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# Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places

Joseph Siprut\*

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## I. INTRODUCTION

Suppose a young man of Middle Eastern descent is walking along a public street on his way to work. Suddenly, a man with a camera steps in front of him and takes his picture. The next day, this individual discovers his picture on the cover of *Time* magazine above the headline "Outcast: The Plight of Young Arab Males in Post-9/11 America," which is displayed on

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\* I am grateful to Greg Walter for insightful discussion on the topic of this article, and whose contributions to this article are innumerable. Any errors or omissions, however, are entirely Greg's, not mine.

newsstands across the country. Shocked and outraged, the young man calls his attorney, whereupon the attorney informs him he has no cause of action.<sup>1</sup>

Consider also a newlywed couple honeymooning at a private resort. The couple strolls onto an area in which, according to signs, “Topless Sunbathing Is Permitted.” With no one in sight, the woman removes her top and begins to wade into the water. Unbeknownst to her, a photographer lurks in the bushes one hundred yards away, and the zoom feature on his camera is fully employed. Two months later, this woman discovers photographic images of herself from that day on the cover of a guidebook to nude beaches, which is distributed in bookstores throughout the nation. She, too, discovers she has no cause of action.<sup>2</sup>

Finally, suppose that a group of friends, lost and in need of directions, stop to ask a female police officer for assistance. Unbeknownst to them, the police officer is in the midst of a photo shoot for *Playboy* magazine, and the men are photographed conversing with the officer. Much to their chagrin, this “action shot” is featured in the following month’s issue as part of the officer’s nude pictorial. Just like the other plaintiffs, these individuals have no right of privacy that can prevent publication of the photos.<sup>3</sup>

Each of these individuals has no cause of action because a plaintiff cannot recover in tort for a breach of privacy for photographs taken of the plaintiff in public places that bear a reasonable connection to the subject matter of the articles they accompany.<sup>4</sup> Thus, in the scenarios discussed above, despite the fact that these individuals did not solicit the use of their images and do not desire that their images be used, and despite the fact that there is nothing particularly interesting or unique about these individuals themselves, publishers have carte blanche freedom to exploit their images for personal gain without being required to even ask for the subject’s permission to use these pictures.<sup>5</sup>

This article argues that this result is incorrect from the perspective of social value. Aside from running counter to our preconceived notions of right and wrong—our moral intuitions—a more expansive conception of privacy rights actually maximizes *economic value* relative to the current regime. Under existing privacy law, the photographers in the above

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1. This hypothetical is based on *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1320 (N.Y. 1982).

2. This hypothetical is based on *Creel v. Crown Publishers, Inc.*, 496 N.Y.S.2d 219, 219-20 (App. Div. 1985).

3. This hypothetical is based on *Jackson v. Playboy Enters.*, 574 F. Supp. 10, 11 (S.D. Ohio 1983).

4. See, e.g., *Arrington*, 434 N.E.2d at 1320-24 (denying plaintiff’s privacy tort claims because his photograph was taken in public and had a reasonable connection to the magazine article it illustrated).

5. See, e.g., *id.* (denying plaintiff’s privacy tort claims even though his picture was not unique and was published without his permission).

hypotheticals own the rights to the photos they took. Accordingly, they have no incentive to bargain with their subjects for the rights to the photographs, and consequently, there exists no means of evaluating which party values those rights more. By assigning the right to these photographs to the individuals, however, we would allow the market to determine the party who places greater value on the photographs, thereby maximizing economic value.

As a general matter, the right of privacy is a state law tort remedy that attempts to balance two opposing interests. On the one hand, it is generally agreed that all individuals have parts of their lives that they should rightfully be allowed to keep free from public view. On the other hand, there is significant public value in the dissemination of information and the right to free speech. The contours of existing privacy law<sup>6</sup> therefore represent an effort by courts and commentators to define the proper balance between an individual's right to be free from intrusion into his private matters and society's right to obtain information about issues of public concern. Though this somewhat *ad hoc* approach to legal development has produced a reasonably effective body of law and provides a coherent starting point for analyzing privacy issues, the lack of grounding in an overarching theory for determining what information should be deemed "private" (and therefore allocated to the individual) and what information should be deemed "public" (and therefore allocated to society) leads to improper, inefficient results such as those described above.

This paper explores why the young Arab gentleman, the topless sunbather, and the lost friends described above should be protected under the right to privacy tort. In Part II, I survey the law governing publication of photographs and images within the context of the current four-pronged formulation of the right to privacy.<sup>7</sup> I then explain why and how the law indeed fails to protect our unsuspecting "celebrities."<sup>8</sup> Part III argues that these individuals should be protected by the law, not only because this result seems intuitively correct but because this approach is *value-maximizing*.<sup>9</sup> I contrast the foregoing to a truly "newsworthy" situation—one in which there is a valid and valuable public interest in the photograph's publication—

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6. In this context, "existing law" primarily refers to the law in the states of California and New York. The predominant role of these two states in defining the scope of privacy law should not be surprising in light of the added importance that privacy law has for celebrities. Cases from other states will be cited herein as appropriate.

7. See *infra* Part II.A.

8. See *infra* Part II.B.

9. See *infra* Part III.

where the law *should* allocate this right to the public.<sup>10</sup> Furthermore, I suggest a workable test that courts can use to determine whether a photograph should be deemed newsworthy.<sup>11</sup> Finally, the article addresses the issue of where protection of this right should find its doctrinal home within the current contours of the right of privacy tort, and concludes that there are several viable possibilities.<sup>12</sup>

## II. PROCEED WITH CAUTION: THE LIMITS OF THE RIGHT OF PRIVACY

### A. *The Evolution of the Right of Privacy*

The right of privacy has been recognized in some form throughout human history,<sup>13</sup> and takes many forms.<sup>14</sup> Although attempting to canvass the history of the law of privacy is beyond the scope of this article, it bears noting that the right of personal privacy did not gain recognition as an independent cause of action in tort until the 1890 publication of the seminal article by Samuel Warren and Louis Brandeis.<sup>15</sup> Warren and Brandeis compiled decisions in the areas of defamation, copyright, property, and implied contract law, and concluded that the various decisions all stood for an implicit recognition of a right to privacy, which they deemed the “right ‘to be let alone.’”<sup>16</sup> This right, Warren and Brandeis argued, should be

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10. See *infra* Part III.B.

11. See *infra* Part III.B.2.

12. See *infra* Part IV.

13. See generally RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 276-82 (1981) (analyzing the “theory of privacy” in an “economic model of privacy contained in comparative and psychological studies”); DECKLE MCLEAN, *PRIVACY AND ITS INVASION* 1-4, 9 (1995) (“Anthropological and historical evidence . . . is sufficient to indicate that a demand for various kinds of privacy and an intuitive understanding of them are built into human beings.”).

14. See Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1340 (identifying “five dominant species of legal privacy . . . [t]ort privacy . . . Fourth Amendment privacy . . . First Amendment privacy . . . [f]undamental-decision privacy . . . [and] [s]tate constitutional privacy”).

15. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890). For convenience, the right of *personal* privacy is referred to herein as the “right of privacy,” as it is commonly referred to in the caselaw. To be technically precise, however, it should be noted that the tort law of privacy also encompasses a right of commercial privacy, which includes substantial protection of the confidentiality of creative ideas, and a limitation on eavesdropping to obtain these facts. See POSNER, *supra* note 13, at 254. These issues implicate trade secrets law, a branch of the tort law of unfair competition. *Id.*

16. Warren & Brandeis, *supra* note 15, at 195 (quoting THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 29 (2d ed. 1888)). Yet at least one commentator has argued that Warren and Brandeis never equated the right to privacy with the right to be let alone. “[T]he article implied that the right to privacy is a special case of the latter.” Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 437 n.48 (1980); cf. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8-9 (2000) (arguing that privacy helps to protect us from being “judged out of context,” and from having only

recognized as an independent tort,<sup>17</sup> and several years later it was explicitly so recognized.<sup>18</sup>

When Warren and Brandeis published their article, they were reacting at least in part to new technology.<sup>19</sup> The development of new mechanical devices “threaten[ed] to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”<sup>20</sup> Moreover, the authors viewed the press as “overstepping in every direction the obvious bounds of propriety and of decency.”<sup>21</sup>

Perhaps the “second great monument”<sup>22</sup> in the development of privacy law occurred after Dean William Prosser published a law review article in 1960.<sup>23</sup> Prosser reviewed court decisions on privacy cases subsequent to the publication of the Warren-Brandeis article and concluded that the law of privacy actually consisted of four separate prongs, each of which was regarded by courts as a separate tort.<sup>24</sup> He described the four torts as follows:

an isolated piece of information become our defining characteristic in the eyes of the world); see also Alex Kozinski, *Pull Down the Blinds*, N.Y. TIMES BOOK REV., July 2, 2000, at 10; but cf. *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (recognizing a privacy interest independent of anonymity).

17. Warren & Brandeis, *supra* note 15, at 195.

18. This was therefore a rare case where legal scholarship clearly and obviously directed the development of the law.

19. Warren & Brandeis, *supra* note 15, at 195-96. Some commentators have suggested that Warren was compelled to write this article because of the unwanted press coverage given to his wife's social functions. See, e.g., Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 206 (1954) (noting the rumor that Warren decided to write on the right of privacy in response to several newspaper articles written about the activities of Warren and his wife).

20. Warren & Brandeis, *supra* note 15, at 195 (source of quotation omitted in original); see also Lawrence M. Friedman, *The Shattered Mirror: Identity, Authority, and Law*, 58 WASH & LEE L. REV. 23, 25 (2001) (“[Before 1890] [y]ou had to sit still to pose because cameras were slow on the draw. Now, with fast cameras, it was possible for somebody to steal your image without your permission—perhaps without your even knowing it.” (citing Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right to Privacy in New York, 1885-1915*, 43 AM. Q. 24 (1991))).

21. Warren & Brandeis, *supra* note 15, at 196. The authors continue:

Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

*Id.*

22. Andrew Jay McClurg, *Bringing Privacy Law out of The Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C.L. REV. 989, 997 (1995).

23. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

24. *Id.* at 389.

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. [Commercial] [a]ppropriation of the plaintiff's likeness or name.<sup>25</sup>

This formulation of the four distinct privacy torts was ultimately adopted by the Restatement (Second) of Torts,<sup>26</sup> and “[c]ourts in at least twenty-eight states have explicitly or implicitly accepted each of the four torts . . . .”<sup>27</sup> Collectively, these four torts do afford some measure of protection to unwitting photographic subjects—but a surprisingly limited measure. To understand their collective application is to expose the limits of ownership rights in one’s own image.

Though all states have adopted some version of the right to privacy either as common law or by statute,<sup>28</sup> the success rate of the tort is less than stellar.<sup>29</sup> One commentator has surmised that “a review of court decisions involving privacy claims raises doubts as to whether there really is a tort remedy for invasion of privacy.”<sup>30</sup> Indeed, though technological advances pose an increasing threat to privacy, the four prongs of the right of privacy afford limited protection.

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25. *Id.* These tort are hereinafter respectively referred to as intrusion, public disclosure of private facts, false light, and appropriation.

26. RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977).

27. See McClurg, *supra* note 22, at 998 & nn.40-41 (noting this fact and citing to cases).

28. See Lori B. Andrews & Ami S. Jaeger, *Confidentiality Of Genetic Information In The Workplace*, 17 AM. J.L. & MED. 75, 80 n.27 (1991) (noting that “[a]s of 1981 the tort of invasion of privacy had been rejected only in Rhode Island, Nebraska and Wisconsin,” but that “all three of these states now recognize it by statute.”) (citations omitted).

29. See Gavison, *supra* note 16, at 457 (noting the “relative rarity of legal actions” brought under the right to privacy); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1268 (1976) (noting the “extraordinary scarcity of cases in which liability has been imposed on the media solely on the ground of an embarrassing disclosure”).

30. McClurg, *supra* note 22, at 999.

## B. *The Four-Pronged Right of Privacy in Action*

Let us now observe each of the four privacy torts in action, using the facts of the case underlying our hypothetical about the young Arab man as an illustration.<sup>31</sup> The hypothetical is based on *Arrington v. New York Times Co.*<sup>32</sup> In *Arrington*, the New York Court of Appeals upheld the unauthorized use of a photograph taken of the plaintiff without his knowledge, which appeared on the front cover of the *New York Times* magazine in conjunction with an article on the “Black Middle Class.”<sup>33</sup> As will now be discussed, none of the four branches of the right of privacy tort protect this individual.

### 1. Intrusion

The tort of intrusion occurs when a defendant intentionally pries or intrudes upon a plaintiff’s private affairs or seclusion in a manner objectionable to a reasonable person.<sup>34</sup> This tort punishes the actual act of intruding—i.e., whether the individual later disseminates the information is irrelevant under this tort.<sup>35</sup> The intrusion must be into a private place or matter as to which a plaintiff would have a reasonable expectation of privacy.<sup>36</sup> Thus, under the facts of *Arrington*, an intrusion claim would fail because the man was in public, and an individual in public has no reasonable expectation of privacy.<sup>37</sup> Since the cases discussed here involve photography or videotaping in a public place, there is not even arguably an intrusion in these cases.

### 2. False Light Publicity

The tort of false light publicity occurs when a defendant publishes facts about a plaintiff that place the plaintiff in a false light in the public eye, and which would be highly offensive to a reasonable person in the same

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31. See *supra* note 1 and accompanying text.

32. 434 N.E.2d 1319 (N.Y. 1982).

33. *Id.* at 1320.

34. See, e.g., W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §117 at 854-55 (5th ed. 1984) [hereinafter “PROSSER ON TORTS”]. This is unlike public disclosure of private facts and false light publicity, discussed below, where it is the dissemination of the information to the public that is objectionable.

35. *Id.*

36. *Id.*

37. See, e.g., *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (1998) (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)) (“[T]here is no liability for . . . observing [a person] or even taking his photograph while he is walking on the public highway . . .”).



circumstances.<sup>38</sup> A fact presents the plaintiff in a false light if it attributes to him either views that he does not hold, or actions that he does not take.<sup>39</sup> The United States Supreme Court has further held that where the published matter is in the public interest, the plaintiff cannot recover unless it is established that the defendant acted with actual malice.<sup>40</sup>

In *Arrington*, the plaintiff's false light claim failed because the article was deemed to be of "public interest" (newsworthy) and a logical "relationship" could be found between the article and photograph of the plaintiff.<sup>41</sup> Even though the plaintiff did not personally participate in the events described in the article, and even though the plaintiff strenuously objected to the article's characterization, the court reasoned that the plaintiff—based on his "good taste and attire"—actually was "a member of 'the black middle class,'" whether he knew it or not.<sup>42</sup> Thus, the *Arrington* plaintiff was not presented in any false light.<sup>43</sup>

Similarly, if our young newlywed appears on the cover of a guidebook to nude beaches, the rational connection test will likewise be satisfied, because she was indeed skinny-dipping.<sup>44</sup> Her appearance on a nude beach bears a rational relationship to the subject of the work—a guidebook to nude beaches.<sup>45</sup>

The *only* way that a photograph illustrating a newsworthy article could be a violation of the false light branch is if the article and the photograph bear no reasonable connection whatsoever.<sup>46</sup> Thus, for example, if the

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38. PROSSER ON TORTS, *supra* note 34, § 117 at 863-64.

39. *See id.* Because this action involves an element of falsity, defamation may also lie on the same set of facts that give rise to false light. *See, e.g.,* *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1133 (7th Cir. 1985) (comparing and contrasting the two torts).

40. *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (defining actual malice as "knowledge that the statements are false or in reckless disregard of the truth."). Thus, where the public interest in the information is not overriding, a false light action may be maintained without proof of actual malice. If the plaintiff is a public figure, however, the *Time v. Hill* requirement of actual malice still holds. *See, e.g.,* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *see also* *Douglass*, 769 F.2d at 1137 (noting that "this little niche of the law of privacy is dominated by Larry Flynt's publications").

41. *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982).

42. *Id.*

43. *Id.* at 1322-23.

44. *See Creel v. Crown Publishers, Inc.*, 496 N.Y.S.2d 219, 220 (App. Div. 1985) (permitting a publisher to print a nude photo of a couple because "the photograph was utilized to illustrate a guide book which disseminated information concerning a matter of public interest.").

45. The young woman might likewise find her image all over the internet. She will have no right of action against any internet company that uses her image so long as she appears as part of a story, or even photographic montage, on nude beaches, skinny-dipping, or the like. Such use satisfies the rational basis test.

46. *See, e.g., Creel*, 496 N.Y.S.2d at 220 (quoting *Dallesandro v. Holt & Co.*, 166 N.Y.S.2d 805, 806 (App. Div. 1957)) ("It is well-settled that '[a] picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute . . . unless it has no real relationship to the article . . . or unless the article is an advertisement in disguise.'").

headline below the picture of the *Arrington* plaintiff had read “America’s Drug Culture,” the plaintiff would likely have a cause of action under false light since the headline wrongly—or at least unfairly—implied that the plaintiff was himself a member of the drug culture.<sup>47</sup>

Under this “rational relationship” or “reasonable connection” test, the photograph itself need not contain any independently newsworthy content; it must only bear a reasonable connection to a newsworthy article.<sup>48</sup> While I will discuss this test later—and ultimately conclude that it should be abandoned—it is sufficient to note for now that this is the state of the law.

### 3. Public Disclosure of Private Facts

The tort of public disclosure of private facts occurs when a defendant publicly discloses private information about a plaintiff that would be objectionable to a reasonable person of ordinary sensibilities, *and* the information is not a matter of legitimate public concern.<sup>49</sup> Liability may attach under this privacy branch if the elements of a prima facie case are satisfied even though the factual statement about the plaintiff is true.<sup>50</sup>

The young Arab and the newlywed skinny-dipper cannot bring a claim for public disclosure because the fact that each plaintiff was in public when photographed means the fact of their image—even a naked image—is by definition not private.<sup>51</sup>

### 4. Appropriation

The tort of appropriation occurs when a defendant uses a plaintiff’s name or likeness without authorization and for the defendant’s own

47. See, e.g., *Peay v. Curtis Publ’g Co.*, 78 F. Supp. 305 (D.D.C. 1948) (no reasonable connection between face of an honest cab driver to illustrate a story about widespread cheating by city taxi drivers); *Itzkovich v. Whitaker*, 39 So. 499, 500 (1905) (finding no reasonable connection between inclusion of plaintiff’s name and photograph in a “rogue’s gallery” of convicted criminals when plaintiff has not been convicted of any crime).

48. See, e.g., *Creel*, 496 N.Y.S.2d at 220 (“[T]he photograph was utilized to illustrate a guide book which disseminated information concerning a matter of public interest . . .”).

49. See PROSSER ON TORTS, *supra* note 34, § 117 at 856-57.

50. *Id.* at 856.

51. See, e.g., *Creel*, 496 N.Y.S. 2d at 220 (holding that a photo of a nude couple, when used to illustrate a guide to nude beaches, was a “matter of some public interest”); *but cf.* *Daily Times Democrat v. Graham*, 162 So. 2d 474, 477-78 (Ala. 1964) (holding that publication of an embarrassing picture captured nothing of legitimate news value, and so was not a form of protected speech).

commercial or business purposes.<sup>52</sup> There are two independent theories of recovery that underlie the appropriation tort.<sup>53</sup> In the case of a celebrity, the subject's likeness has commercial value, whereas a private plaintiff's does not.<sup>54</sup> Thus, a celebrity's damages will likely focus on the reasonable value of the defendant's use, such that the defendant does not profit from the unauthorized use.<sup>55</sup> A private plaintiff, by contrast, will typically seek damages based on the emotional harm that use of his image has cost him.<sup>56</sup>

The newsworthiness limitation applies to appropriation as well.<sup>57</sup> Almost by definition, if the subject of an article is newsworthy, the article is deemed to fall outside the reach of the appropriation tort—and thus with it, any pictures that are reasonably connected to the article.<sup>58</sup> This is largely due to the fact that publication in a newspaper or magazine—even though sold “for a profit”—is not considered to be a commercial or business purpose.<sup>59</sup> Thus, in *Arrington*, the plaintiff brought an appropriation claim, but it was rejected because the primary purpose of the photograph was to illustrate a newsworthy article, and was not for commercial purposes.<sup>60</sup>

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As we have thus seen, although individuals are afforded some degree of protection based on privacy rights while in public, the scope of this protection is narrower than one might expect. With the present state of the law set forth, this article now proceeds to argue that this result is unacceptable. At the same time that the law largely refuses to recognize public protection, voyeurism is becoming increasingly popular, and the tools of the voyeur become more powerful every day. Indeed, if Warren and Brandeis were concerned about the impact of technology on privacy in their

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52. See PROSSER ON TORTS, *supra* note 34, § 117 at 851-52.

53. See generally Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 224 (1999) (comparing “property” and “dignity” approaches to the tort of appropriation); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 792 (1993) (recognizing that the two types of appropriation include the right to publicity and that which “concerns one’s own peace of mind”).

54. See *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 134 (2d Cir. 1984).

55. See *Dora*, 18 Cal. Rptr. 2d at 792.

56. *Id.*

57. See *Lee v. Penthouse Int’l, Ltd.*, No. CV96-7069SVW (JGX), 1997 WL 33384309, at \*4 (C.D. Cal. Mar. 19, 1997) (citing *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349 (Ct. App. 1983)) (“[C]ourts have consistently found that the newsworthy use of names and photographs also bars liability under common law appropriation.”).

58. There are two possible ways of looking at this analytically, though the final result is identical. The first is to say that anything that is newsworthy is by definition not “commercial.” See, e.g., *Lerman*, 745 F.2d at 130-31. The second—notably adopted by the courts of California—is to define any newsworthy article as an exception to the appropriation tort, implying that it is possible for an article to be commercial and still be newsworthy. See, e.g., *Eastwood*, 198 Cal. Rptr. 342.

59. See PROSSER ON TORTS, *supra* note 34, § 117 at 853 (noting how publications are afforded the constitutional protection of freedom of the press).

60. *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1320-23 (N.Y. 1982).

time, one can only imagine what they would think of some of the tools available to photographers and cameramen today.<sup>61</sup> An overall trend toward decreased social civility has coupled with tremendously powerful technology and cheap but effective mediums of distribution, all of which have dramatically magnified the ability of persons to invade the privacy of others.<sup>62</sup>

The time has come to rethink prevailing conceptions of the right to privacy. As Part III now argues, an economic approach to the allocation of

61. See McClurg, *supra* note 22, at 1017-19. McClurg notes:

Warren and Brandeis did not specify the particular "mechanical devices" that concerned them when they expressed their fear that "what is whispered in the closet shall be proclaimed from the house-tops." Film and magnetic sound recording were not invented until the twentieth century, and while "detective cameras" concealed in items such as opera-glasses, revolvers, and books were popular toys among the rich in the 1890s, they had little practical use because of their poor quality.

Whatever snooping devices concerned Warren and Brandeis, it is safe to say they are to modern surveillance technology what the slide rule is to the personal computer. Anyone with the inclination to intrude upon the lives of others may choose from a frightening array of surveillance devices: video cameras built into briefcases, tie-tacs, clocks, smoke detectors, and ceiling sprinklers; microphones and transmitters that can "hear thru walls" and at great distances, and that come concealed in everything from writing pens to electrical outlets; telephone tapping devices; night vision scopes; electronic lock picks; and even devices to track the movement of vehicles. For those uninitiated in surveillance skills, helpful reference books are available. *How to Get Anything on Anybody* explores topics such as "eleven devices for listening through walls," and "expert ways to secretly bug any target."

*Id.* One commentator has suggested that Warren and Brandeis were wrong to implicitly attribute the rise of curiosity about people's lives to the excesses of the press. In so doing, they committed the economic fallacy of theorizing that "supply creates demand." POSNER, *supra* note 13, at 239 (further noting that "[a] more persuasive explanation for the rise of the gossip column is the secular increase in personal incomes.").

62. See Lance E. Rothenberg, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law To Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U.L. REV. 1127, 1128-30 (2000). Rothenberg notes:

In a society perpetually altered by human innovation, we are faced with the elementary problem of keeping the law apace with technology. In particular, the explosion of video surveillance and micro-camera technology has had a profound impact upon our concept of privacy. As video surveillance equipment has become smaller, more portable, more easily concealed, and more accessible to the general public, its pervasive application has contributed to today's cultural fascination with voyeurism.

Throughout the country, newspaper headlines report unsavory stories of surreptitiously concealed video cameras prying into bedrooms, bathrooms, locker rooms, changing rooms, and tanning booths in prurient attempts to film unsuspecting victims while in various states of undress.

*Id.* (citations omitted). See also Charisse Jones, *Phones Make Your Bad Side Visible to World*, USA TODAY, Oct. 20, 2003, at 2A (reporting on the popularity of cell phones with the capability to capture photographic images, and noting that "[t]he potential for unsuspecting people to be shown in humiliating situations, with their images transmitted to millions, is especially unsettling.").

privacy rights suggests that the class of plaintiffs illustrated by the introductory hypotheticals should be afforded protection from the intrusions they encounter.

### III. AN ECONOMICS-BASED REFORMULATION OF THE RIGHT TO ONE'S IMAGE

#### A. *The Initial Allocation of Rights*

To approach the question of how the right to an individual's image should be assigned, the first question to ask is normative.<sup>63</sup> What goal are we seeking to accomplish? Because our aim is to approach this issue from an economic perspective, our goal is accordingly one of value: what rule will maximize the odds that the right at issue will be put to its most valued use?<sup>64</sup> What rule can best insure that the person who values the right the most will end up with it? In this context, we have only two options: either the individual owns the right, or the right belongs to the public. If the individual (for example, our newlywed skinny-dipper) owns the right to her image, any photographer who sought to use the photo would have to bargain for its use with her. In the event of any unauthorized publication, she would be legally entitled to demand that her picture be removed from the cover of the guidebook to nude beaches, and might further be able to demand compensation for any guidebooks already distributed to the public.<sup>65</sup> On the other hand, if the right is allocated to the public (as it is presently),<sup>66</sup> our skinny-dipper would have no recourse to halt production of the guidebooks or to demand compensation for the use of her image. Our goal is to determine which starting point maximizes social value.

First, let us examine what will happen if the individual owns the right. From the photographer's perspective, he is seeking a picture of a nude bather for his book. If the goal is therefore to find a nude bather—i.e., *some* nude bather—then the costs to bargaining are not prohibitive. The photographer in this situation has enough time to approach the woman and seek her consent, or to offer her payment for her consent; there is even time to sign a contract. If that woman refuses, the photographer may seek out the

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63. See POSNER, *supra* note 13, at 49 ("Normative economics holds that an action is to be judged by its effect in promoting the social welfare . . .").

64. See *generally id.* at 60-87 (explaining the "wealth maximization" principle wherein "[t]he most important thing to bear in mind about the concept of value is that it is based on what people are willing to pay for something.")

65. PROSSER ON TORTS, *supra* note 34, § 117 at 854 (noting that "[o]nce protected by the law" an individual can capitalize on his or her right of value by selling licenses or by enjoining "the use of the name or likewise by a third person.")

66. See, e.g., *Playboy v. Jackson Enters.*, 574 F. Supp 10, 11-12 (S.D. Ohio 1983).

permission of another nude bather. Alternatively, he may decide he would rather not invest the time and effort to purchase the right, and so he might hire a model or actor to pose for the guidebook's cover.

If the woman refuses a cash payment of, say, \$500 for the right to her image, she necessarily values that right by more than \$500. She has, therefore, effectively purchased this right for the opportunity cost of not selling the right for \$500. Similarly, if the photographer is unwilling to pay more than \$500 for the image, then he obviously values the right by no more than \$500. And if the woman ultimately offers to sell her right for \$1000 and the photographer agrees, another mutually beneficial agreement is struck: the woman obviously values her right by less than \$1000 since she was willing to accept the payment, and she is therefore better off after the deal. Similarly, the photographer is better off since the photograph, by implication, is worth more to him than \$1000. Thus, by assigning the right to the subject of the photograph herself, the photograph is put to its most valued use, and will ultimately be purchased by the person who values the right the most. And that may well be the subject herself.

The same holds true in the hypothetical involving the young Arab man photographed on the street who winds up on the cover of *Time Magazine*.<sup>67</sup> As in our previous example, assigning the individual the right to his image maximizes social utility. Every bit like putting the newlywed on the cover of a guide-book to nude beaches, there is no reason why the individual on the cover of *Time* must be *this* man, or why he must be photographed at *this instant*, given the context in which the photograph will ultimately be used. If the young man owns the right to his image, he can sell it to the photographer only if he values the payment offered more than retaining the right.

The same holds true for the lost group of friends who end up in the middle of a *Playboy* shoot.<sup>68</sup> If these individuals own the right to their images, then they can bargain with the photographer. Perhaps the photographer genuinely values their images, in which case he will pay for them. Or perhaps the men will sell their images for pennies (or nothing) for the opportunity to appear in a popular men's magazine. On the other hand, perhaps the men collectively ascribe more value to not appearing in *Playboy* than the photographer does in using the picture, in which case the men will

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67. See *supra* note 1 and accompanying text.

68. See *supra* note 3 and accompanying text.

retain the right to not appear in the magazine.<sup>69</sup> We do not, at least *ex ante*, know who will end up with the right. What we *do* know is that when the bargaining stops, the party or parties who value the right the most will end up with it—and from society’s perspective, that is a good thing.

Now let us consider what happens if we allocate the right to the public domain. Suppose the same photographer takes the same picture of the woman on the nude beach. Suppose further that the photographer, an astute businessman, decides to bargain with the woman since, he figures, she might be willing to buy the right to the image. If the value (to her) of the non-production of the photographs exceeds \$500, she might enter into an agreement to pay the photographer \$500 for the rights to this and any other photographs that this photographer may take. However, suppose the same woman continues her sunbathing, taking comfort in the notion that her image will not be appearing on the cover of any nude beach guidebooks. A second photographer, having seen the handsome payment provided to the first photographer, snaps a similar picture, figuring that now *he* can sell it to the guidebook publisher. The woman, in order to keep her image private, needs to bargain with this individual as well. And the same for the third photographer, and the fourth . . . . Clearly, as a practical matter if not a theoretical one, value-maximizing bargaining or negotiations will not take place when the right is assigned to the public domain.<sup>70</sup>

We quickly see that assigning the right to the public domain causes a serious problem. Although the woman values the right to her image more than the photographers, assigning the right to the public results in the strong possibility of that image being put to a lower-valued use than if we had assigned the right to the woman in the first place.

At this point, it may be tempting to think that this calculus is somewhat incomplete because we are not taking the “public good value” of the pictures

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69. We can imagine a slightly more complicated scenario, where three individual men ascribe different values to their images—say, men one and two value their images at \$200, man three values his image at \$500 (for an aggregate value of \$900), and the photographer values the image at \$1100. In this case, though a cash payment of \$1000 divided evenly (\$333.33 per person) would not satisfy man three, men one and two would be wise to give up a share of their payment (say \$100 each) such that each individual is better off. The first two men get \$233.33, the third man gets \$533.33, and the photographer gets the rights to the photograph for \$1000. All are better off.

70. Moreover, photographers should be cautious about approaching their subjects in an attempt to negotiate the rights to the photos in circumstances such as these. For example, Cameron Diaz recently made headlines when a photographer who apparently took topless photos of Diaz before she became famous was arrested for extortion when he apparently offered Diaz the chance to “buy back” the photos. See Julie Hilden, *Does a Photographer’s Attempt to Sell Cameron Diaz’s Topless Photos Back to Her Constitute Extortion?*, FINDLAW, July 22, 2003, <http://writ.news.findlaw.com/hilden/20030722.html>. Although that situation also involved the possibility that the photographer had forged Diaz’s signature on a waiver, *id.*, the photographer’s attempts to communicate with Diaz are not unlike our hypothetical bargaining between the topless newlywed and the photographer.

into account. This is entirely the point: in each of the cases discussed above, there is absolutely *nothing* genuinely unique or noteworthy about the individuals or events photographed. *Time* magazine could just as easily use a picture of another young Arab man, and the guidebook to nude beaches could just as easily feature another nude sunbather (or perhaps a hired model) without any meaningful loss of value to the end product. There is absolutely no public good value to factor into the analysis. The entire analysis is between the subject and the photographer. In each of these cases, we see that the law's allocation of these rights to the public domain can lead to highly inefficient results.

To further illustrate the point (and show its limitations), let us now contrast the foregoing examples with situations properly deemed by privacy law to be newsworthy.

### B. *The Defense of Newsworthiness*

In the hypotheticals discussed above, assigning the right in the image to the individual—and thereby affording the individual a cause of action if that right is violated—maximizes economic value by ensuring that, when bargaining ceases, the person who values the right most will end up with the right.<sup>71</sup> None of the foregoing, however, is meant to or should apply to what the law traditionally refers to as a truly newsworthy situation. In newsworthy situations, the people and events being photographed have public-good aspects to their publication that are absent from the hypotheticals discussed earlier.<sup>72</sup>

In economic terms, a newsworthy situation has additional, independent value to the public that changes the calculus described above, which we analyzed in the context of a non-newsworthy photograph. These public good aspects make it appropriate to assign the photographic rights to a newsworthy situation or image to the public domain rather than to the individual. If we were merely to consider the interests of the photographer and the photograph's subject in a newsworthy situation, we would be missing an essential element of the calculation and might improperly assign the right to the individual. If the individual is given the right, she might decide not to allow publication, in which case the photograph is not put to its most valuable use. Put another way, the First Amendment-based

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71. See *supra* Part III.A.

72. See, e.g., *Messenger v. Gruner + Jahr Printing and Publ'g*, 727 N.E.2d 549 (N.Y. 2000) (denying plaintiff's right to privacy claims because the photograph in question illustrated an article on a matter of public interest.).



newsworthiness doctrine is economically correct—at least when correctly applied.

For example, suppose that our beach-going topless sunbather had instead opted to sunbathe topless in front of city hall. Without question, this event would be newsworthy. After all, it is not every day that an individual appears naked in front of a city's most prominent building, much less sitting down and relaxing for an afternoon tanning session. Or perhaps there are political implications or themes motivating the act. In such cases, there are public good aspects to the dissemination of the picture (and its accompanying story) that are simply not present in the case of a reclusive sunbather unknowingly photographed for the cover of a guidebook to nude beaches. Thus, even if there is no impediment to bargaining—i.e., even if the topless woman in front of city hall was perfectly approachable and amenable to bargaining—the right should be assigned to the public domain because the story and photo are themselves newsworthy.

In other words, if the woman was initially allocated the right to the photograph, and if she refused consent to relinquish the right for valuable consideration, she would have purchased the right to the photo for whatever amount the photographer was willing to pay her for it. But unlike the earlier, non-newsworthy examples, it would not follow that the right had been put to its optimum use. Because the collective circumstances in the city hall example combine to make the incident a newsworthy occurrence, there are public good aspects to the *photo itself* that add value to its publication. The photograph must be of *this* woman, at *this* point in time, because it was *this* woman who sunbathed topless in front of city hall, and a story about a woman sunbathing nude in front of city hall is clearly a matter of public interest. Or to put the point in the language of the “reasonable connection” test, the photograph does not just bear a reasonable connection to a newsworthy story; the story is newsworthy only because of the events captured in the photograph.

By contrast, while there may be public good aspects to the publication of a guidebook on nude beaches, this is irrelevant to the question of whether choosing this particular photographic subject to adorn the cover is a necessary corollary to the article's newsworthiness. It is not. And because the transaction costs to approaching the woman at the beach are not prohibitive, assigning the right to her maximizes net economic value. Accordingly, in such non-newsworthy situations, broadening the scope of the right to privacy to the point where individuals such as these hypothetical plaintiffs are afforded causes of action is a net improvement in societal value.

### 1. Re-examining the “Reasonable Connection” Test

The above analysis suggests that the newsworthiness exception to the right of privacy is economically sound, at least as a theoretical matter. However, for this analysis to retain its usefulness, courts must be careful to avoid an over-inclusive application of newsworthiness.<sup>73</sup> If the analysis is expanded to include photographs that contain no independent public good value, then the “economic soundness” of the doctrine is lost. That is, the newsworthiness exception is economically reasonable only insofar as it protects photographs and information that actually contain some ascertainable public good value. The exception thus ceases being economically reasonable at exactly the point where there is no public good value.

This is exactly what happens when courts hold that a photograph is newsworthy simply if it has a reasonable connection or rational relationship to an otherwise newsworthy article. In such a case, by definition, a court is taking a photographic image that is clearly *not* newsworthy<sup>74</sup> and giving it First Amendment protection based on having some connection with an article that does have public good value. Once we take this step, however, the economic soundness of the newsworthiness doctrine collapses. We are taking a photograph that has absolutely no independent utility—a photograph that could be replaced within the newsworthy article by many other photographs with no loss of value to the public—and we are allowing any use connected with an article in the public interest. This approach is economically unsound and requires reconsideration.

A line of cases out of New York state court further illustrate this point. In *Messenger v. Gruner + Jahr Printing and Publishing*,<sup>75</sup> the New York Court of Appeals considered the claims of a plaintiff whose photograph was used to illustrate an article in *YM* magazine that included the quotation “I Got Trashed and Had Sex With Three Guys.”<sup>76</sup> The article began with a letter from a reader explaining that she became drunk at a party and engaged in group sex, and contained three full-color photographs of the plaintiff.<sup>77</sup> The court first noted the rule that when a photograph illustrates an article on

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73. Of course, an under-inclusive application would be equally harmful.

74. We know it is not newsworthy because if it were, we would not need to say that it bears a reasonable connection to something newsworthy. The picture or image itself would be newsworthy, and would not need a reasonable connection to pass muster.

75. 727 N.E.2d 549 (N.Y.2000).

76. *Id.* at 550.

77. *Id.*

a matter of public interest, the newsworthiness exception bars recovery unless there is “no real relationship between the photograph and the article or the article is an advertisement in disguise.”<sup>78</sup> Because the plaintiff here was a model of the age described by the article, the relationship between photo and article was strong enough to deny the plaintiff’s claims.<sup>79</sup>

Likewise, in *Finger v. Omni Publications International*,<sup>80</sup> the defendant used a picture of a husband and wife and their six children to illustrate an article on caffeine-aided in vitro fertilization.<sup>81</sup> The plaintiffs sued, arguing that none of their children were conceived through in vitro fertilization and that they did not participate in the fertility project.<sup>82</sup> While conceding the false impression conveyed by use of the photograph, the court nevertheless held that the article was newsworthy and that given the fact that the plaintiff did have six children, there was a real relationship between the photograph and the article itself.<sup>83</sup>

Let’s look at the photographs from *Finger* and *Messenger* in economic terms. The articles at work in these two cases were deemed newsworthy—a conclusion that is not disputed.<sup>84</sup> However, when we look at the particular photographs illustrating these articles from an economic perspective, we see that there is absolutely nothing about using these particular photographs that adds any value at all. The fact that the publishers chose these particular individuals, to accompany the articles as opposed to any number of other individuals, adds absolutely nothing to the calculation of value. The articles

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78. *Id.* at 553.

79. *Id.* at 550, 554.

80. 566 N.E.2d 141 (1990).

81. *Id.* at 142.

82. *Id.* at 144.

83. *Id.* As noted previously, this was substantially the same analysis put forth by the *Arrington* court. See *supra* notes 31-33 and accompanying text.

84. *Finger*, 566 N.E.2d at 144; *Messenger*, 727 N.E.2d at 555. This raises an interesting discussion of the nature of newsworthiness, which is somewhat beyond the scope of this article. Courts and commentators have consistently struggled with deciding whether the proper scope of newsworthiness is based on “descriptive” newsworthiness—i.e., what the public actually finds interesting—as opposed to “normative” newsworthiness—i.e., what should be valid fodder for public consumption. See, e.g., *Shulman v. Group W. Prods.*, 955 P.2d 469, 481 (Cal. 1998) *Messenger* is a perfect example of this tension. *Messenger*, 727 N.E.2d at 552-53. While most would agree that sex with multiple partners is rightfully a private subject, most would also agree that it is curiosity-provoking on some level.

For several examples of pro-descriptive arguments, see *Lee v. Penthouse International, Ltd.*, No. CV96-7069SVW, 1997 WL 33384309 (C.D. Cal. March 19, 1997); Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273 (1999).

For several examples of pro-normative arguments, see *Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998); Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 160 (1997); Gary Williams, “*On the QT and Very Hush Hush*”: *A Proposal to Extend California’s Constitutional Right to Privacy to Protect Public Figures from Publication of Confidential Personal Information*, 19 LOY. L.A. ENT. L. REV. 337, 345-46 (1999).

in *Finger* and *Messenger* could just as easily have been illustrated by a picture of another family and another woman, respectively—ones who consented to, or were paid for, the rights to the photos—with absolutely no loss of value to the public.

Furthermore, in addition to *adding* nothing of value, the use of these particular photographs may come at a significant *cost* to the photograph's subject. At a minimum, the woman in *Messenger* will likely be subject to personal ridicule. If her family is informed of the photograph, it might cause them significant embarrassment and might strain familial relations. If her employers or coworkers find out about the photograph, she may incur significant professional consequences.

Now, let us contrast *Finger* and *Messenger* with a situation in which the newsworthy doctrine is applied properly. Consider *Murray v. New York Magazine Co.*<sup>85</sup> There, the plaintiff was a spectator at a St. Patrick's Day parade in New York City.<sup>86</sup> Dressed in "Irish garb," his photograph was taken without his knowledge and published on the front cover of a magazine to illustrate a story on contemporary Irish-Americans in New York City.<sup>87</sup> The court upheld use of the photograph on the grounds that the plaintiff "voluntarily became part of the spectacle," and was permissibly "singled out and photographed because his presence constitute[ed] a visual participation in a public event which invited special attention."<sup>88</sup>

Though subtle, the distinctions between *Murray*, on the one hand, and *Finger* and *Messenger*, on the other, are enormous. In *Murray*, the court's analysis was at least implicitly underpinned by the fact that the subject of the photograph was chosen for the photo precisely because of his participation in an event which, given the circumstances, was itself newsworthy.<sup>89</sup> That is to say, the photograph was newsworthy in its own right. Thus, and quite sensibly, the photograph was then deemed to be a matter of public interest, and the plaintiff's claims failed.<sup>90</sup> By contrast, the *Finger* and *Messenger* courts used the "reasonable connection" test as a bridge to connect a concededly newsworthy article to a *non-newsworthy picture*.<sup>91</sup> And in those two cases, because the transaction costs did not prohibit bargaining for the

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85. 267 N.E.2d 256 (1971).

86. *Id.* at 257.

87. *Id.*

88. *Id.* at 258.

89. *Id.*

90. *Id.*

91. *Messenger v. Gruner + Jahr Printing Publ'g*, 727 N.E.2d, 549, 553-54 (N.Y. 2000); *Finger v. Omni Publ'ns Int'l*, 566 N.E.2d 141, 144 (1990).

rights to photograph those particular individuals to illustrate the accompanying stories (and by hypothesis, because the pictures did not possess “independent” aspects of newsworthiness), assigning the rights to the images to the plaintiffs would have maximized value.

And thus, a rule emerges: whether a picture should be deemed to be newsworthy should be determined, not by mere reference to whether the accompanying article or book is newsworthy, and whether there is a “reasonable connection” between the article and the photo, but rather by reference to whether the picture *itself* is newsworthy. If it is, then the right to the photo belongs in the public domain. If the picture is not newsworthy on its face, and the subject of the photo was chosen merely to illustrate the article, then (whether there is a reasonable connection between the article and the photograph’s subject or not) the right should belong to the individual. Why should the law care? Because this more expansive version of privacy rights *maximizes economic value*. If the photograph does not possess *independent* value as a newsworthy photo (which would change the calculation), then assigning the right to the individual will ensure that, when the bargaining stops, the right will have been purchased by the person who values it the most and that the right will therefore be put to its optimum use. This is an end the law should care about.

In addition, this rule squares with our moral intuitions. Just because the public interest exception limits the privacy of public figures and those directly involved with newsworthy stories, it should not follow that all individuals with even a conceivable connection (no matter how attenuated) to any aspect of a newsworthy story (no matter how minor) should be fair game for publicity.<sup>92</sup>

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92. Cf. *Gill v. Curtis Publ'g Co.*, 239 P.2d 630 (Cal. 1952) (holding in a California Supreme Court case that husband and wife plaintiffs had a cognizable privacy claim where plaintiffs were photographed in public while seated in an affectionate pose, and where the photograph was used to illustrate an article in *Ladies Home Journal* entitled “Love”). *Gill* is an interesting case that was perhaps ahead of its time. The court there was on the verge of accepting the theory of newsworthiness endorsed by this article, noting that “the public interest did not require the use of any particular person’s likeness nor that of plaintiffs without their consent.” *Id.* at 634. But the court ultimately upheld the cause of action in deference to an entirely separate finding: the photographs of the plaintiffs were used to illustrate an article with negative connotations and, on this ground, a cause of action for false light could be found. *See id.* at 635-36. While this may be the correct conclusion—and while the opinion may afford more protection than the *Finger* and *Messenger* holdings—it does not go far enough. Under the theory set forth herein, aside from whether the article had negative connotations, the threshold issue is whether use of the particular photo is newsworthy in and of itself and if the transaction costs prohibit value-maximizing bargaining. *See also* *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (Ct. App. 2001) (plaintiffs prevailed on false light claim over use of their picture to illustrate an article about the coach of their baseball team, who was arrested for child molestation).

## 2. The First Amendment

Some will complain that the problem with this conception of newsworthiness is that it will have an undesirable chilling effect on the press.<sup>93</sup> This is the classic First Amendment argument—and, given the prominent status that the First Amendment has in American jurisprudence, one that must be treated with great seriousness. The argument in this context is that the press will be less likely to publish even newsworthy material under a more restrictive rule because it will be unclear which photographs may be published.<sup>94</sup> However, if one accepts the value calculations above, they should not reject this theory on chilling effect grounds.

First, since the primary cause of the supposed chilling effect is indeterminacy, we can limit the chilling effect by providing a workable rule. The rule, simply stated, is this: does the photograph, in and of itself, contain distinctive elements of newsworthiness? Stated more simply, is the photograph itself newsworthy? Is there anything about the photograph that gives it public-good value? If the photograph does contain distinctive elements of newsworthiness, then it receives First Amendment protection. Or, as with the hypothetical plaintiffs discussed in the introduction, does the photograph depict an otherwise private (anonymous) individual not connected to a newsworthy event except through his or her inclusion in a highly non-distinctive class of individuals? Could many other individuals easily be substituted for this individual without any meaningful loss of value to the article? If so, the picture is not newsworthy.

Note that this rule is significantly more determinate than the reasonable connection test.<sup>95</sup> With reasonable connection, one must first determine whether the article itself is newsworthy under existing law, *then* determine whether the connection of the photograph to the article is sufficiently

93. See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983).

When we weigh the continued chilling effect of potential litigation and unpredictable liability against the benefits of allowing courts to retain the option of remedying some rare, genuinely offensive bits of publicity, we must question whether the preservation of even a small corner of the [right to privacy] tort is worth the risks. This observer answers in the negative.

*Id.*

94. See Joseph Elford, Note, *Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort*, 105 YALE L.J. 727, 735 (1995) (explaining that the ad hoc nature of a newsworthiness inquiry leads to uncertainty on the part of publishers as to what exactly they may publish).

95. For a discussion on the reasonable connection test, see *supra* Part III.B.1.

“reasonable”—whatever that may mean in this context<sup>96</sup>—to expand the article’s newsworthy protection to the photograph.<sup>97</sup> With the test proposed here, one must only determine whether the photograph itself contains distinctive elements of newsworthiness. This more determinate test reduces the chilling effect.

Still, critics may object (and this author admits) that this test is not *entirely* determinate. For example, in many cases it will not be entirely clear whether a photograph has no public-good value or whether there is some limited value that constitutes legitimate newsworthiness. While these cases will require a fact-specific analysis, and while this indeterminacy is certainly undesirable, the relevant question is which alternative results in *less* indeterminacy. All things being equal, a test with one degree of indeterminacy is preferable to a test with two degrees.

Moreover, close cases should be resolved in favor of First Amendment protection out of deference to constitutional rights. The rule of the First Amendment in this area is not absolute, however, and must be balanced with individual privacy rights.<sup>98</sup> As one court has noted, “First Amendment rights and privacy rights must be balanced and the outcome of a case ultimately depends upon its own specific facts.”<sup>99</sup> Furthermore, the fact that there are close cases does not change the fact that there are very clear cases, such as those discussed above, which are being unjustly treated now.

Indeed, the harm to privacy interests under the reasonable connection test far outweighs the First Amendment benefit. As noted above, the First Amendment concerns are small in this context due to the absolute lack of uniqueness or added value associated with these particular photographic images.<sup>100</sup> On the other hand, the cost to individual privacy in terms of loss of anonymity is large, since all individuals that venture beyond the privacy of their own homes are susceptible to becoming a public spectacle in spite of having no legitimate association with a noteworthy event of any kind.

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96. What it means, of course (at least in this context), is that there is likely to be no consistency or predictability between jurisdictions or even within a jurisdiction.

97. *See supra* Part III.B.1.

98. *Times-Mirror Co. v. Superior Court of San Diego County*, 198 Cal. App. 3d 1420, 1425 (1988).

99. *Id.*

100. *See supra* note 84 and accompanying text.

## IV. CONCLUSION

In sum, the crucial step in rethinking this branch of privacy law is recognizing that extending the contours of the right of privacy tort is economically sound. I have argued that a sound conception of the right of privacy, when combined with a more reasonable view of newsworthiness, will result in allocating the right to one's image to a class of individuals that includes the hypothetical plaintiffs referenced throughout this article.

Ultimately, practical application of this approach will require finding a doctrinal home. For example, a method by which to grant individuals the rights to their images in the scenarios outlined above could be addressed by an expansion of the appropriation tort, because it is already premised on ownership rights and applicable to private individuals just as much as public figures<sup>101</sup>—at least in theory.<sup>102</sup> One might also imagine an extension of the tort of public disclosure of private facts to cover a limited subset of non-newsworthy public situations such as those in the introductory hypotheticals.<sup>103</sup> This would require courts to take the step of holding that matters which occur or may be observed in public can still potentially be private—and thus covered by public disclosure of private facts.<sup>104</sup> Or finally, by either abandoning or reworking the notion of non-newsworthy photographs needing only a reasonable connection to a newsworthy article to be fair game for publication, the false light tort may apply.<sup>105</sup>

We might also go even further, and contemplate a more fundamental reformulation of the right of privacy tort. Although this would seem a bit drastic in most situations, a number of judges and commentators have already noted the problematic nature of the current right of privacy tort.<sup>106</sup> While this is to be expected given the ad hoc nature of the law's development in this area, it should not be considered acceptable.

How a court or legislature might doctrinally accomplish this is an issue perhaps best left for another day, as the ultimate approach a court should take is less important than simply recognizing that the economics-based approach advocated herein is superior to the ad hoc approach that the law

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101. For a discussion of appropriation, see *supra* Part II.B.4.

102. This is true at least as a doctrinal matter. Yet in practice, the tort of appropriation mostly ends up applying to public figures.

103. See *supra* Part I.

104. For a discussion of public disclosure of private facts, see *supra* Part II.B.3.

105. For a discussion on false light, see *supra* Part II.B.2.

106. See, e.g., Elford, *supra* note 94, at 727.



has taken to this point. If there is a sense of urgency to this call to action, it is the enormous gulf between popular conceptions or intuitions about the right to privacy and the protection actually afforded by law<sup>107</sup>—particularly given the powerful tools readily available to the voyeur. Now is the time to act.

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107. McClurg, *supra* note 22, at 994. McClurg notes:

There are some indications that privacy law may be poised for a change as plaintiffs' attorneys become cognizant of the gap between existing law and the public's perception of what constitutes reasonable expectations of privacy. For instance, a spate of recent lawsuits based upon intrusive videotaping has been filed against producers of tabloid television shows. However, while plaintiffs have obtained favorable rulings in a few cases where the videotaping occurred inside private residences, the "no privacy in public" rule continues to be a roadblock for plaintiffs whose privacy is invaded in a public place.

*Id.* (internal citations omitted).