PRIVATE PICTURES, PUBLIC EXPOSURE: PAPPARAZZI, COMPROMISING IMAGES, AND PRIVACY LAW ON THE INTERNET

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ABSTRACT

In the "Internet" age, legislators and legal scholars are attempting to reconcile freedom of speech with the spread of pornographic materials[1] across national borders.[2] One solution to this problem is to apply privacy law,[3] to the Internet. Rather than focusing on access to obscene or pornographic material, this Comment argues that non-consenting subjects of Internet pornography should have legal recourse in breach of confidence.

INTRODUCTION

With the advent of the Internet, images can be shared quickly, with a potentially unlimited audience and at no cost.[4] In some cases, the

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1 *See* Jonathan Coopersmith, *Pornography, Videotape, and the Internet*, IEEE TECH. & SOC'Y MAG., Spring 2000, at 27.

2 Kate Reder, Recent Development, Ashcroft v. ACLU: *Should Congress Try, Try, and Try Again, or Does the International Problem of Regulating Internet Pornography Require an International Solution?*, 6 N.C. J. L. & TECH. 139 (2004); Richard N. Coglianese, Comment, *Sex, Bytes, and Community Entrapment: The Need for a New Obscenity Standard for the Twenty-First Century*, 24 Cap. U.L. Rev. 385 (1995). *See also* Taiwo A. Oriola, *Regulating Unsolicited Commercial Electronic Mail in the United States and the European Union: Challenges and Prospects*, 7 TUL. J. TECH. & INTELL. PROP. 113, 127 (2005).

3 The basic concept of the right to privacy stems from the article by Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *But see* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 128-33 (2007).

4 Michael L. Rustad & Thomas H. Koening, *Harmonizing Cybertort Law for Europe and America*, 5 J. HIGH TECH. L. 13, 15 (2005).

Internet has enabled the distribution of images of people who may not have given their consent to these images being made, much less their distribution.[5] This was the case with Catherine Bosley, a Youngstown, Ohio news anchor, who resigned after topless photographs of her surfaced on the Internet.[6] While vacationing, Bosley participated in a wet t-shirt contest at the spur of the moment, which had devastating long-term consequences when someone posted these topless photos of her on the Internet.[7] Thus, a moment of thoughtlessness is captured in a way that is seen as provocative or even pornographic, and can eventually cause damage to a woman's reputation and the loss of her job.[8]

This Comment argues that the subject of a pornographic image, who has not given her consent to the distribution or creation of the images, should be given some type of legal claim against the producers and distributors of such images. A legal recourse would help establish, in law and society, that these women are not accomplices in the distribution of these images, and that the existence of the images does not equate to implicit consent to distribution. In addition, allowing this sort of legal claim may deter others from posting sexually explicit pictures without the subject's consent.

Legislators and writers dealing with Internet pornography have focused mainly on child pornography[9] or access that minors have to pornography via the Internet.[10] In 1998, the European Union passed an act focusing on combating child pornography on the Internet,[11] while the

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[5] As was the case of Tammy Nyp, a student in Singapore who recorded herself having sex with her boyfriend on her mobile phone, only to have her phone stolen and learn that those pictures were posted on the Internet. *See* Scott Duke Harris, *Ready, Set, Click: Camera Phones are the Gadget Du Jour, But They Come With a Costly Threat to Personal Privacy*, S.F. CHRON., Apr. 17, 2006, at C1.

[6] NewsNet5.com, Correction: WKBN Anchor Resigns Over Nude Photos, http://www.newsnet5.com/news/2760440/detail.html (last visited Apr. 15, 2009).

[7] *Id.*

[8] Men are also caught in this uncomfortable situation, but because the subjects of the specific incident discussed in this comment were women, female pronouns will be used in this comment.

[9] *See generally* Dina I. Oddis, Comment, *Combating Child Pornography on the Internet: The Council of Europe's Convention on Cybercrime*, 16 TEMP. INT'L & COMP. L.J. 477 (2002).

[10] *See generally* Reder, *supra* note 2; Coglianese, *supra* note 2.

[11] Council Decision of 29 May 2000 to Combat Child Pornography on the Internet, 2000 O.J. (L 138) 1 (EU). This was followed by the Safer Internet Plus Programme, Council Decision 854/2005/UC, Establishing a Multiannual Community Programme on Promoting Safer Use of the Internet and New Online Technologies, 2005 O.J. (149/1) 1 ("Internet penetration . . . [is] still growing considerably in the [European] Community. Alongside this, dangers, especially for children, and abuse of those technologies continue to exist"). The Safer Internet Plus programme was adopted to promote safer use of the Internet, particularly for children, and to protect the end-user against unwanted content. *Id.* at 2.

United States passed Children's Online Privacy Protection Act.[12] Additionally, there is significant interest in protecting minors from sexual predators who use the Internet to solicit children.[13] However, less attention has been given to adults whose bodies have been exploited and whose privacy has been invaded.

An incident involving Belgian journalist Philippe Servaty, and the women he victimized, highlights the need to focus attention on adult victims of unauthorized distribution of pornographic images on the Internet. On a trip to Morocco, Servaty used promises of marriage and emigration to Belgium to convince more than seventy women to have sex with him.[14] He also used this same promise to further convince these women to pose naked for pictures, often in degrading positions. After returning to Belgium, he posted these pictures on the Internet.[15] When the Moroccan authorities discovered the identities of thirteen of the women, they were arrested.[16] Although Moroccan authorities requested Servaty's extradition, Belgian authorities refused.[17] Servaty had not violated Belgian law, and therefore could not be extradited by Belgian authorities.[18] Moreover, the women consented to Servaty taking the pictures, even if they were unaware of what he intended to do with them.[19]

This Comment focuses on the type of violation in the Servaty incident. The women he victimized were unaware of Servaty's intent, and truly believed the images would remain private. This Comment addresses the situation by considering what legal claims are available to

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[12] 15 U.S.C. §§ 6501-6506 (2000 & Supp. 2008). *See also* Janine Hiller, France Belanger, Micheal Hsiao & Jung-Min Park, *POCKET Protection*, 45 AM. BUS. L.J. 417 (2008).

[13] Emily Ramshaw, *Bill Targeting Online Predators Calls for Texas Sex Offenders to Report E-mail Addresses, Numbers*, DALLAS MORNING NEWS Feb. 20, 2009, *available at* http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/022009dntexsexoffenders.432f628.html (discussing a recent Texas bill that forces sex offenders to submit to local authorities their emails, in an attempt to crack down on sexual predators). *See also* YourSphere, http://yoursphere.com/tour/overview (last visited Mar. 21, 2009).

[14] Arabic News, 'Le Soir' Paper 'Extremely Shocked' to be Associated in Ethical Scandal in Morocco, June 13, 2005, http://www.arabicnews.com/ansub/Daily/Day/050613/2005061326.html; Paul Belien, Avenging Muslims Seek to Kill Belgian Journalist, BRUSSELS J., July 13, 2005, available at http://www.brusselsjournal.com/node/66; Marrakech Scandals Highlight Shameful Trade, DIARIO EL PAIS, S.L., July 19, 2005, at Unica, available at 2005 WLNR 11268842.

[15] Belien, *supra* note 14.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

Internet pornography victims. In incidents like the Philippe Servaty case, the legal concept of privacy and the English legal concept of breach of confidence, as discussed in *Douglas v. Hello! Ltd.*,[20] should be applied. This Comment recognizes and discusses the new dimension that communication via the Internet brings to the legal system, but argues that, as the court found in *Dow Jones & Co. Inc. v. Gutnick*;[21] the legal system should uphold certain fundamental ideas of privacy in a technology neutral context. Furthermore, when extradition or criminal prosecution is not appropriate or possible, the application of privacy law in civil courts offers a legal recourse to pornography victims who would otherwise be without any legal cure. Courts should look to *Douglas v. Hello! Ltd.* and *Dow Jones & Co. Inc. v. Gutnick* for precedent.

Part I of this Comment addresses the development of privacy law in the United States, briefly discusses privacy law globally, and looks at the link between privacy and technology, and Cyber-law and the Internet in general. Next, this Comment discusses privacy law and the breach of confidence by focusing on *Douglas v. Hello!*, followed by a discussion of *Dow Jones & Co. Inc. v. Gutnick*, an Australian case dealing with a defamation suit involving international parties and the Internet. Part I will conclude with a discussion of how *Douglas* affected privacy law and how *Gutnick* affected law in Cyberspace. Part II discusses the facts of the Servaty incident and the paucity of legal tools to deal with this incident. In addition, Part II demonstrates how *Douglas* and *Gutnick* can be used as a basis for dealing with non-consensual pornography on the Internet. Part II concludes by considering the advantages and disadvantages of this solution.

I. PRIVACY IN THE NATIONAL AND INTERNATIONAL CONTEXT

This section addresses privacy law as it was first developed in the United States, before placing privacy in a global context. Next, this section discusses the unique relationship between privacy and technology. Reflecting on the unique qualities of Cyberspace, especially its default worldwide distribution of content without regard to national borders, this Comment considers whether this new technology requires

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[20] [2001] Q.B. 967.

[21] (2002) 210 CLR 575.

new legal tools to handle privacy issues, or a whole new understanding of privacy itself.

A. DEVELOPMENT OF PRIVACY LAW

The current state of privacy law around the world, and its possible future must be viewed in the context of its history. The "birth" of privacy law occurred in the United States in 1890, with Brandeis and Warren's article "The Right to Privacy," which has provided the basic framework for privacy law in the United States ever since.[22] The European Union promulgated privacy protections with the European Convention on Human Rights (European Convention) beginning in 1950.[23] As long as there has been privacy law, advances in communication technology—from the photograph to the Internet—have challenged the boundaries of the private sphere.

1. UNITED STATES

The modern incarnation of privacy law is generally traced to Samuel Warren and Louis Brandeis's seminal article, "The Right to Privacy," published in 1890.[24] Relying primarily on English cases, the two scholars illustrated how the courts made scattered attempts to protect the privacy of an individual and "the right to be let alone."[25]

In the article, the authors articulated their belief that the law was a dynamic and changing entity that recognized new rights when required.[26] The authors saw technological developments—like photography, and new media practices—like newspapers focusing on the domestic sphere—as requiring additional protection of a person's privacy under the law.[27] For Warren and Brandeis, the growing complexities of an advancing society also meant that privacy was more important.[28]

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[22] *See* sources *infra* note 24.

[23] *See* sources cited *infra* note 55.

[24] Warren & Brandeis, *supra* note 3. *See* Des Butler, *A Tort of Invasion of Privacy in Australia?*, 29 MELB. U. L. REV. 339 (2005); Russell Brown, *Rethinking Privacy: Exclusivity, Private Relation and Tort Law*, 43 ALTA. L. REV. 589, 592 (2006); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133 (1992); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335.

[25] Butler, *supra* note 24, at 342; Warren & Brandeis, *supra* note 3, at 195.

[26] Warren & Brandeis, *supra* note 3, at 193.

[27] *Id*. at 195.

[28] *Id.* at 196; *see also* Richards & Solove, 3, at 128-29.

They recognized that within the common law itself it was necessary to find cases that could serve as the foundation for an articulated right to privacy.[29]

The authors claimed that the common thread of the case law on privacy was an implied contract or trust between plaintiffs and defendants.[30] Accordingly, because this trust existed between the parties, the decision on the part of the defendants to publicize the private information was seen as an "intolerable abuse" of the plaintiff's trust.[31] The authors asserted that the court had recognized this type of abuse or violation of a special confidence and that the court should continue to protect against such abuses.[32]

The Warren and Brandeis article differentiated the right to privacy from copyright and libel, while also noting that there are similarities between these areas of law.[33] Both copyright and privacy law address the publication and the dissemination of information. Copyright law focuses specifically on ensuring that the creator of an artistic work is given due credit and incentives to create, while privacy law imposes sanctions against the publicizing of certain private acts or information.[34] Similarly, though libel and the breach of privacy both cause damage to a person's reputation, the distinction between the two is that privacy would only protect those whose private actions do not concern the community.[35] Unlike libel, an action can be taken under privacy irrespective of the truth or accuracy of the disseminated information.[36] The right to privacy centered on allowing a person to keep their private actions private, and protecting an individual from having another publicize private acts, even if done without malice.[37]

Initially, the article did not receive a warm reception.[38] However, as time passed, it gained support and inspired the recognition of a common law right to privacy throughout the United States.[39] By 1939, the legal concept of privacy had found its way into the *Restatement*

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[29] Warren & Brandeis, *supra* note 3, at 197.
[30] *Id.*
[31] *Id.* at 210.
[32] *Id.* at 210-12.
[33] *See generally id.* at 200-07, 213-20.
[34] *See id.* at 200-01.
[35] *Id.* at 197, 214.
[36] *Id.* at 218.
[37] *Id.* at 215.
[38] Butler, *supra* note 24, at 342.
[39] *Id.*

of Torts.[40] In 1960, William L. Prosser explained the four basic variations of breach of privacy:

> 1. Invasion of Privacy - intrusion in another's seclusion, solitude, or private affairs.
> 2. Right of Publicity - public disclosure of private facts.
> 3. Defamation - publicity that places an individual in a false light in the eyes of the public.
> 4. Appropriation - the use of another's name or likeness in an advantageous manner.[41]

The four basic concepts as outlined by Prosser were later adopted by the *Restatement (Second) of Torts* (1977).[42] The strength of these legal claims in the United States, however, is arguable, due to the collision between privacy and the First Amendment of the Constitution, which protects freedom of speech.[43]

In *Time, Inc. v. Hill*,[44] the United States Supreme Court considered the case of a family whose life involuntarily became newsworthy when three escaped convicts held hostage a family of seven in their suburban Philadelphia home for nineteen hours.[45] Although the family remained unmolested during the attack, writer Joseph Hayes was inspired by their ordeal and wrote his crime novel, *The Desperate Hours*. In the novel, the Hilliard family of four is subjected to violent attacks by three escaped convicts who hold the family hostage.[46] Later, when the play based on the novel opened on Broadway, *Life Magazine* published the article "True Crime Inspires Tense Play" claiming that the novel was a depiction of the Hill family's tragedy.[47] The father of the Hill family sued the magazine, claiming that the play did not mirror the actual events that his family lived through.[48]

Though a jury awarded Hill $50,000 in compensatory damages and $25,000 punitive damages, the United States Supreme Court set

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[40] *Id.*; RESTATEMENT (FIRST) OF TORTS § 867 (1939).

[41] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960); Butler, *supra* note 24, at 343; Brown, *supra* note 24, at 593.

[42] Butler, *supra* note 24, at 343.

[43] *Id.* at 344-45. *See also Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that a damage award against a newspaper for publishing the name of a rape victim, which Florida statute expressly forbid, violated the First Amendment).

[44] 385 U.S. 374 (1967).

[45] *Id.* at 378.

[46] *Id.* at 378, 391-92.

[47] *Id.* at 377-78.

[48] *Id.* at 378.

aside the award and remanded the case.[49] Justice Brennan, writing for the majority, showed apprehension at restricting the freedom of speech, freedom of press, and the dissemination of ideas.[50] Though the Hills were not public figures, the hostage event made their lives newsworthy; thus, only if the jury found that *Life Magazine* had sufficient malice or knowledge of the falsity of the article could the jury find for the plaintiff.[51] The Court did not believe that this standard had been met, and the Court overturned the jury award. Thus, *Hill* shows hesitancy on the part of the United States Supreme Court to fully support privacy protections because of the potential conflict with the First Amendment.

2. GLOBALLY

Though Warren and Brandeis provided the first modern, legal, articulation of the concept of privacy, it is by no means an exclusively American concept.[52] Countries throughout Europe, South America, Asia, and Africa recognize privacy law.[53] Nor should it be argued that the United States stands at the forefront of protecting the privacy of individuals. While the United States may have been viewed as the leader in the 1960s and 1970s, during the 1980s and 1990s Europe took the lead in assuring individuals the right of privacy.[54] Because the Internet crosses national borders, any attempt at standardizing the law on privacy must consider the national laws of multiple countries.

In an attempt to come to a more unified understanding of human rights, delegates from multiple European countries met in Rome in

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[49] *Id.* at 379, 398.

[50] *Id*. at 382.

[51] *Id*. at 397.

[52] *See generally* INTERNATIONAL PRIVACY, PUBLICITY AND PERSONALITY LAWS (Michael Henry ed., 2001).

[53] Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, the Republic of Ireland, Finland, France, Germany, Greece, Iceland, India, Italy, Japan, the Netherlands, New Zealand, Norway, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, and the United Kingdom recognize privacy in the law. *Id.*

[54] Robert Gellman, *Conflict and Overlap in Privacy Regulation: National, International and Private*, *in* BORDERS IN CYBERSPACE 255 (Brian Kahin & Charles Nesson eds., 1997). *Cf.* Andrew T. Kenyon and Megan Richardson, *New dimensions in privacy: Communications, technologies, media practices and law*, *in* NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 1-2 (Andrew T. Kenyon and Megan Richardson, eds., Cambridge U Press 2006) (discuses the fact that in United States the Human Rights Movement of the 1960s/70s had the effect of ensuring Freedom of Speech rather than privacy).

1950.[55] The European Convention on Human Rights (European Convention) produced a document outlining basic legal protections for human rights.[56] Article 10 of the European Convention on Human Rights ensures freedom of expression while recognizing that there are restrictions to this freedom, namely the privacy of others. This privacy is discussed in Article 8.[57] Article 8, entitled "Right to respect for private and family life" states:

> 1. Everyone has the right to respect for his private and family life, his home, and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[58]

Article 8 begins with the assertion that everyone a basic right to privacy. Thus, it appears that Article 8 ensures individuals that their private lives will remain private under most circumstances. Article 8 comes prior to Article 10 of the European Convention, which speaks to a person's "Freedom of Expression." Though similar to the American Constitution's First Amendment, Article 10 is not seen as an absolute right. Article 10 of the European Convention, entitled "Freedom of Expression," states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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[55] Convention for the Protection of Human Rights and Fundamental Freedoms, Preamble, Nov. 4, 1950, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf. *See also* Andrew T. Kenyon & Megan Richardson, *New dimensions in privacy: Communications, technologies, media practices and law*, *in* NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 1-2 (Andrew T. Kenyon & Megan Richardson, eds., 2006).

[56] INTERNATIONAL PRIVACY, PUBLICITY AND PERSONALITY LAWS, *supra* note 52, at 1.

[57] *Id.* at 1-3. *See* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950.

[58] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[59]

Articles 8 and 10 of the European Convention show the divergence between Europe's attempt to deal with freedom of expression and privacy and the United States' First Amendment. Unlike the First Amendment of the United States Constitution, which ensures that the government shall place no limits on the freedom of speech or press,[60] Article 10 of the European Convention recognizes and allows for times when the freedom of speech is secondary to other rights or interests, such as privacy. In contrast, Americans only privacy protections come via the United States (U.S.) courts, which have derived a right of privacy from the First Amendment.[61] Predictably, "when the human rights movement of the1960s and 1970s really established the modern conception of rights as basic to a democratic polity in the United States . . . it was free speech rather than privacy that emerged as dominant."[62]

The United Kingdom sent delegates to the European Convention, and ratified it in 1951, yet, it was not until October of 2000 that the European Convention was formally incorporated into English law.[63] Prior to the Human Rights Act of 1998 (incorporated into law in 2000), if an English citizen believed that his or her rights had been violated, he or she could appeal to the European Court of Human Rights, a process that was both expensive and highly inconvenient.[64] This action also meant that the European Council of Human Rights in Strasbourg, not an English court, was making decisions on British policy.[65] Though critics

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[59] *Id.* at art. 10.

[60] U.S. CONST. amend. I.

[61] *See for example,* Griswald v. Connecticut, 381 U.S. 479, 483 (1965) ("the First Amendment has a penumbra where privacy is protected from governmental intrusion").

[62] Kenyon & Richardson, *supra* note 55, at 1.

[63] Henry, *supra* note 52, at 437.

[64] Christine Sypnowhich, *Taking Britain's Human Rights Act Seriously,* 58 U. TORONTO L.J. 105, 106-107 (2008).

[65] *Id.* at 107.

still question the ultimate strength of the Human Rights Act,[66] it has reinforced the "domestic authority of the European Convention on Human Rights."[67] This reinforcement is what allowed Douglas and Zeta-Jones, and later other celebrities to bring privacy cases against media outlets.[68]

3. PRIVACY AND TECHNOLOGY

The balance between free speech and privacy is only substantive and relevant with industrial, and later, electronic communications technology. The practical scope of a defamation or invasion of privacy is limited by the reach of the communications technology conveying the information. Warren and Brandeis saw the development of new technologies, like the photograph, as making possible greater intrusion into people's private lives, and therefore requiring a more substantive and specific legal protection for personal privacy.[69] When Warren and Brandeis wrote their article on privacy, they were witnessing a social upheaval due to the camera and a societal change towards a more impersonal mass culture.[70]

Likewise, in the Australian case *Victoria Park Racing and Recreational Grounds, Ltd. v. Taylor*,[71] a racetrack owner attempted to stop radio broadcast descriptions of races on his racetrack for fear that fewer paying patrons would attend the races. The case was heard in 1937, a year after the publication of the *Restatement of Torts* in the United States.[72] Although the plaintiff was not ultimately successful, the dissent in *Victoria Park Racing* displayed a growing concern for the privacy issues surrounding broadcast media—issues that came into even sharper focus with the advent of the television.[73] Now that the Internet has become omnipresent in modern life, intuitive and practical privacy considerations are again changing. Should the importance and meaning of privacy once again be reconsidered, perhaps even reinvented?

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[66] *Id.* at 106.

[67] *Id.* at 111.

[68] *See* Solove & Richards, *supra* note 3, at 168.

[69] Butler, *supra* note 24, at 342; Warren & Brandeis, *supra* note 3, at 195

[70] Bezanson, *supra* note 24, at 1137-38.

[71] (1937) 58 C.L.R. (Austl. H.C.).

[72] (1937) 58 C.L.R. 479 (Austl. H.C.); *see* Brown, *supra* note 24, at 594.

[73] Victoria Park Racing and Recreational Grounds Ltd., (1937) 58, C.L.R. 479, 505 (Austl. H.C.); *see* Brown, *supra* note 24, at 594.

This Comment suggests that the fundamental answer is "no." The advent of the Internet makes traditional privacy protections more important than ever as privacy becomes easier to violate. What is needed, are new legal tools to protect the private sphere against intrusions made possible by modern technology. In "The Right to Privacy Revisited: Privacy, News, and Social Changes, 1890-1990," Randall Bezanson suggested a movement away from the tort of invasion of privacy, as outlined and understood by Warren, Brandeis, and later Prosser, and towards the tort of breach of confidence.[74] Rather than focus on whether an individual's privacy was '"invaded," the breach of confidence focused on whether or not an individual had a reasonable expectation of confidence in sharing information.[75] Almost a decade later, the English court in *Douglas v. Hello!* relied on breach of confidence, rather than invasion of privacy, in finding for Douglas.[76]

Changes in technology drive the evolution of the legal tools used to protect privacy. When Warren and Brandeis wrote their seminal paper, a private or compromising image was a relatively new and rare concept. A photograph represented a foray into the private sphere never before possible; under the wrong circumstances, it made it a new and powerful invasion of privacy. Logically, Warren and Brandeis focused on the creation of such images, and the expectations people might reasonably have against damage thereby. Today, images are ubiquitous, but the ability for individuals to instantly make any image available to millions is new. Not surprisingly, *Douglas* focuses on the right to distribute images rather than the right to create them.[77] The personal sphere that the law seeks to protect has not changed significantly, only the legal tools have evolved. The basic concept of privacy that has evolved since 1890 can and should be retained. *Gutnick* and *Douglas* demonstrate how legal tools can evolve to defend privacy in the face of fast evolving technology rather than abandoning privacy as an unworkable concept in the digital age.

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[74] Bezanson, *supra* note 24, at 1150-51.

[75] *Id*. at 1150-51; Douglas and Others v. Hello! Ltd., [2001] EWHC (QB) 967, 988 [hereafter Douglas I]; Douglas v. Hello! Ltd., [2003] EWHC (Ch) 786, [181]-[193] [hereafter Douglas II].

[76] Douglas I, at 1011-1012.

[77] *See* Douglas I, at 975; Douglas II, at [216].

B. THE INTERNET AND CYBERSPACE LAW

The regulation of content on the Internet is often a conundrum for national courts. One problem is that courts struggle to understand and handle this new form of telecommunications. Another problem is that the Internet is not constrained by national boundaries,[78] yet the power to regulate it has generally been defined by national boundaries.[79] The Internet is a new technology, which allows information to be posted and viewed by anyone regardless of national boundaries or national laws.[80] With a simple click of a mouse, the Internet gives an international presence to whatever the user wishes to post and potentially triggers international litigation.[81]

In 2004, international availability of user content triggered international litigation against the American Internet website Yahoo!.[82] Yahoo! hosts a variety of auction sites and chat rooms, and by 2000 had expanded its business to other countries.[83] Since Yahoo! did not actively regulate the content of each posting, it was possible for individuals to use Yahoo!'s site to post and attempt to sell offensive matter; the focus of the litigation was the sale of Nazi-related propaganda and memorabilia.[84] *La Ligue Contre Le Racisme et L'Antisemitisme*, a French nonprofit dedicated to eliminating anti-Semitism, requested that Yahoo! prohibit these sales in France, since the sale of Nazi and Third Reich-related objects violates French law, and the website was available to French residents.[85] Under French Criminal Code, the purchasing or possession of Nazi materials within France is illegal.[86] Likewise, the French court found Yahoo! in violation of the French Criminal Code because it was possible for any French citizen to access the materials on American Yahoo.com from France.[87]

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[78] Richard L. Creech, *Dow Jones and the Defamatory Defendant Down Under: A Comparison of Australian and American Approaches to Libelous Language*, 22 J. MARSHALL J. COMPUTER & INFO. L. 553, 553 (2004).

[79] Joel R. Reidenburg, *Governing Networks and Rule-Making in Cyberspace*, *in* BORDERS IN CYBERSPACE 255 (Brian Kahin & Charles Nesson eds., 1997).

[80] Rustand & Koening, *supra* note 4, at 19.

[81] *Id*.

[82] Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp.2d 1181, 1183 (N.D.Cal. 2001).

[83] *Id*. at 1183.

[84] *Id*. at 1183-84.

[85] *Id*. at 1184.

[86] *Id*.

[87] *Id*.

Yahoo! disagreed with the French court's decision and sought declaratory relief against the French court's decision in California Federal Court.[88] In *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*,[89] Yahoo! requested that an American federal court refuse enforcement of the French court's verdict.[90] The California District Court found that the actions of the French court could not be enforced in the United States on First Amendment grounds.[91] However, the Ninth Circuit Court of Appeals reversed the decision for other reasons.[92]

Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme helps to demonstrate some of the difficulty that courts have in dealing with the Internet. Because of the ease with which the Internet allows information to cross borders, it has been suggested that the Internet should be treated as a separate, essentially self-regulating "space."[93] While the Internet is a unique tool that allows information to be transmitted without regard to regulatory borders, its content is created by people who inhabit a physical space and have no claim to exemption from national laws. *Gutnick* demonstrates that the courts are beginning to recognize and embrace this concept.[94]

C. *DOUGLAS V. HELLO! LTD.*

On November 21, 2000, a British court granted an injunction against *Hello!*, restraining the magazine from publishing photographs of the wedding of Michael Douglas and Catherine Zeta-Jones.[95] Prior to their wedding, Michael Douglas and Catherine Zeta-Jones secured an agreement with *OK! Magazine*, granting it the exclusive right to publish photographs of their wedding.[96] In the agreement, the actors retained extensive approval rights over anything that would be published by *OK!* or the subsequent publications to which *OK!* sold pictures.[97] The couple

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[88] *See id.* at 1185.

[89] 169 F. Supp. 2d 1181 (N.D.Cal 2001).

[90] *Id.*

[91] *Id*. at 1194.

[92] Yahoo!, 379 F.3d at 1127.

[93] David R. Johnson & David G. Post, *The Rise of Law on the Global Network*, *in* BORDERS IN CYBERSPACE 13 (Brian Kahin & Charles Nesson eds., 1997).

[94] Rustand & Koening, *supra* note 4, at 27-28.

[95] Douglas I, [2001] EWHC (QB) 967, at 972.

[96] *Id*. at 975.

[97] *Id*. at 976.

and *OK!* informed the guests that they were not allowed to videotape or photograph the wedding, and refused paparazzi entry into the facility.[98] Despite the security, California paparazzo photographer Rupert Thorpe managed to infiltrate the wedding and take photographs.[99] Thorpe's pictures were purchased by *Hello!*, whose bid to be the exclusive photographers of the wedding was rejected by Douglas and Zeta-Jones.[100] Upon learning of the intrusion, the couple and *OK!* sought an injunction to keep the issue of *Hello!* with the unauthorized pictures from being sold.[101] *Hello!* appealed the granted injunction and on November 23, 2000, the injunction was discharged.[102] Although the court discharged the injunction, *Hello!* eventually had to pay damages to the couple and *OK!* for breach of confidentiality.[103]

In *Douglas v. Hello! Ltd* (*Douglas I*),[104] the Court of Appeal found that while the actions of *Hello!* probably rose to the level of a breach of confidence, the Court refused to grant injunctive relief for the claimants for the following reasons[105] (1) Douglas and Zeta-Jones sought control over the rights to the pictures, not actual privacy, so the damages could be appropriately handled economically; (2) *Hello!* would lose an undefined amount of money from not being allowed to sell a full issue, and would have no recourse if the injunction was wrongly granted; and (3) because of the time sensitive nature of *Hello!*'s distribution, an injunction would amount to a final ruling without the benefit of a trial.[106]

The English court found that *Hello!* knew that an agreement existed between the couple and *OK!* and that the couple "had a right of privacy which English law would recogni[z]e."[107] However, the court believed that the couple's action could be dealt with in terms of damages after the magazine was sold.[108] On the other hand, the amount that *Hello!* would have had to pay to its advertisers, as well as the loss of a week's magazine income from sales was significant and difficult to estimate.[109]

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98 *Id.*
99 Douglas II, [2003] EWHC (Ch) 786, [71].
100 *Id.* at [72].
101 *Id.* at [89].
102 Douglas I, [2001] EWHC (QB) 967, at 972.
103 Douglas II, 2003 E.M.L.R. 31, at [279].
104 [2001] EWHC (QB) 967.
105 Douglas I, [2001] EWHC (QB) 967, at 988, 995-96.
106 *Id.* at 995.
107 *Id.* at 984.
108 *Id.* at 1006.
109 *Id.* at 996.

Moreover, the court recognized that allowing the injunction would mean that the court was putting itself in the middle of a commercial dispute between two magazines and ruling without a trial.[110]

In *Douglas I*, the three judges who heard the case alluded that they believed the claimants had a powerful case against *Hello!* even though the injunction was overruled.[111] In 2003, Michael Douglas, Catherine Zeta-Jones, and *OK!* received damages after bringing their claim to court again. In *Douglas II*, the court granted damages to the claimants based on the law of confidence, but rejected the other issues, including privacy, by which the claimants sought redress.[112]

In looking at the evidence, the court noted that the couple was not seeking privacy in their wedding coverage, but rather control over the image projected by the wedding.[113] Although the court acknowledged that the previous decision from the Court of Appeals invited it to hold that the law of privacy existed, ultimately it declined to do so.[114] The court showed significant concern about the broad scope of the tort of privacy, and it did not find that privacy existed in this case.[115] Moreover, the court did not believe that a law of privacy would give the claimants recovery that differed from the recovery attainable under the law of confidence.[116]

The court found that that the law of confidence was the proper manner in which to determine the damages that *Hello!* caused the claimants. The law of confidence was based not upon property or a contract, but on the basic duty to act in good faith.[117] The three elements for this claim are (1) that the information revealed had the necessary quality of confidence, (2) that the information was imparted under circumstances suggesting the obligation of confidence, and (3) that the unauthorized use was to the detriment of the party communicating it.[118]

Viewing the current case, and cases of a similar nature as "a fusion between the pre-existing law of confidence and rights and duties arising under the Human Rights Act,"[119] the court found that "[Articles] 8

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[110] *Id.*
[111] *Id.* at 995.
[112] Douglas II, [2003] EWHC 786, at [279-80].
[113] *Id.* at [216].
[114] *Id.* at [229].
[115] *Id.*
[116] *Id.*
[117] *Id.* at [181] (citing Fraser v. Evans, [1969] 1 Q.B. 349, at 361).
[118] *Id.* at [182] (citing Coco v. A.N. Clark (Eng'rs) Ltd., [1969] R.P.C. 41, at 47).
[119] *Id.* at [186].

and 10 of the European Convention on Human Rights has absorbed into the action for a breach of confidence."[120]

D. *DOW JONES & CO. INC. V. GUTNICK*

While *Douglas II* established a model for how the law of confidence can be applied to unauthorized distribution of images, it does nothing to develop a jurisdictional framework to deal with cases where the implications of information sharing are international. In *Dow Jones & Co. Inc. v. Gutnick*, the Australian Supreme Court of Victoria[121] found that the American company, Dow Jones & Co., Inc., could be held liable for an online article defaming a Victoria resident.[122] On October 30, 2000 Barron's Online (a subsidiary of Dow Jones) ran an article entitled "Unholy Gains: When stock promoters cross paths with religious charities, investors had best be on guard," which accused Victoria businessman Joseph Gutnick of an association with a convicted tax evader and another person awaiting trial for stock manipulation.[123] The article further stated that Gutnick was the convicted tax evader's "biggest money-laundering customer."[124]

Rather than bring suit in the United States, where Dow Jones had its primary place of business, Gutnick brought the suit in Victoria because that is where he believed he suffered the damages.[125] Although the respondent, Dow Jones, was an American company, the court found that Australian defamation law, rather than American defamation law should be used in the case.[126]

In limiting the place of defamation to Victoria, rather than the United States, Gutnick's claim became jurisdictionally simpler—the damage was done in Victoria, via the distribution of information to Victoria, and the plaintiff resided in Victoria. This limitation gave the Supreme Court of Victoria adequate grounds to find that proper jurisdiction existed, even though the distribution was via the Internet.[127] More importantly, for the purposes of this article, the court also found

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[120] *Id.*
[121] This is an Australian appeals court.
[122] *See* Gutnick, (2002) 210 C.L.R 575 (Vict.), [202].
[123] *Id.* at [169-71].
[124] *Id.* at [172].
[125] *Id.* at [46].
[126] *Id.* at [163].
[127] *Id.*

that traditional defamation laws could be applied to statements published on the Internet, since the "rules should be technology neutral."[128]

On appeal, the Australian Court of Appeals in *Gutnick* recognized the unusual nature of the Internet, noting that it was "a decentrali[z]ed, self-maintained telecommunications network," which in itself was essentially "borderless."[129] In this respect, it is unlike newspapers and radio, for which the content providers need to make a positive decision to distribute their content to any given area of the world, and thus may be called to account under local laws for that decision. Absent specific controls, anything posted on the internet would fall under every jurisdiction worldwide. However, the Court was concerned that if it found the Internet to be a "defamation free jurisdiction" then defendants and other similarly situated companies would ultimately have less accountability.[130]

E. PRIVACY AFTER *DOUGLAS V. HELLO!*, CYBERSPACE AFTER *DOW JONES & CO. INC. V. GUTNICK*

Both *Douglas v. Hello!* and *Dow Jones & Co. Inc. v. Gutnick* change the way that privacy law and Cyberspace are treated. In the wake of *Douglas,* England has seen another celebrity asserting her privacy in *Campbell v. MGN Ltd.*[131] The European Court of Human Rights has also been more assertive in its protection of privacy as will be discussed in *Von Hannover v. Germany*,[132] a case in which the Princess Caroline of Monaco asserted her right of privacy against the paparazzi. Likewise, in the wake of *Gutnick,* the English Court has heard *Harrods v. Dow Jones Inc*.[133] *Harrods* suggests that courts are becoming more willing to follow Gutnick in asserting jurisdiction over Internet content based on the location of the damages, not the origin of the postings.

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[128] *Id.* at [125].
[129] *Id.* at [80].
[130] *Id.* at [199].
[131] [2004] UKHL 22, [2004] 2 A.C. 457 (appeal taken from Eng.) (U.K.).
[132] Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 294, [1-2, 8-10].
[133] [2003] EWHC 1162 (Q.B.).

1. PRIVACY AND DOUGLAS V. HELLO!

Douglas v. Hello![134] opened the door for British courts to address privacy; it also spurred a new wave of privacy discussion in the European Union in general, focusing on the issue of breach of confidence. Prior to *Douglas*, in *Kaye v. Robertson*,[135] the English courts held that there was no actionable right of privacy under English law.[136] However, the opinion by Lord Justice Sedley in *Douglas I* suggested that the courts should consider an actionable right to privacy, recognized via the breach of confidence,[137] which has its foundations in Victorian England with the case *Prince Albert v. Strange*, [138] which served as the initial inspiration for Warren and Brandeis's *Right to Privacy*.[139]

Since *Douglas* there have been two privacy law cases that have gained significant interest: *Campbell v. MGN Ltd*.[140] and *Von Hannover v. Germany*.[141] In *Campbell*, the English House of Lords considered the right to privacy in connection with sale of paparazzi photographs of supermodel Naomi Campbell.[142] In *Von Hannover*,[143] the European Court of Human Rights considered whether paparazzi photographs of Princess Caroline of Monaco violated her right to privacy. Both cases involve famous women successfully asserting their rights to privacy despite the fact that they are public figures.

In *Campbell*, Naomi Campbell was photographed while leaving the therapy group "Narcotics Anonymous."[144] Campbell saw this as an

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[134] I mean the full set of opinions on this case, and the multiple times this case was before a court.

[135] [1991] F.S.R. 62.

[136] *Id.* at 66, 70. A television celebrity was recovering from catastrophic injuries in a private room. *Id.* Although there were signs posted requesting that visitors first talk with a member of the staff before visiting Kaye, some journalists ignored the request, entered his room, and interviewed him. *Id.* While interviewing him they also took pictures, which showed that he had severe head and brain injuries. *Id.* at 63-64.

[137] *See* Douglas I, [2001] Q.B. 967, at 1011-13. *See* Megan Richardson, *The Private Life after Douglas v. Hello!*, SING. J. LEGAL STUD. 311, 327-38 (2003).

[138] *See* Prince Albert v. Strange, (1849) 64 ER 293 (Ch.) (Prince Albert made some etchings of the Royal Family, and gave them to a printer to make copies so that he could distribute them to his family. However, the printer tried to distribute the etchings to the public, the British court did not allow the distribution on the grounds of breach of confidence).

[139] Warren & Brandeis, *supra* note 3, at 202, 204, 208.

[140] [2004] UKHL 22, [2004] 2 A.C. 457 (appeal taken from Eng.) (U.K.).

[141] Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 294.

[142] [2004] UKHL 22, [1-3, 5-8, 11-22].

[143] Von Hannover, 2004-VI Eur. Ct. H.R. 294, ¶¶ 1-2, 8-10.

[144] [2004] UKHL 22, [3, 7, 8].

infringement of her right to privacy, and the trial court agreed.[145] The Court of Appeals reversed the judgment, asserting that her celebrity status made her attendance at Narcotics Anonymous "newsworthy." The House of Lords restored the trial judge's order.[146]

Similarly, in *Von Hannover,* Princess Caroline of Monaco tried to stop the publication of various paparazzi photographs that had been taken of her.[147] While a German court found that she had no claim because her celebrity status made her day-to-day movements newsworthy, an appeal to the European Court of Humans Rights allowed her suit.[148] The European Court of Human Rights held that despite her celebrity status, Princess Caroline retained a right of privacy in her everyday life.[149] The European Court found that "the importance of every person's right to privacy and of the freedom of expression is fundamental . . . they are of equal value."[150]

Both *Campbell* and *Von Hannover* dealt with celebrity status and privacy, and both cases favored a celebrity's right to privacy while walking in public arenas, suggesting that privacy is not confined to a non-public environment. The *Douglas* decision has repercussions beyond the rights of celebrities. The English Court of Appeals opinion in *Douglas I* suggests that a breach of confidence claim could be used when confidentiality does not exist, essentially extending breach of confidence to cover any breach of privacy.

2. CYBERSPACE AND DOW JONES & CO., INC. V. GUTNICK

Dow Jones & Co. Inc. v. Gutnick did two important things (1) it showed one court's willingness to apply traditional privacy law to the Internet and (2) it demonstrated how a claimant can get jurisdiction in the claimant's homeland over a respondent in another country.[151]

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[145] *Id.* at [10] (trial court awarded damages for breach of confidence and under the Data Protection Act 1998).

[146] *Id.* at [10, 35, 78, 125, 160, 171].

[147] Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 294, ¶¶ 9-10. *See also* Barbara McDonald, *International and Comparative Perspectives on Defamation, Free Speech, and Privacy: Privacy, Princesses, and Paparazzi,* 50 N.Y.L. SCH. L. REV. 205, 211 (2005/2006).

[148] McDonald, *supra* note 147, at 211-18.

[149] Von Hannover, 2004-VI Eur. Ct. H.R. 294, ¶¶ 77, 84.

[150] *Id.* ¶ 42 (citing Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy).

[151] *See* Gutnick (2002) 210 C.L.R 575 (Vict.), [6, 42, 79-80, 111-22, 125].

By bringing the case in an Australian court using Australian law, rather than in the United States, Gutnick assured that he received a more favorable trial. The United States views the promotion of free speech, pursuant to the First Amendment of the Constitution, as paramount to privacy. Australian courts view a person's reputation as the primary consideration.[152] Thus, a publisher's honest mistake in an American court might not make a publisher liable for defamation because the claimant would need to show that the publisher intended to make the defamatory statements. In Australia, the same scenario would play out differently, because a person's reputation is of the utmost concern and the law is created to reflect this belief.[153] It is therefore unsurprising that Australia court believed that Gutnick's reputation should take precedence over Dow Jones' freedom of speech.

More recently in *Harrods v. Dow Jones & Co., Inc.,* the owner of Harrods department store successfully filed a defamation suit against Dow Jones and Company. [154] The genesis for the lawsuit was a Wall Street Journal article that the newspaper had decided to run in honor of April Fool's Day.[155] The article claimed that Harrods owner Mohammad Al Fayad intended "float" shares of Harrods stock as a sort of public offering.[156] This subtle comparison to failed American company Enron was not taken well by Al Fayad and he filed a defamation suit with the English court.[157]

When Dow Jones attempted to get the claim dismissed, claiming the forum was improper, the English court dismissed Dow Jones' argument.[158] The Honorable Justice Eady presiding over the case used *Gutnick* in reaching his decision that Dow Jones should be held liable under English defamation laws in England, although the majority of the actions took place in the United States.[159] Arguably, this cemented the

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[152] *See id.* at [52, 74, 190].

[153] *See id.* at [190].

[154] [2003] EWHC 1162 (Q.B.), [5, 45].

[155] *Id.* at [1-3].

[156] *Id.*

[157] SIMPSON GRIERSON, X-TECH GROUP, INTERNET DEFAMATION UPDATE – UK COURT APPLIES CONTROVERSIAL AUSTRALIAN DECISION (2003), http://www.simpsongrierson.com/pdf_display.cfm?pathto=/assets/expertise/xtech/publications/it/2003/KYN_CYS_July03.pdf.

[158] *Id.*

[159] *Id.*; s*ee also* Nathan W. Garnett, Comment, *Dow Jones & Co. v. Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?*, 13 PAC. RIM. L. & POL'Y J. 61, 68-69 (2004).

importance of *Gutnick* in the world wide legal arena. Here, a court outside of Australia turned to *Gutnick* for guidance. In *Harrods*, the English court declared that this American Company would be forced to maintain a suit in England despite past precedent from both the English and American courts to hold otherwise.

The success with which Harrods was able to argue that Dow Jones, an American Company, should be forced to maintain a suit in England, suggests that more and more, courts are willing to assert their authority to enforce local or national laws on Internet content.[160] In 2003, this meant holding an American Company accountable to English defamation law for actions taking place in the United States, but posted on the Internet. In the future, it is possible that another English court will likely be willing to apply the claim of breach of confidence to the Internet.

II. THE SERVATY INCIDENT

While Part I explained privacy law its relationship with Cyberspace, Part II discusses the Servaty incident and suggests possible ways that the women Servaty victimized might be given a viable legal claim against him. In the wake of *Douglas* and *Gutnick*, this Comment suggests a possible way that a Belgian court or the European Court of Human Rights might recognize a valid claim by Servaty's victims. This section concludes by considering the possible pros and cons if the court were to look to *Douglas* and *Gutnick* for guidance.

A. BACKGROUND

In 2005, Moroccan authorities arrested thirteen[161] women when pornographic pictures of them were found on the Internet and in a marketplace.[162] The photographer was Philippe Servaty, a Belgian journalist who had wooed the women with promises of marriage, then took pictures of them in a variety of positions, telling them that the images were special memories.[163] Upon returning to Belgium, Servaty

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[160] SIMPSON GRIERSON, *supra* note 157.

[161] *Compare* ARABIC NEWS, *supra* note 14 (12 women), with Belien, *supra* note 14 (13 women).

[162] Belien, *supra* note 14; *see also* Le Soir, http://www.lesoir.be (last visited Apr. 15, 2009).

[163] Belien, *supra* note 14.

published pictures on the Internet[164] of over eighty Moroccan women in pornographic and often degrading positions.[165]

Moroccan authorities were alerted to the distribution of Servaty's photographs when one of the victims, a 42-year-old teacher named Samira, complained to the authorities.[166] At the time the pictures were taken, Samira believed that she would become the wife of a prominent European journalist. However, after waiting for Servaty to return, Samira realized that she had been betrayed.[167] Though she was aware of the betrayal, she had no knowledge that Servaty had published compromising pictures of her and other women on the Internet.[168] She learned of the publication through her then fiancé, a local Agadir man.[169] He recognized her on a CD-ROM for sale in the souks of Agadir.[170] He later beat her and threw her out.[171] Subsequently, she went to the Moroccan police to file a complaint against Servaty.[172] Upon complaining, she was arrested for posing in pornographic pictures, a crime in Morocco.[173] In addition to the thirteen women who were found by the police and convicted, one woman went insane and two other women committed suicide.[174]

Samira's complaint was not the first time that Moroccan authorities had knowledge of Servaty's interest in pornographic material. Moroccan police had arrested Servaty in the summer of 2004 while he was vacationing, and discovered his pornographic photographs.[175] The authorities, upon viewing his photographs, informed him that he faced imprisonment for possession the materials, but he was freed after eighteen hours.[176] Servaty was told to leave the country and not to return.[177] This run-in with the police, however, did not stop him from posting the pictures on the Internet after returning to Belgium.

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[164] *Id.*
[165] *Id.*; ARABIC NEWS *supra* note 14.
[166] Belien, *supra* note 14.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*

After the pictures were posted on the Internet, and following Samira's arrest, a Moroccan judge signed an international arrest warrant for Servaty.[178] Moroccan authorities asked their Belgian counterparts to arrest Servaty.[179]

Because pornography is a crime under Moroccan law, but not under Belgian law, Servaty could not be extradited. Generally in extradition matters, criminal activity should have double criminality, meaning that the activity is criminalized in both the country requesting extradition and the county being asked to extradite.[180] Despite Belgian Justice Minister Laurette Onkelinx's declaration that the jailed Moroccan women "are victims twice over," Belgian authorities ultimately did not see extradition as appropriate.[181]

B. HOW *DOUGLAS V. HELLO!* AND *DOW JONES & CO. INC. V. GUTNICK* CAN BE APPLIED

At the time that this story first made headlines, there was little that appeared could be done for these women. Although neither *Douglas* nor *Gutnick* appear at first glance to have any similarities to the Servaty incident, both cases used in conjunction may serve as a mechanism by which these women or women in a similar situation might have recourse through the legal system.

1. *DOUGLAS V. HELLO!* AS APPLIED TO BREACH OF CONFIDENCE

Though extradition is not appropriate, it does not mean that the there is nothing that can be done for these Moroccan woman or others who must deal with their image being displayed on the Internet without their permission. The English court's findings in *Douglas* suggest that Servaty did not have the right to share the pictures, even though the women consented to being photographed.[182] Moreover, applying the analysis in *Douglas*, Servaty did not have the right to publish the pictures on the Internet or sell them in the markets.

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[178] *Id.*

[179] Belien, *supra* note 14.

[180] *See generally*, GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 47 (Kluwer Academic Publishers 1991) (details of double criminality are discussed here).

[181] *Marrakech Scandals Highlight Shameful Trade*, *supra* note 14.

[182] *See* Douglas II, [2003] EWHC (Ch) 786, [181-82].

In posting the pictures on the Internet, Servaty was in breach of confidence because all three elements of the law of confidence were present[183] (1) the information was given privately and held in confidence; (2) an obligation to ensure privacy existed; and, (3) there was actually injury. First, like *Douglas*, the information that was revealed had the necessary quality of confidence.[184] The pictures showed these women naked or in various states of undress.[185] The pictures would likely be considered private information, no matter the cultural norms of modesty, and doubly so in a country where the pictures themselves were illegal. The second requirement of breach of confidence is that the information is shared under circumstances suggesting an obligation of confidence.[186] These pictures were not taken in public, but behind closed doors, and as part of what the women understood to be a private romantic relationship, not a commercial one. It is difficult to imagine that Servaty was unaware that these pictures were private.[187] The third element of breach of confidence is that the unauthorized use of the material was detrimental to the party that shared the information. In the Servaty case, this element was clearly met.[188] Servaty had been detained and questioned by police; he knew that both extra-marital sexual relations and pornography are illegal in Morocco because he had been warned by Moroccan authorities before he published the pictures.[189] Thus not only was the shared information damaging, but Servaty had effective foreknowledge that this would be so.

Notably, the Servaty incident also lacks the "newsworthiness" of the incidents underlying *Campbell v. MGN Ltd.* or *Von Hannover v. Germany*, and thus lacks the freedom of press concerns that those cases raised. While Servaty could argue for his own celebrity status as a, well-known journalist, the details of his private life had not interested the media or paparazzi prior to this incident.

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[183] *Id.*
[184] *Id.* at [182].
[185] Belien, *supra* note 14.
[186] Douglas II, [2003] EWHC (Ch) 786, [184].
[187] *See* Belien, *supra* note 14.
[188] Douglas II, [2003] EWHC (Ch) 786, [182].
[189] *See* Belien, *supra* note 14.

2. DOW JONES & CO., INC. V. GUTNICK AS APPLIED TO CYBERSPACE

Douglas, Hannover, and *Campbell* help chart how a modern, actionable right to privacy may be sustained; *Gutnick* provides the tools to apply this right internationally on the Internet. *Gutnick* showed an Australian court's successful application of traditional defamation law to the Internet. The court said that the rules of law ought to be technology neutral.[190] As previously discussed, this case had repercussion in England in *Harrods v. Dow Jones & Co. Inc*.[191] If a court that is in no way bound to follow the example of *Gutnick* chose to follow its precedent, it is likely that *Gutnick* will become a case that other courts look to. If other courts are willing to apply defamation law to the Internet for material produced and published in other countries, there is little reason why they should not also consider other aspects of privacy law, such as a breach of confidence, in the same light. The applications and the consequences of the *Dow Jones* decision have not been fully felt, and it is yet to be seen if other courts in the European Union will be open to using this reasoning to support a breach of confidence claim on the Internet.

The English courts have allowed a defamation suit to continue under English law because the damages were limited to England.[192] In *Harrods v. Dow Jones & Co., Inc.* the owner of Harrods department store filed a defamation suit against Dow Jones and Company after they ran an article comparing Harrods to Enron.[193] Dow Jones attempted to get the claim dismissed, claiming the forum was improper, but the English court allowed the suit to continue.[194]

The success with which Harrods was able to argue that Dow Jones, an American Company, should be forced to maintain a suit in England, shows the English court following the example of *Gutnick.* If English courts allow defamation suits to go forward applying English law to American produced Internet content, it seems likely that they would also be sympathetic to international breach of confidence claims involving the Internet.

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[190] Gutnick, (2002) 210 C.L.R 575 (Vict.), [125].
[191] [2003] EWHC 1162 (QB)
[192] *Id.* at [5].
[193] *Id.* at [7].
[194] *Id.* at [45].

3. APPLICATION: WHERE SHOULD THE CASE BE BROUGHT? WHAT WOULD THE DAMAGES BE?

Douglas, *Campbell*, and *Harrods* were all English court cases, yet neither Servaty, nor the women he photographed, have any connection to England, so England would not be the proper venue for a legal claim to be brought. The Belgian or the Moroccan courts are the two most likely venues, with the European Court of Human Rights as a backstop after exhausting all domestic remedies.

The Moroccan court would be problematic choice to bring a lawsuit for numerous reasons. To begin, a warrant for Servaty's arrest still exists, he is unlikely to appear in court, since he has be avoiding the Moroccan officials since this incident.[195] Next, only thirteen of the over seventy victims were arrested, suggesting that most of the women who posed for Servaty's pictures are still in hiding and would be unlikely to expose themselves to criminal prosecution in Morocco.[196] Finally, the women who have already been prosecuted might not feel comfortable bringing suit in Morocco and there could be questions as to whether or not a bias against them would exist. The thirteen women who were found by police dealt with significant shame and were shunned.[197] Thus, these women would be unlikely to feel comfortable in the very courts that condemned them to jail.

Belgium is a viable venue where a suit for breach of confidence could be brought. Belgium has a relatively well-established body of domestic law protecting a person's privacy, and how the images are used.[198] Belgium is also a party to the European Convention and thus recognizes the right of privacy under Article 8.[199] However, according to the Rome II treaty, the Member States of the European Union agreed that in cases of cross-border defamation the suit should be brought where the

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[195] *Marrakech Scandals Highlight Shameful Trade*, *supra* note 14.

[196] *Id.*; ARABIC NEWS, *supra* note 14; Belien, *supra* note 14.

[197] Belien, *supra* note 14.

[198] Alexandre Cruquenaire and Benoit Van Asbroek, *Belgium*, in INTERNATIONAL PRIVACY, PUBLICITY, AND PERSONALITY LAWS 47-67 (Michael Henry ed., 2001).

[199] *Id.* at 47.

damage occurred.[200] However, during treaty negotiations, Belgium was in favor of locating defamation suits in the place of publication.[201] Since the place of publication in the Servaty incident is Belgium, the Belgium court could view Belgium as the proper venue and choice of law for a breach of confidence claim.

Unfortunately, there is no clear or unanimous consensus on the venue for an international defamation or breach of confidence case, even among members of the European Union, to say nothing of nations that are not signatories to the Rome II treaty. As in *Kaye v. Robertson*[202] (English court of Appeal) and *Von Hannover v. Germany* (German Supreme Court), national courts can interpret international agreements loosely.[203] England was part of the Convention on Human Rights, but the court claimed for a time that no actionable right of privacy existed.[204] Similarly, Princess Caroline's breach of privacy claim under European Convention Article 8 was dismissed by the German courts, but was later upheld by the European Court of Human Rights.

The theme that does emerge from the privacy cases to date is that the European Court of Human Rights is the most victim-friendly venue for privacy cases, and is becoming the backstop venue when national courts dismiss victims' claims. For Servaty's victims, the European Court of Human Rights would be the likely final venue if the Belgian courts could not give them relief.[205]

Assuming a successful outcome in an appropriate jurisdiction, what would appropriate damages be for Servaty's victims? In *Douglas I*, Douglas, Zeta-Jones, and *OK! Magazine* sought injunctive relief; however, such relief is meaningless when applied to the Internet. While a court had an opportunity to effectively limit distribution of an image by ordering that the physical copies of *Hello!* not be distributed to newsstands, once an image has been posted to the Internet, it cannot be

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[200] European Parliament, Press Release, *Rome II: MEPs reintroduce rules on defamation*, Jan. 18, 2007, http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20070112IPR01917.

[201] Aaron Warshaw, Note: *Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims*, 32 BROOKLYN J. INT'L L. 269, 299 (2006).

[202] [1991] F.S.R 62.

[203] *See id.*; Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 294; *see also* Gavin Phillipson, *The 'right' of privacy in England and Strasbourg compared*, in NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Andrew T. Kenyon and Megan Richardson, eds., 2006).

[204] Kaye, [1991] F.S.R. 62.

[205] Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 294.

effectively removed. Popular images are copied countless times onto individual computers, and often re-posted multiple times if the original is taken down; once an image is on the Internet, it is essentially out there forever. Therefore, the primary relief that would be available to these women would be economic.

While at first economic compensation might seem inadequate compared to the damage suffered, it could offer these women a new start. The money could assist in a move to Europe, the thing most of these women had hoped to obtain by marrying Servaty.[206] Arguably, the lower economic status of these women was what attracted Servaty—he knew that he could take advantage of their desire for a better life.[207] While nothing could undo the damage that had been done to them in Morocco, giving these women the means to establish a new life in Europe or in another location might give the women the ability to return to some form of a normal life. Financial damages could also cover the legal costs that their families endured during their criminal hearings and imprisonment. Large financial damages could also serve as a deterrent to those who might wish to post exploitive images; otherwise, exploitative postings on the Internet might be viewed as having no repercussions, especially when the poster is not part of the community he is exploiting.

C. ADVANTAGES AND DISADVANTAGES TO EXPANDING PRIVACY TO THE INTERNET

The Internet is a technology unconstrained by national borders, which critics and courts have not yet come to terms with.[208] Some commentators have suggested that the Internet should be treated as a new space with its own rules and regulations.[209] If the courts were to follow this suggestion, it would mean that the Internet would be an essentially lawless space. Luckily, this does not appear to be the way that courts are headed.

In *Gutnick*, an Australian court determined that, regarding defamation law, the "rules should be technology neutral."[210] Because the precedent established by *Gutnick* with regard to jurisdiction appears to be

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[206] *Id.*

[207] Belien, *supra* note 14.

[208] Creech, *supra* note 78, at 553; Rustand & Koening, *supra* note 4.

[209] Johnson & Post, *supra* note 93, at 13.

[210] Gutnick, (2002) 210 C.L.R 575 (Vict.), [125].

influencing other courts,[211] it is likely that other courts will also find its technology neutral approach to the Internet influential. The advantage of both technological neutrality and local jurisdiction is that the court will be applying established laws, which gives users of the Internet more certainty of the legality or illegality of their actions on the Internet, at least within their home countries.

Though Dow Jones is an American company and was sure that its article was not defamation under American laws, the *Gutnick* case stands for the proposition that defamation standards are determined by where the damage is felt rather then the standards which are known to the person writing or publishing the work. The result, as one critic has observed, is that "decisions like *Gutnick* could reduce the level of speech protection to the lowest common denominator."[212] Therefore, "the law of the country with the lowest level of speech protection would become the de facto law of the Internet."[213] This is the worst possible scenario, possibly leading to a chilling effect on Internet free speech worldwide.[214]

This comment maintains that individual countries exercising jurisdiction over Internet content will not lead to an overall chilling of free speech on the Internet. Countries with more repressive governments already restrict not only their nationals' freedom of speech, but also the availability of Internet material.[215] For example, the Chinese government restricts the freedom of speech of its nationals,[216] and controls the content of the Internet that is available for view in China.[217] So for the citizens of countries with more repressive governments, or stricter defamation laws,

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[211] *See* Harrods, [2003] EWHC 1162 (Q.B.) [36].

[212] Garnett, *supra* note 159, at 68.

[213] *Id.*

[214] *Id.*

[215] *See* Anne Chueng & Rolf H. Weber, *Internet Governance and the Responsibility of Internet Service Providers*, 26 WIS. INT'L L.J. 403, 408-11 (2008).

[216] *See* Congressional Executive Committee on China, *available at* http://www.cecc.gov/pages/virtualAcad/exp/ (last visited Mar. 29, 2009); China 'Surpresses Free Speech', News24.com (May 20, 2005), http://www.news24.com/News24/World/News/0,,2-10-1462_1708175,00.html (last visited Mar. 29, 2009); *see also* Chueng & Weber, *supra* note 215, at 460.

[217] Liu Xiaobo, *Communist Internet Censorship an "Internationally Common Problem?*, THE EPOCH TIMES, Feb. 26, 2006, http://www.theepochtimes.com/news/6-2-20/38388.html; Alfred Hermida, *Behind China's Internet Red Firewall*, BBC NEWS ONLINE, Sept. 3, 2002, http://news.bbc.co.uk/2/hi/technology/2234154.stm; Alfr Xiao Qiang, remarks, *The Development and State control of the Internet*, (Apr. 14, 2005), http://www.uscc.gov/hearings/2005hearings/written_testimonies/05_04_14wrts/qiang_xiao_wrts.htm; *see also* Chueng & Weber, *supra* note 215, at 442-43.

cross-border litigation is unlikely to make the current free speech situation worse.

For content providers, web hosts, and authors in other countries, the judgments of countries with extremely strict or repressive media laws are highly unlikely to be enforced. In *Yahoo! v. La Lingue Contre Le Racisme Et L'Antisemitisme*[218] the American Ninth Circuit Court of Appeals ultimately concurred that the French court had made a valid decision on French law, but determined that enforcement of the French decision was outside of their authority.

Yahoo! demonstrates that as a practical matter, international verdicts will only be enforced when they fall within a consensus space where the defamation or privacy laws of both countries overlap. Since strict defamation laws in some countries will not be enforced on those outside of the country, self-censorship based on the media laws of other countries becomes highly unlikely. In the Servaty incident, the venue would likely have been the Belgian courts, which would of course have the ability to enforce their verdict on Servaty.

CONCLUSION

The basic concepts articulated in Brandeis and Warren's "The Right to Privacy" helped multiple countries develop privacy law during a time when information could not be disseminated with the speed allowed by the Internet.[219] The advent of the Internet has increased the ease and scale with which people can share information, but as *Gutnick* shows, the basic precepts of privacy law can and should be retained.

Likewise, Servaty's actions, though enabled by Internet technology, are basically a jurisdictionally complicated breach of confidence, not a crime or action truly unique to the electronic age. Breach of confidence is the basic legal claim—the Internet was simply the method used to disseminate the photographs. While the Internet complicated Servaty's breach of confidence, it did not create the possible legal action against him, nor should it protect him from a legal claim. Similarly, the facts of *Gutnick* are not dependent on the Internet—perhaps one of the reasons that the court chose to maintain the neutrality

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[218] 379 F. 3d at 1127-38.

[219] *See supra* Parts I.A., I.A.2 (as previously discussed "The Right to Privacy," was written in 1890, the Human Rights Act was written following World War II, so while these privacy concepts were articulated during the modern age of the telegraph, the distribution of images at the speed that the Internet allows had not been conceived).

of law with regard to technology.[220] Thus, Internet behavior is bound by the basic legal concepts of privacy law.

Gutnick, in conjunction with *Douglas* suggests that the women who Servaty photographed may have a viable legal claim in his home country and in the European Court of Human Rights. Internet technology allowed a man they trusted to damage their lives and reputations from afar; the development of modern international privacy law may give them the tools to reach back across that expanse for restitution. Ironically, it is the wealthy and famous who have provided the test cases in this area: their ability and willingness to support legal costs for major, multinational suits has carved out an aspect of the law that will ultimately help those at the bottom of the economic ladder.

[220] Gutnick, (2002) 210 C.L.R 575 (Vict.), [125].