

The Revolution Will Not Be Live Streamed: Privacy Law in the Social Media Era

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I. Introduction

Technology, particularly social media, encourages us to commodify ourselves to the point that individuals no longer retain any privacy. As the law has developed in response to advancing technology, it has eroded individual rights of privacy, replacing them with rights of publicity. Worse, as a society, we accept this and trade away our privacy for celebrity, which has disproportionately negative effects on Black people. This is a function of hyperrealism, a theory of philosophy that suggests that society is advanced through simulations, whereby any real thing is a simulation of its immediately preceding ancestor simulation, yet a thing that is entirely its own. In this case, social media and privacy law are simulations that advance society toward a surveillance / police state. While we cannot easily stop the erosion of individual rights of privacy, we can take action to divest from social media and weaken the pace of the progression until we come to more appropriately radical solutions.

This seeks to assess the relationship between celebrity, privacy, and the law, focusing on incidental and situational harms that are common to the digital landscape and encouraged by social media. In particular, this essay discusses digital Blackface and the memeification of Black suffering and biometrics and artificial intelligence (AI) as causal to incidental and situational harms, respectively. The primary questions of the exploration are:

- how can privacy be retained and reclaimed in the progressing social media era?;
- how does our relationship to celebrity impact our desire to retain and reclaim our privacy?; and
- how do individual attitudes toward privacy affect the collective society?

This essay aims to provide individuals the ability to make more informed privacy decisions, particularly in the United States, and it also aims to identify specific actions individuals, technologists, corporations, and governments can take to enable greater retention and reclamation of collective and individual privacy.

II. Hyperrealism: The Advancement of Society, Self Image, and Race

First, it is appropriate to define the concept of hyperrealism. In particular, a formal definition and several examples of hyperrealism will be provided, before the essay addresses social media and privacy law and their relation to hyperrealism. Hyperrealism concerns the process by which a real thing, through systematic abstraction, becomes a thing that is beyond real, is hyperreal. Jean Baudrillard talks about this as occurring through a series of successive "simulations," each of which takes the new hyperreal thing further from its real roots. In this context it is critical to take a literal definition of simulations: "imitation[s] of a situation or process."¹ For example, Marvel movies are simulations of the real world that result in a hyperreal version of the world. This specific version is known as the Marvel Cinematic Universe. The all-encompassing world of the Marvel Cinematic Universe illustrates the all-encompassing scope of hyperrealism. Most everything is subject to the progression toward the hyperreal state.

In *Simulacra and Simulation*, Baudrillard notes that the operation of the aforementioned models, when they are related to an image in particular, create the "successive phases of the image:

- it is the reflection of a profound reality;
- it masks and denatures a profound reality;
- it masks the absence of a profound reality;

¹ Oxford English Dictionary

it has no relation to any reality whatsoever: it is its own pure simulacrum.”²

In other words, concepts go from real to hyperreal, something that is hyperreal is a simulation, and a simulation is real in its own right. The cycle repeats itself more and more quickly as a result of advancing society. Later, I will discuss social media and law (particularly privacy law) as two models (read: systems) within society that contribute to this exponentially rapid advancement. It should be noted that the operation of these models is so seamless as to make the progression Baudrillard describes seem spontaneous. This seamlessness is experienced because simulations simulate simulations, causing an exponential abstraction of subjects from their real counterparts. Said another way, to be hyperreal is to be a simulation; simulations themselves also become more hyperreal over time as later simulations simulate an already simulated subject. While they are topics for another day, it is worth acknowledging that the discussion of this essay is closely related to the studied effects of Moore’s Law and technological singularity;³ as technology advances, novel innovations happen exponentially more quickly. Similarly and relatedly, the progression of real subjects to hyperreal occurs exponentially more quickly over time.

Assume for a moment that Jesus was a real historical figure.⁴ Insofar as Jesus is recognizable, Jesus is also a great example of the transition from real to hyperreal. Once a real singular person, many different hyperreal versions of Jesus now exist. Various depictions and ritual practices simulate the existence of a real Jesus. The fact that multiple depictions and practices can exist demonstrates that a singular real Jesus is not necessary for hyperreal Jesus to exist in the form of these simulations. A few examples of these simulations are found in:

1. the Bible, which notes two particular simulations of Jesus, God and the Holy Spirit;⁵
2. the popular notion that “God is a woman” as made famous by Ariana Grande;⁶ and
3. *Black Jesus*, a television comedy that aired on Adult Swim from 2014 - 2019.⁷

Bearing this example in mind, I will turn to some broader, conceptual examples.

First, we can examine justice as a profound reality, a concept core to our being human (regardless of our differing views on it). The justice system is as it sounds: a systemized, and as a result less nuanced, version of real justice. Here, the justice system is a reflection of real justice, in the lexicon of Baudrillard. Individual legal structures and governments produce laws, regulations, and rulings that mask real justice and even overshadow its reflection, the broader justice system, further obfuscating the nuance of real justice. The concept of law and order, regardless of what entity or entities provide it, masks the disappearance of real justice from society; the system is so efficient as to not formally require real justice and is able to derive a hyperreal justice without real justice. And finally, the surveillance / police state becomes a stand-in for real justice that does not require the mask of legal structures and government to derive justice and law and order. It is self-operational and is so divorced from the initial concept of real justice that “[i]t no longer needs to be rational, because it no longer measures itself against either an ideal or negative instance. It is no longer anything but operational.”⁸

² Jean Baudrillard, *Simulacra and Simulation* 6 (1994).

³ Carla Tardi, *What Is Moore’s Law and Is It Still True?*, Investopedia (2023), <https://www.investopedia.com/terms/m/mooreslaw.asp>.

⁴ Dr. Simon Gathercole, *What is the historical evidence that Jesus Christ lived and died?*, The Guardian (2017), <https://www.theguardian.com/world/2017/apr/14/what-is-the-historical-evidence-that-jesus-christ-lived-and-died>.

⁵ *The New Oxford Annotated Bible* (Michael D. Coogan, Marc Z. Brettler, Carol A. Newsom, & PHEME Perkins eds. 2007).

⁶ Ariana Grande, *God is a woman*, on Sweetener (Republic Records 2018).

⁷ *Black Jesus* (Adult Swim television broadcast 2014 - 2019).

⁸ Jean Baudrillard, *Simulacra and Simulation* 2 (1994).

Said another way, in a surveillance / police state, holding parties accountable that are actually guilty no longer matters. What matters is holding any parties accountable that lead to a feeling of justice in the state. This has the coincidental effect of proving the benefit of the surveillance / police state itself. As the surveillance / police state itself progresses from real to hyperreal, it becomes a self-surveillance state that can look like Karens,⁹ Pre-Crime,¹⁰ doxxing,¹¹ cancel culture,¹² or myriad other concepts. Some of these concepts exist in today's real world, and some only in the fiction of today's real world. Each carries varying degrees of harm, particularly for those belonging to at least one historically excluded demographic.

Taking another example, we can apply the progression from real to hyperreal, as Baudrillard describes it, to the concept of the self. The concept of the self (and our awareness of it) is indeed a profound reality of our being human. The body is, perhaps, the most essential reflection of the real self, given that we perceive our real selves as mind rather than body; for those that are more inclined to think of the real self as body-inclusive, a reflection as we know it, in a mirror, body of water, etc. can, here, also be considered a reflection of the real self. A reproduction of the real self via painting, photograph, etc. masks the real self it is depicting, its creator able to effectively curate the viewer's perception of that real self, so that the perception is primarily based off of the image, rather than from knowledge of the depicted real self. A series of reproductions of the real self via video, collage, etc. can, here, be considered to mask the absence of the real self behind the reproductions; the more sophisticated and developed the curation of these reproductions, the greater the obfuscation of the real self becomes. We are just now seeing the hyperreal self emerge, its exact shape amorphous and undefined. This hyperreal self is the primary artifact of Web3, a digital representation of the real self, largely unbounded by the reality from which it is derived.¹³

A final example we can refer to is: Blackness. Blackness itself is a hyperreal counterpart to the real melanated skin of certain people. There are also elements of Blackness that are not tied to skin color. Regular discussions about whether or not a given person counts as "Black" in certain contexts are commonplace, emphasizing the partially artificial nature of the construct. One can observe that the models for this progression are, broadly, culture and society. As far as we take Blackness as a real starting point, it is reflected in behaviors, vernaculars, and cultures of Black people. While there are many positive ways to observe these behaviors, vernaculars, and cultures in everyday life, it is critical to also observe their harmful counterparts. Blackface and minstrelsy,¹⁴ are recognizable, but shallow, imitative performances of the real experience and state of being of Blackness. As Blackness is abstracted further away from reality, non-Black people are better able to adopt it; this donning of Black aesthetics, from clothing to vernacular,

⁹ Ziwe, 55% (Showtime television broadcast May 9, 2021).

¹⁰ MINORITY REPORT (20th Century Fox, DreamWorks Pictures, Amblin Entertainment, Blue Tulip Productions 2002).

¹¹ Sen Nguyen, *What is doxxing and what can you do if you are doxxed?*, CNN (2023), <https://www.cnn.com/2023/02/07/world/what-is-doxxing-explainer-as-equals-intl-cmd/index.html>.

¹² Emily A. Vogels, Monica Anderson, Margaret Porteus, Chris Baronavski, Sara Atske, Colleen McClain, Brooke Auxier, Andrew Perrin, & Meera Ramshankar, *Americans and 'Cancel Culture': Where Some See Calls for Accountability, Others See Censorship, Punishment*, Pew Research Center (2021), <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/>.

¹³ Nichanan Kesonpat, *Towards Digital Self-Sovereignty: The Web3 Identity Stack* (2022), <https://medium.com/1kxnetwork/towards-digital-self-sovereignty-the-web3-identity-stack-874d5e015bae>.

¹⁴ *Blackface: The Birth of An American Stereotype*, National Museum of African American History & Culture, <https://nmaahc.si.edu/explore/stories/blackface-birth-american-stereotype> (last visited May 6, 2023).

by non-Black people masks real Blackness. Donning these aesthetics digitally, via digital Blackface, distances viewers of these aesthetics from the users of the aesthetics to the point that it masks and obfuscates those users' lack of real Blackness. Our societal willingness to accept this as alright is an early (if not late) harbinger of hyperreal Blackness, the existence of which suggests a greatly increased potential harm for Black people, as anyone but them is allowed to put Blackness on and take Blackness off, so to speak, to their benefit. This example begins to reveal the fact that concepts of identity have a way of becoming hyperreal for society, while remaining real for those who are naturally of the identity; though Blackness has progressed societally toward its hyperreal state, it will always exist as real for Black people as an experience and state of being.

As will be discussed in the next sections, society is careening toward the hyperreal state. As social media advances and the law lags, the resultant privacy loss evidences this progression. This progression will exacerbate harm for Black people as our world becomes more inequitable than it already is. Though the advancement of all technology, especially social media, has the potential to bring great reward to society, our present inability to properly regulate it offers little hope that we will avoid such harm. In particular, these harms will cause and be the result of privacy loss, a vicious cycle. As such, these harms will be increasingly public: Breonna Taylor's murder¹⁵ is, perhaps, the most obvious example of this in recency. Though not all privacy loss is the result of social media, social media remains one of the largest challenges to privacy retention, regardless of individual interaction (or lack thereof) with it.

There are several approaches that can be taken by individuals, technologists, corporations, and governments to ensure course correction and provide a path toward a more equitable society, which I will outline in the conclusion of this essay. Rather than seeking to advise on what not to do, recommendations for addressing challenges will focus on positive activities that preclude the need for retributive response to any harms. First, it is critical to examine the impact of social media and privacy law on society and interrogate the roles of individuals, technologists, corporations, and governments in perpetuating harms that cause and result from privacy loss. These examinations and interrogations will be only for the purposes of assessing the loci of harm, and thus the appropriate loci for recommended remedial activities.

III. Social Media: Incidental and Situational Harms

With the late aughts' wave of social media came a wave of new privacy vulnerabilities, unique in that their existence is positively correlated with the progression toward hyperreality. From doxxing to deepfake nonconsensual pornography,¹⁶ individuals are at risk of losing their privacy to others every day. However, the greater risk to individual privacy is less malicious and more pernicious. Social media encourages us to commodify the self by sharing pieces of information that, taken individually, are rather innocuous, but in aggregate can quickly pose significant risk to our privacy and to the privacy of others. A further challenge that exacerbates social media's erosion of individual rights of privacy is that the exchanged for rights of publicity are being utilized to advance the hyperreal state in which we find ourselves living. This exchange and usage has particularly negative effects on Black people whose real Blackness is commodified primarily to the benefit of non-Black individuals via adoption of Black aesthetics and use of digital Blackface, advancing the hyperreal state.

¹⁵ Richard A. Oppel Jr., Derrick Bryson Taylor, & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, The New York Times (2023), <https://www.nytimes.com/article/breonna-taylor-police.html>.

¹⁶ Matthew B. Kugler & Carly Pace, *Deepfake Privacy: Attitudes and Regulation*, 116 NULR 611, (2021).

Many individuals regularly reduce their privacy simply by engaging with social media; for some this is geotagging,¹⁷ for others it's the vernacular they use in comments, for others still it's the information in their social media bios or even the accounts they are connected to, especially mutually (i.e. My following Beyoncé on Instagram is a data point, but a more meaningful data point would be if Beyoncé and I followed each other, especially since she famously follows no one.). For most people, it is a combination of the above, in various permutations, including for example: being tagged¹⁸ in someone else's photograph that has geographical data; recording and posting a video using particular jargon or slang; or actively maintaining "main"¹⁹ and "alt"²⁰ accounts that are connected via, at minimum, the IP address²¹ they are accessed from. It's important to acknowledge that sometimes this privacy loss is the result of an active trade for publicity (e.g. influencers, the Kardashians, etc.), and at many other times this privacy loss is the result of happenstance, digitally or otherwise being in the wrong place at the wrong time while another is exercising their rights of publicity. Given that justice has given way to its hyperreal counterpart, the surveillance / police state, Black individuals find themselves in this situation more than non-Black individuals, and worse, sometimes the being in the wrong place simply means being located within a Black body. One of the most studied examples of this phenomenon is overpolicing in neighborhoods where the racial demographic of the population is predominantly Black. In Dannika Gordon's words, "predominantly Black neighborhoods are simultaneously over-policed when it comes to surveillance and social control, and under-policed when it comes to emergency services."²² This supports Devon W. Carbado's point, in *E(racing) the Fourth Amendment*: "within America's racial environment, policed [B]lack identity is a natural and national resource."²³ The adoption of Black aesthetics and usage of digital Blackface by non-Black individuals does not require digital or physical proximity to another, but only to real Blackness, to cause harm to Black people.

As our language becomes increasingly visual²⁴, our symbols increasingly both recognize and dissociate themselves from their reference point. This progression from real to hyperreal runs parallel to the idea Carbado presents: "the Court's racialization of the facts is not merely descriptive; it is performative, making race appear and disappear, relevant and irrelevant as a matter of text, law, and social reality."²⁵ A common pattern, the matter at hand is not the matter at hand. The salient point is relegated to the subtext of whatever we are observing, somewhere between immediately under its surface and completely disaggregated from it. Though not all social media is visual, it continues to coalesce around visual communication of ideas, as is evident from the increase in popularity and the iterations in designs of Instagram,²⁶ TikTok,

¹⁷ *Geotagging*, Techopedia (Margaret Rouse ed. 2021).

¹⁸ *What is a tag on social media?*, BigCommerce,

<https://www.bigcommerce.com/ecommerce-answers/what-is-a-tag/> (last visited May 6, 2023).

¹⁹ ALT, Cyber Definitions, <https://www.cyberdefinitions.com/definitions/ALT.html> (last visited May 6, 2023).

²⁰ *Id.*

²¹ *Id.*

²² Robin Smyton, *How Racial Segregation and Policing Intersect in America*, Tufts Now (2020), <https://now.tufts.edu/2020/06/17/how-racial-segregation-and-policing-intersect-america>.

²³ Devon W. Carbado, *E(racing) the Fourth Amendment*, 100 Mich. L. Rev. 946, 964 (2002).

²⁴ Ben Bajarín, *The New Era of Visual Communication*, Vox (2015), <https://www.vox.com/2015/6/16/11563610/the-new-era-of-visual-communication>.

²⁵ Carbado, *supra* note 23 at 1,033.

²⁶ *Introducing Instagram Reels*, Instagram (2020), <https://about.instagram.com/blog/announcements/introducing-instagram-reels-announcement>.

Snapchat, Twitter,²⁷ and even Spotify.²⁸ This is a lens through which we can view two primary groups of people whose privacy rights are being eroded by social media: those who trade their own rights of privacy for rights of publicity and those whose rights of privacy are sacrificed out of happenstance by another as they exercise their rights of publicity. While there is much to be said about the former group, this essay focuses on the latter group; this group experiences both incidental harm and situational harm. In the case of incidental harm, those belonging to a demographic, whose aesthetics are being adopted by an individual exercising their rights of publicity, observe a broad reduction in their rights of privacy as a result of that individual. In the case of situational harm, those proximal to an individual exercising their rights of publicity lose more rights of privacy the closer they are to that individual. In both cases, the scale of impact is correlated with one's demographic, whether or not that demographic is the subject of publicity. The below elaborates on these two types of harm by way of example.

A. Digital Blackface and the memeification of Black suffering are both examples of incidental harm. The concepts of digital Blackface and memeification of Black suffering are defined below, followed by an exploration of how they relate to each other. In particular, formal definitions and three examples of digital Blackface and two examples of memeification of Black suffering will be provided, before moving on to assess their relation to each other and the hyperreal state. First, a note on the history of Blackface.²⁹ Since the 1800s white people have put on pitch black makeup to perform as Black people, utilizing negative stereotypes to heighten their performance, such as laziness, ignorance, cowardice, and hypersexuality.³⁰ We still see these stereotypes proliferated through media, sometimes blatantly inappropriately³¹ and, at other times, in an attempt to offer commentary with historical accuracy.³² Further, we see Blackface persist through fictional media into the real world, where celebrities like Julianne Hough put on Blackface as part of a Halloween costume³³ and then, nearly a decade later, teens in Utah adopt a similar costume.³⁴

Turning to digital Blackface, Lauren Michele Jackson defines it as “used to describe various types of minstrel performance that become available in cyberspace.”³⁵ Often this looks like the donning of Black aesthetics that are apparent in Blackness’s progression toward the hyperreal state. Examples include:

1. the over-usage by non-Black people of reaction GIFs³⁶ featuring Black people;

²⁷ Aja Romano, *Open for a surprise: The endearing results of Twitter’s new image crop*, Vox (2021), <https://www.vox.com/22430344/what-is-twitter-crop-new-image-ratio-memes>.

²⁸ Videos, Spotify, <https://support.spotify.com/us/article/videos/> (last visited May 6, 2023).

²⁹ National Museum of African American History & Culture, *supra* note 14.

³⁰ Harmeet Kaur, *This is why blackface is offensive*, CNN (2019), <https://www.cnn.com/2019/02/02/us/racist-origins-of-blackface/index.html>.

³¹ Reid Nakamura, *15 Stars Whose Blackface Blunders Backfired, From Ted Danson to Jimmy Kimmel (Photos)*, The Wrap (2020), <https://www.thewrap.com/stars-blackface-blunders-ted-danson-kylie-jenner-jimmy-fallon/>.

³² BABYLON (Paramount Pictures 2022).

³³ Jordana Ossad, *Julianne Hough Goes Blackface as “Orange Is the New Black” Character for Halloween Costume*, E! News (2013), <https://www.eonline.com/news/474574/julianne-hough-goes-blackface-as-orange-is-the-new-black-character-for-halloween-costume>.

³⁴ The Damage Report, *Teenagers In Blackface EXPOSED In Heinous Walmart TikTok*, YouTube (Nov. 2, 2022), <https://www.youtube.com/watch?v=DtkXjTwVKsA&t=16s>.

³⁵ Lauren Michele Jackson, *We Need to Talk About Digital Blackface in Reaction GIFs*, Teen Vogue (2017), <https://www.teenvogue.com/story/digital-blackface-reaction-gifs>.

³⁶ *Id.*

2. the usage without accreditation of Black-created content; and
3. Blackfishing,³⁷ which includes Blackvoice³⁸ for the purposes of this argument.

While all forms of Blackface are harmful, digital Blackface is especially pernicious because what makes it wrong is, perhaps, less obvious or observable. Its relative novelty and nebulous shape make defining, spotting, and stopping it a unique challenge to address. Further, attempting to do so by way of assigning culpability to a specific entity or set of entities allows its pervasiveness. The harm itself, by contrast, is clear: Blackface dehumanizes Black people and perpetuates harmful stereotypes that lead to the inequitable treatment of Black people across various contexts, from housing to employment and everywhere in between. This said, it bears repeating that the following analyses are simply for the purposes of identifying the loci of harm.

In the case of non-Black people over-using reaction GIFs featuring Black people, the locus of harm is most clearly evident in the repeated activity itself. If anything, the question of identifying the locus might be: how much use is overuse? While a valid question, this essay declines to answer it. Answering it primarily leads to remedies that would require significant and inappropriate impingement on rights of privacy to execute. Many of these would also be retributive solutions that ultimately do little to ameliorate the harm done, while also advancing the surveillance / police state toward the self-surveillance state. A framing this essay will later utilize for providing recommendations is: how can overuse be prevented? Differently than the former framing, this can be used without needing to identify the locus of harm, and leads to a group of viable recommendations that are balanced less in favor of broadly impinging upon rights of privacy. If we take over-use as the action that creates the locus of harm in this case, then we can say that the locus of harm at least derives from use, in general.

A counter argument to this analysis might be that the locus of harm does not matter as much as the locus of the opportunity for harm, which would be found in the availability of the reaction GIFs at hand. It is conceivable that few would argue for the removal of reaction GIFs from broad usage, so the opportunity for harm being referred to is the presence of Black people in reaction GIFs. This is an argument with both flaws and merits that will not be discussed in this essay.

Another example of digital Blackface, the usage without accreditation of Black-created content,³⁹ follows a similar pattern of arguments. Clearly, the locus of harm is the usage without accreditation. Here again, a counter argument can be made for looking at the locus of the opportunity for harm, instead. In short, this is a counter argument for less Black-created content, which again is an argument with both flaws and merits that will not be discussed in this essay. There is, however, a key feature, unique to this example, that provides for unique recommendations. In particular, this example does not require the actual representation of a Black person or even their content. Rather, a non-Black person can utilize a Black person's choreography, gesticulation, vernacular, or any other performative aspect of that person's real Blackness and cause harm without explicitly naming the reference.

Finally, within the realm of digital Blackface's incidental harm, is Blackfishing. This act has been most (in)famously performed by the Kardashians throughout the vast majority of their time as celebrities. MJ Corey's Kardashian Kolloquium accounts⁴⁰ are a sufficient resource for

³⁷ Habiba Katsha, *What is Blackfishing And Why Is It Problematic For Black Women?*, HuffPost (2021), https://www.huffingtonpost.co.uk/entry/what-is-blackfishing-why-problematic_uk_6166ba94e4b0fcd00f97fa5c.

³⁸ *Chaline v. KCOH, Inc.*, 693 F.2d 477 (5th Cir. 1982).

³⁹ Malcolm Xavier, "When You Hear Some Feedback, Keep Going Take It Higher:" Legal, Technical, and Ethical Notes for the Future of Video-Sharing Apps (2022).

⁴⁰ MJ Corey, <https://www.mjcorey.com/> (last visited May 6, 2023).

further learning in this area. A critical portion of the Kardashian's time as celebrities to discuss is Kim Kardashian's rise to prominence alongside Kanye West. Their curation of self, particularly their various series of reproductions of their selves, arguably serves as a blueprint for advancing the hyperreal state through use of media. Kim's continued strategy to commodify the self in the wake of her separation and eventual divorce from Kanye West follows this very same blueprint. Her ability to appropriate and discard Black aesthetics, while having literally Black children, is evidentiary of the scale of her access to a hyperreal Blackness.⁴¹ The locus of harm in cases of Blackfishing should be found at the point of the discarding of the Black aesthetics. This is because the point of discarding is also a point of revelation, where the viewer is able to see the discarded Black aesthetics for what they are, not real but hyperreal. However, we rarely witness such a discarding and are rarely afforded such a revelation. This is what gives incidents like the one with Rachel Dolezal⁴² so much weight in history. More often than not, it is a "knowing" of the appropriation that is the actual locus of harm. Counter arguments follow the same pattern as the prior examples, but the key feature of this example is that the unrequired actual representation is of a culture, rather than of a specific person. Because Blackfishing is an inherently deceptive act, it is the most insidious of the forms of digital Blackface.

Another type of incidental harm that should be addressed, given its relation to social media, is the memeification of Black suffering. The memeification of Black suffering can best be defined as the proliferation of stories about harm suffered by Black people, often to the point of virality where the original narrative of the story can be overwritten, sometimes to significant detrimental effect. Examples include:

1. Bring Back Our Girls;⁴³ and
2. Blackout Tuesday.⁴⁴

Each of these examples began as a digital social movement. A great affordance of social media is the ability to proliferate media and messages. The downside of this is that the more complex the media or messages are, the more likely their original meaning will be lost. In the spaces where original meanings used to be, others are free to install their own. It is in this installation of these various new meanings that the harm is found. Sometimes this harm is intentional and other times it is not, though identifying the presence of intent is not necessary to address the harm.

In the case of Bring Back Our Girls, several hundred Nigerian school girls were kidnapped by Boko Haram, an Islamic terrorist group, whose name means "Western education is forbidden."⁴⁵ These girls were aged sixteen to eighteen and many were sold into sexual slavery. In an effort to bring awareness to the global community and to incite action, Nigerians took to Twitter and launched a social media activism campaign using the hashtag, #BringBackOurGirls. As the campaign took off, several world leaders participated in the campaign, notably including Malala Yousafzai and Michelle Obama. Michelle Obama's post, in particular, went on to be memed.⁴⁶ One of the first people to parody the post was Ann Coulter, whose post read: Bring

⁴¹ Hannah Kerns, *All About Kim Kardashian and Kanye West's 4 Kids*, People (2023), <https://people.com/parents/all-about-kim-kardashian-kanye-west-children/>.

⁴² Denene Millner, *Why Rachel Dolezal Can Never Be Black*, NPR (2017), <https://www.npr.org/sections/codeswitch/2017/03/03/518184030/why-rachel-dolezal-can-never-be-black>.

⁴³ #BringBackOurGirls, Know Your Meme, <https://knowyourmeme.com/memes/events/bringbackourgirls> (last visited May 6, 2023).

⁴⁴ Joe Cascarelli, *#BlackoutTuesday: A Music Industry Protest Becomes a Social Media Moment*, The New York Times (2020), <https://www.nytimes.com/2020/06/02/arts/music/what-blackout-tuesday.html?auth=login-google>.

⁴⁵ *Who are Nigeria's Boko Haram Islamist group?*, BBC (2016), <https://www.bbc.com/news/world-africa-13809501>.

⁴⁶ *Michelle Obama's hashtag quest to rescue Nigerian girls*, BBC (2016), <https://www.bbc.com/news/world-us-canada-35948362>.

Back Our Country;⁴⁷ it shouldn't be lost on us that a few years later, the United States's forty-fifth President, whom Coulter supported at the time, rallied his base (and continues to do so) with the adjacent "Make America Great Again." Coulter's parody follows the meme format that took off, where users would hold up a blank white sheet of paper and edit digital text over it, reading: "Bring Back Our [Punchline Word]." Regardless of the aim, the infliction of incidental harm upon the Nigerian school girls is borne out of the memeification of the digital social movement. While it may be argued that this memeification is more about lambasting social media activism, it cannot be understated that the actions taken to do so have an outsized impact on the would-be benefactors of the activism at hand.

Over half a decade later, Blackout Tuesday had a significantly greater impact in the wake of the murders of George Floyd, Ahmaud Arbery, and Breonna Taylor. Originally meant to be a music industry protest,⁴⁸ Blackout Tuesday started as a day to reflect on systemic racism and turned into a nightmare for protest organizers. Initially, the digital social movement even used a different hashtag, #TheShowMustBePaused. #TheShowMustBePaused was initiated by two Black women, Jamila Thomas and Brianna Agyemang, and aims to be a call to action for music industry leaders to address the dearth of growth opportunities for Black music industry professionals. As others sought to join the movement and align themselves with it, some would argue performatively, they adopted the corresponding "black squares" posts on Instagram and captioned them with #BlackoutTuesday, #BLM, and #BlackLivesMatter. As this happened during a time with active Black Lives Matter protests, critical information from organizers about the ongoing protests was drowned out. What started as a day calling for acknowledgement of systemic inequities in a specific industry turned into self-congratulatory posturing by the uninformed. Not only did this co-opting of the digital social movement cause incidental harm to Black musical artists, who were the original subject of the movement, but it also opened the door to situational harm to protesters, Black and otherwise. Again, the primary risk to individual rights of privacy is the result of situational harms such as this.

B. If incidental harms were not bad enough, situational harms are more pernicious and pervasive by far because they infringe upon individuals' rights of privacy, while also precluding them from accessing their rights of publicity. Take, for example, a photojournalist capturing images within a number of locations, specific to a community that is their subject, and in which a number of human subjects appear without consent. The photojournalist, through copyright, has access to benefits from the commodification of these subjects that do not infringe upon their rights of publicity. The subjects themselves do not have access to those benefits⁴⁹ and are also subject to further harms as the result of their loss of privacy. These harms are compounded in the social media era, due to biometric technology and AI. Following the concept of biometrics will be defined, before exploring how it relates to AI. In particular, a formal definition and two examples of applied biometrics will be provided, before moving on to assess their contribution to society's progression toward the hyperreal state.

⁴⁷ Jennifer Deutschmann, *Ann Coulter's Plan To Mock 'Bring Back Our Girls' Backfires*, Inquisitr (2014), https://www.inquisitr.com/1249669/ann-coulters-plan-to-mock-bring-back-our-girls-backfires?fbclid=IwAR3TneWtX1R94ES5qieq_ber6tk8hSxSN5_wtgIX7-ESrUj3k2oxLxDK2YA.

⁴⁸ #TheShowMustBePaused, <https://www.theshowmustbepaused.com/about> (last visited May 6, 2023).

⁴⁹ Unless the photojournalist allows use of these photographs for advertisement, in which case the subjects could pursue a rights of publicity claim. Usually, though, this would require costly litigation that subjects belonging to historically excluded demographics may not have access to.

Biometrics are “unique physical characteristics, such as fingerprints, that can be used for automated recognition.”⁵⁰ Artificial intelligence is:

a field, which combines computer science and robust datasets, to enable problem-solving. It also encompasses sub-fields of machine learning and deep learning, which are frequently mentioned in conjunction with artificial intelligence. These disciplines are comprised of AI algorithms which seek to create expert systems which make predictions or classifications based on input data.⁵¹

Often, when AI is discussed, it is some type of machine learning (ML) that is actually the matter at hand. Applied biometrics, then, is simply biometrics that are actively being used for automated recognition. Social media deploys applied biometrics powered by ML and harnesses deep learning to advance the strength of the underlying algorithms. Deep learning is a subset of ML and describes ML processes that handle unstructured data, where ML is broadly meant to describe algorithms that process structured data.⁵² Further, these processes can also be supervised or unsupervised, meaning they either require a level of human input, by way of data labeling, or not. Typically, when applied biometrics are discussed, it is when they are powered by unsupervised, deep learning algorithms. Examples include:

1. facial recognition; and
2. vocal recognition.

While each of these examples poses problems for the individuals that utilize and are the subjects of such technologies, particularly psychological harms⁵³ and broad sociological harms,⁵⁴ the focus of the remaining portion of this essay will be on the situational harms driven by these technologies and that are incurred by bystanders. More accurately, the availability (without proper regulation⁵⁵) of these technologies to corporations and governments drives the potential for such situational harms. Individual usage of these technologies does not usually give way to these same harms; individual usage of related video and / or audio content-producing technologies is more linked to the situational harms at hand. The closer a bystander is to an individual actively using video and / or audio content-producing technologies, the more likely it is that they may incur situational harms associated with facial recognition and / or vocal recognition technologies. Similarly, more harm is incurred when more of these technologies are being used in combination.

As previously mentioned, facial recognition technologies can lead to psychological and sociological harms when used by individuals. The primary application of facial recognition technologies that leads to this is social media filters.⁵⁶ In particular, some of these filters extend the harms of digital Blackface and Blackfishing. Non-Black individuals can use certain filters that deploy facial recognition technologies to adopt Black aesthetics, then shed those aesthetics in subsequent posts simply by not using such filters. There is certainly also something to be said about the psychological and sociological harms done to Black people that cannot effectively use

⁵⁰ *Biometrics*, Department of Homeland Security, <https://www.dhs.gov/biometrics> (last visited May 6, 2023).

⁵¹ *What is artificial intelligence?*, IBM, <https://www.ibm.com/topics/artificial-intelligence> (last visited May 6, 2023).

⁵² *What is deep learning?*, IBM, <https://www.ibm.com/topics/deep-learning> (last visited May 6, 2023).

⁵³ *The Social Dilemma: Social Media and Your Mental Health*, McLean Hospital, <https://www.mcleanhospital.org/essential/it-or-not-social-medias-affecting-your-mental-health> (last visited May 6, 2023).

⁵⁴ Gideon Lewis-Kraus, *How Harmful Is Social Media?*, *The New Yorker* (2022), <https://www.newyorker.com/culture/annals-of-inquiry/we-know-less-about-social-media-than-we-think>.

⁵⁵ Malcolm Xavier, *New Problems Require New Solutions: Nonpartisan Agencies as a Pathway to Regulating Emerging Technologies* (2023).

⁵⁶ Mitchell Krieger, *How to make your own Instagram filter with facial recognition using python* (2020), <https://towardsdatascience.com/how-to-make-your-own-instagram-filter-with-facial-recognition-from-scratch-using-python-d3a42029e65b>.

filters that deploy facial recognition technologies.⁵⁷ Ultimately, all of these cases are ones of incidental harm; differently than the previously discussed examples, Black people's inability to use technologies that lead to incidental harm falls into a sort of subcategory of that harm by which they face erasure, rather than loss of rights of privacy. Prior work⁵⁸ has discussed this and this essay will not expand on it, for sake of clarity in this writing.

Within the scope of this writing, it is more important to address the situational harm that arises from, for example, unintentionally being captured in the background of an individual's photograph. There is some loss of privacy resultant from the capturing of the photograph. There is even greater loss of privacy at the point of the photograph being shared on social media. All of this advances the surveillance state by means of self-surveillance. Given that we live in an increasingly digital time, it is an assumption that most photographs posted to social media are digital, taken on a smartphone or digital camera and then uploaded to a social media app, or taken within the social media app itself, harnessing the camera of whichever digital device is accessing the app. The individual taking and posting the photograph may or may not do so relatively immediately, the most immediate of course being taking the photo inside of the app and immediately posting it. They also may or may not use geotagging on the actual social media post. Regardless, the photograph itself is likely to have metadata⁵⁹ that gives away information about the time and space in which the photograph was taken. Though this only applies to digital photographs, even analog photographs may carry visual evidence that give away similar information to a more trained eye.⁶⁰

Vocal recognition technologies run into similar problems, though it should be noted that there are fewer social media applications that are also more nascent.⁶¹ Incidental harm from these technologies may arise in the form of Blackvoice and in the appropriation of the audio of a Black creator.⁶² Situational harm, in this case, arises from an individual's voice being captured in the background of a recording, for example. As social media apps trend toward encouraging video-based content,⁶³ audio is increasingly paired with posted content, compounding the potential for situational harms. Vocal recognition technologies are being deployed in criminal justice and law enforcement practices globally,⁶⁴ made more powerful by samples provided by social media. This is, perhaps, the clearest way in which the surveillance / police state progresses toward its hyperreal state and becomes self-surveillance. It is easy, here, to think of the criminal

⁵⁷ Tate Ryan-Mosley, *How digital beauty filters perpetuate colorism*, MIT Technology Review (2021), <https://www.technologyreview.com/2021/08/15/1031804/digital-beauty-filters-photoshop-photo-editing-colorism-racism/>.

⁵⁸ Xavier, *supra* note 39.

⁵⁹ *metadata*, National Institute of Standards and Technology, <https://csrc.nist.gov/glossary/term/metadata> (last visited May 6, 2023).

⁶⁰ Andrew Lloyd, *A Google Maps expert tracks down long-lost locations for his followers and posts the results on TikTok. Millions love his videos, but there are risks.*, Insider (2022), <https://www.insider.com/trevor-rainbolt-geoguessr-tiktok-location-tracking-interview-2022-11>.

⁶¹ Chris Doty, *Top Six Use Cases for Automatic Speech Recognition (ASR) in Social Media*, Deepgram (2022), <https://blog.deepgram.com/top-six-use-cases-for-asr-social-media/>.

⁶² Xavier, *supra* note 39.

⁶³ Jillian Warren, *Why Video is Hottest Growth Hack Right Now*, Later (2021), <https://later.com/blog/video-on-social-media/>.

⁶⁴ Nicol Turner Lee & Caitlin Chin, *Police surveillance and facial recognition: Why data privacy is imperative for communities of color*, Brookings Institution (2022), <https://www.brookings.edu/research/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/>.

justice and law enforcement usage of vocal recognition technologies as just that, but more simply we are telling on ourselves and each other with every social media engagement.

The situational harms outlined above affect everyone. However, the effect on Black people is outsized, especially when considering the present ability for corporations and governments to access and act on the artifacts of such surveillance like photographs and videos. Taking on solutions that address the potential for such harms for the most at-risk population benefits everyone. Given that the risk is borne of self-surveillance, privacy solutions are the most relevant to consider. Further, solutions in the realm of rights of publicity are also not relevant to discuss here, since there is no infringement on rights of publicity in the cases of greatest harm.⁶⁵ Below, the situational harms outlined above will be expanded upon through further examples and discussion of the associated privacy risks, before moving on to recommended solutions.

IV. Privacy Law: Warning Signs and the Current Landscape

Rights of privacy, thin as they ever were, continue to be eroded every day. Legal scholars have been attempting to prevent this erosion for more than a century. In their seminal article from 1890, *The Right to Privacy*,⁶⁶ Samuel D. Warren and Louis D. Brandeis warn, “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life.” They were more right than they knew. They argue that privacy is largely the “right to be let alone.”⁶⁷ Privacy is “not simply an absence of information about what is in the minds of others; rather it is the control we have over information about ourselves.”⁶⁸ As a practical matter, one retains the most rights of privacy, the most control over their personal information, when they are alone in their own home. The less one is alone and the less one is within their own home, the fewer rights of privacy they have. It is worth looking at the origins of privacy loss to, at minimum, observe the vulnerabilities of present approaches to rights of privacy. Where possible, it is also worthwhile to observe potential solutions to these vulnerabilities, should they present themselves. In certain cases, one might consider trading their rights of privacy for rights of publicity, but these cases are limited. Generally speaking, there is no legal remedy for broad loss of privacy, and there probably shouldn’t be. Such remedies would begin to encroach on freedom of expression. Ultimately, privacy loss is the result of regulatory law lagging behind technological development.⁶⁹ As social media commodifies identity⁷⁰ and encourages individuals to commodify themselves, everyone suffers privacy loss.

As described in the above examples, particularly of social media’s situational harms, these issues disproportionately affect Black people. As Carbado notes, “there is no reasonable person who is racially unsituated... To avoid explicitly invoking race is to invoke it in a particular way. Race avoidance conveys the idea that race does not matter, and masks the ways in which it actually does.”⁷¹ In other words, race must specifically be addressed as material to the problems.

⁶⁵ It is maybe the case that economists should focus inquiry in this area as rights of publicity are largely economic rights. It is conceivable that the harm of this is larger than estimated, here. Generally, though, this essay takes the opinion that privacy is worth more than publicity, if not priceless. As such, privacy loss is more important to provide solutions for.

⁶⁶ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harvard L.R. 193 (1890).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Malcolm Xavier, *New Problems Require New Solutions: The Need for Deep Learning in Humans* (2023).

⁷⁰ Samphe Ballamingie, *Instagram’s Commodification of Identity* (2022), <https://doi.org/10.22215/stkt/bs11v> (last visited May 6, 2023).

⁷¹ Carbado, *supra* note 23 at 1,002.

Non-Black people do not face the same harms as their Black peers, nor the same amount. In fact, it is their choices that generate the majority of the harms that Black people face. On face, it would seem that desire for rights of privacy, the right to be let alone, has waned in the social media era. As Anita L. Allen puts it in *Coercing Privacy*, “The final decades of the twentieth century could be remembered for the rapid erosion of expectations of personal privacy and of the taste for personal privacy in the United States.”⁷² However, erosion of privacy isn't necessarily due to one's own choices. This trend ignores the relationship outlined above, where non-Black people take actions that cause privacy loss for Black people. Such a trend also ignores how “race – and more particularly, racial stereotypes – can constrain one's choice, one's will, and one's capacity for self-determination.” Black people's attitudes toward privacy differ from their non-Black counterparts as a result of circumstance. Not only do they have fewer choices, but sometimes those are different and sometimes the same choices have different consequences. Because of this, it cannot necessarily be said that expectations of and taste for privacy have been eroded. Such a trend also runs counter to William James Sidis's sentiments in the late 1930s.⁷³ In Sidis's words, “I want to live the perfect life. The only way to live the perfect life is to live it in seclusion.”⁷⁴

At the time, Sidis was the subject of a biographical article in *The New Yorker*. Sidis was a child prodigy with exceptional skill as a mathematician who eventually withdrew from public life. The magazine had published a “Where Are They Now?” segment, including Sidis. Sidis filed a claim against the publisher and, in the above quote, was commenting on what he perceived to be a deprivation of seclusion, given that this particular publication was not entered into willingly by Sidis. While some may agree with Sidis, the Court held a different opinion because of Sidis's past as a child prodigy. At that time, Sidis received news coverage and, in doing so, became a public figure. Rights of publicity do not apply to public figures, even in situations that may cause emotional distress.⁷⁵ For those that agree with Sidis, this opinion and reasoning feels unsatisfactory. There is no clear definition for what constitutes a public figure, nor is there a mechanism by which one can renounce such a status. Additionally, this reasoning fails to address identity-based constraints, particularly as regards race. Should a child prodigy permanently lose their rights of privacy on the basis of a status they earned as a child? Perhaps. Perhaps not. Would the answer change if race were a factor? Perhaps. Perhaps not.

At the present time, though, child prodigies lose their rights of privacy, regardless of race. Once someone does something newsworthy, most anything else they do (and often, anything they have done) is deemed newsworthy⁷⁶ and “a matter of public interest.”⁷⁷ In these and similar cases, rights of publicity are what remain. These rights are also rather limited. Rather than rights that provide for broad control of one's public image, rights of publicity are structured in relation to advertisement, particularly “endorsing or promoting a product.”⁷⁸ For example, appearing in the background of someone's photograph does not give rise to a cause of action, even if the person refuses to take the post down upon request. Worse yet, if one feels their rights of publicity have been infringed upon, they must “allege how the...use of the information deprived [them] of

⁷² Anita L. Allen, *Coercing Privacy*, 40 Wm. & Mary L. Rev. 723 (1999).

⁷³ *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940).

⁷⁴ *Id.*

⁷⁵ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

⁷⁶ U.S. Const. amend. I.

⁷⁷ *Dallesandro v. Henry Holt & Co.*, 4 A.D.2d 470, 166 N.Y.S.2d 805 (1957)

⁷⁸ *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002)

the...economic value.”⁷⁹ In other words, if the photograph were part of an advertisement, and the person appearing in the background was blocked from profiting in the same way, then there would be a rights of publicity infringement. Additionally, the Supreme Court has ruled that “allegations of possible future injury are not sufficient to establish an injury.”⁸⁰ In other words, if the photograph could become an advertisement, but has not yet become one, that does not give rise to a cause of action. Any subjects would need to allege and prove that such deprivation occurred and was not theoretical or imminent. Rights of publicity remedies are responsive, not proactive, and are targeted at resolving unjust enrichment due to the relation between the infringement and profits the infringer received in exchange for the content that produced the infringement. Once someone is a “public figure,” which we all know when we see it, but cannot define, they cannot retain most rights to privacy; instead, those are converted to rights to publicity, much like a conversion of stock options to shares.⁸¹ In both cases, the primary item predominantly gains value at the point of conversion, and that value can only be extracted from the second item at the point of trade. The law encourages us to commodify ourselves as part of its relation to our capitalist economic structure.

Returning to Warren’s and Brandeis’s sentiments, they articulate simply the problem that our society still faces: “harm wrought by such invasions [is not] confined to the suffering of those who may be made the subjects of journalistic or other enterprise.”⁸² The situational harms discussed above, particularly being captured in the background of someone’s photograph, audio recording, or video recording, lead to broad societal harms, in addition to the initial harms being visited upon a select few. The proliferation of such harms across social media make this problem more prevalent than the premise of Warren’s and Brandeis’s sentiments would suggest, on face, and likely more than they ever anticipated. Someone once said something like,⁸³ “In the future, everyone will be world-famous for fifteen minutes.”⁸⁴ The prescience of this statement (however it goes and whoever said it) is seen in today’s social media landscape, where we define each user’s level of celebrity by the size of their following.⁸⁵ It simply doesn’t take much for one to achieve those 15 minutes – and extend them. Insofar as we all might be celebrities without privacy, and to Marshall Leaffers’s point in *The Right of Publicity: A Comparative Perspective*, “the law must balance the celebrity’s interest in controlling their image with the public’s interest in using these images as a means of communication.” Again, the ability to exercise rights of publicity, especially in relation to alleged misappropriation of the self, is minimal.

Take, for example, a 2016 case where Target used images of Rosa Parks on retail merchandise.⁸⁶ In *Rosa and Raymond Parks Institute for Self Development v. Target Corp.*, the Court held that Target had “qualified privilege to report on matters in the public interest[, which] applied to retailer’s sale of items adorned with images of and related to figure.” Here, the Court’s

⁷⁹ *In re Google, Inc. Priv. Pol’y Litig.*, No. C-12-01382-PSG, 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013)

⁸⁰ Daniel J. Solove & Paul M. Schwartz, *Information Privacy Law* 818 - 819 (6th ed. 2018).

⁸¹ James Chen, *What Are Stock Options? Parameters and Trading, With Examples*, Investopedia (2023), <https://www.investopedia.com/terms/s/stockoption.asp>.

⁸² Solove & Schwartz, *supra* note 79 at 14 - 15.

⁸³ This is most often attributed to Andy Warhol, though that fact and the exact phrasing have been debated.

⁸⁴ Rachel Nuwer, *Andy Warhol Probably Never Said His Celebrated “Fifteen Minutes of Fame” Line*, Smithsonian Magazine (2014), <https://www.smithsonianmag.com/smart-news/andy-warhol-probably-never-said-his-celebrated-fame-line-180950456/#:~:text=%22In%20the%20future%2C%20everyone%20will,will%20almost%20always%20be%20fleeting.>

⁸⁵ Rob Sanders, *The 5 Types of Influencers You Need to Know*, Simplilearn (2023), <https://www.simplilearn.com/types-of-influencers-article>.

⁸⁶ *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824 (11th Cir. 2016)

opinion looked to broader privacy rights to establish the fact that public figures are largely not entitled to rights of publicity. A confounding factor of this case is that the likeness of the public figure was controlled by a nonprofit entity (Rosa Parks was no longer alive at this point). That aside, the Court's opinion is seemingly contradictory. If one loses their rights of privacy, when becoming a public figure, they shouldn't also lose their rights of publicity, which hinge on advertisement and sale. Yet, the opinion of the Court is that selling retail is reporting, which would be addressed by rights of privacy. This puts public figures in a paradoxical situation where they lose both rights of privacy and rights of publicity.

But not all public figures. By contrast, the Court ruled, in *White v. Samsung Electronics America, Inc.*, that Vanna White brought evidence that provided for a jury ruling in a rights of publicity case against Samsung. In particular, the Court did not bring up matters of public interest. When held up against the *Rosa and Raymond Parks Institute for Self Development v. Target Corp.* ruling, this indicates that there is some sort of difference between a public figure and an historic public figure, at best. In other words, Rosa Parks is more important to history than Vanna White, and as such her likeness is not entitled to rights of privacy nor rights of publicity. At worst, the difference in the holdings illuminate a racial disparity in such legal proceedings regarding rights of privacy and rights of publicity. In *White v. Samsung Electronics America, Inc.*, the Court even goes as far as to say that:

“the common law right of publicity reaches means of appropriation other than name or likeness, but...specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff's identity. The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable...Although the defendants in [other] cases avoided the most obvious means of appropriating the plaintiffs' identities, each of their actions directly implicated the commercial interests which the right of publicity is designed to protect.”⁸⁷

This opinion was delivered almost a decade and a half prior to the opinion in *Rosa and Raymond Parks Institute for Self Development v. Target Corp.* This makes it even more difficult to square the two and view their holdings as congruous. Notably, both cases only made their way to the Court of Appeals in their respective Circuits, so this incongruity is legally permissible. Though each opinion has a different result for the parties at hand, the holdings overlap in that they maintain that rights of publicity give rise to causes of action when the appropriation of a person's likeness is tied to advertising and selling.

One of the current ways in which this appropriation happens is through the use of deepfakes. Deepfakes are “videos that use machine-learning algorithms to digitally impose one person's face and voice onto videos of other people.”⁸⁸ In *Deepfake Privacy: Attitudes and Regulation*, Matthew B. Kugler and Carly Pace discuss the particular privacy harms associated with deepfakes, especially deepfake pornography. Though not the explicit focus of this research, they make a salient point about the state of privacy in relation to technology:

The case of deepfake technology further points to an emerging problem in the privacy landscape. Privacy in this context is about dignity, autonomy, and identity expression – about people losing control of their public identities. To appropriately understand the danger associated with deepfakes and the unauthorized use of one's likeness, courts and policymakers must take seriously the kinds of dignitary harms associated with these new kinds of privacy invasion.⁸⁹

To their point, deepfakes are but one example of a kind of privacy invasion that is largely made possible by the advent of social media. These new kinds of privacy invasions that Kugler and Pace allude to are critical to consider in the context of *White v. Samsung Electronics America*,

⁸⁷ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), as amended (Aug. 19, 1992)

⁸⁸ Kugler & Pace, *supra* note 16 at 613.

⁸⁹ Kugler & Pace, *supra* note 16 at 673.

Inc., which again states that “means of appropriation other than name or likeness” give rise to causes of action under rights of publicity. In the case where someone is unable to exercise rights of privacy and rights of publicity are limited, it is appropriate to consider an expansive definition of appropriation. Early social media served as the harbinger of the proliferation and commodification of literal self image.⁹⁰ As such, social media continues to play an outsized role in creating the space for the new kinds of privacy invasions that Kugler and Pace warn about. Recalling that a capitalist governmental structure encourages us to commodify ourselves, on social media almost anyone with a public account could become a public figure, especially given the lack of true definition. Further, this commodification of the self, utilizing social media, includes the commodification of personal data that can be used to identify individuals. As Paul M. Schwartz put it in 1999, “individual self-determination is itself shaped by the processing of personal data.”⁹¹ This personal data is more and more commonly the appropriated likeness, when viewed through the lens of doctrine presented in *White v. Samsung Electronics America, Inc.*

All together, individuals are being encouraged to forgo their rights of privacy to commodify themselves, while also being provided limited means by which to access their rights of publicity. This is encouraged by social media and advances us toward a surveillance state wherein there is no privacy. As Julie E. Cohen wrote in 2000, “the condition of no-privacy threatens not only to chill the expression of eccentric individuality, but also, gradually, to dampen the force of our aspirations to it.”⁹² Ultimately, because social media advances us toward the surveillance state it also erodes self-expression, rendering us more alike in all the ways that do not matter. The likeness of likenesses drives down the value found in individuality. This same individuality, being the very thing that was commodified, has real and conceptual costs. While it is problematic to place value on the likeness of individuals, it is a requirement. Present legal doctrine seeks justice financially in cases dealing with rights of publicity, given their relation to advertisement and sales. In light of the current state of privacy, erosion of such a value is more problematic than assessing the value in the first place. As Schwartz warns, “If sound rules for the use of personal data are not established and enforced, society as a whole will suffer because people will decline to engage in a range of different social interactions due to concerns about use of personal information. A public good – the privacy commons – will be degraded.”⁹³ Loss of privacy, being harmful unto itself, the accompanying sameness is a threat looming just off in the distance.

V. Conclusion

Social media erodes our privacy every day. Even if we, as individuals, do not engage with social media, it impacts our ability to maintain any privacy. The further cost of this privacy is our self-expression. As less privacy is available, people are less likely to express anything that deviates from the norm. Cruelly, self-expression is the very thing social media demands to perpetuate its harms. Its greatest harms are borne out of a self-expression that appropriates Blackness and out of less clearly harmful self-expression that simply documents Blackness. Generally, self-expression via social media advances the surveillance state, which has the potential for disproportionate harms to be incurred by Black people. This disproportion is caused

⁹⁰ Ballamingie, *supra* note 70.

⁹¹ Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 Vand. L. Rev. 1609 (1999).

⁹² Julie E. Cohen, *Examined Lives: Informational Privacy and The Subject as Object*, 52 Stan. L. Rev. 1373 (2000).

⁹³ Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 Harv. L. Rev. 2055 (2004).

by the other self-expression that social media encourages, and which leads non-Black people to appropriate Blackness.

Referencing different cultures is not inherently problematic. Adoption of identities that one does not belong to, cultural appropriation,⁹⁴ is. In the digital landscape, the line between reference and appropriation is unclear. The same behavior becomes problematic at a certain, though presently unidentifiable point. Where that point is, only time will tell, and we'll only realize it in retrospect. This is because hyperrealism's systematic abstractions drive the advancement from one stage of a concept to the next. A key feature of this process is that it seems to happen almost instantaneously.⁹⁵ In the context of digital spaces, the difference between what is problematic cultural appropriation and what is unproblematic cultural reference is just the difference between stages of the same behavior.

More truly radical thinking and behavior is necessary to affect the broader systemic change that is required to most wholly meet this moment. At the same time, there are initial solutions that can be found within our current system. These solutions are primarily focused on restoring privacy, or at least mitigating further privacy loss, by way of making privacy more compulsory. That is to say, solutions should coerce privacy as means to prevent overuse of technologies and modes of communication that cause privacy loss. At minimum, this is paramount to restoring health to our current society in the United States. "To speak of 'coercing' privacy is to call attention to privacy as a foundation, a precondition of a liberal egalitarian society."⁹⁶ If the government can be said to be responsible for tending to our society, they have the most ability to implement such solutions.

The primary solution governments can put forth is the adoption of more stringent privacy regulations that provide individuals with a greater level of management of their privacy. GDPR⁹⁷ or CCPA⁹⁸ provide sufficient starter models for data privacy that can be extended to other, perhaps more specific, forms of privacy. Further, governments can regulate the technologies that underpin social media. It is important that they specifically regulate the technologies, rather than particular industries that use and deploy such technologies. For example, regulators might focus on directly regulating algorithms, codebases, and databases, rather than regulating social media platforms. Regulators could also better regulate the purchase and sale of user data. These options all being available, it is difficult to conceive of the United States governments taking any of these approaches with any immediacy, especially at the federal level.

Assuming the government is somewhat responsive to corporate management patterns, corporations also have influence in this matter. Corporations, at minimum, should have clear, brief, and transparent external privacy policies, as well as appropriately clear and exhaustive internal privacy policies. Depending on the business of the corporate entity, various measures

⁹⁴ Ashley Wells, *Appropriation and Appreciation: What's the Difference?*, National Institutes of Health Office of Equity, Diversity, and Inclusion (2021), <https://www.edi.nih.gov/blog/communities/appropriation-and-appreciation-whats-difference>.

⁹⁵ Baudrillard, *supra* note 2.

⁹⁶ Allen, *supra* note 72.

⁹⁷ 2016 O.J. (L 119).

⁹⁸ Cal. Civ. Code § 1798.100.

may need to be addressed. Corporations should also elect to discontinue the purchase and sale of user data. The increased sale of user data over time⁹⁹ does not indicate a pattern of value as much as it indicates a pattern of what may be necessary to compete in the market, particularly for new entrants or corporations facing a downturn. While some businesses are modeled entirely on such transactions, the question remains: should they be?

Corporate policies and stances, though, are only as good as the professionals implementing or adhering to them, especially technologists. In partnership with corporate leadership or failing such leadership, technologists should develop tools, especially social media tools, in compliance with the most stringent global privacy laws. A product “MVP”¹⁰⁰ should consider the most vulnerable, not just the most valuable, as it sets out to determine what is minimally viable. To do this, technologists should lean on ethical frameworks as part of their development practice. Finally, technologists can set up systems that take a “burn after reading” approach with user data. Rather than creating systems that store data in perpetuity, systems can be built to delete user data after an appropriate time. Deletion protocols could also be built to take an approach whereby only user-identifying data is deleted, which would have the effect of retaining greater value for the organization. Of course, this gives rise to complications around what user-identifying data is, in a world where data is disaggregated and re-aggregated so commonly.¹⁰¹

The challenge of productizing solutions or socializing them via corporations or governments is not insignificant. So, while individuals should not be tasked with protecting society, it should be acknowledged that individuals do have power to protect themselves, especially when mobilized as a collective. For starters, more individuals should educate themselves on privacy and media literacy, and encourage their networks to do the same. With that, they should regularly assess their own relationship to privacy and publicity. As more and more people leave social media platforms,¹⁰² it is a strong suggestion that every individual at least engage less with social media. Ultimately, Sidis was right to note that “The only way to live the perfect life is to live it in seclusion.”¹⁰³ More individuals should elect to spend more time alone, particularly as a last ditch effort to retain privacy in an increasingly public world.

Privacy is important to society, and yet humans are social creatures. The challenge is not to eliminate public life, but to recalibrate it so that more individuals can retain a private life if they wish. The premium placed on publicity must be reconsidered and significantly reduced. Human obsession with celebrity, of others and ourselves, must be curbed if society is to be more

⁹⁹ Kalev Leetaru, *What Does It Mean For Social Media Platforms To "Sell" Our Data?*, Forbes (2018), <https://www.forbes.com/sites/kalevleetaru/2018/12/15/what-does-it-mean-for-social-media-platforms-to-sell-our-data/?sh=2a0387872d6c>.

¹⁰⁰ *Minimum Viable Product (MVP)*, ProductPlan, <https://www.productplan.com/glossary/minimum-viable-product/> (last visited May 6, 2023).

¹⁰¹ Natasha Lomas, *Researchers spotlight the lie of 'anonymous' data*, TechCrunch (2019), <https://techcrunch.com/2019/07/24/researchers-spotlight-the-lie-of-anonymous-data/>.

¹⁰² Ian Bogost, *The Age of Social Media Is Ending*, The Atlantic (2022), <https://www.theatlantic.com/technology/archive/2022/11/twitter-facebook-social-media-decline/672074/>.

¹⁰³ *Supra* note 73.

full of diverse self-expression and free from surveillance. In viewing the problem we face through the lens of hyperrealism, it would seem that society's downfall is inevitable. To take that view is defeatist. It is an assumption that it is much preferable for us all to live lives of hopefulness. And just because something seems hopeless is not a sufficient reason to not try to make it better. So, be social. Engage with digital media, get outside, touch some grass – maybe just leave your phone at home every once in a while, and don't post about it.