law, “the ‘right to life’ served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individuals his land and his cattle.” Warren & Brandeis, *supra* note 101, at 193.

<sup>106</sup> THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888); Warren & Brandeis, *supra* note 101, at 195.

<sup>107</sup> Warren & Brandeis, *supra* note 101, at 193.

<sup>108</sup> *Id.* at 197; “Damnum Sine Injuria,” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>109</sup> *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

<sup>110</sup> Warren & Brandeis, *supra* note 101, at 205.



domestic life; and numerous mechanical devices threaten[ed] to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”<sup>111</sup> Warren and Brandeis’ proposed rule of law is rooted in the belief that each individual has, to an extent, the exclusive power to determine the scope of publicity given to “his thoughts, sentiments, and emotions . . . .”<sup>112</sup>

Warren and Brandeis did not propose a distinct rule of law in an elemental sense. Rather, they provided general parameters for a right to privacy in tort, which should require that the injury negatively affect the plaintiff’s interpersonal dealings or “subject him to the hatred, ridicule, or contempt of his fellow-men.”<sup>113</sup> This right would be subject to limitations for newsworthiness,<sup>114</sup> privileged communications,<sup>115</sup> oral publication,<sup>116</sup> self-disclosure or consent,<sup>117</sup> and not abrogated for truthfulness<sup>118</sup> or absence of malice.<sup>119</sup> These principles as they related to privacy existed in defamation, intellectual property, and contract law prior to Warren and Brandeis’ article but only as underlying assumptions and never at the forefront of a legal cause of action.<sup>120</sup> *The Right to Privacy* laid the groundwork for a legal doctrine that would stand on its own two feet.

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<sup>111</sup> *Id.* at 195–96 (“Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery . . . . Even gossip apparently harmless, when widely and persistently circulated, is potent for evil.”).

<sup>112</sup> *Id.* at 198–99.

<sup>113</sup> *Id.* at 197.

<sup>114</sup> “The right to privacy does not prohibit any publication of matter which is of public or general interest.” *Id.* at 214.

<sup>115</sup> “The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.” *Id.* at 216.

<sup>116</sup> “The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.” *Id.* at 217.

<sup>117</sup> “The right to privacy ceases upon the publication of the facts by the individual, or with his consent.” *Id.* at 218.

<sup>118</sup> “The truth of the matter published does not afford a defence [sic].” *Id.*

<sup>119</sup> “The absence of ‘malice’ in the publisher does not afford a defence [sic]. Personal ill-will is not an ingredient of the offence [sic].” *Id.*

<sup>120</sup> *Id.* at 197–214.

*B. The Right to Privacy as Interpreted by the Supreme Court*

Justice Louis Brandeis' dissent in *Olmstead v. United States*<sup>121</sup> and Justice John Marshall Harlan II's concurrence in *Katz v. United States*<sup>122</sup> go beyond the issue of Fourth Amendment protection of one's "persons, houses, papers, and effects"<sup>123</sup> and instead utilize a functional interpretation of the Constitution to consider whether it provides an inherent general right to privacy from governmental intrusion. In *Olmstead*, the Court held that federal prohibition officers did not violate any Fourth Amendment protected domain by intercepting Olmstead's private communications because there is no physical invasion in wiretapping a telephone.<sup>124</sup> However, Brandeis reiterated his argument from *The Right to Privacy* and aligned the protection of privacy interests with originalism to offer the following:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be

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<sup>121</sup> *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), *and* *Berger v. New York*, 388 U.S. 41 (1967).

<sup>122</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>123</sup> U.S. Const. amend. IV. This line of cases addresses whether wiretapping for the purposes of criminal prosecution violates some right to privacy conferred by the Fourth and Fifth Amendments to the Constitution. The question presented in *Olmstead* was "whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments." *Olmstead*, 277 U.S. at 455; *Katz*, 389 U.S. at 349–50, 354. The questions presented in *Katz* were "[w]hether a public telephone booth is a constitutionally protected area" and "[w]hether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution." *Katz*, 389 U.S. at 349–50.

<sup>124</sup> *Olmstead*, 277 U.S. at 456–57, 464–66. (majority opinion).

let alone—the most comprehensive of rights and the right most valued by civilized men.<sup>125</sup>

The Court in *Katz* later held that the Fourth Amendment “protects *people*, not places.”<sup>126</sup> In so holding, the Court overturned *Olmstead* and placed greater emphasis on the *interest* invaded—private communications by an isolated speaker in a phone booth—rather than the fact that the phone booth was located in a public place.<sup>127</sup> Harlan’s concurrence in *Katz* took this line of reasoning a step further to validate that the spirit of the Constitution and the intent of the Fourth Amendment confer “a reasonable expectation of privacy.”<sup>128</sup>

In addition to finding a right to privacy in the criminal context, such as in *Katz*, the Supreme Court has gone on to expand the scope of privacy rights as a dimension of substantive due process guaranteed by the Due Process Clause of the Fourteenth Amendment.<sup>129</sup> Substantive due process protects certain civil liberties not mentioned in the Constitution but identified by courts as fundamental to the notion of liberty such that the State’s invasion upon these interests is subjected to heightened judicial scrutiny.<sup>130</sup> This is complimented by procedural due process, guaranteed by the Fourth, Fifth, and Eighth Amendments, which protects individuals against the coercive power of government and ensures the fairness of judicial proceedings.<sup>131</sup> *Griswold v. Connecticut*<sup>132</sup> was the first case in which the Supreme Court found a right to privacy as a guarantee of substantive due process. In that case, the Court struck down a law that criminalized the use

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<sup>125</sup> *Id.* at 478 (Brandeis, J., dissenting).

<sup>126</sup> *Katz*, 389 U.S. at 351 (emphasis added).

<sup>127</sup> *Id.* at 350–51 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

<sup>128</sup> *Id.* at 360 (Harlan, J., concurring).

<sup>129</sup> “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1.

<sup>130</sup> Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1502 (1999).

<sup>131</sup> *Id.* at 1501.

<sup>132</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

of contraceptives because the law violated “the notions of privacy surrounding the marriage relationship.”<sup>133</sup> While the Constitution is famously silent on any explicit right to privacy, Justice William O. Douglas wrote, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees” which create certain “zones of privacy”—and the marital relationship is one such zone.<sup>134</sup> In Justice John Paul Stevens’ view, *Griswold v. Connecticut* and its progeny can be reduced to protecting at least two fundamental interests: “avoiding disclosure of personal matters . . . [and] independence in making certain kinds of important decisions.”<sup>135</sup>

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<sup>133</sup> *Id.* at 486.

<sup>134</sup> *Id.* at 484. Specifically, Justice Douglas cites the First, Third, Fourth, Fifth, and Ninth Amendments as those which create zones of privacy. *Id.* See also TRAGER ET AL., *supra* note 36, at 227. In subsequent cases, the Supreme Court recognized other zones of privacy. For example, in *Moore v. City of East Cleveland*, a housing ordinance, which limited occupancy of a dwelling unit to members of a single, nuclear family, did not withstand rational basis review and was thus unconstitutional because “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” 431 U.S. 494, 499 (1977) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974)). In *Cruzan v. Director, Missouri Department of Health*, the Court recognized a zone of privacy around an individual’s right to refuse certain medical treatment. 497 U.S. 261 (1990). The Court elaborated, holding that under the Fourteenth Amendment, competent persons have a “constitutionally protected liberty interest in refusing unwanted medical treatment” where the choice at issue is informed and voluntary. *Id.* at 278. “Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.” *Id.* at 287 (O’Connor, J., concurring). Finally, in *Lawrence v. Texas*, the Court recognized a privacy zone around sexual conduct of consenting adults. 539 U.S. 558 (2003). Striking down Texas’ anti-sodomy law, the Court held:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

*Id.* at 578.

<sup>135</sup> *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977). In *Whalen v. Roe*, the

C. Prosser's Four Modern Privacy Torts

As the constitutional right to privacy developed, William Prosser used common law principles to offer bright line rules for what we now consider the four modern privacy torts: intrusion, public disclosure of private facts, false light in the public eye, and appropriation.<sup>136</sup> All four causes of action protect the plaintiff's personal rights which are non-assignable,<sup>137</sup> or non-transferrable, and—depending on the jurisdiction—die with the plaintiff.<sup>138</sup> These tort actions are based on Warren and Brandeis' theory, rooted in natural law, and are exercisable against all persons.<sup>139</sup> Further, as with libel, the privacy torts do not require the plaintiff to plead or prove that he sustained special or particularized damages, but simply that a privacy interest was violated.<sup>140</sup> Most states have adopted some or all of these privacy torts.<sup>141</sup>

Prosser's first tort is intrusion upon seclusion, specifically "intrusion upon the plaintiff's seclusion or solitude, or into his

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Supreme Court held that the New York State Department of Health's competing interest in preventing the abuse of prescription drugs outweighed a patient's right to privacy in keeping prescription records secret. *Id.* at 603–04. Some consider *Whalen v. Roe* as having effectively acknowledged a right to informational privacy. Gerbis, *supra* note 33, at 9.

<sup>136</sup> Prosser, *supra* note 34, at 389, 392, 398, 401. These rights are exercisable against the world, as opposed to limited to state actors, as is the case with constitutional privacy rights.

<sup>137</sup> An assignable right is one that is "transferable from one person to another, so that the transferee has the same rights as the transferor had." "Assignable," BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>138</sup> Prosser, *supra* note 34, at 408.

<sup>139</sup> *Id.* at 422–23.

<sup>140</sup> *Id.* at 409; RESTATEMENT (SECOND) OF TORTS § 652H (1977).

<sup>141</sup> According to a survey of the fifty states and the District of Columbia, 46 of the 51 jurisdictions recognize the tort of intrusion upon seclusion, while 3 do not; 42 recognize the tort of publicity given to private life, while 6 do not; 33 recognize the tort of false light publicity, while 3 do not; and 46 recognize the tort of appropriation of name or likeness, while 1 does not. The remaining jurisdictions have declined to address these torts. MLRC 50-STATE SURVEY 2013-14 MEDIA PRIVACY & RELATED LAW 1589–92 (Media Law Resource Center, Inc. ed., 2013).

private affairs.”<sup>142</sup> This cause of action arises when there is an intentional intrusion into the plaintiff’s private affairs that violates his reasonable expectation of privacy in a manner “highly offensive to a reasonable person.”<sup>143</sup> It is essential that the subject matter of the intrusion was entitled to be private and, in fact, was kept private prior to the intrusion—that which is public cannot be intruded upon.<sup>144</sup> Intrusion claims often involve voyeurism,<sup>145</sup> though the cause of action may extend to overzealous information gathering,<sup>146</sup> outrageous paparazzi exploitation,<sup>147</sup> physical trespass,<sup>148</sup> and data breach.<sup>149</sup> Because the Internet is treated as a public forum,<sup>150</sup> voluntary online disclosure of private facts about oneself extinguishes any future claim of invasion of privacy that

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<sup>142</sup> Prosser, *supra* note 34, at 389.

<sup>143</sup> “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” RESTATEMENT (SECOND) OF TORTS § 652B (1977). *See also* TRAGER ET AL., *supra* note 36, at 255.

<sup>144</sup> Prosser, *supra* note 34, at 391 (“On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about.”).

<sup>145</sup> *E.g.*, Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964) (involving a party listening in on a tenant’s residence with a recording device); Koeppel v. Speirs, 808 N.W.2d 177 (Iowa 2011) (involving the installation a hidden camera in a workplace bathroom). *See also* Video Voyeurism Prevention Act, 18 U.S.C. § 1801 (2004).

<sup>146</sup> *E.g.*, Nader v. General Motors Corp., 255 N.E.2d 765 (N.Y. Ct. App. 1970) (involving intrusive information gathering, including unauthorized wiretapping); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (involving an illegal entry and subsequent photographing). *See also* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977).

<sup>147</sup> *E.g.*, Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (involving a photographer who took countless unauthorized photographs of and continually harassed a public figure and her family).

<sup>148</sup> *E.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (holding that two undercover reporters had trespassed when they secured employment with a grocery store for purposes of investigative journalism).

<sup>149</sup> *E.g.*, Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969) (involving unauthorized copying of confidential files).

<sup>150</sup> *See supra* notes 19–29 and accompanying text.

could have arisen from further dissemination of those facts.<sup>151</sup> If the facts are voluntarily disclosed, then there can be no intrusion.

Prosser's next tort, public disclosure of private facts, requires a showing of three elements: first, a person "gives publicity to a matter concerning the private life of another,"<sup>152</sup> second, information is disseminated that "would be highly offensive to a reasonable person,"<sup>153</sup> and third, the compromised information is "not of legitimate concern to the public."<sup>154</sup> The Restatement (Second) of Torts has adopted Prosser's requirement that "the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities," rejecting any sort application of the thin-skull rule.<sup>155</sup> Generally, these highly private matters include sexual relations,<sup>156</sup> intimate details about one's family life,<sup>157</sup> or health issues.<sup>158</sup> *Daily Times*

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<sup>151</sup> Many courts have held that what occurs in public is not entitled to be private and, thus, would not constitute an intrusion upon a plaintiff's seclusion regarding his private affairs. *E.g.*, *Sanders v. Am. Broad. Co.*, 978 P.2d 67 (Cal. 1999).

<sup>152</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Prosser, *supra* note 34, at 396. The thin-skull or eggshell skull rule maintains that a tortfeasor takes his victim as he finds him and the victim-plaintiff may still recover despite the existence of some preexisting condition that may have aggravated the injury. *Vosberg v. Putney*, 47 N.W. 99, 100 (Wis. 1890). Prosser writes, "The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such publicity." Prosser, *supra* note 34, at 396. *See also* PROSSER AND KEETON ON TORTS 290-93 (William L. Prosser et al. eds., 5th ed., 1984) (discussing the thin-skull or "eggshell skull" rule). *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977).

<sup>156</sup> *See, e.g.*, *Michaels v. Internet Ent. Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (preliminarily enjoining the distribution of a sex tape on copyright, right of publicity, and privacy grounds).

<sup>157</sup> *See, e.g.*, *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488 (Mo. Ct. App. 1990) (finding that plaintiffs retained an expectation of privacy in attending a hospital's gathering of in vitro fertilization patients because plaintiffs made reasonable efforts not to be filmed at the event).

<sup>158</sup> *See, e.g.*, *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. 1994) (involving a plaintiff whose HIV-positive status was mistakenly made public).

*Democrat v. Graham* is a commonly discussed case for privacy invasion in the face of an embarrassing public exposure.<sup>159</sup> Flora Bell Graham accompanied her sons through a “fun house” at the county fair and, upon exiting the attraction, unknowingly stood over air jets which blew Graham’s skirt up and exposed her from the waist down.<sup>160</sup> The *Daily Times Democrat*, a newspaper with a daily circulation of about five thousand, photographed Graham and ran her photo in a story reporting on the fair. The Alabama Supreme Court rejected the *Daily Times Democrat*’s argument that the photo was newsworthy and stated, “Not only was this photograph embarrassing to one of normal sensibilities . . . it could properly be classified as obscene . . . .”<sup>161</sup> Even though the photo was taken in public, a reasonable person in Graham’s situation would be highly offended by an involuntary exposure of her intimate body parts.

Both the torts of intrusion and public disclosure of private facts “require the invasion of something secret, secluded or private pertaining to the plaintiff,”<sup>162</sup> but a principal difference between the two is that intrusion addresses the objectionable manner in which the information was obtained whereas public disclosure of private facts assesses the scope of dissemination.<sup>163</sup> Information generally cannot be reprivatized once public,<sup>164</sup> so it follows that where a plaintiff has revealed certain private facts in a public forum, such as the Internet, another person cannot be held liable for spreading these no longer private facts.

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<sup>159</sup> *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964).

<sup>160</sup> *Id.* at 476.

<sup>161</sup> *Id.* at 477.

<sup>162</sup> Prosser, *supra* note 34, at 407.

<sup>163</sup> “The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.” RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977). “Publicity” within the context of the disclosure of private facts “means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

<sup>164</sup> SOLOVE, *supra* note 18, at 2. This is akin to the legal analogy of not being able to “unring the bell.”



Prosser's third tort, false light in the public eye, differs from the other privacy torts in that it involves a false statement about the plaintiff, or a statement highly susceptible to false interpretation.<sup>165</sup> In an action for false light, the defendant must have known about or recklessly disregarded the falsity of the information he publicized, in such a way as to place the plaintiff in a position "highly offensive to a reasonable person."<sup>166</sup> Misleading statements and photographs used out of context are common causes for a plaintiff to be viewed in a false light.<sup>167</sup> Note, however, that false light does not necessarily mean bad light—this is where false light differs from defamation.<sup>168</sup> For example, implying an endorsement that goes against the beliefs and values of the so-called supporter may not be defamatory but may still falsely associate that person to a trait he finds objectionable.<sup>169</sup> As with public disclosure of private facts, the fact or material given false light is not evaluated by the standards of an extra-sensitive plaintiff.<sup>170</sup>

Prosser's final tort is appropriation, which involves "the exploitation of attributes of the plaintiff's identity" or the misuse "for the defendant's benefit or advantage, of the plaintiff's name or

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<sup>165</sup> Prosser, *supra* note 34, at 407.

<sup>166</sup> RESTATEMENT (SECOND) OF TORTS § 652E (1977).

<sup>167</sup> *E.g.*, Gill v. Curtis Pub'g Co., 239 P.2d 630 (Cal. 1952) (A couple sued when a photo of them embracing accompanied an article about healthy relationships appearing in *Ladies Home Journal* with the caption "Publicized as glamorous, desirable, 'love at first sight' is a bad risk.").

<sup>168</sup> SOLOVE & SCHWARTZ, *supra* note 46, at 205–06; RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1977) ("It is enough that he is given unreasonable and highly objectionable publicity that attributes him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.").

<sup>169</sup> *E.g.*, RESTATEMENT (SECOND) OF TORTS § 652E cmt. b ill. 4 (1977) ("A is a Democrat. B induces him to sign a petition nominating C for office. A discovers that C is a Republican and demands that B remove his name from the petition. B refuses to do so and continues public circulation of the petition, bearing A's name. B is subject to liability to A for invasion of privacy.").

<sup>170</sup> Prosser, *supra* note 34, at 400.

likeness.”<sup>171</sup> Appropriation comes in two forms: unauthorized commercialization and exploitation of another’s right of publicity. Commercialization generally applies “to someone who wants to remain private,” yet the defendant has “us[ed] this person’s name, picture, likeness or voice for advertising or other commercial purposes without permission . . . causing emotional distress.”<sup>172</sup> Right of publicity “diminishes [a celebrity’s] economic value” by “using this person’s name, picture, likeness, voice, identity—or a look-alike or sound-alike—for advertising or commercial purposes without permission.”<sup>173</sup> Appropriation differs from the other three privacy torts in that it is often, *but not exclusively*, encountered where the plaintiff has some value or celebrity in his name or personality, which the defendant has exploited for the “use [of] advertising or for ‘purposes of trade.’”<sup>174</sup> Suppose a photo of a sorority girl in a bikini somehow found its way from her publicly accessible Facebook account to TotalFratMove.com, a site known for its objectification of women. Total Frat Move’s mere use of the photo as a way to drive web traffic to the site would constitute commercial appropriation, regardless of the woman’s lack of status or celebrity, or the defendant’s lack of quantifiable monetary gain or incentive.<sup>175</sup>

Where a plaintiff has welcomed an invasion of privacy, whether by opening his private affairs for all to view or publicizing private facts, he is said to have consented to the disclosure—a complete defense to Prosser’s four privacy torts.<sup>176</sup> Inviting people into your private affairs is an expected product of interpersonal relationships and “mutual revelation” between friends and loved ones.<sup>177</sup> However, the privacy-proof doctrine captures the rare

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<sup>171</sup> *Id.* at 401; RESTATEMENT (SECOND) OF TORTS § 652C (1977).

<sup>172</sup> TRAGER ET AL., *supra* note 36, at 237.

<sup>173</sup> *Id.* See also SOLOVE & SCHWARTZ, *supra* note 46, at 121–22 (defining “commercialization” and “right of publicity”).

<sup>174</sup> Prosser, *supra* note 34, at 403, 407.

<sup>175</sup> See, e.g., *Cohen v. Herbal Concepts*, 482 N.Y.S.2d 457 (1984) (reasoning that commercial appropriation occurs whenever it is possible for the person to be identified through the appropriated picture in question).

<sup>176</sup> RESTATEMENT (SECOND) OF TORTS §§ 652F cmt.b, 583 (1977); Prosser, *supra* note 34, at 419.

<sup>177</sup> JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY*

times when an individual has disclosed private information to such a degree that the law must say he has disclaimed all right to privacy on the subject of his disclosures.

### III. DISCLAIMING RIGHTS THROUGH VOLUNTARY ACTION

When an individual self-discloses certain private information in the public domain, he waives his privacy rights, usually on the specific issue or range of issues disclosed. Consent is a viable defense to a number of torts beyond the privacy realm, including defamation,<sup>178</sup> negligence (i.e., assumption of risk),<sup>179</sup> and intentional torts.<sup>180</sup> The question of whether a plaintiff gave consent in a particular case is rather routine.

However, despite the bright line rules, courts have not come up with a comprehensive test for determining the intended extent of disclosure. Consider two cases: *Multimedia WMAZ, Inc. v. Kubach*<sup>181</sup> and *Fisher v. Ohio Department of Rehabilitation and Correction*.<sup>182</sup> In *Kubach*, the plaintiff sued a television station for failing to properly blur his face and, as a result, identified him as being HIV-positive to viewers nationwide.<sup>183</sup> Even though Kubach had disclosed his illness to approximately sixty friends, family members, doctors, and members of an AIDS support group,<sup>184</sup> the court concluded that Kubach had narrowly tailored his intimate circle and “carved out a zone of privacy which he refused to relinquish.”<sup>185</sup> However, in *Fisher*, the plaintiff told only four of her co-workers about several sexually suggestive incidents with her seven-year-old son.<sup>186</sup> Here, the court concluded that the matter in question was no longer private when the plaintiff discussed the

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IN AMERICA 8–9 (2001).

<sup>178</sup> RESTATEMENT (SECOND) OF TORTS § 583.

<sup>179</sup> *Id.* § 496A. See also PROSSER AND KEETON ON TORTS, *supra* note 155, at 480–98.

<sup>180</sup> See PROSSER AND KEETON ON TORTS, *supra* note 155, at 112–24.

<sup>181</sup> *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. 1994).

<sup>182</sup> *Fisher v. Ohio Dep’t Rehab. Corr.*, 578 N.E.2d 901 (Ohio Ct. Cl. 1988).

<sup>183</sup> *Kubach*, 443 S.E.2d at 493.

<sup>184</sup> *Id.* at 494.

<sup>185</sup> *Id.* at 499.

<sup>186</sup> *Fisher*, 578 N.E.2d at 902.

incidents “publicly and openly” with her co-workers, who then relayed the information their employer.<sup>187</sup>

To square this discrepancy in which disclosing to sixty people is private but four people public, Lior Strahilevitz suggests courts should not look at the number of people to whom the plaintiff makes a disclosure but rather at the likelihood that the information will disseminate beyond those privileged few.<sup>188</sup> Strahilevitz’s social network theory suggests fact-finders should consider structural and cultural variables to determine the likelihood of further disclosure, such as how interesting the information is, the strength of interpersonal ties within the group and the technological means by which information is transmitted and received by its members, and the group’s norms in spreading the type of information at issue.<sup>189</sup> Strahilevitz raises a concern over whether the social network theory should be applied as a matter of law by judges, who may adhere to bright-line rules at the expense of factual incongruities between precedent cases and the case at bar, or by juries, who may flexibly apply these factors to inherently factually specific privacy cases.<sup>190</sup> Nevertheless, as a matter of public policy, it is still desirable to provide a practical framework for judges and juries to apply particular facts of a given case to reach more predictable outcomes so parties may best plan their cases and forecast their success at trial.<sup>191</sup>

This section will proceed with a discussion of the concept of waiver—where there is an interest in keeping certain information secret or private, but that information is voluntarily disclosed—as

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<sup>187</sup> *Id.* at 903.

<sup>188</sup> Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 37 U. CHI. L. REV. 919, 921 (2005).

<sup>189</sup> *Id.* at 970–71.

<sup>190</sup> *Id.* at 980–83.

<sup>191</sup> *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–44 (1974) (“Theoretically, of course, the balance between the needs of the press and the individual’s claim to compensation for wrongful injury might be struck on a case-by-case basis . . . . But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unimaginable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.”).

it relates to the privacy torts. It will then turn to the limited-purpose public figure, one who has chosen to enter the public consciousness and thus invites attention, comment, and criticism,<sup>192</sup> as a model for evaluating whether a plaintiff has surrendered a dimension of his personality to the public.

#### A. *Consent to Invasion or Disclosure*

Consent is the “willingness in fact for conduct to occur”<sup>193</sup> so voluntary agreement to or implicit approval for an act such as invasion of privacy or disclosure of private information serves as a complete defense against the four privacy torts.<sup>194</sup> It would be unreasonable for a person to have an expectation of privacy where he has welcomed the intrusion into his private life, voluntarily given up certain private facts, sanctioned some false portrayal of himself in the public light, or approved the use of his name or likeness. *American Jurisprudence* states the following regarding consent and privacy:

The maxim of law that one “who consents to an act is not wronged by it” applies to the tort of invasion of privacy. The right of privacy may be waived or lost by consent. Thus, consent to the invasion of one’s right of privacy is a bar to a claim for damages for such invasion.<sup>195</sup>

A waiver to one’s right of privacy may be express or implied by conduct—termed by the Restatement (Second) of Torts as consent in fact and apparent consent, respectively.<sup>196</sup> Consent is expressly made when “clearly and unmistakably stated,”<sup>197</sup> while consent

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<sup>192</sup> *Id.* at 345 (emphasis added).

<sup>193</sup> RESTATEMENT (SECOND) OF TORTS § 892 (1977).

<sup>194</sup> *Id.* §§ 652F, 583; Prosser, *supra* note 34, at 419.

<sup>195</sup> 62A AM. JUR. 2D *Privacy* § 220 (2014).

<sup>196</sup> Prosser, *supra* note 34, at 419; RESTATEMENT (SECOND) OF TORTS § 892 (1977). *E.g.*, *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832 (Kan. 1994) (rejecting a restaurant owner’s claim of invasion of privacy on the grounds that he gave written permission to a television news crew to film a health inspection of his restaurant).

<sup>197</sup> “Express Consent,” BLACK’S LAW DICTIONARY (9th ed. 2009).

may be implied when the rights holder makes a clear manifestation of intent to relinquish that right through his actions.<sup>198</sup>

Posting on social media is often considered an implied waiver of privacy rights.<sup>199</sup> For example, in *Sandler v. Calcagni*, a district court ruled that a victim of cyberbullying who alleged false light and publicity given to private life (public disclosure of private facts) could not fully recover on those claims because the plaintiff made certain private facts public when she posted them on her

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<sup>198</sup> First Nat. Bank of L.A. v. Maxwell, 55 P. 980, 981–82 (Cal. 1899) (quoting Ross v. Swan, 75 Tenn. 463, 467 (1881); 28 Am. & Eng. Ency. Of Law, 526) (“‘To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part.’ . . . ‘A waiver is the intentional relinquishment of a known right.’”); Johnson v. Kaeser, 239 P. 324, 329 (Cal. 1925) (citation omitted) (“Obviously, a waiver of a legal right may be implied as well as express . . . [and] there can be no presumption of such a waiver contrary to the plain or clear intention of the party whose rights would be injuriously affected by reason thereof . . . . [A] presumptive waiver of a legal right may be shown by proving a clear, unequivocal, and decisive act of the party ‘showing such a purpose or acts amounting to an estoppel.’”); Bell v. Birmingham Broad. Co., 96 So.2d 263, 265 (Ala. 1957) (“A waiver or relinquishment of this right, or of some aspect thereof, may be implied from the conduct of the parties and surrounding circumstances. While it is to be conceded that the intent necessary to constitute waiver may be implied from the act of the party involved, the inquiry still is what was the intent of the party as manifested by his actions?”). See also Jeffrey F. Ghent, Annotation, *Waiver or Loss of Right to Privacy*, 57 A.L.R.3d 16, §3 (1974) (“A waiver of the right of privacy may be either express or implied. The right may be waived completely or only in part; it may be waived for one purpose and still be asserted for another; and it may be waived as to one individual, class, or publication, and retained as to all others . . . . Waiver depends upon what [he] intends to do, regardless of the attitude assumed by the other party. Therefore, to make out a case of implied waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose.”).

<sup>199</sup> E.g., *Guest v. Leis*, 225 F.3d 325, 333 (6th Cir. 2001) (“Home owners would of course have a reasonable expectation of privacy in their homes and in their belongings—including computers—inside the home . . . . [However,] [u]sers would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting.”). Cf. *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 872 F. Supp. 2d 369, 374 (D.N.J. 2012) (“Plaintiff may have had a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing.”).

MySpace profile.<sup>200</sup> Similarly, in *Pearce v. Whitenack*, a Kentucky police officer brought suit for invasion of privacy after he was suspended for posting about a police matter on Facebook.<sup>201</sup> The court ruled against the officer because he “ran the risk that even a posting or communication he intended to remain private would be further disseminated by an authorized recipient.”<sup>202</sup> In these cases, neither plaintiff gave express consent, yet the courts took an approach akin to Strahilevitz’s social network theory in concluding that the plaintiffs implicitly manifested their consent when they made disclosures on social media that would foreseeably disseminate to others.

The scope of consent may be limited for a particular purpose or group of people, as in *Multimedia WMAZ, Inc. v. Kubach*.<sup>203</sup> As such, consent is an ineffective defense for an invasion of privacy that exceeds the scope of consent.<sup>204</sup> Consent may also be revoked.<sup>205</sup> In *Virgil v. Time, Inc.*, Michael Virgil, a well-known

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<sup>200</sup> *Sandler v. Calcagni*, 565 F. Supp. 2d 184, 196–98 (D. Me. 2008).

Plaintiff asserts that six categories of statements in *Help Us Get Mia* reveal private facts and constitute an invasion of privacy for which liability should attach. Specifically, Plaintiff alleges that the following reveal private facts: 1) excerpts and summaries from her myspace.com webpage; 2) three statements related to her Jewish ancestry; 3) her enrollment at High Point University; 4) two statements regarding Plaintiff’s decision to seek professional psychological care or counseling; 5) Plaintiff’s transfer from one high school to another under a superintendent’s agreement; and 6) two statements regarding plastic surgery on Plaintiff’s nose.

*Id.* at 197. The Court ultimately rejected claims 1, 2, 3, and 5. *Id.* at 197–98.

<sup>201</sup> *Pearce v. Whitenack*, 440 S.W.3d 392, 400 (Ky. Ct. App. 2014).

<sup>202</sup> *Id.* at 402.

<sup>203</sup> *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. 1994).

<sup>204</sup> *See Canessa v. J.I. Kislack, Inc.*, 235 A.2d 62, 79–80 (N.J. Super. Ct. 1967) (quoting PROSSER, *LAW OF TORTS* 850–51 (3d ed. 1964)) (“If the actual invasion goes beyond the contract, fairly construed, as for example by alteration of the plaintiff’s picture, or publicity differing materially in kind or in extent from that contemplated, or exceeding the authorized duration, there is liability.”); *RESTATEMENT (SECOND) OF TORTS* § 829A(4) (1977) (“If the actor exceeds the consent, it is not effective for the excess.”).

<sup>205</sup> *RESTATEMENT (SECOND) OF TORTS* § 829A(5) (1977); *DOBBS ET AL.*, *supra* note 45, at § 108.

athlete, gave an interview with *Sports Illustrated* but withdrew his consent to publish the article when he learned the piece would not focus solely on him as a surfer but also include information about his personal peculiarities unrelated to his sport.<sup>206</sup> When the story ran, Virgil sued for public disclosure of private embarrassing facts.<sup>207</sup> The court ruled in Virgil's favor, reasoning even though Virgil voluntarily revealed private information to a reporter in anticipation of publication, his revocation prior to publication was effective to terminate the consent to disclosure to a larger, national audience.<sup>208</sup> However, *Virgil* is distinguishable from cases in which a private person self-publicizes and then deletes or removes private information because Virgil attempted to prevent the original release of private information before it was published, not curtail the spread of something already public. Once revealed online, there is no telling where that publicized information may flow.

Consent forms the basis of the privacy-proof plaintiff in that the privacy-proof person, acknowledging the public nature of the forum, does not exercise his discretion in tailoring the scope of consent, implicitly agreeing to the privacy invasion. Though prior consent does not necessarily indicate future consent, the privacy-proof plaintiff doctrine suggests that future constructive consent may be implied from prior conduct.

*B. Limited-Purpose Public Figures and Their Entrance  
Into the Public Eye*

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<sup>206</sup> *Virgil v. Time, Inc.*, 527 F.2d 1122, 1123–24 (9th Cir. 1975).

<sup>207</sup> *Id.* at 1123.

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Talking freely to a member of the press, knowing the listener to be a member of the press, is not then in itself making public. Such communication can be said to anticipate that what is said will be made public since making public is the function of the press, and accordingly such communication can be construed as a consent to publicize. Thus if publicity results it can be said to have been consented to. However, if consent is withdrawn prior to the act of publicizing, the consequent publicity is without consent.

*Id.* at 1127.



The law assumes those who have entered the public eye have constructively consented to heightened public scrutiny and a greater risk of reputational injury—more than the average, private person would have to bear—by virtue of their office, position, or status within the community. While this status undoubtedly puts public persons under a microscope, the status does not translate into consent to unfettered access to their private affairs.<sup>209</sup> In suits for libel and slander, however, the law imposes a greater burden on those in the public eye to prove the alleged defamation was made with a heightened level of culpability. Where the plaintiff is one with this special prominence, the aggrieved must show that the defamatory falsehoods were made with “actual malice,” defined as knowledge of or reckless disregard for the challenged statements’ falsity,<sup>210</sup> whereas a private person need only prove the defendant’s negligence.<sup>211</sup>

The Supreme Court first enunciated the actual malice standard as applicable to public officials in *New York Times Co. v. Sullivan*<sup>212</sup> and later extended it to public figures in *Curtis Publishing Co. v. Butts*.<sup>213</sup> In *New York Times Co. v. Sullivan*, the Montgomery, Alabama police commissioner filed a libel suit against *The New York Times* for publishing an editorialized advertisement placed by civil rights leaders which accused public

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A public figure does not . . . surrender all right to privacy. Although his privacy is necessarily limited by the newsworthiness of his activities, he retains the “independent right to have [his] personality, even if newsworthy, free from commercial exploitation at the hands of another.”

*Brinkley v. Casablancas*, 80 A.D.2d 428, 433 (N.Y. App. Div. 1981) (quoting *Booth v. Curtis Publ’g Co.*, 15 A.D.2d 343, 226, 228 (N.Y. App. Div. 1962)). See also *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (finding that “Mrs. Onassis was . . . a public figure and thus subject to news coverage . . . . Nonetheless, . . . [the conduct at issue] went far beyond the reasonable bounds of news gathering.”).

<sup>210</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>211</sup> RESTATEMENT (SECOND) OF TORTS § 580B (1977); TRAGER ET AL., *supra* note 36, at 172.

<sup>212</sup> *Sullivan*, 376 U.S. at 279–80.

<sup>213</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 160 (1975).

officials of suppressing the civil rights movement in Alabama.<sup>214</sup> The Court unanimously held that freedom of expression on issues of public importance is central to the meaning of the First Amendment and, in order to not chill this protected speech, the law requires those in positions of public trust to prove actual malice in order to prevail on a defamation claim regarding their official conduct.<sup>215</sup> Justice William J. Brennan Jr., who wrote the majority opinion in that case, later provided this definition of who is a public official in *Rosenblatt v. Baer*: “The ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have or appear to have the public substantial responsibility for or control over the conduct of governmental affairs.”<sup>216</sup> Then, in *Curtis Publishing Co. v. Butts*, the Supreme Court extended the actual malice standard to include public figures.<sup>217</sup> In a concurring opinion, Chief Justice Earl Warren reasoned that public figures play a similar “influential role in ordering society” as public officials do and possess the same communicative means to respond to criticism.<sup>218</sup> As with public

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<sup>214</sup> *Sullivan*, 376 U.S. at 256–58.

<sup>215</sup> *Id.* at 269.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

*Id.* at 279–80.

<sup>216</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

<sup>217</sup> *Curtis Publ’g Co.*, 388 U.S. at 155. The case involved an article in the *Saturday Evening Post* that accused the University of Georgia’s football coach of fixing a football game between his team and the University of Alabama’s football team. *Id.* at 135–36.

<sup>218</sup>

“Public figures,” like “public officials,” often play an influential role in ordering society . . . . Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues . . . .

*Id.* at 164 (Warren, C.J., concurring) (internal quotation marks and citations omitted).

officials, public figures must bear an “increased risk of injury from defamatory falsehood”<sup>219</sup> as a result of their voluntary exposure and entrance into the public sphere.

The definition of public figure was later refined to comprise two categories: all-purpose and limited-purpose public figures.<sup>220</sup> All-purpose public figures, primarily celebrities, “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes” and in all contexts.<sup>221</sup> Limited-purpose public figures, however, are public on a narrow set of issues or for a specific purpose,<sup>222</sup> “hav[ing] thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>223</sup> The Supreme Court distinguished these two classes of public figures in *Gertz v. Robert Welch*.<sup>224</sup> In *Gertz*, a magazine concocted a story that a police officer was framed and falsely convicted of murdering a Chicago youth as part of a communist conspiracy to discredit the police and that the victim’s family’s attorney, Elmer Gertz, was a instrument of this conspiracy.<sup>225</sup> The Supreme Court rejected the publisher’s argument that Gertz was a public figure and, thus, should have to prove the libelous story was published with actual malice.<sup>226</sup> While he was active in various civic groups, Gertz was not “atypical of the local population” in possessing fame or notoriety to render him a public figure for all purposes nor was he even involved in the police officer’s criminal prosecution.<sup>227</sup>

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<sup>219</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

<sup>220</sup> *Gertz*, 418 U.S. at 345. There is a third category: the involuntary public figure, “individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become ‘news.’” *Tillman v. Freedom of Info. Comm’n*, No. CV074044748S, 2008 WL 4150289, at \*9 (Conn. Super. Ct., Aug. 15, 2008). However, involuntary public figures are “exceedingly rare.” *Gertz*, 418 U.S. at 351.

<sup>221</sup> *Gertz*, 418 U.S. at 345, 350.

<sup>222</sup> *Id.* at 351.

<sup>223</sup> *Id.* at 354 (emphasis added).

<sup>224</sup> *Id.* at 345.

<sup>225</sup> *Id.* at 325–27.

<sup>226</sup> *Id.* at 351–52.

<sup>227</sup> *Id.*

Generally, the requisite elements of limited-public public figure status are: (1) there exists a public controversy and (2) an individual, possessing access and opportunity to do so, voluntarily injects himself into the dialogue, or “vortex.”<sup>228</sup> In *Gertz*, while there was a public controversy around a police officer shooting a civilian, Elmer Gertz had not engaged in the issue and was considered a private individual.<sup>229</sup> Since *Gertz*, the law has placed greater weight on the second prong than on the first; courts have even disregarded the public controversy requirement to say that “voluntary entry into a sphere of activity . . . is sufficient to satisfy this element of the public figure inquiry.”<sup>230</sup> Voluntary entry can be analogized to voluntary disclosure in the privacy-proof plaintiff context. Both are indicative of implicit consent and dispositive in determining whether the plaintiff bears a greater legal burden to retain his reputational or privacy rights.

#### IV. THE PRIVACY-PROOF PLAINTIFF: A PROPOSED LEGAL DOCTRINE

The premise of the privacy-proof plaintiff doctrine—that the law may deprive an individual of his right to privacy in cases where the individual publicly provided the information that formed the basis of the defendant’s tortious invasion—is grounded in the idea of constructive or implied consent. The privacy-proof concept takes the principle that one’s right to privacy “can be surrendered when facts are voluntarily made public” a step further.<sup>231</sup> This next step emphasizes that, due to the scope and pervasiveness of the self-elected disclosure, prior consent may constitute future consent

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 352.

<sup>230</sup> TRAGER ET AL., *supra* note 36, at 171. *E.g.*, *Chuy v. Phila. Eagles Football Club*, 431 F. Supp. 254, 267 (E.D. Pa. 1977) (“Where a person has . . . chosen to engage in a profession which draws him regularly into regional and national view and leads to ‘fame and notoriety in the community,’ even if he has no ideological thesis to promulgate, he invites general public discussion.”).

<sup>231</sup> Gerbis, *supra* note 33, at 25; *see also* RESTATEMENT (SECOND) OF TORTS § 892(2) (1979). “The right to privacy ceases upon the publication of the facts by the individual, or with his consent.” Warren & Brandeis, *supra* note 101, at 218.

on certain aspects of an individual's private life much like entering the public consciousness on a limited range of issues renders a once-private individual a public figure. This section will propose a framework for this common law rule, delineating its boundaries and providing an illustrative hypothetical to guide its application, and conclude with a brief discussion of Europe's right to be forgotten and similar theses for rethinking reputation management.

#### A. *The Rule and its Application*

A person may forfeit his right to privacy by offering private information about himself for public consumption in a forum that the actor should reasonably know is available to a wide audience. Consequently, that person could not recover for invasion of privacy where that once-private information is given further publicity or used in a way the plaintiff finds disagreeable. In other words, broad self-exposure negates a reasonable expectation of privacy, at least on the range of issues disclosed.<sup>232</sup> The burden would rest on the defendant to prove the following four elements: (1) the plaintiff, a private person,<sup>233</sup> voluntarily disclosed certain private or personal information about himself, (2) the disclosure was made in a public forum, (3) the exposure was pervasive, whether by its regularity or extremity, and (4) the defendant's

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<sup>232</sup> See *supra* Introduction; see generally Gerbis, *supra* note 33, at 19–20.

<sup>233</sup> This doctrine is concerned primarily with private persons as opposed to public officials or public figures because, while public figures do retain their right to privacy to a degree, they are subject to heightened scrutiny (i.e., the actual malice standard) by virtue of their notoriety. Scott J. Schackelford, *Fragile Merchandise: A Comparative Analysis of Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125, 143 (2012). For example, the Duke and Duchess of Cambridge successfully exercised their privacy rights in a suit against a French tabloid for photographing the former Kate Middleton topless with a telephoto lens from several hundred meters away. Scott Sayare, *French Court Rules Against Magazine on Royal Photos*, N.Y. TIMES, Sept. 18, 2012, [http://www.nytimes.com/2012/09/19/world/europe/french-court-rebukes-closer-magazine-for-photos-of-kate-middleton.html?\\_r=1&](http://www.nytimes.com/2012/09/19/world/europe/french-court-rebukes-closer-magazine-for-photos-of-kate-middleton.html?_r=1&). While in theory a public figure could qualify as privacy-proof, in practice it would take much more than simply over-sharing to surrender his right to privacy. An evaluation of this doctrine as it applies to public figures is beyond the scope of this Note and is more apt for a discussion on the right of publicity.

tortious invasion did not exceed the scope of what the plaintiff had previously disclosed publicly.

The first element of the defense, voluntary self-disclosure of private facts, is akin to determining whether the plaintiff (by electing to make available the information at issue) consented to the privacy invasion. Whether expressly given or implied by conduct, consent acts as a complete defense to the privacy torts.<sup>234</sup> Posting on the Internet falls squarely within the definition of apparent consent to public disclosure: “If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.”<sup>235</sup> Where the online community’s general consensus has been that the Internet and social media sites are in fact public forums, an individual who shares private information on those platforms would be reasonably understood as tacitly—if not, expressly—acknowledging that he is making a public disclosure.<sup>236</sup> Consent may be withdrawn,<sup>237</sup> but self-help may not be as readily available to a privacy-proof plaintiff because of the breadth and depth of the exposure.<sup>238</sup>

The second requirement of the defense is that the plaintiff must have made the voluntary disclosure in a public forum. Like the limited-purpose public figure, the privacy-proof plaintiff will have thrust himself into the public consciousness to become part of some dialogue.<sup>239</sup> The Internet is a public forum,<sup>240</sup> and social media websites in particular, are designed to create webbed communities of various second, third, and fourth degree connections and contact points.<sup>241</sup> Every major social media

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<sup>234</sup> *Supra* Part II; RESTATEMENT (SECOND) OF TORTS §§ 652F, 583 (1977); Prosser, *supra* note 34, at 419.

<sup>235</sup> RESTATEMENT (SECOND) OF TORTS § 892(2).

<sup>236</sup> Burkell et al., *supra* note 23, at 983.

<sup>237</sup> *E.g.*, Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 270–71 (3d Cir. 2013).

<sup>238</sup> Gerbis, *supra* note 33, at 22.

<sup>239</sup> Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); *supra* Part III.B.

<sup>240</sup> *Supra* Introduction.

<sup>241</sup> BOYD, *supra* note 16, at 5–8.

Social media is often designed to help people spread information, whether by explicitly or implicitly encouraging

website offers and advertises to its users various opt-in privacy settings wherein users may approve or reject connections, limit the visibility of their posts only to approved connections or “friends,” and even create classes of approved and non-approved users or viewers among their existing connections.<sup>242</sup> Therefore, unless the plaintiff has taken steps to limit the scope of his online presence by utilizing privacy settings, he will be deemed to have intended the postings to be publicly accessible and waived his ability to remain private. Even a baseline understanding of these websites would reasonably include knowing that there are privacy settings available. Notwithstanding opting in to a site’s privacy settings, one could reasonably argue that an audience of hundreds or thousands of “friends” or connections, even when limited by privacy settings, remains a public forum. However, privatizing one’s online presence may rebut this element by demonstrating a substantial step in limiting the accessibility of one’s postings and online content.

Third, the disclosures that would qualify the plaintiff as privacy-proof must have been pervasive, meaning the plaintiff posted on the subject matter with great frequency or, in the alternative, his posts or disclosures were so inflammatory that he was thrust into the spotlight as a result. For example, an over-

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the sharing of links, providing reblogging or favoriting tools that repost images or texts, or by making it easy to copy and paste content from one place to another. Thus, much of what people post online is easily *spreadable* with the click of a few keystrokes.

*Id.* at 12.

<sup>242</sup> *E.g.*, *Basic Privacy Settings & Tools*, FACEBOOK (Nov. 26, 2014, 4:55 PM), <https://www.facebook.com/help/325807937506242/>; *About protected and unprotected Tweets*, TWITTER (Nov. 26, 2014, 4:56 PM), <https://support.twitter.com/articles/14016-about-public-and-protected-tweets>; *Controlling Your Visibility*, INSTAGRAM (Nov. 26, 2014, 4:57 PM), <https://help.instagram.com/116024195217477>. Statistics vary as to how many users actually take advantage of privacy settings. In 2012, the Pew Research Center reported that 58% of users have private profiles. MADDEN, *PRIVACY MANAGEMENT ON SOCIAL MEDIA SITES*, *supra* note 27. In 2013, it was reported that 25% of Facebook users did not utilize privacy settings. Brian Honigman, *100 Fascinating Social Media Statistics From 2012*, HUFFINGTON POST (Nov. 29, 2012), [http://www.huffingtonpost.com/brian-honigman/100-fascinating-social-me\\_b\\_2185281.html](http://www.huffingtonpost.com/brian-honigman/100-fascinating-social-me_b_2185281.html).

sharer who uses Facebook as a personal diary or someone whose tweeting attracts widespread (likely, negative) notoriety could qualify as having this sort of online presence. As a matter of policy, we should not allow someone who acknowledges the open nature of a forum to post without restraint and then recover for invasion of privacy regarding the range of issues self-disclosed.

The benchmark for what may be considered pervasive should be evaluated by the prevailing expectations of the plaintiff's online demographic. Courts apply "contemporary community standards" in determining whether speech or expressive conduct is obscene, though, in the context of the Internet, circuit courts are split on whether these standards should continue to be measured by local community standards or reflect a national composite.<sup>243</sup> The concern with applying local community standards for speech on the Internet is that speakers "cannot tailor their message to the specific communities into which they disseminate their speech and truly must comply with the standards of the least tolerant community."<sup>244</sup> The contemporary community standards approach reflects that our regard for what is obscene evolves over time, as do our conceptions of privacy. Even though social media users are not confined by computer code to only interact with their own demographic, their conduct, attitude, and evaluation of others are likely driven by their own in-group dynamics and norms. Therefore, it would be logical to evaluate reactions to the disclosure of private matters based on their community's contemporary expectations.

The scope of the defendant's invasion is the final piece to the privacy-proof defense. Consent to an invasion of privacy is limited by "the language or acts by which it is manifested in the light of the surrounding circumstances"<sup>245</sup> For the defense to stand, the defendant's tortious invasion cannot exceed what the plaintiff had

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<sup>243</sup> See *United States v. Little*, 365 F. App'x. 159 (11th Cir. 2010) (applying local contemporary community standards); *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009) (applying national contemporary community standards); E. Morgan Laird, *The Internet and the Fall of the Miller Obscenity Standard: Reexamining the Problem of Applying Local Community Standards in Light of a Recent Circuit Split*, 52 SANTA CLARA L. REV. 1503 (2012).

<sup>244</sup> *Kilbride*, 584 F.3d at 1251.

<sup>245</sup> RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977).



made publicly available. It would be most prudent to limit the conferral of privacy-proof status to particular subject matters. Similar to *Liberty Lobby v. Anderson*'s rejection of an all-or-nothing approach to the libel-proof doctrine,<sup>246</sup> it would be illogical and unreasonable to extinguish a plaintiff's right to privacy in every facet of life simply as a result of his unreserved nature on certain subjects.

In practice, the privacy-proof plaintiff defense would be raised at trial, as opposed to on a pre-trial motion for summary judgment, because it necessarily involves questions of fact concerning the openness of the plaintiff's forum and, more importantly, the frequency or instigative nature of the disclosures. The defendant would have the burden of proving, again, that the plaintiff voluntarily revealed in a public forum information that his right to privacy would typically protect, the dissemination was unbridled by available privacy settings and was done in such a manner as to draw significant attention either by its frequency or provocativeness, and that the defendant's alleged invasion did not go beyond the content of the plaintiff's prior voluntary, public disclosures.

*B. Chai Yan Leung Revisited: An Illustrative Hypothetical*

Recall Chai Yan Leung, the Chief Executive of Hong Kong's daughter who posted about her expensive purchases funded by the Hong Kong taxpayers.<sup>247</sup> While Leung thrives on attention, she is not too pleased at the American press' reaction to her unapologetic, lavish lifestyle and feels she is being maligned on the Internet. Leung's attorney advises her that because her Facebook post involved a matter of public interest—the manner in which taxpayer money was being spent—the press is protected under the fair report privilege.<sup>248</sup> However, Leung points out that

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<sup>246</sup> *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986).

<sup>247</sup> *Supra* Introduction.

<sup>248</sup> See *Salanzo v. N. Jersey Media Group*, 201 N.J. 500, 520 (2010) (discussing the fair report privilege); TRAGER ET AL., *supra* note 36, at 188 (discussing same).

the media coverage has had less to do with her expensive Lance Crawford necklace, but rather has evolved into investigative profiles of Leung, her outrageous posts, and extravagant lifestyle. She files a lawsuit in a California federal court for tortious public disclosure of embarrassing private facts and false light, claiming various websites and individual commenters domiciled in California invaded her privacy by delving into her private affairs and criticizing her for her material possessions.<sup>249</sup> Leung demands monetary damages and injunctive relief, specifically that the articles be removed. At trial, the defendants assert the privacy-proof plaintiff defense, stating that Chai Yan Leung is privacy-proof with respect to her online presence, Facebook postings, and materialistic lifestyle, and therefore could not have suffered an injury from the alleged invasion of privacy.

Defense counsel would likely be successful in proving that Chai Yan Leung is a privacy-proof plaintiff by proving the doctrine's four elements. First, Leung is a private person and, while the possession of certain material items could be considered a private fact, Leung inflamed the citizens of Hong Kong when she actively flaunted her wealth by posting pictures of her expensive purchases funded by taxpayer dollars.<sup>250</sup> There is no evidence to suggest these photos were taken or that the posts were made without Leung's consent. Though Leung's father is a public official, a court would be hard pressed to consider her a public figure. In California especially, children of public officials and public figures are considered "off-limits" and not expected to have to endure the attention that their parents do by virtue of their positions.<sup>251</sup>

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<sup>249</sup> In *Lugosi v. Universal Pictures*, the Supreme Court of California adopted Prosser's four privacy torts. 603 P.2d 425, 428 (Cal. 1979). Under 28 U.S.C. § 1332(a), a federal court has subject matter jurisdiction over a diversity action between a citizen of a State and a citizen of a foreign country where the amount in controversy exceeds \$75,000. California state law would be applied in this case pursuant to 28 U.S.C. § 1652 and *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

<sup>250</sup> Van, *supra* note 6.

<sup>251</sup> Laura Olson, *Paparazzi Bill Passes In California, Protecting Children Of Public Figures*, HUFFINGTON POST (Sept. 25, 2013), [http://www.huffingtonpost.com/2013/09/25/paparazzi-bill-passes\\_n\\_3991404.html](http://www.huffingtonpost.com/2013/09/25/paparazzi-bill-passes_n_3991404.html).

Second, Leung's Facebook posts were made in a public forum and clearly intended for public consumption. Prior to this incident, her profile was not protected and her posts spoke directly to Hong Kong citizens—Leung remarked that her expensive necklaces, dresses, and purses were “funded by all you [Hong Kong] taxpayers.”<sup>252</sup>

Third, Leung's numerous posts about her spending habits allegedly funded by taxpayer dollars were pervasive in their extremity. By the tone of the posts and the manner in which Leung responded to criticism, the posts were meant to show off and provoke.

Fourth, the alleged invasion of Leung's privacy did not extend beyond comment and criticism of the material she posted on her Facebook. Under existing privacy law, Leung may prevail by claiming she did not consent to the use or publication of what she expected would remain private (i.e., her material possessions).<sup>253</sup> However, having satisfied all four elements of this proposed doctrine, Chai Yan Leung would be dubbed privacy-proof within the context of the material she posts about her extravagant lifestyle and spending habits.

### C. *Privacy-Proof Status Versus the “Right to Be Forgotten”*

In 2014, the Court of Justice of the European Union ruled that, under an EU directive regarding the protection of personal data, individuals have the “right to be forgotten,” the right to request Internet search engine operators remove information from search results that is “inaccurate, inadequate, irrelevant, or excessive.”<sup>254</sup>

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<sup>252</sup> Van, *supra* note 6.

<sup>253</sup> *Supra* Part III.A.

<sup>254</sup> EUROPEAN COMMISSION, FACTSHEET ON THE “RIGHT TO BE FORGOTTEN” RULING (C-131/12) 2, available at [http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet\\_data\\_protection\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf). See also Press Release No 70/14, Judgment in Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, Court of Justice of the European Union (May 13, 2014); *Last Week Tonight with John Oliver: Right To Be Forgotten* (HBO television broadcast May 19, 2014),

This thesis that one should be able to scourge his online footprint is not uncommon. Jeffrey Rosen argues that the Internet's archival ability is threatening to "our ability to control our identities; to preserve the option of reinventing ourselves and starting anew; to overcome our checkered pasts," and that we should be able to "wipe [our] reputation slates clean."<sup>255</sup> Jonathan Zittrain has suggested we should allow people to declare "reputation bankruptcy" and purge certain sensitive or damaging aspects of their online presence.<sup>256</sup> These ideas are persuasive and may very well have a place in privacy law. They do not, however, necessarily undermine the concept of being privacy-proof. While those theories emphasize the value in shedding online baggage, the EU's right to be forgotten is meant for the everyman while the privacy-proof doctrine—like the libel-proof doctrine—"is a limited, narrow one,"<sup>257</sup> applicable only to those who have distinctly thrust themselves into the public spotlight online and so long as their disclosures stay relevant in the view of their respective audiences.

#### CONCLUSION

Spurred by changes in the quality and focus of journalism, Samuel Warren and William Brandeis observed that case law reflected a pressing need for a formal affirmation of a right to privacy.<sup>258</sup> A right to privacy was not written into the Constitution, yet the subtext of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments suggest that they were ratified in that very interest.<sup>259</sup> Modern privacy law continued to develop with that imprimatur, prompting William Prosser to bring the law in line with the prevailing views of the courts and public policy by offering the four privacy torts as a way of validating these

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available at <https://www.youtube.com/watch?v=r-ERajkMXw0>.

<sup>255</sup> Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES, July 21, 2010, [http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0).

<sup>256</sup> *Id.*

<sup>257</sup> *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976).

<sup>258</sup> *Warren & Brandeis*, *supra* note 101, at 196.

<sup>259</sup> *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965).

principles.<sup>260</sup> Each of these advancements in the law was driven by our changing perceptions of “man’s spiritual nature”<sup>261</sup> and our society’s insistence on its protection. The privacy-proof plaintiff doctrine reflects our evolving understanding of the right to privacy and who and what it is meant to protect in our “global village.”<sup>262</sup>

The Internet now demands that the law reevaluate the right to privacy. Social media sites, in particular, have transformed our interpersonal interactions and provided us each with a platform to amplify our voices and reach further to build connections. Yet it has also provided an opportunity to devalue and disclaim our privacy rights by making it easier to share our private, personal information with a large audience. Our online presence has become an extension of our physical self. As such, it should be governed by the same privacy principles as our offline presence. The privacy-proof plaintiff doctrine is premised on a reasonable expectation of privacy that is contingent upon the rights holder maintaining a certain degree of discretion in choosing what he makes public. Where a private person voluntarily discloses certain private or personal information about himself in a public forum, on a publicly accessible social media page or anywhere else in the public eye, he cannot then recover under one of the four privacy torts if the self-exposure was so outrageous or persistent in a way that would violate his demographic in-group social media or online norms. Even if the privacy-proof plaintiff doctrine reaches the same outcome as the traditional consent defense would, it serves as a useful, workable framework for analyzing the extent and effect of disclosure, especially on the Internet, where courts have not yet provided a bright-line rule. The privacy-proof plaintiff doctrine represents the caveat for maintaining a right to privacy on the Internet in that it simply requires each of us to meet the same community expectations for consent to the disclosure of private, personal information as would be required to enjoy one’s rights in the “real world.”

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<sup>260</sup> Prosser, *supra* note 34, at 389.

<sup>261</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>262</sup> SOLOVE, *supra* note 18, at 33.