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"You already have zero privacy. Get over it!"[1] Would Warren and Brandeis Argue for Privacy for Social Networking?

Connie Davis Powell*

I. Introduction

The Internet and new technologies, like social networks,[2] have changed the manner in which members of society interact with one another. Users of that technology are able to provide up-to-date commentary about the details of their daily activity from their smart-phones, Blackberry or iPhone, to name a few. While social networks provide access to unprecedented amounts of information and a new medium of communication, they nevertheless provide challenges to the application of laws that have traditionally governed in the brick and mortar world; particularly, the application of privacy laws. In 1890, Samuel Warren and Louis Brandeis penned one of the most influential

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1. Scott McNealy, CEO of Sun Microsystems, Inc. has been attributed this quote. Edward C. Baig et al., *Privacy: The Internet Wants Your Personal Info. What's in It for You?*, BUS. WK., Apr. 5, 1999, at 84.

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2. Social networks are online communication platforms which enable individuals to join and create networks of users. Usually, these services require the creation of profiles by users, in order for others to view and to provide invitations to join various networks and groups. Well-known examples include Facebook, Twitter, and MySpace. For a more detailed description of social networks, see Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows,* 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741 (2008).

law journal articles, *The Right to Privacy*,[3] out of mere frustration with new technology and journalists' increasing ability to intrude upon the private lives of individuals.[4] Warren and Brandeis wrote:

> 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. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.[5]

Much like Warren and Brandeis, this Article is written out of exasperation with the ever-changing privacy policies of social networking sites. Indeed, a *Wall Street Journal* article exposed yet another instance where social networks have made disclosures of personal information not in compliance with posted privacy policies by social networks.[6] As more of these instances occur, they become indicators that the current self-regulatory regime of contracts between the social networking sites and its users via privacy policy is insufficient to protect the interests of the users.

This Article ambitiously applies the arguments made in *The Right to Privacy* to advocate for expansion of the public disclosure of private facts tort. Part II describes the basic arguments made by Warren and Brandeis in *The Right to Privacy* to support their contention that technology created a harm that was incapable of being addressed by the remedies available at the time. While Warren and Brandeis focused on

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

4. *Id.* at 196-97.

5. *Id.* at 193.

6. Emily Steel & Jessica Vascellaro, *Sites Confront Privacy Loopholes*, WALL ST. J., May 21, 2010, at B1 (discussing various social networks practices of sending its users' data to advertiser which would enable the advertisers to discern personal identifiable information about individuals).

sensational journalism coupled with photography, the premise of *The Right to Privacy* was that the law generally should recognize the "right to be let alone."[7] Part III further summarizes Warren and Brandeis' development of their basic premise and discusses how the authors' arguments laid the foundation for courts to use *The Right to Privacy* as "precedent" to find a "right to be let alone" in a variety of factual situations, as well as setting the stage for the courts to impose a variety of remedies for violations of the new right to privacy. Part IV discusses the obstacles the authors had to overcome as they set out their legal concept for which no precedent existed. Part V summarizes the evolution that occurred in the wake of Warren and Brandeis' article which ultimately lead to the development of today's privacy torts. Part VI outlines the privacy issues presented with the use of social networks, such as Facebook and MySpace. Part VII advocates for courts to recognize the right of privacy in information posted on social networks and to expand the public disclosure of private facts tort to include this information. The Article concludes with a plea comprised of the text of *The Right to Privacy* with reference to social networking and the inefficiency of self regulation.

II. The Right to Privacy: A Plea for Privacy in the Midst of Nineteenth Century Technology

Gossip! Incredulous gossip, documented with photography, publicized and commercialized, was the source of frustration for Warren and Brandeis.[8] The introduction of "[i]nstantaneous

7. Warren & Brandeis, *supra* note 3, at 205.

8. There is much debate about the impetus leading to Warren and Brandeis penning *The Right to Privacy*. Prosser reveals in his 1960 article *Privacy* that the motivation was the publicity given to the wedding of Warren's daughter. *See* Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). Others suggest that the true inspiration for the article was events in the media that had garnered much attention relating to yellow journalism and surreptitious photography. *See* David Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. 769 (1991); Barron, *Warren and Brandeis,* The Right to Privacy, 4 HARV. L. REV. 193 (1890): *Demystifying a Landmark Citation,* 13 SUFFOLK U. L. REV. 875, 891-94 (1979).

photographs and newspaper enterprise[s],"[9] were the technological advances of society that demanded acknowledgment in the common law by Warren and Brandeis. This technology, according to the authors, enabled invasion of the "sacred precincts of private and domestic life,"[10] with ease. Warren and Brandeis bemoan that:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. 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.[11]

The ability to mass produce newspapers, coupled with the intrusive nature of photographers, according to the authors, required recognition of the private individual's right to control the circulation of information pertaining to her private affairs.[12] The authors asserted that the right to one's image for years had been observed as an area to which a legal remedy was needed.[13] Expounding upon this basic observation, Warren and Brandeis advocated for the protection from the unauthorized circulation of photography, and protection against the invasion into the private affairs of individuals, and the subsequent publication and profit from such invasions. In order to provide for such protections, it became necessary for the authors to classify the injury occasioned by the technology. Two classifications of injuries—"mental pain and distress" and the perversion of morality—were advanced by Warren and

9. Warren & Brandeis, *supra* note 3, at 195.
10. *Id.*
11. *Id.* at 196.
12. *Id.*
13. *Id.* at 195.

Brandeis.[14] The authors argued that these injuries were not adequately protected and could not be protected with the remedies available. In advancing this basic argument, Warren and Brandeis first sought to differentiate between the harm addressed under defamation law and the harm caused by widespread commercial gossip.[15] While the harm seemingly resembled that which was protected by the law of defamation—slander and libel—when one delved deeper into the harm that was addressed by defamation law, damage to reputation, it was clear, according to the authors, that the "right to be let alone" differed from the protection against damage to reputation in the community.[16] According to Warren and Brandeis, the law did not recognize a cause of action based upon injured feelings. The "right to be let alone" is a mental state, not associated with outside interactions but rather with internal feelings.[17]

Looking to the existing cause of action for breach of implied contract, trust or confidence, Warren and Brandeis discussed two English cases which provided remedies to plaintiffs whose photographs were used for commercial purposes without authorization.[18] In each case, relief was granted to the plaintiff. Warren and Brandeis wrote that the protection under contract theories for the use of photographs taken at the behest of an individual, which is used by the photographer for her own commercial purposes, did not adequately protect the individual in light of the technological advancements. In each of the cases discussed, there was a relationship with the photographer and the plaintiff. Technology, Warren and Brandeis explained, provided the ability of photographers to take pictures instantaneously and surreptitiously. The authors pointed to Justice North's question in *Pollard v. Photographic Co*, whether the plaintiff's counsel

14. *Id.* at 196.

15. *Id.* at 197.

16. *Id.* at 197-98.

17. This proposition that the law at the time did not provide a remedy for a mental state is disingenuous at best, because of the cause of assault, which clearly addressed the feeling "fright." Warren and Brandeis relegated the discussion of this contradiction to a footnote, and moved on to the next distinction. *Id.* at 197 n.1.

18. *Id.* at 208-10 (discussing Tuck v. Priester, (1887) 19 Q.B. 639 (Eng.) and Pollard v. Photographic Co., (1888) 40 Ch. 345 (Eng.)).

agreed that no cause of action would exist if defendant had "taken [the photographs] on the sly."[19] Indeed, it was acknowledged that in the case as referenced by the Justice, no trust or consideration existed to support any contract claim.[20]

Further, Warren and Brandeis contended that contract law provided a remedy that "satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special confidence."[21] The authors continued, however, that technological advances "afforded abundant opportunities for the perpetration of such wrongs without any participation by the injured party."[22] As such, Warren and Brandeis strongly urged that the courts adjust the law, as it is the nature of common law to protect its citizens from the harms that are occasioned by new technology through the recognition of courts of the necessity to further advance the laws.[23]

III. Grounding a Right of Privacy in Common Law

Having set forth the harms occasioned by the technology and demonstrated the insufficiency of the causes of action available at the time, Warren and Brandeis did not make a call for revisions to the then current legal regime. Instead, Warren and Brandeis argued that while defamation, intellectual property, and contract theories were undoubtedly inadequate to address the "harms" caused by the use and availability of new technology, the basis for these causes of actions nevertheless provided a solution to the problem. The authors argued that rooted in the existing case decisions was a broader principle, the "right to privacy," which required separate

19. *Id.* at 208 (quoting *Pollard*, 40 Ch. 345).

20. *Id.*

21. *Id.* at 210-11.

22. *Id.* at 211.

23. Benjamin Bratman points out that privacy protection in the nineteenth century "fell short of constituting a meaningful 'right to privacy.'" Benjamin E. Bratman, *Brandeis and Warren's* The Right to Privacy *and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 633 (2002) (describing the challenges that Warren and Brandeis faced in establishing the protection of psychological injury).

recognition. It is important to note that Warren and Brandeis did not purport to establish a new body of law,[24] but rather sought for the courts to recognize the underlying principle that formed the basis of many decisions made by the judiciary and then expand existing law to encompass this underlying principle. Most notably, it was recognition by the courts of this "right to privacy" that Warren and Brandeis sought.

Warren and Brandeis acknowledged that while the common law has always protected person and property, the law first only gave recognition to "physical interference with life and property."[25] To truly ground this principle, Warren and Brandeis focused on the development of the "right to life" and "right to property" simultaneously. The right to life in its simplest form, according to Warren and Brandeis, was the protection of "thoughts, emotions and sensations" and was embedded in the protections afforded to many concepts of property.[26] Only part of the satisfaction of "life" rests in physical things.[27] As such, the development of law through the common law "enabled the judges to afford the requisite protection, without the interposition of the legislature."[28]

The authors cited a number of English cases which prevented the unauthorized publication of intellectual or artistic property of another.[29] These cases, according to the authors, were illustrative of the premise that the law as it existed created a legal fiction—property rights which afforded protection "to thoughts, sentiments, and emotions, expressed through the medium of writings or of the arts."[30] In order to maintain this legal fiction upon which the protection of intellectual property was based, Warren and Brandeis wrote that the law should protect against the seizing of facts about a

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24. The Warren and Brandeis article *The Right to Privacy* is most noted for establishing the basis of the four basic privacy torts—intrusion upon seclusion, public disclosure of private facts, false light, and appropriation of name or likeness.

25. Warren & Brandeis, *supra* note 3, at 193.

26. *Id.* at 195.

27. *Id.*

28. *Id.*

29. *Id.* at 204-05.

30. *Id.* at 205.

person's private life by gossip mongers.[31] Without a doubt, these facts could be classified as "property" belonging to the individual.[32] Recognition of the right to privacy, they argued, was merely advancing the foundations previously established.[33]

Next, Warren and Brandeis focused on the extension of tort law to protect the harms established. They argued that tort law provided the best remedy to combat the harms of the new technology. Indeed, it was tort scholar Judge Thomas Cooley's coined term "the right . . . to be let alone"[34] that resonated throughout the article. Warren and Brandeis painstakingly developed a proposal for tort extension which would address the harm created by the technology and the business practices of journalists.[35] The proposal for protection

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31. *Id.* at 204-05.

32. *Id.*

33. This proposition made by Warren and Brandeis was the first amongst many law review articles that agreed with this basic premise. *See, e.g.*, Frederick Davis, *What Do We Mean by "Right to Privacy"?*, 4. S.D. L. REV. 1 (1959); Gerald Dickler, *The Right of Privacy: A Proposed Redefinition*, 70 U.S. L. REV. 435 (1936); Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Wilfred Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948); Basil W. Kacedan, *The Right of Privacy*, 12 B.U. L. REV. 353 (1932); Wilbur Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 694 (1912); Frederick J. Ludwig, *"Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948); Louis Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); George Ragland, *The Right of Privacy*, 17 KY. L.J. 85 (1929); Percy H. Winfield, *Privacy*, 47 L.Q. REV. 23 (1931); Leon R. Yankwich, *The Right of Privacy: Its Development, Scope and Limitations*, 27 NOTRE DAME L. REV. 499 (1952); *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981).

34. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888).

35. It is important to note at this juncture that Warren and Brandeis did not seem interested in a cause of action for intrusion upon seclusion, as there was a recent case, DeMay v. Roberts, 9 N.W. 146 (Mich. 1881), in which an individual who was not a physician and had no other imperative duties was permitted to be present while a woman gave birth. The court took a notable step towards recognizing a cause of action for intrusion upon seclusion in holding:

> To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her

of a right to privacy[36] was to repress the publication of matters "which concern the private life, habit, acts, and relations of an individual" which have no legitimate public concern.[37] Warren and Brandeis stressed that the aforementioned list was not intended to be exhaustive, but rather intended to provide a class of matters that should be considered.[38] Because the matter involved publication and the press, the authors thought it imperative that there be parameters placed upon this particular tort. Their proposal allowed the press to print matters that were of legitimate public concern; did not prevent the disclosure of private facts that would be held in confidence and were subject to privileges; and the tort would cease if the matters were made public by the individual.[39] Under the Warren and Brandeis tort proposal, truth would not be a defense to a claim, nor would a malice standard be applied.[40] This proposal, according to Warren and Brandeis, was aligned with the current theories that shaped the foundations of the law as it existed. Application of the proposal by the courts would be a continued development of the common law to address the ever-changing needs of society based upon the introduction of technology, the change in values, and conventions. The law, argued Warren and Brandeis, must be adaptable.

IV. The Hurdles that Warren and Brandeis Had to Jump

While the laws of the nineteenth century afforded limited protection of concepts of privacy,[41] these protections, as argued

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> this right by requiring others to observe it, and to abstain from its violation.

Id. at 149.

36. While Warren and Brandeis seemingly argue for this broad protection for privacy, the crux of their proposal was to address publication of private affairs.

37. Warren & Brandeis, *supra* note 3, at 216.

38. *Id.*

39. *Id.* at 216-18.

40. *Id.* at 218-19.

41. The protections of privacy in the nineteenth century included: libel; Fourth Amendment protections of the home, private papers and mail;

by Warren and Brandeis, fell short of providing an expressed or meaningful "right to privacy." Courts in 1890 provided remedies only if one could establish elements of the recognized causes of action.[42] Outside of these causes of action, only those violations which could be tied to a property right or classified as a violation of a property right were afforded a remedy. Thus, the proposal set forth by Warren and Brandeis was a leap for any court to follow.[43] First, there was clearly no case precedent cited for the propositions posited by the authors. Second, the idea that one could be compensated for psychological injury absent a showing of physical, reputational, or property harm was contrary to traditional concepts.[44] Undoubtedly, the societal sentiment at the time was that the invasion of privacy protected the home and the privacy associated with it.[45] Warren and Brandeis themselves recognized that courts had to be willing to accept the notion that protections afforded by the law at the time were based upon the right to privacy, even when the law did not provide damages for emotional harms.

The third and the highest hurdle that presented itself with respect to the Warren and Brandeis proposal was the First Amendment. The freedom of the press clause of the First

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trespass, criminal eavesdropping and restrictions on the publication of private letters. *See* Warren & Brandeis, *supra* note 3.

42. *See id*.

43. Contemporary scholars also noted the shortcomings of Warren and Brandeis' appeal in *The Right to Privacy*. Professor Davis argued "that the concept of a right of privacy was never required in the first place, and that its whole history is an illustration of how well-meaning but impatient academicians can upset the normal development of the law by pushing it too hard." Davis, *supra* note 33, at 23. Prominent scholar Harry Kalven argued that Warren and Brandeis failed to outline the requirements for the very cause of action they were advocating. Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 330-31 (1966). And, Pratt boldly commented "that Warren and Brandeis were wrong and that their argument was not supported by their own evidence." Walter F. Pratt, *The Warren and Brandeis Argument for a Right to Privacy,* 1975 PUB. L. 161, 162.

44. *See* Atkinson v. John E. Doherty & Co., 80 N.W. 285 (Mich. 1899) (discussing that no law prevented the use of the deceased's name on cigars, so long as it did not involve libel, and rejecting arguments made by Warren and Brandeis for a right to privacy).

45. For a concise overview of the privacy rights and nineteenth century sentiments regarding privacy, see Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981).

Amendment provides that: "Congress shall make no law . . . abridging the freedom of . . . the press."[46] The very essence of their proposal was to curtail journalistic practices of the time.[47] The proposal by Warren and Brandeis provided individuals the ability to censure the press and seek damages for the publication of truthful information. Critics of *The Right to Privacy* highlighted the direct conflict between the tort proposal that Warren and Brandeis positioned in the article and the First Amendment freedom of the press.[48] Seeing this obstacle, Warren and Brandeis made an appeal to the judiciary, and not the legislature, imploring courts to extend the "right to be let alone" in tort actions. Additionally, Warren and Brandeis sought to address the freedom of the press issue by building in exceptions for the press. Specifically, Warren and Brandeis' proposition excluded from the privacy tort information published with a legitimate "public interest." However, the acknowledgment by the authors that the First Amendment protections afforded to journalists would be a major factor in any cause of action based upon the right of privacy was overshadowed by their two-paged tirade chastising the press for its practices.[49]

V. Establishing Privacy Torts

The recognition of the right to privacy did not happen overnight. Warren and Brandeis' *The Right to Privacy* served only as the catalyst for discussion and provided authority upon which plaintiffs began to base their claims of invasion of privacy. The first case to cite to *The Right to Privacy* was *Schuyler v. Curtis*.[50] This case involved the commission of a statue of the deceased philanthropist, Mary Hamilton

46. U.S. CONST. amend. I.

47. It should be noted that Warren and Brandeis also discussed the appropriation of one's likeness for commercial use, however, it is obfuscated by the invasion by the press arguments put forth.

48. *See generally* Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703 (1990).

49. *See generally* Warren & Brandeis, *supra* note 3, at 195-97 (tirade about yellow journalism).

50. 15 N.Y.S. 787, 788 (Sup. Ct. 1891).

Schuyler, and her heirs' maintenance of a suit to enjoin the production, display, and advertisement of the statue.[51] The defendants in the case contended that the injunction could not be granted because there was no injury to property to which damages could be awarded in a court of law.[52] The court remarked:

> It is true that there is no reported decision which goes to this extent in maintaining the right of privacy, and in that respect this is a novel case. But the gradual extension of the law in the direction of affording the most complete redress for injury to individual rights makes this an easy step from reported decisions much similar in principle. In a recent article of the *Harvard Law Review* . . . entitled "The Right to Privacy," we find an able summary of the extension and development of the law of individual rights, which well deserves and will repay the perusal of every lawyer.[53]

Granting the injunction, the court held that the precedent, as cited and skillfully argued in *The Right to Privacy,* recognized the principle protected in each of the cases was the right to privacy.[54] The decision in *Schuyler* was subsequently reversed on other grounds[55] and did not serve well as precedent for the new right to privacy because the opinion failed to evaluate the cases and arguments provided by Warren and Brandeis. In the years following *Schuyler*, a host of courts considered the right to privacy but summarily dismissed the causes of actions for failure to state a claim upon which relief could be granted.[56] In addition to the cases, law review articles,

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51. *Id.* at 787.
52. *Id.*
53. *Id.* at 788.
54. *Id.*
55. Schuyler v. Curtis, 42 N.E. 22, 25-26 (N.Y. 1895).
56. *See* Corliss v. E. W. Walker Co., 57 F. 434, 435 (C.C.D. Mass. 1893) (refusing to enjoin biography of inventor on grounds he was public figure); Atkinson v. Doherty, 80 N.W. 285 (Mich. 1899) (rejecting privacy claim by

comments, and notes were published discussing the essence of *The Right to Privacy*.[57] It was not until 1902, in *Roberson v. Rochester Folding Box Co.*,[58] that a court evaluated, in depth, the arguments presented by Warren and Brandeis. In *Roberson*, the New York Court of Appeals severely criticized Warren and Brandeis' stance and cautioned that the article, on its face, was incomplete and lacked any substantial precedent.[59] To recognize the right of privacy as positioned by Warren and Brandeis, the court remarked, would be inviting "litigation bordering upon the absurd."[60] Indeed, the court warned:

> If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, . . . for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well

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widow of politician who objected to his likeness appearing on a cigar label on ground that public figures surrender privacy rights to the public); Murray v. Gast Lithographic & Engraving Co., 28 N.Y.S. 271 (Sup. Ct. 1894) (holding that parents cannot enjoin unauthorized publication of pictures of their children).

57. *See generally* Herbert Spencer Hadley, *The Right to Privacy,* 3 NW. L. REV. 1 (1895); Augustus N. Hand, *Schuyler Against Curtis and the Right to Privacy,* 45 AM. L. REG. 745 (1897); Guy H. Thompson, *The Right of Privacy as Recognized and Protected at Law and in Equity,* 47 CENT. L.J. 148 (1898); *The Right to Privacy,* 4 MADRAS L.J. 17 (1894), *reprinted in* 6 GREEN BAG 498 (1894); *The Right to Privacy,* 3 GREEN BAG 524 (1891); Recent Case, Atkinson v. Doherty, *80 N.W. 285 (Mich. 1899)*, 13 HARV. L. REV. 415 (1900); Recent Case, Atkinson v. Doherty, *80 N.W. 285 (Mich. 1899)*, 5 VA. L. REG. 709, 710-12 (1900); Note, *Development of the Law of Privacy,* 8 HARV. L. REV. 280 (1895); Note, *Is This Libel?—More about Privacy,* 7 HARV. L. REV. 492 (1894); Note, *A New Phase of the Right to Privacy,* 10 HARV. L. REV. 179 (1897); Comment, 2 NW. L. REV. 91 (1894); Note, *The Right to Privacy,* 12 HARV. L. REV. 207 (1898); Note, *The Right to Privacy—The* Schuyler *Injunction,* 9 HARV. L. REV. 354 (1896); Note, *The Right to Privacy,* 7 HARV. L. REV. 182 (1894); Note, *The Right to Privacy,* 5 HARV. L. REV. 148 (1892); John Gilmer Speed, *The Right of Privacy,* THE NORTH AMERICAN REVIEW, July 1896, at 64.

58. 64 N.E. 442 (N.Y. 1902).

59. *Id.* at 444-45.

60. *Id.* at 443.

> the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone.[61]

The court remained steadfastly committed to traditional doctrines of requiring some physical or property injury and concluded that: "the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided."[62]

The tides turned for the right to privacy when the New York legislature, in response to public outcry against the holding in *Roberson,* passed legislation that codified the cause of action alleged in *Roberson*.[63] The legislation recognized as a tort the use of "another's name, portrait, or picture for commercial purposes without the subject's consent."[64]

Shortly thereafter, Georgia recognized a common law right of privacy in *Pavesich v. New England Life Insurance Co*,[65]when it refused to follow the decision in *Roberson* and unanimously endorsed the views of Warren and Brandeis espoused in *The Right to Privacy*. The *Pavesich* court found in favor of a plaintiff who claimed that the defendant insurance company violated his right to privacy when it used his name, portrait, and a fictitious testimonial in its newspaper advertisement without consent.[66] The lack of precedent did not disturb the *Pavesich* court.[67] In fact, what disturbed the court the most was the inflexibility of the judiciary to fashion legal

61. *Id.*
62. *Id.* at 447.
63. *See, e.*g., Kramer, *supra* note 48, at 717.
64. *Id.*
65. 50 S.E. 68 (Ga. 1905).
66. *Id.* at 79-80.
67. *Id.* at 69.

remedies for novel situations.[68] The *Pavesich* court condemned the decision in *Roberson* as "the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel."[69] The court stated that "this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right."[70] The court concluded:

> that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . . .[71]

The *Pavesich* court's predictions were soon materialized. By 1939, the privacy torts were recognized in the American Law Institute's *Restatement (First) of Torts*.[72] The right to privacy, as codified by the *Restatement*, read "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[73] In 1960, William Prosser commented on *The Right to Privacy*.[74] By that time a majority of the states had responded to Warren and Brandeis' article and recognized a common law right to privacy.[75] In his

68. *Id.*
69. *Id.* at 78.
70. *Id.*
71. *Id.* at 81.
72. RESTATEMENT (FIRST) OF TORTS § 867 (1939).
73. *Id.*
74. Prosser, *supra* note 33.
75. *Id.* at 386-88.

note, Prosser evaluated over 300 cases involving privacy issues and outlined four distinct types of invasion of privacy that had been recognized by the courts.[76] These "invasions of privacy" formed the basis for the privacy torts listed in the *Restatement (Second) of Torts*.[77] The privacy torts are: (1) intrusion upon seclusion;[78] (2) public disclosure of private facts;[79] (3) false light or "publicity";[80] and (4) appropriation.[81] These torts continue to be recognized today and are an integral part of American jurisprudence. However, technological developments necessitate revisiting whether privacy concerns are different and whether tort law needs to evolve to protect those concerns.

As Warren and Brandeis noted, privacy must be evaluated in light of the "modern enterprise and inventions."[82] In the age of technology, "the continuing expansion of privacy rights may be more important than ever. Indeed, computer age technology

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76. *Id.* at 388-89.

77. *See* RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (1977).

78. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.* § 652B.

79.

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Id. § 652D.

80.

> 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.

Id. § 652E.

81. "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." *Id.* § 652C.

82. Warren & Brandeis, *supra* note 3, at 196.

threatens privacy in ways that Warren and Brandeis could not possibly have imagined."[83] Privacy law, however, has failed to keep pace with technology. Modern day courts, like those in the late nineteenth and early twentieth century, continue to apply traditional laws to novel situations, rather than expanding the laws to address the new problem. As such, there has been much debate about what constitutes privacy.[84] Technology has enabled the collection of an astounding amount of personal data online. Subsequently, the privacy debate has continued and now includes a plea for an individual's right to privacy online. Devotees of the fundamental arguments made by Warren and Brandeis suggest that "the right to be let alone" should include a right to "information privacy" online.[85] Advocates of privacy describe information privacy as "the desire of individuals to limit the kinds of information that others know about them."[86] The novel situation that presents itself today is the protection and usage of information shared across social networks.

VI. The Right to Privacy in Social Networking: A Plea for Privacy in the Midst of Constant Disclosure of Personal Identifiable Information

Mostly everyone utilizes a social network. Facebook boasts 500 million members,[87] while MySpace and Twitter claim 125

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83. Kramer, *supra* note 48.

84. Noted privacy scholar Daniel J. Solove, in the article *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006), argues for a new taxonomy for privacy to aid the judiciary and lawmakers' understanding of privacy violations. Solove undertakes great efforts to fully evaluate all sources of privacy law and develop a taxonomy that focuses more on the various activities that encroach on privacy rather than merely focusing on the poorly defined term "privacy." *Id.*

85. GINA MARIE STEVENS, CONG. RESEARCH SERV., RL 30322, ONLINE PRIVACY PROTECTION: ISSUES AND DEVELOPMENTS 5 (2001).

86. Comment, Steven C. Carlson & Ernest D. Miller, *Public Data and Personal Privacy*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 83, 87 (2000) (noting that information privacy is one kind of privacy interest that individuals possess).

87. Mark Zuckerberg, *500 Million Stories*, THE FACEBOOK BLOG (July 21, 2010), http://blog.facebook.com/blog.php?post=409753352130.

and 105 million members, respectively.[88] Users share personal information, pictures, and comments with their friends and followers and post status updates which provide up-to-the-minute details about their daily activity. Users can even play interactive games with one another.[89] Social networks have grown at record rates based on the ability to connect and/or reconnect. "Boy F[ace]B[ook] has just about everybody on here. From the girl who helped them steal the original BJ (my truck), to people I've known since 2nd grade, to my Aunt Jean!"[90] This status update captures the very essence of the popularity of social networks. Whether it is Facebook, MySpace, or Twitter, social networks have become commonplace. Also typical are headlines like *Sites Confront Privacy Loopholes*,[91] *Facebook Announces Changes to its Privacy Policy*,[92] and *Do Social Networks Bring the End of Privacy?*[93] These headlines are demonstrative of the dilemma created by social networks. Daniel Solove, noted privacy scholar, commented that the idea that society has abandoned privacy in light of its willingness to share personal information is "wrongheaded at best. It is still possible to protect privacy, but doing so requires that we rethink outdated understandings of the concept."[94] However, Facebook founder Mark Zuckerberg offered comments which suggest the very opposite. Zuckerberg contended that society's willingness to share has created an environment where privacy concerns are less important to users of social networks today than they were when social networking began. Justifying the decision to change its privacy

88. Kenneth Lee, *October 2010 Facebook, Twitter, MySpace Statistics*, MRDEFINITE.COM (Oct. 5, 2010), http://mrdefinite.com/facebook-twitter-myspace-statistics-october-2010/.

89. Facebook offers interactive games such as "Sorority Life" and "Mafia Wars" where users of Facebook battle each other to gain "Glam" or "Don" status.

90. Kamilah Hall Sharp, *Kamilah Hall Sharp*, FACEBOOK (Aug. 6, 2010, 10:00PM), http://www.facebook.com/Kamilahmh.

91. Steel & Vascellaro, *supra* note 6.

92. Geriné Tcholakian, *Facebook Announces Changes to Its Privacy Policy*, MEDIA IN CANADA (Aug. 27, 2009), http://www.mediaincanada.com/articles/mic/20090827/facebookprivacy.html.

93. Daniel J. Solove, *Do Social Networks Bring the End of Privacy?*, SCI. AM., Sept. 1, 2008, at 101.

94. *Id.* at 104.

policy in December 2009,[95] Zuckerberg provided the following comments:

> When I got started in my dorm room at Harvard, the question a lot of people asked was "why would I want to put any information on the Internet at all? Why would I want to have a website?" And then in the last [five] or [six] years, blogging has taken off in a huge way and all these different services that have people sharing all this information. People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that has evolved over time. We view it as our role in the system to constantly be innovating and be updating what our system is to reflect what the current social norms are. A lot of companies would be trapped by the conventions and their legacies of what they've built, doing a privacy change—doing a privacy change for 350 million users is not the kind of thing that a lot of companies would do. But we viewed that as a really important thing, to always keep a beginner's mind and what would we do if we were starting the company now and we decided that these would be the social norms now and we just went for it.[96]

These comments are illustrative of the social networking site's position that societal norms have changed such that privacy is no longer paramount to users. These comments are dubious at best. Many of the changes to Facebook's privacy

95. Press Release, Facebook, Facebook Asks More Than 350 Million Users Around the World to Personalize Their Privacy (Dec. 9, 2009), *available at* http://www.facebook.com/press/releases.php?p=133917.

96. Marshall Kirkpatrick, *Facebook's Zuckerberg says the Age of Privacy is Over*, READWRITEWEB (Jan. 9, 2010), http://www.readwriteweb.com/archives/facebooks_zuckerberg_says_the_age_of_privacy_is_ov.php.

policy can be attributed to Facebook's endeavor to "turn that vast amount of data into a multi-billion dollar ad[vertising]-business."[97] While no social network provider has outwardly expressed their desire to capitalize on the data it collects from its network's users, social networking sites nonetheless inundate users with advertisements from the moment they log onto the site.

The business of tracking, aggregating, and selling personal information is not a new concept. However, with advances in technology, social networks have created a platform where data is collected in two ways: from the users directly and from tracking the users' movements online. Tracking, coupled with the openness to share personal information through social networking, and the ever-changing policies with respect to what a user can or cannot designate as private, has created a lack of control of personal information and uninformed consent to various uses of personal information.[98] Social networks espouse the belief that their privacy policies, privacy settings, and terms and conditions constitute sufficient notice of their practices and consent from its users.

Social networking sites provide, through links generally found at the bottom of the sites, their terms and conditions and privacy policies. Most social network sites give users the ability to control how their information is shared amongst users. For example, Facebook's privacy policy[99] and MySpace's privacy policy[100] both contain options such as allowing users to choose who can view their profile, find them in a search, or see their personal information, like birthday, phone number, and address. Indeed, a 2010 Pew Report on social networks and reputation management showed that two-thirds of all social network users (65 percent) have used the privacy settings

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97. Jessica E. Vascellaro, *Facebook Grapples with Privacy Issues*, WALL ST. J., May 19, 2010, at B1.

98. *See, e.g.*, *Facebook's Privacy Policy*, FACEBOOK, http://www.facebook.com/policy.php (last visited Oct. 14, 2010) (Section 8 states: "We cannot ensure that information you share on Facebook will not become publicly available.").

99. *Id.*

100. *MySpace Privacy Policy*, MYSPACE, http://www.myspace.com/index.cfm?fuseaction=misc.privacy (last visited Oct. 14, 2010).

provided by the social networks and have changed the privacy settings to limit what they share with others online.[101] While Facebook and MySpace have policies that seemingly allow users control of their personal information, Twitter explains that its network "asks 'what's happening' and makes the answer spread across the globe to millions, immediately,"[102] and has a slightly different take on privacy. Twitter's privacy policy specifically states: "Our Services are primarily designed to help you share information with the world. Most of the information you provide to us is information you are asking us to make public."[103]

Twitter's approach to privacy can be attributed to the way in which Twitter differs from social networking sites like Facebook and MySpace. Twitter is a blogging site that allows users to share messages of 140 characters in length. While Twitter allows users to share messages with their "followers," the default privacy setting on Twitter is that all messages posted using the site are public and available to any user of Twitter.[104] Thus, the information that is being shared seemingly is limited to the tweets posted by the users.[105] Twitter has not been immune from privacy issues. An article on Techcrunch.com, *Privacy Disaster at Twitter: Directed Message Exposed*,[106] provided a detailed account of a user whose private messages between a friend was posted to her normal Twitter blog and publicized to all 650 of her followers.[107] Most recently,

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101. MARY MADDEN & AARON SMITH, PEW RESEARCH CENTER, REPUTATION MANAGEMENT AND SOCIAL MEDIA 21 (2010), *available at* http://pewinternet.org/Reports/2010/Reputation-Management.aspx.

102. TWITTER, http://twitter.com/about (last visited Oct. 13, 2010).

103. *Twitter Privacy Policy*, TWITTER, http://twitter.com/privacy (last visited Oct. 13, 2010).

104. *Id.* The profile information on Twitter is not robust. Only name, location, website, number of tweets, followers, and followings are shared with viewers of the site.

105. The tweets by users often disclose personal information, such as vacation plans, the whereabouts of the user, and other information that could subject the user to crimes such as identity theft. *See, e.g.*, *infra* note 110 and accompanying text.

106. Michael Arrington, *Privacy Disaster at Twitter: Direct Messages Exposed*, TECHCRUNCH.COM, http://techcrunch.com/2008/04/23/privacy-disaster-at-twitter-direct-messages-exposed (last visited Oct. 15, 2010).

107. This unintended publication of private "tweets" was attributed to

Twitter has come under fire for its failure to provide adequate security measures for the protection of personal information collected from its users.[108] In mid-2009, hackers of Twitter's network were able to gain access to many users' email addresses and other private user information, gain access to user messages, reset user passwords, and send phony tweets from user accounts.[109] While the information that is made public by Twitter provides a limited amount of personal information, privacy is still an issue with the network. Indeed, accounts such as the one exposed on TechCrunch.com, the hacking incident, and a report that a Twitter user's home was robbed after tweeting about his vacation,[110] indicates that privacy is a major issue even when limited information can be outwardly viewed.

Simply stated, users do not have control over use of their information.[111] The *Wall Street Journal* reported that several social-networking sites released data to advertising companies that could potentially enable advertisers to easily acquire names and other personal details about their users, despite policies that indicate this information would not be disclosed without consent.[112] Social networking sites inadvertently provided click-through data to advertisers that include user

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problems caused by the third party application "GroupTweet," but have been addressed by the founder of the application by disabling new registrations until the problems are fixed. *Id.*

108. Press Release, Fed. Trade Comm'n, Twitter Settles Charges that it Failed to Protect Consumers' Personal Information; Company Will Establish Independently Audited Information Security Program (June 24, 2010), *available at* http://www.ftc.gov/opa/2010/06/twitter.shtm. In the first of its kind case against an online social networking site, the FTC reached a settlement with Twitter in response to the site's failure to take proper precautions to protect its users' information from hackers. *Id.* The terms of the settlement bar Twitter from misleading consumers about its privacy policies for 20 years and require the company to establish and maintain a comprehensive information security program that is to be assessed every other year for the next 10 years. *Id.*

109. *Id.*

110. *Man's House Robbed after Tweeting Vacation*, ABC KGO-TV SAN FRANCISCO (May 29, 2009), http://abclocal.go.com/kgo/story?section=news/technology&id=6839323.

111. Secondary use of information relates directly to how the social networking site utilizes the information collected about its users.

112. Steel & Vascellaro, *supra* note 6.

names.[113] This data is capable of enabling advertisers to direct back to the user's profile page which contains other personal information like name, address, phone number, and email address.[114] These incidences clearly indicate not only a lack of control by users over whether their information is knowingly made public or disclosed to third parties, but also a lack of control by operators of the various social networking sites. In a prepared statement for presentation to Congress,[115] Marc Rotenberg, Executive Director of the Electronic Privacy Information Center, remarked:

> I have listened to Facebook experts discuss the privacy settings who quickly became confused. I even heard Facebook founder Mark Zuckerberg describe the new changes to his company's privacy settings only to learn, unexpectedly, that some of his college photos were now available to "everyone."
>
> I am convinced that not even Facebook understands how its own privacy settings operate. And if Facebook cannot understand the privacy settings, how can the users?[116]

As more and more social networks develop and the number of individuals utilizing the various services increases at record speeds, the possibility that social networks could supplant other forms of media is real. This potential is frightening to advocates of privacy and should be frightening to users. The personal information disclosed by users of social networks on posts and profiles, coupled with the data collected electronically from the users' actions and interactions with online networks,

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113. *Id.*

114. *Id.*

115. *Online Privacy, Social Networking and Crime Victimization*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 5 (2010) [hereinafter *Rotenberg Testimony*] (statement of Marc Rotenberg, Executive Director, Electronic Privacy Information Center).

116. *Id.*

creates a rich profile that can be exploited. What is even more troubling is the change of privacy policies, which often occur after users have disclosed personal information. These "bait and switch" tactics employed by social networking have resulted in user confusion as to what information is accessible to the public, thus exposing them to unnecessary risk of harm. For example, an anonymous blogger, "Harriet Jacobs," revealed that her abusive ex-husband obtained her current location and workplace because Google Buzz created automated lists from email contacts without first getting subscriber consent.[117] Individuals have reported being "outed" by unauthorized access to Facebook pages where photographs designated as private were made public.[118] And, in one incident, a professor at the University of Texas was able to discern an individual's political affiliation simply by looking at the individual's profile and friend list.[119] "[S]ocial network sites [have] create[d] the illusion of limited publication and control, but there is no technological mechanism for users to effectuate that control, nor law that recognizes those decisions."[120]

At this juncture, it is imperative that we take a new look at privacy and its protection online, in particular, privacy as it relates to social networking. Warren and Brandeis asserted in *The Right to Privacy* that individuals have the right to determine, "ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[121] This assertion is as valid, and as relevant as it was in 1890.

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117. Harriet Jacobs, *Fuck You, Google*, FUGITIVUS (Feb. 11, 2010), http://fugitivus.wordpress.com/2010/02/11/fuck-you-google/.

118. Carter Jerigan & Behram F.T. Mistree, *Gaydar: Facebook Friendships Expose Sexual Orientation*, FIRST MONDAY (Oct. 5, 2009), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2611/2302. *See also* Carolyn Y. Johnson, *Project 'Gaydar'*, BOSTON GLOBE, Sept. 20, 2009, at K1; Steve Lohr, *How Privacy Can Vanish Online, a Bit at a Time*, N.Y. TIMES, Mar. 17, 2010, at A1.

119. Jack Lindamood et al, *Inferring Private Information Using Social Network Data*, PROC. OF THE 18TH INT'L WORLD WIDE WEB CONF. 1145 (2009), *available at* http://www2009.org/proceedings/pdf/p1145.pdf.

120. Lauren Gelman, *Privacy, Free Speech and "Blurry-Edged" Social Networks*, 50 B.C. L. REV. 1315, 1341 (2009) (arguing that technology controls may be the best solution to express social network users' privacy wishes on information that may be posted).

121. Warren & Brandeis, *supra* note 3, at 198.

Indeed, users of social networking sites share openly with their friends and followers their thoughts, sentiments, and emotions with an understanding, based upon the policy presented at the time of their disclosure, that the information would only be shared with those selected.

Arguably, users who are uncomfortable with a particular social network provider's privacy policy could stop using the services and delete their profile. However, discontinuing use of the services does not eliminate the problem. The problem remains that the social networking website has the ability to continue to use and/or capitalize on information previously acquired by virtue of use of its services. Moreover, it is extremely difficult to delete your online persona and reclaim your information from social network sites, so much so that websites like Web 2.0 Suicide Machine have evolved to help users reclaim their privacy online.[122]

Conventional laws and regulations do not sufficiently address the privacy issues associated with social network sites. Contract law provides little relief to social network users. Privacy policies and terms of use generally provide the basis for such breach of contract claims. However social networking sites routinely change privacy policies and terms of use to suit their needs. Having learned lessons from previous cases invalidating terms of use of online,[123] social networking sites provide notice of changes and have crafted changes to avoid the results in previous cases.[124] Of the privacy torts, positioned by Warren and Brandeis and later more concretely outlined by Prosser, public disclosure of private facts seemingly provides a remedy for social network users. However, it is hard to establish that the facts are private when a user has voluntarily posted them on a social networking site and many terms and conditions give the social networking site control to use the information.

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122. WEB 2.0 SUICIDE MACHINE, http://suicidemachine.org/ (last visited Oct. 15, 2010).

123. *See, e.g.*, Harris v. Blockbuster, Inc., 622 F. Supp. 2d 396 (N.D. Tex. 2009); Specht v. Netscape Commc'ns Corp., 306 F.3d 17 (2d Cir. 2002).

124. Chris Kelley, *Improving Sharing Through Control, Simplicity and Connection,* THE FACEBOOK BLOG (July 8, 2009), http://blog.facebook.com/blog.php?post=101470352130.

Indeed, a jury in *Pietrylo v. Hillstone Restaurant Group*,[125] a case involving employees who were terminated based upon a post to a group, Spec-Tator on MySpace, rejected plaintiffs' privacy claims, explaining that while the Spec-Tator was "a place of solitude and seclusion which was designed to protect the Plaintiffs' private affairs and concerns[,]" they did not have a reasonable expectation of privacy in the MySpace group.[126] In addition to this case, *Moreno v. Hanford Sentinel Incorporated*,[127] further affirms the view held by many, that once information is posted on a social network, it is public information. In *Moreno*, the court ruled that there were no private facts at issue with the publication of a post by Cynthia Moreno bashing her hometown because "[a] matter that is already public or that has previously become part of the public domain is not private."[128] The court commented that there could be no reasonable expectation that the information would remain private and found that "the fact that Cynthia expected a limited audience does not change the above analysis. By posting the article on MySpace, Cynthia opened the article to the public at large. Her potential audience was vast."[129] Recognizing the deficiencies of conventional laws, privacy advocates have petitioned the Federal Trade Commission (FTC) to investigate social network sites for their policies.[130] Privacy advocates believe that, at the very least, the practices of social networks constitute unfair trade practices. The FTC has acknowledged the privacy issues created by social networks and, as a result, has instituted several actions against social networks.[131] However, the actions by the FTC fall short of

125. No. 06-5754(FSH), 2008 U.S. Dist. LEXIS 108834, at *4 (D.N.J. July 24, 2008).

126. Jury Verdict Sheet, Pietrylo v. Hillstone Restaurant Group, No. 06-5754, 2008 U.S. Dist. LEXIS 108834, (D.N.J. July 24, 2008), ECF No. 61.

127. 91 Cal. Rptr. 3d 858 (Cal. Ct. App. 2009).

128. *Id.* at 862.

129. *Id.* at 863.

130. *See* Complaint, *In re* Facebook, Inc., Fed. Trade. Comm'n (Dec. 17, 2009), *available at* http://www.docstoc.com/docs/document-preview.aspx?doc_id=19659893 (last visited Oct. 22, 2010).

131. Complaint, *In re* Twitter, Inc., No. 092 3093, Fed. Trade. Comm'n (June 24, 2010), *available at* http://www.ftc.gov/os/caselist/0923093/100624twittercmpt.pdf; *In re Google*

establishing guidelines or rules for the industry as a whole. The actions of the FTC have been independent and the findings and remedies implemented have been specific to the particular social network.

Data breach laws, enacted by forty-six states and the District of Columbia[132] as a result of the February 2005 security breach at one of the nation's largest data aggregators and resellers, ChoicePoint, also do not provide a viable redress of harm for social network users. These laws generally focus on informing consumers of a security breach when their data is lost or compromised.[133] Generally, these laws contain four main components: (1) a definition of personal identifiable information; (2) notification of any unauthorized access to personal identifiable information; (3) notification procedures; and (4) notification timelines.[134] These laws are of no assistance to users of social networks because the information that may be acquired from social networking sites does not ordinarily fit the definition of personal identifiable information. Generally, these statutes describe personal identifiable information as an individual's name in combination with another identifier, such as a social security number or credit card number with an access code or password. [135] While some user names may consist of legal names, there is no direct access to a site member's social security number or other similar personal information. Moreover, social network sites would only be required to notify its users if there is a reasonable belief that personal identifiable data has been acquired by an

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Buzz, EPIC, http://epic.org/privacy/ftc/googlebuzz/default.html (last visited Oct. 22, 2010); *In re Facebook*, EPIC, http://epic.org/privacy/inrefacebook/ (last visited Oct. 22, 2010); *In re Facebook II*, EPIC, http://epic.org/privacy/facebook/in_re_facebook_ii (last visited Oct. 22, 2010); *Facebook Privacy*, EPIC, http://epic.org/privacy/facebook/ (last visited Oct. 22, 2010).

132. *State Security Breach Notification Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=13489 (last visited Oct. 22, 2010).

133. *States Offer Data Breach Protection*, NAT'L ASS'N OF ATT'YS GEN., http://www.naag.org/states-offer-data-breach-protection.php (last visited Oct. 22, 2010).

134. *Id.*

135. *Id.*

unauthorized person.[136] Even if information on social networks were considered personal identifiable information under the applicable law, the third party accessing the information would not be unauthorized since the network permitted such access. For example, see Facebook's[137] and MySpace's[138] privacy policies. Because the disclosure of information on social networks does not fall under either of the first two components of states' data breach notification laws, notification procedures and timelines which describe how and when affected individuals should be notified in case of a data breach simply do not apply.

Federal laws regulating the collection of personal information provide limited to no help in addressing privacy issues with social networks.[139] The Computer Fraud and Abuse Act,[140] which addresses computer hacking and federal computer crimes, is wholly inapplicable to social networking sites. The Health Insurance Portability and Accountability Act

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136. *Id.*

137. "In order to provide you with useful social experiences off of Facebook, we occasionally need to provide General Information about you to pre-approved third party websites and applications that use Platform at the time you visit them (if you are still logged in to Facebook)." *Facebook's Privacy Policy*, FACEBOOK, http://www.facebook.com/policy.php (last visited Oct. 17, 2010).

138.

> Some of the advertisements that appear on MySpace Services may also be delivered to you by third party Internet advertising companies. These companies utilize certain technologies to deliver advertisements and marketing messages and to collect non-PII about your visit to or use of MySpace Services, including information about the ads they display, via a cookie placed on your computer that reads your IP address.

MySpace Privacy Policy, MYSPACE, http://www.myspace.com/index.cfm?fuseaction=misc.privacy (last visited Oct. 17, 2010).

139. The Video Privacy Protection Act which prevents the disclosure of one's video rentals provided success in disclosure challenges in Lane v. Facebook, Inc., No. C 08-3845 RS, 2009 WL 3458198, at *1 (N.D. Cal. Oct. 23, 2009) and Harris v. Blockbuster Inc., 622 F. Supp.2d 396, 397 (N.D. Tex. 2009).

140. 18 U.S.C. § 1030 (2006).

(HIPAA),[141] which applies to individually identifiable health information, does not apply to the type of information that is disclosed and collected. The Gramm-Leach-Bliley Act[142] is also a dead-end for social network privacy since it only applies to actions by financial institutions and was enacted to regulate the disclosure of private, personally identifiable financial information that is disclosed to non-affiliated third parties. The Children's Online Privacy Protection Act,[143] which outlines rules that persons or entities under U.S. jurisdiction must follow when collecting personal information online from children under 13 years of age, illustrates a concern for the collection of personal information online, however, social networks do not fall within the threshold concern of this act—they are not targeted at children. These laws were narrowly tailored to address limited amounts of information to which Congress found that there was a compelling need to regulate.

Privacy and social networks have sparked Congressional interest.[144] Congress, recognizing the impact of social networking, held hearings on July 28, 2010. These hearings, while a major step for privacy advocates, focused primarily on identifying the potential harms of social networking in an effort to determine whether there is a governmental interest in regulating social networks or whether the current self-regulatory regime is sufficient. It is apparent that the only way to combat the attitudes of social networking sites with respect to user privacy and information disclosure is for the courts to firmly articulate a rule of privacy for social networking and extend existing concepts in the common law to secure privacy protection for social network users. Indeed, "[p]olitical, social and economic changes entail the recognition of new rights and the common law, in its eternal youth, grows to meet the

141. Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, & 42 U.S.C.).

142. Pub. L. No. 106-102, 113 Stat. 1338 (codified as amended in scattered sections of 12 & 15 U.S.C.).

143. 15 U.S.C. §§ 6501-6506 (2006).

144. *See generally Online Privacy, Social Networking and Crime Victimization*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010).

demands of society."[145]

VII. Grounding Social Networking Privacy

There are many differing views on the meaning of "privacy."[146] Indeed, privacy is a concept that is quite elusive and has been the subject of much debate by academics. "[E]ven the most strenuous advocate of a right to privacy must confess that there are serious problems of defining the essence and scope of this right."[147] In order to fully develop protection for information privacy for social networks, it is necessary to start with a clear articulation of the essence and scope of the right that is being protected. One view is that privacy requires an attempt to maintain secrecy of the information—once information is revealed to others, it is no longer private.[148] This notion of privacy is wholly inappropriate for social networks and arguably for privacy in general. Social network theorists have studied the relevance of relationships and the flow of information within an individual's social network for decades.[149] Indeed, the network theory[150] has been used to reconcile differing outcomes in privacy cases where the information was disclosed by the plaintiff to others.[151] The use

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145. Warren & Brandeis, *supra* note 3, at 193.

146. *See, e.g.,* ADAM CARLYLE BRECKENRIDGE, THE RIGHT TO PRIVACY 1 (1970); Anita L. Allen, *Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 CONN. L. REV. 861 (2000); William M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253 (1966); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CALIF. L. REV. 1133 (1992); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968); Ruth Gavinson, *Privacy and the Limits of the Law*, 89 YALE L.J. 421 (1980); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROBS. 307 (1966); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087 (2001).

147. Beaney, *supra* note 146, at 255.

148. *See, e.g.*, Duran v. Detroit News, Inc., 504 N.W.2d 715 (Mich. Ct. App. 1993); Fisher v. Ohio Dep't of Rehab. and Corr., 61 Ohio Misc. 2d 303 (Ct. Cl. 1988).

149. *See, e.g.*, Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973).

150. Network theory describes how information flows between groups of individuals.

151. Lior Jacob Strahilevits, *A Social Network Theory of Privacy*, 72 U.

of network theory principles in determining whether a privacy interest exists in information that has been previously disclosed was highlighted by Lior Strahilevitz in *A Social Networks Theory of Privacy*.[152] Strahilevitz proposed that, rather than looking to the number of individuals to which information is disclosed, the legal analysis to determine whether a privacy interest exists in information after a disclosure should be "what the parties should have expected to follow the initial disclosure of information by someone other than the defendant."[153] In other words, information should be deemed private if the information stays confined to the initial group to which it was disclosed, even if such group is rather large.[154] While this approach to privacy has been viewed as highly contextual, requiring courts to understand sociology concepts, privacy, as it relates to social networking, is complex and requires a more nuanced analysis. Users of social network systems understand that "personal information is routinely shared with countless others, and they also know that they leave a trail of data wherever they go."[155] In addition to this understanding, users are conscientious about the types of sensitive information they share through social networking. Such awareness has been demonstrated by the absence of credit card information and social security numbers disclosed by users of social networks.[156] Comments made by the founder

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CHI. L. REV. 919 (2005).

152. *Id.*

153. *Id.* at 988.

154. The idea of a requirement of complete secrecy of information has been generally rejected in contemporary privacy cases. *See, e.g.*, Times Mirror Co. v. Superior Court, 244 Cal. Rptr. 556 (Ct. App. 1988); Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488 (Mo. Ct. App. 1990). Indeed the standard developed in many of these cases is not how many people the information was disclosed to but rather the relation of those persons to the plaintiff and what the plaintiff reasonably expected those persons to do with the information. *See generally id.*

155. Solove, *supra* note 93, at 104.

156. Marc Rotenberg, Executive Director of the Electronic Privacy Information Center, commented: "I have never seen anyone put a credit card number or an SSN on his or her wall" in his testimony during congressional hearings on online privacy and social networking. *Rotenberg Testimony*, *supra* note 115, at 3.

of Facebook provide insight to social networks' views on privacy. The view held by social networks is that privacy law and policy should focus on the current expectations of privacy, such as the perception that financial information and social security numbers are private and should not be shared within social networks. Indeed, from the social network standpoint, sufficient laws exist to protect this sensitive information.[157] It is true that, for a number of years, the federal government has enacted statutes which serve to protect sensitive personal information from disclosure. As Solove has commented, however, to view privacy as solely the measure of a societal view of what has been considered and what is considered private at any given point in time, does nothing more than "provide a status report on existing privacy norms."[158] Privacy is a much broader concept which includes many of the views espoused by privacy scholars.[159]

Applying to social networks the network theory of privacy is appropriate. It requires nothing more than for courts to embrace the concept that absolute silence is not necessary to maintain privacy. Under this theory, individuals may disclose information on a social network provided that parameters on access are placed on the information shared. When an individual limits access to the information shared on a social network, the individual's right to privacy in that information would not be extinguished.[160] For example, in *Pietrylo v.*

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157. *See, e.g.*, Administrative Procedure Act (APA), 5 U.S.C. §§ 551, 554-558 (2006); Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2006); Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 (2006); Electronic Fund Transfer Act of 1968, 15 U.S.C. §§ 1693, 1693m (2006); Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2522 (2006); Video Privacy Protection Act of 1988, 18 U.S.C. §§ 2701-2712 (2006); Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (2006).

158. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1142 (2002).

159. In his article, *Conceptualizing Privacy*, Solove studies the conceptions legal scholars, philosophers, psychologists, jurists, and sociologists have of privacy. *See generally Id.* From his studies, Solove determines that each group's theories are too extreme—focusing on one or more core characteristics of privacy. *Id.* He puts forth the idea that privacy is better conceived if it is viewed as drawing from a common pool of similar characteristics. *Id.*

160. This argument is based upon the current available technology and

Hillstone Restaurant Group, membership to the group was limited.[161] The group was monitored by its owners. Under the network theory of privacy, the owners of the group and its users would maintain a privacy expectation in the posts to the designated group.[162] Indeed, in *Pietrylo*, the restaurant manager had to acquire access information from a user that had been admitted into the group.[163] Courts would not have to consider the number of users, but whether privacy settings were used to exclude those outside of the network.

Having determined, under the network theory, that a user maintains a privacy interest, even when personal information is disclosed on a network of users, "[i]t remains to consider what are the limitations of this right to [social network] privacy and what remedies may be granted for the enforcement of the right."[164] Once an individual has established privacy settings and parameters for his network, a user must opt-in to changes by the social network that would make any information that was previously restricted by the user public. The failure to obtain permission and subsequent disclosure of this information would constitute a "legal *injuria*." The elements for redress already exist in the public disclosure of private facts tort. A simple expansion of this tort to encompass disclosure of information shared on a social network contrary to the privacy settings would provide a suitable remedy to protect the privacy interests of information posted on social networks. "If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation."[165] The public disclosure of private facts torts is defined as:

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embraces the technological solutions put forth by Lauren Gelman. *See* Gelman, *supra* note 120.

161. Pietrylo v. Hillstone Rest. Grp., 2008 U.S. Dist. LEXIS 108834, at *1-2 (D.N.J. July 24, 2008).

162. *Id.*

163. *Id.* at *2-3. The facts of the case seem to suggest that the individual was coerced by management to disclose her user password.

164. Warren & Brandeis, *supra* note 3, at 214.

165. *Id.* at 213.

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public;[166]

An extension of the tort to include "or (c) discloses information that has previously been restricted from public views on social networks" would provide the necessary remedy.

"In determining the scope of this new rule, aid would be afforded by" looking to the limitations of the technology.[167] If individuals are incapable of excluding information from the public by virtue of the available technology, then the individual's reasonable expectation of privacy is diminished. This limitation at first glance may provide an incentive to social network sites to rid themselves of the various privacy settings that they currently use. However, the term "excluding information from public view" is a broad concept that encapsulates the ability to select who may enter your network.

VIII. Conclusion[168]

"Recent inventions and business methods call attention to the next steps which must be taken for the protection of the person and for securing to the individual"[169] the right to control the disclosure of personal information provided in securing access to social networking technology. "For years there has been a feeling that the law must afford some remedy for the unauthorized"[170] disclosure of personal identifiable information. "The alleged facts of a somewhat notorious case"[171]

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

167. Warren & Brandeis, *supra* note 3, at 214.

168. This section of the Article contains many direct quotes from Warren and Brandeis which simply substitute current technology where the photography was discussed.

169. Warren & Brandeis, *supra* note 3, at 195.

170. *Id.*

171. *Id.*

brought to light in 2004[172] laid the foundation for the functioning yet altogether useless state of security breach laws.[173] "Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt."[174] The growing amount of personal information that is collected and shared using social networking sites and the number of third-party advertisers with access to this information requires an evaluation of the privacy rules that apply. Indeed, the sole purpose of this Article is to consider "whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual" personal information disclosed on social networking sites; and, "if it does, what the nature and extent of such protection is."[175] Information privacy "is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[176] "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends."[177] "[A]nd even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them."[178]

Warren and Brandeis would argue for a "right to privacy"

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172. Financial records of more than 163,000 consumers held in a database owned by Choicepoint was compromised in a data breach attributed to the lack of proper security and record handling procedures. Press Release, Fed. Trade Comm'n, ChoicePoint Settles Data Security Breach Charges; to Pay $10 Million in Civil Penalties, $5 Million for Consumer Redress (Jan. 26, 2006), *available at* http://www.ftc.gov/opa/2006/01/choicepoint.shtm. S*ee also* Letter from Chris Jay Hoofnagle, Assoc. Dir., Elec. Privacy Info. Ctr,, & Daniel J. Solove, Assoc. Professor, George Washington Univ. Law Sch., to Fed. Trade Comm'n (Dec. 16, 2004), *available at* http://epic.org/privacy/choicepoint/fcraltr12.16.04.html.

173. Fred Cate, *Another Notice Isn't Answer*, USA TODAY, Feb 28, 2005, at 14A.

174. Warren & Brandeis, *supra* note 3, at 196.

175. *Id.* at 197.

176. ALLEN F. WESTIN, PRIVACY AND FREEDOM 7 (1967), *quoted in* FRED H. CATE, PRIVACY IN THE INFORMATION AGE 22 (1997).

177. Warren & Brandeis, *supra* note 3, at 198 n.2 (quoting Millar v. Taylor, 4 Burr. 2303, 2379 (1769) (Yates, J.)).

178. *Id.* at 198.

for social networks. They would make the claim that technology has created a need to revisit privacy protection. While users of social networks are willing to share information, they should nonetheless retain the right to limit information shared to their intended audience. Indeed, Warren and Brandeis would argue that courts should view the disclosure and commercialization of personal information contrary to the wishes of the users as a legal *injuria* and that privacy cannot be left in the hands of those who seek to diminish it. Warren and Brandies would demand *secretum pro amicabiliter promptum*![179]

179. Roughly translated to mean "Privacy for Social Networks Now."