From Street Photography To Face Recognition: Distinguishing Between The Right To Be Seen And The Right To Be Recognized

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Abstract

“‘Critical eyes are sizing you up right now. Keep your face fresh, firm, fit,’ threatened the manufacturers of Williams’ Shaving Cream.” Such holds true in the streets of today’s society, as technology advances with incredible speed

KEYWORDS: face, street, photography
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I. INTRODUCTION

“‘Critical eyes are sizing you up right now. Keep your face fresh, firm, fit,’ threatened the manufacturers of Williams’ Shaving Cream.”¹ Such holds true in the streets of today’s society, as technology advances with incredible speed.² A recent article emphasizes the danger of a new Russian mobile application, FindFace, which allows a stranger to snap a photo of another and, within seconds, learn of that person’s intimate information.³ A

* Claudia Cuador earned her bachelor’s degree in Philosophy and Art History from the University of North Carolina at Chapel Hill in 2013 and will receive her Juris Doctor from Nova Southeastern University, Shepard Broad College of Law in 2018. Claudia would like to thank her parents, Rene Cuador and Luz Torrens, for their love, sacrifice, and direction. Claudia would also like to thank her sister, Amanda Cuador, for always inspiring her to write. Additionally, Claudia would like to thank her husband, Carlos Gonzalez, for being reason for this Comment and for his expertise in guiding her research. Lastly, Claudia would like to thank her fellow associates for their dedication to this Comment.

¹ S AMANTHA BARBAS, LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA 91 (2015).
³ Id. (The Russian identification application, FindFace, was created by Alexander Kabakov, 29, and Artem Kukharenko, 26, in February of 2016); Shaun Walker, Face Recognition App Taking Russia by Storm May Bring End to Public Anonymity,
series of photographs by Russian photographer, Yegor Tsvetkov, titled “‘Your Face is Big Data’ . . . shows how powerful facial recognition software has become; . . . a complete stranger can find you [with] the click of a button.”\footnote{Elena Cresci, Russian Photographer Identifies Strangers with Facial Recognition App, GUARDIAN (Apr. 14, 2016, 10:27 AM), https://www.theguardian.com/world/2016/apr/14/russian-photographer-yegor-tsvetkov-identifies-strangers-facial-recognition-app (“One girl in the project texted [Yegor Tsvetkov] after the publication and said that it was a bad feeling when she saw herself . . . but she fully understood [his] idea.”).} Even more alarming than the danger posed by the application is the creators’ inability to control its use.\footnote{See Alex Heath, This Russian Technology Can Identify You with Just a Picture of Your Face, BUS. INSIDER (June 21, 2016, 5:33 PM), http://www.businessinsider.com/findface-facial-recognition-can-identify-you-with-just-a-picture-of-your-face-2016-6 (”‘We see that the advantages for society from our technology are more helpful [than harmful],’ said Kabakov. ‘We can[not] stop this process, but we should make it public.’”) (alteration in original).}

Jurisprudence revolving around the topic of invasion of privacy in public spaces generally recognizes that, under most circumstances, one who reveals himself in public does not hold a reasonable expectation of privacy.\footnote{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, 1003–04 (1995). “Intrusion is limited in some jurisdictions by the requirement of a physical trespass, and in virtually all jurisdictions by the rule that no intrusion can occur in a public place.” Id. (footnote omitted).} This reasoning is applied to general surveillance systems, such as videotaping; and artistic mediums, such as street photography.\footnote{See Marc Jonathan Blitz, Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World That Tracks Image and Identity, 82 TEX. L. REV. 1349, 1377, 1384 (2004); Nancy Danforth Zeronda, Note, Street Shootings: Covert Photography and Public Privacy, 63 VAND. L. REV. 1131, 1133, 1135 (2010).} “But facial recognition [is] more fraught because, like DNA sequencing, it measures and
records biological patterns unique to individuals.” When asked about invasion of privacy and loss of anonymity concerns the application’s creator, Alexander Kabakov, responded: “A person should understand that, in the modern world, he is under the spotlight of technology. You just have to live with that."

The courts have addressed street photography—the capturing of another’s image in public spaces—as a generally permitted intrusion. Part of the reasoning behind the legality of street photography is that the photographer is merely sharing information—an image—that was already in plain sight. Such interpretation lacks the presence of more recent technology and needs revision. Face recognition not only shares an already visible image but also uses that image to share what is not in plain sight—personal information. Mobile applications that use facial recognition technology, such as FindFace, potentially offer strangers an advanced platform to begin persecution:

Kabakov says the application could revolutionize dating: “If you see someone you like, you can photograph them, find their identity, and then send them a friend request.” The interaction does not always have to involve the rather creepy opening gambit of clandestine street photography, he added: “It also looks for similar people. So you could just upload a photo of a movie star you like, or your ex-girlfriend, and then find the ten girls who look similar to her and send them messages.”

“In the future, the designers imagine a world where people walking past you on the street could find your social network profile by sneaking a photograph of you, and shops, advertisers, and the police could pick your face out of crowds and track you down via social networks.” Today, this

10. Zeronda, supra note 7, at 1131 n.1, 1140.
11. Daily Times Democrat v. Graham, 162 So. 2d 474, 477–78 (Ala. 1964);
Daniel J. Solove, A Taxonomy of Privacy, 154 U. PA. L. REV. 477, 538 (2006) (“This reasoning was based on the secrecy paradigm—that once something is disclosed to the public, it is no longer secret.”).
13. See Walker, supra note 3.
14. Id.
15. Id.
invasive technology is available to everyone, not just law enforcement agencies, and thus requires regulation. Facial recognition technology must be regulated for one fundamental distinction, the right to be seen versus the right to be recognized. While one cannot reasonably expect to not be seen in public, it is likely that a majority of people do in fact have a reasonable expectation of not being recognized. As such, the United States must amend its current laws to reflect the growing danger of extreme invasion and severe crime.

Part II begins by providing a brief legal history of street photography, addressing the issue of invasion of privacy. Part III continues with a discussion of the complex relationship between privacy rights and freedom of speech, focusing on the paradox of invasion of privacy in public spaces. Part IV describes face recognition—highlighting the scarce attention it receives in the United States and the risks resulting from the inaccuracy of face recognition technology. Part V, using street photography case law as a starting point, proposes a line of reasoning that will help guide litigation dealing with the misuse of facial recognition technology in an effort to protect citizens from invasion of privacy. Finally, Part VI concludes by urging legal reform in order to arrive at a more encompassing scheme of privacy laws.

16. Sarafa et al., supra note 12 (“Despite the proliferation of the use of biometrics, there are very few state statutes—and no federal statutes—that create civil remedies based on the capture and disclosure of biometric data by private businesses.”).
18. See Solove, supra note 11, at 496.
19. See Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1007 (N.H. 2003). Public concern about stalking has compelled all fifty States to pass some form of legislation criminalizing stalking. Approximately one million women and 371,000 men are stalked annually in the United States. Stalking is a crime that causes serious psychological harm to the victims, and often results in the victim experiencing post-traumatic stress disorder, anxiety, sleeplessness, and sometimes, suicidal ideations. Not only is stalking itself a crime, but it can lead to more violent crimes, including assault, rape, or homicide.
20. See infra Part II.
21. See infra Part III.
22. See infra Part IV.
23. See infra Part V.
24. See infra Part VI.
II. STREET PHOTOGRAPHY AND UNWANTED NOTORIETY

In 1890, *The Right to Privacy*, a law review article by Supreme Court Justice Louis Brandeis and Professor Samuel Warren, revolutionized privacy law. In the article, the law is recognized to be an ever-evolving product of society’s “[p]olitical, social, and economic changes [which] entail the recognition of new rights.” They remind us that “common law [too], in its eternal youth, grows to meet the demands of society.” The piece was inspired, in part, by new privacy concerns sparked by developments in photographic technology:

“Prior to 1884, cameras were large, expensive, . . . minimally portable, and they required subjects to sit still for extended periods of time to have their photograph taken.” “In 1884, the Eastman Kodak Company introduced the *snap camera*, an inexpensive, handheld camera that could take instantaneous photographs of people in public.” “With the [arrival] of this technology and the growing popularity of print media, Warren and Brandeis . . . [anticipated that covertly] taken photographs would threaten the ‘right to be let alone’ . . . .”

Just as developments in photographic technology stimulated groundbreaking scholarly discussion regarding the laws of privacy, facial recognition technology is doing the same in the twentieth century. In the early 1880s, as cameras and processing techniques became “portable and practical enough to leave the confines of the studio, . . . photographers began documenting the world around them” and unlocking new levels of privacy concerns. In particular, they photographed “urban areas where life moved quickly and the urge to record and document change and progress was instinctive.” In order to fully comprehend the connection

27. Id.
28. Zeronda, supra note 7, at 1135; see also Warren & Brandeis, supra note 25, at 193.
29. See Warren & Brandeis, supra note 25, at 196.
31. Id.; see also Zeronda, supra note 7, at 1135–37.
32. Airton, supra note 30; see also Charles Hagen, *What Walker Evans Saw on His Subway Rides*, N.Y. Times (Dec. 31, 1991),
between street photography and the law, and for purposes of clarity throughout this piece, it is important to offer a clear definition.\textsuperscript{33} According to the London Street Photography Festival, “[s]treet photography captures people and places within the public domain.”\textsuperscript{34} More specifically, it is an “un-posed, un-staged photography [that] captures, explores, or questions contemporary society and the relationships between individuals and their surroundings.”\textsuperscript{35} The essential element in this method of photographing is that the scene being captured is unplanned, and, consequentially, un-consented.\textsuperscript{36} Thus, with the advent of street photography, the twentieth century saw the creation of the “law[s] of public image, and the phenomenon of personal image litigation,” a set of cases that address the issue of being photographed, and, more importantly, the use of those photographs without one’s consent.\textsuperscript{37}

Walker Evans’ renowned \textit{Subway Passengers} photography series remains one of the earliest examples of street photography during the Great Depression era.\textsuperscript{38} Using a hidden camera, Evans snapped photos of unsuspecting passengers traveling around New York City: “‘He had the camera around his neck, resting on his chest, and a long cable going down his sleeve to his hand,’ said Helen Levitt, [ninety-one], . . . who accompanied Evans as he took many of the subway portraits. ‘So he just pointed his chest at whomever he wanted to shoot . . . .’”\textsuperscript{39} The series of photos contains people of both genders, all races, and all ages.\textsuperscript{40} Particularly, in one of the portraits, an approximately seven-year-old girl is photographed.\textsuperscript{41} None of the subjects were asked for permission before having their photo taken, http://www.nytimes.com/1991/12/31/arts/review-photography-what-walker-evans-saw-on-his-subway-rides.html.

\textsuperscript{33} See Airton, supra note 30; Zeronda, supra note 7, at 1131 n.1, 1133.
\textsuperscript{34} Airton, supra note 30.
\textsuperscript{35} \textit{Id.}.
\textsuperscript{36} See id.; Philip Gefter, \textit{Street Photography: A Right or Invasion?}, N.Y. TIMES (Mar. 17, 2006), http://www.nytimes.com/2006/03/17/arts/street-photography-a-right-or-invasion.html?_r=0; Zeronda, \textit{supra} note 7, at 1132, 1140.
\textsuperscript{37} BARBAS, \textit{supra} note 1, at 1–2, 4, 190–91 (“The laws of image protect the right to control one’s public image, to defend one’s image, and to feel good about one’s image and public presentation of self.”).
\textsuperscript{39} Chan, \textit{supra} note 38.
\textsuperscript{40} Hagen, \textit{supra} note 32; see also \textit{The Streets of New York: American Photographs from the Collection, 1938-1958}, NAT’L GALLERY ART, http://www.nga.gov/content/ngaweb/features/slideshows/the-streets-of-new-york-american-photographs-from-the-collectio.html (last visited Apr. 9, 2017).
\textsuperscript{41} See Hagen, \textit{supra} note 32; \textit{The Streets of New York: American Photographs from the Collection, 1938-1958}, \textit{supra} note 40.
Walker Evans influenced many other artists to record and document America in similar ways. Andrew Bush’s *Vector Portraits* series, from 1989 through 1996, mimics the notion behind *Subway Passengers*. For about seven years, Bush would photograph people driving on the highway. In an interview regarding his photographs, he described the series as “pictures of people as they were driving on freeways, . . . the notion of making a very still image of a person moving at a great velocity, . . . [the] notion of movement with a direction.” Bush created a moving tripod out of his car, “[w]here [he] attached a camera to . . . the passenger side and fixed a light so [he] could drive and look through [his] window and get an idea of what the framing . . . was.” According to Bush, several of his subjects, upon noticing that their picture had been taken, chased him, “wanting to know whether or not [he] was a detective involved with their divorce.” In this series, like with most street photography, the subjects were left unidentified.

Finally, Philip-Lorca DiCorcia, recognized as one of the most influential and innovative photographers working today, “set up his camera on a tripod in Times Square, attached strobe lights to scaffolding across the street,” and took photographs of people passing by. DiCorcia’s work is marked by its focus on ordinary people in everyday life, particularly in New York City. His photographs often capture candid moments, with subjects unaware of being photographed. DiCorcia’s work has been exhibiting in museums around the world, including the Museum of Modern Art, The Whitney Museum of Art, and the Museo Nacional Centro de Arte Reina Sofía.

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44. See Chan, *supra* note 38; Hagen, *supra* note 32.
46. Hagen, *supra* note 45.
48. *Id.* at 1:37–1:53.
49. *Id.* at 2:44–2:52.
50. See Airton, *supra* note 30; Chan, *supra* note 38; Hagen, *supra* note 45 (Although the photographs do not identify the subjects by their personal names or addresses, Bush recorded “where and when each photograph was taken, but also how fast the car was going, what the weather was like and so on.”).

Defendant DiCorcia is a professional photographer for over [twenty-five] years. His body of work has drawn international artistic acclaim and has been exhibited in fine art museums around the world, including but not limited to, the Museum of Modern Art . . . , The Whitney Museum of Art . . . , the Museo Nacional Centro de Arte Reina Sofia . . . , and Art Space Gizo . . . .
street, and in the time-honored tradition of street photography, took a random series of pictures of strangers passing under his lights.”\footnote{52}{Gefter, \textit{supra} note 36.} “The project continued for two years, [concluding] in an exhibition of a [series of seventeen] photographs called \textit{Heads} at the Pace/MacGill Gallery in New York City.”\footnote{53}{\textit{Id.; see also} Nussenzweig, 2006 WL 304832, at *3 (None of the seventeen subjects included in \textit{Heads} consented to having their photographs taken or exhibited.) “Pace [Gallery] is a photographic and picture gallery that exhibits and sells photographic art . . . . It considers itself one of the nation’s leading art galleries specializing in art photography.” Nussenzweig, 2006 WL 304832, at *3.} DiCorcia was taken to court years later, after one of the subjects included in the series filed a lawsuit claiming that his right to privacy had been violated.\footnote{54}{\textit{Id.} at *1.} Surely, it must have been striking to see his image printed in the catalogue, seeing as it was more than just a regular photograph: “They are . . . more intimate, the paradox of standing farther away being enhanced intimacy.”\footnote{55}{Michael Kimmelman, \textit{Art in Review; Philip-Lorca diCorcia — ‘Heads’}, N.Y. TIMES (Sept. 14, 2001), \url{http://www.nytimes.com/2001/09/14/arts/art-in-review-philip-lorca-dicorcia-heads.html}; \textit{see Nussenzweig}, 2006 WL 304832, at *3.} Indeed, Mr. Erno Nussenzweig, after seeing his photograph in a copy of the exhibition catalogue, was horrified to discover that his image had been commodified, exhibited, and sold without his knowledge.\footnote{56}{\textit{Nussenzweig v. DiCorcia}, \footnote{57}{No. 108446/05, 2006 WL 304832 (N.Y. Sup. Ct. Feb. 8, 2006).} The plaintiff filed a complaint arguing that not only was DiCorcia’s process of making art, and the subsequent exhibition and sale of it, a violation of his personal right to privacy, but that these actions also violated his religious beliefs.\footnote{58}{\textit{Id.} at *3–4; Gefter, \textit{supra} note 36 (“The suit sought an injunction to halt sales and publication of the photograph, as well as $500,000 in compensatory damages and $1.5 million in punitive damages.”); \textit{see also} U.S. CONST. amend. IV.} The plaintiff is an Orthodox Hasidic Jew, and for him, the dissemination of his representation violated Orthodox religious views, namely the second commandment prohibition of graven images.\footnote{59}{\textit{Nussenzweig}, 2006 WL 304832, at *3–4; \textit{Barbas, \textit{supra} note 1, at 190 (“Public figures had no privacy, said some courts, having \textit{waived} it by pursuing a career in the spotlight. Celebrities assumed the risk of having their privacy invaded when they embarked on a path towards public recognition and fame.”); Gefter, \textit{supra} note 36 (It is important to note, for purposes of the law, that Nussenzweig was not famous, or in any way a public figure.).} Nussenzweig considered DiCorcia’s photograph to be a type of graven image, and such a thing could have profound spiritual consequences—all the more so because it was

\textit{Thou shalt not make unto thee any graven image, or [a] likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, or serve them . . . .”)\footnote{59}{\textit{Nussenzweig}, 2006 WL 304832, at *4; \textit{Exodus} 20:4–5 (King James) (“Thou shalt not make unto thee any graven image, or [a] likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, or serve them . . . .”)}}
reproduced countless times. According to the Supreme Court of New York’s ruling, laws were in place to address Nussenzweig’s claim that DiCorcia had violated his right to privacy. As “[r]ight of privacy laws are intended to defend the average person from unwanted public exposure and the potential emotional damage thereby inflected,” it appears that the court would have ruled in favor of the plaintiff, for he certainly suffered from unwanted exposure that resulted in emotional harm and psychological distress. But the court did not. Instead, on February 8, 2006, the court entered summary judgment dismissing Nussenzweig’s complaint and articulated the tension that exists between experiencing a violation of one’s right to privacy in the legal sense, and experiencing such a violation in the personal sense. Moreover, it rejected the claim on First Amendment grounds that the possibility of such a photograph is simply “the price every person must be prepared to pay for . . . [in] a society in which information and opinion flow freely.” The court expressed its sympathy for the plaintiff, but dismissed his case nonetheless:

Clearly, [the] plaintiff finds the use of the photograph bearing his likeness deeply and spiritually offensive. The sincerity of his beliefs is not questioned by defendants or this court. While sensitive to plaintiff’s distress, it is not redressable in the courts of civil law. In this regard, the courts have uniformly upheld Constitutional [First] Amendment protections, even in the face of a deeply offensive use of someone’s likeness.

III. PRIVACY AND LOCATION

“[C]ourts often view privacy as a binary status—information is either completely private or completely public,” with much middle ground to

60. Nussenzweig, 2006 WL 304832, at *3–4 (“A catalogue was published to coincide with the exhibition and the catalogue contained . . . the photograph of plaintiff. According to defendant, a substantial number of catalogues were distributed to the public during the period of September through October 2001.”).
61. Id. at *5; see also U.S. CONST. amend. IV.
62. Id.
63. See id. at *4–5; Daily Times Democrat v. Graham, 162 So. 2d 474, 476 (Ala. 1964) (discussing “[e]vidence offered by [subject of an unconsented photograph] during the trial tended to show that the [plaintiff], as a result of the publication of the picture, became embarrassed, self-conscious, upset, and was known to cry on occasions.”).
65. Id.; see also U.S. CONST. amend. IV.
66. Id.; see also U.S. CONST. amend. I.
67. Id.
be desired. 68 Ironically, in *Katz v. United States*, 69 the Supreme Court of the United States discussed that “the Fourth Amendment protects people, not places.” 70 Later in the discussion, however, it reiterated the common view that “[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.” 71 An article published by Professor of Law Daniel J. Solove attempts to reconcile these complex notions of privacy, acknowledging its elusive role in the legal sphere, stating that “[p]rivacy is far too vague a concept to guide adjudication and lawmakers, as abstract incantations of the importance of *privacy* do not fare well when pitted against more concretely stated countervailing interests.” 72 In *Nussenzweig*, the laws of invasion of privacy proved to be deficient in protecting citizens from inquisitive lenses in public spaces. 73

Prima facie, the invasion caused by street photography seems instinctually threatening to our notions of privacy. 74 Individuals are photographed and then exhibited in famous museums, national media, and circulated in catalogues all around the world without their consent. 75 Their images bring fortune to the photographer, for these photographs are often sold for thousands of dollars to the interested consumer, and today, they are further published on the Internet for all to see—posing new privacy concerns altogether. 76 The ruling in *Nussenzweig* begs the public to assuage their

68. Solove, supra note 11, at 540; see also *Katz v. United States*, 389 U.S. 347, 351 (1967); McClurg, supra note 6, at 1003–04, 1025.
70. *Id.* at 351; see also U.S. CONST. amend. IV.
71. *Katz*, 389 U.S. at 351; see also U.S. CONST. amend. IV.
72. Solove, supra note 11, at 478; see also Daily Times Democrat v. Graham, 162 So. 2d 474, 476 (Ala. 1964); Zeronda, supra note 7, at 1156 (This notion of freedom of expression as being upheld over a person’s right to privacy is seen uniformly throughout case law).
73. See Nussenzweig, supra note 8.
74. See McClurg, supra note 6, at 1041; Hagen, supra note 45 (“One driver was so incensed that he chased Mr. Bush for miles, and when he caught up with him at a stoplight, grabbed the keys of his car and demanded that he hand over the film.”).
75. See Nussenzweig, supra note 3; Gefter, supra note 36.
76. Nussenzweig, supra note 3, at 478; BARBAS, supra note 1, at 210 (“The permanence of online information—the inability of online material to ever be fully deleted—is said to pose a profound threat to an
intuitions and accept an undoubtedly undesirable outcome, as the court emphasizes that this case is just one of many “examples illustrat[ing] the extent to which the constitutional exceptions to privacy will be upheld—notwithstanding that the speech or art may have unintended, devastating consequences on the subject, or may even be repugnant.” 77 Currently, the law addresses surveillance but generally does so by focusing on where surveillance takes place, rather than on the problematic effects it has on its subjects. 78 Solove discusses the privacy dilemma when the debate involves location—i.e., private versus public areas—because, “for the tort of public disclosure, ‘there is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.’” 79

Such seems to be the case in the aforementioned instances of street photography: All subjects were captured in an already public area, and, thus, because there was no extra personal information added to the series of photos, the artists released no new information:

On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description of a public sight which anyone present would be free to see. 80

However, the issue is not so black and white and fails to account for the broader truth. 81 Once a photograph is made public, it is made a permanent record, and, thus, duplicates the impact that it has on the victim. 82 To hold that nothing new is disclosed when a photograph is disseminated is a

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78. See Solove, supra note 11, at 549 (“The harm, then, is an impingement on the victim’s freedom in the authorship of [his or] her self-narrative, not merely her loss of profits.”).
79. Id. at 540 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. LAW INST. 1977)).
81. See McClurg, supra note 6, at 1042.
82. Id.
misstatement. Each series of photographs discussed above created a compilation of information. Although each subject was captured in a public place, by making his or her image part of a collage intended for publication, each subject suffered from exposure to increased accessibility. Solove recommends considering the extent to which the information is made more accessible:

In United States Department of Justice v. Reporters Committee for Freedom of the Press, the Supreme Court recognized the problem of increased accessibility. . . . In addition to concluding that there was a difference between scattered pieces of information and a fully assembled dossier, the Court recognized that “there is a vast difference between the public records that might be found after a diligent search of courthouse files . . . and a computerized summary located in a single clearinghouse of information.”

The notion that “visual observation is not a search because the eyes cannot be guilty of trespass,” is devastating to our anonymity. Fortunately, in some narrow instances, courts have reconciled the holding of a reasonable expectation of privacy while being physically present in a public space:

[In Nader v. General Motors Corp., Ralph Nader [claimed] that General Motors’ automobiles were unsafe. General Motors [then] undertook a massive investigation seeking information discrediting Nader. Among other things, General Motors wiretapped his telephone [conversations] and placed him under extensive surveillance while in public. The court recognized that certain kinds of public surveillance might amount to an invasion of privacy; although observation “in a public place does not amount to an invasion of . . . privacy,” in certain instances, “surveillance may [also] be so overzealous as to render it actionable.” The court noted: “A person does not automatically make public everything he does merely by being in a public place, and the mere fact that

Nader was in a bank did not give anyone the right to try to discover the amount of money he was withdrawing.\(^8^8\)

Therefore, it is clear that although the law focuses on whether surveillance occurs in a public or private place, surveillance may be harmful in all settings, not just private.\(^8^9\) In Bush’s *Vector Portraits*, it is not so obvious that the photographs captured people in an evidently public space.\(^9^0\) In fact, all of the subjects were within the confines of their automobiles, and “[n]ot surprisingly, some people [felt] threatened by this invasion of the semipublic-semiprivate space of their cars.”\(^9^1\) In 1985, *United States v. Karo*,\(^9^2\) the Supreme Court of the United States compared invasion of privacy as it applied to private and public places: the home versus an automobile.\(^9^3\) While the Court held that a tracking device placed inside a person’s home violated the Fourth Amendment, it looked to another case by the Supreme Court of the United States in which the police placed an electronic tracking device was placed in the plaintiff’s car to track the location of the vehicle.\(^9^4\) The Court concluded that the Fourth Amendment did not apply to the automobile because “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy,” since it, “could have been observed by the naked eye.”\(^9^5\) Despite this holding and the fact that each of the *Vector Portraits* were taken in the streets of Los Angeles, California, the notion of a person’s car as semipublic-semiprivate property should hold true.\(^9^6\) Like a house—the ultimate symbol of private property—an automobile should also be considered private property in which one holds a reasonable expectation of privacy.\(^9^7\) It is easy

\(^8^8\) Solove, supra note 11, at 498; see also Nader v. General Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970).
\(^9^0\) See Hagen, supra note 45.
\(^9^1\) *Id.* (emphasis added).
\(^9^3\) *See id.* at 709–12.
\(^9^4\) *Id.* at 713 (citing to United States v. Knotts, 460 U.S. 276 (1983)); see also U.S. CONST. amend. IV.
\(^9^5\) Knotts, 460 U.S. at 281; Karo, 468 U.S. at 714; see also U.S. CONST. amend. IV.
\(^9^7\) See Carney, 471 U.S. at 390–94; Karo, 468 U.S. at 714, 734 (“[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.”); Solove, supra note 11, at 496 (“[T]he Fourth Amendment draws a firm line at the entrance of the house.”) (quoting Kyllo v. United States, 533 U.S. 27, 40 (2001)).
to imagine instances of people engaging in activities inside of their cars that they would otherwise not do in public spaces, such as apply make-up, talk loudly on the phone, play loud music, or pick their nose. This phenomenon is due to the perception of being within a protected private area. Certainly, this is not the case in public streets. People walking in Times Square for instance, surrounded by others and unprotected by their car windows and doors, will likely not take part in these behaviors. This is evident in the two series themselves. Bush’s automobile portraits seem instantly more humorous, since they depict people engaging in acts not normally seen in public. DiCorcia’s, on the other hand, is more solemn for people are aware of their surroundings and knowingly restrain their emotions and actions. Furthermore, simply because the cars featured were in public places—i.e., a freeway—it should not be the case that the artist is authorized to take the photo. One cannot say that just because a person’s house is not located within a gated community others are free to take photos of the person through his or her window. Here, it is important to reference Solove’s distinction between exposure and disclosure:

Exposure is related to disclosure in that concealed information is revealed to others, but the information is not revealing of anything we typically use to judge people’s character. Unlike disclosure, exposure rarely reveals any significant new information that can be used in the assessment of a person’s character or personality. Exposure creates injury because we have developed social

98. Solove, supra note 11, at 493–95.
99. See Karo, 468 U.S. at 735; The Streets of New York: American Photographs from the Collection, 1938-1958, supra note 42 (“Aware that people would inevitably compose themselves and alter their expressions if they knew they were being photographed, [Walker Evans] did not raise the camera to his eye to look through [his] viewfinder, nor did he adjust its focus or exposure, or use a flash.”).
100. See Solove, supra note 11, at 493, 495–96, 498 (explaining that being aware of the general possibility of being watched, without certainty, can cause similar phenomenon. “[B]ased on Jeremy Bentham’s 1791 architectural design for a prison called . . . Panopticon,” the Panoptic effect describes this very scenario).
101. See id. at 493–95.
102. See Hagen, supra note 45; Kimmelman, supra note 55.
103. Hagen, supra note 45 (“A pouty blonde in a purple sweater . . . [a] beefy tattooed man in ridiculous sunglasses drives a canary-yellow car with delicate racing stripes.”).
104. See Kimmelman, supra note 55.
105. See Hagen, supra note 45; McClurg, supra note 6, at 991, 995, 1043.
practices to conceal aspects of life that we find animal-like or disgusting.\textsuperscript{107}

This distinction is relevant to our photographers: In Heads, DiCorcia discloses information about people—namely their faces as they walk down the street—and in Vector Portraits, Bush oftentimes exposes the individuals by showing them in vulnerable situations.\textsuperscript{108} One may argue that yawning, kissing, or singing in one’s car is hardly animal-like or disgusting behavior and is surely different from nudity or sexual acts.\textsuperscript{109} Nonetheless, these examples constitute a set of behaviors that we are often taught to avoid in public spaces.\textsuperscript{110} It is likely that the man would have covered his mouth had he known he was being watched, that the couple would not have kissed so intimately, and that the girl would not have sang aloud.\textsuperscript{111} The court supported this notion in Daily Times Democrat v. Graham,\textsuperscript{112} in which air jets blew up a woman’s dress while she was in a country fair, exposing her underwear.\textsuperscript{113} At that very moment, a photographer for the local newspaper took her photograph, and the picture was printed on the front page of the paper.\textsuperscript{114} The newspaper contended that the picture was taken in public, and that, accordingly, there was no privacy interest.\textsuperscript{115} “However, the court concluded that the woman still had a right to be protected from ‘an indecent and vulgar’ violation of privacy . . . .”\textsuperscript{116}

“Understood broadly, these actions are all forms of intrusion. Intrusion involves invasions or incursions into one’s life. It disturbs the victim’s daily . . . [life and] solitude . . . .”\textsuperscript{117} As we have noted, courts throughout the United States have not held uniformly in regards to privacy laws.\textsuperscript{118} In some cases, they have ruled solely based on the location of said invasion:

\begin{quote}
[\textit{G}iven . . . the increasing presence of cameras in public, people were said to assume the risk of unwanted publicity whenever they went outside their homes. While a person might have a cause of
\end{quote}

\begin{itemize}
\item[107.] Solove, \textit{supra} note 11, at 536 (emphasis added).
\item[108.] \textit{See} Hagen, \textit{supra} note 45; Kimmelman, \textit{supra} note 55.
\item[109.] Solove, \textit{supra} note 11, at 536–37.
\item[110.] \textit{See id.;} VernissageTV, \textit{supra} note 47, at 2:20–2:53.
\item[111.] \textit{See} Solove, \textit{supra} note 11, at 495.
\item[112.] 162 So. 2d 474 (Ala. 1964).
\item[113.] \textit{Id.} at 476.
\item[114.] \textit{Id.}
\item[115.] \textit{Id.} at 477–78.
\item[116.] Solove, \textit{supra} note 11, at 538 (quoting \textit{Daily Times Democrat}, 162 So. 2d at 478).
\item[117.] \textit{Id.} at 553; \textit{see also} \textit{Daily Times Democrat}, 162 So. 2d at 476.
\item[118.] \textit{See} Solove, \textit{supra} note 11, at 498.
\end{itemize}
action for intrusion upon seclusion if a paparazzo broke down his
door to get a picture, an individual in a public place was fair game.
The dominant rule was that ‘photographers on public property may
take pictures of anyone they want to, objection or not.’ 119

In other cases, the court ruled based on the harms that the said
invasion caused to the victim. 120 Location should not, under any
circumstances, be the sole factor in making a decision in cases dealing with
privacy laws. 121 As the court in Daily Times Democrat stated, “a purely
mechanical application of legal principles should not be permitted to create
an illogical conclusion.” 122 There are more significant factors involved—in
particular, the injury resulting from the invasion and the revelation of new
private information. 123 Especially today, as privacy seems to lose popularity
with the development of more complex technological systems, anonymity
must be safeguarded and privacy laws reviewed with modern glasses. 124

IV. FACIAL RECOGNITION TECHNOLOGY

“Instantaneous photographs and newspaper enterprise[s] have
invaded the sacred precincts of private and domestic life; and numerous
mechanical devices threaten to make good the prediction that ‘what is
whispered in the closet shall be proclaimed from the house-tops.’” 125
Although Professor Warren and Justice Brandeis were referring to the
advances in photographic technology, the same statement applies today,
perhaps more appropriately than it did a century ago: “In the past hundred
years, in increasing numbers, Americans have turned to the law to help them
defend and control their public images.” 126 Street photography announced its
sequel, one that is more covert, more sophisticated, and vastly more
intrusive: face recognition. 127 “Face recognition is a subset of biometrics, a

119. BARBAS, supra note 1, at 191.
120. See Daily Times Democrat, 162 So. 2d at 476, 478.
121. See id. at 478.
122. Id.
123. See Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832, at *8
124. See Walker, supra note 3.
126. BARBAS, supra note 1, at 1; see also Warren & Brandeis, supra note 25, at
195.
127. See Blitz, supra note 7, at 1383; Natasha Singer, Consumer Groups Back
Out of Federal Talks on Face Recognition, N.Y. TIMES: BITS (June 16, 2015, 12:10 AM),
http://bits.blogs.nytimes.com/2015/06/16/consumer-groups-back-out-of-federal-talks-on-face-
recognition/?_r=0.
technology that involves recording and analyzing people’s unique physiological characteristics, like their fingerprint ridges or facial features, to learn or confirm their identities.”

Today, people seek to defend and control not only their public images, but also the way in which their personal information is acquired and used. Although “[f]acial recognition technology was first developed in the 1960s, . . . [it] only recently became accurate enough for widespread use.” Facial recognition has indeed become widespread—becoming one of the most powerful tracking tools in modern technology:

Face recognition technology works by scanning a photo or video still of an unknown face and comparing its unique topography against a facial-scan database of people whose names are already known. Because the technology can be used covertly, civil liberties advocates say its popularization has the potential to undermine people’s ability to conduct their personal business anonymously in . . . public spaces.

The technology “became famous when it was [used as an experiment during] the 2001 Super Bowl in Tampa.” Facial recognition technology has the power to “link a person’s online persona with his or her actual offline self at a specific public location,” thus becoming a threat to our ability to

Whatever one thinks of these impressive technological advances in . . . surveillance, they are not accurately described as a mere automated equivalent of human vision that captures nothing more than “what any passerby would easily have been able to observe.” Rather, they change public space into something it would not otherwise be, something which in a sense preserves and processes records of people’s movements and activities in a way that primitive cameras . . . have not done before.

Blitz, supra note 7, at 1383 (quoting United States v. Jackson, 213 F.3d 1269, 1281 (10th Cir. 2000)).

128. Singer, supra note 127.

129. See BARBAS, supra note 1, at 209–10; Singer, supra note 8. “Facebook in 2011 introduced Sponsored Stories, a system that enabled advertisers to use Facebook users’ likes as product endorsements. If you liked Coca-Cola on Facebook, for example, Coke could then use your name and image in an advertisement. . . . The company settled with the users for [twenty] million.” BARBAS, supra note 1, at 209–10. This is similar to the issue of facial recognition and mobile apps—i.e., what differentiates these circumstances, where a person voluntarily reveals their likes, to that person’s image being published and shared with a larger audience? See id.


131. Singer, supra note 127; see also Fung, supra note 76.

132. McCoy, supra note 87, at 476.
remain anonymous in public.  Although the need for a stronger right to privacy in the digital world has been the subject of a good deal of campaigning and discussion, there is still much work left to be done.

A.  Comparing the Law

At common law, “a set of tort rights . . . protect[s] against four types of invasion of privacy: . . . (1) intrusion upon one’s seclusion; (2) public disclosure of private facts; (3) publicity that places one in a false light before the public; and (4) appropriation of one’s name or likeness without permission.” As technology advances, however, our current world becomes less common, and the common law of invasion of privacy becomes less useful in protecting our images. As Paul M. Schwartz, Professor of Law, notes, “[v]arious limitations that the common law places on each of these four branches eliminate their usefulness in responding to violations of

133. Singer, supra note 8 (“[F]acial recognition technology has the potential to provide important benefits and to support a new wave of technological innovation, . . . but it also poses consumer privacy challenges.”).

134. See U.S. CONST. amend. IV; BARBAS, supra note 1, at 210; Singer, supra note 127.


General Principle: (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right to privacy is invaded by: (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or (b) appropriation of the other’s name or likeness, as stated in § 652C; or (c) unreasonable publicity given to the other’s private life, as stated in § 652D; or (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

RESTATEMENT (SECOND) OF TORTS, § 652A–D. “[E]ach of the four torts involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears, and publications of others.” Id. § 652A.

136. Schwartz, supra note 135, at 777–78; see also McClurg, supra note 6, at 1008 (citing to Jackson v. Playboy Enters., Inc., 574 F. Supp. 10, 11 (S.D. Ohio 1983)).

Consider the case of the three boys who were photographed without their consent while they spoke with a policewoman on a public sidewalk. The photo subsequently appeared in Playboy magazine next to nude photos of the policewoman, and the three boys sued the magazine for invasion of privacy. Their position evokes sympathy. It seems wrong for one to secretly photograph a person without his consent and then to disseminate the photo to a wide audience, particularly in a manner and publication many would find objectionable. However, the court held that the facts fell short of satisfying the requirements of any of the four invasion of privacy torts and dismissed the plaintiffs’ complaint. The court ruled that no intrusion occurred because the photo was taken on a public sidewalk ‘in plain view of the public eye.’

McClurg, supra note 6, at 1008.
privacy in cyberspace.” To further illustrate the weakness of current laws, it is useful to contrast American jurisprudence regarding privacy against that of other countries:

American laws do not protect the right to one’s public image and persona as extensively as in other parts of the world. In some European countries, under certain conditions, newspapers or websites can be forbidden from publishing ostensibly newsworthy pictures of people, or facts in public record, without the subject’s authorization. This broad protection of public image would be unimaginable in the United States. Since the 1940s, the image torts have been substantially constrained by freedom of speech and press, and it is difficult to recover under them. Despite this, the laws of image remain alive, not only on court dockets but in legal culture—in Americans’ beliefs about the law, the legal system, and their legal rights and entitlements.

In *Karo*, the Supreme Court of the United States held that, “[i]t is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.” Facial recognition does not merely exist; rather, it is being used rather aggressively and “remains largely unregulated in the United States.” Further, the majority reasoning in *Nader* noted that “extensive public surveillance can reveal hidden details that would not ordinarily be observed by others. . . . The court did not recognize the surveillance as a harm itself—only surveillance that destroyed secrecy represented an actionable harm.” The sole function of facial recognition is destroying people’s secrecy. Advocates of privacy, amidst the growing danger of invasion, are aware of these risks and have begun to propose necessary regulations. During an event organized by the White House in which technology industry experts and consumer advocates confronted the issue of facial recognition, “[p]articipants . . . agreed to endorse notices that applications could display before they were downloaded, alerting users if

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139. United States v. Karo, 468 U.S. 705, 712 (1984); see also U.S. Const. amend. IV.
140. Jeff John Roberts, *Facebook and Google Really Want to Kill This Face-Scanning Law*, FORTUNE (June 30, 2016, 10:17 AM), http://www.fortune.com/2016/06/30/facebook-google-facial-recognition-lawsuits/.
142. *See* Singer, *supra* note 8; Singer, *supra* note 127.
143. *See* Singer, *supra* note 8; Singer, *supra* note 127.
an app[lication] collected material, like photos or contact lists, from their phones. 144 Further:

In 2012, the Obama administration [announced] a plan for a consumer privacy bill of rights. Among other things, the report called for the Commerce Department to [organize] a series of multi-stakeholder processes in which trade and advocacy groups were to create industry codes of conduct for the use of drones, data-mining by mobile apps, and other consumer-tracking technologies. 145

Few of their efforts, however, have been successful, as companies like Google and Facebook make it difficult for legal reform by pouring money into lobbying and litigation:

...In the last [sixteen] months, the two sides had been meeting periodically under the auspices of the National Telecommunications & Information Administration, a division of the Commerce Department. But the privacy advocates said they were giving up on talks because they could not achieve what they consider minimum rights for consumers—the idea that companies should seek and obtain permission before employing face recognition to identify individual people on the street. ‘At a base minimum, people should be able to walk down a public street without fear that companies [they have] never heard of are tracking their every movement—and identifying them by name—using facial recognition technology . . . . Unfortunately, we have been unable to obtain agreement even with that basic, specific premise.’ 146

The state of California, the mecca of technology development and the place “where many businesses that use [facial] recognition technology are located,” has failed to enact any pertinent regulation; “the most recent attempt to pass a biometric information law died in committee.” 147 Fortunately, several states like Texas and Illinois continue to fight for reform, enacting laws to allow citizens some degree of control over their images by requiring companies to notify people and obtain their permission before taking facial scans or sharing their biometric information. 148 Illinois’

144. Singer, supra note 8.
145. Singer, supra note 127.
146. Id.; see also Roberts, supra note 140.
147. Sarafa et al., supra note 12.
148. 740 ILL. COMP. STAT. 14/15(b) (2015); TEX. BUS. & COM. CODE ANN. § 503.001 (West 2015); see also Russell Brandom, Someone’s Trying to Gut America’s
Biometric Information Privacy Act ("BIPA") is "a simple law, requiring a person’s explicit consent before" his biometric information is taken. Its strength, however, is the fact that it allows for a private right of action. "[S]ince the law was first passed, [facial recognition technology has] become a central part of products like Google Photos, Snapchat filters, and Facebook’s photo-tagging system." Under Illinois law, "[a]ll three companies are currently facing lawsuits for allegedly violating [BIPA], producing biometric face prints without notifying Illinois citizens." Consequently, the law has proven to be a nuisance for technology giants like Google and Facebook. According to a recent article, under BIPA, "companies that collect biometric identifiers without consent can be forced to pay $1,000 or $5,000 for each violation," or, if the class action lawsuits were to succeed, "they could force the companies to pay millions of dollars in damages and, in what would likely be a greater nuisance, force them to change their policies around how they use faces."
In Germany, where online privacy enjoys much more protection than in other countries, facial recognition technology has faced many legal challenges. In 2011, German officials responded with legal action to privacy threats posed by facial recognition technology employed by Facebook. Johannes Caspar, a Hamburg data protection official, stated:

The legal situation is clear in my opinion . . . . If the data were to get into the wrong hands, then someone with a picture taken on a mobile phone could use biometrics to compare the pictures and make an identification . . . . Such a system could be used by undemocratic governments to spy on the opposition or by security services around the world. The right to anonymity is in danger . . .

According to Caspar, “[t]he software offered potential for considerable abuse and was illegal.” Although Facebook responded in opposition, saying that users can easily disable its facial recognition feature, it failed to capture the essence of German data protection law: express consent. Caspar, in a different interview, discussed an essential aspect of Facebook’s policy that made its use of the intruding technology more troublesome: The inability for a user to expressly consent to storage of their personal data. “[W]e have demanded that biometric data be stored with the subject’s express consent. At first any company has to ask whether the user wants his or her data stored or not. Facebook just gives [users] the possibly to opt-out. If you [do not] opt-out, [you are] not consenting.”

This policy of express consent by users remains at the core of German data protection laws and should be mirrored in the United States. People want

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156. Id.
157. Id.
159. Farivar, supra note 158.
160. See id.
161. Id.
162. See id.; Roberts, supra note 140.
to protect information that makes them vulnerable to potential violent crimes.\textsuperscript{163}

In \textit{Remsburg v. Docusearch, Inc.},\textsuperscript{164} the defendant was seemingly obsessed with Amy Lynn Boyer.\textsuperscript{165} He purchased Boyer’s social security number and employment address, among other information, from a database company called Docusearch.\textsuperscript{166} The man went to Boyer’s workplace, waited for her to leave, and murdered her.\textsuperscript{167} The court concluded that, “threats posed by stalking and identity theft lead us to conclude that the risk of criminal misconduct is sufficiently foreseeable so that an investigator has a duty to exercise reasonable care in disclosing a third person’s personal information to a client.”\textsuperscript{168} While it may be feasible to expect an individual investigator to exercise reasonable care in sharing one’s personal information, expecting multi-million dollar companies to adhere to this standard is not.\textsuperscript{169} The only foreseeable solution is requiring express consent from users before these companies can sell and distribute their intimate information.\textsuperscript{170}

B. \textit{Inaccuracy and Risks}

Although street photography is intrusive, especially if the image is later published and distributed, it does not run the risk of inaccuracy.\textsuperscript{171} Courts have held that street photography, despite its possible negative

\begin{itemize}
  \item \textsuperscript{163} See \textit{Remsburg v. Docusearch, Inc.}, 816 A.2d 1001, 1007 (N.H. 2003).
  \item \textsuperscript{164} 816 A.2d 1001 (N.H. 2003).
  \item \textsuperscript{165} See id. at 1005–06.
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} \textit{Id.} at 1006.
  \item On October 15, 1999, [the defendant] drove to Boyer’s workplace and fatally shot her as she left work. [The defendant] then shot and killed himself. A subsequent police investigation revealed that [he] kept firearms and ammunition in his bedroom, and maintained a website containing references to stalking and killing Boyer as well as other information and statements related to violence and killing. \textit{Id.}
  \item \textsuperscript{168} \textit{Remsburg}, 816 A.2d at 1008.
  \item \textsuperscript{169} See \textit{id.}; Roberts, \textit{supra} note 140.
  \item \textsuperscript{170} See F LA. STAT. § 540.08(1) (1997) ("No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use . . . .") (emphasis added); Roberts, \textit{supra} note 140.
  \item \textsuperscript{171} See \textit{Airton}, \textit{supra} note 30; McClurg, \textit{supra} note 6, at 1041–43; Mike Orcutt, \textit{Are Face Recognition Systems Accurate? Depends on Your Race}, MIT TECH. REV. (July 6, 2016), https://www.technologyreview.com/s/601786/are-face-recognition-systems-accurate-depends-on-your-race/. It is important to note that the term \textit{inaccurate}, as used in this section, only refers to those photographs that are left untouched after shooting; in other words, photographs that have not later been altered or distorted. Airton, \textit{supra} note 30; Orcutt, \textit{supra}.  
\end{itemize}
consequences, simply reflects “a public sight which any one present would
be free to see.”\textsuperscript{172} Moreover, they have noted that these photographs run
parallel with the traditional notion that they “do not reveal anything
private.”\textsuperscript{173} Although this Comment has suggested that, in some instances,
street photography does have the ability to reveal intimate details, it does not
stand for the proposition that the new details can be erroneous.\textsuperscript{174} Facial
recognition technology, on the other hand, often presents mistaken
information.\textsuperscript{175} Unlike Evans, Bush, and DiCorcia, whose photography did
not reveal the identity of its subjects, facial recognition does.\textsuperscript{176} As of June
2016, “the Government Accountability Office issued a report saying that the
FBI has not properly tested the accuracy of its face matching system, nor that
of the massive network of state-level face matching databases it can access.”\textsuperscript{177} Facial recognition not only reveals intimate, personal information
that is not visible to the naked eye, but it also does so at the risk of being
wrong, as “people who are not criminal suspects are included in the database,
and the error rate for the software is as high as [twenty] percent—meaning
the authorities could misidentify millions of people.”\textsuperscript{178} The risk of
misidentification is even more rampant among minority groups.\textsuperscript{179}
According to Anil Jain, head of the biometrics research group at Michigan
State University:

The algorithms can also be biased due to the way they are trained .
. . . If a gender, age group, or race is underrepresented in the
training data, that will be reflected in the algorithm’s performance
. . . . [After] examin[ing] the performance of several commercially
available face recognition systems . . . . The algorithms were
consistently less accurate on women, African-Americans, and
younger people. Apparently they were trained on data that was not
representative enough of those groups . . . .\textsuperscript{180}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{172} Zeronda, supra note 7, at 1139; see also McClurg, supra note 6, at 1008.
\item \textsuperscript{173} Zeronda, supra note 7, at 1140.
\item \textsuperscript{174} Id. at 1149–50. By new information, this section refers to photography
that is, for example, presented in a different angle or captured under different lighting, which
would otherwise not be seen by the average person walking on the street. Id. at 1136 n.32,
1149.
\item \textsuperscript{175} Blitz, supra note 7, at 1390 (“[T]est in 2002 showed that even the most
effective current systems had difficulty identifying faces outdoors—the best recognition rate
was only [fifty percent] . . . .”).
\item \textsuperscript{176} Cresci, supra note 4; Guarino, supra note 2; Singer, supra note 8; Walker,
supra note 3.
\item \textsuperscript{177} Orcutt, supra note 171.
\item \textsuperscript{178} Blitz, supra note 7, at 1390; Williams, supra note 130.
\item \textsuperscript{179} See Orcutt, supra note 171.
\item \textsuperscript{180} Id.
\end{enumerate}
\end{footnotesize}
Other factors can affect the risk of misidentification, such as poor image quality, unusual poses or facial expressions, and the age of the photograph; the more images a database has, “the greater the chance of such errors—either incorrect matches or failure to match photos of people already in the database.” Advocates of facial recognition technology claim that it “is necessary to prevent further terrorist attacks, and it should not be dismissed because of a mere potential for abuse.” Evidently, the risk is more than just the mere potential. Facial recognition, despite its chilling capacity, receives little attention from federal agencies. The technology goes beyond that of making a vulgar image public—it can place criminal liability on an innocent person. In such scenarios, the negative emotional consequences on its victim are virtually doubled, as few things can compare to the stripping of one’s freedom.

V. RECOMMENDATION

In molding the current laws to encompass modern trends in technology, a specific court ruling provides helpful insight. In Daily Times Democrat, the court stated that “[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust.” This line of reasoning, although intuitive, only applies to photographs showing subjects in embarrassing pose[s]. In other words, the court’s holdings surrounding invasion of privacy generally seem to be more sensitive to the protection of people’s physical presence, striving to bury obscene images, or those that may seem “offensive to modesty or decency,” more willingly than those sharing and publishing the one’s personal information. Although this Comment would not go as far as proposing face scans as a battery, or a

182. McCoy, supra note 87, at 483.
183. See Orcutt, supra note 171; Walker, supra note 3.
184. See Williams, supra note 130 (“There is very little oversight on the local level, and little concern from the federal agencies providing the grants.”).
185. See Orcutt, supra note 181; Williams, supra note 130; Zeronda, supra note 7, at 1150.
186. See Williams, supra note 130; Zeronda, supra note 7, at 1154.
188. Id.
189. Id.
190. Id. at 477–78.
complete ban on facial recognition technology, civil law must provide a means to place liability on those who, without consent, take a scan of one’s image or body. 191 It is crucial that facial recognition technology is recognized as able to capture information that is just as intimate as an image of our physical bodies, and thus considered a search under the Fourth Amendment. 192

In an article by The New York Times, some regulators expressed that “Congress [should] pass a law giving consumers basic rights to control how intimate details about them are collected and used, no matter the technology.” 193 Terms like unique topography, DNA, and genetic data, are just a few of the descriptors of the sort of information captured by facial recognition technology. 194 It would be illogical, wrong, and unjust to treat the threat of facial recognition technology different from the threat of being physically exposed in an image. 195 Equally as important as recognizing its capabilities is understanding that the technology is still quite new—“so new that experts say they are unaware of major legal challenges.” 196 To say that the use of facial recognition technology is not a violation “because there are no reasonable expectations of privacy in public places and facial-recognition technology is used in public places,” fails to see the second part of the issue, the revelation of secret information that is not, in fact, visible to the naked eye. 197

To further claim that “[f]acial-recognition technology is . . . similar to fingerprinting,” also fails to acknowledge a key difference: Fingerprinting is rarely done without the person’s consent, whereas facial recognition asks for no permission. 198 The executive director of the Center on Privacy and Technology at Georgetown Law expressed this same notion of innate wrongness surrounding facial recognition technology: “What the FBI is doing may be legal, but it [is not] right.” 199 He added, “I know what I touch, and I certainly know if I give fingerprints for a background check . . . [but] I

191. See McCoy, supra note 87, at 483; Zeronda, supra note 7, at 1156 (“While the First Amendment could still serve as a defense against a battery claim, characterizing street shootings as battery might mitigate the problems that result when privacy rights are pitted against the right to freedom of expression.”).
192. See U.S. CONST. amend. IV; e.g., Roberto Iraola, New Detection Technologies and the Fourth Amendment, 47 S.D. L. REV. 8, 30 (2002); Singer, supra note 8; Singer, supra note 127.
193. See Singer, supra note 8 (emphasis added).
194. See Singer, supra note 127; Singer, supra note 8.
195. Daily Times Democrat, 162 So. 2d at 478.
196. Williams, supra note 130.
197. McCoy, supra note 87, at 487.
198. Id. at 489.
199. Fung, supra note 76.
[do not] think [there is] anyone who keeps track of every surveillance or smartphone camera.” In 2013, Boston authorities tested facial recognition technology but felt that an instinctual wrong would be done to its citizens if they adopted it as a tool in their investigations; “I [do not] want people to think [we are] always spying on them,” said William B. Evans, Boston’s police commissioner. Ultimately, they decided not to use it, “saying it crossed an ethical line.” Since there is no feasible way for the average citizen to know where all surveillance cameras are located, express consent must be required.

VI. Conclusion

A Wall Street Journal poll in 1999 asked individuals what concerned them most about the next century from a list of options. “Threats to personal privacy came in at the top of the list—ahead of terrorism, the destruction of the environment, and overpopulation.” The same poll showed that “ninety-five percent of Americans would be uncomfortable about a website creating a profile that included [their] real name as well as additional personal information.” Their fears are now a reality, and the technology behind it is virtually unstoppable. In trying to explain the severity of disclosure, this Comment does not undermine freedom of speech as another detriment: “Although protecting against disclosure does limit freedom of speech, [unconsented] disclosure . . . inhibit[s] the very interests [that] free speech protects.” Protection from disclosure, like free speech, promotes individual autonomy. It is imperative that the law recognizes technological advances and adapts to their changes as it has done throughout history.

200. Orcutt, supra note 181.
201. Williams, supra note 130.
202. Id.
203. See id.
204. Christy Harvey, Optimism Outduels Pessimism: Breakthroughs in Medicine, Technology Are Forecast; But the Auto Is Still Here, WALL STREET J., Sept. 16, 1999, at A10; see also Schwartz, supra note 135, at 744 n.2.
205. Schwartz, supra note 135, at 744 n.2.
206. Id.; see also Harvey, supra note 209.
207. Heath, supra note 5.
208. Solove, supra note 11, at 532–33.
209. Id. at 532–33 (pointing to several consequences suffered by victims of disclosure, such as preventing them from engaging in activities that further their own self-development, threatening their security, and making them a prisoner of their recorded past).
210. See McClurg, supra note 6, at 1074.

As technology progressed, the law took cognizance of the fact that new forms of communication such as radio and television could cause harm as great or greater
According to the company behind the technology in FindFace, NTechLab, “widespread facial recognition [is] an inevitable reality—for better or for worse.”\textsuperscript{211} The company hopes that “everyone [will] have the ability to find someone online, not just governments and big tech[ology] companies.”\textsuperscript{212} When NTechLab reaches its objective, it is crucial that the appropriate laws are in place to protect the citizens of the United States and preserve their ever diminishing right to privacy.\textsuperscript{213}