IN THE PRIVACY OF ONE'S OWN HOME: DOES NEW YORK STATE LAW PREVENT INVASIONS OF PRIVACY IN THE HOME?♦

"A man's house is his castle."[1] This Old English proverb, used for centuries, still holds true in our beliefs about our homes today. Not only has it shaped our cultural view of home and hearth, but it was also the basis for the legal prevention of a person's home without permission.[2] Privacy is as equally entrenched an idea in society and goes hand in hand with the message of this proverb: a person's home is his/her sanctuary and a private place. In the interest of protecting this right, many states and countries have enacted legislation to protect the constitutional right to privacy.[3]

New York has one of the oldest invasion of privacy statutes.[4] The New York state legislature enacted New York Civil Rights Law sections 50 and 51 in response to the public's negative reaction to the decision in *Roberson v. Rochester Folding Box Co.*, in which a young woman's likeness was used in advertisements for local flour and folding box companies.[5] Section 50 criminalizes the use of someone's person

1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: PART I, 160 (1628).

2 *See, e.g.*, *id.*

3 Griswold v. Connecticut, 381 U.S. 479 (1965).

4 N.Y. CIV. RIGHTS LAW §§ 50–51 (Consol. 2017).

5 Roberson v. Rochester Folding Box Co, 171 N.Y. 538 (N.Y. 1902); *see also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

for commercial or trade purposes and section 51 provides a civil cause of action.[6] Specifically, section 51 of the New York Civil Rights Law prevents the use of a person's name, likeness, voice, or image without his or her written consent for commercial or trade purposes.[7] It seems natural that an invasion of privacy statute would uphold the principles of the English proverb. Yet a recent decision by the Appellate Division of the Supreme Court of New York challenges this standpoint.[8] In *Foster v. Svenson*, the plaintiffs sought damages and an injunction for photographs taken of their children while in their home without their knowledge.[9] Svenson took photographs of the plaintiffs and their children in their home from a darkened apartment across the street with a telescopic lens.[10] These photographs were published, exhibited, and sold at a New York City gallery.[11] Subsequently, the Fosters brought an action for invasion of privacy under the New York Civil Rights Law section 51.[12] The court affirmed the trial court's dismissal, holding that "we are constrained to find that the invasion of privacy of one's home that took place here is not actionable . . . because defendant's use of the images in question constituted art work . . . not 'use for advertising or trade purposes,' within the meaning of the statute."[13] The statute forced the court to place the defendant's right to free speech over the plaintiffs' right to privacy.

This Note will address the conflict between privacy and the First Amendment in invasion of privacy claims such as the one that occurred in *Foster*. This Note will also address whether an artist who surreptitiously takes photos of an ordinary person in a place in which they have a reasonable expectation to privacy can be protected by the newsworthiness and free speech exception of the New York Civil Rights Law section 51. Part I of this Note explores the history of New York Civil Rights Law section 51, its exceptions, and contrasts it with other states' invasions of privacy statutes. Part II of this Note discusses the facts of *Foster v. Svenson* and its implications. Part III of this Note analyzes how the tort of invasion of privacy is treated in Utah and California, states with robust invasion of privacy statutes that have progressively increased protection for their citizens. Part IV compares international invasion of privacy statutes, specifically in France and Australia, to that of New York, to demonstrate how strong statutory privacy rights are enacted while at the same time preserving free speech

6 N.Y. CIV. RIGHTS LAW §§ 50–51 (Consol. 2017).
7 *Id.* at § 51.
8 Foster v. Svenson, 128 A.D.3d 150 (N.Y. App. Div. 2015).
9 *Id.*
10 *Id.* at 152.
11 *Id.* at 153.
12 *Id.* at 154.
13 *Id.* at 152.

protections. Part V proposes a solution to the constraints of the Civil Rights Law section 51 posited by the New York Supreme Court, Appellate Division. Amending New York Civil Rights Law section 51's newsworthiness exemption to include the definition of newsworthiness and intrusion on seclusion from the Restatement Second of Torts as well as allowing for judicial discretion to weigh the value in the matter of public interest against the interest in protecting privacy will prevent invasion of privacy claims like that of the plaintiffs' in *Foster v. Svenson* from being dismissed before trial without exceedingly abridging artists' First Amendment rights.

I. NEW YORK CIVIL RIGHTS LAW SECTION 51

New York has one of the oldest invasion of privacy statutes in the United States. The New York state legislature was spurred to enact legislation at the beginning of the twentieth century in response to public outrage over a decision made by the Court of Appeals in *Roberson v. Rochester Folding Box Co*.[14] In *Roberson v. Rochester Folding Box Co.* the Franklin Mills Co. used the image of an attractive Rochester local in advertisements for its products.[15] Her likeness was featured on flyers that appeared in stores, warehouses, and local haunts all around Rochester.[16] The plaintiff's likeness was recognizable to her friends and many others, causing her great distress.[17] Thus, she sued for damages over the use of her likeness without her consent in order to advertise the Franklin Mills Co. and Rochester Folding Box Co.[18] The Court of Appeals reversed the lower court's decision granting the plaintiff's request for damages on the basis that there was no right to privacy, and the plaintiff had not made a sufficient claim for libel, to which there was an appropriate statutory remedy.[19]

The *Roberson* court mentioned Samuel Warren and William Brandeis's Harvard Law Review article, *The Right to Privacy*, in its decision.[20] In this article, Warren and Brandeis discuss the need to create a statutory right to privacy to combat what they discovered to be a new tort, invasion of privacy.[21] Concerned about the threat to privacy because of advances in technology, the same fear that is mentioned in the *Foster* decision, Warren and Brandeis advocate for the recognition

[14] Prosser, *supra* note 5.
[15] Roberson v. Rochester Folding Box Co, 17 N.Y. 538 (N.Y. 1902).
[16] *Id.* at 542.
[17] *Id.* at 543.
[18] *Id.*
[19] *Id.* at 557.
[20] *Id.* at 547.
[21] *See* Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

of a right to privacy.[22] Built around the theory that "the intensity and complexity of life . . . have rendered necessary some retreat from the world" and that invasions of privacy have caused man "mental pain and distress, far greater than could be inflicted by mere bodily injury," the authors propose statutory protection and a remedy for the abovementioned harms.[23] These remedies were an action in tort for damages and an injunction in certain cases.[24]

Civil Rights Law section 51 offers these same remedies for invasion of privacy.[25] Section 51 states that the use of a person's name, image, likeness, or voice without his or her written consent for commercial or trade purposes in the state of New York constitutes an unlawful invasion of privacy for which a plaintiff can claim damages or injunction.[26] Civil Rights Law section 51 also includes exceptions to the statute.[27] These exceptions allow for the nonconsensual use of a person's name, image, voice, or likeness when it concerns a matter that is newsworthy or of a legitimate public interest.[28] This exception is commonly applied to instances where newspapers have used someone's likeness without their permission to illustrate the substance of an article.[29] As long as the image is related to the subject matter that is a legitimate issue of public concern, and not used incidentally, it is not actionable under the invasion of privacy statute.[30]

The paradigmatic example of the use of this exception appears in a New York Court of Appeals decision.[31] In *Arrington v. New York Times Co.*, plaintiff, Clarence Arrington, sued the New York Times Co. for damages under Civil Rights Law section 51 after the *New York Times* used a photo of the plaintiff to illustrate its article, *The Black Middle Class: Making It*.[32] Plaintiff objected to the defendant's use of his image, taken by a *New York Times*-commissioned photographer while he was walking on the street and without Plaintiff's permission, because

[22] *Id.* at 195 ("Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house tops.'" (citation omitted)); *see also* Foster v. Svenson, 128 A.D.3d 150, 152 (N.Y. App. Div. 2015) ("Undoubtedly, such privacy concerns have intensified for obvious reasons. New technologies can track thought, movement, and intimacies, and expose them to the general public . . . . This public apprehension over new technologies invading one's privacy became a reality for plaintiffs and their neighbors [in this case].").

[23] *Id.*

[24] *Id.* at 219.

[25] N.Y. CIV. RIGHTS LAW § 51 (Consol. 2017).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See* Arrington v. N.Y. Times Co., 55 N.Y.2d 433 (N.Y. 1982).

[31] *Id.*

[32] *Id.* at 437.

he did not agree with the article and claimed that his association with its content was injurious and degrading.[33] Despite the plaintiff's assertion of his contrary opinions, the Court held that the use of the plaintiff's image was permissible under the public interest exception of section 51.[34] Since the article was on a subject of real interest to the public, it fell within the bounds of the exception and did not constitute trade or commercial purposes.[35] Moreover, use of the plaintiff's likeness was related to the article because both parties agreed that the plaintiff looked like what someone would imagine a member of the middle class to look.[36]

Over time, the newsworthiness of the public interest exception has been applied to exempt works of art from the invasion of privacy statute.[37] In *Hoepker v. Kruger*, the photographer Thomas Hoepker sued the well-known artist Barbara Kruger for violating his copyright and appropriating his photograph to form the background of one of her own works.[38] Plaintiff Charlotte Dabney, whose portrait was in the Hoepker photograph used by Kruger, brought an action for invasion of privacy against Kruger for using her portrait without written consent.[39] The court held that Dabney did not have a sufficient claim under section 51 because Kruger's composite was art, and thus, protected by the exception.[40] In its decision, the court detailed its reasoning for including art in the exception concluding that "New York courts have taken the position in the right of privacy context that art is speech, and accordingly, that art is entitled to First Amendment protection vis-à-vis the right of privacy."[41]

New York courts have applied this reasoning to more traditional mediums of art as well.[42] A painting was at the center of the plaintiff's claim for invasion of privacy in *Altbach v. Kulon*.[43] The defendant painted a satirical portrait using the plaintiff's image and then distributed flyers of the painting with the plaintiff's photograph next to

33 *Id.*

34 *Id*. at 440 ("Now it can hardly be questioned that the article in this case, dealing as it does with the circumstances and tensions incident to yet another example of the mobility our country prides itself on encouraging within and among our societal groups, relates to a subject of 'public interest,' clearly a term to be freely defined." (citations omitted)).

35 *Id.*

36 *Id.* at 441.

37 *See* Hoepker v. Kruger, 200 F. Supp. 2d 340 (S.D.N.Y. 2002); Altbach v. Kulon, 302 A.D.2d 655 (N.Y. App. Div. 2003); Nussenzweig v. diCorcia, 38 A.D.3d 339 (N.Y. App. Div. 2007).

38 *Hoepker*, 200 F. Supp. 2d at 342–44.

39 *Id.* at 347.

40 *Id.* at 350 ("The Kruger Composite itself is pure First Amendment speech in the form of artistic expression . . . and deserves full protection, even against Dabney's statutorily-protected privacy interests.").

41 *Id.*

42 *See, e.g.*, *Altbach*, 302 A.D.2d 655.

43 *Id.*

it in promotion of the opening of the plaintiff's art gallery.[44] The Appellate Division held that as a work of art, the painting was protected by the First Amendment right to free speech.[45]

Fine arts photography has also been the subject of invasion of privacy claims under New York law.[46] In *Nussenzweig v. diCorcia*, the defendant took the plaintiff's photo while he was walking on the street and then used it as part of his exhibition, "Heads."[47] The photograph was on display at a New York City gallery and was distributed in a catalog of the exhibition.[48] The plaintiff then sued the defendant under section 51 for invasion of privacy and using his likeness without his consent.[49]

Although the court dismissed the plaintiff's claim on a procedural basis, the concurrence examined the photograph in its relationship to the privacy statute.[50] The concurring justices urged upholding the decisions of past New York courts in affirming that despite being sold in reproductions and catalogues, art does not fall under the meaning of "for trade" or "commercial purposes" under section 51.[51] The concurrence not only reiterated that a work of art using a person's likeness is protected by the First Amendment, but also that "the publication of plaintiff's portrait in both the popular press and art media confirms that the image is 'a matter of legitimate public interest . . . so as to bring its use within the newsworthiness exception,' providing an interesting addition to the court's reasoning for including art in the exception.[52]

II. THE FACTS

The New York State Supreme Court's recent holding in *Foster v. Svenson* revealed the limitations that the New York Civil Rights Law section 51 places on a person's ability to protect his or her privacy.[53] At the same time, the holding also uncovered the expansive exceptions that the statute affords artists in evading invasion of privacy claims.[54] The defendant, Arne Svenson, was a well-respected fine arts photographer

44 *Id.*
45 *Id.* at 657 ("[W]e conclude that Supreme Court correctly found that the painting and its publication in defendant's flyers are artistic expressions . . . that are entitled to protection under the First Amendment and excepted from New York's privacy protections.").
46 Nussenzweig v. diCorcia, 38 A.D.3d 339 (N.Y. App. Div. 2007).
47 *Id.* at 343.
48 *Id.*
49 *Id.*
50 *Id.* at 341.
51 *Id.* at 347 ("That profit may be derived from the sale of art does not diminish the constitutional protection afforded.").
52 *Id.*
53 Foster v. Svenson, 128 A.D.3d 150 (N.Y. App. Div. 2015).
54 *Id.*

who, through his artistic series, attempted to combine aesthetics with the social anthropology.[55] In early 2012, Svenson embarked on his next series, an investigation of the anonymity of New Yorkers through the glimpses on view in the windows of their apartments.[56] Motivated by the inheritance of a telescopic "birding" camera, Svenson repeatedly watched the Alfred Hitchcock movie *Rear Window*, about a wheelchair bound man who solves a mystery by spying on his neighbors with binoculars,[57] in order to prepare.[58] He also met with a lawyer.[59] During the year that he photographed his neighbors in their apartments, Svenson never informed his subjects of his work, nor let himself be seen as he took photos "from the shadows of his apartment."[60]

In 2013, "The Neighbors," the exhibition of the photographs, was displayed at a New York City gallery.[61] Martha and Matthew Foster, along with the rest of the neighbors that were subjects of the photos, became aware of their unexpected turn as artist's models through publicity for the exhibition.[62] Even though Svenson attempted to obscure the identity of his subjects, the Fosters' children, James and Delaney, are clearly depicted in the photographs numbered "6" and "12."[63] When the Fosters learned that their children were shown in the exhibit, the artist's website, the gallery's website, and that the photos of them were for sale, Martha Foster called Svenson asking him to remove the photos.[64] When Svenson did not acquiesce, the Fosters hired a lawyer and sent letters to Svenson and the gallery where "The Neighbors" was being shown demanding the removal of the photos of their children from the exhibit and the websites.[65]

Although the photos were removed pursuant to the Fosters' letters, one of the photos depicting the Fosters' daughter was used to promote Svenson's exhibit on a New York City television show and on the nationally syndicated television news program, *The Today Show*.[66] Further, the address of the building was given to the media.[67] This caused the Fosters to file a claim for invasion of privacy under New

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55 *The Neighbors*, ARNE SVENSON, http://arnesvenson.com/theneighbors.html (last visited September 30, 2016).
56 Hili Perlson, *Voyeuristic Photographer Arne Svenson Wins New York Appellate Court Case*, ARTNET: ARTNET NEWS (Apr. 10, 2015), https://news.artnet.com/market/arne-svenson-neighbors-photographs-supreme-court-286916.
57 *Rear Window*, IMDB, http://www.imdb.com/title/tt0047396/ (last visited September 30, 2016).
58 Perlson, *supra* note 56.
59 *Id.*
60 Foster v. Svenson, 128 A.D.3d 150, 152 (N.Y. App. Div. 2015).
61 *Id.* at 153.
62 *Id.*
63 *Id.*; *see also* Perlson, *supra* note 56.
64 *Foster*, 128 A.D.3d at 153.
65 *Id.* at 154.
66 *Id.*
67 *Id.*

York Civil Rights Law section 51.[68] The Fosters sought an injunction and damages under the tort of invasion of privacy, as well as a preliminary injunction and a temporary restraining order.[69] The court allowed the temporary restraining order but denied the preliminary injunction.[70] Contemporaneously, the defendant cross-complained for a dismissal of the entire complaint on the basis that the photographs are art and protected by the First Amendment, preventing restraints from being placed on their publication, sale, and use.[71] The trial court agreed with the defendant, dismissing the plaintiff's complaint.[72]

The plaintiffs then appealed the trial court's decision to dismiss the complaint to the Appellate Division.[73] The court reviewed the lower court's decision by examining the history of Civil Rights Law section 51 and its application of the newsworthiness and the public concern exception.[74] The court specifically focused on the decisions of other courts when reviewing privacy statute claims about works of art, noting that the newsworthiness exception has been applied to many different forms of art.[75]

Synthesizing the decisions in *Altbach v. Kulon*, *Hoepker v. Kruger*, and *Nussenzweig v. diCorcia*, the court held that works of art fall under the Civil Rights Law section 51's newsworthiness and public concern exception because "the public . . . has an equally strong interest in the dissemination of images, aesthetic values and symbols contained in the art work."[76] Moreover, the plaintiffs' allegations that their children's images were used for publicity for the exhibition and sold as photographs for profit, did not diminish the images' protection as a work of art under the First Amendment nor did the usages qualify as being for "commercial or trade purposes."[77] Ultimately, the Appellate Division affirmed the trial court's holding that the plaintiffs did not have a sufficient claim for invasion of privacy, not because of precedent, but primarily because of the language in the New York statute.[78]

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 155.
[74] *Id.* at 155–57.
[75] *Id.* at 158.
[76] *Id.* at 159 ("The court held that the creation itself 'should be shielded from [the plaintiff's] right of privacy claim by the First Amendment. [It] is pure First Amendment speech in the form of artistic expression . . . and deserves full protection'. . . . '[T]he inclusion of the photograph in a catalog sold in connection with an exhibition of the artist's work d[id] not render its use commercial' pursuant to the privacy statute because 'the public expression of those *id*eas and concepts [wa]s fully protected by the First Amendment.'" (citations omitted)).
[77] *Id.* at 152, 163.
[78] *Id.*

III. THE RIGHT TO PRIVACY IN OTHER STATES

Although New York may have been at the forefront of privacy law when it was the first state to codify it, recently it has fallen behind other states.[79] Civil Rights Law section 51 protects ordinary persons from having their name, image, or voice used without their permission, but only in situations that exactly meet the definitions of "for commercial or trade purposes."[80] Further, the exemptions for newsworthiness and matters of the public interest have become so broadly defined that it has ended up sanctioning truly intrusive behavior, instead of protecting New York citizens' privacy.[81] *Foster* made this clear; the language in Civil Rights Law section 51 offers greater protections for an artist's First Amendment right to free speech than it does an ordinary person's constitutional right to privacy.[82] Although it is of the greatest importance to protect an artist's right to expression, an invasion of privacy statute should not act as a shield for egregious transgressions of social norms, such as spying on one's neighbors and then publicizing their private lives.[83]

Arts-related cases prior to *Foster* dealt with art created in the public sphere, i.e., photographing someone on the street when the plaintiffs' privacy was already limited to a certain degree.[84] Taking photographs of people on the street intrudes on a more conceptual form of privacy—the right to keep oneself private.[85] However, it is also reasonable to have less control over one's privacy in a public space. There are other people around, and one cannot constantly prevent intrusions in a large environment. If one does not want to take the risk of being photographed without permission then one should not go outside.[86]

Nevertheless, *Foster* proved one cannot even accomplish this in one's own home. In *Foster*, the traditional view of privacy, what a

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[79] *See* UTAH CODE ANN. § 76-9-402 (LexisNexis 2017); UTAH CODE ANN. § 45-3-3 (LexisNexis 2017); CAL. CIV. CODE § 43 (Deering 2017).

[80] N.Y. CIV. RIGHTS LAW § 51 (Consol. 2017).

[81] Foster v. Svenson, 128 A.D.3d 150, 152 (N.Y. App. Div. 2015) (This case highlights the limitations of New York's statutory privacy tort as a means of redressing harm that may be caused by this type of technological home invasion and exposure of private life. We are constrained to find that the invasion of privacy of one's own home that took place here is not actionable as a statutory tort of invasion of privacy pursuant to sections 50 and 51 of the Civil Rights Law, because defendant's use of the images in question constituted art work and, thus is not deemed "'use for advertising or trade purposes,' within the meaning of the statute." (citation omitted)).

[82] *See Foster*, 128 A.D.3d at 152.

[83] *See id.*

[84] *See* Hoepker v. Kruger, 200 F. Supp. 2d 340 (S.D.N.Y. 2002); Altbach v. Kulon, 302 A.D.2d 655 (N.Y. App. Div. 2003); Nussenzweig v. diCorcia, 38 A.D.3d 339 (N.Y. App. Div. 2007).

[85] *See* Nussenzweig v. diCorcia, 38 A.D.3d 339 (N.Y. App. Div. 2007).

[86] *See id.* at 343.

person is entitled to in his or her own home, was violated.[87] Throughout history, there has been an expectation of complete privacy in the home.[88] Yet this violation went unpunished because of New York's restrictive statute.[89] Svenson's ability to evade reprimand for an action that so egregiously violated social norms proves that Civil Rights Law section 51 is outdated and must be amended.

This necessity is further proven by how behind New York is in developing privacy rights in comparison to other states.[90] New York's trend favoring speech over privacy stands in sharp contrast to decisions made by other states, specifically Utah and California.[91] These states demonstrate how to substantially protect privacy without overly restricting speech.[92] Utah and California have been able to limit invasive behaviors for matters that are "of the public interest" and increase privacy protections in interpreting claims in light of the Restatement (Second) of Torts and separating actionable aspects of a complaint from the nonactionable aspects.[93]

A. *Restatement (Second) of Torts*

States such as Utah and California have made progressive steps to protect privacy by incorporating the Restatement (Second) of Torts definition concerning privacy into their applicable state laws.[94] This definition states that a subject stops being a matter of public interest "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."[95] This definition of newsworthiness limits the breadth of exceptions to privacy,[96] such as those found in New York Civil Rights Law section 51.

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87 *Foster*, 128 A.D.3d at 152.

88 COKE, *supra* note 1.

89 *See id.*

90 *See, e.g.*, Shulman v. Grp. W Prods., Inc., 955 P.2d 469 (Cal. 1998); Raef v. Appellate Div. of Superior Court, 193 Cal. Rptr. 3d 159 (Cal. Ct. App. 2015); Judge v. Saltz Plastic Surgery, PC, 330 P.3d 126 (Utah Ct. App. 2014).

91 *See, e.g.*, *Shulman*, 955 P.2d; *Raef*, 193 Cal. Rptr. 3d; *Judge*, 330 P.3d.

92 *See Shulman*, 955 P.2d; *Raef*, 193 Cal. Rptr. 3d; *Judge*, 330 P.3d.

93 *See Shulman*, 955 P.2d; *Raef*, 193 Cal. Rptr. 3d; *Judge*, 330 P.3d.

94 *See Shulman*, 955 P.2d; *Raef*, 193 Cal. Rptr. 3d; *Judge*, 330 P.3d.; UTAH CODE ANN. § 76-9-402 (LexisNexis 2017); UTAH CODE ANN. § 45-3-3 (LexisNexis 2017); CAL. CIV. CODE § 43 (Deering 2017).

95 RESTATEMENT (SECOND) OF TORTS §652D illus. h (AM. LAW INST. 1977); *see also* N.Y. CIV. RIGHTS LAW § 51 (Consol. 2017).

96 *See, e.g.*, Amy Gadja, *The Present of Newsworthiness*, 50 NEW. ENG. L. REV. 145 (2015); *Judge*, 330 P.3d. at 135; *Shulman*, 955 P.2d. at 218–19.

B. *The Right to Privacy in Utah*

The Utah statute enacting a cause of action for invasion of privacy, Utah Code Annex section 45-3-3, details "acts constituting abuse—Permitting Prosecution."[97] Abuse has occurred when someone uses a person's identity without his or her consent in such a way that it seems that the person is endorsing the subject matter of the advertisement.[98] This sounds substantially similar to New York Civil Rights Law section 51.[99] However, Utah has gone a step further than New York by also enacting a statute that codifies a privacy violation, not just an invasion of privacy pertaining to the use of image in advertisements.[100] Utah Code Annex section 76-9-402 states several ways in which privacy can be violated, including when a person "installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing . . . sounds or events in the place or uses any such unauthorized installation."[101]

Utah also differs from New York by embracing the Restatement (Second) of Torts.[102] In *Judge v. Saltz Plastic Surgery, PC*, Conilyn Judge sued her plastic surgeon, Dr. Renato Saltz for giving photographs of her naked body, before and after surgery, to a television news reporter to use in a television news show.[103] Although Judge had consented to the photographs for "medical, scientific, or educational purposes," she did so with the restriction that her "identity is not revealed by the pictures."[104] Judge consented to being interviewed for the news show, but she did not consent to having her name associated with the photos, which the television news reporter explicitly did.[105]

In response to this, Judge sued Saltz for "false light, publicity of private facts, intrusion upon seclusion, breach of fiduciary duty, and negligent employment and supervision."[106] The trial court granted summary judgment for the defendant on all five claims, holding that Judge's privacy had not been invaded and that the broadcast was on a topic of public interest.[107] Judge then appealed this decision to the Utah Court of Appeals, which reversed the trial court's decision on each claim, holding that there were genuine questions of fact on which a jury

97 UTAH CODE ANN. § 45-3-3 (LexisNexis 2017).
98 *Id.*
99 N.Y. CIV. RIGHTS LAW § 51 (Consol. 2017).
100 UTAH CODE ANN. § 76-9-402 (LexisNexis 2017); N.Y. CIV. RIGHTS LAW § 51 (Consol. 2017).
101 UTAH CODE ANN. § 76-9-402 (LexisNexis 2017).
102 Judge v. Saltz Plastic Surgery, PC, 330 P.3d 126 (Utah Ct. App. 2014).
103 *Id.* at 129.
104 *Id.*
105 *Id.* at 129–30.
106 *Id.* at 130.
107 *Id.*

should deliberate.[108] Both the district court and the court of appeals used the Restatement (Second) of Torts in coming to their conclusions on Judge's claims, yet nevertheless arrived at different decisions.[109] The Court of Appeals held that whether or not a private fact was disclosed publicly, "that would be highly offensive to the reasonable person," and, pursuant to the Restatement, was a fact for the jury to find.[110] Further, the appellate court held that there was a question of fact for the jury as to whether the public had a real interest in being educated on plastic surgery.[111]

The Restatement was used once again in determining Judge's claim of intrusion on seclusion, this time through precedent.[112] For intrusion on seclusion under Utah law, there must be "(1) an intentional substantial intrusion, physical or otherwise, upon the plaintiff's solitude (2) that would be highly offensive to the reasonable person."[113] By identifying Judge in the nude photographs, Saltz possibly acted in opposition to the contract that he had Judge sign in which he agreed not to associate her identity with the images.[114] This opposition created a question as to whether Saltz committed an intrusion on seclusion, dependent on the language of the contract and, once again, whether plastic surgery is a legitimate public interest.[115]

The Court of Appeals decision, and use of the Restatement, has been viewed as a progressive movement in favor of protecting ordinary persons over giving the media greater freedom.[116] Although Utah still abides by the general principle that "if a truthful item is newsworthy, but privacy-invading, the newsworthiness of the information can trump the plaintiff's privacy interests," the *Judge* court enacted limitations to the breadth of newsworthiness.[117] By using this definition of newsworthiness, the court created a balancing test that allows a jury to decide on whether information was actually a legitimate public interest.[118] It was this determination that led the court to remand the

108 *Id.* at 138.
109 *Id.*
110 *Id.* at 136. "Judge's photograph had been taken in a private location, her doctor's office . . . . Judge may have been willing to make a public fact of what she looked like in a certain bikini on a certain day in a certain context. By so doing, she did not lose her ability to argue that whatever parts of her body that bikini revealed were private facts on different days in different contexts. Genuine issues of material fact remain and the district court erred in deciding that Judge's redacted photographs revealed no private fact as a matter of law." *Id.* at 134–35.
111 *Id.* at 136.
112 *Id.*
113 Stien v. Marriott Ownership Resorts, Inc., 944 P.2d 374, 378 (Utah Ct. App. 1997).
114 *Id.*
115 *Id.*
116 Gadja, *supra* note 96.
117 *Id.* at 145.
118 *Id.*

plaintiff's newsworthiness claim for further deliberation.[119] This less deferential approach to newsworthiness has been noted as part of a trend towards protecting privacy.[120]

C. *The Right to Privacy in California*

A representative panoply of decisions from California courts demonstrate movement in favor of privacy protection.[121] Since California first enacted its own privacy statutes in the early twentieth century, California courts have increasingly favored privacy over the absolute rights of the media. [122] This tendency has been partially in response to the rise of paparazzi in the state.[123] In contrast to Utah's reliance on the Restatement, California courts, although still referencing the Restatement, have come to their more protective conclusions by bifurcating plaintiffs' claims, separating the invasion of privacy (or intrusion on seclusion) claim from the newsworthiness (First Amendment) claim.[124]

Two holdings from the California Court of Appeals demonstrate this method of division.[125] The first decision was reached nearly two decades ago. In *Shulman v. Group W Productions Inc.*, plaintiffs Ruth and Wayne Shulman were in a serious car accident that required them to be airlifted to a hospital by emergency helicopter.[126] The emergency medical staff that came to their rescue had an agreement with a television news show, *On Scene: Emergency Response*, to wear microphones and record their actions during the emergency.[127] When the Shulmans were brought into the helicopter in order to be taken to the hospital, the emergency nurse was wearing a microphone and recorded everything that Ruth said.[128] There was also a cameraman filming the car crash and the Shulmans rescue, including interior scenes of the

119 *Id.*

120 *Id.* at 147. ("[N]ewsworthiness was becoming a privacy touchstone because of increasingly push-the-envelope news decisions by media, that courts were becoming more hesitant to leave it to the publishers themselves to decide what is newsworthy despite historical deferential language, and that non-journalistic publishers who became defendants in cases involving newsworthiness would set dangerous precedent for all publishers, including mainstream journalists, in the future. An outcome like the one in Utah supports my thesis that a First Amendment bubble of protection for media is in the process of bursting because of courts' privacy concerns, and the sometimes appalling decisions by push-the-envelope publishers that then attempt to cloak themselves with the Constitution.").

121 Shulman v. Grp. W Prods., Inc., 955 P.2d 469 (Cal. 1998); Raef v. Appellate Div. of Superior Court, 240 Cal. App. 4th 1112 (Cal. Ct. App. 2015).

122 CAL. CIV. CODE § 43 (Deering 2017); *Raef*, at 240 Cal. App. 4th.

123 *Raef*, at 240 Cal. App. 4th 1112.

124 *Shulman*, at 955 P.2d; *Raef* , 240 Cal. App. 4th.

125 Shulman v. Group W Productions, Inc., 18 Cal. 4th 210 (Cal. 1998); Raef v. App. Division of Superior Ct., 240 Cal. App. 4th 1112 (Cal. Ct. App. 2015).

126 *Shulman*, 18 Cal. 4th at 210.

127 *Id.*

128 *Id.*

helicopter.[129] These recordings were used in a segment of *On Scene: Emergency Response*.[130] After learning of this segment's unauthorized use of their statements, the Shulmans sued the producers of the show.[131] They had two causes of action for invasion of privacy: one for unlawful intrusion by videotaping the car crash and another for public disclosure of private facts during the segment.[132]

The defendants submitted a motion for summary judgment based on the protections afforded to them by the First Amendment.[133] The trial court granted this motion, ruling that the car accident was a matter of public interest.[134] The Plaintiff then appealed this decision to the Court of Appeals, which reversed the trial court's decision on certain causes of action.[135] The Court of Appeals concluded that the plaintiffs did not have a reasonable expectation of privacy on the highway, but they did have a reasonable expectation of privacy in the helicopter, as it was analogous to an ambulance and hospital room, which are both private areas.[136] The Court of Appeals also held that the degree of newsworthiness was an issue of fact for a jury to decide.[137]

The Utah Supreme Court affirmed part of the Court of Appeals' decisions and diverged on the newsworthiness of the car accident and the degree of the intrusion.[138] The court examined the claim's newsworthiness using several different metrics of evaluation: California precedent, a balancing test, and a test to ensure that there was a legitimate connection between the private person and the story of public interest.[139] Regarding the claim for intrusion of seclusion, the court relied on precedent, as well as the definition of intrusion in the Restatement (Second) of Torts.[140] In the lower court, it was decided that the plaintiffs had a reasonable expectation of privacy in the helicopter, possibly on the roadway as well, and that a jury could find the way in which the information was gathered to be highly offensive.[141] The

129 *Id.* at 210–11.
130 *Id.* at 210.
131 *Id.* at 212.
132 *Shulman*, 18 Cal. 4th at 212.
133 *Id.*
134 *Id.*
135 *Id.* at 212–13.
136 *Id.* at 213.
137 *Id.*
138 *Shulman*, 18 Cal. 4th at 213.
139 *Id.* at 223–24 ("[C]ourts have generally protected the privacy of otherwise private individuals involved in events of public interest 'by requiring that a logical nexus exist between the complaining individual and the matter of legitimate public interest'").
140 *Id.* at 231 ("As stated in *Miller* and the Restatement, therefore, the action for intrusion has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. We consider the elements in that order").
141 *Id.* at 237–38 ("[W]e believe a jury could find defendants' recording of Ruth's communications to Carnahan and other rescuers, and filming in the air ambulance, to be 'highly offensive to a reasonable person' . . . . Defendants, it could reasonably be said, took calculated

above bifurcation of the causes of actions and thus the court's focus on each claim separately allowed the court to hold in favor of the plaintiffs. While the accident itself was newsworthy, as car crashes are matters of interest to the public,[142] "the defendants had no constitutional privilege so to intrude on plaintiff's seclusion and private communications."[143]

A California Court of Appeals applied a similar separation to a recent case centering on First Amendment concerns.[144] In *Raef v. Appellate Division of Superior Court*, Paul Raef was charged with violating California's Vehicle Code section 40008, subdivision (a) for driving too closely behind another car with an increased punishment for driving recklessly with the intent to "capture an image, sound recording, or other physical impression of another person for commercial purpose."[145] Raef filed a demurrer asserting that the charges were unconstitutional, intending to deprive him of his First Amendment rights.[146] The trial court granted this demurrer, holding that Vehicle Code section 40008 was "overinclusive."[147]

The People appealed the trial court's decision.[148] The Court of Appeals reviewed Raef's contention that the statute infringed on his First Amendment rights because the extra punishment for reckless driving with intent to capture unconstitutionally targeted paparazzi.[149] In order to determine whether or not the statute was unconstitutional, the court separated each aspect, first looking at the plain language of the statute.[150] Based on the language of the statute, the court concluded that

advantages of the patient's 'vulnerability and confusion' . . . . A jury could reasonably believe that fundamental respect for human dignity requires the patients' anxious journey be taken only with those whose care is solely for them and out of sight of the prying eyes (or cameras) of others. Nor can we say as a matter of law that defendants' motive–to gather usable material for a potentially newsworthy story–necessarily privileged their intrusive conduct as a matter of common law tort liability. A reasonable jury could conclude that the producers' desire to get footage . . . did not justify either placing a microphone on Nurse Carnahan or filming inside the rescue helicopter . . . . [T]heir behavior could, even in light of their motives, be thought to show a highly offensive lack of sensitivity and respect for plaintiff's privacy").

142 *Id.* at 215–16 ("We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts . . . . If the contents of a broadcast or publication are of legitimate public concern, the plaintiff cannot establish a necessary element of the tort action, the lack of newsworthiness. To so state, however, is merely to begin the necessary legal inquiry, not to end it. It is in the determination of newsworthiness–in deciding whether published or broadcast material is of legitimate public concern–that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom.").

143 *Id.* at 213.

144 Raef v. App. Division of Superior Ct., 240 Cal. App. 4th 1112 (Cal. Ct. App. 2015).

145 *Id.* at 1119.

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.* at 1120.

150 *Raef*, 240 Cal. App. 4th at 1121.

the statute was not unfairly prejudicial to paparazzi.[151] Still analyzing the statute on its face, the court then used the United States Supreme Court's decision in *Branzburg v. Hayes* to declare that "[t]he First Amendment does not immunize the press from 'the enforcement of civil or criminal statutes of general applicability.'"[152] The decision in *Branzburg* was intended to prevent people from using the defense of contributing to free speech as a means of evading the law.[153] The court continued the United States Supreme Court's line of reasoning in not creating a "newsman's privilege," determining that Vehicle Code section 40008 was not discriminatory towards newsgatherers.[154]

Next in its line of analysis was Raef's claim that the statute unduly burdened the right to free speech.[155] The rule of general applicability was once again applied to the statute to examine the statute's constitutionality, citing that "when 'speech' and 'nonspeech' elements are combined, and the 'nonspeech' element (e.g., prostitution) triggers the legal sanction, the incidental effect on speech rights will not normally raise First Amendment concerns."[156] Laws regulating traffic violations are laws of general applicability to which newsmen would be subject; it is the heightened penalty for capture that is in question for its constitutionality.[157]

The court applied a rule from another United States Supreme Court decision to examine the extra violation for capture.[158] Raef relied on the rule that came down from *Wisconsin v. Mitchell* stating that "the First Amendment is not implicated when a belief or expression, which may be protected in other circumstances, is closely related to and motivates illegal conduct that causes special individual and societal harm," to support his claim for limiting freedom of speech.[159] The court disagreed

151 *Id.* at 1122 ("Nothing in the statutory language suggests the Legislature intended to target the gathering of newsworthy material to be delivered to the general public via some medium of mass communication. As written, Section 40008 applies without limitation").

152 *Id.* at 1123 ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects on [the] ability to gather and report the news").

153 *Id.*; Branzburg v. Hayes, 408 U.S. 665 (1972) (Petitioner contended that he was privileged as a newsman, under Kentucky's reporters' privilege statute and the First Amendment, to refuse to reveal his sources when being questioned by a grand jury. Petitioner witnessed people committing a crime when they used marijuana to make hashish. The United States Supreme Court held that petitioner was not privileged under the First Amendment when it came to fulfilling integral duties under the law. The Court also held that the refusal of this privilege would not stem the free flow of news and information under the First Amendment.).

154 *Raef*, 240 Cal. App. 4th at 1124.

155 *Id.* at 1125.

156 *Id.* at 1126.

157 *Id.*

158 *Id.* at 1127.

159 *Id.* at 1128; Wisconsin v. Mitchell, 508 U.S. 476 (1993) (The accused's First Amendment right to free speech was not violated when extra time was added to his sentence for aggravated battery, under state "hate crimes" statute allowing enhanced prison sentences when the victim was selected for his or her race).

with Raef, concluding that the *Mitchell* reasoning was misapplied.[160] Unlike the statute in *Mitchell*, the California statute does not proscribe intent; it proscribes an act that while may have a free speech intent, causes great danger to others.[161] In addition to this, the court held that the government's interest in preventing this type of behavior outweighed the incidental effect on free speech caused by the statute.[162] Lastly, the Court of Appeals determined that the statute was not "overinclusive," vague, overbroad, or too narrow to be constitutional.[163]

Applying the California reasoning to *Foster* would have produced a different outcome. Not only would the Restatement definitions on newsworthiness have prevented the Civil Rights section 51's exception from shielding Svenson, but the court also would have been able to separate the artistic element of the claim from the invasive action that produced it.[164] Following the holding in *Shulman*, despite Svenson's art probably being protected, the Fosters would have been able to proceed to trial based on Svenson's invasive behavior when photographing them.[165] Further, if the logic in *Raef* were to be applied to New York's invasion of privacy statute, then Svenson's free speech right via his photographs could be constitutionally limited based on the greater harm that his photographing had on the Fosters' privacy rights.[166] Thus, it is clear that both the California methodology and the Utah statutory modifications should be followed in New York.

IV. THE RIGHT TO PRIVACY INTERNATIONALLY

Invasion of privacy is not only an actionable claim in the United States, but is a globally recognized tort.[167] As with each different state, each different country has its own statutes and theories about what constitutes invasion of privacy.[168] However, despite the variances in the law, the same trend of increased privacy protection that is seen in the invasion of privacy trends in California and Utah is also prevalent internationally.[169] A growing number of countries are striving to balance

160 *Raef*, 240 Cal. App. 4th at 1128.
161 *Id.* at 1128–129.
162 *Id.* at 1130.
163 *Id.* at 1119, 1139.
164 *See* Gadja, *supra* note 96; Shulman v. Group W Productions, Inc., 18 Cal. 4th 210, 215–16 (Cal. 1998).
165 *Shulman*, 18 Cal. 4th at 223–38.
166 Raef v. App. Division of Superior Ct., 240 Cal. App. 4th 1112, 1128–129 (Cal. App. Dep't Super Ct. 2015).
167 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.).
168 *Id.*
169 Jessica Whyte, *Criminalising 'Camera Fiends': Photography Restrictions in the Age of Digital Reproduction*, 31 AUSTL. FEMINIST L.J. 99 (2009); *Serious Invasions of Privacy in the Digital Era*, AUSTRALIAN GOVERNMENT: AUSTRALIAN LAW REFORM COMMISSION, http://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123/recommendations (last Visited Nov. 30, 2016), at 17–22.

free speech rights with the right to privacy, and are increasing protections on the latter without detrimental effects to the former.[170] French and Australian legislation have been chosen for comparison because of their consideration of the balance between privacy and speech.[171] France's statute demonstrates how a society historically protective of art, speech, and privacy has continued to expand and balance those protections since enacting its first privacy code. Whereas the Australian proposals reflect a society's changing mores and renewed interest in what has become an extremely topical issue: privacy.[172] Further, as when compared to fellow states, New York lags behind other countries because of its stagnant invasion of the privacy statute.[173] To address the faults in the Civil Rights Law section 51, New York should look to the examples set by France and Australia, in addition to those set by Utah and California.

A. *The Right to Privacy in France*

France has one of the most protective privacy statutes in the world because the right to privacy is an entrenched value in French society.[174] Although it did not enact a specific statute protecting privacy until 1970, the right to publicity, control over one's likeness, and the right to privacy itself were recognized as early as the mid-nineteenth century in France.[175] Privacy is safeguarded throughout the French legal system. There are statutes prohibiting invasive behavior under the Civil and Penal code, as well as certain rules of professional ethics.[176] Under Article 9 of the France's Civil Code (also criminalized under Article 226-1 of the French Penal Code), "each person has the right to the respect of his or her private life" and it enables judges to prescribe all measures that can prohibit an attack on a person's private life.[177] Courts then apply tort liability principles under Article 1382 of the Civil Code to adjudicate the complaint.[178]

Despite also having to balance the right to publication of free

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170 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.).

171 *See* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.); W.J. Wagner, *Photography and the Right to Privacy: The French and American Approaches*, 25 CATH. LAW. 195, 195–96 (1979-1980); Elisabeth Logeais & Jean-Batiste Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, 18 LOY. L.A. ENT. L.J. 514 (1997-1998).

172 *See* Whyte, *supra* note 169; AUSTRALIAN GOVERNMENT: AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169.

173 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.); AUSTRALIAN GOVERNMENT: AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169; N.Y. CIV. RIGHTS LAW § 51.

174 *French Legislation on Privacy*, FRANCE IN THE US (Dec. 2, 2007), http://franceintheus.org/spip.php?article640 (last visited Nov. 29, 2016).

175 *See* Wagner, *supra* note 171.

176 FRANCE IN THE US, *supra* note 174.

177 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.); CODE PENAL [C. PEN.] [PENAL CODE] art. 226-1 (Fr.).

178 Logeais & Schroeder, *supra* note 171.

expression and information and the limitation of invasion one's privacy and image, French courts have made robust decisions that protect the enshrined right to privacy.[179] Defined by the courts, under the French legal system, citizens can expect privacy regarding "his or her love life, friendships, family circumstances, leisure activities, political opinions, trade union or religious affiliation and state of health."[180] The courts, as well as the legislators, have clearly stated that this right to privacy also extends to a person's right to control his or her image.[181] Thus, in France it is illegal to disseminate a person's image without their consent.[182] Once the claimant can prove that his or her recognizable image or name has been used without the judicially defined consent, the judge can issue an injunction and/or damages to rectify the invasion, or any other remedy that the judge sees fit to correct the situation.[183]

However there are certain exceptions to this: "(1) when photographs are taken in a public place; (2) when freedom of speech and news information are involved; and (3) when parody is at stake."[184] The exception to photographs taken in a public place is further limited, as long as "(1) the photograph does not focus on, or single out, the individual or individuals claiming the right of image; and (2) the photographs must show the photographed person or persons engaged in public, rather than private, activities."[185] In spite of these exceptions, by analyzing the Civil and Penal codes, it is clear that dissemination of a person's image that was taken in a private place would be illegal, no matter the purpose.[186] Photographs taken in public constitute one of the only exceptions to the right of image, although there are limitations to its application, while intrusions into a private place and photographing private activity in a private place have been criminalized.[187] Thus it can be inferred that photography of a private act in a private place would not

179 *See* FRANCE IN THE US, *supra* note 174; Logeais & Schroeder, *supra* note 171, at 525–26 ("French courts attempt to balance the conflicting principles behind the right of image and the freedom of speech and expression.").

180 FRANCE IN THE US, *supra* note 174.

181 *Id.*

182 *Id.*

183 *See* Logeais & Schroeder, *supra* note 171, at 519–21 ("Consent must be clearly expressed for both the taking and the using of a person's image . . . . [F]our principles have been extracted by the courts. First, it is irrelevant which medium is used to reproduce or disseminate a person's image . . . . Second, courts have also condemned the unauthorized use of a performing artist's fictitious name that reflects his or her personality . . . . Third, the person must be recognizable in the reproduction of his or her image . . . . The final element extracted from the Civil Code involves the concept of consent. Consent must be clearly expressed for both the taking and the further usage of a person's image. It is then within the court's discretion to decide whether or not consent was given and to evaluate the scope of that consent.").

184 *Id.* at 526.

185 *Id.*

186 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.); CODE PENAL [C. PEN.] [PENAL CODE] art. 226-1 (Fr.).

187 Logeais & Schroeder, *supra* note 171, at 519–26.

be subject to an exception civilly as well.[188]

Unlike in New York, even if a person's image is used for artistic purposes, if his or her image was used without the requisite consent, then it can be considered an illegal invasion of privacy.[189] This is a liberal and expansive view of the right to privacy that affords far more protection to the control over one's image than in New York.[190] France's invasion of privacy code is a model for New York, demonstrating how a state can construct a law that thoroughly protects privacy, but also does not overly restrict free speech.[191]

B. *The Right to Privacy in Australia*

Australia has not enacted a unified statute to provide civil liability for invasion of privacy.[192] However, the worry over advances in technology and its ability to encroach on everyday privacy is increasingly rampant in Australia, fomenting action in favor of codifying a new tort liability for the invasion of privacy.[193] Several states in Australia have enacted legislation to criminalize certain intrusions on privacy concerning videotaping and photographing private acts or in circumstances where a reasonable expectation of privacy would be expected.[194] The Australian Law Reform Commission ("ALRC") has submitted proposals outlining recommendations for an invasion of privacy tort since 2008, the most recent of which was submitted in 2014.[195] The first list of recommendations was based on a twenty-eight month long report by the ALRC investigating how effective the Privacy Act of 1988 and its related laws has been in protecting the privacy of the Australian people.[196] This resulted in a

188 *Id.* at 526; CODE PENAL [C. PEN.] [PENAL CODE] art. 226-1 (Fr.).

189 *See* Logeais & Schroeder, *supra* note 171, at 515 (A book about the life of the former convict Henri Charrière was written without his permission. The book was permissible, but the use of his photograph on the cover with his permission was deemed an illegal invasion of privacy.).

190 *But see* N.Y. CIV. RIGHTS LAW § 51.

191 *See* Logeais & Schroeder, *supra* note 171, at 519–26; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.).

192 *See Privacy Act*, AUSTRALIAN GOVERNMENT, https://www.oaic.gov.au/privacy-law/privacy-act/. (last visited Nov. 30, 2016) (noting Australia's Privacy Act of 1988 protects private information among individuals).

193 Whyte, *supra* note 169, at 99 ("As anxieties have crystallised around the questions of privacy, morality, and security, a climate of suspicion has been created, leading Dupain to comment that anyone with a camera today is regarded as a 'potential pervert'."); AUSTRALIAN GOVERNMENT: AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169.

194 Whyte, *supra* note 169, at 100 ("In the criminal law, various jurisdictions have introduced laws to restrict unauthorised photography. In Victoria, under legislation pertaining to 'surveillance devices', it is an offence to take photographs of a 'private activity' without the consent of the parties involved. NSW has introduced laws against 'filming for indecent purposes', which make it an offence to photograph someone 'in a state of undress, engaged in a 'private act' or in circumstances where a reasonable person would expect privacy'.").

195 AUSTRALIAN GOVERNMENT, *supra* note 192; AUSTRALIAN GOVERNMENT: AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169.

196 AUSTRALIAN GOVERNMENT, *supra* note 192.

three-volume report with seventy-four chapters and 295 recommendations for improvement and reform.[197]

For an invasion of privacy tort, each proposal stated that "for the plaintiff to have a cause of action, the court must be satisfied that the public interest in privacy outweighs any countervailing public interest."[198] This is similar to New York's exceptions for public interest and newsworthiness.[199] Yet leaving it to the court to decide whether the public interest is more important than the privacy concern is much less restrictive than the strict adherence to the exceptions delineated by the Civil Rights Law section 51. This was the only resemblance between the proposal and the Civil Rights Law section 51.[200]

The ALRC's recommendations were actually most similar to Utah's invasion of privacy statutes.[201] Tort liability is proposed for intrusion on seclusion, and a serious invasion of privacy is defined as "any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities . . . or [the defendant] knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff."[202] The proposal also states that this tort only applies to invasions of privacy that occurred in a place in which a person "would have had a reasonable expectation of privacy, in all of the circumstances."[203] Although it has not yet been enacted, these consistent proposals reflect the rising interest in protecting people from intrusions into their private lives, especially in private places.

Both the French codes and the Australian proposals demonstrate statutes that recognize the need to allow for the freedom of expression and the free flow of information, while still broadly protecting the right to privacy against invasive behavior.[204] While the Civil Rights Law section 51 also addresses the conflicting issues of free speech and privacy protection, it affords greater latitude to newsworthiness and matters of the public interest than it does privacy.[205]

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197 *Id.*

198 AUSTRALIAN GOVERNMENT: AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169, at 9-1.

199 *See* N.Y. CIV. RIGHTS LAW § 51.

200 AUSTRALIAN GOVERNMENT, *supra* note 192; AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169, at 9-1; N.Y. CIV. RIGHTS LAW § 51.

201 AUSTRALIAN LAW REFORM COMMISSION, *supra* note 192, at 9-1; UT CODE ANN. § 76-9-402; UT CODE ANN. § 45-3-3.

202 AUSTRALIAN GOVERNMENT: AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169, at 8-1. "[I]ntrusion upon seclusion, such as by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs"). *Id.* at 5-1(a).

203 *Id.* at 6-1.

204 *See* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.); AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169.

205 N.Y. CIV. RIGHTS LAW § 51; Arrington v. N.Y. Times Co., 55 N.Y.2d 433 (1982); Foster v. Svenson, 128 A.D.3d 150, 152 (1st Dep't 2015).

V. AMENDING CIVIL RIGHTS LAW SECTION 51

In *Foster v. Svenson*, Justice Renwick writing for the majority, rebuked in no uncertain terms the failings of New York Civil Rights Law section 51, stating "this case highlights the limitations of New York's statutory privacy tort as a means of redressing harm that may be caused by this type of technological home invasion and exposure of private life."[206] Even though the court agreed that Arne Svenson invaded the Fosters' privacy and exposed their private life to the public, the Fosters were unable to proceed to trial, much less seek justice, because of the restrictions imposed on the court by the language of Civil Rights Law section 51.[207] The statute gives such great deference to First Amendment concerns under its exceptions for newsworthiness or matters of the public interest that it ends up allowing invasions of privacy instead of protecting people from them.[208] The default application of the exceptions in advance of a determination on invasiveness has become a statutorily acceptable means of evading the law under the guise of the First Amendment. Regardless of whether the First Amendment claims are used to evade the law, the Supreme Court explicitly prohibited the application of the First Amendment in this way in *Branzburg v. Hayes*.[209]

Civil Rights Law section 51 was intended to stop people from being able to profit from reprehensible behavior.[210] Yet, as evidenced by the decision in *Foster*, Civil Rights Law section 51 has become a shield for the perpetrators instead of the victims.[211] This is because the statutory language has not been substantially altered since its inception at the beginning of the twentieth century. The product of this inertness is that the statute is now permitting the behavior it was supposed to prevent.[212] An amendment to the Civil Rights Law section 51 would rectify this problem. The definitions for newsworthiness and intrusion on seclusion from the Restatement (Second) of Torts should be added into the Civil Rights Law section 51 as guidelines for characterizing an invasion of privacy.

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206 N.Y. CIV. RIGHTS LAW § 51; Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).
207 *Id.*
208 *Id.*
209 *See* Branzburg v. Hayes, 408 U.S. 665 (1972); Raef v. Appellate Division of Superior Court, 240 Cal. App. 4th 1112, 1123 (Cal. Ct. App. 2015) ("The First Amendment does not immunize the press from 'the enforcement of civil or criminal statutes of general applicability.'").
210 *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).
211 Foster v. Svenson, 128 A.D.3d 150, 152 (1st Dep't 2015).
212 N.Y. CIV. RIGHTS LAW § 51.

Furthermore, the exceptions for newsworthiness or matters of the public interest should not automatically preempt deliberation on whether an action was invasive. The application of the exceptions should be amended so that the product's value in terms of newsworthiness or public interest is balanced against the interest in protecting privacy, subject to the Restatement definitions.[213] Including these definitions to New York's statute, and thus following the model of their insertion into Utah and California's statutes, along with removing the preemption of the exceptions would give courts more latitude in deciding actionable claims.[214] This greater freedom in deciding what claims go to trial is seen in *Judge* and in *Shulman*.[215] New York should follow these models in order to prevent invasive behavior from slipping through the cracks of Civil Rights Law section 51.

The need for New York to follow Utah and California's models is abundantly clear when reviewing the recent decisions from those states' courts as they reveal that New York's invasion of privacy statute has become outdated and inadequate.[216] Although courts in Utah and California are also required to consider whether something is newsworthy or of the public interest, unlike in New York, they have found ways to prevent a claim for invasion of privacy from being dismissed solely on that basis.[217] New York should follow these examples. The definitions of newsworthiness and intrusion on seclusion from the Restatement (Second) of Torts should be applied when examining invasion of privacy claims to limit the breadth of the exceptions to invasion of privacy and to give judges greater latitude when deciding invasion of privacy claims, unlike in *Foster*.[218] Further, New York courts should apply California's method of separating invasion of privacy claims so that actionable complaints are not summarily dismissed simply because they are connected to claims that are nonactionable.[219]

If the Civil Rights Law section 51 were to have been used in the *Judge* decision, it is unlikely that the court would have reversed the motion to dismiss because the news program on plastic surgery was a matter of public concern, which is automatically exempt from

[213] *See* AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169 (The model phrasing for the balancing of public interest and protection of privacy is found in the proposals made by the Australian Law Reform Commission).
[214] Judge v. Saltz Plastic Surgery, PC, 330 P.3d 126 (Utah Ct. App. 2014); Shulman v. Group W Productions, Inc., 18 Cal. 4th 210 (Cal. 1998).
[215] *Judge*, 330 P.3d at 126; *Shulman*, 18 Cal. 4th at 200.
[216] *Judge*, 330 P.3d at 144; *Shulman*, 18 Cal. 4th at 200; Raef v. App. Division of Superior Ct., 240 Cal. App. 4th 1112 (Cal. Ct. App. 2015).
[217] *Judge*, 330 P.3d at 144; *Shulman*, 18 Cal. 4th at 200; Raef v. App. Division of Superior Ct., 240 Cal. App. 4th 1112 (Cal. Ct. App. 2015).
[218] *Judge*, 330 P.3d at 134–36; Foster v. Svenson, 128 A.D.3d 150, 152 (1st Dep't 2015).
[219] *Shulman*, 18 Cal. 4th at 200; *Raef*, 240 Cal. App. 4th at 1112.

litigation.[220] Instead, the court applied the definitions and held that a jury could find that the photographs "would be highly offensive to the reasonable person," and that there had been "an intentional substantial intrusion . . . upon the plaintiff's solitude . . . that would be highly offensive to the reasonable person."[221] Thereby, the court permitted Ms. Judge's claims to be put in front of a jury and not dismissed as the Fosters' claims were.[222] Additionally, as Utah does not have exceptions that preempts deliberation on invasive actions, the court also found that the issue of plastic surgery was a matter of public concern that could be put to the jury.[223]

Conversely, if Utah's statute were used to determine *Foster*, it is likely that several of the plaintiffs' claims would have been held actionable, rather than nonactionable. This is not only based on the decision in *Judge*, and the *Foster* court's own admission that Svenson's actions were an invasion of privacy, but also grounded in opinions on what constitutes an invasion of privacy.[224] Whereas the right to privacy in public is a contentious topic on which there still is no concrete consensus, the right to privacy in one's own home, as well as a place where a person has a reasonable expectation of privacy, is universally agreed upon.[225] In France, the country with one of the most protective privacy statutes in the world, photographing someone in their home without their consent is not only prohibited civilly, but is also a crime.[226]

Looking at the decision in *Shulman* also shows how it is highly probable that had the *Foster* court been able to apply the Restatement definitions, the outcome would have been different.[227] As the court in *Judge* did, the *Shulman* court also used the Restatement to analyze the plaintiffs' claims of invasion of privacy.[228] The court held that a jury could find that the nurse surreptitiously recording the plaintiff while she was being evacuated in the medical helicopter was an intrusion that was highly offensive to an ordinary person.[229] This was because the court

220 *See Judge*, 330 P.3d at 134–36; *Foster*, 128 A.D.3d at 152; N.Y. CIV. RIGHTS LAW § 51.
221 Judge v. Saltz Plastic Surgery, PC, 330 P.3d 126, 134–36 (Utah Ct. App. 2014).
222 *Id.*; *Foster*, 128 A.D.3d at 152.
223 *Judge*, 330 P.3d at 134.
224 *See* Logeais & Schroeder, *supra* note 171, at 519–21, 526; AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169; *Foster*, 128 A.D.3d at 152.
225 *See* Ariella Goldstein, *Privacy from Photography: Is There a Right Not to Be Photographed Under New York State Law?*, 26 CARDOZO ARTS & ENT. L.J. 233 (2008-2009) (examining New York Civil Rights Law Section 51 in its application to whether or not there is a remedy to public invasion of privacy when someone is photographed without their consent in public); Whyte, *supra* note 169.
226 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.); Logeais & Schroeder, *supra* note 171, at 519–21, 526; CODE PENAL [C. PEN.] [PENAL CODE] art. 226-1 (Fr.).
227 Shulman v. Group W Productions, Inc., 18 Cal. 4th 210, 213 (Cal. 1998).
228 *Id.*
229 *Id.*

concluded that the inside of the medical helicopter was a place in which a person had a reasonable expectation to privacy, which is the same amount that one would expect to have in a hospital room or an ambulance.[230] If an air ambulance has been recognized as a place in which a person can reasonably expect privacy, then it can be concluded that someone's home is also afforded that same level of expectation. Applying the metric of analysis used by the *Judge* and *Shulman* courts, it is possible to conclude that a jury would be able to find that Svenson surreptitiously taking photos of his neighbors without their knowledge or consent and then disseminating them in several different public forums could be highly offensive to an ordinary person, pursuant to the Restatement definitions of newsworthiness and intrusion on seclusion.[231]

Including the Restatement definitions would also give judges more freedom because it would allow them to make use of California jurisprudence. The restrictive language of the Civil Rights section 51 prevented the *Foster* court from making any conclusion other than that the Fosters' claim was not actionable.[232] However, California's statute does not have language that restrains its courts, which allows them to analyze each claim separately, weighing the public interest against the invasiveness of the action.[233] In *Shulman* and *Raef*, the courts were able to separate the different claims from those that were actionable on the invasion of privacy and from those that were nonactionable on the invasion of privacy.[234] Rather than having to dismiss the entire complaint because one part of it was nonactionable on the basis of a public interest exception, the court was able to parse the claims.[235] This bifurcation led to some of the Shulmans' claims based on invasion of privacy to proceed to trial.[236] This type of jurisprudence, while it may not be entirely applicable to the claims in *Foster*, would prevent an entire complaint from being dismissed just because part of it was deemed nonactionable.

Broadening the protection of privacy under Civil Rights section 51 in this manner would not endanger First Amendment rights. As seen in *Judge* and *Shulman*, the application of the Restatement definitions do not decide whether or not there has been an invasion of privacy—it simply allows the claim to proceed to trial on the basis that there are

230 *Id.*
231 Judge v. Saltz Plastic Surgery, PC, 330 P.3d 126, 134–36 (Utah Ct. App. 2014); *Shulman*, 18 Cal. 4th at 231.
232 Foster v. Svenson, 128 A.D.3d 150, 152 (1st Dep't 2015).
233 *Shulman*, 18 Cal. 4th at 231.
234 *Id.* at 210; Raef v. App. Division of Superior Ct., 240 Cal. App. 4th 1112 (Cal. App. Ct. 2015).
235 *Shulman*, 18 Cal. 4th at 231.
236 *Id.*

facts on which a jury should decide.[237] Moreover, the newsworthiness and intrusion on seclusion definitions are generally applicable to a place where a person has a reasonable expectation to privacy.[238] One could say that these places are a small set of locations. It is internationally recognized that photographing somebody in their home, a place where one has a reasonable expectation of privacy, is an invasion of privacy.[239] Incorporating the breadths of the French code and the Australian proposal, as well as by following the Utah and California models, would help to loosen the strictures of the Civil Rights Law section 51 in order to prevent commonly recognized invasions of privacy from being protected by the law.

VI. CONCLUSION

Civil Rights Law section 51 is failing New York's citizens, "[w]e are constrained to find that the invasion of privacy of one's home that took place here is not actionable as a statutory tort of invasion of privacy . . . because defendant's use of the images . . . constituted art work and, thus is not deemed 'use for advertising or trade purposes,' within the meaning of the statute."[240] Civil Rights Law Section 51 was intended to protect New York citizens from unlawful invasions of their privacy.[241] However, the lack of significant change to the law since its enactment has morphed this once innovative statute into a dinosaur. Instead of preventing invasive behavior, it has condoned it.[242]

When compared to the invasion of privacy statutes in California and Utah it is clear that New York has fallen behind.[243] The power and usefulness of the Civil Rights Law section 51 is further weakened when viewed in light of the protections afforded by the French's right to privacy.[244] Not only is the right to privacy in the home, or an equally private location, of the utmost importance in France, but even the contentious area of whether or not there can be an invasion of privacy in public is regulated.[245] Even statutes that have not yet been enacted reflect more progressive thinking than the law currently in force.[246]

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237 Judge v. Saltz Plastic Surgery, PC, 330 P.3d 126, 134–36 (Utah Ct. App. 2014); *Shulman*, 18 Cal. 4th at 231.
238 *Judge*, 330 P.3d at 134–36; *Shulman*, 18 Cal. 4th at 231.
239 CODE PENAL [C. PEN.] [PENAL CODE] art. 226-1 (Fr.).
240 *Foster*, 128 A.D.3d at 152.
241 Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).
242 *Foster*, 128 A.D.3d at 152.
243 UT CODE ANN. § 76-9-402; UT CODE ANN. § 45-3-3; C.A. CIV. CODE § 43.
244 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.); Logeais & Schroeder, *supra* note 171, at 519–21, 526 ("(1) the photograph does not focus on, or single out, the individual or individuals claiming the right of image; and (2) the photographs must show the photographed person or persons engaged in public, rather than private, activities.").
245 Logeais & Schroeder, *supra* note 171, at 526.
246 AUSTRALIAN LAW REFORM COMMISSION, *supra* note 169.

Civil Rights Law section 51 was not intended to be a tool used to chisel away at the right to privacy, but a shield against it. To actually protect people and achieve its original aims there needs to be a change. The Civil Rights Law section 51 needs to be amended to include the Restatement (Second) of Torts definitions of newsworthiness and intrusion on seclusion, and change the statutory language to prevent the statute's exceptions from preempting judicial analysis on the invasiveness of the action at issue.

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