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Retrievable Images on Social Media Platforms: A Call for a New Privacy Tort

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Retrievable Images on Social Media Platforms: A Call for a New Privacy Tort

ZAHRA TAKHSHID†

The recognition of a right of privacy in Warren and Brandeis's famous article has long been celebrated and lamented. It is celebrated because privacy is a central feature of individual well-being that deserves legal protection. It is lamented because the protection they contemplated, and that is actually provided by the law, is quite modest. Modern technology, especially social media platforms, has only raised the stakes. Anytime one goes out in public, one risks having one's image captured and shared worldwide, leaving us with little or no control over how we are perceived by others.

This Article argues for the recognition of a new privacy tort: the tort of unwanted broadcasting. It would allow a person whose image is, without permission, shared widely on one or more social media platforms that has an enduring retrievable character, to recover damages from a person who posts it. While in some respects novel and far-reaching, the unwanted broadcasting tort has a solid grounding in privacy

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theory and doctrinal roots in English case law. This Article also shows that this tort can be fashioned in a manner that renders it consistent with First Amendment principles.

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INTRODUCTION

Imagine you are in a café enjoying a cup of coffee when you notice the person sitting at a nearby table is staring at you. The individual pulls out a cellphone and takes a picture of you. Before you know it, the individual is posting those pictures on her social media platform which has a large audience. Unless you are a public figure who is accustomed to desired or even undesired attention, you most likely do not enjoy being the subject in this scenario. You may choose to either ignore the individual or give up on that coffee and leave the café. But leaving the café won't help you from being in similar situations as long as you remain in a public space. You inevitably have a lower expectation of privacy in public; after all, "the timorous may stay at home."¹ But does that mean you have to consent to your picture becoming available online and expect to be watched by a thousand followers on a stranger's social media account for an indefinite time by choosing to be in a public space? The minute the individual posts your picture on their public social media profile, the nature of your presence in public changes: it is now a retrievable visibility that can haunt you for years to come and have many unwanted consequences.

Today, the novel ways that third parties can take advantage of a simple photo are alarming.² A New York Times report on a start-up company called Clearview AI neatly illustrates this point. Clearview AI accumulated millions of publicly available pictures of people online to build up a facial recognition app that would allow the users to identify strangers. Anyone can simply take a picture of a stranger walking down the street and upload that image on the app. The app would then use its database to identify that stranger. While the use of the app has thus far been limited,

1. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929).

2. Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It* (Jan 18, 2020), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html>.

it may be soon that similar apps become available to the public. The app has heavily relied on social media platforms to collect images. One may argue that the photo scrapping used by Clearview AI is against the terms of services of Facebook. However, such violations may keep recurring regardless of what companies' terms of services state. Furthermore, despite the ban on facial recognition technology in a number of U.S. cities, such as San Francisco,³ the future of the technology is opaque. New ways of using publicly available images as data can and will become available. While we can think of ways to address each new technology as it emerges, the legal system should grant the privacy of not having any picture online if an individual chooses so.

This Article asks whether choosing not to have your picture available online in general, and specifically on social media platforms, is a protected privacy interest that should allow individuals to sue for damages when their image has been intentionally widely broadcasted on social media platforms without their consent. The Article argues that the answer is yes. The harm of such image dissemination online is retrievable visibility that is not addressed by the current mainstream common law privacy torts.

Unease with unwanted enduring effects of photography is not new. In 2009, one member of Congress introduced a bill that would have mandated a clicking sound to serve as a notice to persons that they are being photographed.⁴ Some

3. Kate Conger, Richard Fausset, and Serge F. Kovalski, *San Francisco Bans Facial Recognition Technology*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html>; see also Bruce Schneier, *We're Banning Facial Recognition. We're Missing the Point*, N.Y. TIMES (Jan. 20, 2020), <https://www.nytimes.com/2020/01/20/opinion/facial-recognition-ban-privacy.html>.

4. Camera Predator Alert Act of 2009, H.R. 414, 111th Cong. (2009). The act would have required "any mobile phone containing a digital camera" to "sound a tone . . . whenever a photograph is taken with the camera in such phone." *Id.* The act would have further prohibited such a phone from being "equipped with a means of disabling or silencing such tone or sound." *Id.*

have suggested using an app that would immediately emit a flash “when sensing a camera lens, thereby ruining the image.”⁵ The impracticality of such proposals forces us to look at the growing body of scholarly literature that focuses on similar online privacy concerns involving images: scholars have recognized the phenomenon of widespread video recording (especially citizen recording v. professional journalism) and its potential for generating privacy violations.⁶ One author called for recognizing a tort of objectification of crime spectators in light of widespread video recording of crime scenes,⁷ while another introduced a tort for the misuse of personal information.⁸ Scholarship has also focused on online shaming and the importance of laws

5. Yana Welinder, *A Face Tells More than a Thousand Posts: Developing Face Recognition Privacy in Social Networks*, 26 HARV. J.L. & TECH. 168, 225 (2012).

6. See, e.g., Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. (forthcoming 2019) (manuscript at 5) (available at <https://ssrn.com/abstract=3344815>) (citing Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 175–76 (2017)) (noting that Kaminski advocated that “recording’s situated, physical privacy harms be balanced against recording’s expressive interests under an intermediate scrutiny time, place, manner test”); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 395–96 (2011) (suggesting that balancing privacy against recording might be appropriate under Supreme Court jurisprudence); Marc J. Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115, 197–98 (2013) (arguing that First Amendment right to record could be overcome by legitimate government interests in privacy). For a general debate on challenges of information privacy, see Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN L. REV. 1049 (2000).

7. Amelia J. Uelmen, *Crime Spectators and the Tort of Objectification*, 12 U. MASS. L. REV. 68, 75 (2017). Uelmen writes that taking pictures of people in their everyday activity “may also be problematic and morally wrong,” however she distinguishes those instances from her proposed tort which imagines the scenarios where the victim is vulnerable and in need of emergency assistance. *Id.* at 110. She opines, “Limiting the tort to encounters with a vulnerable person in need of emergency assistance helps to keep the harm complained of within judicially cognizable limits.” *Id.* at 116.

8. Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140 (2006).

that “recognize and legally protect the need for dignity.”⁹ Others have addressed the unwanted consequences of use of facial recognition technology.¹⁰ None have addressed the concern of widespread dissemination of images on social media platforms persuasively, or given attention to the role that tort law might play in defining new wrongs related to the dissemination of one’s image in cyberspace and “empowering private parties to initiate proceedings designed to hold tortfeasors accountable.”¹¹

In the age of social media, the unwanted dissemination of the videos and images of an individual causes a distinct injury. Publications on social media are “instantaneous, readily accessible by both recipient and onlookers, . . . cumulative, persistent, viral, potentially global in reach, continuous, and unless arrested, permanent.”¹² Unlike human memory, the internet does not forget—one’s image is retrievable years after an incident. Yet the currently recognized privacy torts do not help in addressing this new injury. The most relevant tort—appropriation of likeness—renders persons liable for appropriating another’s image, but in several states¹³ only when they do so for commercial gain.¹⁴ Furthermore, as in the Clearview AI facial recognition app

9. ANNE S.Y. CHEUNG, UNIVERSITY OF HONG KONG FACULTY OF LAW, *REVISITING PRIVACY AND DIGNITY: ONLINE SHAMING IN THE GLOBAL E-VILLAGE* 11 (2014) (noting that “such dignity should prevail over the right of freedom of expression in the case of online shaming”).

10. Welinder, *supra* note 5, at 168 (calling for a regulation on facial recognition technologies).

11. John C.P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 *TEXAS L. REV.* 917, 946–47 (2010) (introducing the civil recourse theory in torts and stating “tort law provides victims with an avenue of civil recourse against those who have committed relational and injurious wrongs against them”).

12. SIR MICHAEL TUGENDHAT & IAIN CHRISTIE, *THE LAW OF PRIVACY AND THE MEDIA* 760 (N. A. Moreham & Sir Mark Warby eds., 3d ed. 2016).

13. *See infra* Part I.

14. *See infra* Part I. For a study of the challenges and limitations of the existing tort privacy see Neil M. Richards, *The Limits of Tort Privacy*, 9 *J. TELECOMM. & HIGH TECH. L. REV.* 357 (2011); Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 *CALIF. L. REV.* 1887 (2010).

case, there are ways that the use of one's publicly available image does not fall into the premises of the appropriation of likeness tort standard. The action for violations of the right of publicity, too, is limited. It only protects celebrities and owners of celebrities' images, not so much the ordinary persons.¹⁵

The federal Communication Decency Act ("CDA") only intensifies the need for recognizing a common law cause of action.¹⁶ Section 230(c) limits the liability of internet service providers,¹⁷ including the liability of websites that post others' content.¹⁸ Section 230 was "written long before Facebook or Twitter existed."¹⁹ With its shortcomings and the apparent unwillingness of the Congress to address the criticisms over the statute,²⁰ this Article looks to the common law of torts to find a path forward.

Building on the mainstream privacy torts, the tort this Article proposes allows courts to further promote privacy in public spaces, foster responsible behavior among social media users, and compensate the injured. For this proposed tort, the injury is the retrievable visibility caused by the unwanted broadcast of one's image which renders the

15. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

16. 47 U.S.C. § 230(c)(2) (2012) (stating "No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)").

17. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997) (holding American Online immune from liability for delayed removing of defamatory content posted by third party).

18. *See* 47 U.S.C. § 230(c).

19. Sarah Jeong, *Politicians Want to Change the Internet's Most Important Law. They Should Read It First*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/opinion/section-230-political-neutrality.html>.

20. *See infra* Part III.

individual powerless over one's presence in public, taking away one's power over self-presentation for an undetermined period of time.

Of course, any privacy tort must conform to First Amendment limitations and, in particular, modern courts' expansive conception of what counts as newsworthy and therefore protected speech. However, the terms on which liability will be imposed under the tort advocated here comport with constitutional principles. By recognizing the exception of newsworthy content explained in Part III, the tort of unwanted broadcast will work side by side with the other privacy torts such as appropriation of likeness.

To justify the proposed tort in this Article, Part I provides a look into the social media industry and the issue with the widespread publications. It then discusses the legal options an individual may decide to pursue based on the current available legal remedies in tort and copyright law. Part I illuminates the shortcomings of each path in addressing the privacy breach of unwanted broadcasted images on social media platforms.

Part II examines the new privacy tort recognized by U.K. law, and the European Union's approach to the unwanted publication of images and the recognition of the right to be forgotten. Each approach supports the idea of a greater protection for privacy. The right to be forgotten in Europe, while including all data—visual and nonvisual—not only demonstrates the missing part that exists in the U.S. legal discourse, but also the possibility for bold moves that provide a greater protection of individuals' rights of privacy. Part II then turns to a theoretical examination of the nature of privacy and whether the proposed tort is supported by any of several widely recognized privacy theories. It examines ongoing debates on what privacy is and relates the theoretical framework to the proposed tort of unwanted broadcasting.

Part III proposes the new tort of unwanted broadcasting, focusing on traditional notions of physical presence and

boundaries in public spaces. Part III also addresses and rebuts First Amendment objections to the recognition of this tort and elaborates on the exception to the proposed tort.

PART I

A. *Social Media and Life in Public*

The rise of social media platforms such as Instagram, Twitter, and Facebook have created an unprecedented degree of image sharing. From drinking a cup of coffee to diving deep in the ocean, it is common now for people to constantly record everyday activities. This billion-dollar industry²¹ has created a platform for many voices.²² From cooks blogging about food to social activists fighting for a cause, social media facilitate publications that reach unprecedented audiences. In the new social network era, Instagramers, influencers, and social media sensations generate income from the content of their pages.²³ They are also “chasing users” unstopably.²⁴ Some go as far as purchasing followers to showcase, falsely, their popularity.²⁵

21. Emily McCormick, *Instagram Is Estimated to Be Worth More than \$100 Billion*, BLOOMBERG NEWS (June 25, 2018, 1:26 PM), <https://www.bloomberg.com/news/articles/2018-06-25/value-of-facebook-s-instagram-estimated-to-top-100-billion> (last updated June 25, 2018, 2:17 PM).

22. For a discussion on the overwhelming false speech on social media platforms see Louis W. Tompros, Richard A. Crudo, Alexis Pfeiffer & Rahel Boghossian, *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World*, 31 HARV. J. OF L. & TECH. 65 (2017).

23. See, e.g., Jules Schroeder, *5 Millennial Instagramers Share How They Get Paid To Travel The World*, FORBES (June 29, 2017, 4:09 PM), <https://www.forbes.com/sites/juleschroeder/2017/06/29/5-millennial-instagramers-share-how-they-get-paid-to-travel-the-world/#59a5226647fd>.

24. Dante Disparte, *Facebook And The Tyranny Of Monthly Active Users*, FORBES (July 28, 2018, 5:43 PM), <https://www.forbes.com/sites/dantedisparte/2018/07/28/facebook-and-the-tyranny-of-monthly-active-users/#251d6c796aea>.

25. See, e.g., Natalie Robehmed, *For Sale: Instagram Followers and Likes*, FORBES (July 19, 2012, 10:10 AM), <https://www.forbes.com/sites/natalie-robahmed/2012/07/19/for-sale-instagram-follows-and-likes/#5564427617ce>; Madeline Buxton, *It's Insanely Easy To Buy Thousands Of Instagram Followers*

To generate revenue or attract audiences, Instagram users may and do use pictures and stories of other individuals to either mock, shame, tease or to just have fun at the expense of others' privacy. As Tim Wu notes, "The forces of wealth creation no longer favor the expansion of privacy but work to undermine it."²⁶

What is missing in debates surrounding social media is the power of a retrievable posted image. An enduring photograph can reveal much more than a real-time live observation. It "may capture more information than even a careful observer would perceive, will preserve that information in a potentially permanent form, and can be used to communicate more information more efficiently than mere words easily could."²⁷ In any given day, whether we like it or not, we are in people's cellphone video clips, souvenir pictures, and more. It is the reality of our times. The law does not provide one with a legal basis to oppose being photographed randomly on the streets. Yet, being photographed in public spaces is not the same as having one's image circulated widely on the Internet for millions of people to see for an indefinite period of time. The fact is that "[w]e act differently when we know we are 'on the record.' Mass privacy is the freedom to act without being watched and thus, in a sense, to be who we really are—not who we want others to think we are."²⁸

—*But Should You?*, REFINERY29 (Apr. 10, 2017, 11:20 AM), <https://www.refinery29.com/how-to-buy-instagram-followers> (last updated Oct. 18, 2018, 4:50 PM). Twitter reportedly took down around 70 million fake accounts in May and June 2018. See Craig Timberg & Elizabeth Dwoskin, *Twitter is sweeping out fake accounts like never before, putting user growth at risk*, WASH. POST (July 6, 2018), https://www.washingtonpost.com/technology/2018/07/06/twitter-is-sweeping-out-fake-accounts-like-never-before-putting-user-growth-risk/?no-redirect=on&utm_term=.894f54624d40.

26. Tim Wu, *How Capitalism Betrayed Privacy*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/opinion/sunday/privacy-capitalism.html>.

27. NICHOLAS J. MCBRIDE & RODERICK BAGSHAW, TORT LAW 600 (4th ed. 2012).

28. Wu, *supra* note 26.

In limited cases on the social media platforms, such as when an individual's picture is used to impersonate her identity by a third party, one has certain forms of recourse. She can, for example, ask a social media platform to address the issue, and they might well do so.²⁹ However, besides a limited number of exceptions, the individual whose image is being circulated without her consent and against her will cannot choose to stop the dissemination of her image once it has begun. The harm of this form of instant and global dissemination of images is of a different order, and the benefits of publicizing such images in enduring retrievable form are not palpable. The individual is forced into an unwanted self-presentation that violates the individual's privacy.³⁰ This is especially alarming considering the new trends of deep fake technology,³¹ and facial recognition apps³² that perpetuate unimaginable privacy harms.

Currently, the law affords individuals several tools to address the unwanted dissemination. However, as this Article illustrates, none are adequate to address the harm of unwanted instant and global dissemination of imagery of persons in public spaces via social media platforms with its enduring retrievability.

29. Instagram's help page, for example, gives guidelines on how to file a report if you believe an account is impersonating you. However, you do need a government issued I.D. If after filing your claim, the third party does not take down your image, you are then asked to submit a photo of yourself, holding your government issued I.D. in your hand, to further continue with your complaint. This is a burden for countries where Instagram does not have an active presence and the users may or may not be able to follow up with the rules. See *Impersonation Accounts*, INSTAGRAM, <https://help.instagram.com/446663175382270> (last visited Apr. 10, 2019).

30. See *infra* Part II.

31. For more on deep fake, see, e.g., Chesney, Robert and Citron, Danielle Keats, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. (Forthcoming 2019).

32. Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It* (Jan 18, 2020). <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html>.

B. *Existing Recourses and Limitations*

Analysis of liability for invasions of privacy under U.S. law begin with Dean Prosser's influential framework,³³ which isolated four distinct privacy torts³⁴ based on Samuel Warren & Louis Brandeis's call for a common-law right to privacy.³⁵ Later, Prosser argued the torts recognized by courts following the *Privacy* article were not just one tort, but "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represent an interference with the right of the plaintiff . . . 'to be let alone.'"³⁶ He described the four privacy torts as follows: "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. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."³⁷ The unwanted broadcast of one's image on social media falls between the cracks of these categories.

1. Appropriation of Likeness and the Right to Publicity

For the tort of appropriation, Prosser initially suggested the courts should first ask "whether there has been appropriation of an aspect of the plaintiff's identity,"³⁸ and next "whether the defendant has appropriated the name or

33. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

34. *Id.* Goldberg and Zipursky point to Prosser's role as the lead reporter for the American Law Institute's Second Restatement of Torts in this widespread adaptation as he "incorporated his article's framework into the new Restatement." JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 331 (Dennis Patterson ed., 2010).

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

36. Prosser, *supra* note 33, at 389.

37. *Id.* at 389.

38. *Id.* at 403.

likeness for his own advantage.”³⁹ Today, the defendant in the tort of appropriation of likeness must show the voice, likeness or name has been used without permission “for commercial purposes.”⁴⁰ Commercial speech enjoys a lower level of First Amendment protection, and recognizing what constitutes commercial speech for the purposes of this tort may not be easy.⁴¹

The facts of early leading lawsuits are illuminating. In *Roberson v. Rochester Folding Box Co.*, plaintiff appealed from a lower court decision that had rejected her claim.⁴² Defendant, a flour company, had used Ms. Roberson’s portrait to advertise their product without her consent. They had spread about 25,000 lithographic prints and photographs of the plaintiff in stores, warehouses, saloons, and other public places.⁴³ While, in 1902, no distinct action for the invasion of privacy was recognized, plaintiff asked the court to “enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and, as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of \$15,000.”⁴⁴

The court was not willing to recognize the property nor the privacy rights of Ms. Roberson in her image, probably influenced in part by the then-prevailing strongly sexist prejudices.⁴⁵ The court opined:

39. *Id.* at 405.

40. GOLDBERG & ZIPURSKY, *supra* note 34, at 335.

41. *See, e.g.*, *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003) (discussing the different approaches jurisdictions have taken in identifying commercial speech).

42. 64 N.E. 442, 442 (N.Y. 1902) (superseded by statute).

43. *Id.*

44. *Id.* at 443.

45. *See* JESSICA LAKE, *THE FACE THAT LAUNCHED A THOUSAND LAWSUITS, THE AMERICAN WOMEN WHO FORGED A RIGHT TO PRIVACY* 67 (2016) (“[C]hief Justice Parker’s inability to identify with her meant he could not understand or empathize with her plight, which led to his unwillingness to provide her with a

The so-called “right of privacy” is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise.⁴⁶

In rejecting Ms. Roberson’s claim, the New York Court of Appeals noted that “she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes.”⁴⁷ Justice Parker pointed out, “The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize.”⁴⁸

Consequently, the New York legislature enacted a statute that recognized a right of publicity in its civil code:⁴⁹

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained [as provided in Civil Rights Law § 50] may maintain an equitable action . . . to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use . . .⁵⁰

Meanwhile, at about the same time, the Georgia Supreme Court in *Pavesich v. New England Life Ins. Co.* took a different path and recognized liability for misappropriation of likeness.⁵¹ In *Pavesich*, plaintiff brought a suit against an insurance company that had used his picture in an advertisement. Mr. Pavesich was not a famous man, yet the

remedy.”).

46. *Roberson*, 64 N.E. at 443.

47. *Id.*

48. *Id.* at 442.

49. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2019).

50. *Id.*; see also *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 393 (N.Y. 2018) (citing Civil Rights Law § 51).

51. 50 S.E. 68 (Ga. 1905).

court recognized that even if he was, it did not mean that his picture could be “displayed in places where he would never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked.”⁵²

Goldberg and Zipursky categorize the three protected interests of the tort of appropriation of likeness as follows: a privacy interest against unwanted exposure, an autonomy interest in controlling the presentation of one’s image to others, and an economic interest in the value of one’s image.⁵³

Yet, some aspects of the tort gradually became associated with celebrity rights and economic gains over the years of its development and moved further away from its initial natural law basis.⁵⁴ In an article written by Harold R. Gordon in 1960, the author encouraged the recognition of a distinct right of appropriation—for commercial exploitation rather than injury to feelings⁵⁵—that would help the confused courts address the lawsuits involving commercial exploitation of public figures.⁵⁶ With *Zacchini v. Scripps-Howard Broad. Co.*⁵⁷—the only case to date involving this tort that has gone to the U.S. Supreme Court—an independent right of publicity was boosted.⁵⁸

52. *Id.* at 80.

53. GOLDBERG & ZIPURSKY, *supra* note 34, at 336.

54. *See Pavesich*, 50 S.E. at 71 (“The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law.”).

55. Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 613, 555 (1960).

56. *See* JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY* 73 (2018).

57. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

58. 433 U.S. 562, 573 (1977). The Court rejected the First Amendment defense and allowed certain publicity cases to be heard despite the mandate of First Amendment on free speech and newsworthiness. *Id.* at 578. The plaintiff had filed the lawsuit when 15 seconds of his performance as a human cannonball

In *Zacchini*, the Court explained that “[t]he State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment”⁵⁹ and that “[t]he State’s interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.”⁶⁰

Later, in *Carson v. Here’s Johnny Portable Toilets, Inc.*⁶¹ the U.S. Court of Appeals for the Sixth Circuit wrote: “The right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.”⁶² In such cases, “celebrities are not injured by the exposure in the media,”⁶³ they only want to be compensated for it. Many lawsuits involving the right of publicity are now similar to lawsuits involving intellectual property rights.⁶⁴ For example, in *White v. Samsung Elecs. Am., Inc.* the court ruled in favor of Vanna White, a T.V. personality who claimed Samsung had infringed her publicity by using a robot in an advertisement that looked like her.⁶⁵ Right of publicity, as a result of this development

was recorded and broadcasted on tv by a freelance reporter. *Id.* at 564.

59. *Id.* at 573.

60. *Id.*

61. 698 F.2d 831 (6th Cir. 1983).

62. *Id.* at 835.

63. MICHAEL D. MURRAY, *RIGHT OF PUBLICITY IN A NUTSHELL* 21 (2018).

64. WESTON ANSON, *RIGHT OF PUBLICITY: ANALYSIS, VALUATION AND THE LAW* 5 (2015). Anson states, “The right of publicity falls outside the parameters of the three main areas of intellectual property—copyrights, trademarks, and patents—however most IP attorneys typically spend their time.” “However, the federal courts and the vast majority of state courts agree that the right of publicity is an IP right, and that it is an overlooked IP right in many cases.” *Id.*

65. 971 F.2d 1395, 1396 (9th Cir. 1992).

and its distinct features from the tort of appropriation of likeness, now survives the death of the celebrity whose image is being used, whereas the appropriation of likeness tort is personal and does not survive the death of the person whose image is being used.⁶⁶As a result, right of publicity claims remain in the hands of the famous who want to recoup lost economic gains.

As for the tort of appropriation of likeness, courts generate different outcomes depending on the local statute and the method of analyzing the harm. The Second Restatement of Torts, too, notes commercial gain is generally not a requirement of an appropriation of likeness claim.⁶⁷ Nevertheless, today, statutes in New York,⁶⁸ Oklahoma,⁶⁹ Utah,⁷⁰ and Virginia⁷¹ require the tort of appropriation of likeness to involve an economic gain for the defendant.⁷² In *Binion v. O'Neal*, for example, plaintiff was initially able to commence an invasion of privacy claim and avoid a motion to dismiss.⁷³ The 23 year-old plaintiff who suffered from a medical condition had posted his own picture on his public Instagram account. Defendant, a famous former basketball player, posted one of those pictures with his own face next to it on his Instagram account with more than 8 million

66. For a discussion on the differences of appropriation of likeness and the right of publicity, see Kathryn Riley, *Misappropriation of Name or Likeness versus Invasion of Right of Publicity*, 12 J. CONTEMP. LEGAL ISSUES 587, 590–91 (2001).

67. RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. LAW INST. 1977).

68. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2019).

69. OKLA. STAT. ANN. tit. 12, § 1449 (West 2019).

70. *See, e.g.*, *Cox v. Hatch*, 761 P.2d 556, 565 (Utah 1988). The Utah Supreme Court rejected the plaintiff's claim of appropriation of likeness, reasoning that it had no intrinsic value. Thus, the plaintiff could not maintain an action for appropriation of likeness under UTAH CODE ANN. § 45-3-3. *Id.* at 564.

71. VA. CODE ANN. § 8.01-40 (2019).

72. *But see* RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

73. No. 15-60869-CIV-COHN/SELTZER, 2016 WL 111344, at *4 (S.D. Fla. Jan. 11, 2016).

followers, mocking the young man. Plaintiff sued O’Neal for appropriation of likeness, among other privacy torts.

Defendant argued the plaintiff appropriation claim fails “because Binion lacks a significant pecuniary or commercial interest in his identity.”⁷⁴ Applying Michigan law, the court held in favor of the plaintiff since Michigan does not require defendants to make commercial use of an image for the tort of misappropriation.⁷⁵ Although the case was later resolved through mediation,⁷⁶ it was a victory for a non-celebrity to make a valid appropriation of likeness claim.

Nevertheless, the various approaches different jurisdictions take in handling the appropriation of likeness lawsuits do not create a unified protection for individuals whose pictures and video recordings are easily shared on social media accounts without their consent. The privacy tort of appropriation of likeness was initially a response to unwanted exposure. In the face of the social media age and the emerging ways the tech industry enables the use of images in producing new products, such as that of the Clearview AI facial recognition app, there are harms that do fall under the tort of appropriation of likeness umbrella. The exposure and spread of images on social media platforms are unlike anything imaginable even twenty years ago. Many claims do not involve celebrities and are not for economic gain, making it very difficult to access the appropriation right as a remedy. This limited scope may force plaintiffs to seek refuge in the tort of false light. Below I will discuss why false light also proves to be inadequate.

74. *Id.*

75. *Id.* (citing *Asmi v. Nasir*, No. 316208, 2014 WL 5690503, at *10 (Mich. Ct. App. Nov. 4, 2014)).

76. *Binion v. O’Neal*, No. 15-60869-CIV, 2016 WL 614523, at *1 (S.D. Fla. Feb. 16, 2016), *vacated*, No. 15-60869-CIV, 2016 WL 3511940 (S.D. Fla. Mar. 18, 2016) (showing that mediation was ordered before the case was dismissed).

2. Public Disclosure of Private Facts

The tort of public disclosure of private facts is concerned with the publicity of an aspect of one's life. The Second Restatement of Torts distinguishes between "publication" and "publicity" to highlight the core of privacy torts. Unlike the publication element of defamation, publicity means:

[t]hat the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.⁷⁷

It is the element of publicity that gives rise to an obligation to refrain from publicizing certain information about an aspect of another person's life that you are aware of.⁷⁸ In public disclosure of private facts, the tortfeasor has obtained certain information about an individual without necessarily intruding upon that individual's privacy. Nevertheless, she may be held liable if she gives publicity to the private facts of that person's life. This distinction is crucial because tort law is recognizing, once again, that there are aspects of our life that we do not want to be publicized, even though certain people may already know them.

However, the subject matter of the facts disclosed should pertain to an aspect of our "private life," as opposed to our public life, one which if publicized "would be highly offensive to a reasonable person, and is not of legitimate concern to the public."⁷⁹ By these requirements, the tort carves out the public life of the individual. Therefore, based on this tort, there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus, "[H]e normally cannot complain when his photograph is taken

77. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. LAW INST. 1977).

78. This is different from the tort of "intrusion upon seclusions" in which a person (or an entity such as the government) intrudes upon one's private space.

79. RESTATEMENT (SECOND) OF TORTS § 652D.

while he is walking down the public street and is published in the defendant's newspaper."⁸⁰ The Restatement's description leaves no room for the new harm identified in this Article to be redressed by this tort. Notwithstanding, there is still room for liability for what is not newsworthy. The publication addressed in this Article is in a new space—social media—with a global audience, one that makes the medium's peculiar qualities the reason why a specific tort needs to be recognized to address the harm.

3. False Light

Another one of Prosser's privacy torts is "[p]ublicity which places the plaintiff in a false light in the public eye."⁸¹ This tort involves "a false statement about the plaintiff that affects the way third parties view her, and thereby harms the plaintiff."⁸² The Second Restatement of Torts defines the tort of false light as:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.⁸³

An example of the tort of false light is illustrated in *Duncan v. Peterson*.⁸⁴ In this case, a pastor filed a lawsuit against his former church. The church had sent letters to Mr. Duncan's new church accusing him of unbiblical behavior. The letters claimed he should no longer be able to keep the

80. *Id.* special note.

81. Prosser, *supra* note 33, at 389.

82. GOLDBERG & ZIPURSKY, *supra* note 34, at 334.

83. RESTATEMENT (SECOND) OF TORTS § 652E.

84. 835 N.E.2d 411 (Ill. App. Ct. 2005).

title “Pastor.”⁸⁵ Mr. Duncan argued the letters were false and violated his privacy. The Appellate Court of Illinois sided with Mr. Duncan and noted that although the complaint did not mention false light, “the alleged wrongdoing describes a cause of action for the tort of placing a person in a false light,”⁸⁶ requiring similar elements to those specified in the Second Restatement of Torts.

False light is not a thriving tort,⁸⁷ and its four corners remain vague.⁸⁸ Nevertheless, the underlying basis for recognizing this tort is the distinct harm of the spread of non-defamatory but false information, one which is undesirable, “albeit in a manner that is often hard to pin down.”⁸⁹ The tort does not help in addressing the widespread broadcast of one’s image on online social media platforms, yet it emphasizes the range of privacy concerns the law is capable of protecting.

4. Copyright Protection

Can an individual find recourse through copyright laws when her image is posted on social media platforms and widely viewed without her consent? While it may be true that

85. *Id.* at 415.

86. *Id.* at 422.

87. *See, e.g.*, *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100 (Fla. 2008) (declining to recognize the tort of false light); *Denver Publ’g Co. v. Bueno*, 54 P.3d 893, 894 (Colo. 2002) (rejecting the tort of false light as “duplicative of defamation both in interests protected and conduct averted”); *Cain v. Hearst Corp.*, 878 S.W.2d 577, 577 (Tex. 1994) (ruling false light substantially duplicates the tort of defamation and therefore rejecting the tort of false light).

88. *See Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Time, Inc. v. Hill*, the Court extended the *New York Times v. Sullivan* rule to private figures, ruling that they also need to prove actual malice for a false light action. *Time, Inc.*, 385 U.S. at 390. However, in *Gertz v. Robert Welch*, the Court stepped back on the requirement of actual malice for private figures in defamation lawsuits. *Gertz*, 418 U.S. at 345–46. Whether *Gertz* also applies to false light claims, in light of *Time, Inc. v. Hill* decision, remains unsolved. The Restatement (Second) of Torts § 652E took no position on this issue. *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

89. GOLDBERG & ZIPURSKY, *supra* note 34, at 334.

“copyright infringement is essentially a tort,”⁹⁰ copyright is now an elaborate distinct body of law that has developed particularly in response to advancements in technology.⁹¹ The Copyright Act of 1976 and its amendments continue to provide guidelines for courts on the new challenges of copyright law.

On social media platforms, copyright issues are especially challenging “[b]ecause a growing number of social networking sites allow users to post photos, videos, and other digital files for public viewing, inevitably resulting in their copying and distribution.”⁹² The Digital Millennium Copyright Act (DMCA)⁹³ tried to address some of these concerns.⁹⁴

In order to answer the initial question of whether one can claim a right to her distributed image under copyright law, it is necessary to define what counts as copyrightable material. Based on the 1976 Copyright Act, “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with aid of a machine or device” are copyrightable material, which does not include “any idea, procedure, process, system, method of operation, concept, principle, or discovery”⁹⁵

90. Sverker K. Hogberg, *The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law*, 106 COLUM. L. REV. 909, 914 n.33 (2006).

91. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 588 (S.D.N.Y. 2018) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

92. Jonathan J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm*, 6 NW. J. TECH. & INTELL. PROP. 1, 3 (2007).

93. 17 U.S.C. § 512 (2012).

94. See Jessica Gutierrez Alm, “Sharing” Copyrights: *The Copyright Implications of User Content in Social Media*, 35 HAMLINE J. PUB. L. & POL’Y 104, 104 (2014).

95. 17 U.S.C. § 102.

Through Section 301(a), the Act's definition of copyrightable materials preempts any state law to the contrary.⁹⁶

Copyright protection is distinct from the right of publicity.⁹⁷ An individual's persona, his or her name, likeness, and attributes, is not a copyrightable work.⁹⁸ Nevertheless, the two may at times conflict. When, for example, the persona is depicted "in a medium associated with copyrighted works."⁹⁹ In these cases, distinguishing between the right of publicity and the copyrighted material may be challenging.¹⁰⁰

In *Garcia v. Google, Inc.*, the Ninth Circuit rejected a notion of publicity protection deriving from copyright regulations.¹⁰¹ The court stated, "In broad terms, 'the protection of privacy is not a function of the copyright law. . . . To the contrary, the copyright law offers a limited

96. On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. 17 U.S.C. § 301(a).

97. For a discussion on how copyright laws do not run afoul of the First Amendment, see NEIL WEINSTOCK NETANEL, COPYRIGHT: WHAT EVERYONE NEEDS TO KNOW 45 (2018).

98. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 47 (3d ed. 2010).

99. *Id.* at 731.

100. See, e.g., *Brown v. Ames* 201 F.3d 654, 656 (5th Cir. 2000) (deciding that the publicity claim was not preempted by the Copyright Act); cf. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 665 (7th Cir. 1986), cert. denied, 480 U.S. 941 (1987) (ruling on preemption of the baseball players' rights of publicity). For a discussion on these two cases see COHEN ET AL., *supra* note 98, at 731.

101. 786 F.3d 733, 736–37 (9th Cir. 2015).

monopoly to encourage ultimate *public access* to the creative work of the author.”¹⁰²

Therefore, the copyright law too fails to protect against the harm of dissemination of an individual’s image in the manner identified in this Article. An individual does not have a copyrightable claim towards her image taken in public. Quite the opposite, the person who captures another’s image may stand to gain a copyright to her creation.

Existing laws in the U.S. provide little or no basis for liability for the dissemination of images of persons captured in public spaces. In the next Part, I will explain how the common law system of the United Kingdom handles similar privacy violations to the one explained in this Article. I will then examine the prominent privacy theories and offer a new account pertaining to social media platform privacy.

PART II

A. *Comparative Study of the United Kingdom Privacy Law*

Among the commonwealth jurisdictions, the U.K. has had the most dynamic evolution in its protection-of-privacy doctrine.¹⁰³ This is so even though the U.K. does not recognize an “over-arching, all -embracing cause of action for ‘invasion of privacy.’”¹⁰⁴ Historically, it protected privacy through reliance on the equity doctrine of breach of confidence. However, the House of Lords abandoned this approach in *Campbell v MGN*,¹⁰⁵ in which it first recognized the “tort of wrongful disclosure of private information,” also referred to as “misuse of private information.”¹⁰⁶ Now breach

102. *Id.* at 745 (citing *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir.2003)).

103. Samuel Beswick & William Fotherby, *The Divergent Paths of Commonwealth Privacy Torts*, 84 SUP. CT. L. REV. (2d) 226 (2018).

104. *Campbell v. MGN* [2004] UKHL 22 [11], [2004] 2 AC 457 (appeal taken from Eng.).

105. *Id.*

106. MCBRIDE & BAGSHAW, *supra* note 27, at 591.

of privacy is seen as “the violation of a citizen’s autonomy, dignity and self-esteem,” not as a breach of confidence.¹⁰⁷ In addition, the House of Lords recognized the tort of wrongfully obtaining access to private information in 2010.¹⁰⁸

In *Campbell v. MGN*, a newspaper called *The Mirror* ran a story on the famous model Naomi Campbell.¹⁰⁹ Under the title “Naomi: I am a drug addict,” the article included a picture of Ms. Campbell standing outside of a building after a support group meeting.¹¹⁰ Ms. Campbell sued the paper for damages for breach of confidence and demanded compensation under the Data Protection Act of 1998. In ruling in favor of Ms. Campbell, the House of Lords recognized the tort of wrongful disclosure of private information and later developed it in *Mosley v. News Group Newspapers Ltd.*¹¹¹

Two different views emerged in *Campbell* on the nature of the harm suffered by a victim of breach of privacy. The minority view, stated by Lord Nicholls and Lord Hoffmann, emphasized the importance of privacy as a way to preserve and protect an individual’s dignity, personality, and well-being.¹¹² The majority, however, “placed greater emphasis on the emotional and psychological impact that the publications had on the claimant.”¹¹³

The Court discussed the theoretical basis for the protection of wrongful use of private information on grounds of breach of confidence. However, the Court insisted that this nomenclature was misleading.¹¹⁴ Lord Birkenhead wrote

107. *Mosley v. News Grp. Newspapers Ltd.* [2008] EWHC (QB) 1777 [7] (Eng.).

108. *Imerman v. Tchenguiz* [2010] EWCA (Civ) 908 (Eng.).

109. *Campbell*, [2004] UKHL 22.

110. *Id.* at [2].

111. *See Mosley*, [2008] EWHC (QB) at [232].

112. N. A. Moreham, *Privacy in the Common Law: A Doctorial and Theoretical Analysis*, 121 L. Q. REV. 628, 634 (2005).

113. *Id.* at 635.

114. *Cambell v. MGN Ltd.* [2004] UKHL 22 [13], [2004] 2 AC 457 (appeal taken

that the values underlying the European Convention on Human Rights have larger applicability and are not confined to disputes between individuals and public authorities.¹¹⁵ For the court, “the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy,”¹¹⁶ and not whether the information was within the sphere of the complainant’s private or family life.¹¹⁷

Lord Hoffmann noted that the new tort “focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one’s private life and the right to esteem and respect of other people.”¹¹⁸ In this regard, the information need not be secret: “what matters is whether they can reasonably expect to retain some control over its dissemination.”¹¹⁹ Lord Hoffmann further wrote, “The widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information.”¹²⁰

N.A. Moreham, a New Zealand privacy scholar, correctly concludes from the this case, “privacy is about the protection of autonomy and dignity and an intrusion upon those interests will not automatically be less significant because the claimant cannot point to any physical or financial detriment which he or she suffered as a result of it.”¹²¹

from Eng.).

115. *Id.* at [18].

116. *Id.* at [21].

117. *Id.* at [20].

118. *Id.* at [51].

119. MCBRIDE & BAGSHAW, *supra* note 27, at 595.

120. *Campbell*, [2004] UKHL 22 at [75].

121. Moreham, *supra* note 112, at 635–36.

Later in *Mosley v. News Group Newspapers Ltd.*,¹²² the court differentiated between the publication of a story in a newspaper and the publication of a story accompanied by a video clip on the newspaper's website.¹²³ The defendant had used a hidden camera to record sexual activities involving Max Mosely, the president of Fédération Internationale de l'Automobile. The Court cited the opinion in *D v. L* which said:

A court may restrain the publication of an improperly obtained photograph even if the taker is free to describe the information which the photographer provides or even if the information revealed by the photograph is in the public domain. It is no answer to the claim to restrain the publication of an improperly obtained photograph that the information portrayed by the photograph is already available in the public domain.¹²⁴

The Court ruled for the plaintiff and noted "it should not be assumed that, even if the subject-matter of the meeting on 28 March *was* of public interest, the showing of the film or the pictures was a reasonable method of conveying that information."¹²⁵ The English court rejected a mere broad generalization that public figures must expect less privacy. Instead, the court focused on a proportionality approach which would determine privacy violations with a focus on the individual circumstances of each lawsuit.¹²⁶

The English tort of wrongful disclosure has a larger inclusive scope than its name may imply to an American audience. It has been used by ordinary—not celebrity—plaintiffs "who have attracted the attention of the media, such as victims of crime, people who suffer from unusual illnesses, and the children of famous parents."¹²⁷ The robust

122. *Mosley v. News Grp. Newspapers Ltd.* [2008] EWHC (QB) 1777 (Eng.).

123. *Id.* at [22]–[24].

124. *Id.* at [18] (quoting *D v. L* [2004] EWCA (Civ) 1169 [23] (Eng.)).

125. *Id.* at [21].

126. *Id.* at [12].

127. MCBRIDE & BAGSHAW, *supra* note 27, at 590.

approach the English courts have taken in applying this tort has helped remedy a wide range of privacy violations. Part of this is attributable to Article 8¹²⁸ of the European Convention on Human Rights (ECHR).¹²⁹ The Convention requires a higher degree of privacy protection compared to the original protection offered by the English courts. For example, the European Court of Human Rights held that Princess Caroline of Monaco had a right not to be photographed as she went about her everyday life despite the fact that she is well known and was appearing in public.¹³⁰ The success of a lawsuit by a celebrity in a similar situation in a U.S. jurisdiction is almost unimaginable.¹³¹

Notwithstanding, recall that for the *Pavesich* court, dignity was also a driving factor.¹³² In *Pavesich*, as I discussed, the Georgia Supreme Court wrote that the right to privacy in “matters purely private” is derived from natural

128. European Court of Human Rights Article 8 describes the right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention on Human Rights art. 8, Nov. 4, 1950, C.E.T.S. 194, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

129. MCBRIDE & BAGSHAW, *supra* note 27, at 592.

130. *Id.* at 609 (citing *Von Hannover v. Germany*, Eur. Ct. H.R. (June 24, 2004), <http://hudoc.echr.coe.int/eng?i=001-61853>).

131. In a rare case, however, famous wrestler Hulk Hogan sued for damages after a sex tape of him surfaced on Gawker, an internet media website. Gawker attorneys claimed the publication of the sex tape was subject to the First Amendment and newsworthy. The jury ruled in favor of Hogan. The fact that the underlying privacy was a sexual act seems to have persuaded the court and the jury. See Ryan McCarthy, *When a Sex Tape Is Newsworthy: Privacy in the Internet Era*, N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/interactive/2016/03/04/us/Hulk-Hogan-sex-tape.html>.

132. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905).

law.¹³³ The court explained, “The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence.”¹³⁴

Moreover, the emphasis on “balancing” of the facts of each case to decide whether the plaintiff is afforded a privacy protection has allowed for an inclusive privacy tort in the U.K.¹³⁵ Based on this approach, a reasonable expectation of privacy may extend even to circumstances in which an individual is in public.¹³⁶ The sharp public-versus-private binary categorization of U.S. privacy jurisprudence drastically limits the scope of invasion of privacy claim, making it difficult for individuals to claim “privacy” in “public.” By contrast, a softer approach to this binary can realistically address the emerging privacy concerns.

Furthermore, persons subject to English law can benefit from the recourse provided through claims for harassment available under the Protection from Harassment Act of 1997.¹³⁷ The Act defines harassment as causing a person alarm or distress which occurs on at least two occasions,¹³⁸ and allows for the imposition of liability on harassment through speech.¹³⁹ As such, it is a “flexible and effective weapon in putting a stop to the activities of a persistent online wrongdoer”¹⁴⁰

Lastly, the English Defamation Act of 1996 in the U.K. does not extend a protection to Internet Service Providers

133. *Id.*

134. *Id.* at 69.

135. MCBRIDE & BAGSHAW, *supra* note 27, at 593.

136. *Id.* at 601 (discussing *Murray v. Express Newspapers plc* [2007] EWHC 1908 (Ch), in which the court afforded privacy rights to J.K. Rowling’s 19-month-old son who was photographed in public).

137. Protection from Harassment Act 1977, c. 40 (Eng. & Wales).

138. *Id.* §§ 1, 2, 7.

139. *Id.*; *see also* TUGENDHAT & CHRISTIE, *supra* note 11, at 763.

140. TUGENDHAT & CHRISTIE, *supra* note 12, at 763.

(“ISPs”) as broad as the protection provided by CDA Section 230(c). In particular, an ISP on notice that it is transmitting defamatory content is a publisher of that content. In *Godfrey v. Demon Internet Ltd.*, an English court ruled in favor of the plaintiff, a British lecturer in physics who complained against a bulletin board in which defamatory content about him was posted.¹⁴¹ The board failed to take down the content and was thus liable.

The U.K. later passed the Defamation Act 2013 to amend the common law of defamation.¹⁴² Section 5 addresses the liability of operators of websites and holds that the operator is not liable if it shows it was not the one who posted the statement on the website. In this situation, the defense is defeated if the plaintiff shows that:

- (a) it was not possible for the claimant to identify the person who posted the statement,
- (b) the claimant gave the operator a notice of complaint in relation to the statement, and
- (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.¹⁴³

Relying on the core principles of protecting the dignity and self-control over information has also pushed the E.U. to recognize a right to erasure, a.k.a. right to be forgotten. The E.U. right to be forgotten not only protects images and video recordings, but also personal information and data. After Brexit, it is possible—not yet certain—that the U.K. citizen will lose this right,¹⁴⁴ and their alternative remains largely through recourse available under English tort law. Below I will briefly note how the protection functions.

141. *Godfrey v. Demon Internet Ltd.* [1999] EWHC (QB) 244 [3], [12]–[15], [33]–[35], [2001] QB 201 (Eng.).

142. Defamation Act 2013, c. 26 (Eng. & Wales).

143. *Id.* § 5.

144. Michael J. Kelly & David Satola, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1, 37–38 (2017).

B. *The European Union Right to Erasure*

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms sets out the right to “private life.” E.U. residents also enjoy “Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.”¹⁴⁵

In 2014, the Court of Justice of the European Union decided *Google Spain v. Agencia Española de Protección de Datos (AEPD)*.¹⁴⁶ In this lawsuit, Mr. Gonzalez requested that Google take down from the search engine a real estate auction ad that listed one of his properties as having been sold to pay his debts. The ad appeared in a daily newspaper called *La Vanguardia*.¹⁴⁷ Mr. Gonzalez complained the online dissemination of the data violated his “right to be forgotten.”¹⁴⁸

The Court held Google’s activities include “processing” within the meaning of Directive 95/46.¹⁴⁹ It did not matter

145. Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) 31 (EC).

146. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

147. *Id.* paras. 14–15.

148. *Id.* para. 91.

149. Personal Data and processing of personal data was defined according to Article 2 of Directive 95/46 which stated:

(a) “personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity; (b) “processing of personal data” (“processing”) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

that the information found by search engine “[had] already been published on the internet and are not altered by the search engine.”¹⁵⁰ It further ruled that the search engine is also the “controller” with respect to the processing of personal data in that context.¹⁵¹

The Court reasoned that search results on Google are data related to Mr. Gonzalez,¹⁵² who is entitled to “protection of his rights and freedoms in regard to the processing of personal data and that it has investigative powers and effective powers of intervention enabling it to order in particular the blocking, erasure or destruction of data or to impose a temporary or definitive ban on such processing.”¹⁵³ According to the Court, economic interest cannot justify the search engine’s processing of such data.¹⁵⁴

The Court stated that Mr. Gonzalez’s objection to the processing of such data by the search engine, according to Article 12(b)¹⁵⁵ of Directive 95/46, was on point since the objectionable data included not only inaccurate data but also “inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical statistical or scientific

Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, art. 2, 1995 O.J. (L 281) 31 (EC).

150. *Google Spain*, 2014 E.C.R. 317 para. 29.

151. *Id.* para. 32.

152. *Id.* para. 80.

153. *Id.* para. 78.

154. *Id.* para. 81.

155. “Article 12 Right of access: Member States shall guarantee every data subject the right to obtain from the controller: . . . (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.” Council Directive 95/46, art. 12, 1995 O.J. (L 281) 31 (EC).

purposes.”¹⁵⁶ Therefore, “The information and links concerned in the list of results must be erased.”¹⁵⁷

The final balancing of the right of the public to have access to the information in dispute is for the court to decide.¹⁵⁸ The Court continued:

[T]hose rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject’s name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.¹⁵⁹

This decision introduced a new concept to the legal debate surrounding the right to privacy. It was also expanded in later decisions in Europe. The Spanish Supreme Court ruled “that the right to be forgotten imposes obligations not just on search engines but on newspapers and publishers of the underlying content as well.”¹⁶⁰ The court placed the burden of technical developments to tackle this issue on the newspapers.¹⁶¹ The German,¹⁶² Belgian,¹⁶³ and

156. *Google Spain*, 2014 E.C.R. 317 para. 92.

157. *Id.* para. 95.

158. *Id.* para. 98.

159. *Id.* para. 97.

160. Dawn Carla Nunziato, *The Fourth Year of Forgetting: The Troubling Expansion of the Right to Be Forgotten*, 39 U. PA. J. INT’L L. 1011, 1012 (2018) (citing S.T.S., Oct. 15, 2015 (J.T.S. No. 545) (Spain)) (criticizing the expansion of the right to be forgotten).

161. *Id.* at 1021.

162. *Id.* at 1025. (citing Hanseatic Oberlandesgericht, Hamburg, 7 Zivilsenat [OLG, Hamburg] [Higher Regional Court, Hamburg, 7th Civil Division] Jul. 7, 2015, 7 U 29/12 (Ger.).

163. *Id.* at 1027 (citing Hof van Cassatie [Cass.] [Court of Cassation], 29 April 2016, AR C150052F, <http://www.cass.be> (Belg.) (holding that a newspaper should take down an archive of a newspaper article which wrote about the data subject’s criminal drunk driving to make sure it will not appear on Google’s search engine results)).

Italian¹⁶⁴ courts have required similar obligation for newspapers as well.

The many instances of the implementation of the right to be forgotten illustrates the influence of *Google Spain* throughout Europe. While the European Court of Justice did not rule on the geographical application of the right to be forgotten, privacy regulators argue the right expands far beyond Google's European domains.¹⁶⁵

The *Google Spain* decision is binding for "EU-based web browsers, which means that private data can still be accessed via US or non-EU search engines."¹⁶⁶ The right to be forgotten, or de-linking unwanted personal information, in the EU is also subject to a balancing test considering "the nature of the information in question and its sensitivity for the data subject's private life [on one hand] and the interest of the public in having that information [on the other hand]."¹⁶⁷ Furthermore, while the removed data are no longer accessible to the general public, the underlying data remains in the search engine's database. However, with this approach, the EU court has created "a speed bump"¹⁶⁸ for the fast-growing industry.

The implication of such decision is a heavy burden on the internet-based companies. It has been reported that since 2014, Google has received 650,000 requests for such erasures.¹⁶⁹ This right was later introduced in the General

164. *Id.* at 1029 (citing Cass., sez. un., 24 giugno 2016, n. 13161, Giur. It. 2016, II, 1 (It.) (holding that the newspaper must pay damages to the data subject for leaving the news article online for a long time).

165. *Id.* at 1031–32 (disagreeing with a broad reading of the case that would apply the delisting right for Google's users globally).

166. URSULA SMARTT, *MEDIA & ENTERTAINMENT LAW* 97 (3rd ed. 2017).

167. *Id.* at 96.

168. Jeffrey Toobin, *The Solace of Oblivion*, *THE NEW YORKER* (Sept. 22, 2014) <https://www.newyorker.com/magazine/2014/09/29/solace-oblivion> (quoting Viktor Mayer-Schönberger).

169. James Doubek, *Google Has Received 650,000 'Right To Be Forgotten' Requests Since 2014*, *NPR* (Feb. 28, 2018, 5:44 AM), <https://www.npr.org/sections/>

Data Protection Regulation¹⁷⁰ as “Right to Erasure.”¹⁷¹ Outlining six grounds, GDPR establishes the right for the data subject to demand the controller erase “personal data concerning him or her without undue delay.”¹⁷²

This discussion illustrates the feasibility of such wholehearted approaches in balancing possible privacy violations in cyberspace. Although the court in 2019 restricted the right to be forgotten to the EU member states’ jurisdiction,¹⁷³ the right had an impact outside of the EU. An example of the right’s influence in the U.S. emerged in June 2018 in California, the home of Silicon Valley. California

thetwo-way/2018/02/28/589411543/google-received-650-000-right-to-be-forgotten-requests-since-2014.

170. Commission Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing the Directive 95/14/EC (General Data Regulation), 2016 O.J. (L 119/1).

171. The grounds under which the right is applicable are:

the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

the personal data have been unlawfully processed;

the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

Id. § 3, art. 17.

172. *Id.*

173. Case C-507/17, *Google v. CNIL*, ECLI:EU:C:2019:772 (Sept. 24, 2019), <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-507/17#> (“[C]urrently, there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject, as the case may be, following an injunction from a supervisory or judicial authority of a Member State, to carry out such a de-referencing on all the versions of its search engine.”).

enacted an amendment to Part 4 of Division 3 of California's Civil Code, titled California Consumer Privacy Act of 2018, beginning in January 2020. Following the EU right-to-be-forgotten model, California has recognized the right to request deletion of personal information from businesses. The new bill "would grant a consumer the right to request deletion of personal information and would require the business to delete upon receipt of a verified request, as specified."¹⁷⁴ According to section 1798.192 of California's code the right is not waivable by agreement between the consumer and the business.¹⁷⁵

The right to erasure in the European Union and its possible influence in the U.S. is a double-edged example for the U.S. legal system. On the one hand, it illustrates the recognition of an individual's interest in controlling access to one's images on the web in a wide range of legal jurisdictions. On the other hand, the feasibility of a command to platforms to remove an image shows the simple way out of the dilemma. Notwithstanding, the current approach in the U.S. and the unwillingness of the legislature to put pressure on social media platforms forces us to look to the common law tools to offer a way to protect the individual's privacy interest in her image. Building on these global approaches and legal frameworks, the next Section lays out a normative theory of privacy that mandates the protection of an individual's privacy interest on social media platforms.

C. A Privacy Theory Apt to Set Boundaries

There are numerous accounts of defining privacy. It would be impossible to survey all of them, and this Section does not do so. Instead, it will lay out the most prominent and relevant privacy scholarship in the U.S.¹⁷⁶ that can

174. CAL. CIV. CODE § 1798.100 (Deering 2018) (effective Jan. 1, 2020).

175. *Id.* § 1798.192.

176. For a review of European scholars' views on privacy and how it relates to social media, see SEBASTIAN SEVIGNANI, *PRIVACY AND CAPITALISM IN THE AGE OF*

provide an account to justify privacy pertaining to one's presence in public spaces v. the exposure of one's image on social media.¹⁷⁷

As William Parent notes, "Privacy is a notoriously elusive concept. And the family of concepts to which it belongs is extraordinarily rich in complexity."¹⁷⁸ It is "significantly vast and complex, extending beyond torts to constitutional 'right to privacy,' Fourth Amendment law, evidentiary privileges, dozens of federal privacy statutes, and hundreds of state privacy statutes."¹⁷⁹

The Justices in *Griswold v. Connecticut*¹⁸⁰ were also divided on the underlying source of privacy in U.S. law. One author writes:

Justice Douglas saw privacy in the penumbra of the Bill of Rights, Justice Goldberg saw it in the Ninth Amendment, and Justice Harlan saw it covered by the due process clauses of the Fourteenth Amendment. The problem with this kind of defense of the right to privacy is that some may not see it all.¹⁸¹

Studying prominent theoretical analyses of privacy can help us grasp why the tort of unwanted broadcasting is well-suited in the pool of privacy harms. We can begin with

SOCIAL MEDIA 113 (2016).

177. In addition to common law privacy torts, a large array of privacy concerns are addressed under federal and state statutory law. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 2033 (1996); Children's Online Privacy Protection Act of 1998 ("COPPA"), 15 U.S.C. §§ 6501–6506 (2012); Family Educational Rights and Privacy Act 1974 ("FERPA"), 20 U.S.C. § 1232g (2012). These statutes are outside the scope of this Article.

178. William A. Parent, *Privacy: A Brief Survey of the Conceptual Landscape*, 11 SANTA CLARA COMPUTER & HIGH TECH L.J. 21, 21 (1996).

179. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 483 (2006) (identifying four main rubrics of privacy law: information collection, information processing, information dissemination, invasion).

180. *Griswold v. Connecticut*, 381 U.S. 479, 483, 527 (1965) (ruling a ban on contraceptives was unconstitutional and noting that "the First Amendment has a penumbra where privacy is protected from governmental intrusion").

181. James H. Moor, *The Ethics of Privacy Protection*, 39 LIBR. TRENDS 71, 73 (1990) (arguing for the intrinsic value of privacy).

Warren and Brandeis, for whom “The right to life has come to mean the right to enjoy life,—the right to be let alone”¹⁸² A violation of privacy, in their view, is “a kind of spiritual harm.”¹⁸³ This is the privacy account that was widely adopted by courts when Dean Prosser’s article framed the four proposed torts.

Charles Fried’s theory of privacy, on the other hand, focuses on the sense of “control” we ought to have over ourselves. For him, privacy is not about secrecy and limiting the knowledge of others about ourselves, rather “it is the *control* we have over information about ourselves.”¹⁸⁴

Scholars have argued that Fried’s view on privacy—control over one’s information—is too narrow.¹⁸⁵ For example, if one voluntarily divulges personal and intimate information about herself, does her control over publication of this information mean that she has not relinquished some aspects of her privacy? In other words, her control of the publication of her personal and intimate information does not undermine her relinquishment of her privacy.¹⁸⁶

As Parent described it, “Privacy is the condition of not having undocumented personal knowledge about one possessed by others.”¹⁸⁷ Parent recognizes a moral right to privacy for several reasons: (1) “If others manage to obtain sensitive personal knowledge about us, they will by that very fact acquire power over us,”¹⁸⁸ which is undesirable; (2) We live in a society “where individuals are generally intolerant of life styles, habits, and ways of thinking that differ

182. Warren & Brandeis, *supra* note 35, at 193. Warren & Brandeis cite Judge Cooley for the phrase “to be let alone.” *Id.* at 195.

183. Moor, *supra* note 181, at 71.

184. Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 482 (1968).

185. Parent, *supra* note 178, at 23–24.

186. W. A. Parent, *Privacy, Morality, and the Law*, 12 *PHIL. & PUB. AFF.* 269, 273 (1983).

187. *Id.* at 269.

188. *Id.* at 276.

significantly from their own,”¹⁸⁹ meaning that they will always desire privacy; and (3) “[W]e desire privacy out of sincere conviction that there are certain facts about us which other people, particularly strangers and casual acquaintances, are not entitled to know.”¹⁹⁰

In this view, individuals are “to be respected as autonomous, independent being[s] with unique aims to fulfill. Parent argues “anyone who deliberately and without justification frustrates or contravenes our desire for privacy violates the distinctively liberal, moral principles of respect for person.”¹⁹¹

Today, the online world “has provided few gatekeepers to safeguard the quality and the nature of our input.”¹⁹² We are “[e]xposed, watched, recorded, predicted.” “[T]he inability to control our intimate information, the sentiment of being followed or tracked” is shaping our subjectivity.¹⁹³ The new technology has provoked legal scholars to offer new theories for privacy.

Anita Allen has shifted the right to privacy to a responsibility of an individual.¹⁹⁴ This, she argues, is an ethical obligation in the age when many have made “disclosure the default rule of everyday life.”¹⁹⁵ She continues to say that “if we are to take normative ethic seriously . . . we have to be open to the possibility that some of what we do and enjoy doing may not be ethically good or best.”¹⁹⁶ Allen

189. *Id.*

190. *Id.*

191. *Id.* at 277.

192. ADAM KLEIN, FANATICISM, RACISM, AND RAGE ONLINE: CORRUPTING THE DIGITAL SPHERE 147 (2017).

193. BERNARD E. HARCOURT, EXPOSED 217 (2015).

194. See Anita L. Allen, *An Ethical Duty to Protect One's Information Privacy?* 64 ALA. L. REV. 845, 846 (2013).

195. *Id.* at 848.

196. *Id.* at 849.

places the burden of control over one's information privacy on the individual as a duty owed to oneself.

Another scholar, Julie Cohen, notes that “freedom from surveillance whether public or private, is foundational to the practice of informed and reflective citizenship.”¹⁹⁷ For Cohen, privacy is a dynamic concept that is “shorthand for breathing room to engage in the process of boundary management that enable[s] and constitute[s] self-development.”¹⁹⁸ This account is enlightening in explaining the privacy violation that unwanted online exposure causes an individual. The boundary management account pertains to a social context. It is in our relationship with others that the self acts in a certain manner.

The relationship between dignity and its social aspect is best described in David Matheson's work on “dignity and selective self-presentation.”¹⁹⁹ Matheson describes why an account of self-control is insufficient in defining dignity. To act with dignity, he explains, “is to present aspects of oneself to others in a selective manner, that is to reveal information about oneself to different individuals, in different contexts, in accord with one's considered convictions about the appropriateness of doing so.”²⁰⁰ Under this theory, “not just any self-controlled action is relevant to dignity concern”; practical dignity is a social phenomenon.²⁰¹ By this account, too, unwanted exposure on social media platforms is an insult to dignity and a form of invasion of privacy, since it has the power to “transform an individual's behavior from

197. Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1905 (2013).

198. *Id.* at 1906. For more, see JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 16–20, 107–26 (2012).

199. David Matheson, *Dignity and Selective Self-Presentation*, in *LESSONS FROM THE IDENTITY TRIAL ANONYMITY: PRIVACY AND IDENTITY IN A NETWORKED SOCIETY* 318, 327 (Ian Kerr et al. eds., 2009).

200. *Id.*

201. *Id.*

the nondignified to the undignified by altering the epistemic relations carried by the behavior.”²⁰²

Today, the Internet has changed the way we think about privacy. This is why the contemporary legal scholarship is addressing privacy violations specific to the Internet. This Article argues for an account of privacy that is also specific to cyberspace. Privacy, however defined, is a notion that comes to life in light of people and spaces. Different privacy torts—for example, intrusion upon seclusion or appropriation of likeness—each try to protect the privacy of the individuals either in a designated space or from other people. Social media has created a distinct space and audience. Therefore, the centrality of “space” and “people” in what privacy is, and how privacy torts or regulations protect individuals urges us to legitimize a privacy violation when imagery of persons is forcefully dragged from its geographically physical presence into a cyber-“space”—social media platforms—and viewed by “people” in that space which has retrievable visibility as its distinct feature.

Social media platforms are not a space in their natural form. Nevertheless, they are distinct cyberspace that one may choose to be part of or refrain from. People’s behavior in this space is commonly the topic of studies for psychologists and anthropologists.²⁰³ It has provided scientists a different world to analyze. It should also give legal scholars a chance to harmonize the individual’s legitimate interests related to that space.

This view requires the abandonment of the strict dichotomy of public vs. private. Under the private vs. public distinction, a person who steps in the public no longer has privacy rights that can stop the use of unwanted photography—unless, for the most part, one is a celebrity

202. *Id.* at 328.

203. See, e.g., Christopher A. Bail et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, 115 PROC. NAT’L ACAD. SCI. 9216 (2018), <https://www.pnas.org/content/115/37/9216>.

who enjoys the right of publicity. A softer approach to this binary distinction can realistically address the emerging privacy concerns.²⁰⁴

In the age of social media, being in the eye of the public in a public space is distinguishable from having a presence on social media. One's physical presence in public is limited to interactions with those whom one sees or those who have the ability to see the individual in person. We have control over our interactions, and we plan according to the physical geographical space we plan on being part of. For example, in parks and streets,²⁰⁵ despite the random unwanted or unplanned encounters,²⁰⁶ people can still choose to engage in or walk past a protest that is taking place and choose their level of engagement. One may change their path or hide behind a newspaper (or at least one's cell phone or tablet) to avoid an encounter. If, on the other hand, our picture is taken and posted on social media accounts with large numbers of users, our autonomy over managing our presence in the geographical boundary which we chose is taken away. We have been forced into a different space with a different number of audiences.

204. Neil Richards writes that separating private facts and public facts based on the method Warren and Brandeis have put forward in their framework is sometimes an impossible task as “[i]nformation can be in both categories at once . . . or it can lie in the extremely fuzzy area between the two concepts, which are themselves poorly defined.” He writes that the distinction poses a problem for the free speech doctrine that the later courts, too, have understood “that although the line between public and private makes sense in the abstract, it is impossible to draw with any confidence or predictability in practice.” NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* 44–45 (2015).

205. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

206. CASS SUNSTEIN, *REPUBLIC.COM* 30 (2001) (discussing the benefits of an unplanned encounter on a public forum in exposing individuals to different views and ideas that they may not otherwise avail themselves of).

Social media publications are in an enduring retrievable form. As a result, whether in form of face-to-face chitchats, when recognized on the street, or receiving e-mails, unwanted social media presence consequently results in unwanted interactions for an enduring time. Going viral can even lead to losing your job.²⁰⁷ Privacy in the context of social media means having the right to be in public without worrying about appearing as content on someone's social media account. In that regard, our presence in a geographical public space does not mean our consent to our presence on an online platform. By stepping outside, our privacy in public is only lost to the degree required to be present in a geographically limited space, unless one consents otherwise. In this regard, your privacy has been violated once your image is disseminated on social media accounts without your consent, subject to certain exceptions,²⁰⁸ and the individual should be afforded the right to stop the unwanted broadcasting of their image on social media platforms.

PART III

A. *The Tort of Unwanted Broadcasting*

Technological innovation regularly challenges existing legal frameworks. Virtual reality worlds, for example, have called for a new way of thinking about the rights and obligations of the participants.²⁰⁹ In response to the Internet of Things, some have argued for “an internet of torts.”²¹⁰ New

207. See, e.g., Kaelyn Forde, *Inside online shaming, and the ‘viral infamy’ that follows*, ABC NEWS (July 7, 2018, 10:34 AM), <https://abcnews.go.com/US/inside-online-shaming-viral-infamy/story?id=56200539> (outlining a series of recent cases of public shaming via internet); see also Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1030–31, 1049 (2016).

208. See *infra* Part III.

209. See, e.g., Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2043–47 (2004).

210. See, e.g., Rebecca Crootof, *The Internet of Torts*, 69 DUKE L. J. (2019) (arguing for the expansion of civil liability in light of the internet-connected

communications tools likewise create new problems that require new solutions. When Warren and Brandeis wrote in 1890 of “a remedy for the unauthorized circulation of portraits of private persons,”²¹¹ they could not have imagined what “instantaneous photographs”²¹² would become.

In light of the widespread use and misuse of social media platforms, this Article proposes “the tort of unwanted broadcasting.” The injury in this tort is the unwanted widespread broadcast of one’s image or video recording on social media platforms with enduring retrievable visibility which forces presence in a distinct space one does not wish to be, that is, cyberspace.²¹³ People have “a greater expectation of privacy in places where only a few people can see or hear them. . . . [P]eople quite reasonably adapt their self-presentation efforts according to their assessment of who can observe them.”²¹⁴ When one’s image is broadcasted on social media platforms, the individual’s autonomy in self presentation is shattered. The tort of unwanted broadcasting addresses the unwanted exposure and can be categorized as a “communications tort—a category of legal causes of actions in which people are harmed by speech acts of others that are not otherwise protected by the First Amendment.”²¹⁵

devices that constitute the Internet of Things).

211. Warren & Brandeis, *supra* note 35, at 195.

212. *Id.* (“Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life.”).

213. Legal scholars have written on the distinctness of cyberspace and have argued for the “conceiving of Cyberspace as a distinct ‘place’ for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the ‘real world.’” David R. Johnson & David Post, *Law and Borders- The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367, 1378 (1996). The distinctness of the cyberspace, I believe, is also intuitive. We know it has become a different world when, for example, you can find a grandmother or an old uncle who has little understanding of how it functions.

214. N. A. Moreham, *Privacy in Public Places*, 65 *CAMBRIDGE L. J.* 606, 622 (2006).

215. Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 *N.Y. L. SCH. L. REV.* 63, 73 (2014).

For better or for worse, there is no binding legal definition of what social media is to this date. However, it is helpful to depict the ways courts have been addressing social media in their opinions. This is especially important since this paper argues the specific nature of social media calls for its own tort—one that can unify the heterogeneous field of privacy lawsuits pertaining to social media accounts and misuse of images.

One Supreme Court case which dealt with social media was *Packingham v. North Carolina*.²¹⁶ In this case, the U.S. Supreme Court addressed the relationship between the First Amendment and the modern internet.²¹⁷ A North Carolina law made it a felony for a registered sex offender to use social media networks.²¹⁸ The law defined commercial social networking websites by setting out four criteria:

- (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
- (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
- (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

216. 137 S. Ct. 1730, 1733 (2017).

217. *Id.* at 1736.

218. N.C. GEN. STAT. § 14-202.5(a) (2017) (“It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking website.”).

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.²¹⁹

Justice Kennedy, writing for the majority, declared the law unconstitutional in light of First Amendment values and noted:

[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.²²⁰

The Court, however, did not define social media. In a concurring opinion, Justice Alito, joined by Chief Justice Roberts and Justice Thomas, voiced the concern that the majority's language "is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers."²²¹ For Justice Alito, the North Carolina law was not a content-neutral "time, place, or manner" restriction that was narrowly tailored to serve a legitimate government interest.²²² He deemed it too broad since the four elements the law gives in providing a definition for social media networks also included "a large number of

219. *Id.* § 14-202.5(b)(1)-(4).

220. *Packingham*, 137 S. Ct. at 1737.

221. *Id.* at 1738.

222. *Id.* at 1739 (Alito, J., concurring) (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)); see also *Ward*, 491 U.S. at 791 ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

websites that are most unlikely to facilitate the commission of a sex crime against a child.”²²³ Justice Alito observes that “As the law at issue here shows, it is not easy to provide a precise definition of a ‘social media’ site, and the Court makes no effort to do so.”²²⁴

Lower courts have tried to define the platforms when needed. In *People v. Lopez*,²²⁵ the California Court of Appeal relied on the Oxford dictionary to determine the meaning of “social media.” The court wrote that despite a lack of a definitive legal definition, “a practical, acceptable, and common-sense definition of the term does exist.”²²⁶ Therefore, defining social media platforms for the purposes of the tort of unwanted broadcasting will not constitute a problem. Courts have an understanding of the concept and can enforce the tort when called upon.

Who, in the event of widespread online dissemination, is the tortfeasor and can be held liable? Anyone who has intentionally and without the consent of the subject published the content—a photo or a video recording—on an

223. *Packingham*, 137 S. Ct. at 1741 (Alito, J., concurring) (providing examples such as Amazon.com and WebMD that fit within the definition of North Carolina’s statute).

224. *Id.* at 1743 n.16.

225. *People v. Lopez*, No. H041713, 2016 WL 297942, at *4 (Cal. Ct. App. Jan. 25, 2016).

226. *Id.* (“According to the Oxford English Dictionary, ‘social media’ constitutes ‘websites and applications which enable users to create and share content or to participate in social networking.’” (quoting *Social media*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/183739?redirectedFrom=social+media#eid272386371> (last visited Nov. 17, 2019))). In turn, “social networking” is defined as “the use or establishment of social networks or connections; (now *esp.*) the use of websites which enable users to interact with one another, find and contact people with common interest, etc.” *Social networking*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/183739?redirectedFrom=social+networking#eid139354807> (last visited Nov. 17, 2019). And “social network” is defined as “a system of social interactions and relationships; a group of people who are socially connected to one another; (now also) a social networking website; the users of such a website collectively.” *Social network*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/183739?redirectedFrom=social+network#eid139354802> (last visited Nov. 17, 2019).

online public platform can be held liable.²²⁷ However, to limit the floodgate of lawsuits, an additional element of the tort requires that the content reach, or be capable of reaching, a large audience. For example, an online user who has 50 followers and publishes a video of an individual without consent would not face liability. Admittedly, there is no precise line to draw on this issue. Instead, a court should consider the significance of a certain publication for the person whose image is being published; its bandwidth; and whether a reasonable person may find the online post widely publicized. These criteria are non-exclusive and aim to only provide a guideline for the courts.²²⁸

If the subject can prove that she does not have any picture of herself available online, not even one picture, in that case, regardless of the size of the audience, the unwanted publication of her picture online should satisfy the tort of unwanted broadcasting. In this case, one is too many. This approach allows for preventing further privacy breaches with undesired consequences, such as the one allegedly committed by Clearview AI.²²⁹

What is the outcome of a successful lawsuit? The plaintiff will be entitled to enjoin the defendant to take down the original post. She will also be able to ask the court for damages depending on the magnitude of the dissemination and whether it involves additional socially problematic behaviors such as mocking or shaming that target dignitary

227. According to the Stored Communication Act of 1986, private messages and posts are not accessible by parties without the consent of the publisher. 18 U.S.C. § 2702(b) (2012); *see also* Facebook, Inc. v. Superior Court, 417 P.3d 725, 728 (Cal. 2018) (recognizing the right for defendant to subpoena the public information on social media platform, while requiring consent of the author based on SCA to subpoena private messages).

228. German courts have incorporated the size of the audience in their judicial decisions on privacy. For the German courts, “The larger the audience/readership, the more the scales will tip towards an injury to personality.” PATRICK O’CALLAGHAN, *REFINING PRIVACY IN TORT LAW* 118 (2013).

229. *See supra* Introduction.

interests—both of which have no clear-cut legal remedy in our current tort system.²³⁰

The Second Restatement of Torts notes that “liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”²³¹ For insults, dignitaries, and similar behaviors, the Restatement calls on individuals to be “hardened to a certain amount of rough language.”²³² However, when coupled with a post online on social media, those same behaviors are aggravated and should not be ignored. As one author rightly points out, “Information speech restrictions like the right to be forgotten are appealing because they speak to a new collective danger . . . in going about your daily life, your actions might suddenly be held under a microscope, or broadcast to the world, and replayed on infinite loop.”²³³ The tort of unwanted broadcasting can also address this doctrinal void wrongfully justified by calling to be tough.

This tort also works to address in part the shortcomings of the U.S. Communication Decency Act § 230(c).²³⁴ As

230. Despite the recognitions of intentional infliction of emotional distress (IIED), the high bar to satisfy the tort—an outrageous act— has left many uncompensated. *See, e.g.*, *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark.), *appeal dismissed*, 138 F.3d 758 (8th Cir. 1998) (rejecting an IIED claim and noting that the sexual advances made by President Bill Clinton did not amount to “outrageous” conduct to satisfy the tort of IIED).

231. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1977).

232. *Id.*

233. Klonick, *supra* note 207, at 1061.

234.

No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C.A. § 230(c)(2) (West 2019).

interpreted by the courts, this widely criticized statute²³⁵ inverts the traditional common law “republication rule,”²³⁶ eliminating it for ISPs.²³⁷ By virtue of this statute, one who owns or operates a website, and posts a defamatory statement or image initially authored or captured by someone else cannot be held liable.²³⁸ While a discussion of the shortcomings of § 230(c) are beyond the scope of this piece, it clearly leaves open the possibility of liability being imposed on the original author or publisher. Hence, the tort of unwanted broadcasting can apply to the original publisher of an image or video recording.

In reality, finding the original publisher is not easy. The original author of the publication may hide behind a fake name and identity. And, while a plaintiff may ask a court to subpoena the social media platform (or ISP) to release the identity of the publisher,²³⁹ such a procedure is both costly and limited in its effectiveness.²⁴⁰ This is not to say the tort

235. See, e.g., Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 208 (2018) (“The CDA immunity doctrine, born over two decades ago, is at odds with the world as it is today. Internet intermediaries are structuring online content, conduct, and the entire networked environment in ways that the current doctrine does not contemplate. The consequences of this failing are troubling and require reform.”); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401, 401–04 (2017); Benjamin C. Zipursky, *The Monsanto Lecture: Online Defamation, Legal Concepts, and The Good Samaritan*, 51 VAL. U. L. REV. 1 (2016) (calling for a closer look at tort law principles in libel law—specifically the republication rule—in regulating speech and interpreting 230(c) that would not result in total immunity).

236. Sylvain, *supra* note 235, at 211–12.

237. See Zipursky, *supra* note 235, at 4 (noting that based on the common law republication rule “a speaker who writes or speaks a defamatory statement made by another is liable as if he or she were the speaker herself”); see also RESTATEMENT (SECOND) OF TORTS § 578 cmt. b (AM. LAW INST. 1977).

238. 47 U.S.C. § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

239. TUGENDHAT & CHRISTIE, *supra* note 12, at 774.

240. Anonymous speech is a guaranteed First Amendment right which also applies to an online speech. See *Anonymous Online Speakers v. U.S. Dist. Court*,

of unwanted broadcasting is unable to redress the privacy violation; however, its limited scope removes the worry of a floodgate of lawsuits.

B. *Exceptions*

1. The First Amendment

Internet broadly, and social media platforms specifically, have provided numerous platforms for speech of any kind, including cheap speech which “may be used to attack, harass, and silence as much as it is used to illuminate or debate. And the use of speech as a tool to suppress speech is, by its nature, something very challenging for the First Amendment to deal with.”²⁴¹ Nevertheless, American exceptionalism on free speech provides an obstacle in proposing any form of limitation on speech. As interpreted by the Supreme Court, the First Amendment provides strong protection to any speech that fits the broad definition of “newsworthy.”

661 F.3d 1168, 1173 (9th Cir. 2011). However, the right is not unlimited and “the degree of scrutiny varies depending on the circumstances and the type of speech at issue.” *Id.* While political speech has the highest degree of protection, *id.* (citing *Meyer v. Grant*, 486 U.S. 414, 417 (1988)), other purely private speech, including defamatory speech or commercial speech, enjoys a lesser degree of protection. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (holding that purely private speech, such as commercial speech, enjoys a lower level First Amendment protection). There is no consensus on the requirements necessary to unmask the identity of an online speaker and the courts’ power in issuing subpoenas. *See, e.g., Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440, 445 (Va. 2015) (holding that the circuit court was not empowered to enforce a non-party subpoena duces tecum which directed Yelp to produce documents located in California for a defamation action brought in Virginia). It therefore remains a question for the courts to decide whether the degree of harm in each case of unwanted broadcasting outweighs the required protection for anonymous speech. For a discussion of the level of privacy afforded to social media communications and posts, see Brian Mund, *Social Media Searches and the Reasonable Expectation of Privacy*, 19 YALE J.L. & TECH. 239 (2018) (describing how the current law affords no reasonable expectation of privacy to social media communications based on third-party doctrine). Mund argues for a stronger Fourth Amendment requirement to protect citizens from baseless searches of social media profiles.

241. Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 549 (2018).

In *New York Times v. Sullivan*,²⁴² the court announced that tort law regulations on speech (specifically the tort of defamation) are in nature state-action restrictions on free speech that are subject to the First Amendment. The dominant “marketplace of ideas”²⁴³ conception, and case law following *New York Times v. Sullivan*, have left little space for unprotected speech.²⁴⁴ In addition to public officials and general-purpose public figures, the limited-purpose public figure has further made it difficult for individuals to sue for speech torts in the U.S. Recently, Justice Clarence Thomas raised the concern of the scope of the First Amendment application²⁴⁵ following the dismissal of a defamation case by Kathrine Mae McKee, who sued Bill Cosby for defamation.²⁴⁶

In this climate, would the tort of unwanted broadcasting create a limitation on speech contrary to the First Amendment free speech doctrine? Two cases discussing the privacy tort of publication of private facts provide a background for determining a balance between the First Amendment doctrine on free speech and the privacy tort proposed in this paper.

In the first case, *Florida Star v. B.J.F.*, the Supreme Court held in favor of publication of the name of a rape victim

242. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

243. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”); *see also* *Whitney v. California*, 274 U.S. 357, 376 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1.

244. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that the First and Fourteenth Amendments do not allow public figures to recover damages for the IIED tort without showing actual malice). Some courts have held social media users with large numbers of followers to be public figures. Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1395 n.357 (2017).

245. *McKee v. Cosby*, 139 S. Ct. 675, 675–76 (2019) (Thomas, J., concurring).

246. *See also* Cass R. Sunstein, *Clarence Thomas Has a Point About Free-Speech Law*, BLOOMBERG (Feb. 21, 2019), <https://www.bloomberg.com/opinion/articles/2019-02-21/clarence-thomas-has-a-point-about-free-speech>.

in a newspaper.²⁴⁷ The *Florida Star* newspaper had obtained the name of the rape victim through the public police report available at the Sheriff's Department.²⁴⁸ The tension in the lawsuit was between an individual's right to privacy against the publication of private information and the First Amendment right accorded to the press. Declining to rule a categorical judgment that would render any truthful publication permissible,²⁴⁹ the court narrowed down the question to and held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."²⁵⁰

In the second notable case, *Haynes v. Alfred A. Knopf, Inc.*, the author of a book called "The Promised Land: The Great Black Migration and How It Changed America" revealed information about Haynes and his wife that they considered private.²⁵¹ The information included paragraphs about the plaintiffs' sex life, heavy drinking habits, laziness and more. Relying on the implications of *Florida Star*, the Seventh Circuit Court of Appeals expanded on the newsworthiness element.²⁵² Despite the humiliation the publication brought about for the plaintiffs, the court rejected plaintiffs' claim and held that the information was newsworthy. The court opined:

People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.²⁵³

247. 491 U.S. 524, 540–41 (1989).

248. *Id.* at 524.

249. *Id.* at 532.

250. *Id.* at 541.

251. 8 F.3d 1222, 1224–26 (7th Cir. 1993).

252. *Id.* at 1232.

253. *Id.*

In these two cases, and other similar cases,²⁵⁴ when deciding between privacy torts and the First Amendment, the Court has ruled in favor of free speech.²⁵⁵ However, there is a balancing test that courts take into consideration: the newsworthiness criterium. Categorically limiting the scope of privacy torts in favor of free speech means leaving wrongs unredressed, whereas balancing the two by separating what is newsworthy or of legitimate public concern can better serve the society as a whole.²⁵⁶ This is especially true in the Internet Age, where privacy violations have reached a whole different level as discussed in the Introduction.

Similarly, newsworthy content cannot be protected by the tort of unwanted broadcasting and falls outside of its realm. The proposed tort seeks to protect ordinary people's images from unwanted broadcasting. Therefore, it does not violate the First Amendment doctrine on speech as long as the shared image is not newsworthy.

2. Other Exceptions

The tort of unwanted broadcasting may give rise to concerns that such tort will have a chilling effect on recordings and publications that try to promote social responsibility and respectable behavior. Research shows that “[w]hen individuals believe, rightly or wrongly, that their

254. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (ruling in favor of free speech by unanimously rejecting the intentional infliction of emotional distress claim of a public figure); *see also* *Snyder v. Phelps*, 562 U.S. 443, 454–59 (2011) (rejecting the plaintiff's IIED and invasion of privacy by intrusion upon seclusion claims, among other claims, based on the First Amendment doctrine, and ruling that picketing in front of a deceased military member's funeral was of public concern and therefore entitled to First Amendment protections); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496–97 (1975) (ruling in favor of a newspaper that had published a rape victim's name).

255. NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* 49 (2015).

256. In stating the tort of public disclosure of private facts, the Restatement (Second) of Torts also notes that the matter publicized must not be of legitimate concern to the public. *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

acts won't be attributed to them personally, they become less concerned about social convictions."²⁵⁷ To avoid the possible chilling effect of social accountability, the tort of unwanted broadcasting comes with its exceptions:

a. Police officers and public officials cannot have a claim to this tort when performing their duties; being under scrutiny is part of the officers' official roles. Recording police while on duty or posting their pictures on social media accounts is protected by the First Amendment right to free speech and press as observed in *Fields v. City of Philadelphia*.²⁵⁸

b. Individuals who are photographed or filmed engaged in criminal activity in public cannot enjoy this privacy protection. The protection of law does not extend to outlaws. Therefore, if a person is recorded or pictured while engaging in an illegal activity, they may not invoke the tort of unwanted broadcasting to stop the dissemination of their image on social media platforms.

c. Artistic creations supported by the Copy Rights Act of 1976 and relevant laws are do not fall under the penumbra of this tort.²⁵⁹ This will ensure there is no chilling effect on artistic expression.

d. A user claiming innocent dissemination cannot be held liable. I am borrowing the phrase "innocent dissemination" from the English law defense as outlined in Defamation Act 1996.²⁶⁰ Section one of the act provides that a person has a defense if he shows: "(a) he was not the author,²⁶¹ editor or

257. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 58 (2014) (citing PATRICIA WALLACE, THE PSYCHOLOGY OF THE INTERNET 124–25 (2001)).

258. 862 F.3d 353, 362 (3d Cir. 2017) (holding that while citizens have a right to record the police, officers have qualified immunity in such settings). For a discussion of the *Fields* case, see *Third Circuit Holds Bystanders Have First Amendment Right to Record Police but Grants Qualified Immunity to Officers Involved.—Fields v. City of Philadelphia*, 131 HARV. L. REV. 2049 (2018).

259. See discussion on copyright, *supra* Part I.

260. MCBRIDE & BAGSHAW, *supra* note 27, at 568.

261. Defamation Act 1996, c. 31, § 2 (UK) ("[A]uthor' means the originator of the statement, but does not include a person who did not intend that his

publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.”²⁶² Similar balancing factors can be used in the online publication of the image or video clip in the tort of unwanted broadcasting.

e. The tort should also be confined to wide publication on platforms society considers social media. It is important to distinguish social media from the rest of the functions of the internet. As noted at the outset of this Article, an image distributed via social media platforms becomes viewable for an unprecedented number of people with the use of a single hashtag. There is nothing inherently wrong with this feature. Many positive social movements and protests that have benefited societies, such as #MeToo, are recognized by this very feature—hashtag activism.²⁶³ However, the harm that can be caused is just as powerful, and the tort of unwanted broadcasting mitigates these harms.

If tort law is to keep its regulatory role, a limited degree of restrictions must be tolerated. Otherwise, “[t]he only way to be sure tort liability does not deter speech is to abolish it in all cases in which the harm results from speech,”²⁶⁴ which is not a proposition worth fighting for. Tort law works in the field of recognizing harms and redressing them by providing an avenue to sue when one has been wronged. In a society where “exposure is the norm, rather than the exception,”

statement be published at all[.]”).

262. *Id.* § 1. The new Defamation Act 2013 has introduced a regime to update the innocent dissemination defense in light of online defamations. Defamation Act 2013, c. 26, § 5 (Eng. & Wales); *see supra* Part II.

263. For a discussion on the role of hashtags, see Monica Anderson et al., *Activism in the Social Media Age*, PEW RES. CTR. (July 11, 2018), <https://www.pewinternet.org/2018/07/11/activism-in-the-social-media-age/> (noting that according to a Pew Research Analysis, as of May 1, 2018, one hashtag has been used nearly 30 million times on Twitter alone).

264. David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 777 (2004).

recognizing a tort for wrongful dissemination feels like swimming against the current.²⁶⁵ Yet, the unwanted use of an individual's photographs protected by the tort of unwanted broadcasting incentivizes a higher degree of care on social media platforms while allowing for the platform and its user to enjoy its positive outcomes. The benefits of this narrow limitation outweigh the cost of restriction placed on individuals not to use another person's images without their consent.

CONCLUSION

With the advancement of technology, the line between what is public and what is private has become thin. In Warren and Brandeis's words, "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection."²⁶⁶ We are now at a time where we need to look at the meaning of our physical presence in public and the privacy the law affords us.

Today, promoting economic or political agendas or spending leisure time by exposing individuals' images and video recordings on social media platforms are the unpleasant consequences of this new digital age. The unwanted spread of video recordings and pictures of private individuals through social media platforms which allow for a retrievable visibility is a new privacy violation that needs to be addressed effectively. Being physically present in public and expecting the forgoing of a certain degree of privacy by mere presence in public is one thing; allowing one's image to be publicized through the eye of millions for an indefinite time, retrievable at any time, is another. This article, building on common law of torts and its privacy developments, proposed the tort of unwanted broadcasting

265. Skinner-Thompson, *supra* note 6 (manuscript at 31).

266. Warren & Brandeis, *supra* note 35, at 193.

and sought to legitimize the grievance of retrievable visibility. With its exceptions laid out in this article, the proposed tort also promotes a culture of responsibility amongst social media users.