DIGNITY AND DEEPFAKES

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ABSTRACT

Today, we face a dangerous technosocial combination: AI-generated deepfakes and the Internet. Believable and accessible, deepfakes have already spread sex and lies across the Internet, harming the dignity of everyone from Taylor Swift to middle school students and teachers. Yet this is not the first time a new technology for reproducing one's likeness and a method for disseminating those images threatened individuals' dignity. In the late nineteenth century, the right of publicity emerged in response to a similar duo: the portable camera and mass media. With no existing legal remedy, the right of publicity sought to protect both individuals' dignitary and economic interests by curtailing the sharing of images without permission.

This Article proposes that the right of publicity not only offers a helpful historical analog, but could once again offer a third path between doctrinally or conceptually lacking proposals. Accepting the right of publicity's prevailing definition as intellectual property would exclude it from Section 230 so online platforms could be held liable for hosting users' misappropriations of another's likeness. This would oblige online platforms, consistent with the First Amendment, to adopt notice-and-takedown frameworks to restrict deepfakes' dissemination. Furthermore, the original right of publicity that emerged in response to the portable camera considered

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dignitary harms. Although the right of publicity has become unmoored from its dignitary purpose and is increasingly limited to commercial uses, the rise of AI-generated deepfakes presents an opportunity to restore the right's original purpose to address both commercial and dignitary harms such as those inflicted by deepfakes.

INTRODUCTION

Over a century ago, a new technology imperiled individual privacy that had long been taken for granted. Kodak's portable camera was revolutionary, both for innovation and personal boundaries. Amateur photographers, so-called Kodak fiends, used this new technology to capture an individual's likeness without their permission.[1] The photographs could compromise the innermost privacy of their subjects, from catching them in a state of undress to revealing clandestine meetings.[2] The burgeoning press shared such salacious photographs with their constituencies, casting subjects' private moments into the public light at the expense of their dignity.[3] In response, a new right to privacy, which ultimately became the right of publicity, emerged, granting individuals control over the use of their name, image, and likeness.[4]

Today, a new image-creating technology is similarly threatening humanity's dignity: AI-generated deepfakes.[5] Previously, the use of someone's likeness was more circumscribed and fakes were often of noticeably poor quality.[6] Today, however, advances in generative AI technology make realistic deepfakes— synthetic portrayals of an individual in image, video, or audio—possible, easy, and cheap.[7]

Deepfakes can harm everyone, whether rich or poor, Black or white, Republican or Democrat. For example, a digital President Donald Trump hugged and kissed Dr. Anthony Fauci.[8] Elsewhere, a deepfake Taylor Swift appeared completely naked.[9] Deepfakes are not limited to celebrities. Sexualized and inappropriate deepfakes have also victimized ordinary

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[1] Mia Fineman, *Kodak and the Rise of Amateur Photography*, MET (Oct. 2004), https://www.metmuseum.org/toah/hd/kodk/hd_kodk.htm#:~:text=Various%20forms%20of%20the%20word,the%20palm%20of%20the%20hand.

[2] *The Kodak Fiend*, HAWAIIAN GAZETTE, Dec. 9, 1890, at 5.

[3] AURORA WALLACE, NEWSPAPERS AND THE MAKING OF MODERN AMERICA: A HISTORY 156 (2005).

[4] *See* RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977) (defining misappropriation of the right of publicity when "[o]ne . . . appropriates to his own use or benefit the name or likeness of another").

[5] Others have declined to use the term deepfake and instead have adopted other terms such as image-based sexual abuse. In this Article, I use the term deepfake because its intended meaning and harms are not cabined to intimate images, but could apply to a broader category of synthetic media including opinion- and marketing-based deepfakes.

[6] Nicola Jones, *How to Stop AI Deepfakes from Sinking Society — and Science*, NATURE (Sept. 27, 2023), https://www.nature.com/articles/d41586-023-02990-y.

[7] *Id.*

[8] Nicholas Nehamas, *DeSantis Campaign Uses Apparently Fake Images to Attack Trump on Twitter*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/us/politics/desantis-deepfakes-trump-fauci.html.

[9] Scott Nover, *The Deepfake Porn Problem Is Bigger than Taylor Swift*, SLATE (Jan. 29, 2024, 11:30 AM), https://slate.com/technology/2024/01/taylor-swift-deepfake-porn-cyber-violence-abuse-research.html.

students and teachers at schools across the world.[10] As the Supreme Court recently suggested, loss of control over one's name (or image) can harm their reputation.[11] Loss of reputation in society can then cause victims to be ostracized by internalizing shame. Through the Internet, these deepfakes can be disseminated across society almost instantaneously to millions. The dignitary harms of today's deepfakes are the result of a dual problem of an advanced new technology to replicate one's likeness and a method for disseminating it.[12]

Despite these new dangers, this is not the first time a troublesome combination stemming from a new likeness-creating technology has threatened individuals' dignity. The right of publicity emerged at the end of the nineteenth century in response to a similar problem. One of the earliest sources that elucidated the nascent right of publicity was Samuel Warren and (the future Supreme Court justice) Louis Brandeis' canonical 1890 article, "The Right to Privacy."[13] Warren and Brandeis were concerned about the combined dignitary harms posed by the portable camera copying one's image and mass media distributing it.[14] The right to privacy they elucidated—which would ultimately take the form of the right of publicity—was meant to fill the legal vacuum and address the twin harms of a new technology to reproduce one's likeness and a method to disseminate it.[15] Although what became the right of publicity implicated economic harms, Warren and Brandeis were also deeply concerned with preserving individuals' dignity and protecting their control of their own image in the face of this technological change.[16]

Warren and Brandeis' approach to the dual reproduction-dissemination threat of their day and the original right of publicity that emerged offers a helpful historical analogy for conceptualizing and responding to the problem

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[10] Nigel Winnard, *The Rise of Deepfakes in Schools*, INT'L EDUCATOR (Jan. 17, 2024), https://www.tieonline.com/article/3632/the-rise-of-deepfakes-in-schools.

[11] Vidal v. Elster, 602 U.S. 286, 305–06 (2024).

[12] *See infra* Part I.

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

[14] *Id.* at 195–96. The right of publicity has since responded to other technological developments, including mass manufactured products, video, television commercials, videogames, and social media. *See infra* note 190.

[15] The constitutional right to privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), may be partially in doubt following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022), which overturned the right to an abortion from *Roe v. Wade*, 410 U.S. 113, 154 (1973). The right of publicity, however, is a state law claim predating *Griswold*, so *Dobbs* is inapplicable.

[16] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 5 (2018); *see also infra* notes 117–128 and accompanying text (discussing the meaning of dignity).

of AI-generated deepfakes and their dissemination via the Internet. Scholars have given renewed attention to the right of publicity due to the rise of AI-generated deepfakes and other technology.[17] Some scholars have suggested the right of publicity as an anti-deepfake option, although they have largely cabined their analyses to the use of deepfakes in the entertainment industry or only addressed it in passing.[18] Congress is also actively considering legislation for a federal right of publicity, most prominently the NO FAKES Act, based on the perceived dangers of deepfakes.[19] In its recent report on digital replicas, the U.S. Copyright Office even briefly suggested that "the right of publicity may be the most apt state law remedy for unauthorized digital replicas."[20] Nonetheless, these proposals have not considered the historical analogy of the emergence of the right of publicity in response to a similar historical moment at the end of the nineteenth century. Appreciating

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[17] *See, e.g.*, Mark Bartholomew, *A Right to Be Left Dead*, 112 CALIF. L. REV. 1591, 1594–95 (2024) (building on right of publicity doctrine to propose a postmortem right to be left dead); Anita L. Allen & Jennifer E. Rothman, *Postmortem Privacy*, 123 MICH. L. REV. 1, 5–6 (forthcoming 2025) (arguing that there are convincing reasons to recognize a limited postmortem privacy right, including a postmortem right of publicity, but that such a right should not unduly burden or limit the rights and opportunities of the living); Yvette Joy Liebesman, *The Rule Against Perpetual Celebrity*, 74 AM. U. L. REV. 1, 8 (forthcoming 2025) (arguing for a limited time postmortem right of publicity based on parallel rationales for the Rule Against Perpetuities); Zahra Takhshid, *Data as Likeness*, 112 GEO. L.J. 1161, 1166 (2024) (proposing that when data are conceptualized as one's likeness, the right of publicity should protect against unauthorized use of that data); Jason M. Schultz, *The Right of Publicity: A New Framework for Regulating Facial Recognition*, 88 BROOK. L. REV. 1039, 1045 (2023) (advocating for the use of the right of publicity to constrain uses of facial recognition).

[18] *See, e.g.*, Alice Preminger & Matthew B. Kugler, *The Right of Publicity Can Save Actors from Deepfake Armageddon*, 39 BERKELEY TECH. L.J. 783, 789 (2024) (proposing the right of publicity as a useful tool for addressing deepfakes in the entertainment industry); Alexandra Curren, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity*, 102 TEX. L. REV. 155, 179 (2023) (same); Russell Spivak, *"Deepfakes": The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339, 364–98 (2019) (discussing the viability of a variety of claims against deepfakes); Adam Candeub, *Nakedness and Publicity*, 104 IOWA L. REV. 1747, 1779, 1788–89 (2019) (only proposing the right of publicity as a way to curtail dissemination of *actual* naked images); Quentin J. Ullrich, *Is This Video Real? The Principal Mischief of Deepfakes and How the Lanham Act Can Address It*, 55 COLUM. J. L. & SOC. PROBS. 1, 21–26 (2021) (discussing the right of publicity as a similar right to false association, but concluding that false association is the more promising claim); Benjamin L.W. Sobel, *A Real Account of Deep Fakes*, SSRN, at 73 (May 16, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4829598. (concluding, after primarily discussing other bases for anti-deepfake laws, that appropriation might make sense because it is focused on regulating images rather than indices).

[19] S. 4875, 118th Cong. (2024); *see also* S. 3696 § 2, 118th Cong. (2024).

[20] United States Copyright Office, *Copyright and Artificial Intelligence Part 1: Digital Replicas* 11–13 (July 2024), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf [hereinafter "Copyright Office Report"].

this history can offer a better legal framework for combatting deepfakes by considering both dissemination and the dignitary (and economic) harms at issue.

Addressing both prongs of this approach has been an issue for many prior anti-deepfake proposals because many areas of law cannot both sufficiently circumscribe dissemination and address the dignitary harms deepfakes inflict. Civil claims and state criminal laws that seek to address dignitary harms—including defamation, infliction of emotional distress, and bespoke state non-consensual intimate images ("NCII") and deepfake laws—are better conceptual matches for deepfakes' harms, but are ineffective at restricting the dissemination of deepfakes online, largely due to Section 230 of the Communications Decency Act immunizing online platforms for their users' actions.[21] Section 230 does not apply to intellectual property claims, including copyright and trademark infringement, but these claims are of limited effectiveness due to being conceptually removed from deepfakes' dignitary harms.[22]

In between these two imperfect sets of legal claims, the right of publicity may offer not only a helpful historical analogy for understanding the issues at stake, but a promising third path for countering deepfake harms. The right of publicity is already largely considered intellectual property in most states. Accepting this definition of the right of publicity as intellectual property outside the confines of Section 230 is a pragmatic approach to curtailing the worst excesses of deepfakes without requiring Congressional action or overturning Section 230.[23] Courts have previously debated whether the right of publicity is intellectual property excluded from Section 230 or not.[24] Excluding the right of publicity from Section 230 would facilitate the creation of a common law notice-and-takedown regime, similar to that under trademark law, for hosting users' misappropriations of others' likenesses.[25] Upon learning of deepfakes on their platforms, service providers would be obligated to remove them or face a risk of liability if the First Amendment or other exceptions do not apply, curtailing the dissemination of deepfakes.[26] A

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[21] *See infra* Part II.A.

[22] *See infra* Part II.B.

[23] While others take issue with Section 230 as creating a gross incentives problem, this Article does not contemplate amending Section 230 but rather offers a framework for addressing the harms of deepfakes and a proposal that would work within the existing legal status quo.

[24] *Compare* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007) (limiting the exception to Section 230 to only include *federal* intellectual property law, not the right of publicity) *with* Hepp v. Facebook, Inc., 14 F.4th 204, 212 (3d Cir. 2021) (excluding the right of publicity from Section 230).

[25] *See infra* Part III.

[26] *See infra* Part III. While standing can be a problem for privacy claims due to the more

more limited circulation would not solve the problems of deepfake dissemination, but it would restrict the worst dignitary harms of loss of control, reputational damage, and ostracization and shame.

The feasibility of this approach could be limited by an increasingly common conceptual limit on the right of publicity requiring a commercial use of one's likeness. Over the course of the twentieth century, and especially after the Supreme Court's lone right of publicity decision, *Zacchini v. Scripps-Howard Broadcasting Co.*, the right of publicity was increasingly termed an intellectual property right and tied to economic interests at the expense of its original dignity-preserving goals.[27] This narrow right would prevent deepfakes in commercial advertisements, but not sexualized or other non-commercial deepfakes, despite the dignitary harms they impose.

By understanding the history of the right of publicity as addressing both dignitary and economic harms, however, a promising conceptual match for countering deepfakes emerges. Several scholars have previously called for a return to the dignitary purpose of the right of publicity, but so far largely to no avail.[28] However, the rise of a similar technosocial danger to that of 1890 in the form of AI-generated deepfakes and online dissemination offers a suitable moment to restore dignity to the right of publicity and curtail the worst harms of deepfakes. The harms of deepfakes have and will continue to affect everyone, not just those with valuable commercial personas. While the First Amendment is an important further consideration on the lawfulness of deepfakes, the right of publicity has already incorporated free speech limitations into its core doctrine. This provides a doctrinal benefit of using the right of publicity over the recently-enacted TAKE IT DOWN Act, which

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nebulous nature of the harm, every individual has an inherent right of publicity that they can enforce, although they still need to establish the prima facie claim for misappropriation, as discussed below. *See infra* Part III; *see also* TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021) (requiring a concrete harm for standing).

[27] 433 U.S. 562, 573 (1977); *see also* ROTHMAN, *supra* note 16, at 76 (describing *Zacchini*'s central role in today's understanding of the right of publicity as intellectual property).

[28] *See, e.g.*, ROTHMAN, *supra* note 16, at 181; Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 124–25 (2020); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 408–09 (1999); Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: The Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1360 (2002). *But see* Sarah "Alex" Howes, *Digital Replicas, Performers' Livelihoods, and Sex Scenes: Likeness Rights for the 21st Century*, 42 COLUM. J.L. & ARTS 345, 347 (2019) ("The right of publicity is an economic right. It is not about hurt feelings and it should be about economics."); Stacey Dogan, *Stirring the Pot: A Response to Rothman's Right of Publicity*, 42 COLUM. J.L. & ARTS 321, 322–23 (2019) (contending that a privacy framework for the right of publicity may have expanded in similarly problematic ways to the right's current intellectual property formulation).

does not provide First Amendment exceptions to removing reported nonconsensual intimate imagery.[29] While the right of publicity solution to deepfakes depends on several contested limitations, it nonetheless offers a promising approach as a historical, doctrinal, and conceptual matter.

This Article proceeds in five parts. In Part I, I describe the dignitary harms of deepfakes and the role of dissemination via the Internet. Part II describes how the right of publicity emerged from a similar historical moment with portable cameras and mass media and therefore offers a helpful historical analogy for our current deepfake crisis, namely the need to address dissemination and the dignitary harms of using one's image without their permission. Part III describes how most existing claims for addressing deepfakes either fail to restrict the dissemination of deepfakes due to Section 230's liability shield or are conceptually inapt. Part IV then proposes the right of publicity as a promising third alternative that could fall outside of Section 230 because, at present, it is predominantly understood as intellectual property. Part V then proposes that by restoring the original dignity-preserving goals of the right of publicity, it could, consistent with the First Amendment, be a conceptual match for restricting the nonconsensual dissemination of one's likeness in a harmful manner.

I. DEEPFAKES AND DIGNITARY HARMS

Deepfakes are realistic but synthetic portrayals of an individual in images, video, and audio. They show individuals doing things they never did or said. Deepfakes can harm everyone from President Trump to Taylor Swift, New Yorkers to Mississippians, and me and you. Part I.A. first explains how rapid advances in generative artificial intelligence ("AI") allow anyone to create lifelike deepfakes of another person.[30] As deepfakes become increasingly prevalent in modern society, it is incumbent to conceptually understand the harms they pose to craft an apt response. While deepfakes can inflict economic and societal harms, Part I.B. shows how deepfakes also harm individual victims at an emotional and sociological level, including stripping them of control over their own self-presentation, damaging their reputations, and causing them to internalize shame and even ostracize themselves from society. Together, as described in Part I.C., these harms attack the subject's dignity. While the creation of deepfakes can undermine an individual's control over their image, Part I.D. explains how deepfake dissemination via the Internet is the primary cause of these dignitary harms.

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[29] S. 146, 119th Cong. (2025).

[30] Nilay Patel, *AI Deepfakes Are Cheap, Easy, and Coming for the 2024 Election*, VERGE (Feb. 29, 2024, 10:00 AM), https://www.theverge.com/2024/2/29/24085663/ai-deepfakes-misinformation-policy-free-speech-first-amendment-decoder-podcast.

A. The Rise of AI-Generated Deepfakes

Synthetic media is not a new phenomenon, but it is becoming increasingly realistic. Long before deepfakes, there were "cheapfakes," where the author mislabeled or edited a piece of media to imply false information.[31] Deepfakes instead involve comprehensive alteration with machine learning, which can be more convincing.[32] This is not merely using AI to assist with editing or optimizing an image, as many of us do with our photos to enhance the color or brightness. Instead, deepfakes are fabricated images or representations of individuals. Increasingly realistic deepfakes were possible as early as 2017 with Deep Fakes, a face-swapping machine learning algorithm.[33] But, until recently, one usually required complex and expensive software to convincingly juxtapose a person's face onto another.[34] Media was often clumsily edited and easy to identify as fake, although the technology has steadily improved.[35] Creating a realistic deepfake required considerable skill. While cheapfakes cause similar harms to deepfakes, their lack of sophistication and resulting deception dampened their impact.

Recent advances in AI caused a paradigm shift in deepfake possibilities. AI is a machine-based system that makes predictions and acts in ways that mimic human intelligence.[36] Today's advanced AI is trained through machine learning, by which "the machine essentially programs itself."[37] Because these AI systems are nondeterministic and train themselves based on their programmed goals, they are able to achieve results that are unpredictable and unrealizable solely by humans.[38] Machine learning allows the AI system to

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[31] Vittoria Elliott, *Worried About Political Deepfakes? Beware of 'Cheapfakes*,' WIRED (Dec. 18, 2023, 9:10 AM), https://www.wired.com/story/meta-youtube-ai-political-ads.

[32] *Deepfakes and Cheap Fakes*, DATA & SOCIETY (Sept. 18, 2019), https://datasociety.net/library/deepfakes-and-cheap-fakes.

[33] DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE 37 (2022).

[34] Alakananda Mitra, Saraju P. Mohanty & Elias Kougianos, *The World of Generative AI: Deepfakes and Large Language Models*, ARXIV (Feb. 8, 2024), https://arxiv.org/pdf/2402.04373v1.pdf.

[35] *See, e.g.*, Shantanu Narayen, *Deepfake Epidemic Is Looming—And Adobe Is Preparing for the Worst*, FORBES (June 29, 2022, 10:12 AM), https://www.forbes.com/sites/aayushipratap/2022/06/29/deepfake-epidemic-is-looming-and-adobe-is-preparing-for-the-worst/?sh=84e468a5b81d (discussing clumsy deepfakes of Nancy Pelosi in 2020 and 2021).

[36] Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513, 531 (2015).

[37] Will Knight, *The Dark Secret at the Heart of AI*, MIT TECH. REV. (Apr. 11, 2017), https://www.technologyreview.com/2017/04/11/5113/the-dark-secret-at-the-heart-of-ai.

[38] Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. U. L. REV. 1305, 1318 (2019).

continuously improve based on the information and feedback it processes.[39] Due to these impressive capabilities, machine learning has been lauded as one of the few great general-purpose technologies ("GPTs") in world history, alongside the engine, Internet, and electricity.[40]

One of the most significant uses of machine learning-based AI is generative AI. Generative models "learn" how to create content by extracting statistical patterns from existing media.[41] As with AI more broadly, the creators of the generative models choose what training material to use.[42] The AI system then creates an entirely new work based on its machine learning.[43] Through techniques like diffusion and large language models ("LLMs"), generative AI technology has advanced to a level where AI systems can have a deep understanding of the meaning of data and its relationship to other data.[44]

Through these advancements, generative AI can create increasingly realistic, digital versions of you, me, and everyone else.[45] For example, generative AI seemingly created the scandalous pornographic deepfake images of Taylor Swift that circulated online in early 2024.[46] Students have also, for example, used generative AI to create intimate deepfakes of their classmates and a deepfake of their principal shouting racist slurs.[47]

AI-generated deepfakes add three new, troubling dimensions to the status quo: they are realistic, accessible, and versatile. First, AI-generated deepfakes are increasingly difficult for viewers to distinguish from authentic material.[48] This blurring of truth and lies increases the chances a viewer will believe a deepfake to represent the truth about the subject. Second, practically anyone can use a generative AI tool to create believable deepfakes. Even middle

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[39] Calo, *supra* note 36, at 538–39.

[40] Mark A. Lemley & Bryan Casey, *Remedies for Robots*, 86 U. CHI. L. REV. 1311, 1325 (2019).

[41] Ziv Epstein, Aaron Hertzmann, & Investigators of Human Creativity, *Art and the Science of Generative AI*, 380 SCI. 1110, 1110 (June 16, 2023).

[42] *Id.* at 1110.

[43] Andres Guadamuz, *A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs*, GRUR INT'L 1, 3 (2024).

[44] *Id.* at 4.

[45] George Lawton, *How to Prevent Deepfakes in the Era of Generative AI*, TECHTARGET (Apr. 12, 2023), https://www.techtarget.com/searchsecurity/tip/How-to-prevent-deepfakes-in-the-era-of-generative-AI.

[46] Kevin Dolak, *Who Is Behind the Spread of Taylor Swift's Deepfake Nudes?*, HOLLYWOOD REP. (Feb. 1, 2024, 11:38 AM), https://www.hollywoodreporter.com/news/music-news/taylor-swift-ai-deepfake-images-x-source-1235811794.

[47] Winnard, *supra* note 10.

[48] Don Philmlee, *Practice Innovations: Seeing Is No Longer Believing – The Rise of Deepfakes*, THOMSON REUTERS (July 18, 2023), https://www.thomsonreuters.com/en-us/posts/technology/practice-innovations-deepfakes.

schoolers have been able to create realistic deepfake nudes of their classmates with today's generative AI tools.[49] Third, deepfake images can show practically anything. While earlier deepfake technologies and cheapfakes were more limiting, generative AI can respond to prompts to depict a person doing and saying things they never contemplated. Together, these features put us at a "technological tipping point" that makes deepfakes a "bomb that could go off at any moment."[50]

B. Deepfakes' Multifarious Harms

While static images of individuals can inflict harm, deepfakes go far beyond the representations of individuals in photographs. Photos can be taken in certain ways that obfuscate the truth or present a certain viewpoint.[51] They can also be modified or edited to distort reality.[52] Author and photographer Susan Sontag sagaciously noted that "despite the presumption of veracity that gives all photographs authority . . the work that photographers do is no generic exception to the usually shady commerce between art and truth."[53] But, even if they can mislead, photographs capture a snapshot of something that actually happened. Humans' ocularcentrism makes images particularly believable.[54] Modern art theorist Thierry de Duve described photographs as "frozen gestalt[s]."[55] Oliver Wendell Holmes, Sr., called a photograph a "mirror with a memory."[56] Even Sontag admitted that, in practice, "[p]hotography furnishes evidence. Something we hear about, but doubt, seems proven when we are shown a photograph of it."[57]

Deepfakes and their harms go beyond this photograph paradigm because

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[49] Caroline Haskins, *Florida Middle Schoolers Arrested for Allegedly Creating Deepfake Nudes of Classmates*, WIRED (Mar. 8, 2024, 11:35 AM), https://www.wired.com/story/florida-teens-arrested-deepfake-nudes-classmates.

[50] Daniel Immerwahr, *What the Doomsayers Get Wrong About Deepfakes*, NEW YORKER (Nov. 13, 2023), https://www.newyorker.com/magazine/2023/11/20/a-history-of-fake-things-on-the-internet-walter-j-scheirer-book-review.

[51] *See, e.g.*, Fred Ritchin, *The Ambiguous Role of Photography in Presenting Innocence and Guilt*, TIME (June 20, 2016, 10:40 AM), https://time.com/4374225/photography-innocence-guilt (describing in the context of mug shots how photographs can be manipulated).

[52] Immerwahr, *supra* note 50.

[53] SUSAN SONTAG, ON PHOTOGRAPHY 4 (1978).

[54] Katrina G. Geddes, *Ocularcentrism and Deepfakes: Should Seeing Be Believing?*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1042, 1064–69 (2021).

[55] Thierry de Duve, *Time Exposure and Snapshot: The Photograph as Paradox*, 5 PHOTOGRAPHY 113, 113 (1978).

[56] Oliver Wendell Holmes, *The Stereoscope and the Stereograph*, ATL. MONTHLY 738, 739 (June 1859).

[57] SONTAG, supra note 53, at 5.

they are fake; they show a constructed reality rather than a snapshot of what has actually occurred. This fake reality can cause real damage. Deepfakes magnify the harms from the nonconsensual dissemination of images of actions actually taken to those never taken at all. The harms deepfakes—especially pernicious uses such as sex, lies, and marketing—inflict on individuals are multifarious.[58] Three of the most prominent psychological and social harms are stripping the subject of control over their own public-facing persona, damaging their reputation, and causing them to internalize shame. While these harms are related and not each does not appear with every deepfake, they highlight the lived experiences of the victims and reflect the prior qualitative and theoretical findings of legal scholars. The degree of the harm may ratchet up or down depending on the use, with, for example, sexual deepfakes often causing more severe harms than false endorsement. Together, these harms strike at a victim's dignity, as I will discuss in Part I.C.[59] Finally, Part I.D. will describe how, while both creation and dissemination of deepfakes leads to a loss of control over one's image, dissemination causes most of the harm. Understanding these related harms of deepfakes is essential for crafting a responsive legal framework.

1. Loss of Control

First, deepfakes undermine individuals' control over their own self-representation. Taking or sharing photos of an individual without their permission can deprive the subject of control. The photographer can share or publish a record of an individual's action without their permission or awareness. While this is broadly true with any unauthorized representation, scholars have particularly detected these harms with intimate imagery. For example, Danielle Citron explains that non-consensual intimate images ("NCII") makes victims feel that they lost control not only over their bodies, but also their minds and intimate selves.[60] These harms are not limited to NCII, but the unauthorized dissemination of one's actual or synthetic naked and sexual images more broadly, including deepfakes.[61] While they do not depict an individual's actual naked body, sexual deepfakes deprive the

[58] The vast majority of deepfakes appear to be sexual. Karen Hao, *Deepfake Porn Is Ruining Women's Lives. Now the Law Might Finally Ban It.*, MIT TECH. REV. (Feb. 12, 2021), https://www.technologyreview.com/2021/02/12/1018222/deepfake-revenge-porn-coming-ban. (finding, in a pre-generative AI study of deepfake images from 2018 to 2021, that between 90–95% of these images were nonconsensual porn).

[59] *See infra* Part I.C.

[60] CITRON, *supra* note 33, at 41–43.

[61] *See* Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotapes: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 893 (2019) ("Deep-fake pornography, therefore, is closely related to what is often colloquially referred to as 'revenge porn.'").

victims of their ability to control their self-representation in society.[62] Mary Anne Franks and Ari Ezra Waldman describe how deepfake pornography "turns individuals into objects of sexual entertainment against their will."[63] Due to these related harms, other scholars specifically situated NCII inside a broader continuum of image-based sexual abuse to provide a broad and flexible enough understanding to capture new forms of abuse such as deepfakes.[64]

As other scholars have previously explained, lack of control over one's image online is especially likely to harm historically marginalized groups such as women and LGBTQ+ persons. This is perhaps not surprising, as leading privacy scholars such as Julie Cohen have explained that cyberspace is an extension of our lived experiences and reinscribes the biases and inequalities of physical society.[65] Nonetheless, it is important to understand this differential impact of nonconsensual imagery—including deepfakes—on historically marginalized populations. For example, Franks and Citron concluded that NCII especially "denies women and girls control over their own bodies and lives."[66] Citron, among others, has also noted that NCII affects LGBTQ+ people at much higher rates than heterosexual people.[67] Waldman found that gay and bisexual men are particularly likely to be victims, especially if they have used dating apps.[68] Intellectual property law scholar Andrew Gilden has noted the additional harms of NCII (and presumably sexual deepfakes) for LGBTQ+ people, for whom the

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[62] Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1921 (2019).

[63] Franks & Waldman, *supra* note 61, at 893.

[64] Clare McGlynn, Erika Rackley & Ruth Houghton, *Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse*, 25 FEMINIST LEGAL STUDS. 25, 28 (2017).

[65] Julie E. Cohen, *Cyberspace As/And Space*, 107 COLUM. L. REV. 210, 246–247 (2007).

[66] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 353 (2014).

[67] Danielle Keats Citron, *A New Compact for Sexual Privacy*, 62 WM. & MARY L. REV. 1763, 1797 (2021); *see also* ANASTASIA POWELL, ADRIAN J. SCOTT, ASHER FLYNN & NICOLA HENRY, IMAGE-BASED SEXUAL ABUSE: AN INTERNATIONAL STUDY OF VICTIMS AND PERPETRATORS 4 (2020) ("We found 1 in 2 (56.4%) LGB+ respondents had experienced one or more form[s] of image-based sexual abuse compared with 1 in 3 (35.4%) heterosexual respondents."); AMANDA LENHART, MICHELE YBARRA & MYESHIA PRICE-FEENEY, NON-CONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN" 5 (2016), https://datasociety.net/wp-content/uploads/2016/12/Nonconsensual_Image_Sharing_2016.pdf ("Among internet users who identify as lesbian, gay, or bisexual (LGB), 15% say someone has threatened to share a nude or nearly-nude photo or video of them without their permission, a far higher rate than among heterosexual internet users (2%).").

[68] *See* Ari Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 L. & SOC. INQUIRY 987, 988 (2019) (finding that gay and bisexual men that use gay dating apps are more frequently victims of nonconsensual pornography than the general heterosexual and LGBTQ+ population).

unauthorized dissemination of sexual images can mean not just the exposure of their naked bodies, but outing their sexual orientation and gender identity.[69] It is well documented that unauthorized outings, with or without intimate images, can cause significant social, psychological, and physical harms to LGBTQ+ people.[70]

AI-generated deepfakes can magnify these harms by further removing control over one's identity from that individual. When someone takes an action that is photographed, they choose to take the action even if they did not intend for it to be captured in photograph form. Deepfakes eliminate even this semblance of control. Others can, like a puppet master, animate one's likeness to take any action they please. The increasing accessibility and versality of generative AI tools for deepfakes exacerbates the problem. There is a growing risk of both celebrities and everyday citizens having their likenesses contorted and used in all manner of ways that they do not desire and cannot control. Regina Rini and Leah Cohen have evocatively referred to this undermining of one's control of their identity through deepfakes as panoptic gaslighting.[71]

Sociological literature demonstrates the importance of controlling one's self-representation. For example, the eminent sociologist Erving Goffman likened individuals to actors on a stage, explaining that individuals develop personalities through their interactions in society.[72] We engage in "dramatic realization," or presenting our public personas, or "front," in an idealized light consistent with prevailing social norms while aberrant behavior (which might be revealed in the private backstage) is hidden through a process of "mystification."[73] Each social interaction we undertake then contributes to our public "face," or "the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact."[74] Allowing others to use one's likeness risks undercutting this carefully curated front and one's ability to maintain face.

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[69] Andrew Gilden, *The Queer Limits of Revenge Porn Laws*, 64 B.C. L. REV. 801, 815 (2023); *see also* Waldman, *supra* note 68, at 1009 (noting "the unique burdens faced by gay and bisexual male users of the Internet, many of whom risk surveillance, outing, and loss of control over their identities").

[70] *See, e.g.*, *Why Outing Can Be Deadly*, NAT'L LGBTQ TASK FORCE (Feb. 20, 2014), https://www.thetaskforce.org/news/why-outing-can-be-deadly; Erin Reed, *The Painful History of Forced Outing and Anti-LGBTQ+ School Policies*, LOS ANGELES LGBT CTR. (Oct. 11, 2023), https://lalgbtcenter.org/vanguard/the-painful-history-of-forced-outing-and-anti-lgbtq-school-policies.

[71] Regina Rini & Leah Cohen, *Deepfakes, Deep Harms*, 22 J. ETHICS SOC. PHILOS. 143, 143 (2022).

[72] ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 8 (1954).

[73] *See id.* at 13–22, 44–46 (explaining these concepts).

[74] Erving Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, *in* ERVING GOFFMAN, INTERACTION RITUAL 5, 5 (1967).

Building on Goffman's work, privacy scholars have previously explained the importance of respecting the boundary between our public and private selves. Using Goffman's theories of social facades, Cohen supported the need for information privacy by explaining that a key part of socialization is defining the parameters around how private information is shared.[75] Waldman similarly noted that Goffman's work distinguished private places from the public, as only invitees can gather in the former.[76] Waldman explains that, accordingly, privacy helps avoid inconsistencies with an individual's public façade.[77] Control over our self-presentation is therefore critical to fully engaging in society, yet that is precisely what deepfakes take away from us.

2. Reputational Damage

Goffman's work also highlights how lack of control over our image in society can lead to reputational repercussions. He explains that individuals carefully craft their face in each interaction to develop their reputation, but when this impression management fails, an individual is revealed as different from societal norms.[78] Face "is only on loan to [an individual] from society; it will be withdrawn unless he conducts himself in a way that is worthy of it."[79] Loss of face—whether from one's own action or another's—leads to being discredited by society.[80] For example, if people see an intimate image of someone, they would have to look past it to connect with the subject as a whole person.[81] Representations of artificial but inconsistent actions pose similar issues for socialization. Deepfakes that do not comport with one's self and front can exacerbate the risk of stigmatization. After all, as Goffman notes, humans are eager to "pounce on chinks in [our] symbolic armour in order to discredit [our] pretensions."[82]

The recent Supreme Court decision in *Vidal v. Elster* seems to echo this sentiment about loss of control leading to reputational harm. *Elster* addressed

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[75] Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1427 (2000); *see also* Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 197–98 (2008) (describing different needs of privacy for Goffman's "presentation of self" by different communities).

[76] Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. MIAMI L. REV. 559, 560 (2015) (quoting ERVING GOFFMAN, BEHAVIOR IN PUBLIC PLACES: NOTES ON THE SOCIAL ORGANIZATION OF GATHERINGS 9 (1963)).

[77] *Id.* at 578.

[78] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2 (1963).

[79] Goffman, *supra* note 74, at 5, 10.

[80] GOFFMAN, *supra* note 78, at 2.

[81] CITRON, *supra* note 33, at xii.

[82] GOFFMAN, *supra* note 72, at 38.

whether the bar on registering trademarks consisting of the name of another without their permission was constitutional.[83] Justice Thomas, writing for the majority in most of his opinion, remarked that "a trademark protects the markholder's reputation . . . [and] is 'his authentic seal.'"[84] If another uses it, he strips the owner of control and inflicts injury even in the absence of tarnishment, "for a reputation, like a face, is the symbol of its possessor and creator."[85] This connection between reputation and trademark is at its peak when the "mark contains a person's name."[86]

Legal scholarship has explained that deepfakes exacerbate the reputational harms caused by outside control over one's face and not aligning with prevailing norms. Especially concerning is that even if the deepfakes are not trustworthy, viewers may still develop negative associations with the victim in response. Being presented with deepfakes can develop psychological associations related to the victim that subconsciously harm their reputation.[87]

Several scholars have documented the harms sexual deepfakes can inflict on victims' reputations. Franks and Waldman describe how deepfake pornography causes reputational injury by turning individuals into sexual entertainment.[88] Citron elaborated on this injury by finding that sexual privacy invasions cause victims to be otherized through associated stigma with their nudity and sex being publicly revealed.[89] Martha Nussbaum explained that sexual imagery leads to reputational harm because of the "universal human discomfort with bodily reality."[90]

The resulting stigma associated with revealing sexual imagery can have tangible consequences for victims, including loss of employment opportunities.[91] These reputation-based consequences are especially likely to harm women, who are much more likely to be victims of sexual deepfakes

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[83] Vidal v. Elster, 602 U.S. 286, 291–92 (2024).

[84] *Id.* at 305.

[85] *Id.* at 306.

[86] *Id.*

[87] Keith Raymond Harris, *Video on Demand: What Deepfakes Do and How They Harm*, 199 SYNTHESIZE 13373, 13386–87 (2021).

[88] Franks & Waldman, *supra* note 61, at 893.

[89] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 6 (2014). Brenda Dvoskin has questioned Citron's approach by seeking to disentangle the scripted descriptive and normative accounts of sexual privacy harms and asking whether changing social stigma around nude images could reduce harm from such unauthorized exposures. Brenda Dvoskin, *Speaking Back to Sexual Privacy Invasions*, 99 WASH. L. REV. 59, 75–77, 95 (2024). But today's reality is that the related harms of lack of control, reputational loss, and shame currently injure victims of sexual-based imagery, and deepfakes more broadly.

[90] MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 17–18 (2010).

[91] Citron, *supra* note 62, at 1947.

than men.[92] Framing LGBTQ+ individuals as sex can also weaponize the taboo around queer sex by reinforcing dehumanizing stereotypes of queer individuals, particularly gay and bisexual men, as driven by lust and deprive LGBTQ+ individuals of opportunities due to the perpetuation of this harmful stereotype.[93]

Reputational harms are not, however, limited to sexual deepfakes. Take, for example, association with any socially undesirable trait through lies. A deepfake depicting someone as a Nazi. Supporting a terrorist group. Wearing culturally inappropriate dress. Doing drugs. Drinking alcohol to excess. Any of these depictions could lead to stigma and social repercussions such as loss of employment.

For example, take three prominent examples of lie-based deepfakes and their repercussions. In January 2024, an AI-based robocall used President Joe Biden's voice to discourage voters from going to the polls during the New Hampshire presidential primary.[94] The next month, a deepfake of Taylor Swift endorsing former President Donald Trump circulated on the social media platform X (formerly Twitter).[95] A year before that, a high school athletic director created a deepfake of the school's principal shouting racist and antisemitic slurs.[96] Deepfakes could affect how listeners and viewers think of President Biden, Swift, or the high school principal due to presenting inaccurate information or views with which they do not agree. In the case of the principal, he was even briefly suspended from his job.[97] Bobby Chesney and Citron have warned that deepfake lies may even erode trust in public

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[92] *See* Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1262, 1308 (2017) (presenting the demographics of nonconsensual pornography, including the disparate impact on women and people of color); Citron & Franks, *supra* note 66, at 353 (explaining that women and girls are victims of nonconsensual pornography more than men and boys); Hao, *supra* note 58 (presenting the results of a subsequent study with similar findings).

[93] *See* Stephen M. Engel & Timothy S. Lyle, *Fucking with Dignity: Public Sex, Queer Intimate Kinship, and How the AIDS Epidemic Bathhouse Closures Constituted a Dignity Taking*, 92 CHI.-KENT L. REV. 961, 977–78 (2017) (describing dehumanizing treatments of LGBTQ+ individuals during the AIDS pandemic and describing it as a dignity taking).

[94] Ali Swenson & Will Weissert, *New Hampshire Investigating Fake Biden Robocall Meant to Discourage Voters Ahead of Primary*, AP (Jan. 22, 2024, 11:32 PM), https://apnews.com/article/new-hampshire-primary-biden-ai-deepfake-robocall-f3469ceb6dd613079092287994663db5.

[95] Kat Tenbarge, *Taylor Swift Deepfakes on X Falsely Depict Her Supporting Trump*, NBC News (Feb. 7, 2024, 7:30 PM), https://www.nbcnews.com/tech/internet/taylor-swift-deepfake-x-falsely-depict-supporting-trump-grammys-flag-rcna137620.

[96] Thomas Lake, *A School Principal Faced Threats After Being Accused of Offensive Language on a Recording. Now Police Say It Was a Deepfake*, CNN (Apr. 26, 2025, 2:25PM), https://edition.cnn.com/2024/04/26/us/pikesville-principal-maryland-deepfake-cec/index.html

[97] *Id.*

institutions, exacerbate social divisions, and threaten democracy.[98]

Another area of concern is in advertising. Deepfake ads are cheap to make, and as AI technology continues to improve, so will the quality of the ads, further blurring the ability of individuals to determine what is true.[99] Video advertisements for real estate investment and machine learning companies have featured the likes of Elon Musk, Tom Cruise, and Leonardo DiCaprio even though they never filmed or agreed to appear as digital replicas.[100] There are deepfake product endorsement videos, including a fake Kelly Clarkson endorsing weight-loss keto gummies and a replica of Tom Hanks recommending a dental plan.[101] Elsewhere, AI-generated images of Piers Morgan and Oprah Winfrey endorsed a U.S. influencer's controversial self-help course.[102] Being affiliated with products or services, especially if they are of poor quality, can harm victims' reputations. Even association with advertising at all could cause reputational harms. For example, Alex Howes, Director and Counsel for Government Affairs and Public Policy with the Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA"), shared that SAG-AFTRA journalists worried that "their reputations as journalists would be significantly harmed if ever associated with a company or put on a T-shirt or on a doll."[103]

AI-generated deepfakes amplify those risks by being more believable and easier to create by ordinary individuals. The accessibility of high-quality AI-generated deepfakes to spread sex, lies, and other reputation-harming content accelerates undermining one's image and opportunities in society.

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[98] Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1776–85 (2019).

[99] Joedy McCreary, *Real Products, Fake Endorsements: Why Experts Say AI-Generated Ads Will Get Tougher to Spot*, USA TODAY, https://www.usatoday.com/story/news/factcheck/2024/02/18/ai-deepfake-ads-tougher-detect/72536444007 (last updated on Feb. 18, 2024, 3:34 PM).

[100] Patrick Coffee, *'Deepfakes' of Celebrities Have Begun Appearing in Ads, With or Without Their Permission*, WALL ST. J. (Oct. 25, 2022, 2:24 PM), https://www.wsj.com/articles/deepfakes-of-celebrities-have-begun-appearing-in-ads-with-or-without-their-permission-11666692003.

[101] Melissa Goldin, *Bogus Social Media Ad Uses an Edited Video of Kelly Clarkson to Sell Weight-Loss Gummies*, AP (Oct. 27, 2023, 7:10 PM), https://apnews.com/article/fact-check-kelly-clarkson-weight-loss-gummies-702026826728; Derrick Bryson Taylor, *Tom Hanks Warns of Dental Ad Using A.I. Version of Him*, N.Y. TIMES (Oct. 2, 2023), https://www.nytimes.com/2023/10/02/technology/tom-hanks-ai-dental-video.html.

[102] Shomini Sen, *Oprah Winfrey, Nigella Lawson and Piers Morgan's Deep Fake Used for an Ad to Promote US Influencer*, WION, https://www.wionews.com/entertainment/oprah-winfrey-nigella-lawson-and-piers-morgan-deep-fake-used-for-an-ad-to-promote-us-influencer-694030 (last updated Feb. 26, 2024, 5:04 PM).

[103] Howes, *supra* note 28, at 346.

3. Ostracization and Shame

Finally, loss of control over one's image and resulting reputational harm can lead to ostracization and internalized shame. Society stigmatizing certain attributes or behaviors can result in internalized negative feelings in the form of shame when we do not meet these social norms.[104] Goffman also describes this harm to one's self-image as a result of loss of face and reputational damage.[105] Every interaction involves a risk of shame from slight embarrassment to deep humiliation due to loss of face.[106] A related feeling of what philosopher Jean-Paul Sartre calls "pure shame" occurs when we are seen or treated as objects because we feel less than human.[107]

Internalized shame is especially prominent with sexual deepfakes, although loss of control can lead to shame in other contexts too. Nussbaum explained that unwanted exposure or presentation confers on victims "diminished status" that is often internalized.[108] Citron and Franks explained how victims of NCII suffered psychological damage such as severe anxiety and social withdrawal.[109] In a series of interviews, Waldman reported LGBTQ+ victims of cyber harassment suffering similar harms, including feeling "anxious" and "blamed for what happened," "crippled" by "fear and anxiety," and "sick every day . . . nervous, sometimes shaking, from the moment [they] woke up to the moment [they feel asleep, if [they] ever slept."[110] These same feelings occur with deepfakes too. Franks and Waldman describe how deepfake pornography causes intense distress and humiliation.[111] One deepfake victim described how she gave up writing because the deepfakes of her created such a strong feeling of shame.[112] Even with those who engage in sexual expression regularly, such as sex workers, depiction in these scenarios without their permission undermines their autonomy. These types of violations of one's control over their self-presentation and resulting reputational harm shatters self-esteem and leads to

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[104] Maybell Romero, *Shamed*, 111 VA. L. REV. 1, 8 (forthcoming 2024).

[105] GOFFMAN, *supra* note 78, at 2.

[106] GOFFMAN, *supra* note 72, at 243.

[107] JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: A PHENOMENOLOGICAL ESSAY ON ONTOLOGY 384 (Hazel E. Barnes, trans., 1956).

[108] MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 363 (2013).

[109] Citron & Franks, *supra* note 66, at 350–53.

[110] Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 715 (2017).

[111] Franks & Waldman, *supra* note 61, at 893.

[112] Sophie Compton, *More and More Women Are Facing the Scary Reality of Deepfakes*, VOGUE (Mar. 16, 2021), https://www.vogue.com/article/scary-reality-of-deepfakes-online-abuse.

internalization of shame.[113] Shame isolates individuals, and can cause them to withdraw from society in a manner that, in effect, ostracizes them.

C. Defining Dignity

Although these related harms of loss of control, injury to reputation, and infliction of shame are difficult to describe comprehensively under existing typologies, this Article proposes that the term "dignity" can embrace these psychological and social harms of deepfake dissemination. Citron and Daniel Solove previously proposed a typology of privacy harms that distinguished physical, reputational, relationship, psychology, economic, discrimination, and autonomy harms.[114] All of these harms can potentially stem from deepfake dissemination, but understanding these harms as separate in this context can miss their related nature. For example, lack of control can be understood under this typology as an autonomy harm. Reputational harm is a separate category. Ostracization and shame could arguably fall within reputational, relationship, psychology, discrimination, and autonomy harms. Yet these harms are interrelated and, together, strike at one's dignity.

Society may intuitively understand (or think it understands) what dignity means. Indeed, the term dignity is replete in legal documents and treaties on human rights.[115] Yet philosophers and scholars have debated the meaning of dignity from the Stoics and Aristotle in Ancient Greece to today.[116] Today, the term dignity is still murky and lacks a standard definition.[117] For example, a study of Supreme Court decisions found the term used in over 900 opinions with a cacophony of different uses.[118] Philosopher Ruth Macklin went so far

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[113] CITRON, *supra* note 33, at 41–43.

[114] Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 831 (2022). At least in the data breach context, David Opberbeck has resisted the doctrinal and practical applicability of dignitary harms to privacy. David W. Opderbeck, *Cybersecurity and Data Breach Harms: Theory and Reality*, 82 MD. L. REV. 1001, 1040 (2023). However, the dignitary harms stemming from deepfakes discussed in this Article are not "general societal harms," *id.* at 1004, but individualized harms based on the specific use of one's likeness in a harmful manner without the victim's permission.

[115] *See, e.g.*, Universal Declaration of Human Rights, pmbl., G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, pmbl., Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, pmbl., Dec. 19, 1966, 999 U.N.T.S. 171.

[116] Martha Nussbaum, *Human Dignity and Political Entitlements*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS (Mar. 2008), https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/chapter14.html.

[117] JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 3, 15 (Meir Dan-Cohen, ed., 2012).

[118] Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172, 178 (2011).

as to label dignity "a useless concept" because it is so vague.[119]

Many scholars and philosophers have tried, with some success, to propose viable definitions. One set of theories discusses equal status. Legal philosopher Jeremy Waldron has suggested dignity is about high and equal status for everyone and explained that some legal rights seek to maintain this status for individuals.[120] Waldron endorsed the approach of an earlier scholar, Gregory Vlastos, theorizing that "we organize ourselves not like a society *without* nobility or rank, but like an aristocratic society, which has just one rank (and a pretty high rank at that) for all of us . . . [e]very man a duke, every woman a queen."[121]

Other definitions have instead connected dignity to our ability to self-present and achieve our true selves while protecting against encroachments. For example, philosopher Michael Meyer argued that dignity has a strong connection to one's ability to control how they are presented to others.[122] Relatedly, Nussbaum explains the importance of protecting dignity by endorsing an Aristotelian/Marxian view of dignity as about respect.[123] She explains—contrary to the Stoics—that human capacities are latent and "the world can interfere with their progress toward development and functioning."[124] Therefore, a proper understanding of dignity "requires creating the conditions in which latent capacities can develop and unfold themselves."[125] The Supreme Court seems to have intuitively followed Nussbaum's approach sometimes, using the term dignity for personal integrity, or safeguarding people's reputations and bodies from disgraceful or humiliating intrusions.[126]

Some legal scholarship also endorses this view of dignity as about respect and control over self-representations. For example, legal scholar Rebecca Moosavian described the term dignity as having a spiritual or sacred quality at the core of our personhood.[127] Robert Post and Jennifer Rothman have explained that, due to the social interdependence of persons in society, dignity is about enforcing civility rules to maintain one's personality.[128] Although she does not mention dignity specifically, Cohen similarly

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[119] Ruth Macklin, *Dignity Is a Useless Concept*, 327 BMJ 1419, 1419 (2003).

[120] WALDRON, *supra* note 117, at 14, 18, 50.

[121] Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1120 (2011).

[122] Michael J. Meyer, *Dignity, Rights, and Self-Control*, 99 ETHICS 520, 528 (1989).

[123] Nussbaum, *supra* note 116.

[124] *Id.*

[125] *Id.*

[126] Henry, *supra* note 118, at 190.

[127] Rebecca Moosavian, *Stealing 'Souls'? Article 8 and Photographic Intrusion*, 69 N. IR. L.Q. 531, 538–39 (2018).

[128] Post & Rothman, *supra* note 28, at 121–22.

describes privacy as "boundary management through which the capacity for self-determination develops."[129] Citron has also argued that a loss of dignity compromises our ability to "develop[] identities, enjoy[] self-respect and social respect, and open[] up to others so that we can forge relationships and fall in love."[130]

Another meaning of the concept is introduced by Bernadette Atuahene in her canonical work on dignity takings. In the context of colonial property takings, Atuahene defines dignity takings as "when the state confiscates property from groups that have been dehumanized or infantilized."[131] Dehumanization or infantilization suggests that loss of dignity is connected to a loss of societal recognition and equal treatment that mere economic remedies cannot restore.[132]

These definitions of dignity, while only a subset, align with the deepfake harms described in Part I.B. Under any of these views, dignity is not something conferred by the state but is innate and lost through social interactions.[133] These proposed definitions provide a general picture of dignity as protecting individuals' control of their status in society against representations that contravene societal norms and would impinge upon their reputation in ways that would shame them. This use of dignity to describe the harms deepfakes inflict is not novel. Scholars including Citron, Franks, and Waldman have used the term in this context before.[134] However, by intentionally describing and defining the harms deepfakes can inflict, we can better appreciate the conceptual shortcomings and promise of different legal claims.

D. Platforms' Dissemination Role

The dignitary harms of deepfakes are primarily based on their dissemination. Deepfake creation can lead to loss of control of one's image, but the full impact on victims, including reputational injuries and resulting shame, flow from threatening to or actually disseminating deepfakes. Banning generative AI technology is unlikely because courts are generally

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[129] Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013).

[130] Citron, *supra* note 62, at 1944.

[131] BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 21, 26 (2014).

[132] *Id.* at 21, 34.

[133] *See* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 278–80 (2014) (criticizing the Supreme Court in *United States v. Windsor* for presenting dignity as a status conferring by the State).

[134] *See, e.g.*, Citron, *supra* note 62, at 1886; Franks & Waldman, *supra* note 61, at 893; Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. LEGAL STUD. 534, 546 (2017).

reluctant to ban technologies that have both lawful and unlawful uses, such as generative AI.[135] The proper regulatory focus should therefore be on deepfake dissemination.

Scholars, legislators, and others have understood in other contexts that the most central harm of problematic content is not necessarily its creation, but its dissemination. For example, the Internet Watch Foundation has emphasized that, in response to child sexual abuse material ("CSAM"), "[w]e have to act quickly. The longer an image stays live, the more opportunity there is for offenders to view and share it, and more harm is caused to victims."[136] Similarly, part of the concern with NCII in the 2010s was how easy it had become to disseminate content online.[137]

A similar shift is occurring with deepfakes. While the creation of deepfakes is troubling, personal consumption alone is less harmful to the subject's dignity.[138] Much of the harm lies with deepfakes' wide public dissemination for everyone from neighbors to coworkers to family to see. Indeed, when Universal Music Group ("UMG") initially pulled its catalog from TikTok in January 2024, one of the main reasons it cited was the number of deepfakes of its artists proliferating on the platform.[139]

The Internet, and especially social media, are key and trusted disseminators of deepfakes across the globe. On average, humans spend 400 minutes—nearly seven hours—online each day.[140] Of this, we spend an

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[135] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (holding that a provider of a technology that can be used for infringement does not have constructive knowledge of that infringement so long as the technology has "substantial non-infringing uses"); *see also* Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap*, 81 IOWA L. REV. 883, 956 (1996) (arguing that permitting technological discrimination under the First Amendment is inimical to free expression).

[136] *Internet Watch Foundation 2021 Annual Report* 93 (2022), https://annualreport2021.iwf.org.uk/pdf/IWF-Annual-Report-2021.pdf.

[137] Citron & Franks, *supra* note 66, at 350.

[138] Creation of deepfakes can still generate harms but it is outside the scope of this Article. On policy reasons to criminalize the creation of deepfakes, see Clare McGlynn, *Deepfake Porn: Why We Need to Make It a Crime to Create It, Not Just Share It*, CONVERSATION (Apr. 9, 2024, 9:30 AM), https://theconversation.com/deepfake-porn-why-we-need-to-make-it-a-crime-to-create-it-not-just-share-it-227177. However, personal consumption of deepfakes would likely be protected under the First Amendment. Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime).

[139] Clint Rainey, *TikTok Users: What to Know About Universal Music Group Pulling Taylor Swift, the Weekend, and Others from the Platform*, FASTCOMPANY (Jan. 31, 2024), https://www.fastcompany.com/91020977/tiktok-users-what-to-know-about-universal-music-group-catalog.

[140] Lindsey Leake, *17 Years of Your Adult Life May Be Spent Online. These Expert Tips May Help Curb Your Screen Time*, FORTUNE (Mar. 6, 2024, 5:10 AM), https://fortune.com/well/article/screen-time-over-lifespan.

average of two hours and twenty-three minutes on social media.[141] Social media platforms are the size of nations and some are much larger. For example, as of 2024, Pinterest has 482 million active monthly users, X (formerly Twitter) 619 million, Snapchat 750 million, TikTok 1.5 billion, Instagram 2 billion, YouTube 2.5 billion, and Facebook 3 billion.[142]

Social media and other online platforms have also become a primary and trusted source of news for many. As traditional journalism and print media have declined, many Americans are turning to the Internet—and, more specifically, social media—as their primary source of news.[143] According to a Pew study, over 50% of American adults get at least some of their news from social media.[144] With this pole position in the information economy also comes trust. Young adults in the United States now trust information they find on social media almost as much as that from national news outlets.[145]

Enacted anti-deepfake laws recognize that a major part of the harm of deepfakes lies in their dissemination. For example, California and New York's statutes prohibit the intentional disclosure of pornographic deepfakes.[146] Illinois prohibits intentional and threatened dissemination.[147] Mere creation of deepfakes does not appear to be illegal under any of these three laws.[148] Dissemination is the issue that most leads to dignitary harms,

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[141] Simon Kemp, *The Time We Spend on Social Media*, DATAREPORTAL (Jan. 31, 2024), https://datareportal.com/reports/digital-2024-deep-dive-the-time-we-spend-on-social-media#:~:text=Research%20from%20GWI%20reveals%20that,per%20day%20using%20social%20platforms.&text=On%20average%2C%20that%20means%20that,attributed%20to%20social%20media%20platforms..

[142] *Most Popular Social Networks Worldwide as of January 2024, Ranked by Number of Monthly Active Users*, STATISTA (Jan. 2024), https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users.

[143] *See Digital News Fact Sheet*, PEW RSCH. CTR. (July 23, 2019), https://www.journalism.org/fact-sheet/digital-news; Peter Suciu, *More Americans Are Getting Their News From Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), https://www.forbes.com/sites/petersuciu/2019/10/11/more-americans-are-getting-their-news-from-social-media/#e1aee33e1791.

[144] *Social Media and News Fact Sheet*, PEW RSCH. CTR. (Nov. 15, 2023), https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet.

[145] Jacob Liedke & Jeffrey Gottfried, *U.S. Adults Under 30 Now Trust Information from Social Media Almost as Much as from National News Outlets*, PEW RSCH. CTR. (Oct. 27, 2022), https://www.pewresearch.org/short-reads/2022/10/27/u-s-adults-under-30-now-trust-information-from-social-media-almost-as-much-as-from-national-news-outlets.

[146] Cal. Civ. Code § 1708.86(a)(7), (b); N.Y. Civ. Rts. L. § 52-c(2)(a).

[147] 740 Ill. Comp. Stat. Ann. 190/10(a).

[148] Cal. Civ. Code § 1708.86 (b) (providing a civil cause of action when one "creates and intentionally discloses sexually explicit material"); N.Y. Civ. Rts. L. § 52-c(2)(a) (providing a cause of action against one who "discloses, disseminates or publishes sexually explicit material related to the depicted individual" and knows or should have known "the depicted individual in that material did not consent to its creation, disclosure, dissemination,

and victims want their deepfakes removed from the Internet.[149]

While deepfake dissemination is a general problem, online platforms that host user-generated deepfakes can be separated into three broad groups: those who try to actively limit deepfakes, neutral or under-resourced platforms, and those that are actively assisting the proliferation of deepfake content. First, some platforms—generally the largest, such as Facebook, Instagram, and TikTok—have already started to create anti-deepfake policies *sua sponte*.[150] These and other major platforms also have policies and sometimes takedown procedures for nonconsensual intimate images.[151] They may have also introduced design choices to help reduce misinformation, such as disallowing the sharing of unclicked links.[152] As Kate Klonick has explained, even in the absence of legal obligations, platforms sometimes have market incentives to remove problematic content such as hate speech.[153] Powerful actors can be particularly persuasive. For example, UMG was able to pressure TikTok to enact more robust anti-deepfake music practices by pulling its catalog from the platform in January 2024.[154] Of course, most individuals likely cannot muster that level of influence by themselves.

In the middle are other, often smaller platforms, which can also contribute to the dissemination of deepfakes but often lack the same robust policies. This is usually due to lacking resources and market pressures because they appeal to smaller audiences.

Finally, on the other side are platforms who actively traffic in deepfakes. For example, deepfakes feature prominently on pornography websites.[155]

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or publication"); 740 Ill. Comp. Stat. Ann. 190/10(a) (providing a cause of action from the intentional dissemination or threatened dissemination of the "digitally altered sexual image without the depicted individual's consent").

[149] CITRON, *supra* note 33, at 135.

[150] *See, e.g.*, Monika Bickert, *Enforcing Against Manipulated Media*, META (Jan. 6, 2020), https://about.fb.com/news/2020/01/enforcing-against-manipulated-media (describing Meta's efforts against manipulated media, including deepfakes); *Integrity and Authenticity*, TIKTOK (Apr. 17, 2024), https://www.tiktok.com/community-guidelines/en/integrity-authenticity ("We do not allow synthetic media that contains the likeness of any real private figure.").

[151] The Cyber Civil Rights Initiative ("CCRI") has a helpful list of platforms' image-based sexual abuse policies and removal procedures. *Get Help Now*, CCRI, https://cybercivilrights.org/ccri-safety-center/#online-removal (last visited Dec. 18, 2024).

[152] *See* PROSOCIAL DESIGN NETWORK, https://prosocialdesign.org (last visited Apr. 17, 2025) (summarizing various prosocial design choices platforms may take).

[153] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speec*h, 131 HARV. L. REV. 1598, 1625–30 (2018).

[154] Dan Milmo, *Universal Signs TikTok Deal Allowing Artists Back on Platform*, GUARDIAN (May 2, 2024, 10:43 AM), https://www.theguardian.com/music/article/2024/may/02/universal-signs-tiktok-deal-allowing-artists-back-on-platform.

[155] CITRON, *supra* note 33, at xv.

Deepfake platforms such as MrDeepFakes receive millions of monthly visitors.[156] The number of such platforms is far from negligible. In 2020, there were at least 9,500 websites dedicated to nonconsensual intimate images.[157] Deepfakes may migrate from good actor platforms to these more nefarious ones.

Yet the law currently fails to incentivize anti-deepfake practices and policies in our online ecosystem, even though most online platforms that host deepfakes have the technical capacity to staunch their flow across the web. Once informed of specific deepfakes, platforms can remove them, curtailing their dissemination. This is a much quicker process than filing litigation against the creator or poster of deepfakes, which could take years to resolve. By that time, the damage to the victim's dignity will have been done. And even a successful lawsuit cannot stop the already disclosed image from continuing to circulate.[158] In fact, requiring litigation could preserve a public record of the contested images in court filings.[159] Litigation is also expensive. In the NCII context, Citron and Franks noted that most victims lacked the resources to bring civil suits against the perpetrators of NCII.[160] The same is true for deepfake litigation.

II. THE HISTORICAL ANALOGY OF THE RIGHT OF PUBLICITY

Despite the terrifying prospect of increasingly realistic deepfakes being spread across the Internet and inflicting their associated dignitary harms, the specter of technology and modern society circumscribing one's control of their image is not novel. Over a century ago, a similar historical moment spurred the emergence of the right of publicity. In 1890, Samuel Warren and Louis Brandeis (the future U.S. Supreme Court justice) wrote their canonical 1890 *Harvard Law Review* article, "The Right to Privacy." They described the need for the new, titular right—which would ultimately become the right of publicity—in response to the twin concerns of the portable camera and mass media.[161] Although the right of publicity is often thought of as preventing commercial uses of one's likeness, the original right was concerned with both commercial *and* dignitary harms, stemming from dissemination of one's likeness. The origins of the right of publicity offers

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[156] Kat Tenbarge, *Found Through Google, Bought with Visa and Mastercard: Inside the Deepfake Porn Economy*, NBC NEWS (Mar. 27, 2023, 11:56 AM), https://www.nbcnews.com/tech/internet/deepfake-porn-ai-mr-deep-fake-economy-google-visa-mastercard-download-rcna75071.

[157] CITRON, *supra* note 33, at 71.

[158] Citron & Franks, *supra* note 66, at 349, 358.

[159] Candeub, *supra* note 18, at 1784–85.

[160] Citron & Franks, *supra* note 66, at 358.

[161] Warren & Brandeis, *supra* note 13, at 195–96.

insights into how to address our own new technology that replicates one's likeness and a method for its mass dissemination: AI-generated deepfakes and the Internet. While deepfakes go beyond the fixation of actual events because they are fabricated, the underlying concerns about an image-creating technology and the dissemination of images are analogous. This makes the right of publicity a particularly attractive historical model for understanding how to use the law to counter deepfakes. In particular, any proposal must consider both how to counter the dissemination of a deepfake as well as address its dignitary harm.

The right of publicity has its origins in the development of the right of privacy at the end of the nineteenth century.[162] While today we think of privacy as a right associated with everything from contraception to data privacy, the right to privacy that first emerged was more circumscribed. One particularly prominent area of concern was protecting against the unauthorized use of one's name and likeness. As leading right of publicity scholars Jennifer Rothman has remarked, the nineteenth and early twentieth century "right of privacy was the original right of publicity."[163]

While there were earlier proposals for a right to privacy, Samuel Warren and Louis Brandeis (the future U.S. Supreme Court justice) significantly expanded upon the hidden right in their canonical 1890 *Harvard Law Review* article, "The Right to Privacy," which articulated the need for the titular right.[164] One catalyst for the article was the increased risk to one's privacy from image-capturing technology.[165] The other was mass media.[166] Warren and Brandeis warned that, together, "[i]nstantaneous photographs and newspaper enterprise 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."[167] According to some, their work was sparked by concerns about the privacy of Warren's wife, the prominent daughter of a senator, and other members of the Boston bourgeoisie, the so-called Boston Brahmins.[168] However, the real catalyst for the article may have been protecting the

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[162] ROTHMAN, *supra* note 16, at 11; *see also* Eric E. Johnson, *Review of The Right of Publicity: Privacy Reimagined for a Public World*, 9 IP BOOK REV. 6, 7 (2019) (agreeing with the narrative).

[163] Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 COLUM. J.L. & ARTS 277, 279 (2019).

[164] Warren & Brandeis, *supra* note 13.

[165] *Id.* at 195.

[166] *Id.* at 196.

[167] *Id.* at 195.

[168] Amy Gajda, *What If Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy*," 2008 MICH. ST. L. REV. 35, 40.

identity of society's more marginalized. Warren worried that this troublesome pair of technology and the press would publicly out his closeted younger brother as gay.[169] To counter these growing threats to privacy, they proposed a right to privacy with remedies for infringements of the "general right of the individual to be let alone" in order to preserve an "inviolate personality."[170]

The technology that spurred Warren and Brandeis' concerns was the portable camera. George Eastman introduced the first commercially successful portable camera, the Kodak, in 1888.[171] Being in public spaces was never truly private, but the lack of ways to physically capture others' activities in public created a perception of privacy. The evolution of the camera from an unwieldly daguerreotype for professional portraitures to a compact, consumer-friendly product shattered this perception.[172] Kodak's slogan epitomized this fundamental shift in camera technology: "You press the button, we do the rest."[173]

The development of personal cameras that could be used surreptitiously stoked society's concerns about privacy at the end of the nineteenth century.[174] Warren and Brandeis were not alone in their fear that the technology invaded individuals' privacy. For example, an article published in the *Hawaiian Gazette* that same year warned,

> Have you seen the Kodak fiend? Well, he has seen you. He caught your expression yesterday while you were in recently talking at the Post Office. He has taken you at a disadvantage and transfixed your uncouth position and passed it on to be laughed at by friend and foe alike. His click is heard on every

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[169] See generally Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128 (2016).

[170] Warren & Brandeis, *supra* note 13, at 205–06.

[171] Alan McQuinn, *From Kodak to Google, How Privacy Panics Distort Policy*, TECH CRUNCH (Oct. 1, 2015, 5:00 PM), https://techcrunch.com/2015/10/01/from-kodak-to-google-how-privacy-panics-distort-policy; *see also* Nikola L. Datzov, *North Dakota's Path of Innovation: A Rich History and Promising Future*, 99 N.D. L. REV. 543, 546 (2024) (noting that North Dakotan David Houston developed a novel method to take pictures before Eastman).

[172] *See The Timeline of Evolution of the Camera from the 1600s to 21st Century*, CAPTURE (May 5, 2023), https://www.capture.com/blogs/insights/evolution-of-the-camera (discussing the evolution of the camera, including from the daguerreotype to the Kodak).

[173] Clive Thompson, *The Invention of the "Snapshot" Changed the Way We Viewed the World*, SMITHSONIAN MAG. (Sept. 2014), https://www.smithsonianmag.com/innovation/invention-snapshot-changed-way-we-viewed-world-180952435/?all.

[174] *See* Daniel Castro & Alan McQuinn, *The Privacy Panic Cycle: A Guide to Public Fears About New Technologies*, INFO. TECH. & INNOV. FOUND. 10–12 (Sept. 2015) (explaining the privacy panic cycle for the Kodak camera).

> hand. He is merciless and omnipresent and has as little conscience and respect for proprieties as the verist hoodlum. What with Kodak fiends and phonographs and electric search lights, modern inventive genius is certainly doing its level best to lay us all out bare to the gaze of our fellow-men.[175]

A few years later, a group in England formed a "Vigilance Association" whose sole purpose was the "thrashing of cads with cameras who go about in seaside places taking snapshots of ladies emerging from the deep."[176] Newly minted president Theodore Roosevelt similarly showcased his distrust for the camera when he accosted a boy trying to take his picture: "Trying to take a man's picture as he leaves a house of worship. It is a disgrace. You ought to be ashamed of yourself."[177] Across oceans, from the lowest to the highest in the land, the public panicked about the camera and its erosion of privacy.

While the camera was alarming, the growth of the press aggravated the risks to individuals' sense of privacy. Like with deepfakes, the magnitude of the harm was reflected in the twin threats of a new technology for creation and a method for mass dissemination. Fears expressed in the *Hawaiian Gazette* article were not of photos merely being taken, but of sharing them for all to see.[178] The end of the nineteenth century saw the rise of mass media newspapers and magazines along with so-called "muckraking," or the publishing of salacious stories to pique the interests of consumers.[179] Print news had existed for centuries since the invention of the printing press, but production was generally limited and was the prerogative of the literate. Several developments over the course of the nineteenth century fostered the emergence of a true mass media. First, while literacy was once the prerogative of the elite, by the late nineteenth century the vast majority of the U.S. populace was literate.[180] Second, technological innovations in printing presses allowed for quicker and cheaper production in the form of the penny press.[181] Third, with the ability to print tens of thousands of papers a day came

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[175] *Kodak Fiend*, *supra* note 2, at 5.

[176] Ronald R. Thomas, *Making Darkness Visible: Capturing the Criminal and Observing the Law in Victorian Photography and Detective Fiction*, *in* VICTORIAN LITERATURE AND THE VICTORIAN VISUAL IMAGINATION 134, 147 (Carol T. Christ & John O. Jordan, eds., 1995).

[177] Matt McFarland, *What Teddy Roosevelt's Angst Toward Photography Teaches Us About Technology*, WASH. POST (Sept. 10, 2015, 9:21 AM), https://www.washingtonpost.com/news/innovations/wp/2015/09/10/what-teddy-roosevelts-angst-toward-photography-teaches-us-about-technology/.

[178] *Kodak Fiend*, *supra* note 2, at 5.

[179] ROTHMAN, *supra* note 16, at 15.

[180] STEVEN PINKER, ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM, AND PROGRESS 236 (2018).

[181] WALLACE, *supra* note 3, at 156.

the need to sell as many. Journalism evolved to suit mass market tastes by adding a focus on scandal and sensationalism.[182] Photography circumscribed control over our own image, but this modern media network amplified the harm by spreading scandalous (and not so scandalous) photos far and wide.

Although economic harms occurred too, concerns about cameras and the press—and the desire for privacy—were especially rooted in a perceived harm to individuals' dignity.[183] Warren and Brandeis worried that sensitive secrets reserved for the home would be shared publicly.[184] Although there was a desire to preserve privacy, the harms are similar to those with deepfakes: a lack of control over one's self-presentation, reputational damage, and shame. Subjects of photographs felt that they suffered a dignitary harm because they had no control over whether or how their image could be used and disseminated.[185] Even less compromising photos, such as President Roosevelt leaving church, could potentially still inflict this sort of perceived dignitary harm. The *Hawaiian Gazette* warned readers how acquaintances would laugh at them slouching in a candid photo.[186] The Vigilance Association formed to stop photographers from snapping photos of women returning from a swim in the sea, presumably in a state of undress that would be improper in polite society and could reflect on their reputation.[187] Warren and Brandeis reasoned that "publicity" could lead to "mental pain and stress . . . far greater than could be inflicted by mere bodily injury."[188] All of these harms served to lessen others' esteem for the targeted individual, or at least the subject's own sense of self-esteem due to the embarrassment of having their photo taken and disseminated without their consent.

In response to these new types of dignitary (and economic) harms posed by portable cameras, new legal rights emerged. Existing legal remedies such as copyright and breach of contract could perhaps apply in the photographer's studio, but did not apply to the public photographing of an individual.[189] A new claim was needed to address these harms. This nascent right of privacy

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[182] *Id.*

[183] ROTHMAN, *supra* note 16, at 32–33; *see also* Danielle Keats Citron, *The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life*, 42 COLUM. J.L. & ARTS 383, 384 (2019) ("The emotional harm was at the heart of privacy, not financial loss.").

[184] Warren & Brandeis, *supra* note 13, at 196.

[185] *See* ROTHMAN, *supra* note 16, at 12–13 (describing how the camera ended the days of anonymity and "privacy"); Warren & Brandeis, *supra* note 13, at 200 (describing the need to protect one's ability to control "one's thoughts, communications, and sentiments").

[186] *Kodak Fiend*, *supra* note 2, at 5.

[187] Thomas, *supra* note 176, at 147.

[188] Warren & Brandeis, *supra* note 13, at 213–14; *see also* 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1:25 (2d ed. 2014) (remarking that Warren and Brandeis' theory "focus[ed] upon the affront to human dignity").

[189] Warren & Brandeis, *supra* note 13, at 208–11.

claim ultimately became the right of publicity. While later technological innovations implicated the right of publicity too,[190] the origins of the right of publicity provide the most instructive analogy to deepfakes.

As it turned out, the earliest privacy law cases involved nonconsensual uses of people's likenesses in a very particular context, on commercial products and advertisements.[191] For example, in the infamous case of *Roberson v. Rochester Folding Box Co.*, the New York Court of Appeals had to decide whether Franklin Mills Flour's reproduction of the likeness of Abigail Roberson on 25,000 lithographic advertisements was unlawful.[192] The court rejected Roberson's so-called "right of privacy," commenting that the legislature, not the court, was the proper venue for crafting a remedy.[193] While the claim might seem primarily economic, dissenting Judge John Clinton Gray, echoed Warren and Brandeis in describing the nonconsensual dissemination of one's likeness as an "act of invasion of the individual's privacy . . . possibly more formidable and more painful in its consequences than an actual bodily assault might be."[194]

Widespread outrage at the decision in *Roberson* led the New York legislature to pass a right of privacy law less than a year later in 1903.[195] This law, largely unchanged to this day, prohibits the use of a person's "name, portrait, picture, or voice . . . for advertising purposes [or] for purposes of trade" without that person's written consent.[196] Following New York's adoption of a right of privacy, courts and legislatures across the country started to recognize similar rights either under common law or by statute.[197]

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[190] *See, e.g.*, Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (mass manufactured products); Zacchini v. Scripps-Howard Broad., 433 U.S. 562 (1977) (video); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (television commercials); Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013) (videogames); In re NCAA Student-Athlete Name & Likeness Litig., 724 F.3d 1268 (9th Cir. 2013) (same); Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011) (social media).

[191] ROTHMAN, *supra* note 16, at 11.

[192] 64 N.E. 442, 442 (N.Y. 1902).

[193] *Id.* at 447–48.

[194] *Id.* at 450 (Gray, J., dissenting).

[195] According to Jennifer Rothman, the first right of publicity statute in the United States was likely an 1899 California law, but the law seems to have never been enforced and was repealed in 1915. ROTHMAN, *supra* note 16, at 19; Act of Feb. 23, 1899, ch. 29, 1899 Cal. Stat. 28 (codified at Cal. Penal Code § 258). Act. of May 22, 1915, ch. 459, 1915 Cal. Stat. 761.

[196] N.Y. CIV. RTS. LAW §§ 50–51; *see also* Michael Goodyear, *Transfixed in the Camera's Gaze:* Foster v. Svenson *and the Battle of Privacy and Modern Art*, 11 HARV. J. SPORTS & ENT. L. 41, 66 (2020) (describing how the statute has largely remained the same). New York did add a postmortem right in 2020, which has since been codified at § 50-F. *See New York*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/new-york (last visited Dec. 18, 2024).

[197] *See* ROTHMAN, *supra* note 16, at 25–27 (detailing the adoption of the right of privacy

Many of the early cases involved blatant misrepresentations that used one's likeness without compensation in ways that could harm the subjects' reputations.[198] For example, the Georgia Supreme Court explained, in the case that recognized the right of privacy in that state, "The knowledge that one's features and form are being used for such a[n unauthorized] purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him."[199] In both this case and *Roberson*, dignity interests—not just economic ones—were at stake. Dignitary and commercial harms can often overlap, such as images that damage one's reputation and lead to the need to move or lost employment opportunities.[200]

The right of privacy continued to expand and evolve over the course of the twentieth century. Over time, seeing one's photograph disseminated in the marketplace became more common and less shocking, no longer eliciting the same degree of dismay reflected in the *Hawaiian Gazette* or expressed by Judge Gray, Warren, and Brandeis.[201] Nonetheless, the desire to control the use of one's likeness remained. By 1940, fourteen states had recognized the right of privacy.[202] In the following decades, states and courts across the country continued to adopt this right.

Famous tort law scholar William Prosser helped foster this trend. In his influential 1941 treatise on tort law, William Prosser included the "right of privacy," describing it as the right to control "publicity given to [one's] name or likeness, . . . and the commercial appropriation of elements of his personality."[203] Prosser later expanded on the right of privacy in his prominent1960 *California Law Review* article, in which he divided the right of privacy into four different torts: intrusion upon seclusion, public disclosure

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in Virginia, Georgia, Kentucky, Missouri, Kansas, Louisiana, Missouri, New Jersey, and California); Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy,* 98 CALIF. L. REV. 1887, 1895 (2010) (noting that fourteen states recognized privacy torts by 1940, either in common law or statutory form).

[198] Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1170–71 (2006).

[199] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80 (Ga. 1905).

[200] *See, e.g.*, DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 7 (2014) (describing only homophobic bullying of a high school student, which inflicted dignitary harms but also forced his family to move towns).

[201] *See* ROTHMAN, *supra* note 32, at 34–35 (describing a gradual shift from people being "mortified when their image was used . . . [to] simply want[ing] to choose when and how their images appeared"); Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1119, 1125 (2013) (examining this socio-cultural shift in morality of advertising and mass consumption).

[202] Richards & Solove, *supra* note 197, at 1894.

[203] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1050 (1st ed. 1941).

of private facts, portrayal in a false light, and appropriation of name or likeness (i.e., the right of publicity).[204] This division later became canonical when the American Law Institute adopted it in the Restatement (Second) of Torts in 1977.[205] According to Benjamin Zipursky and John Goldberg, all four of these torts focus on dignity interests: "interfering unduly with how (and whether) others perceive them [and] how others imagine, think, and feel about them."[206]

During this time, the term "right of publicity" emerged for the first time in the case law. The Second Circuit's 1953 decision in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* was one of the first to explicitly refer to the right of publicity, as compared to the right of privacy or appropriation.[207] But, as Rothman has noted, "the right of publicity was really nothing new, and was simply a component of the right of privacy."[208] While some jurisdictions ultimately started to separately refer to the right of publicity and the misappropriation tort, many jurisdictions and scholars—including this author—treat them as synonymous.[209] The terminology for part of the right Warren and Brandeis identified has merely shifted over time to be called the right of publicity.

This original right of publicity offers an apt historical analogy for addressing today's deepfake problem. First, while the generation of one's image can potentially cause some harm, the primary concern is with the harms resulting from that image's dissemination. Second, the dissemination

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[204] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

[205] RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (AM. L. INST. 1977).

[206] Benjamin C. Zipursky & John C. P. Goldberg, *A Tort for the Digital Age: False Light Invasion of Privacy Reconsidered*, 73 DEPAUL L. REV. 461, 475 (2024).

[207] 202 F.2d 866, 868 (2d Cir. 1953).

[208] ROTHMAN, *supra* note 16, at 71. There were some unique aspects of the right of publicity that started to emerge in cases like *Haelan*, such as licensing. Dustin Marlan, *The Dystopian Right of Publicity*, 37 BERKELEY TECH. L.J. 803, 821 (2022). However, these changes to the doctrine do not affect its origins in Warren and Brandeis' right to privacy.

[209] *See* Post & Rothman, *supra* note 28, at 93–95 (explaining the history of the two claims and how they should be treated as variants of a single overarching right of publicity); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 902–03 (2017) ("treat[ing] appropriation (or misappropriation) and the right of publicity as one"); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) (referring to Prosser's misappropriation tort as the right of publicity); RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977) (treating the appropriation tort and the right of publicity as identical). *But see* Takhshid, *supra* note 17, at 1177–78 (arguing that after the 1960s, more courts started to treat misappropriation and the right of publicity differently, but admitting that today "the distinctions between the appropriation tort and the right of publicity remain imprecise" and referring generally to the "protection of identity" underlining both torts). Ben Sobel treats the two claims as distinct in an article on deepfakes, but therein lies the problem: economic harms and dignitary harms are improperly separated rather than considering how the uniform right can redress multifarious harms. Sobel, *supra* note 18, at 24–26.

of one's likeness without permission inflicts not only commercial harms, but also dignitary harms.

III. DOCTRINALLY AND CONCEPTUALLY INCOMPLETE CLAIMS

As with the historical portable camera and right of publicity analogy from 1890, addressing deepfake harms requires a legal claim that both doctrinally permits the restriction of dissemination and addresses the conceptual harms of deepfakes. However, most of the legal claims that have been proposed to address deepfakes either fail to restrict dissemination across the Internet or are a conceptual mismatch. Limiting online dissemination of deepfakes likely entails secondary liability claims, or causes of action that hold platforms liable for their users' (direct) torts or state law crimes. But Section 230 provides Internet service providers with a general safe harbor for their users' actions, preventing secondary liability for user-posted defamation, infliction of emotional distress, and other claims that seek to address dignitary harms.[210] Section 230 excludes intellectual property claims,[211] but copyright and trademark claims are conceptual mismatches for deepfakes' dignitary harms, limiting the effectiveness of their notice-and-takedown regimes for online platforms. Therefore, most existing anti-deepfake proposals are unlikely to provide sufficient recourse for the dignitary harms of deepfake dissemination due to these twin requirements, as summarized in Figure 1, and described in more detail in this Part.

Issues with Proposed Deepfake Claims		
Claim	**Dissemination Liability Limits**	**Conceptual Mismatch**
Defamation	Section 230	Requires falsity and (sometimes) malice
Intentional Infliction of Emotional Distress	Section 230	High bar of outrageousness
False Light	Section 230	Requires falsity and malice
NCII	Section 230	Usually do not address synthetic content
State Anti-Deepfake Laws	Section 230	N/A

[210] 47 U.S.C. § 230.
[211] 47 U.S.C. § 230(e)(2).

Issues with Proposed Deepfake Claims		
CSAM	N/A	Only children
FOSTA	N/A	High scienter requirement
Copyright Infringement	DMCA	Only for copyrighted works; must own copyright
Trademark Infringement	*Tiffany v. eBay*	Commercial use of identity as a trademark; commercial use in deepfake
Dilution	*Tiffany v. eBay*(?)	Limited to famous marks

FIGURE 1

A. Section 230, Torts, and Crimes

Liability shields for Internet platforms restrict the ability of the law to limit online dissemination of deepfakes. Dubbed "the twenty-six words that created the Internet,"[212] Section 230 of the Communications Decency Act provides two important liability shields. First, no interactive computer service is the "publisher or speaker" of any user-generated content.[213] Second, an interactive computer service is not liable for good faith efforts to restrict objectionable content (i.e., to moderate content).[214] According to its drafters, Senator Ron Wyden and former Representative Christopher Cox, Section 230 primarily intended to recognize the "sheer implausibility of requiring each website to monitor all of the user-created content that crossed its portal each day."[215]

Section 230 has defended platforms against a wide variety of tort claims, including defamation,[216] invasion of privacy,[217] offline product injuries,[218]

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[212] *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019) (describing the importance of Section 230 in the development of the Internet).

[213] 47 U.S.C. § 230(c)(1).

[214] *Id.* § 230(c)(2).

[215] Reply Comments of Co-Authors of Section 230 of the Communications Act of 1934, In re Matter of National Telecommunications and Information Administration Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act of 1934, No. RM-11862, 7–8 (F.C.C. Sept. 17, 2020).

[216] *See, e.g.*, Caraccioli v. Facebook, Inc., 700 F. App'x 588, 590 (9th Cir. 2017).

[217] *See, e.g.*, *id.*

[218] *See, e.g.*, Smith v. Airbnb, Inc., 504 P.3d 646, 652 (Or. Ct. App. 2021).

terrorism,[219] offline physical harms,[220] fraud,[221] negligence,[222] and doxing.[223] It therefore serves as a powerful shield for online platforms, leading to early dismissals of cases involving user-generated content.[224]

Several state tort laws—namely defamation, intentional infliction of emotional distress, false light, and anti-deepfakes—could restrict deepfakes in certain circumstances, but they are normatively inexact matches for deepfakes' dignitary harms and, regardless, Section 230 would prevent such claims against platforms for user-generated deepfakes. These types of torts harm an individual's "personality" interests—including reputation, honor, and emotional tranquility.[225] Defamation could potentially be a viable claim in certain circumstances, namely where the deepfake damages the subject's reputation through publishing or communicating false statements with a requisite mental state.[226] But, at least for public figures, defamation requires a finding of actual malice.[227] Defamation may also be less identifiable because the line between potentially actionable truth statements and lawful opinion is murky.

Intentional infliction of emotional distress could be a possibility, as it requires outrageous conduct that caused the victim severe emotional distress. However, the Supreme Court curtailed the effectiveness of such a claim in 2011 by questioning the subjectivity of "outrageousness" and noting the significant bar of the First Amendment in many of these cases.[228] Deepfakes could also cause dignitary harms below this threshold of outrageousness.

Zipursky and Goldberg have advocated for the privacy tort of false light as a solution to deepfakes because it prevents highly offensive fabricated stories about the plaintiff.[229] Such a claim would, however, be limited by the

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[219] *See, e.g.*, Force v. Facebook, Inc., 934 F.3d 53, 71 (2d Cir. 2019).

[220] *See, e.g.*, Doe v. Grindr, Inc., Docket No. 2:23-CV-02093-ODW (PDx), 2023 WL 9066310, at *7 (C.D. Cal. Dec. 28, 2023).

[221] *See, e.g.*, Rodriguez v. OfferUp, Inc., 2019 WL 13247290, at *3 (M.D. Fla. Aug. 29, 2019).

[222] *See, e.g.*, Doe v. Snap, Inc., 2022 WL 2528615, at *13 (S.D. Tex. July 7, 2022).

[223] *See, e.g.*, Couture v. Noshirvan, No. 23-cv-340-SPC-KCD, 2023 WL 8280955 (M.D. Fla. Nov. 30, 2023).

[224] Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 39 (2019).

[225] Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 70 (2012).

[226] *See, e.g.*, Palin v. N.Y. Times Co., 940 F.3d 804, 809 (2d Cir. 2019) (listing elements for defamation under New York law).

[227] *Id.*

[228] Snyder v. Phelps, 562 U.S. 443, 451, 458 (2011).

[229] Zipursky & Goldberg, *supra* note 206, at 462. *But see* Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 369 (1989) (arguing that false light is a "conceptually empty tort" and free speech should mean "either severely restricting the doctrine of false light or rejecting it altogether").

requirements for falsity and actual malice.[230] Yet deepfakes inflict dignitary harms regardless of the degree of falseness or the creator's malice or lack thereof.

Beyond their conceptual limitations, Section 230 would prevent any successful claims against platforms for hosting user content that would qualify under any of these torts.[231] Therefore, regardless of their potential benefits, these claims' ability to restrict deepfake dissemination is hollow. Anti-deepfake laws seem to understand that these dignitary torts are incapable of addressing all the dignitary harms of deepfakes.[232]

Many states have also enacted NCII laws. NCII laws typically prohibit the dissemination of only actual photographs or recordings of an individual's intimate parts without their consent or do not address synthetic content.[233] States such as Illinois are starting to revise these statutes to also prohibit the dissemination of sexual deepfakes.[234] But state criminal laws cannot overcome the liability shield of Section 230 for platform liability.

Most recently, states have started to pass anti-deepfake laws, primarily aimed at sexual deepfakes, which are more promising, although they are usually limited to a specific type of deepfake.[235] Some states, such as California and Texas, have also adopted anti-deepfake laws for politicians prior to elections.[236] These laws are a bespoke match for countering deepfakes, but they often do not appreciate the harms that flow from the downstream dissemination of deepfakes or misunderstand the ambit of Section 230. Even if any of these more limited claims could succeed against the direct tortfeasor, the platforms that host the deepfakes would be immune from liability under Section 230.[237] Indeed, Section 230 likely preempts state

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[231] 47 U.S.C. § 230(c)(1).

[232] Sobel, *supra* note 18, at 17–24.

[233] *See, e.g.*, N.Y. PENAL LAW § 245.15 (requiring that a "still or video image was taken"); FLA. STAT. § 784.049 (covering "a sexually explicit image [even] taken with the person's consent"); ME. STAT. tit. 17, § 511-A (referring to "a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in a sexual act"); 15 U.S.C. § 6851 (referring to a "visual depiction" of someone's uncovered genitalia or display or transfer of bodily sexual fluids).

[234] *See, e.g.*, 740 ILL. COMP. STAT. 190/5 (referring to both private and "intentionally digitally altered sexual image[s]").

[235] *See "Deep Fake" or Synthetic Media Laws*, CYBER CIV. RTS. INITIATIVE, https://www.cybercivilrights.org/deep-fake-laws (last visited Dec. 18, 2024) (compiling current state deepfake laws).

[236] CAL. ELEC. CODE § 20010; TEX. ELEC. CODE ANN. § 255.004(d).

[237] *See, e.g.*, Poole v. Tumblr, Inc., 404 F. Supp. 3d 637, 640, 643 (2019) (immunizing Tumblr for user-posted nude photographs of the plaintiff); Caraccioli v. Facebook, Inc., 700 Fed. Appx. 588, 590 (9th Cir. 2017) (holding defamation claims barred under Section 230); Doe v. Grindr, LLC, No. 23-cv-193-JA-PRL, 2023 WL 7053471, at *1–3 (M.D. Fla. Oct. 26, 2023) (dismissing IIED claim under Section 230).

anti-deepfake laws that seek to require online platforms to remove deepfakes upon notice.[238]

Although Section 230 limits the effectiveness of these claims, it is not a universal shield. The statute carves out five areas of law from the confines of its safe harbor: federal criminal law, intellectual property law, state law consistent with Section 230, communications privacy law, and sex trafficking law.[239]

Criminal law and sex trafficking law could bear some fruit, but the relevant current law is limited in effect and current federal laws are not aligned with deepfakes' harms. For example, federal law prohibits the receipt, distribution, and possession of CSAM, which includes any content in which a minor engages in sexually explicit conduct not only as an act of sexual abuse, but also as a "collateral violation against the child's dignity."[240] The law prohibiting CSAM likely includes deepfakes so long as the AI-generated image is "indistinguishable" from an actual minor.[241] CSAM could be legally limited to actual images of specific children, but at least one prosecutor of AI-generated CSAM argued that the images were "realistic" without confirming whether they were of specific children.[242] But this law would only apply to sexual deepfakes of individuals under the age of eighteen, excluding other uses of deepfakes that also pose dignitary harms.

Another option is the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"). FOSTA could prevent deepfakes that further sex trafficking (although that is likely rare), but due to the high scienter requirement for the defendant, platforms would only be held liable in rare circumstances.[243] Indeed, Kendra Albert and their co-authors found

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[238] *See* Eric Goldman, *Court Enjoins California's Anti-"Political Deepfakes" Law (AB 2839) Because It's Unconstitutional Censorship–Kohls v. Bonta*, TECH. & MKTG. L. BLOG (Oct. 7, 2024), https://blog.ericgoldman.org/archives/2024/10/court-enjoins-californias-anti-political-deepfakes-law-ab-2839-because-its-unconstitutional-censorship-kohls-v-bonta.htm (explaining Section 230 preemption for California law AB 2655).

[239] 47 U.S.C. § 230(e). The fifth exception, sex trafficking law, was only added in 2018 with the passage of FOSTA-SESTA. *See* Kendra Albert et al., *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084, 1100–01 (2021) (explaining how FOSTA-SESTA affected Section 230).

[240] 18 U.S.C. § 2252(a); Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 216 (2001).

[241] 18 U.S.C. § 2256; *see also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002) (holding that the CPPA's ban on virtual child pornography is overbroad and unconstitutional).

[242] *Man Arrested for Producing, Distributing, and Possessing AI-Generated Images of Minors Engaged in Sexually Explicit Conduct*, OFFICE OF PUBLIC AFFAIRS DEPT. OF JUSTICE (May 20, 2024), https://www.justice.gov/opa/pr/man-arrested-producing-distributing-and-possessing-ai-generated-images-minors-engaged.

[243] *See* Does, No. 1-6 v. Reddit, Inc., 51 F.4th 1137, 1145 (9th Cir. 2022) ("[I]t is clear that FOSTA requires that a defendant-website violate the criminal statute by directly sex

the effects of FOSTA fairly marginal to date.[244]

Some scholars have advocated for further anti-deepfake criminal laws, which could be a helpful route.[245] However, such theoretical laws are typically targeted at the direct perpetrators rather than urging platforms to act. In addition, there are potential benefits of considering a civil claim approach, such as providing victims with greater control over when and how to prosecute the claim.

B. Federal Intellectual Property Claims

Another exception to Section 230—intellectual property—has been significant for online secondary liability.[246] In Section 230's stead, both copyright and trademark law have developed notice-and-takedown-based safe harbor regimes.

1. Copyright

The Digital Millennium Copyright Act ("DMCA") provides the online safe harbors for copyright law.[247] Codified as § 512 of the Copyright Act, the DMCA provides four distinct safe harbors for different types of online service providers.[248] To be eligible for any of the safe harbors, a service provider must meet two threshold requirements: (1) have, inform users of, and reasonably implement a repeat infringer termination policy, and (2) accommodate and not interfere with standard technical measures.[249] Each of the four safe harbors has slightly different additional requirements. The safe harbor that has garnered the most litigation is § 512(c), which is for user-generated content such as a Facebook post or an Amazon listing.[250] Section

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trafficking or, with actual knowledge, 'assisting, supporting, or facilitating' trafficking, for the immunity exception to apply. We agree with Representative Wagner that, as enacted, 47 U.S.C. § 230(e)(5)(A) retains only a limited capacity to accomplish its original goal of allowing trafficking victims to hold websites accountable.").

[244] Albert et al., *supra* note 239, at 1091.

[245] *See, e.g.*, *CCRI Welcomes Recent Calls for Federal Legislation Against Image-Based Sexual Abuse*, CCRI: CYBER CIVIL RIGHTS INITIATIVE (Mar. 7, 2025), https://cybercivilrights.org/ccri-welcomes-recent-calls-for-federal-legislation-against-image-based-sexual-abuse; Rebecca A. Delfino, *Pornographic Deepfakes: The Case for Federal Criminal Update of Revenge Porn's Next Tragic Act*, 88 FORDHAM L. REV. 887, 927–28 (2019).

[246] 47 U.S.C. § 230(e)(2).

[247] *See generally* 17 U.S.C. § 512.

[248] *See* 17 U.S.C. § 512(a)–(d) (providing safe harbors for transitory digital network communications, system caching, user-generated content, and information location tools).

[249] 17 U.S.C. § 512(i).

[250] A search of Westlaw on March 30, 2024, reveals the following number of results per

512(c) has a host of requirements for service providers in addition to the threshold requirements, including:

1. No actual knowledge that user-generated content is infringing;
2. No red flag knowledge that user-generated content is infringing;
3. Expeditiously remove infringing content once known (including in response to takedown notices);
4. Not both receive a direct financial benefit from the infringing content and have the right and ability to control it; and
5. Have a designated service agent to whom rights owners can submit takedown notices.[251]

At the heart of the § 512(c) safe harbor is a notice-and-takedown system, whereby a platform is required to remove content once it learns it is infringing. Under this system, a service provider is only obligated to remove infringing content once it knows it is infringing, it gains red flag knowledge that it is infringing, or a rights owner reports that it is infringing.[252] This structure is premised on the belief that it is infeasible for a platform to know by itself whether content is infringing, but that once a rights owner informs the platform, it is reasonable to require the platform to act.[253] A separate provision of the statute clarifies that a service provider need not proactively monitor for infringement.[254]

This is a sharp departure from Section 230, which provided a general liability shield that was not tied to knowledge.[255] The knowledge requirement, along with the other various DMCA requirements, make it more difficult to avail oneself of the § 512(c) safe harbor than Section 230. Nonetheless, like Section 230, the DMCA—and especially § 512(c)—protects online platforms from rampant liability for their users' infringements.[256]

Although copyright infringement claims may be viable against online

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each of the four safe harbors (e.g., "17 U.S.C. 512(a)"): 83 results for § 512(a), 13 results for § 512(b), 356 results for § 512(c), and 31 results for § 512(d).

[251] 17 U.S.C. § 512(c)(1)–(2).

[252] 17 U.S.C. § 512(c)(1)(A), (C).

[253] James Grimmelmann & Pengfei Zhang, *An Economic Model of Intermediary Liability*, 37 BERKELEY TECH. L.J. 1011, 1045 (2023).

[254] 17 U.S.C. § 512(m).

[255] *Compare* 47 U.S.C. § 230(c)(1) *with* 17 U.S.C. § 512(c)(1)(A), (C).

[256] In the copyright infringement context, I have termed these types of claims architectural infringement claims, which I address in an earlier work. *See generally* Michael P. Goodyear, *Infringing Information Architectures*, 58 UC DAVIS L. REV. 1959, 1970 (2025).

platforms and the DMCA would encourage ethe removal of infringing user-generated content, copyright law would likely only restrict deepfakes where the subject owns the copyright. Only a copyright owner can bring an infringement suit.[257] Likewise, only the rights owner or their representative can submit a legitimate takedown notice under the DMCA, making copyright law a limited tool.[258] It is possible that the subject of the deepfake is the owner of the photograph(s) the AI system used to generate the deepfake. Indeed, scholars such as Amanda Levendowski advocated for copyright being a potential limit on nonconsensual porn based on similar logic.[259] But unlike NCII, where the victim often took the nude or sexual photograph themselves and would own the copyright in that photograph,[260] deepfakes can be based on any content. This increases the odds that the photo was not taken by the subject of the deepfake but by someone else. It is also possible that the deepfake is a fair use, licensed, or otherwise non-infringing.[261] These shortcomings reflect the different goals of copyright law, which is primarily meant to encourage the creation of new expressive works and public access to those works, not address dignitary harms.[262]

2. Trademarks

Unlike copyright, which has a statutory safe harbor, the pseudo-safe harbor for user-generated trademark infringement gradually emerged in the courts. In 2010, the Second Circuit decided what is undoubtedly the most significant case for online secondary trademark infringement, *Tiffany (NJ) Inc. v. eBay, Inc.*, in which it incorporated a safe harbor of sorts into the common law. In that case, jewelry company Tiffany sued e-commerce platform eBay for user listings of alleged knockoff Tiffany rings.[263] Convinced by similar rationales to the DMCA, the court held that an Internet service provider can be held contributorily liable for trademark infringement only when it knows of specific instances of infringing content on its platform and fails to remove them.[264] Generalized knowledge of infringement

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[257] 17 U.S.C. § 501.

[258] 17 U.S.C. § 512(c)(3)(A)(i).

[259] Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, N.Y.U. J. INTELL. PROP. & ENT. L. 422, 426 (2014).

[260] *Id.* But not always. Waldman, *supra* note 110, at 722.

[261] *See* 17 U.S.C. § 107 (enumerating the fair use exception).

[262] *See* Goodyear, *supra* note 256, at 1972–73 (describing the normative goals of copyright law); *see also* Waldman, *supra* note 110, at 722 (noting that copyright law is not an adequate solution for NCII because it focuses on theft of property, not privacy invasions and dignitary harms).

[263] Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d 93, 101 (2d Cir 2010).

[264] *Id.* at 107.

somewhere on the platform, or the mere prospect of the platform being used for infringement, was insufficient.[265] Because eBay removed specific Tiffany-related content once it learned it was infringing, eBay was not contributorily liable.[266] Other courts have subsequently adopted similar rules to those in *Tiffany v. eBay*.[267] Like the DMCA, trademark law does not require platforms to affirmatively police for infringement.[268]

Unlike the rule-heavy DMCA, the *Tiffany v. eBay* safe harbor is fairly amorphous. Beyond the specific knowledge and removal requirement, the Second Circuit (and subsequent courts) have not defined what, if any, additional requirements should apply for federal and common law trademark infringements. There is no explicit repeat infringer policy requirement, notice and counternotice procedure, language around expeditious takedowns, or prohibition on having a right and ability to control and a direct financial benefit. Regardless of the exact confines of the safe harbor, in practice, *Tiffany v. eBay* has led service providers and platforms to adopt notice-and-takedown regimes.[269]

Trademark law and related rights under the federal Lanham Act or state law will likely only prevent commercial uses of deepfakes depicting one's likeness, and only if the subject previously used their likeness as a trademark.[270] To have a trademark in one's name or likeness, they must have used it in commerce and it must have become a source identifier for their goods or services.[271] To infringe that trademark, someone must then use it in

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[265] *Id.*

[266] *Id.*

[267] *See, e.g.*, Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144, 163 (4th Cir. 2012) ("It is not enough to have general knowledge that some percentage of the purchasers of a product or service is using it to engage in infringing activities; rather, the defendant must supply its product or service to 'identified individuals' that it knows or has reason to know are engaging in trademark infringement."); 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1252–53 (10th Cir. 2013) (citing *Tiffany v. eBay* and *Rosetta Stone v. Google*); Y.Y.G.M. SA v. Redbubble, Inc., 75 F.4th 995, 1002 (9th Cir. July 24, 2023) ("We hold that willful blindness for contributory trademark liability requires the defendant to have specific knowledge of infringers or instances of infringement.").

[268] *See Y.Y.G.M.*, 75 F.4th at 1002 ("Without that [specific] knowledge, the defendant need not search for infringement.").

[269] Graeme B. Dinwoodie, *Secondary Liability for Online Trademark Infringement: The International Landscape*, 37 COLUM. J.L. & ARTS 463, 478 (2014). For a study on how platforms have adopted notice-and-takedown policies and practices for trademark infringement in the absence of formal legal requirements, see Michael P. Goodyear, *Common Law Notice-and-Takedown*, 15 N.Y.U. J. INTELL. PROP. & ENT. L. 1 (forthcoming 2025).

[270] State trademark infringement claims would face similar hurdles. *See* Car-Freshner Corp. v. Meta Platforms, Inc., No. 22-CV-1305 (MAD/ML), 2024 WL 51286, at *3–4 (N.D.N.Y. Jan. 4, 2024) (requiring "use" in commerce for a New York common law trademark infringement claim).

[271] 15 U.S.C. § 1052(f).

commerce, such as in connection with the sale or advertising of a good or service, in a way that is likely to cause confusion.[272] There is a broader prohibition on false designations of origin and false endorsement under the Lanham Act which do not require trademark registration, but those claims still require a use in commerce and likelihood of confusion.[273] Under these requirements, trademark infringement or false endorsement could be a useful restriction for some deepfakes used in false advertising. However, these claims are unlikely to reach other uses such as sexual or lie-based deepfakes that rarely involve a use in commerce by their perpetrator. These shortcomings can partially be explained by the purpose of trademark law, which is supposed to identify the source of a good or service and avoid confusion thereof.[274]

The related dilution doctrine could restrict actions that impair the trademark's distinctiveness or bring it into disrepute, such as sex.[275] Dilution is closer to the dignitary torts because it relates to reputational damage. But dilution is limited to famous marks, excluding most victims of deepfakes, who may not even use their likenesses as marks in commerce, let alone use them enough to be famous.[276]

IV. THE RIGHT OF PUBLICITY EXCEPTION TO SECTION 230

Given the inadequacies of the proffered solutions discussed in Part III, we return to the right of publicity. The right of publicity could offer not just a helpful historical analogy to the harms of creating and sharing images with new technologies, but also a doctrinal solution that addresses both dissemination and the dignitary harms of deepfakes. This section addresses the doctrinal solution to dissemination, while Part V will address how the right of publicity is conceptually suited to address deepfakes' harms.

In between the immunity of Section 230 and the conceptual mismatches of copyright and trademark law lies the right of publicity. Today, the vast majority of states recognize the right of publicity by statute or common law.[277] The exact confines of the right of publicity vary by state. For example, some states restrict the right of publicity to commercial uses while others have a broader used to the defendant's "advantage" requirement.[278]

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[272] 15 U.S.C. § 1114(1).
[273] 15 U.S.C. § 1125(a).
[274] 15 U.S.C. § 1114(1)(a).
[275] 15 U.S.C. § 1125(c).
[276] *Id.* § 1125(c)(1).
[277] For a survey of this patchwork of states, see Jennifer Rothman's helpful website, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com (last visited Dec. 18, 2024).
[278] For example, New York requires a use of a likeness for advertising or trade purposes.

As explained below in Part IV.A., the right of publicity has increasingly been referred to in commercial terms and as intellectual property. Part IV.B. then explains that by embracing this dominant definition of the right of publicity as intellectual property, the right of publicity would fall within an exception to Section 230.[279] This could make platforms liable for users' misappropriation of one's likeness in deepfakes, which would pressure them to enact a similar notice-and-takedown structure to those for copyright and trademark infringement. Notice-and-takedown for right of publicity misappropriations can impose duties on platforms while avoiding some of the dangers of altering the protections of Section 230, which are important for maintaining the Internet ecosystem.[280]

A. The Intellectual Properitization of the Right of Publicity

Over time, commentators and courts started to pass over the privacy origins and dignitary justifications for the right of publicity. Instead, they increasingly referred to the right of publicity as a property right, specifically an intellectual property right.[281]

In 1954, the prominent intellectual property law scholar Melville Nimmer was one of the first to describe the right of publicity as a property right.[282] Nimmer did not begin the trend. For example, the previous year, the Second Circuit in *Haelan* described the right of publicity as providing a license to grant use of one's identity to a third party.[283] However, Nimmer accelerated the trend by advocating for recognizing the right of publicity as a property right that would address the concerns of Hollywood and Broadway.[284] While

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N.Y. CIV. RTS. LAW § 50. But California courts have recognized right of publicity claims for noncommercial speech so long as the likeness was appropriated for the defendant's "advantage." Browne v. McCain, 611 F. Supp. 2d 1062, 1069–70 (C.D. Cal. 2009). Even defining commercial value can vary. According to at least one court, the mere use of a person's identity may establish commercial value in California. Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 800 (N.D. Cal. 2011). But in Pennsylvania, you need to have "investment of time, effort, and money." 42 Pa. Cons. Stat. § 8316(e).

[279] 47 U.S.C. § 230(e).

[280] Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 103 (2018).

[281] Admittedly, some blame must lie with Warren and Brandeis themselves because even though they sought to disentangle the right to privacy from property, they sometimes referenced property-based terminology such as referring to "intrusion upon the domestic circle" and "a man's house as his castle." Warren & Brandeis, *supra* note 13, at 196, 220.

[282] Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 216 (1954).

[283] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868–69 (2d Cir. 1953); *see also* Marlan, *supra* note 208, at 821 (describing how the *Haelan* court described the right of publicity).

[284] *Id.* at 203, 216.

many courts had previously followed Warren and Brandeis' theory, some courts and commentators now started to look to Nimmer's property-based conception of the right of publicity instead.[285]

The transition was gradual, but the greatest sea-change occurred in the 1970s, when the Supreme Court heard its lone right of publicity case to date. *Zacchini v. Scripps-Howard Broadcasting* involved the broadcasting of the plaintiff's 15-second "human cannonball" act without his consent.[286] Although nominally placing Zacchini's right of publicity claim in Prosser's four privacy tort framework, the Court defined the right in relation to intellectual property law by analogizing to an incentive theory like that with copyright and patent law.[287] According to Rothman, *Zacchini* placed the right of publicity in the "pantheon of IP."[288]

Several scholars besides Rothman have likewise noted the growing trend of properitization of the right of publicity. As Sheldon Halpern argued in the mid-1990s, "[f]orty years of judicial and legislative effort have produced a coherently defined and rather clearly enumerated independent right of publicity protecting the economic associative value of identity."[289] Alice Haemmerli similarly observed that "[b]oth proponents and critics of the right of publicity generally perceive it [inaccurately] as a property right grounded in Lockean labor theory."[290] The right of publicity became, in the words of Dustin Marlan, an "image-as-object capable of being owned and transferred."[291]

Following *Zacchini*, some state legislatures started to explicitly describe the right of publicity as a "property" right in the statute.[292] For example, take the history of the right of publicity in Tennessee. In 1980, shortly after *Zacchini*, the Sixth Circuit declined to find a postmortem right of publicity in a case involving Elvis Presley, holding that "the common law has not heretofore widely recognized this right to control commercial publicity as a property right which may be inherited."[293] Two decades later, however, the Sixth Circuit acknowledged "the weight of authority" that the right of publicity "reflect[s] property rights, as opposed to dignitary rights."[294]

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[285] J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1704 (1987).

[286] 433 U.S. 562, 563–64 (1977).

[287] *Id.* at 573.

[288] ROTHMAN, *supra* note 16, at 87.

[289] Sheldon W. Halpern, *The Right of Publicity" Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 869 (1995).

[290] Haemmerli, *supra* note 28, at 388.

[291] Dustin Marlan, *Unmasking the Right of Publicity*, 71 HASTINGS L.J. 419, 458 (2020).

[292] *See, e.g.*, KY. REV. STAT. ANN. § 391.170; TEX. PROP. CODE ANN. § 26.002.

[293] Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980).

[294] Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc., 270 F.3d 298, 325–26 (6th Cir.

Case law bears out this dominant relationship between right of publicity and property. In a prominent Tenth Circuit case, the court referred to the right of publicity as a "cognizable property interest" to protect the "full commercial value of [one's] identit[y]."[295] The Sixth Circuit described "[t]he right of publicity [as] an intellectual property right of recent origin . . . to control the commercial use of his or her identity."[296] Similarly, the Third Circuit explained that "the goal of maintaining a right of publicity is to protect the property interest that an individual gains and enjoys in his identity through his labor and effort."[297] The recent Supreme Court trademark decision in *Vidal v. Elster* also referred to one's name in terms of ownership and property, albeit in the trademark context.[298] This properitization shift in the case law is relatively recent. A search of Westlaw's case database shows that of 227 cases discussing the right of publicity within fifty words of intellectual property, courts decided 207 since 2000.

Statutes and courts continue to refer to the right of publicity as a property right rooted in economic interests. Some right of publicity statutes explicitly refer to rights of publicity as "property rights."[299] In a 2019 case involving an ownership dispute over the intellectual property of artist Bob Ross, the Eastern District of Virginia included Ross' right of publicity under the umbrella of intellectual property.[300] In a 2021 decision, the Eastern District of Missouri noted that "Missouri courts [still] treat the right of publicity like a property right."[301] That same year, the Third Circuit in *Hepp v. Facebook* described the right of publicity as an intellectual property right, relying in part on *Zacchini*.[302]

B. Evading Section 230

While federal copyright and trademark infringement are clearly excluded from the protections of Section 230, it is unclear how Section 230 relates to *state* law intellectual property claims, including the current incarnation of the right of publicity. The vast majority of states recognize a right of publicity, either by statute or under common law.[303] But Section 230 says, rather

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2000).

[295] Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 867–68 (10th Cir. 1996).

[296] ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 929 (6th Cir. 2003).

[297] Hart v. Elec. Arts, Inc., 717 F.3d 141, 151 (3d Cir. 2013).

[298] Vidal v. Elster, 602 U.S. 286, 302 (2024).

[299] *See, e.g.*, 765 ILL. COMP. STAT. 1075/15; Ariz. Rev. Stats. § 12-761(G).

[300] RSR Art, LLC v. Bob Ross, Inc., 380 F. Supp. 3d 510, 512 (E.D. Va. 2019).

[301] Phyllis Schlafly Revocable Trust v. Cori, 512 F. Supp. 3d 916, 926 (E.D. Mo. 2021).

[302] 14 F.4th 204, 213–14 (3d Cir. 2021).

[303] *See* Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 UC

generically, that "[n]othing in [Section 230] shall be construed to limit or expand any law *pertaining to intellectual property*."[304] The legislative history is silent on what "intellectual property" is intended to cover. This undefined terminology does not address whether the right of publicity—in any state or at large—should be considered an intellectual property right excluded from the confines of Section 230 or a non-intellectual property claim for which Section 230 should immunize service providers. Indeed, at least four courts have noted in dictum that it is uncertain whether state intellectual property claims fall within the exemption to Section 230.[305]

This ambiguity over what constitutes "intellectual property" has led to a growing division between courts that consider the right of publicity to be an intellectual property right for purposes of Section 230 and those that do not. On the one hand, some courts have barred right of publicity claims under Section 230 because they limit the exclusion to federal intellectual property laws or deem the right of publicity a non-intellectual property law. The Ninth Circuit has interpreted the term "intellectual property" to only mean "federal intellectual property."[306] Under this reading, the intellectual property exception would not include *state* intellectual property laws, including the right of publicity.[307] The Ninth Circuit justified this reading based on online content likely being viewable anywhere in the United States (indeed, the world), so allowing any particular state's definition of intellectual property to

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DAVIS L. REV. 199, 203 n.9 (2002) (detailing which states have recognized a right of publicity by statute and common law). For more details on specific states, Jennifer Rothman maintains information on each state's right of publicity statutes and jurisprudence. *See* ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com (last visited Dec. 18, 2024).

[304] 47 U.S.C. § 230(e)(2) (emphasis added).

[305] *See* Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1323 (11th Cir. 2006) ("Thus, while there appears to be no dispute that the right of publicity is a type of intellectual property right, Almeida argues that it is not clear from the statute that 'any law pertaining to intellectual property' includes claims based upon state intellectual property rights."); Stayart v. Yahoo! Inc., 651 F. Supp. 2d 873, 887–88 (E.D. Wisc. 2009) (citing *Almeida*, 456 F.3d at 1322); Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 163 n.13 (D. Mass. 2015) (noting that "[c]ourts also disagree as to whether state law intellectual property claims are exempted under section 230"); Obado v. Magedson, No. 13-2382 (JAP), 2014 WL 3778261, at *7 (D.N.J. July 31, 2014) ("Even if this Court were to assume that the CDA's intellectual exception applies to state law claims like the ones Plaintiff invokes, Plaintiff's argument fails as a matter of law.").

[306] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007); *see also* Perfect 10, Inc. v. Giganews, Inc., No. CV11-07098 AHM (SHx), 2013 WL 2109963, at *15 (C.D. Cal. Mar. 8, 2013) ("Accordingly, under *CCBill*, Plaintiff's state law [unfair competition] claims are preempted by the CDA."); Free Kick Master LLC v. Apple Inc., 140 F. Supp. 3d 975, 983 (N.D. Cal. 2015) (same); Lasoff v. Amazon.com Inc., No. C16-151 BJR, 2017 WL 372948, at *3 (W.D. Wash. Jan. 26, 2017) (same).

[307] *CCBill*, 488 F.3d at 1118–19.

dictate the contours of federal immunity would be contrary to Congress' express goal of insulating the growth of online platforms from various state-law regimes.[308] More recently, a court in the Southern District of New York held that Section 230 immunized platforms from right of publicity claims for their users' misappropriations under New York Civil Rights Law Sections 50 and 51 because they provide for "injury to the person not to the property," so the claim sounded in privacy, not intellectual property law.[309]

On the other hand, a growing number of courts reject the Ninth Circuit's interpretation and have instead held that right of publicity claims qualify as intellectual property for purposes of Section 230. For example, courts in the District of New Hampshire, Southern District of Ohio, and Southern District of Florida explicitly held that Section 230 does not apply to federal and state intellectual property laws, including the right of publicity.[310] Several other courts have also held that Section 230 excludes federal and state intellectual property claims, albeit in the context of unfair competition.[311] The First Circuit suggested that it agreed with these courts, stating in dicta that "claims based on intellectual property laws [including, in that case, state trademark dilution claims,] are not subject to Section 230 immunity."[312] Courts in the Western District of Tennessee and Central District of Illinois similarly concluded, in dicta, that a right of publicity claim should fall outside of Section 230 immunity because it pertains to intellectual property.[313] Most

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[308] *Id.* at 1118.

[309] Ratermann v. Pierre Fabre USA, Inc., 651 F. Supp. 3d 657, 668–69 (S.D.N.Y. 2023).

[310] *See* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 302 (D.N.H. 2008) ("§ 230(e)(2) applies simply to any law pertaining to intellectual property, not just federal law."); Ohio State Univ. v. Skreened Ltf., 16 F. Supp. 3d 905, 918 (S.D. Oh. 2014) (holding that Section 230's "immunity provision does not apply . . . in the context of a state law right of publicity claim"); Albert v. Tinder, Inc., No. 22-60496-CIV-COHN/STRAUSS, 2022 WL 18776124, at *11 (S.D. Fla. Aug. 5, 2022) ("At this juncture, the Court finds persuasive the reasoning of other jurisdictions that have applied the CDA intellectual property exception to state law claims, barring immunity from those claims.").

[311] *See* Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009) ("Section 230(c)(1) does not provide immunity for either federal or state intellectual property claims."); UMG Recordings, Inc. v. Escape Media Grp., Inc., 37 Misc. 3d 208, 217 (N.Y. Sup. Ct. 2012), *rev'd on other grounds by* 107 A.D.3d 51 (N.Y. App. Ct. 2013) ("This Court agrees that the word 'any' in § 230(e)(2) means what it says.").

[312] Universal Commn's Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422-23 (1st Cir. 2007).

[313] *See* Gauck v. Karamian, 805 F. Supp. 2d 495, 500 n.3 (W.D. Tenn. 2011) (assuming "that Plaintiff's publicity rights claim falls within the CDA's statutory exclusion for claims that arise from 'any law pertaining to intellectual property'"); Nieman v. Versuslaw, Inc., No. 12-3104, 2012 WL 3201931, at *8 (C.D. Ill. Aug. 3, 2012) ("Plaintiff's commercial misappropriation claims, which this Court has treated as claims under the Right of Publicity Act, would also likely be considered intellectual property claims and would therefore not be barred by the § 230 of the CDA."); *see also* Parisi v. Sinclair, 774 F. Supp. 2d 310, 318 (D.D.C. 2011) (noting in dicta that "I am not inclined to extend the scope of the CDA

prominently, the Third Circuit in *Hepp v. Facebook, Inc.* explicitly disagreed with the Ninth Circuit, holding that "a state law [including right of publicity claims, such as those at issue in the case] can be a 'law pertaining to intellectual property.'"[314] These courts were not as concerned about the state-by-state nature of the right of publicity. Indeed, despite differences between states' laws, the right of publicity shares broad consistencies across jurisdictions and courts would likely follow the rules of the most powerful jurisdictions anyway, as they tend to do in the data privacy context with fragmented state and national laws.[315]

If Section 230 no longer prevents platforms from facing liability for their users' misappropriations, it is likely they could be held secondarily liable. Unlike copyright and trademark law, there is little case law on secondary liability for right of publicity misappropriation. The seemingly lone platform case to squarely address this question is *Perfect 10, Inc. v. Cybernet Ventures, Inc.* In that case, the Central District of California recognized secondary liability-type claims for right of publicity misappropriation.[316] Cybernet had the requisite knowledge under California's right of publicity statute when it received notices from celebrities objecting to the uses of their likenesses or at least when it received the plaintiffs' complaint in the litigation.[317] But even if most courts have not addressed the question, as a general matter, courts interpret a statute to abrogate a common law principle such as secondary liability only if the statute "speak[s] directly to the question addressed by the common law."[318] For example, in a recent case involving Illinois' Biometric Information Privacy Act ("BIPA"), a court in the Northern District of Illinois denied an argument that secondary liability does not apply to BIPA, noting that under Illinois law, "[s]tatutes are to be construed in reference to the principles of the common law" and a desire to "abrogate the common law must be clearly and plainly expressed."[319]

While no statutory system such as the DMCA exists in the right of publicity context, a common law notice-and-takedown regime could emerge like that for federal and state trademark infringement in *Tiffany v. eBay*.

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immunity as far as the Ninth Circuit").

[314] Hepp v. Facebook, Inc., 14 F.4th 204, 212 (3d Cir. 2021).

[315] *See* Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 10–11 (2012) (describing the conditions for the European Union's influence on privacy law globally).

[316] 213 F. Supp. 2d 1146, 1184 (C.D. Cal. 2002).

[317] *Id.*

[318] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 35 (2d Cir. 2012) (quoting Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009)).

[319] Rogers v. BNSF Railway Co., No. 19 C 3083, 2022 WL 4465737, at *2 (N.D. Ill. Sept. 26, 2022) (quoting Carle Found. v. Dep't of Revenue, 917 N.E.2d 1136, 1146 (2009) and Bd. of Trs. of Cmty. Coll. Dist. No. 508 v. Coopers & Lybrand, 803 N.E.2d 460, 466 (2003)).

Trademark law also does not have a statutory safe harbor for platforms. Instead, the Second Circuit and other courts filled the gap in the law with decisions like *Tiffany v. eBay*, which provided for a common law notice-and-takedown regime.[320] The jurisdictions that held the right of publicity outside of Section 230 have not indicated what would be required of platforms to avoid (secondary) liability in these cases, especially since cases like *Hepp* have settled prior to a final determination on the merits.[321] Nonetheless, similarly to in *Tiffany v. eBay*, courts could create a common law notice-and-takedown system for right of publicity misappropriation. Once a platform is on notice that another is using the reporting party's likeness, they should remove it or risk being held liable. Trademark law has also rejected a rule requiring platforms to affirmatively police for infringement, which would likewise be helpful in the misappropriation context to balance obligations.[322] Although other obligations are more uncertain under common law, a benefit of relying on a common law regime is that it gives courts space to determine which requirements are optimal for achieving the goals of the right of publicity.[323] At the same time, platforms can leverage their existing infrastructures for copyright and trademark-related takedown notifications to reduce their compliance costs.[324]

Once notice-and-takedown exists, identifying and reporting misappropriations should not be an onerous process through deepfakes' social nature, online detection tools, and streamlined reporting procedures. First, individuals will often learn of deepfakes through their social circles.[325] Victims' networks act as an extension of their own eyes and ears, allowing them to become aware of misappropriations quicker. Second, individuals can also use free tools such as Google Reverse Image Search to find their likeness online.[326] Some individuals may even use emerging third-party services—certain of which offer free plans—to monitor and engage with platforms to get their deepfakes removed.[327]

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[320] Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 107 (2010).

[321] Kyle Jahner, *Meta, News Anchor Settle Precedent-Setting Publicity Rights Suit*, BLOOMBERG L. (May 24, 2023, 4:45PM), https://news.bloomberglaw.com/ip-law/meta-news-anchor-settle-precedent-setting-publicity-rights-suit.

[322] Y.Y.G.M. SA v. Redbubble, Inc., 75 F.4th 995, 1002 (9th Cir. 2023).

[323] Goodyear, *supra* note 269, at 16.

[324] *See id.* at 25 (describing copyright's notice-and-takedown regime and its relationship to trademark law).

[325] Presumably their descendants or representatives will have the right to pursue postmortem claims.

[326] *Reverse Image Search*, GOOGLE, https://sites.google.com/view/reverse-images/home (last updated 2024).

[327] *See, e.g.*, LOTI, https://www.lotiai.com (last visited Apr. 16, 2025). The availability of free plans reduces the likelihood of creating a two-tiered system where only wealthy individuals can obtain meaningful protection. Chinmayi Sharma, Thomas E. Kadri & Sam

Third, most platforms also do not require much information to report infringing content in the copyright or trademark context. Platforms primarily require contact information and sufficient information to identify the alleged infringement.[328] Takedown notices for right of publicity violations would likely share major similarities.[329] Differences between notice-and-takedown requirements can prevent scalability.[330] However, in the trademark context, certain best practices seem to be emerging through institutional isomorphism.[331] In addition, platforms may join together to create a single framework for sharing information, reducing the need for victim action and allowing the platforms to more easily identify misappropriations across their respective services.[332] Furthermore, while copyright and trademark owners have complained about the whack-a-mole nature of notice-and-takedown,[333] the framework has resulted in millions of successful takedowns by encouraging platforms and rights owners to work together to identify and stop infringements.[334]

A benefit of a common law notice-and-takedown regime is that it could look to platforms' capabilities rather than completely mimic the DMCA or *Tiffany v. eBay* regimes. For example, while knowledge would still be the crux of liability in the first instance, platforms could be obligated to impose filtering technologies or other best available technologies to prevent the same misappropriated image from reoccurring on their platform.[335] Proactive filtering for any images bearing an individual's likeness could result in overzealous removal of protected uses of individuals' likenesses, but cabining it to exact instances of reported deepfakes would mitigate this risk.

Adler, *Brokering Safety*, 114 CALIF. L. REV. __, 12 (forthcoming 2026).

[328] *See* 17 U.S.C. § 512(c)(3)(A).

[329] *See* Goodyear, *supra* note 269, at 28–30 (describing how notice requirements under trademark law often track those for copyright infringement notices).

[330] Sharma, Kadri & Adler, *supra* note 327, at 12.

[331] Goodyear, *supra* note 269, at 31.

[332] For example, several platforms use the STOP Non-Consensual Intimate Image Abuse (STOP NCII) database to identify and even proactively block NCII. *How StopNCII.org Works*, STOPNCII.ORG, https://stopncii.org/partners/industry-partners.

[333] *See, e.g.*, David Newhoff, *Activists Promote Revisionist History of DMCA*, ILLUSION OF MORE (Aug. 23, 2016), https://illusionofmore.com/activists-revisionist-history-dmca.

[334] *See About Us*, LUMEN, https://lumendatabase.org/pages/about (last visited Jan. 20, 2025) ("Our database contains millions of notices, many of them with a valid legal basis.").

[335] *See* Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1217 (2011) (proposing a "best available technology" standard for platforms to counter copyright infringements on their websites). Proposed digital replica legislation would require removing or disabling access to all other current or future instances of the reported work through use of digital fingerprinting. NO FAKES Act, S. Rep. ___, § 2(d)(1)(B)(ii)(II) (2025). The enacted TAKE IT DOWN Act instead requires platforms to "make reasonable efforts to identify and remove any known identical copies" of intimate visual depictions. S. 146 § 3(a)(3)(B), 119th Cong. (2025).

Removing non-infringing content is a concern in the DMCA context, where filtering is unlikely to properly consider free speech protections such as fair use.[336] The specter of liability will encourage platforms to be overzealous in removing reported misappropriations. This has led platforms to generally remove content first and ask questions later, if at all.[337] Similarly, deepfake detection tools are often inaccurate.[338] However, the risk of removing bona fide protected speech is somewhat less pronounced when the platform is aware of a misappropriative deepfake and only filters identical matches rather than trying to identify all content containing one's likeness. Once a specific image is known to be a harmful deepfake, all future matches for that exact image could confidentially be removed without impinging upon speech. Removal of edge-cases such as news reporting in the deepfake context may even be acceptable or appealing given their harms to victims and capacity to sow misinformation.[339]

Recognizing the right of publicity as intellectual property for right of publicity purposes therefore offers a promising solution for imposing platform liability for user-generated deepfakes. Although not a universal rule, platforms tend to block content only where there is a real risk of liability.[340] The right of publicity can offer such a risk due to fitting outside of Section 230's immunities because of its current conception as intellectual property. The right of publicity would require platforms to remove deepfakes under a common law notice-and-takedown regime or face liability for the misappropriation of victims' likenesses.

Others have advocated for broader reforms to address deepfakes and other modern content moderation ills. Some scholars, including Citron, have advocated for amending Section 230 to address image-based harms.[341] Others on both sides of the political aisle have advocated for amending or ending

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[336] Dan L. Burk, *Algorithmic Fair Use*, 86 U. CHI. L. REV. 283, 285 (2019).

[337] *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2314 (2014) ("If a private party alleges that the intermediary is hosting content that infringes the party's copyrights, the intermediary must promptly remove it or risk liability. Thus, intermediaries still have incentives to take down content that is protected by fair use and the First Amendment.").

[338] Simiao Ren et al., *Do Deepfake Detectors Work in Reality?*, ARXIV 4–5 (Feb. 15, 2025), https://arxiv.org/pdf/2502.10920.

[339] *See infra* Part V.2.

[340] CITRON, *supra* note 33, at 27.

[341] *Id.* at 149–51; Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46 (2020); Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J. F. 475, 484–85 (2022). *But see* Klonick, *supra* note 153, at 1625–30 (explaining that platforms sometimes have market incentives to remove harmful content, even absent legal obligations).

Section 230 altogether.[342] Indeed, across the United States, there is growing anger about Section 230 not sufficiently incentivizing platforms to do what they can to prevent harms through content moderation.[343]

Recognizing the right of publicity as intellectual property would offer a more cautious approach to Section 230 reform than wholesale destruction. Despite valid concerns about content moderation in the twenty-first century, Section 230 has helped foster the modern Internet and its many advantages.[344] Reform to Section 230 requires care and should not be contemplated where existing tools would already work. The right of publicity offers such a tool. While state laws in the Internet space have been criticized for lacking technical sophistication,[345] state courts have applied right of publicity laws for, in some cases, over a century and do not require technical sophistication about deepfakes to apply them in these cases. Indeed, relying on existing law avoids the issue of states, or potentially Congress, trying to adopt a bespoke anti-deepfake law but failing to account for all the necessary nuances.

Furthermore, any reform to Section 230 would require Congressional agreement, which is unlikely in the current political climate. Despite congressmen proposing many bills advocating for reforming Section 230 during the Biden Administration, none advanced very far. It is unlikely they would fare much better under the second Trump Administration. The right of publicity is an undertheorized possibility that would help address the liability gap between Section 230 and intellectual property laws without legislative change or remaking the entire liability landscape upon which the modern Internet is based.

V. RESTORING DIGNITY TO THE RIGHT OF PUBLICITY

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[342] Mike Masnick, *House Republicans Introduce Ridiculous, Contradictory, Unconstitutional Package of 32 Bills About Section 230 and Content Moderation*, TECHDIRT (July 29, 2021, 9:25 AM), https://www.techdirt.com/2021/07/29/house-republicans-introduce-ridiculous-contradictory-unconstitutional-package-32-bills-about-section-230-content-moderation; Shannon Bond, *Democrats Want to Hold Social Media Companies Responsible for Health Misinformation*, NPR, https://www.npr.org/2021/07/22/1019346177/democrats-want-to-hold-social-media-companies-responsible-for-health-misinformat (last updated July 22, 2021, 3:59 PM).

[343] Quinta Jurecic, *The Politics of Section 230 Reform: Learning from FOSTA's Mistakes*, BROOKINGS (Mar. 1, 2022), https://www.brookings.edu/articles/the-politics-of-section-230-reform-learning-from-fostas-mistakes.

[344] *See generally* KOSSEFF, *supra* note 212.

[345] *See, e.g.*, Blake E. Reid, NetChoice *and Telecom Law's First Amendment*, 59 UC DAVIS L. REV. __, 9 (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5168834 (proposing that the Supreme Court in *Netcom* struggled to respond to "state legislatures often clumsily seeking to fill the [telecom policy] void left by the federal policymaking apparatus").

Despite these doctrinal and pragmatic advantages to the right of publicity, it faces a significant hurdle in the commercial use requirement that many jurisdictions require. The exact elements of a right of publicity claim can vary somewhat due to their state-specific nature. However, at a general level, a right of publicity claim requires: (1) the defendant to have used the plaintiff's identity; (2) for the defendant's (commercial) advantage; (3) without consent; and (4) with a resulting injury.[346] The greatest variation is for the second element. Some jurisdictions require a commercial use, while others more broadly refer to a benefit or advantage, whether commercial or otherwise.[347]

Yet the right of publicity need not be so limited. The original right of publicity—which, as explained in Part II, emerged from a similar historical moment in technology to today's AI-generated deepfakes and the Internet—was meant to address both commercial and dignitary harms. Part IV.A. showed how the right of publicity's dignitary purpose started to recede in the mid to late twentieth century, by which time it was increasingly (and somewhat troublingly) referred to only as an economic right in the guise of intellectual property. Scholars have advocated for restoring the right of publicity's dignitary purpose, but largely without success.

This Part explains that the harms of deepfakes provide a particularly promising opportunity for such a restoration of the right of publicity's dignitary purpose.[348] In turn, this Part explains how the dignitary purpose of the right of publicity has retreated, why commercial use should not be an absolute requirement for right of publicity violations, how First Amendment interests are less salient in the deepfake context, and how the discussions in this Article may better inform current debates in Congress about regulating deepfakes.

A. The Right of Publicity's Lost Dignity

As explained in Part II, preserving one's dignity, along with providing recourse for economic injury, was a core justification for the right of publicity and the right of privacy from which it emerged. However, as the right became increasingly associated with intellectual property, it started to be increasingly referred to in economic terms alone. Being classified as intellectual property law by itself does not necessarily harm the right of publicity's ability to

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[346] *See, e.g.*, Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998).

[347] *Compare id.* ("the appropriation of plaintiff's name or likeness to defendant's advantage") *with* N.Y. CIV. RTS. LAW § 50 (limiting the right to advertising or trade purposes); *see also infra* Parts IV and V.

[348] *See generally* Jessica Silbey & Woodrow Hartzog, *The Upside of Deep Fakes*, 78 MD. L. REV. 960 (2019) (proposing that deepfakes could break failing systems, providing an opportunity for repair).

address dignitary harms, since intellectual property can have both economic and dignitary goals.[349] Nonetheless, over the twentieth century courts used the intellectual property formulation of the right of publicity to increasingly emphasize its economic purpose to the exclusion of its dignitary one.[350]

Nimmer and *Zacchini* fashioned today's understanding of the right of publicity as an economic-focused intellectual property right.[351] Nimmer defended his property conception of the right of publicity in economic terms alone, describing how (in his view) celebrities were not worried about dignity-based harms, but economic control over their own persona.[352] In *Zacchini*, the Supreme Court based the right of publicity on a similar incentive theory to copyright and patent, "provid[ing] an economic incentive . . . to make the investment required to produce a performance of interest to the public."[353] Although it did not explicitly rely on Nimmer's work, by analogizing the right of publicity to intellectual property, the Court further distanced the right from its privacy law foundations.[354] Even more troublingly, the Court specifically noted that unlike other types of privacy torts, this case had "little to do with protecting feelings or reputation."[355]

Today, the right of publicity has been ensconced in judicial imagination as a right primarily concerned with economic harms.[356] While publicity rights have never been completely severed from their privacy roots, the connection has significantly weakened.[357] For example, a search of Westlaw's case database shows that while 227 cases discussed the right of publicity within fifty words of intellectual property, the word dignity only appeared in eleven of those decisions.

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[349] Gilden, *supra* note 280, at 71. *But see* Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. REV. 929, 977 (disagreeing with Gilden and arguing that copyright should be focused on the (economic) problems it was designed to solve due to the deleterious effects on speech broader copyright law could incur).

[350] *See* Dogan & Lemley, *supra* note 198, at 1181 n.94 ("[T]he current form of the right of publicity . . . has in fact moved away from concerns about human dignity and toward maximization of economic returns.").

[351] *See* McCarthy, *supra* note 285, at 1704 (describing the role of Nimmer); ROTHMAN, *supra* note 16, at 78–79 (describing the role of *Zacchini*).

[352] Nimmer, *supra* note 282, at 204.

[353] *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562, 576 (1977).

[354] *Id.* at 575–76.

[355] *Id.* at 573.

[356] ROTHMAN, *supra* note 16, at 71; Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 158; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 177 n.254 (1993).

[357] Jacoby & Zimmerman, *supra* note 28, at 1358; *see also, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1103 (9th Cir. 1992) (describing musician Tom Waits' "shock, anger, and embarrassment" at having a sound-alike voice used in a Doritos commercial).

This prevailing conception of the right of publicity as economically-driven intellectual property isolates it from its dignity-based origins and constrains our understanding of what the right can and should achieve. Economic harms were part of the original impetus for the right of privacy, as exemplified by the law New York passed in response to *Roberson*, which protected against unauthorized uses of one's likeness for advertising or trade purposes.[358] But Warren, Brandeis, and other commentators and courts also emphasized the dignitary harms caused by the use of one's likeness without their permission. As explained in the prior section, dignity was in the right of publicity from the start.[359] Over a century on, however, this goal of Warren and Brandeis has retreated.[360] This troubling, dignity-less state of affairs in right of publicity law largely remains the general framework across the United States.

B. Beyond Commercial Purpose

As explained in Part IV, a primary concern about the effectiveness of the right of publicity for restricting deepfake dissemination is that some states limit the claim to commercial or trade purposes. But the right does not have to be limited to its current economic conception, especially at common law. Part II discussed how, over a century ago, the right of publicity was originally intended to address not only economic harms, but also dignitary ones, such as individuals' privacy and reputations in society. Recognizing both types of harms is imperative for protecting the right of publicity against deepfakes.

This is not the first Article to advocate for a restoration of dignitary interests to the right of publicity. Rothman has argued that both the preservation of personal dignity and the prevention of economic harms should be treated as justifications for today's right of publicity.[361] She and Robert Post explained how embracing the right of publicity's dignitary interests could fill a gap in other dignitary torts such as defamation, emotional distress, and false light.[362] Before Rothman, Jonathan Kahn called for "bringing dignity back" to the right of publicity as early as 1999.[363] That same year, Haemmerli noted that the split of the right of publicity from the right of privacy caused it to lose a "crucial part of its raison d'être as a right based on, and protective of, personal autonomy."[364] More recently, Moosavian

[358] N.Y. CIV. RTS. LAW §§ 50–51.

[359] *See supra* Part II.

[360] CITRON, *supra* note 33, at xiii.

[361] ROTHMAN, *supra* note 16, at 181.

[362] Post & Rothman, *supra* note 28, at 124–25.

[363] Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 213–14 (1999).

[364] Haemmerli, *supra* note 28, at 408–09.

concluded that rights that are concerned with human dignity, such as the right of publicity, must provide some protection for self-presentation and social engagement for us to fully engage in our social roles on Goffman's figurate stage.[365] Several others have similarly found that dignity or similar interests should be the guiding consideration for the right of publicity.[366] Despite these exhortations, several scholars have admitted that we "likely cannot turn the ship around."[367]

There are still a few dignitary aspects that shine through right of publicity doctrine. The Restatement (Second) of Torts defines the tort of misappropriation broadly as "[o]ne who appropriates to his own use or benefit the name or likeness of another."[368] A comment clarifies that the benefit need not be a commercial one.[369] Rothman and Rebecca Tushnet have also noted that while the right of publicity is often thought to be limited to commercial uses, it has been successfully applied to non-commercial uses in some states.[370] California common law, for example, broadly prohibits using another's likeness for their "advantage, commercially or otherwise."[371] Furthermore, dignitary harms may also lead to economic harms. For example, intimate deepfakes inflict reputational harms but could also lead to lost employment opportunities due to the perceived connection to the synthetic image. Nonetheless, as shown in Part V.A., the dignitary interests of the right

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[365] Moosavian, *supra* note 127, at 543.

[366] *See* Kwall, *supra* note 356, at 155 ("Extending moral-rights protection [in copyright law] to personas, and thereby protecting the reputational and personality interests often at stake in right of publicity disputes . . . is constitutionally sound and would be doctrinally beneficial."); Jacoby & Zimmerman, *supra* note 28, at 1360 (describing how uses of one's likeness implicates personal dignity); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 PITT. L. REV. 225, 279 (2005) (finding a right of autonomous self-definition related to controlling uses of one's identity); Marlan, *supra* note 291, at 466 (emphasizing the need "for a recasting of the right of publicity's focus from commodity to intersubjectivity").

[367] Rothman, *supra* note 163, at 316; Barbas, *supra* note 201, at 1189.

[368] RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977).

[369] *Id.* at § 652C, cmt. c. ("[T]he defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness."). When Sobel proposed that the appropriation tort might be apt for deepfakes, he referred to "highly offensive" appropriations, but the prima facie right of publicity/misappropriation claim looks to benefit rather than offensiveness. Sobel, *supra* note 18, at 73–74. Furthermore, the Supreme Court severely limited the viability of claims based on conduct being "outrageous" (which is seemingly equivalent or worse than "highly offensive"), finding that the standard is often too subjective. Snyder v. Phelps, 562 U.S. 443, 458 (2011).

[370] ROTHMAN, *supra* note 16, at 87–88; Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 163 (2015).

[371] White v. Samsung Elecs. Am., Inc., 871 F.2d 1395, 1397 (9th Cir. 1992) (quoting Eastwood v. Superior Ct., 149 Cal. App. 3d 409, 417 (1983)).

of publicity have generally grown distant.

Although the right of publicity has become unmoored from its origins, there are several normative reasons to restore dignity as a consideration. The more general "advantage" requirement should be favored for deepfakes because an economic understanding of misappropriation cannot fully address dignitary harms, an emphasis on commerciality ignores the importance of control over one's likeness, the commerciality requirement would only favor the rich and famous, the choice of victim is intentional regardless of commercial use, and the dignitary harm to all victims are the same.

First, an economic understanding alone cannot redress dignitary harms. For example, Roberta Kwall has written that the maximum harm to an individual's persona is when the persona is appropriated in an objectionable context or for an objectionable purpose.[372] In these cases, monetary relief will not restore the victim because they involve dignitary harms rather than economic ones.[373] Atuahene's concept of dignity takings is also relevant, as it explains that financial remuneration is insufficient to remedy the harms of dehumanization and infantilization that accompany colonial property takings from minority groups.[374] More broadly, this highlights how an incomplete conception of harms can undermine the effectiveness of causes of action and remedies.[375] Similarly, separating the right of publicity from its dignitary origins can distort the law's ability to address appropriation's harms.

Second, treating the right of publicity as an economically-grounded intellectual property right while ignoring the dignitary interests inherent in the right also conflicts with the right's original purposes by ignoring the role of control. For example, Rothman and others have argued that there is a restriction on a fundamental right of liberty when an individual cannot control their own identity.[376] Several scholars, including Rothman, have criticized the right of publicity's characterization as intellectual property because that permits voluntary transfers and involuntary assignments of one's likeness

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[372] Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment and the Right of Publicity*, 50 B.C. L. REV. 1345, 1346 (2009).

[373] *Id.*

[374] ATUAHENE, *supra* note 131, at 34.

[375] *Id.*

[376] Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 209–17 (2012); *see also* McKenna, *supra* note 366, at 279–85 (postulating an interest in autonomous self-definition); David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 UC DAVIS L. REV. 1141, 1146 (2005) (arguing that "unchecked properitization portends a diminution of personal identity"). *But see* Jacoby & Zimmerman, *supra* note 28, at 1357, 1360–61 (questioning the appropriateness of "[t]he most fervent argument against allowing publicity rights to be forcibly sold . . . that these interests, to an extent not matched by other forms of intellectual property, implicate personal dignity, reputational interests, and human autonomy").

that undermine an individual's control over their persona.[377] This control is key for preserving dignity in both the right of publicity and deepfake contexts. This example is emblematic of a conflict between the right of publicity's origins in individual, dignitary rights and its current, legal incarnation as an economically-grounded intellectual property right.[378]

Third, limiting the right of publicity to commercial uses would protect famous individuals, but leave the vast majority of people unprotected. The right of publicity was possibly initially conceived as a way not just to protect the wealthy Boston Brahmins, but also marginalized persons, including Warren's gay brother, Ned.[379] Rothman and Anita Allen have convincingly argued that granting publicity rights only to famous individuals creates obvious inequities.[380] Thirty years ago, Michael Madow leveled a similar critique against such a limited conception of the right of publicity, arguing that the right "redistributes wealth *upwards*" and "confer[s] a source of *additional* wealth on athletes and entertainers."[381] The Supreme Court of Georgia noted this issue when it remarked that "[w]e know of no reason why a public figure prominent in religion and civil rights would be entitled to less protection than an exotic dancer or a movie actress."[382] The court held that the right of publicity applies to uses without permission and for financial gain "whether the person whose name and likeness is used is a private citizen, entertainment, or . . . a public figure."[383]

Expanding the right of publicity to all is especially important because deepfakes present a universal harm. Deepfakes do not just target celebrities. Middle school students, teachers, and other ordinary people have been victims of deepfakes. One deepfake-detection service recently recognized

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[377] *See, e.g.*, ROTHMAN, *supra* note 16, at 116–22 (describing normative issues with allowing the assignment or transfer of one's right of publicity); David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 122–23 (2005) (describing how this "property syllogism" has enveloped the right of publicity, with "property" expanding the right beyond its appropriate confines compared to a balancing of relevant policy interests); McKenna, *supra* note 366, at 279 (describing Kantian property theory an insufficient justification for the right of publicity and one's interest in controlling uses of their identity).

[378] *See generally* ROTHMAN, *supra* note 16, at 45–112 (describing the history of the development of the right of publicity, including the conflict between individual rights and intellectual property-like conceptions of the right).

[379] Colman, *supra* note 169, at 135.

[380] *See* Allen & Rothman, *supra* note 17, at 54 (describing equity and justification issues with extending postmortem publicity rights to only mega-celebrities whose likenesses were used for commercial purposes).

[381] Madow, *supra* note 356, at 136–37 (emphasis in original).

[382] Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982).

[383] *Id.*

this reality, offering plans for everyone rather than just celebrities.[384]

Fourth, the right of publicity should not be constrained to merely commercial uses in light of the intentional targeting of victims with AI-generated deepfakes. The perpetrator's choice of a subject is not random, but a specific selection for use in deepfakes, whether for sex, lies, marketing, or any other purpose. The perpetrator is undoubtedly creating the deepfake of a specific person for some perceived benefit to themselves. This interest could be commercial, but it could also be, for example, prurient, vengeful, or anticompetitive.[385] Matthew Kugler and Carly Pace's study of opinions on deepfakes even found that respondents considered deepfakes of friends and private individuals worse than those of celebrities (which are more likely commercial).[386] These various personal benefits from creating deepfakes would seem to fit within the definition of more expansive rights of publicity such as California's common law right.[387]

Finally, the harms of AI-generated deepfakes affect all victims regardless of commerciality. Those who are well-known are the most likely to have their images commercially exploited. Other subjects—such as lesser-known artists and those whose fame only lasts for a short while—may have more limited commercial appeal that could be harder to prove.[388] However, AI-generated deepfakes have exacerbated harms across the board. People can easily make digital replicas of anyone from the most famous to the most reclusive. Sexual and lie-based deepfakes, in particular, can seriously harm one's dignity, regardless of the subject's fame or whether they are being used in connection with advertising or selling a good or service. On Goffman's figurative stage, everyone engages in dramatic realization to present and preserve their face and reputation in society.[389]

Government, interest groups, and academics also recognize the

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[384] Lauren Coates & Carolyn Giardina, *Deepfake Detection Firm Loti AI Expands Access for All Users*, VARIETY (Mar. 20, 2025, 8:00 AM), https://variety.com/2025/digital/news/loti-ai-deepfake-protection-announces-public-service-1236339546.

[385] *Cf.* Waldman, *supra* note 68, at 995 (reporting that perpetrators of NCII usually want something, whether money, to stay in a relationship, more photos, or simply to satisfy their passion or anger).

[386] Matthew B. Kugler & Carly Pace, *Deepfake Privacy: Attitudes and Regulation*, 116 NW. U. L. REV. 611, 644–45 (2021).

[387] Stewart v. Rolling Stone LLC, 105 Cal. Rptr. 3d 98, 111 (Cal. Ct. App. 2010) (requiring appropriation "to defendant's advantage, commercially or otherwise").

[388] *See* Howes, *supra* note 28, at 346 (2019) ("I hear from less famous performers about theft at jazz festivals, local tourist shops, and in local ads. Each successful artist has a market. It just might not be apparent to others that these markets may be smaller."); Kwall, *supra* note 372, at 1347 ("Today more than ever before, ordinary people have the opportunity to garner their so-called 'fifteen minutes' of fame.").

[389] GOFFMAN, *supra* note 72, at 13–22.

universality of these harms. The Copyright Office concluded that anti-deepfake measures should protect all individuals, not just famous people.[390] Similarly, the ELVIS Act amended Tennessee's right of publicity statute to generally provide liability for "mak[ing] available to the public an individual's voice or likeness, with knowledge that use of the voice or likeness was not authorized by the individual."[391] Unlike most right of publicity laws, commercial use and advertising are not mentioned.[392] In testimony at a U.S. Patent and Trademark Office roundtable on deepfakes, Recording Academy managing director Michael Lewan concluded that "[t]he proliferation of digital replicas goes beyond commercial harms and poses a threat to all individuals, regardless of level of fame."[393] The universal harms of deepfakes led Citron to propose broadening rights from protecting against only commercial uses to prohibit intimate privacy violations.[394] Although predating deepfakes, Mark McKenna similarly concluded others' unauthorized uses of one's identity—celebrity or not—can impose the same harm of recasting how others perceive them.[395]

Restoring the original conception of the right of publicity as protecting dignitary interests would expand the viable misappropriation claims deepfake victims could raise against online platforms. While the commercial use requirement would allow right of publicity claims involving deepfakes that are used for advertising purposes, it would exclude other harmful deepfakes, including most sexual deepfakes and those that espouse false beliefs. A more general "advantage" requirement would facilitate other right of publicity actions that would aim to protect one's dignitary interests rather than only their economic ones.

C. Navigating the First Amendment

Even if commercial use was not a requirement for misappropriation, the doctrine would—and should—still need to contend with the First Amendment. The First Amendment broadly protects free speech, even adult sexual imagery and lies.[396] This suggests that courts would likely not find

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[390] Copyright Office Report, *supra* note 20, at 30.

[391] ELVIS Act, TENN. H.B. 2091 § 6(a)(2); TENN. CODE ANN. § 47-22-1105.

[392] ELVIS Act, TENN. H.B. 2091 § 6(a)(2); TENN. CODE ANN. § 47-22-1105.

[393] Ivan Moreno, *Music, Movie Orgs. Address Deepfake Proposals*, LAW360 (Aug. 5, 2024, 7:51 PM), https://www.law360.com/sports-and-betting/articles/1853987/music-movie-orgs-address-deepfake-proposals.

[394] *See* CITRON, *supra* note 33, at 137 ("Under my reform agenda, the law would have to cover all intimate privacy violations, not just instances where an intimate image is used for commercial purposes.").

[395] McKenna, *supra* note 376, at 229.

[396] *See* Sable Commn's of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that

deepfakes to be categorically excluded from First Amendment protections.[397] A right of publicity law that ignores First Amendment limits would likely be unconstitutional. For example, a federal court in California recently enjoined a California state law, AB 2839, that broadly sought to prohibit election-related deepfakes.[398] The court found the law could broadly apply to "almost any digitally altered content" and was targeted at a particular type of content, political expression, which raised strict scrutiny.[399] The law likely violated the First Amendment because it was not narrowly tailored since it contravened constitutional "principles safeguarding the people's right to criticize government and government officials" by not properly considering "the longstanding tradition of critique, parody, and satire protected by the First Amendment."[400] By comparison, a court found no standing to enjoin a similar Minnesota election-related anti-deepfake law where the altered content at issue had prominent "parody" and "digitally generated" disclaimers, leading the court to conclude that no reasonable person would believe that the deepfake videos were truthful.[401]

There are different First Amendment obstacles for regulating content that is private and true, and that which is false. Deepfakes may implicate both categories, and this, at least in some circumstances, suggests weaker free speech protections for deepfakes.

First, private but truthful content can have lower free speech protections. In *Snyder v. Phelps*, for example, the Court emphasized that matters of purely private significance deserve less rigorous First Amendment protections.[402]

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sexual expression can be protected by the First Amendment); United States v. Alvarez, 567 U.S. 709, 718 (2012) (holding that false statements can be protected under the First Amendment).

[397] Chesney & Citron, *supra* note 98, at 1788; *see also* Thomas E. Kadri, *Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse*, 78 MD. L. REV. 899, 957 (2019) (providing examples of socially valuable deepfakes that should be protected, including educational and artistic uses). Although a thorough discussion is beyond the scope of this Article, it is possible that the heightened harms of deepfakes could lead a court to find deepfakes unprotected by the First Amendment, much like CSAM. New York v. Ferber, 458 U.S. 747, 765 (1982). However, courts have been skeptical of expanding this category. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002) (deeming a categorical ban on virtual CSAM unconstitutional, despite the ruling in *Ferber*).

[398] Kohls v. Bonta, No. 24-cv-02527 JAM-CKD, 2024 WL 4374134, at *8 (E.D. Cal. Oct. 2, 2024).

[399] *Id.* at *3

[400] *Id.* at *4–5.

[401] Kohls v. Ellison, No. 24-cv-03754-LMP-DLM, 2025 WL 66765, at *5 (D. Minn. Jan. 10, 2025).

[402] *See* Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) ("Speech on matters of purely private concern is of less First

Several state supreme courts have interpreted the standard in *Snyder* to likely provide lower free speech protections for nonconsensual pornography due to its highly personal nature and the substantial injuries it inflicts.[403] Two of those courts even suggested that nonconsensual pornography might be a good candidate for a categorical exclusion from First Amendment protections.[404] NCII cases have highlighted this lower interest too, as free speech concerns have retreated compared to privacy interests in those cases.[405]

In line with this precedent, synthetically fabricated deepfakes that relate to private matters—especially sexual deepfakes—could have lower First Amendment protections. Deepfakes are technically false because they portray a synthetic image of something that did not occur. However, the degree of falseness may vary depending on whether the deepfakes reflect actual images, events, or attributes. While it is not technically true, the content could nonetheless implicate information that we consider private, such as sexual encounters or clandestine meetings. For example, a deepfake could show a closeted teenage boy engaged in a sexual act with another boy, truthfully outing him as gay even if the act itself is fictious.

The First Amendment more robustly protects false content—which likely includes most deepfakes, even if they also implicate private matters—although the breadth of these protections have come into question in recent years. At present, falsity is protected under the First Amendment unless there is a limiting principle, such as for fraud or defamation.[406] In *New York Times Co. v. Sullivan*, the Supreme Court explained that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"[407] More recently, in *United States v. Alvarez*, a plurality opinion reiterated that "falsity alone may not suffice to bring the speech outside the First Amendment."[408] But the justices differed on what level of scrutiny should apply. The four-justice plurality opinion applied strict scrutiny to the Stolen Valor Act at issue as a content-based law.[409] Two justices believed

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Amendment concern"). However, this must be weighed against the public importance of the private information. *See* Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) ("In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance.").

[403] *See, e.g.*, State v. Casillas, 952 N.W.2d 629, 640 (Minn. 2020); State v. Van Buren, 214 A.3d 791, 810 (Vt. 2019); People v. Austin, 155 N.E.3d 439, 459 (Ill. 2019).

[404] State v. Van Buren, 214 A.3d 791, 807 (Vt. 2019); People v. Austin, 155 N.E.3d 439, 455 (Ill. 2019).

[405] Roni Rosenberg & Hadar Dancig-Rosenberg, *Revenge Porn in the Shadow of the First Amendment*, 24 J. CON. L. 1285, 1289 (2022).

[406] United States v. Alvarez, 567 U.S. 709, 723 (2012).

[407] 376 U.S. 254, 271–72 (1964).

[408] 567 U.S. 709, 719 (2012).

[409] *Id.* at 724.

intermediate scrutiny should apply, where a law might be constitutional if it regulates "a subset of lies where specific harm is more likely to occur."[410] The three-justice dissent thought a statute that "reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge" should be constitutional because the "right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."[411]

Since *Alvarez,* modern communication via the Internet has increased calls to reevaluate the protection of false information under the First Amendment. Others and I have argued that increasing dissemination of false information into the marketplace of ideas may necessitate a paradigm shift in how the First Amendment protects false content.[412] The marketplace of ideas rationale is based on the premise that ideas will compete and the market (i.e., the public) will ultimately accept the truth.[413] Yet the modern information ecosystem has become balkanized through filtered bubbles on social media and the Internet more broadly, allowing an increased flood of false information to persist and only be opposed, at best, by curtailed counterspeech.[414] Individuals should not have the right to control information about themselves due to First Amendment interests.[415] Nonetheless, the marketplace of ideas—especially its current online incarnation—benefits little from pure falsities.[416] Based on this understanding of deepfakes as undermining the marketplace of ideas, Franks and Waldman proposed greater deepfake regulation, explaining that deepfakes "are not ideas that can be simply countered with different and better ideas" and arguing that the "unchecked proliferation [of deepfakes] is completely at odds with a society

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[410] *Id.* at 736 (Breyer, J., concurring).

[411] *Id.* at 739 (Alito, J., dissenting).

[412] Michael P. Goodyear, *Priam's Folly:* United States v. Alvarez *and the Fake News Trojan Horse*, 73 STAN. L. REV. ON. 194, 197–202 (2021); *see also* Franks & Waldman, *supra* note 61, at 892 ("Whatever merit these claims may have had in the past, they cannot be sustained in the digital age."); Zipursky & Goldberg, *supra* note 206, at 486 ("Blind faith in the marketplace of ideas seems untenable in a world of ubiquitous and highly influential disinformation."); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 866 (2018) ("[D]emonstrable falsehoods were never part of the intellectual tradition of the metaphor. To include them now bastardizes the doctrine and erodes the very freedoms the First Amendment, as the constitutional manifestation of the marketplace of ideas metaphor, is meant to protect.").

[413] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[414] Michael P. Goodyear, *Queer Trademarks*, 2024 U. ILL. L. REV. 163, 186.

[415] *See* Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 195 (2015) (expressing that "celebrities *shouldn't* have general control over information about themselves").

[416] Zipursky & Goldberg, *supra* note 206, at 481 ("Normally the dissemination of truth is thought to have some inherent value. By contrast a pseudo-disclosure has none.").

that values the pursuit of truth."[417] Deepfakes can contribute to truth decay rather than promoting legitimate ideas to the public. In a similar vein that seems to recognize the dignitary harms of deepfakes, Cass Sunstein has argued that deepfake regulation could be consistent with the First Amendment where deepfakes are undisclosed and cause reputational injury to their subjects.[418] Although the doctrine is evolving, courts seem particularly inclined to enjoin uses of one's likeness where the defendant knowingly includes falsities in that representation, as compared to taking the raw materials of one's life.[419]

The image-based nature of deepfakes compounds these problems for traditional free speech justifications. Tushnet has explained that some courts have been cautious about recognizing images and other nonverbal media as "speech" protected by the First Amendment given that they do not work like words.[420] She found that it is more likely that misappropriation will be found when the defendant used only an image as compared to an image with surrounding words providing context.[421] Amy Adler has also observed that the First Amendment "offers greater protection for verbal as opposed to visual forms of representation," which is viewed as "peculiarly dangerous."[422] Indeed, images can be hard to refute with counterspeech; deepfakes "are not ideas that can simply be countered with different and better ideas."[423] Kugler and Pace's study also found that participants viewed deepfakes as more harmful than written stories describing the same actions.[424] These insights suggest that while image-based deepfakes can be evocative, their lack of words and potential to be manipulated may grant them lower protection under the marketplace of ideas rationale.

Within these broader First Amendment considerations, the right of publicity offers two advantages that may help ferry it through the straits of the First Amendment. First, it is subject matter agnostic because it treats all right of publicity violations equally. Second, the right of publicity already

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[417] Franks & Waldman, *supra* note 61, at 894–95.

[418] CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 117 (2021).

[419] *Compare* Spahn v. Julian Messner, Inc., 233 N.E.2d 840, 842 (N.Y. 1967) *with* De Havilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 860 (2018); *see also* SUNSTEIN, *supra* note 418, at 129–30 (arguing that creators of deepfakes act with an intentional state of mind, increasing the likelihood of deepfake regulation passing constitutional muster).

[420] Rebecca Tushnet, *Worth a Thousand Words*, 125 HARV. L. REV. 683, 698 (2012).

[421] Tushnet, *supra* note 370, at 164–65, 172.

[422] Amy Adler, *The First Amendment and the Second Commandment*, 57 N.Y.L.S. L. REV. 41, 42, 45 (2012/13).

[423] Franks & Waldman, *supra* note 61, at 895; *see also* SUNSTEIN, *supra* note 418, at 119 (describing deepfakes as having "a unique kind of authenticity; they are more credible than merely verbal representations").

[424] Kugler & Pace, *supra* note 386, at 639, 643–44.

contains built-in free speech protections in the form of balancing tests.

First, one advantage of using the right of publicity compared to laws such as AB 2839 is that it is subject matter agnostic. Anti-deepfake laws or laws such as FOSTA can restrict all related content, potentially restricting all deepfakes or sexual content even when they would properly be protected by the First Amendment. The right of publicity is less likely to chill a particular type of speech—whether sexual content, election endorsements, deepfakes, or any other category—due to it being a general purpose law that prevents the use for another's likeness for their own advantage.

Second, First Amendment safeguards for speech as criticism are already built into right of publicity doctrine through balancing tests. Courts typically employ a balancing test that considers the competing interests of the right of publicity and free speech in the instant case to avoid over- or under-protection. Courts have employed at least five different balancing tests to evaluate when First Amendment defenses should succeed in right of publicity cases.[425] One of the most prominent tests is a transformative use test, which is the most akin to copyright's fair use test.[426] When evaluating the constitutionality of copyright law, the Supreme Court accepted an expanded copyright term in part because copyright already had built-in free speech protections, including fair use.[427] Copyright law's fair use test considers commercial use as one of its factors,[428] and the right of publicity could similarly consider commercial use as a free speech consideration under its balancing tests rather than as a prima facie requirement for misappropriation. Nor, as shown by their diversity, are these tests static. Additional considerations may be added to help insulate the right of publicity from First Amendment challenges, such as considering the degree of harm (such as for sexual vs. opinion-based deepfake) or the intent of the misappropriator.[429]

Under these balancing tests, the abject falsification of information, the low social value of harmful deepfakes such as those for sex, lies, and marketing, and the dignitary harms they inflict, should weigh in favor of the right of publicity. Indeed, even if the deepfakes are not convincing enough for most viewers to be tricked, they can still cause the dignitary harms discussed in Part I.[430] This offers a more nuanced weighing of free speech interests and harms than categorical bans of potentially harmful content,

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[425] *See* ROTHMAN, *supra* note 16, at 145–48 (summarizing these tests).

[426] Hart v. Electronic Arts, Inc., 717 F.3d 141, 163 (3d Cir. 2013).

[427] Eldred v. Ashcroft, 537 U.S. 186, 190 (2003).

[428] 17 U.S.C. § 107.

[429] For example, defamation claims against public figures pass constitutional muster because they require actual malice, a higher degree of mens rea. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[430] *See supra* Part I.B–C.

which courts have typically rejected under the First Amendment.[431]

Deepfakes could, however, be used for less dignity-harming purposes, such as parody, caricatures, education, or inclusion as a secondary character in a movie or comic.[432] The condemnable dignitary harms of deepfakes should not be confused with the permissible harm of criticism. Deepfakes may also be acceptable if used in narrative or expressive works, which could assuage concerns of scholars such as Tushnet that the right of publicity had expanded too far when it prevented uses of visual likenesses in video games and comics and other artistic uses.[433] Under their right of publicity balancing tests, courts can continue to consider how other uses of deepfakes might further conversations or be used for news or commentary purposes by journalists, documentary filmmakers, and others. Courts may also consider the identity of the victim, as the Supreme Court has been more permissive of speech involving public figures.[434]

A related free speech concern is what Chesney and Citron have termed "the liar's dividend."[435] As deepfakes proliferate, it becomes easier for bad actors to claim that true depictions are fictional.[436] This may further obfuscate the truth in a marketplace that is already cluttered with fake news. A right of publicity notice-and-takedown regime may provide yet another tool to these actors to hide their acts. Eric Goldman criticized a similar notice-and-takedown proposal for this reason.[437] Similar issues have emerged with the notice-and-takedown regimes under the DMCA and the European Union's right to be forgotten, whereby some rights owners misuse the process to

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[431] *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002) (deeming a categorical ban on virtual CSAM unconstitutional).

[432] *See* Kwall, *supra* note 372, at 1368–69 (explaining why parodies of individuals would likely be protected free speech even under her proposed test); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 976 (10th Cir. 1996) (holding that caricatures of baseball players did not misappropriate their rights of publicity); Kadri, *supra* note 397, at 957 (proposing that educational uses of deepfakes should be protected by the First Amendment); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 908 (2003) (arguing that the right of publicity should not restrict movies, novels, plays, or songs that mention people's names or likenesses).

[433] *See, e.g.*, Tushnet, *supra* note 415, at 167, 178–79; *see also* Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 1539, 1554 (2017) (proposing that the test from *Rogers v. Grimaldi* would be helpful in distinguishing between protected artistic uses and appropriative ones).

[434] *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988) (requiring actual malice for an infliction of emotional distress claim involving a "parody ad").

[435] Chesney & Citron, *supra* note 98, at 1785.

[436] *Id.* at 1785–86.

[437] Christa Laser & Eric Goldman, *Deepfakes, Privacy, and Freedom of Speech*, YOUR WITNESS (June 18, 2021), https://yourwitness.csulaw.org/uncategorized/deepfakes-privacy-and-freedom-of-speech.

silence criticism and other lawful speech.[438] The legal system and platforms should remain vigilant for similar abuses.

The risk of abuse does not outweigh the pressing dignitary interests with deepfakes, especially when one considers how properly applying First Amendment balancing tests, using counternotice procedures, and the Streisand effect may help constrain the liar's dividend. The tests for balancing right of publicity harms with First Amendment interests could help circumscribe the risk of the liar's dividend. For example, news reporting should not be barred under this proposed regime, especially if they only name the subject in words rather than in image. But particularly troubling deepfakes such as sexual content and opinion-based lies rarely need to be visually or auditorily depicted to convey their message, if they are newsworthy at all.[439]

In addition, it is possible that Congress (or possibly courts) could adopt a counternotice procedure, as exists under the DMCA, to protect platforms from liability when the poster provides a valid counternotice and the reporting party does not initiate litigation.[440] Platforms could also adopt a counternotice procedure as a best practice for deepfakes, as seems to be the case with several platforms' trademark takedown policies.[441] While not a formal requirement, counternotices are becoming an industry best practice and help prevent improper removal of content.

Outside of legal structures, if the subject submits false takedown notices, there is the possibility it could backfire due to the Streisand effect. This common phenomenon is where the attempt to hide the story actually attracts more attention to it.[442] These legal and nonlegal guardrails should assist in combatting the liar's dividend.

Together, these various First Amendment and practical limits to the right of publicity help maintain constitutional safeguards while also permitting right of publicity claims involving many dignity-harming deepfakes.

D. Future Platform Liability Possibilities

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[438] Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1003 (2008); Courtney C. Radsch, *Weaponizing Privacy and Copyright Law for Censorship*, CIGI PAPERS NO. 276, 12–14 (May 2023).

[439] For example, European courts have distinguished between text and images for purposes of invasions of privacy in the news context, noting that "a photograph is particularly intrusive." Moosavian, *supra* note 127, at 533–34.

[440] *See* 17 U.S.C. § 512(g) (explaining counternotice procedures).

[441] Goodyear, *supra* note 269, at 20–40.

[442] *See* Mike Masnick, *Since When Is It Illegal to Just Mention a Trademark Online?*, TECHDIRT (Jan. 5, 2005, 1:36 AM), https://www.techdirt.com/2005/01/05/since-when-is-it-illegal-to-just-mention-a-trademark-online (coining and explaining the significance of the term).

Embracing the right of publicity as a solution for deepfakes could help restore the origins of the right of publicity as a dignity-based right. From the beginning, the right of publicity has shared dignity- and economic-related aims.[443] But, as Rothman and others have noted, the dignitary purpose of the right of publicity has been increasingly disregarded.[444] As explained above in Parts I and III, deepfakes and the Internet have created a new situation reminiscent of 1890 in which one's dignity is threatened by the capture and dissemination of one's image in new and harmful ways. By directly defining the right of publicity as an intellectual property right and freeing it from Section 230's confines, and foregoing the commercial use limitation in favor of a more general advantage requirement, the right of publicity will be better suited to address the types of dignitary concerns stemming from authorized dissemination of one's likeness for which it originally emerged, albeit updated for the twenty-first century. Online takedowns would help restrict the dignitary harms of loss of control, reputational damage, and internalized shame that deepfake dissemination inflicts on victims.

A notice-and-takedown regime for right of publicity misappropriations is not a panacea for the harms of deepfakes due to downloads and resharing. In the intervening period before the deepfake is removed from a platform, others could view it or even download local copies. There may be instances where victims have to engage in a game of whack-a-mole to remove various copies of the deepfake.[445] A right of publicity-based notice-and-takedown regime cannot stop these initial and new harms, but it can at least circumscribe them by preventing further dissemination of identified online copies. Due to the dignitary harms stemming from dissemination, other proposed laws described in Part II offer hollow hope for victims. A dignity-focused right of publicity and a notice-and-takedown regime may offer one of the few viable paths for victims to staunch the harms caused by their deepfakes being disseminated across the Internet. While the right of publicity approach depends on several contested meanings—namely, whether the right of publicity is an intellectual property right and whether it can overcome its limitation to commercial uses—this proposal offers a historically grounded solution that avoids broader Congressional changes to the legal regime governing the Internet.

The proposal in this Article offers a common law approach to regulating the dissemination of deepfakes for pragmatic reasons, but the conceptual approach based on the right of publicity and notice-and-takedown should better inform Congress in crafting legislation due to the conceptual and doctrinal benefits of the right of publicity.

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[443] ROTHMAN, *supra* note 16, at 32–33.
[444] *See supra* note 377.
[445] Citron, *supra* note 62, at 1955.

In May 2025, President Trump signed the TAKE IT DOWN Act into law.[446] The TAKE IT DOWN Act creates a rigid notice-and-takedown procedure for platforms and imposes criminal liability for sexual deepfakes.[447] On the surface, the law seems promising. It criminalizes the knowing publication of intimate images—including AI-generated images—and acknowledges psychological and reputational harm in addition to financial harm.[448]

However, the TAKE IT DOWN Act both does not go far enough in its definition and lacks sufficient guardrails to guarantee its constitutionality. First, the law defines "digital forgery" as computer-generated "intimate visual depictions,"[449] despite the similar harms that may result from non-sexual deepfakes. Second, the TAKE IT DOWN Act is likely unconstitutional because its proposed notice-and-takedown system does not include free speech exceptions for categories such as matters of public concern and parodies, and its required takedown period of forty-eight hours after notice is likely to necessitate filtering or automatic takedowns. Failure to comply shall be treated as a de facto unfair or deceptive act or practice under the Federal Trade Commission Act.[450] Several procedural and free speech safeguards in the DMCA are missing, including the notice-and-takedown regime functioning as a safe harbor rather than a liability test, a counternotice procedure, and the possibility of free speech exceptions for liability. It is likely that platforms will challenge the TAKE IT DOWN Act and Congress may have to revise the law for it to endure.

Congress is considering other proposed legislation that could also exclude platform liability for deepfakes from Section 230 and provide a federal right of publicity. For example, the No AI FRAUD Act bill lists several well-known deepfake incidents before providing everyone with a right of publicity, including for digital depiction and digital voice replicas.[451] The NO FAKES Act would go beyond this to specifically provide a digital replica right.[452] The Copyright Office has offered additional support for a federal digital replicas law, arguing for one in the first part of its report on copyright and AI.[453] The DEFIANCE Act would more narrowly provide a civil claim

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[446] *President Donald J. Trump Signed S. 146 into Law*, WHITE HOUSE (May 19, 2025), https://www.whitehouse.gov/presidential-actions/2025/05/president-donald-j-trump-signed-s-146-into-law.

[447] S. 146, 119th Cong. (2025).

[448] S. 146 §§ 2(a)(2), (3), 119th Cong. (2025).

[449] S. 146 § 2(a)(1)(B), 119th Cong. (2025).

[450] S. 146 § 3(b), 119th Cong. (2025).

[451] H.R. 6943 §§ 2–3, 118th Cong. (2024).

[452] S. 4875 § 2(c), 118th Cong. (2024).

[453] Copyright Office Report, *supra* note 20, at 22.

against the inclusion of an individual in an intimate digital forgery.[454]

This Article would contribute to these and future legislative efforts by providing historical, doctrinal, and conceptual justifications for using the right of publicity or a similar law to restrict the dissemination of deepfakes. Congress seems to understand that there are multifarious harms stemming from deepfakes (although not necessarily dignitary harms). The No AI FRAUD Act, for example, refers to harm as financial, physical, deceptive, or severe emotional distress.[455] However, both the No AI FRAUD Act and NO FAKES Act refer to the right of publicity as a property right (with corresponding economic value).[456] This suggests a primarily economic justification for those bills, even if the TAKE IT DOWN Act recognizes both economic and dignitary harms. But, as described above, focusing on economic harms to the exclusion of dignitary ones can fail to fully address the problem.[457] The NO FAKES Act also permits alienability of one's right of publicity, yet a licensor may not protect an individual's own dignitary interests in their image like they would the economic interests.[458] Adding the original dignitary purpose of the right of publicity can strengthen the policy justifications for these bills and the protections the bills offer. When applying these laws, courts can also look to dignitary harms when crafting appropriate remedies. This additional context and justification would help achieve the goals of the right of publicity Warren and Brandeis initially espoused over a century ago.

These legislative efforts recognize that dissemination must be restricted, but provide scant guidance on how platform liability should work for right of publicity violations. They contemplate that knowledge should play a role in secondary liability for platforms, but they lack specifics. Unlike with existing notice-and-takedown regimes, which provide initial safe harbors for infringement claims, the Federal Trade Commission ("FTC") would enforce violations of the TAKE IT DOWN Act rather than rights holders.[459] The draft versions of both the No AI FRAUD Act and NO FAKES Act impose civil liability for publishing, distributing, or transmitting digital replicas with knowledge that the replica was unauthorized.[460] This standard is similar to the *Tiffany v. eBay* regime in trademark law in that the bills do not explain what constitutes knowledge in this context.

An anti-deepfake bill could craft a new deepfakes exception to Section

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[454] S. 3696 § 2, 118th Cong. (2024)

[455] H.R. 6943 § 3(e), 118th Cong. (2024).

[456] H.R. 6943 § 3(b), 118th Cong. (2024); S. 4875 § 2(b)(2)(A)(i), 118th Cong. (2024).

[457] *See supra* note 374 and accompanying text.

[458] S. 4875 § 2 (a)(2)(A)(i), 118th Cong. (2024). On the problems of alienability of one's right of publicity more broadly, see Rothman, *supra* note 376.

[459] S. 146 § 3(b), 119th Cong. (2025).

[460] H.R. 6943 § 3(c)(1)(B), 118th Cong. (2024); S. 4875 § 2(c), 118th Cong. (2024).

230, like FOSTA, but there are advantages to using an existing exception (intellectual property) instead. For example, using the existing, time-tested First Amendment balancing tests of the right of publicity would help avoid constitutional pitfalls of overly broad takedown procedures such as those in the TAKE IT DOWN Act. If the TAKE IT DOWN Act is found to be unconstitutional, or if similar bills are enacted, *Tiffany v. eBay* and my above proposal for notice-and-takedown in response to specific knowledge of an instance of misappropriation could also help fill the gap on what obligations knowledge imposes on platforms.[461] Courts could rely on common law principles from trademark law cases like *Tiffany v. eBay* while having the freedom to adjust standards for right of publicity violations where obligations should differ to capture bad actors and encourage platforms to use their capabilities to prevent harms.

CONCLUSION

The world of AI-generated deepfakes and the Internet would have been unimaginable to Warren and Brandeis in 1890. But their concerns about the combined danger of portable cameras and mass media to the dignity of one's person share an unexpected historical and conceptual parallel with the present day. Recognizing the right of publicity as intellectual property for purposes of Section 230, and therefore ushering in a notice-and-takedown regime for online misappropriations, makes the right of publicity a promising doctrinal avenue for restraining deepfake dissemination. The Section 230 liability shield and conceptual mismatches limit the effectiveness of most proposed anti-deepfake claims, such as defamation and copyright infringement. The novel, dignity-sensitive right of publicity approach offered by this Article can contribute to other efforts to restrict deepfakes and their harms, including criminal prosecutions of perpetrators, educational efforts around deepfakes, and public advocacy.

The utilization of the right of publicity as the primary vehicle for challenging deepfakes' harms also serves to restore dignity to the right of publicity. Several scholars have previously encouraged us to once again fully consider dignity a goal of the right of publicity. This Article has demonstrated how—like in 1890—new technological developments, particularly in dissemination, have exacerbated the risks of dignitary harms related to our image. By more actively considering the right of publicity's original dignity-preserving goals, courts, legislators, and scholars can fully leverage its potential to combat new dissemination harms as technological progress continues to accelerate.

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[461] *See supra* Part III.

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