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A Computer with a View: Progress, Privacy, and Google

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A Computer with a View

PROGRESS, PRIVACY, AND GOOGLE

INTRODUCTION

> [T]he existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, . . . [or] any other modern device for recording or reproducing scenes . . . .[1]

> [Is it the case that] any individual, by appearing upon the public highway, or in any other public place, makes his appearance public, so that any one may take and publish a picture of him as he is at the time[?] What if an utterly obscure citizen, reeling along drunk on the main street, is snapped by an enterprising reporter, and the picture given to the world? Is his privacy invaded?[2]

The authors of the quotations above, Samuel Warren, Louis Brandeis, and William Prosser, were not referring to the Internet when they described the increasing invasion of modern devices into personal privacy, but their words are still poignant for many citizens of a world in which novel technology seems to sprout silently, rapidly, and endlessly. The generation gap has reappeared in digital form, between the youth culture's acceptance of camera phones, email, Internet video, online chat rooms, and computerized socializing and analog-loving parents. One area of great concern to the older generations is personal privacy, which many note has been threatened (if not eviscerated) by the recent proliferation of private surveillance technologies and the Internet's capability to provide unlimited access to that information.[3] Much scholarship on surveillance technology and the Internet focuses on the frightening aspects of the phenomenon and its dystopic effects, culminating in a call to establish new legislation to prevent invasions of individual privacy,[4] to modify tort

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[1] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206 (1890).

[2] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 394 (1960).

[3] *See, e.g.*, James X. Dempsey, *Digital Search & Seizure: Updating Privacy Protections to Keep Pace With Technology*, 902 PLI/PAT 407, 411-12 (2007); Clifford S. Fishman, *Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media*, 72 GEO. WASH. L. REV. 1503, 1505-07 (2004); Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 BERKELEY TECH. L.J. 1085, 1091-92 (2002).

[4] *See, e.g.*, Camrin L. Crisci, Note, *All the World Is Not a Stage: Finding a Right to Privacy in Existing and Proposed Legislation*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 207, 239-43 (2002); Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms In Cyberspace*, 18 CARDOZO ARTS & ENT. L.J. 469, 500 (2000); Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 755-57 (1999).

law to bring anticipated harms to privacy within reach,[5] or to enshrine a new right of privacy into the Constitution or state law.[6] These solutions, however, are sometimes problematic because they often assume that people value personal privacy homogenously.[7] This assumption proves increasingly false in a world where some people enjoy broadcasting their entire lives through an Internet web camera and others relish the opportunity to publish embarrassing photographs of themselves on the World Wide Web.[8]

Protection against invasions of privacy may be formal or physical.[9] Formal protections are those value- or standards-based social conventions that tell us, for example, not to stare at disabled people and to expect to vote by secret ballot.[10] Physical protections are the logistical obstacles that prevent society from gathering information about an individual, such as locked doors or password-protected hard drives.[11] Notions of what types or levels of privacy should be expected by reasonable people depend on both the goals of the formal protections and the possibilities of the physical protections.[12] New technologies do not necessarily reshape this basic interdependence. They either weaken or bolster the pre-existing physical protections such that we must reexamine the social support and desire for the formal ones to maintain the status quo.

This Note contends that the advent of Google Street View, a web-based surveillance application, provides an excellent vantage point from which to evaluate the formal and physical protections of legal privacy in the United States. The technology behind Street View has long been regarded by legal academics, social scientists, and philosophers as synonymous with unchecked power and coercion, yet the strong public

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[5] *See, e.g.*, Joseph Siprut, *Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places*, 33 PEPP. L. REV. 311, 322-33 (2006); Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 991-92 (1995).

[6] *See, e.g.*, Matthew C. Keck, *Cookies, the Constitution, and the Common Law: A Framework for the Right of Privacy on the Internet*, 13 ALB. L.J. SCI. & TECH. 83, 95 (2002); Lin, *supra* note 3, at 1107-18.

[7] Anita L. Allen is a notable exception to this generalization. Her work discusses exactly this wide divergence in privacy valuations, and suggests forcing privacy on certain populations to protect them. Allen, *supra* note 4, at 728-29.

[8] *See infra* notes 99-104 and accompanying text. For instance, experts currently estimate that over 100 million people maintain personal web pages on social networking sites where everything and anything can be published. Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 THE LABOR LAWYER 19, 19 (2007).

[9] Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 27, 43 (1995) ("[P]rivacy can be protected in two ways, . . . the formal conditions of privacy and the material conditions.").

[10] *Id.* at 43.

[11] *Id.* at 43.

[12] For a fuller explanation of the formal/material dichotomy in privacy protection, *see* Shawn C. Helms, *Translating Privacy Values With Technology*, 7 B.U. J. SCI. & TECH. 288, 315-16 (2001). Anthropologists have also concluded that "privacy is minimal where technology and social organization are minimal." DECKLE MCLEAN, PRIVACY AND ITS INVASION 11 (Praeger 1995).

backlash that scholarship predicted has not occurred yet in America.[13] Thus, Street View represents a unique watershed moment in modern American privacy discourse because it has spurred only a single lawsuit and mild public protest, yet the technology it represents is the subject of hundreds of pages of legal commentary.[14] Could it be that the digital generation gap operates in conjunction with another ideological gap already at work? If so, how should that gap be addressed or integrated into privacy law's current schema?

Part I of this Note provides a background of Street View's inception and technology, and explains why it is the ideal event through which to unearth how American society protects personal privacy. Part I concludes by arguing that both the growing population that lives a large part of life online and the development of industries dedicated to policing online reputations demonstrate an understanding that online image management is a crucial aspect of how people present themselves to the modern world. Part II of this Note explores the strengths and weaknesses of a privacy tort claim against Street View and Google's available defenses to such a claim. Part III will pick up the notion of online image management expounded in Part I, and will suggest that this concept forms the nucleus of a new branch of privacy that is already recognized by most Internet users. This Note will conclude by suggesting several legal and economic reforms that could be implemented if we determine as a society that the privacy values laid bare by Street View should be protected.

I. STREET VIEW: WHAT IT IS AND WHY WE SHOULD CARE

Street View is an application embedded in Google's standard map platform that allows the user to view images of selected street façades as if he or she was literally standing on the street of the target address.[15] Despite its very recent origins, Street View has become one of

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[13] Canada, by contrast, is debating whether Street View invades individuals' privacy on a national level. Mathew Ingram, *Google: We Hear (and See a Fuzzy Rendition of You), Canada*, GLOBE & MAIL, Sept. 24, 2007. European privacy law may pose hurdles to Street View's arrival there as well. Struan Robertson, *Google's Street View Could Be Unlawful in Europe*, OUT-LAW.COM, May 6, 2007, http://www.out-law.com/page-8116. In response, Google will alter Street View images taken in Europe to blur out or block faces and license plates. Robert McMillan, *Google Making Street View Anonymous*, PCWORLD.COM, Nov. 30, 2007, http://pcworld.com/article/id, 140164-pg,1/article/html. Google's plans for a version of Street View in the United Kingdom have been questioned by the government's Information Commissioner and met with demands for privacy guarantees. David Derbyshire & Arthur Martin, *Google Spies at Your Door: Privacy Row as Web Giant Starts Sending Cameras Down Every Street*, DAILY MAIL, July 11, 2008. The lone legal complaint filed against Google Street View has come from the United States and is discussed in Part II.A and *infra* note 116.

[14] Ironically, Google itself is attempting to lead the discussion on appropriate international online privacy standards. Ingram, *supra* note 13. International concerns about Google's storage of users' web search data has provoked the U.S. Federal Trade Commission and the European Union to look into Internet privacy issues in the coming months. *Id.*

[15] Posting of Stephen Chau to Google Lat Long Blog, http://google-latlong.blogspot.com/2007/05/introducing-street-view.html (May 29, 2007, 10:11 EST).

Google's most popular and most critiqued features.[16] Street View's scope continues to expand; since its introduction, it has grown to include over 170 cities and their surrounding areas across the United States.[17] Street View represents both the best and the worst of the role that online images play in modern society. On the one hand, there is significant potential for images of Street View's ilk—pictures taken in public of unaware subjects—to wreak havoc on an unwitting subject's life, and this potential has already been realized in some cases.[18] Yet on the other hand, Street View's generally warm acceptance by the public signals a new understanding of privacy, one in which people expect and apparently approve of being surveyed by a benign private actor.[19] Thus, regardless of what one thinks of its appropriateness or utility, Street View is a key development in privacy law that warrants a new accounting of why we protect privacy in the first place, and how violations of privacy caused by novel technologies should be treated under the law.

A. *Development, Scope, and Public Response*

Google's product manager announced the arrival of Street View on May 29, 2007, describing it as a vehicle to "further enhance [users'] ability to understand the world through images . . . by viewing and navigating within 360-degree scenes of street-level imagery."[20] Initially available in only five U.S. cities, Street View has since grown to cover the downtown areas of over 170 U.S. cities in approximately sixteen months.[21] Google has also launched Street View in France, Italy, Spain, Australia, and Japan.[22]

Street View works by allowing the user to click on an intersection of the online Google map, which opens a smaller window showing composite digital images of the street façade of that intersection.[23] The images on Street View are gathered by a fleet of automobiles that Google deploys

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[16] The web post through which Google first announced its launch of the Street View application was one of Google's five most-often read posts in 2007, and the phrase "street view" was one of the year's most popular keyword searches. Posting of Carter Maslan to Google Lat Long Blog, http://google-latlong.blogpost.com/2007/12/best-of-blog.html (Dec. 23, 2007, 18:20 EST).

[17] Google Maps, http://maps.google.com/ (click "Street View" button and click on map; move map around to see where Street View is available) (last visited Oct. 15, 2008).

[18] *See infra* Part I.B.

[19] *See infra* notes 99-104 and accompanying text.

[20] Chau, *supra* note 15.

[21] Google Maps, *supra* note 17. To date, only one U.S. city, North Paul, Minnesota, has not allowed Street View to film its streets, and Google complied. Lora Pabst, *North Oaks Tells Google Maps: Keep Out - We Mean It*, STARTRIBUNE.COM, May 31, 2008, http://www.startribune.com/lifestyle/19416279.html.

[22] Google Maps, *supra* note 17.

[23] Brady Forrest, *Where 2.0: Google Launches Streetside View with Tech from ImmersiveMedia* (May 29, 2007), http://radar.oreilly.com/2007/05/where-20-google-launches-stree.html.

with varying regularity[24] on the streets of target cities, each equipped with a special 360-degree camera that snaps pictures at specified intervals.[25] The cameras produce overlapping pictures that are blended together to create the impression of a seamless panoramic view of a street.[26] Navigational arrow buttons let the user "walk" down a street in a particular direction and rotate the view of the camera window, giving the user the sense of turning around 360 degrees on the street.[27] Vertical viewing (both down and up) is now available in all Street View cities,[28] and Google has augmented the Street View options for its most recently added cities by including a vertical zoom that allows users to pan up the façades of fifty-story skyscrapers.[29] Image quality also varies by city; for example, San Francisco, San Diego, Phoenix, Tucson, and parts of Chicago were filmed in high resolution, giving the user increased zooming without sacrificing image clarity.[30] As a result, even faces, fine print on fence signs,[31] and products on a shelf inside a store[32] are clearly visible.

Google's rollout of Street View is the latest escalation in the Internet "mapping war," in which Internet behemoths such as Microsoft, Google, Yahoo!, and MapQuest have engaged for the last few years.[33] According to one industry market analyst, the fight for digital mapping supremacy has transformed online mapping into "a microcosm of the search space, with the major companies competing for users and

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[24] Although the images on Street View are not currently live, Google executives have expressed interest in adding live video feeds to the application in the future. Thomas Claburn, *Google Adds Street-Level Pictures to Google Maps*, INFORMATIONWEEK.COM (May 29, 2007), http://www.informationweek.com/showArticle.jhtml?articleID =199703115.

[25] Charlie White, Google Streetview Camera Car Fleet Set to Invade America (July 17, 2007), http://gizmodo.com/gadgets/eye-on-you/google-streetview-camera-car-fleet-set-to-invade-america-279222.php. *See also* Daniel Terdiman, *The Camera Behind Google's Street View*, CNET NEWS.COM, May 31, 2007, http://news.com/8301-10784_3-9724604-7.html. Google apparently used its own proprietary technology to create the highest resolution pictures of the San Francisco Bay area. *Id.*

[26] Elinor Mills, *Google Now Zaps Faces, License Plates on Map Street View*, CNET NEWS.COM, Aug. 22, 2007, http://www.news.com/8301-10784_3-9764512-7.html.

[27] *See* Forrest, *supra* note 23 (showing screen shot of the Street View interface and directional buttons).

[28] Posting of Jiajun Zhu to Google Lat Long Blog, http://google-latlong.blogspot.com/2008/06/street-view-turns-1-keeps-on-growing.html (June 10, 2008, 9:57 EST).

[29] Posting of Stephane Lafon to Google Lat Long Blog, http://google-latlong.blogspot.com/2007/10/more-street-view-cities-to-explore.html (Oct. 9, 2007, 5:46 EST).

[30] *See* Posting of Stephen Chau to Google Lat Long Blog, http://google-latlong.blogspot.com/2007/08/more-street-view-cities.html (Aug. 7, 2007, 6:13 EST); Lafon, *supra* note 29.

[31] Google Street View Gallery, http://streetviewgallery.corank.com/tech/framed/great-Google-Street-View-Resolution (click on Street View character) (last visited Sept. 5, 2008).

[32] Post, High Res Google Street View, http://streetviewgallery.corank.com/tech/framed/high-Res-Google-Street-View (click on Street View icon and zoom in to closest level) (last visited Sept. 5, 2008).

[33] Elise Ackerman, *Search Giants Battle over Mapping*, SAN JOSE MERCURY NEWS, May 29, 2007; *see also* Kevin Werbach, *Sensors and Sensibilities*, 28 CARDOZO L. REV. 2321, 2335-36 (2007) (detailing the acquisition of mapping software by various search engine companies).

innovation . . . ."[34] Given that Microsoft has offered a comparable web application, "Street-Side," since February 2006,[35] and Amazon.com supported static images of streets in twenty-two cities in its now-defunct search service, "A9," for a year and a half,[36] Google's addition of Street View might not have attracted much attention outside the industry were it not for a tabby cat.

The day after Street View's launch, an Oakland resident, Mary Kalin-Casey, entered her own home street address into the program, and was more than surprised to recognize her tabby cat lounging on a perch near the window of her second-story apartment in the image associated with her street corner.[37] While Casey supported online mapping in general, Street View "literally g[ave] [her] the shakes" because she felt it had invaded her privacy to some degree.[38] Responses to Kalin-Casey's complaint ranged from sympathetic and supportive, to those who labeled her insane, paranoid, or a "deluded cat fancier."[39] Kalin-Casey's story was quickly picked up by the New York Times the next day and Slate.com within a week.[40] The fight over Street View's purported invasions of privacy had begun.

Kevin Bankston is another prominent voice in the debate over whether Street View's images invade the privacy of their subjects. Bankston, a staff attorney at an Internet privacy advocacy group, was caught on camera a few years ago by Amazon.com's obsolete A9 mapping platform while smoking a cigarette outside his office—a habit he had been successfully hiding from his family for some time.[41] After A9's demise, Bankston might have thought his days in front of the camera were over, but ironically Street View caught him again, this time on a walk to work.[42] Bankston was one of the first to test Street View's

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[34] Ackerman, *supra* note 33 (quotation marks omitted) (quoting Greg Sterling of Sterling Market Intelligence). In 2007, Google also introduced images of the night sky (capable of zooming in on constellations, our galaxy's planets, the moon, and individual stars) into its downloadable map platform, Google Earth, complete with imagery integrated from the Hubble Space Telescope. Google Press Center, Introducing Sky in Google Earth: New Feature in Google Earth Enables Users to Explore Space from Their Computer (Aug. 22, 2007), http://www.google.com/intl/en/press/pressrel/earthsky_20070822.html.

[35] Michael Arrington, Killer New Live.com Service: Street-Side, TechCruch.com (Feb. 28, 2006), http://www.techcrunch.com/2006/02/28/killer-new-livecom-service-street-side/.

[36] Claburn, *supra* note 24 (describing A9 features). Amazon removed the street-level pictures from A9 as part of the rollback of its "flashy search engine" project in October 2006, roughly 18 months after its launch in January 2005. Seattle24X7.com, What's Brewing: A-9 R-I-P!, (Oct. 9, 2006), http://www.seattle24x7.com/brewing/brewing100906.htm.

[37] Miguel Helft, *Google Zooms In Too Close for Some*, N.Y. TIMES, June 1, 2007, at C1.

[38] Xeni Jardin, *Google Maps is Spying on My Cat, Says Freaked out BB Reader*, BoingBoing.net (May 30, 2007), http://boingboing.net/2007/05/30/google-maps-is-spyin.html.

[39] *Id.*

[40] Helft, *supra* note 37; Michael Agger, *Google Spy*, SLATE, June 8, 2007, http://www.slate.com/id/2168127/fr/rss/.

[41] Elinor Mills, *Cameras Everywhere, Even in Online Maps*, CNET NEWS.COM, May 30, 2007, http://www.news.com/Cameras-everywhere,-even-in-online-maps/2100-1038_3-6187556.html; *see also* Helft, *supra* note 37.

[42] Posting of Kevin Poulsen to Wired Blog Network, http://blog.wired.com/27bstroke6/

procedure for requesting removal of an image and was shocked to find it was arguably more invasive than being caught on Street View itself.[43] Google's removal procedure requirements demanded that a user submit his legal name, email address, a sworn statement, and a copy of a valid photo ID in order to secure "temporary" removal of an image.[44]

Thanks to the fast-moving blog community, Bankston's outrage was not in vain. Bankston provided the website Wired.com with the letter he received from Google detailing its removal requirements, and within a few hours after Wired.com posted a piece on Bankston's story, Google "blinked."[45] The company's product counselor telephoned Bankston to tell him that Google had officially changed its Street View removal policy, which now asks users only for their names and the location of the disputed image in Street View, and even promises not to use that information for any other purpose.[46] Google's policy also now provides for the removal of a person's face or license plate number upon request.[47]

Street View has unquestionably become a powerful player in the online mapping war since its introduction in May 2007. As some individuals have already discovered, being captured by Street View can lead to personal unrest and plenty of unwanted Internet fame.[48] Nonetheless, by continually expanding the number of cities it covers, increasing its image resolution capacity, and adding sophisticated vertical pan/zoom features, the application's popularity will surely only increase in the future.[49] Therefore, the effects of Street View's scope

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2007/06/eff_privacy_adv.html (June 11, 2007, 12:41 EST).

[43] Posting of Kevin Poulsen to Wired Blog Network, http://blog.wired.com/27bstroke6/2007/06/want_off_street.html (June 15, 2007, 2:42 EST) ("Apparently you have to jump through more hoops than a trained seal . . . . Of course, if the choice is giving Google a copy of my driver's license or leaving the picture up, I'll take the latter . . . . It's worth noting that there's no apparent policy limiting Google's use of the information I'm being asked to provide them") (quotation marks omitted) (quoting Kevin Bankson).

[44] *Id.* (reprinting Google's letter to Bankston in response to his removal request).

[45] *Id.*

[46] *Id.*; Google Maps: Report Inappropriate Image, http://maps.google.com, (locate a Street View image, click "Street View Help," click "Report Inappropriate image") (last visited Sept. 5, 2008). The actual removal request submission form provides the following choices as reasons for flagging a particular image: (1) "This image contains inappropriate content"; (2) "This image infringes on my privacy"; (3) "This image present personal security concerns"; and (4) "Other (please describe below)." *Id.*

[47] Mills, *supra* note 26. However, as discussed *infra* in Part I.B, post-hoc removal of a Street View image solves only a very small portion of the problems it may have caused.

[48] *See infra* Part I.B.

[49] For example, teenagers in the United Kingdom are already using Google Earth (into which Street View is embedded) to locate houses with insecure swimming pools to arrange mass "dipping" events, leaving pool owners enraged. Luke Salkeld, *The Google Earth Gatecrashers Who Take Uninvited Dips in Home-owners' Swimming Pools*, THE DAILY MAIL, June 18, 2008. Home owners have woken up to find strangers in their pools or have come home to find their pools full of empty beer cans. *Id.*

have practical and theoretical consequences for privacy law that must be considered.[50]

B. *Practical and Theoretical Significance*

Google responds to the claim that Street View invades the privacy of the people it photographs by equating Street View's function with that of a live person walking down a street and looking around and up at her surroundings.[51] Thus, Google contends, photographing and publishing images of street façades does not violate the privacy of its subjects any more than a regular citizen violates her neighbor's privacy when she walks down the road to get a newspaper. While Google's assertion that Street View is equivalent to what any person could view while walking down the street[52] appears accurate at first glance, it seems hollow in light of certain physical aspects of Street View's technology. For example, Google's recent addition of a fifty-foot vertical pan/zoom option in certain metropolises adds extra-human viewing capacity to the conventional view, a fact which Google emphasized as a selling point in its own press release announcing the arrival of this feature.[53] Street View users have also found numerous images that do contain content invisible, or not very visible, to the naked eye on the street. For example, one blogger found pictures of the interior of the Brooklyn Battery Tunnel in New York City, an area off limits to cameras since September 11, 2001.[54]

Furthermore, the fact that Street View publicizes moments in time that might otherwise go completely unnoticed also contradicts Google's position that Street View reveals nothing more than does a stroll around town. For instance, images of women unknowingly baring their undergarments, women sunbathing in vulnerable positions, and men entering strip clubs or erotic shops have already become the subject of significant Internet attention.[55] A few photographs even seem to portray

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[50] Another example of tension between a Google service and privacy law has recently emerged from the U.S. Justice Department's issuance of subpoenas to Google and other Internet search providers regarding individuals' Internet search queries. Dempsey, *supra* note 3, at 442-45. Over Google's objection, the government requested records of both the text entered by a user into Google's search engine and the resulting URLs the engine provided. *Id.* at 443-44. While the court did allow the government to obtain sample URLs from Google's search index, it drew the line at search text in large part for concern "about the privacy of Google's users." *Id.* at 443.

[51] Helft, *supra* note 37, at C1. According to a Google company representative, "Street View only features imagery taken on public property . . . [which] is no different from what any person can readily capture or see walking down the street." *Id.*

[52] For convenience, this Note will refer to the view that a person experiences while physically walking down the street as the "conventional" view.

[53] Lafon, *supra* note 29. As this Google software engineer noted, "[a]s an added bonus, the images [of newly-added cities] are all in high resolution. But wait! There's more. Ever wish you could pan up to the very top of a 50-story skyscraper using Street View? Well, prepare yourself for some serious sightseeing . . . . (Remember to use caution if you have a fear of heights!)." *Id.*

[54] Bryan Eisenberg, *How Does Google's New 'Street View' Get Illegal Pics?* (May 31, 2007), http://www.grokdotcom.com/2007/05/31/how-does-googles-new-street-view-get-illegal-pics/.

[55] Agger, *supra* note 40; Helft, *supra* note 37.

criminal acts in progress, such as a man scaling a fence with a set of lock-picks dangling from his pocket[56] and a man physically attacking another man on the street.[57] Other images that reflect potentially sensitive social issues include a man wearing a t-shirt displaying the Communist flag,[58] a group of people praying on the sidewalk,[59] and a woman entering a portable HIV testing center.[60] Street View has not only memorialized these passing details, but encourages "the scrutiny to be extended indefinitely."[61]

It might be argued that all of the sensitive images described above could have been seen by a live witness at the same point in time the Street View cameras filmed them. However, one crucial (if obvious) difference between a live person observing the events above and Street View is reproducibility, which, when combined with the power of the 360-degree camera to capture all views simultaneously, is the true indicator of Street View's impact. While an observer of any one of these events could describe it to a third party, he is unlikely to be able to recall the event perfectly via photographic evidence to an unlimited audience as often as he likes.[62] Accordingly, Street View does much more than provide panoramic views that a live person would experience walking down the street. It also simultaneously prepares an image for unlimited distribution, reproduction, downloading, and other secondary uses.[63] Also, Street View provides a full, simultaneous 360-degree view of an area, which, without some dizzying head snapping, could not be accomplished by a human viewer. In this sense, Street View is a lot

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[56] Ryan Singel, *Request for Urban Street Sightings: Submit and Vote on the Best Urban Images Captured by New Google Maps Tool*, Wired.com (May 30, 2007), http://blog.wired.com/27bstroke6/2007/05/request_for_urb.html (featuring a snapshot of "Crime Guy").

[57] Street Fight, Google Sightseeing.com (June 16, 2007), http://googlesightseeing.com/2007/06/16/street-fight (last visited Sept. 26, 2007) (showing images of street fight captured frame-by-frame).

[58] Google Street View Gallery, http://streetviewgallery.corank.com/tech/framed/communist-ipod-Advertising (last visited Nov. 3, 2007).

[59] Google Street View Gallery, http://streetviewgallery.corank.com/tech/framed/praying-on-the-sidewalk (last visited Nov. 3, 2007).

[60] Google Street View Gallery, http://streetviewgallery.corank.com/tech/framed/hiv-Testingjust-a-walk-in-the-park (last visited Nov. 3, 2007).

[61] McClurg, *supra* note 5, at 1042 (making a similar observation with respect to the effect produced by a photographer taking pictures of a couple at an outdoor farmers' market).

[62] Jim Barr Coleman makes a similar argument regarding digital photography, noting as well the cheapness and ease with which one can access a computer and the Internet. Jim Barr Coleman, Note, *Digital Photography and the Internet, Rethinking Privacy Law*, 13 J. INTELL. PROP. L. 205, 221 (2005). The recent proliferation of camera phones is another phenomenon that has led to the increased possibility of being photographed in public, as with South Korea's "Dog Poop Girl." *See infra* text accompanying notes 74-77. For an interesting treatment of the significance of the increasing presence of camera phones in modern America, *see* Werbach, *supra* note 33, at 2327-28.

[63] For example, information about where a photograph was taken—which is clearly one of the special services Street View provides—"adds rich 'metadata' that can be employed in countless ways. In effect, location information links the physical world to the virtual meta-world of sensor data." Werbach, *supra* note 33, at 2332.

closer to the mechanical eye of the Terminator than the naked eye of the casual human observer.[64]

As a solution for those who feel their privacy has been invaded by Street View, Google points to its "simple" process for removal of objectionable images.[65] Yet removal of the images addresses only half of the problem for those whose images have become the subject of the intense online fallout that occurs when a scandalous image is discovered.[66] As Kevin Bankston noted with respect to his own situation, Street View's removal procedures do little to ameliorate the damage done when the objectionable image has already been discovered (and likely disseminated) by random users.[67] And as one blogger noted, there is no guarantee that a person's image appears in only one Street View photograph, so in order to ensure complete removal a user will have to do some significant Internet research and still can only hope for the best.[68] Further, removal of an objectionable image does nothing to affect the availability of the image if it has already been downloaded by a user or embedded in a different website. For example, Michael Agger's article on Street View contains live links to two images that Google has removed from Street View, one of a man urinating on the street and the other of a woman getting into a car and exposing her thong underwear.[69]

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[64] Professor Clifford Fishman agrees that the Internet has revolutionized the possibilities of disseminating information:

> Until recently, it was usually difficult to disseminate information about another.... If the mass media . . . declined to publish or broadcast the information, someone hoping to disseminate it was out of luck.
>
> Today, the Internet has obliterated those restraints. [People] can disseminate even the most private information about individuals at will; and if the information tickles the public fancy, information about private people can world "news" within days.

Fishman, *supra* note 3, at 1511 (footnotes omitted).

[65] Posting of Peter Fleischer to Google Lat Long Blog, http://googlelatlong.blogspot.com/2007/09/street-view-and-privacy.html (Sept. 24, 2007 7:01 EST).

[66] As one commentator noted,

> [w]hat Street View demonstrates is the magnifying effect of technology, especially Google technology. People drive by the Stanford campus every day and see attractive co-eds searching for the optimum tanning angle. But when those same co-eds are captured by the Google camera, the men of the Web go a little crazy and 100 links to the "Girls of Escondido Road" bloom.

Agger, *supra* note 40.

[67] Poulsen, *supra* note 42. Other bloggers and Internet users agree that unless the offensive or embarrassing image is removed before others find it, removal of the image seems useless. *E.g.*, Posting of Anonymous to Search Engine Roundtable.com, http://www.seroundtable.com/archives/013780.html (June 8, 2007, 17:09 EST) (responding to removal of Street View image of a woman exposing her underwear and backside, "Of course, the damage is already done. This woman's ass is all over the Internet."); Posting of Jason Striegel to Hacks Blog, http://www.hackszine.com/blog/archive/2007/06/removing_yourself_from_street.html (June 17, 2007, 21:05 EST) ("[I]f someone else has already caught you [on Street View], there's no point in removing the image anymore. Effectively, you'll need to find any compromising images before anyone else does.").

[68] Striegel, *supra* note 67.

[69] Agger, *supra* note 40.

Thus, Google's reliance on the removal of images from Street View as the answer to its potential privacy issues is at most self-serving, and at the least inattentive to the true depths of the problems Street View can create.

Another aspect of Street View that distinguishes it from photographs of public areas taken from the conventional view is the level of popularity and notoriety that Street View enjoys among frequent Internet-users. Google reports that the web post through which it first announced the launch of Street View was one of Google's five most-often read posts in 2007, and the phrase "street view" was one of the year's most popular keyword searches.[70] The online clamor regarding Street View itself and its potential privacy problems has even led some websites to solicit user submissions of the most provocative Street View images,[71] and it has actually spawned (at the time of this Note) at least ten other websites that catalogue, rank, and display Street View photos.[72] The palpable online interest in disseminating Street View photos is noteworthy because it significantly heightens the probability that a certain number of users will view any particular photo and that the juicier images will become the objects of excessive scrutiny.

The practical consequences for individuals whose images have been captured online are wide-ranging and sometimes destructive.[73] For example, South Korea's infamous "Dog Poop Girl" was socially ostracized in her home country and vilified internationally after a digital photograph showing the girl's unwillingness to clean up her dog's excrement on a subway was disseminated on the Internet.[74] Once the picture was posted on the Internet, bloggers sounded a "call to arms" for information about her, which quickly yielded the girl's identity and

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[70] Maslan, *supra* note 16.

[71] *See, e.g.*, Steve Johnson, *Show Us Your Google Street View Chicago Finds*, CHI. TRIB. Oct. 17, 2007, http://featuresblogs.chicagotribune.com/technology_Internetcritic/2007/10/show-us-your-go.html; Posting of Stan Schroeder to Mashable.com, http://mashable.com/2007/05/31/top-15-google-street-view-sightings/ (May 31, 2007, 11:05 PDT); Posting of Ryan Singel to Wired Blog Network, http://blog.wired.com/27bstroke6/2007/05/request_for_urb.html (May 30, 2007, 15:31 EST).

[72] *E.g.*, Laudontech.com (last visited Oct. 15, 2008), Onmylist.com (last visited Oct. 15, 2008), Mashable.com (last visited Oct. 15, 2008), Kongtechnology.com (last visited Oct. 15, 2008), StreetViewFun.com (last visited Oct. 15, 2008), Clipmarks.com (last visited Oct. 15, 2008), Streetviewr.com (last visited Oct. 15, 2008), Linkinn.com (last visited Oct. 15, 2008), GStreetSightings.com (last visited Oct. 15, 2008), and Streetviewgallery.corank.com (updated every 4 hours) (last visited Oct. 15, 2008).

[73] One example of online conflict spilling into real life is the case of *Jewish Defense Org., Inc. v. Superior Court of Los Angeles County*, 85 Cal. Rptr. 2d 611 (Cal. Ct. App. 1999), in which the defendant hired companies to create websites devoted to defaming the plaintiff (in addition to defaming the plaintiff on his own website) and registered the plaintiff's name as a URL address. Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 117 (2003). The plaintiff retaliated by "slamm[ing] a steaming bowl of soup on the defendant's head. The case escalated further when one of the parties opened fire, wounding an innocent bystander." *Id.*

[74] Werbach, *supra* note 33, at 2366-67 (citing Jonathan Krim, *Subway Fracas Escalates into Test of the Internet's Power to Shame*, WASH. POST, July 7, 2005, at D1).

details about her past.[75] Soon people were able to identify her by the dog and the kind of purse she wore, and "Dog Poop Girl" was eventually forced to quit college due to the public harassment she experienced.[76] As Professor Daniel Solove pointed out with respect to this incident, online images are increasingly functioning as "digital scarlet letters," with bloggers playing the role of "cyber-posse" that track and brand violators of social norms.[77] As a result, some have noted, "[o]ne single act available to a world-wide audience may now define you for the rest of your life."[78] Street View, therefore, is a source of constant fuel for this online firestorm, in which disproportionately severe social sanctions can be doled out by any person or group with an Internet connection.[79]

Examples of the powerful reverberations that online images can produce are usually found in the employment context, as more and more employers search social networking sites for information about job candidates that might not be revealed in an interview.[80] Non-job seekers, however, are equally vulnerable to harm from unwanted Internet publicity generated by an online photo,[81] as Allison Stokke, a high school champion pole vaulter, recently learned. The California teenager's experience with unwelcome Internet fame is particularly relevant to the Street View controversy, beginning as it did with a photo taken in public of an unaware subject.

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[75] Jonathan Krim, *Subway Fracas Escalates Into Test of the Internet's Power to Shame*, WASH. POST, July 7, 2005, at D1.

[76] *Id.* (internal quotation marks and citations omitted).

[77] *Id.*

[78] Frank Vascellaro, Company Helps You Defend Your Online Reputation, WCCO-TV.com (May 17, 2007), http://wcco.com/topstories/Internet.privacy.reputationdefender.2.367458.html.

[79] The flurries of web activity that lead to the imposition of these social sanctions are known as "flaming sessions," which "are the functional equivalent of public verbal lashings." Rustad & Koenig, *supra* note 73, at 117 (internal quotation marks omitted). One author, however, argues that such increased social transparency (and the consequent increased certainty that misbehavior will be detected) is actually a public good, considering the widespread self-editing of undesirable behavior that theoretically should occur. DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? 334 (1998). Moreover, once society's initial thirst for others' personal information is satiated, that information might come to be perceived as mundane and uninteresting. *Id.* at 334-35. A key component missing from this proposition, however, is that most people would likely expect and demand a level of proportionality in the punishment that social wrongdoers receive. This Note contends that until proportionality can somehow be addressed, unfettered social lashings likely do more harm than good. For examples of people who have experienced tangible harms arising out of Internet harassment, see notes 73, 81-87, 89 and accompanying text.

[80] Wei Du, *Job Candidates Get Tripped Up by Facebook*, MSNBC.COM, Aug. 14, 2007, http://www.msnbc.msn.com/id/ 20202935/; *see generally* Ian Byrnside, Note, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicants*, 10 VAND. J. ENT. & TECH. L. 445 (2008).

[81] For example, a Duke University basketball player was suspended after he passed out at a fraternity house, someone photographed him asleep while some people "drew on him with a magic marker and pressed their genitalia against his face," and the photo turned up on the Internet in a widely disseminated email. Coleman, *supra* note 62, at 206-07. Another example is the experience of a TV newscaster who lost her job when images of her participation in a wet t-shirt contest turned up on various pornographic websites. *Id.* at 207.

In May 2007, a sports journalist photographed Stokke waiting around at a meet in her tight-fitting spandex uniform, which he posted on a prep school track-and-field website.[82] A popular sports blogger in New York then lifted the photo and made it the subject of four paragraphs of lewd "locker room talk."[83] Within days, Stokke's image was searched for and downloaded by thousands of Internet users, dozens of blogs and message boards linked or published the item, her MySpace account received thousands of messages, hundreds of users posted their sexual fantasies about Stokke on message boards and chat forums, an unofficial fan site was launched, and an imposter created a fake Facebook profile under her name.[84] The wave of online attention was also matched by real-life attention. The number of photographers who attended Stokke's meets doubled, Stokke's high school received hoards of requests for her picture from newspapers and periodicals, "including one from a risqué magazine in Brazil," and Stokke began being recognized by strangers in public and receiving countless random phone calls.[85] As Stokke and her attorney father note, however, "none of it is illegal," even while the objectification and scrutiny she suffered was personally "demeaning."[86]

Stokke's feeling of helplessness throughout her transformation into an unwitting Internet pinup-girl is reminiscent of many individuals' experiences with unwanted publication of photographs.[87] Academics have long decried the failure of existing privacy law to protect "unsuspecting celebrities,"[88] people who were photographed in public and whose images were widely publicized by others, which has led to many case outcomes in which such plaintiffs were unable to recover because their picture was taken in public.[89] Street View therefore

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[82] Eli Saslow, *Teen Tests Internet's Lewd Track Record*, WASH. POST, May 29, 2007, at A1.

[83] *Id.*

[84] *Id.*

[85] *Id.* Stokke's father now makes searching the Internet for potential stalkers a daily activity. *Id.*

[86] *Id.* The reasons why Stokke (or other similarly situated plaintiffs) likely does not have a viable claim under the privacy torts are discussed in Part II.B, *infra*.

[87] Other individuals who have been on the receiving end of malicious Internet scrutiny include Sue Scheff, a counselor for troubled teens, who was vilified on PTA web sites in her home state and even threatened in YouTube videos after a former client turned against her. Susan Kinzie & Ellen Nakashima, *Calling in Pros to Refine Your Google Image*, WASH. POST, July 2, 2007, at A1. Politicians, lobbyists, real estate moguls, academics, fund managers and securities traders are also among those who have been subjected to negative attacks online. *Id.*

[88] Siprut, *supra* note 5, at 313 (internal quotation marks omitted).

[89] *E.g.*, *id.* at 311-13 (describing the legal helplessness of people whose publicly-taken photos were selected as the cover page of national periodicals, the cover of a guidebook to nude beaches, and even as an insert to a photo spread in a pornographic magazine); Coleman, *supra* note 62, at 206-08 (describing inability of plaintiffs to recover for damages when their images were disseminated online to their social and economic detriment); McClurg, *supra* note 5, at 992-94 (detailing failed attempts to recover under privacy torts by plaintiff of whom video footage was used in a commercial without her consent, a plaintiff who was coerced into a provocative pose for a photograph, and plaintiffs whose photographs were published in a pornographic magazine without consent); Warren & Brandeis, *supra* note 1, at 196-98 (noting that the "modern enterprise and

exacerbates this problem by providing an endless array of downloadable photographs of buildings and the people in or near them, especially in cities filmed in high-definition resolution where even people standing inside glass storefronts or a few floors up are identifiable.

C. *Online Image Management*

Despite Street View's arguably invasive features, for many, its appearance is a logical extension of a modern understanding of privacy in which surveillance by private actors is expected and approved.[90] The apparent ease with which Internet users will accept surveillance by certain parties, however, stands in tension with a desire to maintain a degree of control over the dissemination of personal online information.[91] This Note contends that this desire to control, in combination with the burgeoning industry of online reputation defenders, comprises a field of personal privacy, dubbed "online image management" for present purposes,[92] that should be recognized by courts.[93]

For example, one recent survey found that people's attitudes toward the relative intrusiveness of a covert camera with zoom capacity used to monitor streets fell about halfway between the perceived intrusiveness of camera surveillance of convenience and retail stores

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invention" necessitate protection of one's own image from unwanted publication, but that "[o]n the other hand, our law recognizes no principle upon which compensation [for such an injury] can be granted").

[90] *See, e.g.*, Werbach, *supra* note 33, at 2322 ("The [electronic] sensors will be so ubiquitous, and so innocuous, that we will have to get used to them."); Coleman, *supra* note 62, at 233-34 ("There is little doubt that the upsides to the technological advancements . . . far outweigh the downside. . . . However, with these advancements we must be willing to sacrifice some of . . . our privacy."); Mike Rogoway, *Smile, You're on Google*, OREGONIAN, Oct. 11, 2007, at A1 ("Americans generally seem to welcome the avalanche of data and accept a corresponding loss of privacy . . . I haven't seen major signs of revolt.") (internal quotation marks omitted) (quoting University of Oregon law professor Garrett Epps); Editorial, *Street Smart: The Region Gets Virtual Treatment from Google*, PITTSBURGH POST-GAZETTE, Oct. 16, 2007, at B6 ("[W]e are now a place where people can stroll down busy streets and navigate through thickets of tall buildings without having to get out of their pajamas. This is the new face of Pittsburgh progress. Get used to it."); Allen, *supra* note 4, at 736 ("[Y]ounger Americans appear to be learning to live reasonably well and happily without privacy. Young adults seem to take exposure for granted and many understand that they live in virtual glass houses."). Even teenagers, however, draw a distinction between private and governmental surveillance, suggesting a burgeoning sense among younger generation that the exposure of personal information on the Internet is a normal part of daily life, even while they remain skeptical about the government's attempts to collect information available online. Justin Berton, *The Age of Privacy: Gen Y Not Shy About Sharing—but Worries About Spying*, SAN FRANCISCO CHRON., May 20, 2006, at A1.

[91] *See infra* notes 99-106 and accompanying text.

[92] While the phrase "online reputation management" is used with reference to negative textual publicity from bloggers or websites by service provides, *see infra* note 109, this Note uses the phrase online *image* management to highlight the photographic element of Street View-based harms. Many of the same arguments in support of judicial recognition of online image management could apply to online reputation management.

[93] *See infra* Part III.

(low) and that of the overt use of cameras to survey streets (high).[94] While it appears that the "knowledge that cameras *are* present trigger[ed] a greater feeling of intrusion than knowledge that cameras *might* be present,"[95] Street View-style surveillance—unseen cameras with zoom capacity used to monitor streets—was not perceived as the most intrusive form of camera surveillance.[96] Interestingly, even in Canada, a country with much more robust legal protection for personal privacy, a recent poll shows that the majority of Canadians think "people are over-reacting [*sic*]" to Street View's potential invasions of privacy.[97]

This sense of approval of private surveillance is also linked to the increasingly prominent role that online images play in modern society. "Indeed, armed with nothing more than cameras and Internet connections, young Americans have become foot soldiers in a cultural revolution."[98] Additionally, the current understanding of how online images should be managed or controlled among avid Internet users is surprisingly nuanced. For example, a woman who has been a "Web cam entrepreneur"[99] for over twelve years does not mind "sharing really intense personal experiences" when she has "control of that flow of information," but is concerned that government surveillance programs may undermine that control "without [her] consent."[100]

Members of Facebook, the immensely popular Internet social networking web site, can access a forum called "30 Reasons Girls Should Call It a Night," consisting of over 4000 pictures showing girls in various stages of intoxication (the vast majority depicting unconscious and semi-clothed young women) that the girls themselves posted with commentary.[101] Internet bloggers claim the forum is the fastest growing

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[94] Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 275-85 (2003). It should be noted that the study was designed to measure respondents' attitudes toward police use of camera surveillance, not specifically of use by private companies. One reason for this was that at the time the study was conducted, "[n]o entity other than the government engage[d] in concerted, overt surveillance of the public streets using cameras." *Id.* at 273. Despite the different purpose of the study, however, we can still glean a useful insight from the relative levels of intrusiveness that people ascribed to Street View-*style* surveillance methods compared to other methods of camera surveillance described on the surveys.

[95] *Id.* at 279 (first emphasis added).

[96] *Id.* at 277-79. Both overt camera surveillance of streets and the use of a camera able to overhear conversations on the street were ranked much higher by survey respondents in terms of intrusiveness. *Id.* at 277.

[97] *Click Counter*, GLOBE & MAIL (CANADA), Sept. 20, 2007, at B17 (reporting results of a poll of Globe and Mail readers, 58% of respondents felt Street View is not a privacy threat).

[98] Note, *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, 120 HARV. L. REV. 1870, 1870 (2007).

[99] A "Web cam entrepreneur" is a person who maintains a website from which she charges users a fee to watch her conduct her daily life, usually including highly private events such as using the bathroom, sleeping, or engaging in sexual relations. *See, e.g.*, Berton, *supra* note 90, at A1. These sites are also sometimes called "Girl-Cam" websites.

[100] *Id.*

[101] 30 Reasons Girls Should Call It a Night, BuzzFeed.com, http://www.buzzfeed.com/buzz/30_Reasons_Girls_ Should_Call_ It_a_Night (last visited Aug. 31, 2008).

group on Facebook and may boast 200,000 members.[102] Yet the public's access to this Forum is still limited by Facebook's requirement that a user subscribe to the site to view pictures.[103] Thus, it seems that many people embrace the apparent contradiction of wanting to create an Internet profile comprised of personal images, while simultaneously retaining a measure of control over how those images are disseminated.[104]

More evidence of the burgeoning importance of online image management is the recent appearance of a cottage industry to enhance individuals' ability to control their identities and images that appear on the Internet.[105] Companies like International Reputation Management, Naymz, and ReputationDefender offer to repair damage done by hostile bloggers, which they measure by searching for a client's name on Google and other search engines and evaluating the amount of negative links that appear.[106] To improve a client's online image (both pictorial and reputational), the companies request the removal of negative posts or comments and may even threaten litigation on a client's behalf.[107] Another method is to flood the Internet with positive comments or items about the client to counteract the negative information already out there.[108] Online image or reputation management, therefore, is more than just a cautionary step for recent college graduates and hopeful job seekers. It is fast becoming a profitable activity for service providers,[109] and more than ever, a necessary prophylactic for the vast number of people who maintain Internet profiles and images of themselves.

Therefore, Street View's prominence and scope have far-reaching consequences for the Internet community and society in general. While Google asserts that the application is the equivalent of a

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[102] *Id.*

[103] *Id.* The efficacy of Facebook's security measures has been called into question, however. Experts have warned users that program codes are easy to obtain online that bypass blocks on an individual's Facebook profile pages that are designated "private." Terry Webster, *On Web, Privacy is Just an Illusion*, FORT WORTH STAR-TELEGRAM, July 24, 2007. One highly-publicized example of such a security breach was the recent attempt to blackmail Miss New Jersey, Amy Polumbo, with scandalous photographs lifted from her private Facebook page. *Id.*

[104] *See* Berton, *supra* note 90, at A1.

[105] Kinzie & Nakashima, *supra* note 87, at A1 ("Google's ubiquity as a research tool has given rise to a new industry: online identity management.").

[106] *Id.* Because search engines usually rank results of a search by frequency (how often the search term appears on the web site), bloggers can make it appear that the only news about a person is negative by using the person's name over and over again in their posts to artificially boost the negative blog in the search engine rankings.

[107] Vascellaro, *supra* note 78.

[108] Kinzie & Nakashima, *supra* note 87, at A1.

[109] For example, in September 2008, fifteen global brands, including Unilever, Clifford Chance, and American Airlines, sent panelists to an international conference on international corporate reputation management with a focus on online disparagement. International Reputation Management Summit, http://slicemedia.blogspot.com/2008/07/international-reputation-management.html (July 29, 2008, 12:29). Additionally, online reputation management has its own fairly extensive Wikipedia.org entry that provides a link to an online reputation management buyer's guide (in print, no less). Online Reputation Management, http://en.wikipedia.org/wiki/Online_Reputation_Management (last visited Oct. 15, 2008).

person walking down the street and snapping photos, that contention is self-serving at best. Qualitative differences in image resolution, in the possibilities of image reproduction, storage, and dissemination, and in the zooming and panning options on Street View indicate that Street View is indeed a different animal. Further, Google's image-removal process provides little comfort to those who have been caught in sensitive positions and must suffer the real-life consequences.

As an individual's ability to control his or her image online is an increasingly crucial aspect of everyday life in the Internet age, Street View takes on even more cultural significance. Specifically, Street View has weakened our society's formal and physical protections of privacy by engendering a novel species of voyeurism and providing the tools to achieve those voyeuristic goals. However, while Street View's general acceptance might signal that our society is outgrowing some of those protections and is comfortable with being surveyed by private actors, more individuals than ever before find themselves faced with real-life consequences stemming from interference with or unwanted dissemination of online images. Thus, if society ever wants to regain the pre-Street View balance between the formal and physical protections of personal privacy, legal institutions and players alike will have to negotiate the impact of Street View on current privacy law.

II. HOW CLAIMS AGAINST STREET VIEW WOULD TAKE SHAPE UNDER CURRENT PRIVACY LAW

The word "privacy" has been ascribed so many different meanings throughout legal history that its usefulness is often called into doubt.[110] As one prominent scholar explained, "[h]aving fudged the concept of privacy we have put ourselves in a position where we cannot discern the interest we seek to protect, but only the situation which involves it."[111] The uncertainty of what "privacy" is, however, does not lessen the importance of its role as a shield for regular citizens from the government or other civilian actors.[112] Regardless of the intellectual

[110] *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1088 (2002) (surveying scholars and philosophers who bemoan the slipperiness of privacy as a legal concept); Judith Jarvis Thomson, *The Right to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 272, 272 (Ferdinand David Schoeman ed., 1984) ("Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is."); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422, 425-26 (1980) (noting that to be useful a concept of privacy must be "distinct and coherent," and rejecting descriptions of it as a "claim, a psychological state, [] an area that should not be invaded," or "a form of control"); William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way Baby*, 23 U. KAN. L. REV. 1, 21 (1974) ("[W]idely divergent claims, which upon analysis have very little in common with one another, are lumped under the umbrella of 'privacy.'").

[111] Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 39 (1967).

[112] *See* Rehnquist, *supra* note 110, at 3, 14. Rehnquist notes that "[o]ne of the basic questions that must be answered by any organized society is the extent to which the government shall regulate the lives of its citizens." *Id.* at 14. That being said, "before any sort of meaningful

murkiness that may always surround it as a legal concept, some anthropologists and historians argue that notions of and desires for personal privacy are actually hardwired into the Homosapien species.[113] If an intrinsic human urge is at work behind the frequency with which notions of privacy appear in legal discourse, then perhaps it also explains privacy's persistent migration from constitutional law to tort law to criminal law and beyond,[114] despite our collective inability to agree on what it is.[115]

A full treatment of privacy's numerous legal incarnations, however, is beyond the scope of this Note. Thus, this Section will discuss how a privacy-based claim against Google Street View might take shape under the American torts of privacy. For purposes of convenience and scope, this Section will only evaluate the potential claims of an "outside" plaintiff, a person filmed by Street View while he or she was on public streets (as distinguished from people photographed while inside buildings or homes).[116] Moreover, while the putative Street View

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analysis can be undertaken, we need to know precisely what is meant by the concept of 'privacy.'" *Id.* at 3.

[113] MCLEAN, *supra* note 12, at 9-15 . "Anthropological and historical evidence . . . is sufficient to indicate that a demand for various kinds of privacy and an intuitive understanding of them are built into human beings." *Id.* at 9.

[114] According to one commentator, "[t]he 'right' of privacy has been discussed in over 700 Supreme Court opinions since that Court's inception and in many lower court opinions over the same time." Keck, *supra* note 6, at 95, n.74 (citing AMITAI ETZIONI, THE LIMITS OF PRIVACY 188-90 (Basic Books 1999)). For an illuminating history of the use of the word privacy in Supreme Court opinions, see Keck, *supra* note 6, at 99-104.

[115] Professor Daniel Solove suggests that the primary reason for the splintered nature of privacy as a legal construct is a result of the top-down analytic approach, in which "theorists look for a common set of necessary and sufficient elements that single out privacy as unique from other conceptions." Solove, *supra* note 110, at 1095. By attempting to distill what privacy "is," we lose the contextual understanding of specific facts or practices that are usually the very circumstances that give abstract knowledge much of its meaning. *Id.* at 1127-28. Professor Solove propounds a pragmatist approach to the study of privacy that "conceptualizes privacy within particular contexts rather than in the abstract." *Id.* at 1129.

[116] An additional reason for this limitation is the reality that thus far, aside from Mary Kalin-Casey's experience, few Street View images depict recognizable people or objects inside buildings. To date, the only lawsuit against Google stemming from Street View was filed in the Pennsylvania Court of Common Pleas by a couple living on a private road in April 2008. Zusha Elinson, *Boring Couple Sues Google Over Street View*, LAW.COM, Apr. 7, 2008, http://www.law.com/jsp/article.jsp?id=1207305794776. According to their complaint, Mr. and Mrs. Boring reside at the end of a lane clearly marked "Private Road." Complaint ¶ 6, Boring v. Google, Inc., No. 2:2008cv00694 (W.D. Pa. May 21, 2008), *available at* http://docs.justia.com/cases/federal/district-courts/pennsylvania/pawdce/2:2008cv00694/86623/1/. Thus, the appearance of the couple's house and swimming pool on Street View could only have been accomplished by the Street View car disregarding the Private Road sign and driving onto private property. *Id.* ¶¶ 9-11. The Borings sued under the intrusion upon seclusion tort, trespass, and negligence for $25,000 in damages, and requested that the court enjoin Google from continuing to post the image of their house and destroy any of its existing images. *Id.* ¶¶ 17-23. In its motion to dismiss the subsequently amended complaint, Google responded that there was no private road sign and that a photo of the Borings' home was already available on the local county assessor's website. Motion to Dismiss the Amended Complaint at 11, Boring v. Google, Inc., No. 2:2008cv00694 (W.D. Pa. Aug. 14, 2008) (on file with author). To date, the district court has not ruled on Google's motion. This case, however, is distinguishable from the hypothetical situations discussed *infra*, because here the plaintiffs can rely on an explicit "Private Road" sign to demark their reasonable sphere of

plaintiff's claim under the privacy torts may seem to overlap with the tort of defamation, this Section will not address defamation law because it provides compensation for injury to reputation and financial position, not the actual invasion of privacy that the privacy torts are meant to cover.[117] The Section will conclude by exploring the particular challenges posed by an Internet phenomenon such as Street View and why reconciling new technology and old law is often so problematic.

A. *Origins and Development of the Torts of Privacy*

Concern for privacy in the United States dates back to the nation's Founding Fathers, who enshrined in the Bill of Rights the guarantee that the government refrain from intruding into its citizens' homes, private papers, religious choices, associational choices, and choices of conscience.[118] These constitutional guarantees, however, do not supply the substance of privacy; they only mark the contours of those "situations of privacy" that will be safeguarded by the law.[119] As such, what is or is not private shifts in our constitutional tradition according to context[120] and in conjunction with what the public reasonably perceives to be private.[121] Further, as the late Chief Justice Rehnquist observed in his influential essay on the subject, tensions arise in privacy jurisprudence because "quite reasonable claims to privacy find themselves competing with equally reasonable claims weighing against the privacy interest."[122] Courts must therefore balance privacy claims in light of the parties' and society's expectations. This responsibility has perhaps never been so complicated as now, when the personal computer and the Internet have revolutionized individuals' methods of

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expected privacy, whereas the putative Street View plaintiffs discussed in this Section do not rely on a sphere of expected privacy by virtue of their appearance on a public street.

[117] Another reason for refraining from exploring defamation is that only untrue statements or content is actionable under the defamation tort, while Street View's images are "true" in a literal sense and are thus not proper subjects for this branch of law anyway. *See* David A. Myers, *Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting*, 110 PENN ST. L. REV. 667, 674-75 (2006) (explaining that in order to state a claim a defamation plaintiff must allege that the defamatory statements are false).

[118] DANIEL J. SOLOVE, ET AL., PRIVACY, INFORMATION, AND TECHNOLOGY 28-29 (2006) (summarizing the privacy aspects of the U.S. Constitution's First, Third, Fourth, and Fifth Amendments); *see also* Anita L. Allen-Castellitto, *Understanding Privacy: The Basics*, 865 PLI/Pat 23, 27 (2006).

[119] Gross, *supra* note 111, at 36.

[120] For example, a person has different privacy rights in the workplace depending on whether her employer is a governmental entity or in the private sector. *See* Rustad & Koenig, *supra* note 73, at 95 (describing vastly diminished privacy rights of employees who work for private companies).

[121] Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 846 (2002) ("[C]ourts define privacy by reference to society's prevailing understanding of what is a reasonable expectation of privacy. Because this conception of privacy tracks societal expectations, what is protected as private will vary in accordance with relevant social changes.").

[122] Rehnquist, *supra* note 110, at 18.

communication, self-determination, information-collection, and information storage, all of which courts must consider when adjudicating a claim that turns on reasonable expectations of privacy.[123]

According to a vast majority of scholars, Samuel Warren and Louis Brandeis took the first key step in the formation of civil privacy law when they published their seminal article, *The Right to Privacy*.[124] As Professor McClurg observes:

> Warren and Brandeis surveyed a number of decisions in the areas of defamation, property, implied contract, and copyright law and concluded that, in reality, they represented recognition of a right to privacy. They asserted that this right, which they characterized as "the right to be let alone," should be recognized as an independent tort.[125]

Warren and Brandeis aimed to uncover a source in common law to protect the individual's "inviolate personality" but did not define this concept further.[126] They argued that privacy of this sort (which many would later dub personal or information privacy[127]) should be judicially recognized in torts to protect people from the "modern enterprise and invention[s]" of the media, which they believed caused more overall mental pain and suffering than the physical harm tort law normally compensates.[128] Thus, in addition to setting the terms of privacy discourse for decades to come, Warren and Brandeis's article pioneered the use of "injury to the feelings"[129] as the showing of harm that tort law

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[123] Indeed, "[i]n this period of internet snooping into private people's lives and stealing of identities, courts must often balance people's need for privacy against the requirements of our functioning legal system." Johnson v. Bryco Arms, 224 F.R.D. 536, 542 (E.D.N.Y. 2004). And while the Internet has provided a plethora of challenges to personal or information privacy, the concern itself predates the personal computer. In *Whalen v. Roe*, the Supreme Court considered a challenge to New York's statute requiring doctors prescribing certain drugs to provide the state with a copy of the prescription for the purpose of patient data collection and monitoring. Whalen v. Roe, 429 U.S. 589, 593-95 (1977). The Court did not believe that the statute would pose a serious danger, but it noted the "threat to privacy implicit in the accumulation of . . . personal information in computerized data banks." *Id.* at 605. Further, in his concurring opinion, Justice Brennan acknowledged that a person's "interest in avoiding disclosure of personal matters is an aspect of the right of privacy." *Id.* at 606 (Brennan, J., concurring) (internal quotation marks omitted). Justice Brennan also noted that he was most troubled that the "central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information." *Id.* at 606-07. Information privacy's role in modern conceptions of privacy will be discussed more fully in Part III.

[124] Warren & Brandeis, *supra* note 1. "The article has been described as 'the very fount of learning on the subject.'" McClurg, *supra* note 5, at 997 n.33 (1995) (quoting Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?*, 46 TEX. L. REV. 611, 611 (1968)); *accord* Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 643-44 (2007); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 958-59 (1989); Solove, *supra* note 110, at 1099-1100.

[125] McClurg, *supra* note 5, at 997 (footnotes omitted).

[126] Warren & Brandeis, *supra* note 1, at 205.

[127] *See, e.g.*, Chemerinksy, *supra* note 124, at 651 ("In their famous article, Warren and Brandeis urged tort law protection for public disclosure of private facts. Their focus was entirely on informational privacy.").

[128] Warren & Brandeis, *supra* note 1, at 196.

[129] *Id.* at 197.

requires, even though at the time of their article's publication, tort law did not easily recognize psychological or emotional types of harm.[130]

Decades later, Warren and Brandeis's themes were refined by Dean William Prosser, who was responsible for the next watershed moment in privacy law.[131] Prosser collected and analyzed state court decisions involving privacy claims that had come down since the publication of Warren and Brandeis's article, and concluded that the common law notion of privacy was actually comprised of four distinct torts of privacy.[132] They are: (1) "Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs[;]" (2) "Public disclosure of embarrassing private facts about the plaintiff[;]" (3) "Publicity which places the plaintiff in a false light in the public eye[;]" and (4) "[Commercial] [a]ppropriation . . . of the plaintiff's name or likeness."[133] Dean Prosser's articulation of these four separate causes of action was later adopted by the Restatement (Second) of Torts, which embraced his formulation almost verbatim.[134] The states' acceptance of Prosser's privacy torts, however, was not nearly as straightforward. While more than half of the fifty states have accepted all four of the privacy torts (as defined by the Restatement), several others have declined to adopt the tort of false light.[135] Yet even in the states that claim to accept all four privacy torts, plaintiffs often fail to recover due to both a widespread "judicial wariness" of the privacy torts and certain structural features of the torts that make them notoriously defendant-friendly.[136]

Therefore, although privacy was a central concern of the Framers,[137] uncertainty persists in the legal community regarding what privacy is, when it is violated, and how it should be protected. Warren and Brandeis focused these issues significantly by identifying the media and technological innovation as the key catalysts of society's progressive

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[130] Solove, *supra* note 110, at 1100-01 ("While the law of defamation protected injuries to reputations, privacy involved injury to the feelings, a psychological form of pain that was difficult to translate into the tort law of their times, which focused more on tangible injuries.") (internal quotation marks omitted). For a revealing explanation of the social and factual backdrop to the writing of Warren and Brandeis' article, see JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 6-7 (2000) and Prosser, *supra* note 2, at 383-84.

[131] McClurg, *supra* note 5, at 997.

[132] Siprut, *supra* note 5, at 315.

[133] Prosser, *supra* note 2, at 389. Hereinafter, the four privacy torts will be referred to as intrusion upon seclusion, public disclosure, false light, and misappropriation.

[134] *See* RESTATEMENT (SECOND) OF TORTS §§ 652B - 652E (1977); McClurg, *supra* note 5, at 998 & n.40 (noting that Prosser also served as Reporter for the Restatement and that his version of the torts is essentially equivalent to the Restatement's).

[135] *Id.* at 998-99; *see also* Helms, *supra* note 12, at 310 ("Even more troubling, from the perspective of Internet privacy, is the fact that tort law varies significantly from state to state, with some states recognizing all such torts and others recognizing none.").

[136] McClurg, *supra* note 5, at 999-1007. The structural features of the four torts that make them friendlier to defendants will be discussed in Part II.B.

[137] *See supra* note 118 and accompanying text.

loss of personal privacy.[138] Dean Prosser continued this work by demarcating the common law right of privacy into four separate but interrelated torts.[139] However, despite the states' nominal acceptance of Warren and Brandeis' right, as articulated by Prosser's torts, civil law has yet to provide a firm foothold for plaintiffs alleging certain kinds of invasions of privacy.

B. Why the Privacy Torts Fail the Street View Plaintiff

The putative Street View plaintiff faces many hurdles to recovery in civil privacy law. Some obstacles are obvious: recall that such a plaintiff would allege an invasion of privacy stemming from being photographed by Street View while walking on a public street, but because "[t]ort law clings stubbornly to the principle that privacy cannot be invaded in or from a public place," the image-subject effectively has no legal recourse.[140] Other obstacles are more subtle, such as the general inability for plaintiffs to recover when they cannot describe their harm in concrete terms,[141] or the fact that invasions of privacy must be deemed highly offensive by society in order to be actionable.[142] This part will first briefly sketch the formal elements of each privacy tort, in addition to any other doctrinal features relevant to a Street View plaintiff. It will then identify and explore the thematic obstacles apparent across the four torts and how they affect a Street View plaintiff's chance for a successful claim.

1. Elements of the Four Privacy Torts

To recover under the first privacy tort, intrusion upon seclusion, a plaintiff must show that a secret or private subject matter exists, that she has the right to keep that information secret, and that the information about the matter was discovered through unreasonable means.[143] Additionally, "intrusion" can refer to the physical invasion of a private place or "sensory intrusions such as . . . visual or photographic spying."[144] Regardless of what manner of intrusion is at hand, to be actionable it must be "highly offensive to a reasonable person."[145] Thus,

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[138] *See supra* notes 124-130 and accompanying text.

[139] *See supra* notes 131-134 and accompanying text.

[140] McClurg, *supra* note 5, at 990; *accord* Calvert & Brown, *supra* note 4, at 489; Coleman, *supra* note 62, at 225; Lance E. Rothenberg, Comment, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U. L. REV. 1127, 1147 (2000); Siprut, *supra* note 5, at 312.

[141] *See infra* notes 216-217 and accompanying text.

[142] *See infra* Part II.B.3.

[143] Keck, *supra* note 6, at 106 (quoting Beaumont v. Brown, 237 N.W.2d 501, 505 (Mich. Ct. App. 1975)).

[144] Calvert & Brown, *supra* note 4, at 557 (quoting the leading case of Schulman v. Group W Prods. Inc., 955 P.2d 469, 489 (Cal. 1998)).

[145] Keck, *supra* note 6, at 106 (internal quotation marks and citations omitted); *accord* Helms, *supra* note 12, at 310.

some scholars have suggested that this tort is perfectly suited for victims of "video voyeurism," which, though a close cousin of Street View, has certain distinguishing features which bring it within the intrusion tort's reach.[146]

The tort of public disclosure of private facts provides an action for the "disclosure of private information that is (1) widely disseminated; (2) highly offensive to a reasonable person; and (3) not 'newsworthy' or 'of legitimate concern to the public.'"[147] The Supreme Court drastically undermined the efficacy of this tort in *Florida Star v. B.J.F.*, when it found that a rape victim could not collect damages from a newspaper for publishing her name without her consent because the information was truthful and the newspaper obtained it from publicly-available documents.[148] Thus, truthfulness and the extent to which information is publicly available or easy to find will affect the "'private nature'" (i.e., legal actionability) of the disclosed information.[149] Furthermore, when the form of disclosure is a photograph, a plaintiff's identity must be revealed by the image in order for him to recover.[150] The public disclosure tort thus has a catch-22 effect, because a piece of private information may be so widely disseminated by the disclosure as to become public, which will then bar the plaintiff's success.[151] Therefore, a putative plaintiff suing Street View under public disclosure for its dissemination of "private" information may be offering up the very evidence fatal to his cause of action. Because the accused Street View image is of a public space,[152] Google can successfully argue that the image's contents are not private to begin with because they were on

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[146] Calvert & Brown, *supra* note 4, at 557. Specifically, "video voyeurism" refers to the clandestine videotaping of people while in dressing rooms, tanning booths, and bathrooms. *Id.* If in a public place, it usually refers to "upskirting," the practice of placing small hidden cameras at low angles to film women's underwear. *Id.* This phenomenon is not limited to women. *Id.* at 479. According to Calvert and Brown, a plaintiff suing for video voyeurism that occurred in a dressing room can easily prove the elements of intrusion, "assuming a jury finds that [video voyeurism] is highly offensive conduct." *Id.* at 557. There is evidence that public opinion may be swinging that way: in California, upskirting had become such a problem that the legislature amended its so-called Peeping Tom laws to impose liability specifically for this conduct. David D. Kremenetsky, *Insatiable "Up-skirt" Voyeurs Force California Lawmakers to Expand Privacy Protection in Public Places*, 31 MCGEORGE L. REV. 285, 288-90 (2000).

[147] Lin, *supra* note 3, at 1110 (quoting FRED H. CATE, PRIVACY IN THE INFORMATION AGE 90 (1997)).

[148] Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989); McClurg, *supra* note 5, at 1002 (citing Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989)). Interestingly, Prosser did not envision truthfulness to be a defense to the publication of private facts. Prosser, *supra* note 2, at 398 ("[Public disclosure of private facts] is in reality an extension of defamation, . . . with the elimination of the defense of the truth.").

[149] Keck, *supra* note 6, at 107 (quoting U.S. Dep't of Justice v. Reports Comm., 489 U.S. 749, 764 (1989)).

[150] Calvert & Brown, *supra* note 4, at 564.

[151] Lin, *supra* note 3, at 1110-11 (discussing the catch-22 effect of this tort regarding the wrongful disclosure of private consumer databases, because "[d]atabases that are widely disseminated may be . . . [part of the] public record . . . [and] not tortious . . . [but] [c]onversely, databases that are . . . seemingly private . . . are often considered not to have been widely disseminated").

[152] *See supra* note 116 and accompanying text.

public display, and this tort by definition will not impose liability for further disseminating information that is already public.[153]

The third privacy tort, false light, requires a successful claimant to show that the publicized information is both false and highly offensive, and that defendant knew the information was untrue "or recklessly disregarded its truth or falsity."[154] With respect to Internet information privacy, this tort is largely inapplicable because where the privacy of personal information (*e.g.*, Social Security or bank account numbers) is concerned, the information is almost always true and thus non-actionable.[155] If the information at issue is in the form of a photograph or image, however, the false light tort would only provide a legal recourse for someone whose image was "digitally manipulated to create a false impression about the person identified in the image."[156] Thus, this tort is likely completely inapplicable to the Street View plaintiff's situation, because any image a plaintiff might object to will be "true" in a literal sense, even if the information it revealed was highly offensive.

Finally, in order to recover under the fourth privacy tort, commercial appropriation (or as it is also known, misappropriation[157]), a

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[153] This theoretical outcome is based on *Jackson v. Playboy Enterprises*, 574 F. Supp. 10 (S.D. Ohio 1983), discussed by Professor McClurg, *supra* note 5, at 993, 1008-09. In that case, three young men who were lost asked a policewoman on the street for some directions and were photographed without their consent while speaking with her. *Id.* at 1008. The policewoman later appeared as a nude model in *Playboy* magazine, and the photograph of her speaking to the three boys appeared next to her nude pictorial. *Id.* The court, however, dismissed the plaintiffs' claims under all four privacy torts largely because "the photo was taken on a public sidewalk 'in plain view of the public eye.'" *Id.* (citation omitted). Additionally, on the issue of Playboy's dissemination of the photo without the boys' consent, the court held that "'[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.'" *Jackson*, 574 F. Supp. at 13 (quoting RESTATEMENT (SECOND) OF TORTS 652D cmt.b (1977)). Indeed, this is one of Google's arguments in the Boring case. *See supra* note 116.

[154] FRED H. CATE, PRIVACY IN THE INFORMATION AGE 90 (1997). As Prosser noted, the false light tort is very closely related to common law defamation. Prosser, *supra* note 2, at 400 ("There has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both, will very often lie.").

[155] Lin, *supra* note 3, at 1111-12. To be clear, this insight is only relevant to circumstances in which an individual's personal information is disclosed. When a person's *reputation* is harmed via publications on the Internet, defamation law (either the common law tort or statutory form) comes into play. Myers, *supra* note 117, at 679-85 (describing two recent cases before the California Supreme Court involving Internet defamation).

[156] Calvert & Brown, *supra* note 4, at 565 (describing the experience of an actress whose head was placed on the nude body of another woman and posted on a website as an example of a fact pattern that fits inside the tort of false light). Moreover, like the tort of public disclosure, false light will also not apply to a plaintiff unless she is identifiable in the image in dispute. *See id.* However, "an identifiable facial representation" is not a "prerequisite to relief for appropriation." *Id.* at 563. This principle comes from a New York case, Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379 (1984), in which the appellate court found that a plaintiff was indeed identifiable in an image by her "hair, bone structure, body contours and stature and [her] posture." *Id.* at 385.

[157] One commentator suggests that the tort of "right of publicity" is essentially equivalent to misappropriation, although "doctrinal disorder" persists on this question. Note, *supra* note 98, at 1877-79. For example, in *Henley v. Dillard Department Stores*, the district court noted that the two claims were different in name only. 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999). By contrast, a

plaintiff must prove that the defendant used an aspect of the plaintiff's identity for his own advantage ("commercially or otherwise"), that the plaintiff did not consent to this use, and that the plaintiff suffered some resulting injury.[158] As a general matter, misappropriation is normally invoked by celebrities against those who would profit from use of their names or likenesses,[159] even though the tort does not technically require a plaintiff to be famous.[160] A plaintiff's celebrity status, however, is extremely useful in proving both the measure of plaintiff's loss and that the defendant misappropriated his image for his own commercial gain.[161] Another important consideration in this tort is the doctrine of incidental use, which renders "fleeting" use of a likeness non-actionable.[162]

2. Public Presence as Consent to Surveillance

Despite the robust body of law on privacy that Dean Prosser developed, his own work demonstrated an extreme reluctance to recognize invasions of privacy that take place in public.[163] Judges have largely agreed with Prosser's viewpoint, as demonstrated by the many cases where courts have prevented privacy claims from even reaching a jury.[164] Thus, as one scholar notes, the resulting current legal reality is that "[t]ort law clings stubbornly to the principle that privacy cannot be invaded in or from a public place."[165] The rationale behind the general rule that invasions of privacy cannot occur in public seems to have two interconnected roots. The first root is contractual theory: because "reasonable" people know that entering a public space is sure to entail some degree of visibility to others, a person thus implicitly consents to being watched by others when she is in a public area.[166] The other root is

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California appellate court suggested that actually misappropriation is the root of the right of publicity tort. *See* Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 313 (Ct. App. 2001).

[158] Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867, 873 (C.D. Cal. 1999); *see also* RESTATEMENT (SECOND) OF TORTS § 652C (1977).

[159] Note, *supra* note 98, at 1877-78.

[160] Keck, *supra* note 6, at 107.

[161] *See* Note, *supra* note 98, at 1879-80.

[162] Preston v. Martin Bregman Prods., Inc., 765 F. Supp. 116, 120 (S.D.N.Y. 1991).

[163] Prosser, *supra* note 2, at 391-92 ("On the public street, or in any other public place, the plaintiff has no right to be alone . . . . Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record . . . of a public sight which any one present would be free to see.") (citation omitted). One exception to this rule was noted by the Restatement authors in their comments to the public disclosure tort: "Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters." RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977). This comment was based on *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964), *see infra* note 170, which remains one of the few examples of a plaintiff who recovered for an invasion of privacy in public. McClurg, *supra* note 5, at 1045-46.

[164] McClurg, *supra* note 5, at 999-1006.

[165] *Id.* at 990.

[166] Prosser, *supra* note 2, at 391-92; RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977) ("Complete privacy does not exist in this world except in a desert, and anyone who is not a

the familiar tort defense of voluntary assumption of risk, whereby if a plaintiff voluntarily and knowingly puts herself at risk for the harm she suffers, she cannot recover from the defendant.[167] With regard to privacy invasions in public, assumption of risk is related to implicit consent[168] because when a jury finds that a plaintiff assumes the risk of having her privacy invaded by others when she goes into a public space, it is essentially saying that reasonable members of the community should perceive or be aware of that risk in public.[169] Even with these policy concerns as a backdrop, some victims of public invasion of privacy have been able to lodge successful claims,[170] but the general rule that a person's mere presence in public is equivalent to consenting to surveillance goes a long way towards precluding the Street View plaintiff's success.

When applied to the circumstances of the putative Street View plaintiff, the public-presence-as-consent-to-surveillance rule will likely be fatal to any claim under the torts of privacy. Take, for example, the woman caught entering the HIV testing facility.[171] First, the fact that the woman was in a public place when she was photographed means she has almost zero chance of recovery.[172] This is due to the judicial enforcement of society's purported view that it is unreasonable to expect privacy in

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hermit must expect and endure the ordinary incidents of the community life of which he is a part.") (citation and quotation marks omitted).

[167] David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 24 (2000) (citing BLACK'S LAW DICTIONARY 1569 (7th ed. 1999) ("The underlying idea of the assumption of risk defense is that a user has fully consented to incur a risk which the user fully comprehends. By the act of incurring the risk, the user thus implicitly agrees to take responsibility for any harmful consequences that may result from the encounter and so relieves the person who created the risk from responsibility."); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 68, at 480 (5th ed. 1984)).

[168] McClurg, *supra* note 5, at 1038-39 (regarding the RESTATEMENT (SECOND) OF TORTS' definition of assumption of risk, "assumption of risk is grounded in the notion of consent").

[169] Calvert & Brown, *supra* note 4, at 496 (regarding plaintiff who successfully sued journalist for invasion of privacy who published a picture of her taken at a funhouse with her skirt blown up over her head by an air jet and noting that "[s]he should not have been entitled to such an expectation [of privacy], if she had known or reasonably should have known about the . . . air jet in advance of entering the funhouse" and that the plaintiff "would have assumed the risk of exposure"); Helms, *supra* note 12, at 310 (with respect to each privacy tort but misappropriation, "[i]t is clear that if a person is *aware of or can foresee* [the invasion of privacy], a court will deem [the] disclosure of such information *voluntary*" and non-actionable) (emphases added); McClurg, *supra* note 5, at 1036-37 ("Underlying the rule that there is no legitimate expectation of privacy in public places is the idea that persons effectively assume the risk of scrutiny when they venture from private sanctuaries such as dwellings or offices.").

[170] *See, e.g.*, Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964) ("Where the status [a plaintiff] expects to occupy is changed without his volition to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because misfortune overtakes him in a public place."). Calvert and Brown proffer this argument for a victim of upskirting who was photographed or videotaped in public: because a person "deliberately" wears clothing to conceal his or her undergarments, it is implicit that she reasonably expects that the underwear will be private, so the fact that the voyeurism occurred in public does not mean she relinquished all her reasonable privacy expectations. Calvert & Brown, *supra* note 4, at 557.

[171] *See supra* note 60 and accompanying text.

[172] *See, e.g.*, McClurg, *supra* note 5, at 992-95 (collecting and describing cases in which plaintiffs have failed in attempts to sue for invasions of privacy that occurred in public).

public because reasonable people know others can observe the plaintiff when they occupy the same public space as she does.[173] Alternatively, from the assumption of risk perspective, our plaintiff could be viewed as having assumed the risk of being photographed because she voluntarily entered a public space in which she knew or reasonably should have known she could be seen by others.[174] We might even say that she knows (or reasonably should know) that she will be videotaped by some sort of surveillance camera at some point on her journey,[175] and so it would be unreasonable for her to assume that there would be no cameras present at her destination. Under either approach, then, the Street View plaintiff's claim fails under the privacy torts, because they revolve around the judicially approved, societal expectation of no privacy in public spaces and allow the plaintiff's consent to surveillance to be inferred from her presence in public.

The primary critique of the public-presence-as-consent principle is that it assumes a fiction: that people can really choose whether or not to enter public spaces in the course of their daily lives.[176] As one legal scholar has noted, in order to truly avoid "voluntarily" consenting to the public gaze, a person would have to decline jobs outside the home, cease shopping outside the home, refrain from seeking medical help outside the home, teach one's children at home, and otherwise "stay inside with the blinds drawn."[177] Since the ability to conduct work and shopping from inside one's home is a relatively recent phenomenon[178]—Dean Prosser certainly would not have been able to accomplish these tasks from within

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[173] *See supra* notes 166-169 and accompanying text.

[174] The level of actual knowledge of a particular risk a plaintiff must have in order to be said to have assumed it varies by jurisdiction. Owen, *supra* note 167, at 26-27. Some courts will not uphold the defense unless the plaintiff fully understood and appreciated the exact risk at hand, while others merely require that the plaintiff should have known of the risk. *Id.* at 26-29 (citing and disapproving of Bereman v. Burdolski, 460 P.2d 567, 569 (Kan. 1969), which applied a "should have known" requirement).

[175] Werbach, *supra* note 33, at 2355-56 (describing the increasing presence of government and privately owned surveillance cameras on public streets); Coleman, *supra* note 62, at 221 ("We have all seen the video cameras stationed on city street corners and on the highways to monitor traffic."). The author of this Note has also observed the increasing presence of street cameras on television and that currently at least one television station in the metropolitan New York area is entirely devoted to showing live footage from cameras placed near heavy automobile traffic areas. How these pervasive cameras encroach upon society's expectation of privacy will be discussed in Part II.B.3.

[176] McClurg, *supra* note 5, at 1040 ("There is nothing 'voluntary' about assuming a public pose except in the most trivial sense. Merely to survive in society requires that people spend a considerable amount of their time in places accessible to the public.").

[177] *Id.*

[178] Jim Barr Coleman points out the irony that while shopping from home might give a person protection from the public's gaze, it puts the same person squarely at risk of being "force[d] . . . to share personal information with people [he has] never even seen," due to the data and consumer information-collection programs so widespread among Internet vendors. Coleman, *supra* note 62, at 232-33; *see also* ROSEN, *supra* note 130, at 163-66 (discussing how direct marketers and Internet retailers are posing an increasing threat to the security of individuals' personal information).

his home in 1960, the year he wrote his article[179]—it seems odd that the legal tradition has latched onto the "public presence as consent to surveillance" model as firmly as it has.[180] Modern tort law experts also agree that if a person's "only or best 'choice' is to encounter a known risk, . . . the encounter is not 'voluntary.'"[181] Yet in any case, it seems clear that as long as courts and the law adhere to this principle, the Street View plaintiff will not be able to state a viable claim for invasion of privacy under the torts.

The second main objection to the public-presence-as-consent-to-surveillance model is that it obscures the fact that more than the taking of a photograph is at issue for the Street View plaintiff. In order for it to function as it does, Google must also compile the images into panoramic views, link the images to its digital map platform (so that when a user enters an address into Google Maps, the accompanying Street View image is also brought up), and then publish the composite Street View scenes (enabled with browsing and zooming capabilities) onto the Internet.[182] Is it really fair for tort law to assume that a person consents to all this and more merely by leaving her home? Many commentators are now answering this question with a resounding no.[183] Whether judges ever undertake a more precise investigation into exactly what a plaintiff purportedly consents to by entering a public space will likely depend on the evolution of society's expectations, since, as discussed below, society's expectations supposedly gave rise to this rule in the first place.

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[179] *See* Prosser, *supra* note 2, at 394.

[180] Professor McClurg suggests that a kind of class separatism may be behind the legal machine's acceptance of the public-presence-as-consent model, in that wealthier people are often able to buy themselves physical privacy that poorer people (what to say of homeless people) could never acquire. McClurg, *supra* note 5, at 1040.

[181] Owen, *supra* note 167, at 31; *accord* Dix W. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 127 (1972) (discussing illusory nature of an employee's "consent" to being forced to work a dangerous factory machine at his job). It might be argued that, at least for some of the acts captured by Street View, such as those depicting socially undesirable acts like not cleaning up after your dog on the subway, the people photographed assumed some risk that acquaintances could discover their transgressive behavior, despite the expectation that only uninterested strangers might see. Our sympathies, therefore, for those people might be justifiably weaker than for people who did no "wrong," yet were subject to excessive scrutiny and harassment (like Alison Stokke, discussed *supra* in notes 82-86). This Note contends that, at least for the ostensibly blameless victim of Internet harassment, the public-presence-as-consent model should be inapplicable. Additionally, for people whose undesirable actions are caught on camera, notions of proportionality should still inform the limits of cyber punishment. *See supra* note 79.

[182] The mechanics of Street View are discussed in Part I.A. Calvert and Brown similarly identify the separate, successive acts that are inherent in the video voyeur's taping of a victim in public. Calvert & Brown, *supra* note 4, at 488.

[183] *See, e.g.*, *id.* at 495-96; Crisci, *supra* note 4, at 210 (objecting to implied consent to photography via presence in public even when the photographed subject is a well-known celebrity); Keck, *supra* note 6, at 108-11 (pointing out that consumers have no ability to consent to cyber-surveillance because they cannot control the bargaining terms); McClurg, *supra* note 5, at 1040-41; Siprut, *supra* note 5, at 312-13.

3. The "Highly Offensive" Requirement and the Reasonable Person

Another aspect of the first three privacy torts (intrusion, public disclosure, and false light) that affects the Street View plaintiff's chance for recovery is the "highly offensive" requirement.[184] The tort of intrusion, for example, requires that the manner of intrusion be highly offensive to a reasonable person in order for the defendant's conduct to be actionable.[185] With respect to the tort of public disclosure of private facts, the information actually disclosed must be highly offensive to state a claim.[186] While not applicable to the Street View plaintiff,[187] the false light tort requires that the "*false light* in which the [plaintiff] was placed . . . be highly offensive to a reasonable person."[188] Accordingly, a Street View plaintiff suing for intrusion would need to show that the manner of Street View's intrusion was highly offensive and, if suing under public disclosure, would need to show that the Street View image itself is highly offensive.

An inquiry into whether the manner in which Street View collects its images is highly offensive to a reasonable person necessarily entails an examination of "the prevailing social practices . . . relevant to the expectation of privacy under the circumstances."[189] An instructive example of this principle in action is *Shulman v. Group W Productions, Inc.*[190] The plaintiffs in that case sued for intrusion upon seclusion when a production company disseminated film footage showing one of the plaintiffs being rescued and transported by a helicopter crew after a devastating car accident.[191] To evaluate the offensiveness of the production company's intrusion (by filming the plaintiff at the accident scene and inside the helicopter), "[t]he court considered the implications of established custom and norms" in then-current "media practices."[192] Accordingly, the court held that the plaintiff could not have had a reasonable expectation that she would not be filmed at the accident

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[184] Spencer, *supra* note 121, at 853 (explaining that the torts of intrusion and public disclosure "are not actionable unless the intrusion 'would be highly offensive to a reasonable person'") (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)). The fourth tort, misappropriation, does not contain a "highly offensive" requirement of any kind. RESTATEMENT (SECOND) OF TORTS § 652C (1977) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.").

[185] Helms, *supra* note 12, at 310; Keck, *supra* note 6, at 106.

[186] Helms, *supra* note 12, at 310.

[187] The reason for this tort's inapplicability is discussed *supra*, Part II.B.1.

[188] RESTATEMENT (SECOND) OF TORTS § 652E (1977) (emphasis added).

[189] Spencer, *supra* note 121, at 854.

[190] 955 P.2d 469 (Cal. 1998).

[191] *Id.* at 475-76. The plaintiffs also successfully sued for disclosure of public facts based on the release of an audiotape of the plaintiff conversing with a nurse in the helicopter, *id.* at 477, but since audio recordings constitute an entirely different category of information (and form of intrusion), this Note will address only the elements of the plaintiffs' claims that relate to the putative Street View plaintiff.

[192] Spencer, *supra* note 121, at 854-55.

scene, because it was customary for media personnel to congregate at and film accident locations.[193] However, because it was not customary for reporters to actually accompany victims while en route to the hospital, the court found that this portion of the defendant's act was indeed an intrusion upon seclusion.[194]

The *Shulman* court's analysis of the highly offensive requirement is problematic because it allows the media to define what is *not* a highly offensive means of intrusion by simply employing the contested technique on a regular basis.[195] It suggests that when society becomes sufficiently accustomed to a certain surveillance practice, its presence and eventual practice become so ingrained in the social fabric that any "reasonable" person is precluded from finding it highly offensive. Under this approach, the highly offensive requirement is tautologically linked to the reasonable person standard by analytic necessity: to decide whether intrusive conduct is highly offensive, the courts look to what a reasonable person would perceive as highly offensive. And to decide what a reasonable person would perceive as offensive, the courts appear to ask whether she would tolerate the conduct at issue. This "encroachment" cycle becomes internalized by its subjects and repeated over time until society "lose[s] any sense that privacy was once possible in the encroached upon area."[196] This is not to say that the *Shulman* court's approach does not have any advantages. For example, it takes the court out of the business of adjudicating the normative content of the highly offensive requirement in the intrusion tort; if it did not rely on current practices as the benchmark, the court might end up having to ask the legislature what it meant by "highly offensive" manner of intrusion when it codified the intrusion tort.

Nevertheless, one compelling reason for objecting to the encroachment process in the context of privacy is that it contravenes the purpose of the legal norm underlying the reasonable person standard, which the Restatement injected into all the privacy torts except for misappropriation.[197] The reasonable person, of course, is "an abstraction, a representative of the normal standard of community behavior."[198] Its function is to protect what Robert Post calls "civility rules," the rules of "deference and demeanor" that guide and shape personal interaction in

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[193] *Shulman*, 955 P.2d at 490; *see also* Spencer, *supra* note 121, at 854-56.

[194] *Shulman*, 955 P.2d at 490-91; *see also* Spencer, *supra* note 121, at 855-56.

[195] This kind of circuitous reasoning will be familiar to anyone with knowledge of the "newsworthiness" standard (as a defense in tort or to government censorship), described *infra* Part II.B.

[196] Spencer, *supra* note 121, at 844.

[197] Regarding intrusion upon seclusion, liability only attaches "if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977). In the public disclosure tort, one is only liable for disclosure of a matter that would be "highly offensive to a reasonable person." *Id.* § 652D. Similarly, to be liable under the false light tort, the light in which the plaintiff is cast must be "highly offensive to a reasonable person." *Id.* § 652E.

[198] Post, *supra* note 124, at 961 (internal quotation marks and citation omitted).

society.[199] The reasonable person standard accomplishes this by allowing recovery only for injuries that would be highly offensive to an idealized member of society who fully obeys all the relevant civility rules, not for the actual injuries to people who either perceive the conduct at hand to be too serious (the eggshell plaintiff) or not serious enough to constitute a social violation (the unusual exhibitionist).[200] Accordingly, when applied to the privacy torts, the reasonable person standard (against which the offensiveness of the defendant's conduct is measured) should function as a reminder of what conduct *should* be deemed offensive and not, as the *Shulman* court indicated, whether the conduct is deemed routine by its perpetrators. Thus, the *Shulman* case demonstrates the central problem with how the highly offensive requirement has been applied by courts to claims of invasion of privacy and how it dovetails with the encroachment process.

With respect to the putative Street View plaintiff suing for intrusion, if the court follows the *Shulman* approach to deciding what a highly offensive manner of intrusion is, it will look at the prevailing customs of the intruding media as evidence of society's acceptance of that kind of intrusion. Because Google is the defendant, the relevant information-collecting practices might be defined by the community of other Internet map providers or search engines. As noted earlier, Google's Street View application is not the only one of its kind.[201] Amazon used similar filming and web distributing technology in its A9 service,[202] and Microsoft and smaller companies like Everyscape[203] currently provide competitive equivalents to Street View. Therefore, the court would likely infer that because nowadays Internet companies commonly film street façades and link them to their online map platforms, society has accepted this manner of information-collection, and it cannot be deemed highly offensive to a reasonable person.[204] A significant unresolved problem with this inference is that many such "societal" shifts in acceptance are really performed by a host of disparate private actors for whom social benefit is but a minor concern and should not be given such prophetic weight by courts.[205] Moreover, given the

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[199] *Id.* at 963.

[200] *See id.* at 963-64.

[201] *See supra* Part I.A.

[202] *Id.*

[203] See Everyscape.com, http://everyscape.com (last visited Sept. 10, 2008), for an introductory demonstration of this service.

[204] Microsoft may actually soon get off the Internet street façade bandwagon. The company has test versions of "street-level technology" in operation for the cities of Seattle and San Francisco, but it has delayed unveiling the application to the public because it is "looking at ways to obscure identifiable images like faces and license plates" to avoid some of the backlash Google has received. Mills, *supra* note 41.

[205] As Shaun B. Spencer observes,

> [the] expectation-driven conception of privacy is vulnerable to encroachment. Actors and groups powerful enough to influence social behavior can change society's expectation of

increasing familiarity in society (especially among younger generations) with having one's image and personality defined in part by Internet participation,[206] a court (or jury) would likely view being caught by Street View in an embarrassing situation as part and parcel of living in a heavily networked modern world.[207] In sum, the Street View plaintiff has very little chance of bringing a successful intrusion claim due to incremental encroachment upon social expectations of privacy and due to courts' aversion to using a normatively strong reasonable person standard to counter that encroachment.[208]

4. Problems with Damages

As in all tort actions, the putative Street View plaintiff must allege legally cognizable damages that flow from the injury to which he has been subjected. The form of these damages may be nominal or presumed (i.e., an extremely small amount),[209] they may be "special" (damages that would not reasonably be expected to accompany the injury), they may be commercial and monetizable, they may be punitive, or they may be emotional damages that compensate for intentional infliction of emotional distress.[210] Alternatively, the plaintiff may also opt to request equitable or injunctive relief to stop the defendant from continuing the conduct that is the basis of the lawsuit, which in fact is actually the current trend in Internet-related tort claims.[211] However, even if a plaintiff can show legally cognizable damages, a court will not impose liability unless the defendant had a duty of care to the plaintiff that, through his breach, caused the plaintiff's foreseeable injuries (that are the source of the damages).[212] Furthermore, whether a duty of care

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> privacy, and thereby change what the law will protect as private. They do so by changing their own conduct or practices, by changing or designing technology to affect privacy, or by implementing laws that affect society's expectation of privacy.

Spencer, *supra* note 121, at 860.

206 *See supra* notes 98-104 and accompanying text.

207 *See* Werbach, *supra* note 33, at 2323 (describing the increasing ubiquitousness of networked sensors in everyday modern life); *accord* Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 2 (2007) ("Technologies of surveillance continue to proliferate. What one does and says in public places is increasingly subject to surveillance by means of a combination of [private actors] and official surveillance tools . . . .").

208 Professor McClurg noted a related judicial trend when he discovered that 73% of state privacy cases and 72% of federal cases were thrown out by judges before ever reaching a jury. McClurg, *supra* note 5, at 1000-01. This observation is troubling given the centrality of the reasonable person standard in privacy claims, because "objective reasonable person tests are usually for the fact finder to apply and resolve." *Id.* at 1005. Thus, it may also be the case that in addition to eschewing the responsibility to identify the privacy norms society wants to preserve in the reasonable person standard, judges are also preventing those norms from being substantiated by juries through verdicts and awards.

209 *See* Post, *supra* note 124, at 965-66.

210 Coleman, *supra* note 62, at 216-20; *see also* Prosser, *supra* note 2, at 409.

211 Rustad & Koenig, *supra* note 73, at 101.

212 *Id.* at 132-33.

exists, whether a breach occurred, and whether that breach foreseeably caused the plaintiff's injuries, will be judged from the "reasonable person" perspective discussed above.[213]

Dean Prosser noted in his famous article that there is "general agreement" that a court may award damages for the "presumed mental distress inflicted" by invasions of privacy, even "without proof" of the plaintiff's actual harm.[214] The Restatement (Second) of Torts concurs with Dean Prosser, and provides that

> [o]ne who has established a cause of action for invasion of his privacy is entitled to recover damages for (a) the harm to his interest in privacy resulting from the invasion; (b) his mental distress proved to have been suffered . . . ; and (c) special damage of which the invasion is a legal cause.[215]

Despite these two persuasive authorities, however, courts remain wary of awarding damages for a plaintiff's unproven harm "to his interest in privacy." One commentator theorizes that the lack of reported cases in which courts have awarded damages (even nominal amounts) to plaintiffs who have not alleged actual harm by the defendant indicates that "as a practical matter virtually every plaintiff will . . . be able to produce some credible evidence of . . . actual injury in the form of emotional suffering."[216] This optimistic analysis, however, is not borne out by caselaw, which hints that, to the contrary, courts do not approve of plaintiffs who do not allege more concrete forms of damages, such as commercial loss from misappropriation or contingent special damages.[217] Some cases even demonstrate an active judicial hostility towards the more amorphous damages that Dean Prosser and the Restatement envisioned.[218] Thus, the Street View plaintiff alleging only vague damages related to the harm to her privacy interest will likely find courts

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213 *See supra* notes 198-200 and accompanying text.

214 Prosser, *supra* note 2, at 409 .

215 RESTATEMENT (SECOND) OF TORTS § 652H (1977).

216 Post, *supra* note 124, at 965-66.

217 For example, in a case where an employer videotaped its employees during a hearing in which the employees contested the recent denial of promotions to them, the court "stopped just short of openly ridiculing" the employees when they described the psychological harm the videotaping had caused them. McClurg, *supra* note 5, at 1006-07 (discussing Albright v. United States, 732 F.2d 181, 183 (D.C. Cir. 1984)). The plaintiffs described their respective harms from the forced videotaping as analogous to living in an oppressive totalitarian state, as feeling the same vulnerability as one might after a home invasion, and as feeling like a "nonentity, . . . that things could be done to me without my knowledge, approval, or say." *Albright*, 732 F.2d at 187. The court, however, scoffed at their testimony (which it found so exaggerated as to render the entire case unbelievable), and even suggested that if the plaintiffs had truly been so offended, they should have left the employment hearing. *Id.*

218 *See, e.g.*, Jackson v. Playboy Enters., Inc., 574 F. Supp. 10, 13 (S.D. Ohio 1983). In *Jackson*, *see supra* note 153, the court refused to make a common sense finding that the plaintiffs had been "exposed to public contempt and ridicule" by their unwitting appearance in the country's most popular pornographic magazine. *Id.* The court also discredited the plaintiffs' allegation that they were "humiliated, annoyed, [and] disgraced" by the publication because of defective pleading. *Id.* Of course, it was within the court's discretion to allow the plaintiffs to amend their complaint.

inhospitable to her claims, even if some or most people would intuitively think she had indeed suffered psychological distress and harm.[219]

It might be argued, of course, that by setting up high barriers regarding damages for plaintiffs using the privacy torts, judges are merely serving their traditional gatekeeper function to weed out frivolous claims that would otherwise overwhelm the legal system.[220] However, several rationales exist that support Dean Prosser's and the Restatement's version of more amorphous damages. The first rationale is that unless the plaintiff is a celebrity or has suffered a significant commercial loss because of the defendant's invasion of privacy, the amount of damages involved in a privacy case is likely to be very small[221] and hence provides little incentive for frivolous plaintiffs to sue. Therefore, by imposing further obstacles in addition to the cost of litigation on a plaintiff, courts are artificially shrinking the pool of potential plaintiffs to those who have commercial damages, even though the "mushrooming number" of people being victimized through the Internet is well-recorded.[222] The second rationale is that judges do not appear to "get it" in privacy cases when it comes to appreciating the depths of plaintiffs' mental distress resulting from unwanted dissemination of a photograph,[223] and this institutional incompetence is especially pronounced in cases involving the effects of technology and the Internet upon citizens.[224] Thus, plaintiffs may be prejudiced by judges' generally low level of understanding regarding the Internet's intricacies and common practices (such as "flaming"[225]) and injuries that should be compensated are not. Accordingly, the more stringent damages standards used by judges are not desirable in many cases and should be informed by the more flexible Restatement standard described above.[226]

Damages are also a problem for the would-be Street View plaintiff attempting to sue under the misappropriation tort.[227]

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[219] For example, if the woman who was caught entering the HIV testing facility were to discover that this photo has been disseminated and discussed so widely (which she may already have), *see supra* note 60 and accompanying text, most people would agree that having the whole world comment upon one's choice to be tested for HIV is psychologically distressing and a terrible ordeal.

[220] Professor McClurg suggests judges do this partly in order "to exert jury control over a tort that has been criticized as having no 'legal profile,'" and partly to protect the free speech issues that often arise in invasion of privacy cases. McClurg, *supra* note 5, at 1006 (citing Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966)).

[221] Note, *supra* note 98, at 1878-81.

[222] Rustad & Koenig, *supra* note 73, at 87-88.

[223] *See* McClurg, *supra* note 5, at 1006; *see also supra* notes 216-217 and accompanying text.

[224] *See* Rustad & Koenig, *supra* note 73, at 132-33.

[225] *See supra* note 79 and accompanying text.

[226] *See supra* text accompanying notes 212-218.

[227] There are several other doctrinal obstacles relating specifically to misappropriation. For example, the doctrine of incidental use renders "fleeting" use of a likeness non-actionable. Preston v. Martin Bregman Prods. Inc., 765 F. Supp. 116, 120 (S.D.N.Y. 1991). Nonetheless, for

Interestingly, while this tort has been unhelpful to victims of other kinds of Internet information privacy violations (such as the sale of a mailing list or consumer profile),[228] at first glance the Street View plaintiff does seem to have a much stronger chance of prevailing under it. Street View is made up entirely of images, which fit squarely inside the statutory definition of the plaintiff's "likeness" that the tort is designed to protect.[229] While the "benefit" Street View gains[230] from using individuals' pictures appears to be advertising revenue, recovery based on the value of the defendant's use of the contested image is generally restricted to celebrity plaintiffs.[231] Non-celebrity plaintiffs "typically seek damages based on the emotional harm that use of [their] image has cost [them],"[232] even though, as discussed earlier, courts have not been particularly receptive to their emotional harms.[233] Courts may also require the Street View plaintiff to show that his image had an intrinsic value from which the accused wrongdoer intended to profit.[234] Therefore, the non-celebrity Street View plaintiff who cannot monetize his image's prior value in his complaint, or who cannot convince a judge that he suffered some actual emotional harm, will likely fail in his cause of action under misappropriation.

5. Google's Newsworthy Defense

As many would-be plaintiffs have found, complaints based on the torts of privacy must overcome defenses and traditional privileges afforded to members of the media, which arise out of the First

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purposes of focus, this Note will only discuss the damages issue. The viability of a newsworthy defense to misappropriation is explored *infra* Part II.B.

[228] Lin, *supra* note 3, at 1109, 1111. This is because mailing lists or consumer profiles contain information about various aspects of a person's personality (perhaps in addition to the person's name), which do not necessarily come within the statutory meaning of "identity" (interpreted as a name) or "likeness" (interpreted as an image). *Id.*

[229] RESTATEMENT (SECOND) OF TORTS § 652C (1977). Some commentators suggest, however, that if a non-celebrity's image appears "on a for-profit, commercial site on the World Wide Web," the commercial appropriation tort could obtain, since the commercial gain element can be proven through revenues from advertising. *See* Calvert & Brown, *supra* note 4, at 562; *see also* CATE, *supra* note 154, at 89. However, this argument would certainly fail in states like New York, where courts have held that "the presence of advertising matter" in or near the allegedly-misappropriated image does not automatically mean the defendant has used the plaintiff's likeness for a commercial purpose. Prosser, *supra* note 2, at 405.

[230] *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977).

[231] *See* Siprut, *supra* note 5, at 320; Lin, *supra* note 3, at 1111.

[232] Siprut, *supra* note 5, at 320.

[233] *See supra* notes 216-217 and accompanying text. The Tenth Circuit has indicated its rejection of the "emotional side to misappropriation," preferring instead to allow recovery under the tort only when financial losses have been sustained by the plaintiff. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 973, 976 (10th Cir. 1996); *see also* Note, *supra* note 98, at 1883 n.84.

[234] Jackson v. Playboy Enters., Inc., 574 F. Supp. 10, 13 (S.D. Ohio 1983) ("[I]n order to state a cause of action for invasion of privacy by appropriation, the complaint must allege that plaintiff's name or likeness has some intrinsic value, which was taken by defendant for its own benefit, commercial or otherwise.").

Amendment guarantee of freedom of the press.[235] Specifically, "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public," or when the defendant publicizes "what the plaintiff himself leaves open to the public eye."[236] Thus, Google may also be able to claim First Amendment protection (also known as the newsworthy defense) for Street View because it is a commercial actor engaged in the "gathering of images" and speech equivalents.[237] If successful, such a defense would provide a complete bar to Google's liability under the public disclosure and misappropriations torts.[238]

A threshold issue in this area is whether Google can be included with the more traditional newsgatherers as part of the "press" that the Framers contemplated would be protected by the First Amendment's umbrella.[239] One indication that Google would be considered a member of the press is that its services disseminate news.[240] Since the Supreme Court has held that there is no particular inherent quality in information to qualify it for First Amendment protection, it seems fair to assume Google would be treated as a newsgatherer for these purposes.[241]

To formulate its newsworthy defense to the Street View plaintiff's claim of public disclosure or misappropriation, Google would need to show that Street View publishes content that is "lawfully obtained and of some interest to the public."[242] This so-called newsworthiness standard is a notoriously loose one, with "the vast majority of cases seem[ing] to hold that what is printed is by definition of legitimate public interest."[243] Diana Zimmerman describes these

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[235] Prosser, *supra* note 2, at 410 (describing the two special rights of the press to give "further publicity to already public figures" and to give "publicity to news, and other matters of public interest"). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

[236] RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

[237] Calvert & Brown, *supra* note 4, at 505.

[238] Because the intrusion upon seclusion has no publicity component, a defense of newsworthiness (which is to say publicity was warranted) is inapplicable. Newsworthiness does, however, provide a defendant with a solid shield under the false light tort, RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977), but because that tort does not apply to the Street View plaintiff, *see supra* notes 154-156 and accompanying text, it will not be addressed here.

[239] Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (affirming importance of free speech and press to country's welfare and noting that "without some protection for seeking out the news, freedom of the press could be eviscerated"). For a more detailed discussion of the legal ramifications of dubbing Internet providers or web blog posters "members of the press," see Zick, *supra* note 207, at 42-45.

[240] *See, e.g.*, http://news.google.com (last visited Oct. 16, 2008).

[241] As Justice Thomas commented in *McConnell v. Federal Election Commission*, "First Amendment protection was extended to that fundamental category of artistic and entertaining speech not for its own sake, but only because it was indistinguishable, practically, from speech intended to inform." 540 U.S. 93, 282 (2003) (Thomas, J., dissenting).

[242] Zick, *supra* note 207, at 45 (citing Fla. Star v. B.J.F., 491 U.S. 524 (1989)).

[243] Diana L. Zimmerman, *Requiem for a Heavyweight: Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 353 (1983). This standard was at work in the *Shulman* case, *see supra* notes 190-194 and accompanying text. In that case, the newsworthiness of the plaintiff's accident in conjunction with the court's approval of the media's method of

outcomes as illustrating courts' preferred "[l]eave-it-to-the-[p]ress [m]odel," in which courts allow the media to determine what is newsworthy through its choice to publish a particular item.[244] Thus, even though very few (if any) images available on Street View possess newsworthy or informational qualities, Google will likely be able to argue that its images are "[n]on-obscene photographs [which] are a form of speech protected by the First Amendment."[245]

Moreover, while the ostensibly commercial nature of Street View might give a plaintiff a foothold under the misappropriation tort,[246] "[t]he fact that speech is sold for a profit or that it is used for entertainment does not mean that its distribution is unprotected by the Constitution."[247] Therefore, courts are not likely to locate restraints on Street View's gathering or disseminating of online photos under the First Amendment due to the defense of newsworthiness.

In sum, the putative Street View plaintiff has little chance of prevailing under the privacy torts as they are currently interpreted by the legal system. The inherent obstacles to her recovery, such as the public-presence-as-consent doctrine and the highly offensive requirement, could become more pliant if judges discard the circular reasoning underlying them and become more alert to guarding against encroachment in privacy protection. Further, the judiciary's customary hostility to the more amorphous damages sustained by plaintiffs whose privacy was invaded in public is dismissive of the social and emotional consequences that can follow such a violation. Additionally, as long as Google can employ the leave-it-to-the-press model of the newsworthy defense with impunity, any Street View complainant will likely fail on that point as well. Therefore, until scholars, judges, and legislatures begin to wade through the thick doctrinal hedges surrounding Internet privacy violations, Google (or companies engaged in similar activities) will likely emerge unscathed from litigation and thus unmotivated to become more responsive to privacy concerns.[248]

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information-collection was a central reason the court found for the defendant on the intrusion relating to the videotaping of the plaintiff at the scene of her accident. *See supra* notes 189-194 and accompanying text.

[244] Zimmerman, *supra* note 243, at 353. This of course is very similar to the courts' analysis of the highly offensive requirement in intrusion cases. *See supra* notes 184-189 and accompanying text.

[245] Calvert & Brown, *supra* note 4, at 504 n.200 ("As with pictures, films, paintings, drawings, and engravings, both oral utterances and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution.") (citing Kaplan v. California, 413 U.S. 115, 119-20 (1973)).

[246] See *supra* text accompanying notes 157-162 for a discussion on misappropriation.

[247] Calvert & Brown, *supra* note 4, at 508.

[248] As noted by the attorney for the Boring couple, who started the first suit against Street View in the United States, discussed *supra* note 116, Google's reliance on its removal procedures belies its desire to not have "any accountability. What's to motivate them to change and put in better internal controls?" Elinson, *supra* note 116.

III. HOW PRIVACY PROTECTION SHOULD EVOLVE IN LIGHT OF STREET VIEW

This Note has argued thus far in Part I that while people are more comfortable than ever with being surveyed by private actors and living much of their lives online, they are nevertheless increasingly concerned with their online image management.[249] In Part II, this Note explored the contours of a hypothetical claim against Street View under the privacy torts and concluded that as privacy law stands now, the putative Street View plaintiff is destined to fail.[250] However, because several key features of privacy law are dependent on societal expectations, it is quite possible that at some point soon, concepts like online image management and alternative damage theories will rise to prominence and can provide the would-be Street View plaintiff a viable legal platform. This Section begins by arguing that online image management should be recognized in the legal community as the essence of a new privacy, in which people are comfortable with private surveillance but can still expect a modicum of control in determining the distribution and extent of that surveillance. The Section will then suggest several tort reforms and non-legal solutions that would recalibrate the balance between our formal and physical means of protecting privacy in modern America.

A. *What Are We Trying to Protect in the First Place?*

The meaning of "privacy" has long been a subject of controversy and disagreement.[251] There does seem to be a small consensus, however, around Ruth Gavison's articulation of solitude, secrecy, and anonymity as privacy's essential components.[252] Online image management, the concern for an individual's ability to define one's image (both pictorial and reputational) on the Internet, should be included in any modern enunciation of what people look to protect when they assert their right to privacy. Concomitantly, online image management should also concern the potential for others to manipulate or interfere with one's online image. Accordingly, Street View's arrival in the Internet community and its potential for defining individuals' online images bring the need for explicit recognition of these concerns into sharp relief.

One significant reason why online image management should be explicitly recognized as a component of legally protected privacy is that

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249 *See supra* notes 105-109 and accompanying text.

250 *See supra* Part II.

251 *See supra* notes 110-115 and accompanying text.

252 Gavison, *supra* note 110, at 428; McClurg, *supra* note 5, at 1029-36 (using Gavison's articulation as basis for analyzing hypothetical illustrating the loss of privacy that can occur in a public place); Coleman, *supra* note 62, at 225-26 (describing McClurg's acceptance of Gavison's theory in his work).

Street View and other similar Internet applications are fundamentally different from the more traditional methods of information-collection that can threaten privacy. This insight should be emphasized, especially with respect to the Internet's power to provide any user with the ability to reproduce, store, and distribute a photograph without the logistical or pecuniary restraints that once were in place.[253] The gravitas of online image and reputation management is already recognized by employers, landlords, admissions offices of educational institutions, students and youth culture in general, and of course members of the online reputation management industry.[254] Further, the fact that the public relations industry has already recognized its importance is a compelling indication that this concept will only become more crucial as Internet access continues to spread across the globe.[255]

Another noteworthy reason why online image management is a desirable addition to the pantheon of privacy rights is that it provides a more accurate understanding of the harms that people actually experience when their online image integrity is compromised. As one commentator notes, unauthorized use of another's image impedes that person's ability to control the way she presents herself to society.[256] The essence of this harm "is an impingement on the victim's freedom in the authorship of her self-narrative, not merely her loss of profits."[257] Another problem exacerbated by an online photo is that it allows the viewer to fit the subject into one of several discursive categories ("X is a homosexual and/or a diseased person"[258] for entering that HIV-testing facility) and encourages speculation that further damages the individual's ability to control her identity.[259]

The utility of this principle is clear when applied to the *Jackson v. Playboy Enterprises, Inc.* case, in which the judge refused to accept that the plaintiffs were "exposed to public contempt and ridicule" by their nonconsensual appearance in the country's most popular pornographic magazine.[260] Pretending for a moment that this case arose during the Internet era, it is much more likely that if the judge had understood the nuances of online image management and how the

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253 *See, e.g.*, Coleman, *supra* note 62, at 221; Fishman, *supra* note 3, at 1511 ("Until recently, . . . the means to disseminate information beyond a fairly small community were limited. . . . Today, the Internet has obliterated those restraints.").

254 *See supra* notes 105-109 and accompanying text.

255 *See supra* note 108 and accompanying text. Additionally, there is no reason to assume that uses for others' online images will be strictly benign; it is certainly possible that Street View and technologies like it could be used by stalkers or burglars, and thus online image management could impact safety concerns as well.

256 Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 548 (2006).

257 *Id.* at 549.

258 Stan Karas, *Privacy, Identity, Databases*, 52 AM. U. L. REV. 393, 427 (2002) (internal quotation marks omitted).

259 *Id.*

260 574 F. Supp. 10, 13 (S.D. Ohio 1983).

plaintiffs' lives were inexorably altered by the publication of the contested photograph, he would have been more receptive to the plaintiffs' allegations of emotional harm.

Moreover, when truthful information that affects a person's status in a community is disseminated without that person's consent, the law should recognize the victim's loss of respect and dignity.[261] Many people who were children or teenagers during the Internet revolution's infancy will find that many of their less noble moments will be preserved forever. It is no exaggeration to suggest that "[t]his phenomenon creates the risk that individuals will be judged solely on the basis of their moments of weakness, thus erasing a lifetime of good."[262] In fact, the existence of the online image management service providers is a signal that this eventuality has already come to pass.

Therefore, online image management is an aspect of privacy that deserves legal protection. The general trend among judges to disregard the impact of unwarranted manipulation of a person's online image (or printed image, for that matter) increasingly contradicts the emerging social importance that online image management carries.[263] Additionally, by supporting the implementation of online image management as a proper privacy concern, legal actors can continue to fine-tune existing tort law to the needs and particularities of the Internet surveillance and information-collection technologies of the future. However, if online image management is ever actually recognized, it will affect certain aspects of the privacy tort doctrine in ways beneficial to the putative Street View plaintiff.

B. How the Formal/Physical Balance Can Be Regained

The first area of likely tort reform in response to the recognition of online image management is the general rule that privacy invasions cannot take place in public.[264] This public-presence-as-consent model is premised upon the notion that people consent to a certain amount of surveillance by others when they enter the public sphere.[265] Yet if online image management was a pervasive concept, the fact that an image-subject was captured in public would be inconsequential because courts would understand that the photography that occurred in public is but one element of the violation as a whole. That Internet images are a different animal from print images would be self-evident from the enhanced

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[261] Post, *supra* note 124, at 967-68. The leading case for the recognition of loss of dignity independently of financial loss resulting from the invasion of privacy in public is *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964). *See supra* note 170.

[262] Note, *supra* note 98, at 1881.

[263] This is especially true given the widespread use of scanners that convert any printed image or text into digital information that can be searched and stored. *See id.* at 1871-72.

[264] *See supra* notes 163-165 and accompanying text.

[265] *See supra* notes 166-169 and accompanying text.

reproductive, storing, and disseminating capabilities that the Internet provides. Therefore, judges would be able to draw more accurate lines along the gradations of consent that appear in populations who might voluntarily pose for a photo in public but would object to that photograph being posted on a public web site.

The next area of tort reform would likely occur in how judges interpret the highly offensive requirement, which is so crucial to recovery under certain privacy torts.[266] Currently, courts look to prevailing media practices to determine if a method of information-collection is highly offensive.[267] However, the acknowledgement of online image management's significance would encourage courts to enter the normative debate about what type of media intrusion is likely to interfere with an individual's ability to self-determine his online profile. For example, the unwanted Internet attention received by Alison Stokke[268] would not be judged by the fact that media personnel routinely post pictures to blogs that often become the subject of derisive commentary. Instead, a court could ask whether the nonconsensual posting of Stokke's image on the Internet is likely to detract from her ability to present herself to our larger society in the way she chooses. Not only is this the more precise formulation of the issue for victims like Stokke and "Dog Poop Girl," it also would provide a firm incentive for Street View and other similar services to self-police their web sites for content that would interfere with subjects' authorship of their online profiles.[269]

The problems that the putative Street View plaintiff faces regarding damages would also be eased by the legal community's formal recognition of online image management. As discussed above, the victims of privacy invasions akin to the putative Street View plaintiff have encountered both outright hostility and scorn from the judiciary when attempting to articulate the emotional harms they experienced.[270] Yet it also appears that the privacy torts, as first conceptualized by Dean Prosser, were designed to address exactly those emotional harms, even without particularized proof.[271] Online image management would give judges a more definitive framework from which to evaluate plaintiffs' emotional harms because they can hear testimony from Internet users, review web site popularity indicators, and conduct their own Internet searches to gage the extent to which a defendant has wrongly interfered

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266 *See supra* Part II.B.3 and accompanying text.

267 *See supra* notes 195-196 and accompanying text.

268 *See supra* notes 82-86 and accompanying text.

269 Formulating an objective standard for policing images that interfere with an individual's online image is likely to be a complex and contested process. That being said, this Note would suggest that certain categories of photographs, such as photographs of people unknowingly revealing undergarments or bare body parts, seem more likely to gain support for removing.

270 *See supra* notes 217-219 and accompanying text.

271 *See supra* notes 214-215 and accompanying text.

with a plaintiff's online image management. Further, online image management can also be judged from the familiar reasonable person standard (i.e., whether a reasonable person would experience loss of control of his or her online image profile from the alleged conduct). This would square nicely with tort law's general goals of providing predictable incentives to private actors, in the form of presumed or nominal damages that encourage Google and similar companies to self-police, and the substantiation of community norms.[272]

Another benefit regarding the damages problem that online image management provides is a better opportunity to address the ignorant plaintiff problem. As scholars have noted with respect to other kinds of Internet privacy violations, "it is not very likely that a victim would even discover or learn about the display of her image on the [Internet]."[273] Thus, it is probably the case that the pool of potential plaintiffs complaining of Street View or similar applications will be underinclusive, since whether any particular plaintiff discovers the interference with her online image management is left to the luck of the draw. There is little incentive for Google or other Internet companies to self-edit their content, because the chances of being sued successfully are quite slim.[274] If online image management is implemented as a means of alleging presumed or statutory damages, however, that incentive becomes notably stronger because there would be no question whether a person would have a stake in maintaining the integrity of his or her online image.

The last and perhaps most difficult area of reform could occur with respect to the newsworthiness doctrine as a defense to the privacy torts. As explained earlier, the newsworthiness standard is notoriously loose, with most courts following the deferential leave-it-to-the-press model when it comes to determining whether published content is newsworthy.[275] While the rarified position the First Amendment occupies in American law will surely endure,[276] online image management provides at the least another counterbalance to the weight courts usually give to the compulsion to protect media speech. Also, since newsworthiness does revolve around media practices, if online image management were recognized by media actors as well, it might very well lead to changes in industry practice that will in turn affect the determination of newsworthiness.

Finally, it is also very possible that an explicit recognition by the legal community of online image management would effect a change in

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[272] *See supra* notes 198-200 and accompanying text.

[273] Calvert & Brown, *supra* note 4, at 562 (making this point with respect to victims of video voyeurism and upskirting).

[274] *See supra* note 116 for a discussion of the lone civil lawsuit against Google Street View.

[275] *See supra* notes 243-244 and accompanying text.

[276] *See* Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1006-07 (2000).

market forces for Internet companies like Google. There is already evidence that this is occurring. Recently, Microsoft (a chief Google competitor) indicated that it would take more drastic measures to protect individuals' privacy in its own mapping platform that features some views of street façades.[277] The company has test versions of "street-level technology" in operation for the cities of Seattle and San Francisco, but it has delayed unveiling the application to the general public because it is "looking at ways to obscure identifiable images like faces and license plates" to avoid some of the criticism Google has received.[278] Even Google itself has already signaled its willingness to bow to societal pressure regarding privacy protection by agreeing to blur faces and license plates in its European version of Street View.[279] Further, Google now reports that it is considering doing the same to its domestic version:

> [E]ven if it's legal, some may still be uncomfortable with the [Street View] photographs. . . . It's sort of that "ick" feeling that something makes you feel uncomfortable . . . . [T]his calls into question the whole idea of whether privacy is something that needs to be regulated by law or if there's this other concept of privacy that we need to look at . . . .[280]

And indeed, in May of 2008, Google implemented its face-blurring technology in the streets of Manhattan, New York.[281] Thus, market pressure exerted by consumers may encourage Internet companies to rethink their values and choices regarding consumer privacy.[282] Google might also consider making all Street View images resistant to downloading by users or could begin self-policing through mandatory quality checks in order to address consumer concerns.

In sum, the recognition of online image management as a distinct and valued aspect of legally-protected privacy will affect several areas of current privacy tort law. The rule that privacy invasions cannot occur in public and the highly offensive requirement may very well evolve into more plaintiff-friendly principles that could provide a viable legal platform for the putative Street View plaintiff. Additionally, online image management provides a sound theoretical framework that encompasses the real emotional harms that victims of Internet privacy

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277 Mills, *supra* note 41.

278 *Id.*

279 McMillan, *supra* note 13. Additionally, when Google was approached by the director of an Oregon domestic violence shelter with concerns that Street View might endanger victims of domestic violence by revealing confidential shelter locations, Google agreed to obscure those images that could identify the shelters or their residents. Rogoway, *supra* note 90, at A1.

280 McMillan, *supra* note 13.

281 Posting of Andrea Frome to Google Lat Long Blog, http://google-latlong.blogspot.com/2008/05/street-view-revisits-manhattan.html (May 12, 2008 6:00 PM EST). The efficacy of this technology, however, is already being questioned; the algorithm used to blur faces is not entirely accurate at this stage. Posting of Steven Shankland to CNET News Blog, http://news.cnet.com/8301-10784_3-9943140-7.html (May 13, 2008, 10:01 AM PDT).

282 Several Internet applications that search online images to identify requested faces are actually already available, *see, e.g.*, TinEye.com, http://tineye.com/login (last visited Oct. 17, 2008).

violations often feel but have had difficulty translating into legally-cognizable terms. Finally, online image management could galvanize the Internet community to become more responsive to consumer demands for privacy and control over how they are presented to the world over the Internet.

CONCLUSION

The balance between formal and physical protections of privacy is not a static one, and new surveillance technology is one of the main forces that continually tips the scale. But the interdependent relationship between them remains; if "old" privacy values are left vulnerable by new technologies, then either society has outgrown the formal assurances that protected those values, or it must reexamine their content and refine the formal/physical dichotomy to regain the status quo. Google Street View's reception in American society as compared with its treatment under current privacy tort law is an example of this process at work. Despite criticism from certain corners, Street View's popularity continues to grow as Internet users discover new applications for the program and more cities are filmed. However, Street View's spreading popularity does not mean that Internet users have totally abandoned all sense of privacy. The nuanced understanding of online privacy demonstrated by many frequent Internet users and the blooming online reputation management industry signal that a concern for online image management should be included among the legal (formal) protections of privacy as people become more aware of the risks of digital storage, reproduction, and distribution of online information. On the other hand, market forces and technological alterations are also available to supplement the physical protections for online image management. Regardless of which path we choose, we must commit to vigorous reevaluation of our privacy values alongside the constantly developing technology that draw them into question.

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