"A Virtual 'Puppet'": Performance and Privacy in the Digital Age

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The recent case of Garcia v Google *identifies a central problem of the internet world as we know it — that speech may be freer and more powerful than before and opportunities for creative expression radically extended but individuals may lose control over what happens to their images and other distinctive features, challenging assumptions about their identity. In the discussion below, it is argued that the time has come to move beyond relying on the language of "privacy" and if the idea is to allow individuals to maintain control over the formulation of personal identity in the digital age, then laws should be framed around that.*

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I. Introduction

A curious moment in the case of *Garcia v Google Inc.* was the passing comment of Judge Margaret McKeown that "[p]rivacy laws, not copyright, may offer remedies tailored to Garcia's personal and reputational harms".[1] My initial reaction was to wonder what privacy interests were at stake in this case of Innocence of Muslims whose trailer aired on YouTube in 2012, fomenting outrage across the Muslim world, violent protests in the Middle East and parts of Asia (where it was blocked)[2] and Australia (where it was not),[3] and a fatwa issued from an Egyptian cleric against those associated with the film including its performers.[4] Cindy Lee Garcia's complaint before the 9th Circuit was that she was deceived into thinking that the film, originally titled Desert

1. *Garcia v Google, Inc.*, 786 F (3d) 733 at 745 (9th Cir 2015) (en banc) (US) [*Garcia v Google*].
2. See Jeremy Bowen, "Anti-Islam Film: Thousands Protest around Muslim World" *BBC News* (17 September 2012), online: BBC <www.bbc.com/news/world-middle-east-19625167>.
3. "As it Happened: Violence Erupts in Sydney over Anti-Islam Film" *ABC News* (16 September 2012), online: ABC <www.abc.net.au/news/2012-09-15/anti-us-protests-hit-sydney/4263372>.
4. See Andrew Blankstein & Ned Parker, "Police Probe Threats, Fatwa against "Innocence of Muslims" Actors" *Los Angeles Times* (21 September 2012), online: LA Times <latimesblogs.latimes.com/lanow/2012/09/police-probe-threats-fatwa-against-innocence-of-muslims-actors.html> (adding "[w]hether anyone will abide by them is another matter. Senior mainstream Sunni clerics have urged restraint in regard to the film").

Warrior, was to be an historical Arabian Desert adventure film.[5] Instead, during post-production it was turned into an anti-Islamic polemic, with her lines overdubbed to express the director's "hateful" "bigoted" views, using her as a virtual "puppet" in a manner repugnant to her character as someone who would "never debase another person's religious beliefs".[6] Further, the instrumentalities of the film's notoriety, Google and YouTube, refused to take it down despite her many requests relying on the *Digital Millennium Copyright Act*.[7] As a result of these acts and refusals, Garcia claimed, she suffered emotional distress, the destruction of her career and reputation and credible death threats.[8] It seems that, at this point of the proceedings, copyright not privacy was Garcia's legal concern. Yet for fairly obvious reasons to do with the fact that copyright law protects authors not performers, that claim failed,[9] leaving Garcia with no legal claim — subject to the puzzling hint above that had she pursued an alternative claim in privacy she might yet have prevailed. And I am still puzzled. Yes, there are a number of scenarios where privacy laws

5. She was not the only one. Other actors also maintained that they were duped by Nakoula into thinking the film was an incompetent amateur adventure story although admittedly they did not look too closely. See Michael Joseph Gross, "Disaster Movie" *Vanity Fair* (27 December 2012), online: Vanity Fair <www.vanityfair.com/culture/2012/12/making-of-innocence-of-muslims>.
6. See Garcia's Complaint in *Cindy Lee Garcia v Nakoula Basseley Nakoula*, *et al*, 2012 WL 4426549 at paras 4, 8–9, 29 (CD Cal 2012) (US) [Garcia's Complaint, CD Cal].
7. 112 Stat 2860 (US).
8. Garcia's Complaint, CD Cal, *supra* note 6 at para 38; *Garcia v Google*, *supra* note 1 at 745.
9. *Garcia v Google*, *ibid* at 742–745. For a thorough analysis of the different stages of the case, including an earlier judgment for Garcia given by Judge Kozinski in the 9th Circuit in *Garcia v Google, Inc* 766 F (3d) 929 (9th Cir 2014) (US), overturned by the en banc Court (Judge Kozinski dissenting), see Elizabeth Martin, "Using Copyright to Remove Content: An Analysis of *Garcia v Google*" (2016) 26:2 Fordham Intellectual Property, Media and Entertainment Law Journal 464. Documents for the case are available at *Santa Clara Law Digital Commons*, online: SCU <https://digitalcommons.law.scu.edu>.

rather than copyright might be the preferable basis for a claim, especially if copyright is restricted to protecting and fostering authored creative expression as the 9th Circuit posited in Garcia's case,[10] echoing an argument of Samuel Warren and Louis Brandeis in 1890.[11] And we can debate whether, nevertheless, if privacy law fails to provide an effective remedy in such cases, copyright and other claims may be drawn on to fill the gap.[12] But what was the "digital circuit"[13] signalling with its suggestion that privacy should frame the response to the essential problem that Garcia identified in her case? The problem of individuals caught up as "puppets" in fictionalised worlds created and fostered by others working behind the scenes and pursuing their own ends — the internet world as we know it, where speech may be freer and more powerful than before and opportunities for creative expression radically extended but individuals may lose control over what happens to their images and other distinctive features, challenging assumptions about their identity? In the discussion below, I argue that the time has come to move beyond relying on the nebulous language of "privacy" and if the idea is to allow individuals to

10. *Garcia v Google*, *ibid* at 745. See further the Hon Margaret McKeown, "Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment" (2016) 15:1 Chicago Kent Journal of Intellectual Property 1.
11. Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4:5 Harvard Law Review 193 at 205.
12. See, for instance, Margaret Chon, "Copyright's Other Functions" (2016) 15:2 Chicago Kent Journal of Intellectual Property 364 (giving the particular example of "cyber-harassment [using] non-consensual pornography" at 366). In fact remedies may not be limited to copyright to deal with such cases. See Federal Trade Commission, Press Release, "Website Operator Banned from the 'Revenge Porn' Business After FTC Charges He Unfairly Posted Nude Photos" (29 January 2015), online: FTC <www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges>; and Danielle Citron & Woodrow Hartzog, "The Decision That Could Finally Kill the Revenge-Porn Business" *The Atlantic* (2 February 2015), online: The Atlantic <www.theatlantic.com/technology/archive/2015/02/the-decision-that-could-finally-kill-the-revenge-porn-business/385113/>.
13. The label adopted by the Hon McKeown, *supra* note 10 at 1.

maintain control over the formulation of personal identity in the digital age, then laws should be framed around that.

II. Nebulous Privacy

Even a superficial examination of Garcia's privacy claims in her earlier proceeding before the Superior Court of the State of California, later to be superseded by her federal proceeding, shows the challenges of claiming privacy in a case such as this.[14] Garcia claimed invasion of her constitutional right to privacy under the California Constitution,[15] again using the imagery of "a virtual 'puppet'" to object to Nakoula Basseley Nakoula's treatment of her as an "egregious breach of social norms",[16] and false light invasion of privacy under California law;[17] namely, that "Defendants, through the above described Film and their actions in publishing it, including the contents that falsely purported to depict Plaintiff saying bigoted things that she did not say, gave publicity to matters concerning Plaintiff that unreasonably places her in a false light and violates her right to privacy".[18] Yet these claims, along with claims for fraud, unfair business practices, right of publicity, defamation and intentional infliction of emotional distress were discontinued after the Superior Court dismissed the application for a preliminary injunction

14. Complaint of Cindy Lee Garcia in *Cindy Lee Garcia v Nakoula Basseley Nakoula, et al*, Case No BC 492358, filed Superior Court, County of Los Angeles, State of California, September 19, 2012 [Garcia's Complaint, Sup Ct].
15. Although query whether the Constitution could in itself provide the basis for a claim as opposed to lending constitutional support and weight to a claim, as in *Melvin v Reid*, 112 Cal App 285 (Ct App 1931) (US), where the Constitutional right to privacy was said to support the plaintiff's common law tort claim of the defendant's public disclosure of private facts when it identified her as the subject of its film biopic about her former life as a prostitute swept up in a murder trial.
16. Garcia's Complaint, Sup Ct, *supra* note 14 at paras 24, 26.
17. See William Prosser, "Privacy" (1960) 48:3 California Law Review 383 at 398–491, identifying false light as the third of four torts developing in the wake of Warren & Brandeis's article, Warren & Brandeis, *supra* note 11, recognised in states including California.
18. Garcia's Complaint, Sup Ct, *supra* note 14 at para 30.

on the basis that "Plaintiff has not shown a likelihood of success on the merits".[19] Presumably this was because she was unable to demonstrate that the absent Nakoula had acted falsely and with "actual malice", that is with knowledge of falsity or reckless disregard of truth or falsity,[20] her Constitutional burden in this case of a newsworthy publication according to the Supreme Court in *Time, Inc v Hill*.[21] Moreover, given she was applying for a mandatory injunction, a prior restraint, asking "that the offending content be removed from the Internet",[22] her burden was especially high. We can imagine the Superior Court at this preliminary stage thinking there might have been a variety of possible exonerations of Nakoula's conduct, including that Garcia had signed the usual release

19. See *Cindy Lee Garcia v Nakoula Basseley Nakoula, et al*, Case No BC 492358, filed Superior Court, County of Los Angeles, State of California, September 19, 2012 [Minutes of Garcia's Complaint, Sup Ct], specifically Judge Luis A Lavin, minutes entered 20 September 2012.
20. Garcia unsuccessfully sought to argue "actual malice" in these terms in her Complaint. See Garcia's Complaint, Sup Ct, *supra* note 14 at para 36.
21. *Time, Inc v Hill*, 385 US 374 (1967) [*Time, Inc*], another false light claim where the plaintiff argued that the defendant's theatre review of a Broadway play misrepresented the play's fictionalised account of a home invasion as the actual home invasion which the plaintiff and his family had suffered. Also see Andrew T Kenyon & Megan Richardson, "Reverberations of Sullivan" in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) ch 16.
22. Garcia's Complaint, Sup Ct, *supra* note 14 at para 11.

form that performers signed for films,[23] or impliedly consented to his post-production editing through her participation in the film (as the District Court later held in her federal case,[24] a finding that the 9th Circuit was reluctant to disturb as "clearly erroneous", notwithstanding its conclusion that she was "bamboozled").[25] Thus, even apart from the problem that Google/YouTube were immunised from liability under Section 230 of the *Communications Decency Act*[26] ("*CDA*"), as Rebecca Tushnet points out,[27] her prospects of success under her State law privacy claims seemed to be weak at best.

As such, Judge McKeon's suggestion that privacy laws might have been a better avenue to give Garcia a viable claim to address her "personal

23. As Nakoula later argued in the federal proceedings: see Declaration of Timothy L Alger for Google and YouTube, *Garcia v Google*, *supra* note 1. The Release appended specifically grants to "Sam Bessi" and his production entity the right to photograph and record Ms. Garcia, releases all claims including for invasion of privacy, right of publicity or other civil rights in connection with the authorized use of her likeness and sound in the film and assigns the rights necessary to make the film (including any relevant copyright, performance right or right of publicity). See also Nakoula's Answer, filed on 20 May 2014, *Garcia v Google*, *supra* note 1 at 1–2, which alleges not only that Garcia signed the Release but states that the words spoken by her character in *Innocence of Muslims* "came from her voice and were never changed", adding that "any NON-UNION actress such as the Plaintiff knows that any movie they participate in represents the opinions or knowledge of the writers and Producers, not the actors". Garcia nevertheless disputed the authenticity of the document with the support of a handwriting expert: See Declaration of James A Blanco (handwriting expert), filed 30 November 2012, *Garcia v Google*, *supra* note 1.
24. See Order of Judge Michael W Fitzgerald that denies Plaintiff Garcia's Motion for Preliminary Injunction in *Cindy Lee Garcia v Nakoula Basseley Nakoula, et al*, 2012 WL 12878355 (CD Cal 2012) (US) [2012 Order Denying Garcia's Motion].
25. *Garcia v Google*, *supra* note 1 at 736, 737, 743 (incongruously finding that Garcia was "bamboozled" and lines were "dubbed", yet the District Court was not clearly erroneous in finding she impliedly consented).
26. 47 USC tit V § 230.
27. Rebecca Tushnet, "Fair Use's Unfinished Business" (2016) 15:2 Chicago Kent Intellectual Property 399.

and reputational harms" than copyright is rather surprising. Nevertheless the question whether privacy is the appropriate organising principle and theoretical foundation of a false light claim,[28] offering a powerful argument based on dual ideas of human dignity and individual flourishing as core principles of a liberal society,[29] is still worth considering. So, was *Garcia v Google* even a case about privacy? If I take as the core concern of privacy the desire to be "let alone", as Warren and Brandeis put it in 1890,[30] or not to be subjected to the "public gaze" as Lisa Austin explains,[31] then I would say no. Further, stretching the meaning of privacy to cover Garcia's situation, treating privacy in a "pluralist manner from the bottom up", as Daniel Solove for instance argues,[32] would only undermine this important idea. The difficulty is not that Garcia is a performer and lives much of her life in the public gaze. For even performers and those who live much of their lives in the public gaze can benefit from periods "backstage" in

28. See Melville Nimmer, "The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56:4 California Law Review 935; *Cf.* Dianne Zimmerman, "False Light Invasion of Privacy: The Light that Failed" (1989) 64:2 New York University Law Review 364 (although doubting that the claim has anything to do with privacy).
29. Warren & Brandeis, *supra* note 11, talk about both dignity and flourishing: the right to privacy a right of "inviolate personality" at 205; development of an "intense intellectual and emotional life" the product of "the advance of civilisation" which law must respond to, at 195, although the first is more prominent. See also Edward J Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39:6 New York University Law Review 962; Nimmer, *ibid* at 959.
30. Warren & Brandeis, *supra* note 11 at 195; see also 196 (as opposed to "intrusion upon the domestic circle").
31. Lisa Austin, "Privacy and the Question of Technology" (2003) 22:2 Law & Philosophy 119.
32. Daniel Solove, *Understanding Privacy* (Cambridge, MA: Harvard University Press, 2008), proposing a pluralist theory of privacy in these terms at 40; and treating false light as falling within a privacy taxonomy "because of its significant similarity to other privacy disruptions", involving "the spreading of information that affects the way society views a person" and resulting in "embarrassment, humiliation, stigma, and reputational harm" at 160.

order to relax with close associates, prepare for the "putting on and taking off of character", engage in informal and intimate conduct, and find opportunities for reflection as well as support from peers, as Canadian sociologist Erving Goffman pointed out in his study on *The Presentation of the Self in Everyday Life* some sixty years ago.[33] And those of us who find that being onstage is a near-constant feature of modern internet life can draw a similar conclusion about the importance of privacy. Yet Garcia showed no sign of this being her desire in this particular instance. Rather, her objection to being used as a "virtual puppet" seemed to have more to do with another common human desire talked about by Goffman, namely that of maintaining control over the "frontstage" performances in different aspects of one's everyday life.[34] As such, it is hard to see this as a false light right to *privacy* claim (although such arguments may be more feasible in some other false light cases, such as *Time, Inc v Hill* where the claimed false light publicity concerned matters that were private family matters which the plaintiff would rather not have seen aired in public).[35]

III. Reputation Insufficient

On the other hand, query whether reputation is necessarily a preferable organising principle as some, including William Prosser, have argued.[36] Yet perhaps it comes closer than privacy in many cases. It has the beneficial

33. Erving Goffman, *The Presentation of Self in Everyday Life* (Garden City: Anchor Books, 1959) ch 3 at 120–130, passim [Goffman, *Presentation of Self*].
34. See *ibid*, ch 1, where Goffman talks about the challenges of impression management, the need to negotiate different roles, the difficulty of maintaining expressive control, and the risks of being caught out.
35. As Nimmer argues, *supra* note 28 at 962–66 (although Zimmerman doubts this, *supra* note 28 at 432–34). See similarly, regarding the UK's tort of misuse of private information, *McKennitt v Ash*, [2006] EWCA Civ 1714, Longmore LJ ("[t]he question in a case of misuse of private information is whether the information is private not whether it is true or false" at 86).
36. Prosser, *supra* note 17 ("the interest protected is clearly that of reputation" at 400).

feature of being concerned with the frontstage aspect of a performance.[37] And as Justice Stewart said in *Rosenblatt v Baer*, "the right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than the basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty".[38] Thus, while I might dispute whether the false light tort can be wholly equated the protection of reputation in every case (for instance, recall the *Time, Inc v Hill* case noted above), the concerns may be more along these lines in some cases. Was this the case for Garcia who in her false light claim talked of "being shunned, avoided and subjected to ridicule", resulting in "significant damage to her reputation and to her livelihood", harms usually associated with defamation and repeated in her defamation claim?[39] The 9th Circuit at one point suggested that defamation law might equally be an appropriate claim to address Garcia's "personal and reputational harms".[40] Not that her prospects of a remedy were greater with defamation, given the "actual malice" standard equally applies,[41] prior restraints are equally resisted, and Section 230 of the *CDA* extends to such claims (and recall that Garcia's defamation claim was dismissed by the Superior Court along with her privacy claims; moreover, she suffered the same result in the District court where a defamation

37. See Warren & Brandeis, *supra* note 11 at 197. Warren and Brandeis distinguish reputation from privacy, identifying this as essentially concerning "the individual in his external relations to the community, by lowering him in the estimation of his fellows" (as opposed to "intrusion upon the domestic circle" which is they identify as a core concern of privacy as a right to be "let alone").
38. *Rosenblatt v Baer*, 383 US 75 at 92 (1966) [*Rosenblatt*].
39. Garcia's Complaint, Sup Ct, *supra* note 14 at paras 30, 33, 34, 69, 76.
40. *Garcia v Google*, *supra* note 1 at 741, 745.
41. Indeed, the Court in *Time, Inc*, *supra* note 21, in setting out an "actual malice" test followed the path being established for defamation in *New York Times Co v Sullivan*, 376 US 254 (1964) (where the standard was applied to public officials); *Curtis Publishing Co v Butts*, 388 US 130 (1967); *Associated Press v Walker*, 389 US 28 (1967); *Gertz v Robert Welch, Inc*, 418 US 323 (1974) (where the standard was extended to public figures). See Kenyon & Richardson, *supra* note 21.

claim was added to her copyright claim).[42] But there is a suggestion here that defamation and false light may be rather alike in their treatment of reputational harms, although from Garcia's perspective there seemed to be some differences. Her false light claim focussed more on personal harms and invoking the moral standard that the conduct was "highly offensive to a reasonable person".[43]

Of course it may still be argued that such personal harms can be brought within the rubric of a defamation claim broadly construed and generously applied. And in common law jurisdictions such as the United Kingdom, Australia, and Canada which do not recognise a false light tort, a distinctly American invention, a claimant in Garcia's position would probably rely on defamation to address her personal and reputational harms[44] (possibly supplementing this with reference to the right to reputation under the *European Convention on Human Rights*[45] in

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42. See Minutes of Garcia's Complaint, Sup Ct, *supra* note 19; 2012 Order Denying Garcia's Motion, *supra* note 24.
43. See Garcia's Complaint, Sup Ct, *supra* note 14 at para 31 ("[t]he false light in which Plaintiff was placed would be highly offensive to a reasonable person"), and para 33 ("[p]laintiff has suffered and will suffer emotional distress, and has been, and continues to be, embarrassed and humiliated by the false statements and implications, [and] terrorized by the death threats that she has received as a result of the false light in which she has been placed...").
44. See *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934), 50 TLR 581 (CA (Eng)) (substantial damages awarded to plaintiff Princess Youssopov who claimed defamation in her portrayal as a fictional character in the film *Rasputin, the Mad Monk*); *Kidu v Fifer*, [2016] NSWSC 488 (Austl) [*Kidu*, 2016] (granting an interlocutory injunction against defendant filmmaker showing certain extracts from her film at a Canadian festival after the subject who signed a release then purported to withdraw it), although the plaintiff's version of the facts of the parties' agreement was successfully disputed and the injunction discharged in *Kidu*, 2016.
45. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*ECHR*].

the UK).[46] Further, given that reasonableness rather than "actual malice" is the touchstone of analysis in these jurisdictions,[47] the claim might well succeed. Indeed, an injunction might be awarded, based on recent experience of an injunction granted in the Irish internet defamation case of *McKeoh v John Doe* where the plaintiff was falsely identified as a taxi fare evader and subjected to public condemnation, after an attempt on the part of the court to broker a voluntary arrangement with Google and Facebook to take appropriate steps failed.[48] Thus it may be said that the right to reputation is better recognised in these jurisdictions than in the US, providing an effective vehicle to deal with false light-type claims in cases where a privacy claim is unavailing.[49] Nevertheless, the point remains that an exclusive focus on reputation where privacy is unavailing risks understating the personal dimension of a false light claim — that while "reputation" may be understood broadly as "the estimation by which the community holds a person",[50] or "the social apprehension that we have of each other" as Robert Post puts it,[51] focussing just on the way that a person is judged by their community risks fails to appreciate Goffman's point that multiple diffuse aspects may contribute to a performer's success (or failure) in projecting an identity, or "self", including the way that "the

46. See Tanya Aplin & Jason Bosland, "The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?" in Kenyon, *supra* note 21, ch 13.
47. See, for instance, *Jack Monroe v Katie Hopkins*, [2017] EWHC 433 (QB) (allegation by defendant right-wing blogger that plaintiff left-wing blogger had vandalised a war memorial); *Rebel Wilson v Bauer Media*, [2017] VSC 521 (Austl) (allegation in *Women's Day* based on email correspondence with anonymous source that plaintiff actor was a serial liar); *Baglow v Smith*, 2015 ONSC 1175 ("more vocal supporters" although there treated as "fair comment" on the basis they were statements of opinion not fact).
48. *Eoin McKeogh v John Doe*, [2012] IEHC 95 (HC (I)), specifically decision of Peart J on Interlocutory Injunction application.
49. Although this is not to say that a privacy claim would not be viable in some cases, see *Rosenblatt*, *supra* note 38.
50. See Aplin & Bosland, *supra* note 46 at 268.
51. Robert C Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74:3 California Law Review 691 at 692.

individual … handle[s] things during his presence among others".[52] Here having a strong sense of identity may count for more than reputation.

IV. Towards a Right to Identity

Thus my argument is that we should consider a right to identity as an appropriate frame for false light cases in the internet world where so much more is social than before. A focus on identity would take us beyond considerations of reputation and also privacy in assessing the harms suffered by a person in a false light case, even appreciating that reputation and privacy may be relevant as well and may sometimes coincide (for instance, where a person is affected in their private self by the judgments of others). It would allow us to consider what Jeremy Waldron refers to as a "concern for the ordinary dignity of an individual focus[ed] on the ways his or her status is affirmed and upheld — and the ways in which it might be endangered — as one person among thousands or millions of

52. *Ibid*, citing Erving Goffman, *Interaction Ritual* (Garden City: Anchor Books, 1967) [Goffman, *Interaction Ritual*] talking about a person's "projected … identity" or "self" (or "selves") as a product of various things including reputation (the way that a person may be remembered and judged from the past), social role and status, and more particular factors such as setting, audience and (most significantly here) the ways that "the individual … handle[s] things during his presence among others" at 107–108, 168.

others",[53] and having to do with the person's capacity to engage effectively in public discourses and contribute to the formulation of a diverse multi-vocal community.[54] As Waldron puts it, there is "a sort of public good of inclusiveness that our society sponsors and that it is committed to"[55] — using language reminiscent of Goffman's earlier observation that in "urban secular living", the individual "walks with some dignity", aware of his "status" relative to those of others and "finding that they must treat him with ritual care", but now adapting this idea to suit a modern virtual setting where "status" is a more fluid thing than previously imagined and a person's ability to maintain their identity is key.[56] This sentiment comes through in Garcia's complaint that her identity as an individual who

53. Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012) at 142 [Waldron, *Harm in Hate Speech*] in Jeremy Waldron, "How Law Protects Dignity" (2012) 71:1 Cambridge Law Journal 200 at 202 [Waldron, "How Law Protects Dignity"], Waldron expands on the concept he is putting forward here of a dignitarian "status" as "predicated on the fact that [the person] is recognised as having the ability to control and regulate her actions in accordance with her own apprehensions of norms and reasons that apply to her; it assumes that she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organising her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others, in others' attitudes and actions towards her, and in social life generally". See also Jeremy Waldron, "Lecture 2: Law, Dignity, and Self-Control" in Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012).
54. See especially Waldron's discussion in *The Harm in Hate Speech*, *ibid* at 4–5, 58–60, talking about hate speech. Waldron's terms this group defamation but I think it goes beyond defamation designed simply to protect reputation.
55. *Ibid* at 4.
56. Goffman, *Interaction Ritual*, *supra* note 52 at 95. Generally in a more traditional way Goffman connects status more with a person's position in society, *e.g.* a person of higher or lower status — but in this quoted comment he hints at a more flexible evolving idea of social status more reminiscent of Waldron's.

would "never debase another person's religious beliefs" was being radically impugned by Nakoula's egregious breach of social norms, combined with the unwanted notoriety conferred by Google/YouTube's worldwide publication.[57] As such, we have a powerful argument against the argued rights of those such as Nakoula, Google and YouTube to engage in free speech without restraint,[58] based on an individual's ability to express herself freely on her own terms, participate in public discussions and democratic processes, and even possibly avoid violence and maintain truth in an environment in which she is accurately represented.[59]

I appreciate that this reasoning would represent a shift beyond Warren and Brandeis's advocacy of a right to be "let alone" as but one aspect of what they called "inviolate personality",[60] coming closer to a right in inviolate personality. But then the false light tort already takes us beyond the right to privacy, as Prosser points out.[61] I believe it would also take us further than a right to reputation, although this is also important, and may be almost enough in a case such as Garcia's. If anything, it comes closest to the right of publicity which is sometimes couched as a

57. See Garcia's Complaint, CD Cal, *supra* note 6; Garcia's Complaint, Sup Ct, *supra* note 14.

58. See Nimmer, *supra* note 28 at 949–950, summarising the values of free speech as elucidation of truth, democratic participation, self-expression and aversion of violence, citing, *inter alia,* Justice Brandeis in *Whitney v California*, 274 US 357 at 375–377 (1927). Although query whether violence was averted by publication of *Innocence of Muslims*.

59. Including the prospect of violence against Garcia. Note, however, the argument of Judge Watford in *Garcia v Google* that "[t]he sad but unfortunate truth is that the threat posed to Garcia by issuance of the fatwa will remain whether *The Innocence of Muslims* is available on YouTube or not. Garcia is subject to the fatwa because of her role in making the film, not because the film is available on YouTube": *Garcia v Google*, *supra* note 1 at 748. But perhaps a different kind of injunction, such as a public disclaimer of association available on YouTube, might be more effective here.

60. See Warren & Brandeis, *supra* note 11 at 205.

61. See Prosser, *supra* note 17.

way of protecting a person's "identity" from commercial appropriation.[62] But I am not suggesting that false light amounts to a full appropriation of identity, in the sense of taking over a person's identity.[63] Rather, I am simply arguing that the law here should offer protection from an unjustifiable attack on a person's identity, specifically her perception of herself as someone who has the "ability to control and regulate her actions in accordance with her own apprehensions of norms and reasons that apply to her", as Waldron puts it.[64] Nor am I going as far as to advocate a European-style right to control the use of personal information, a right also based on an idea of a right to personality which transcends privacy and reputation and may go significantly further,[65] appealing as that may be in the internet environment where control over personal information may be key to a person's capacity to maintain an independent dignified existence.[66] For present purposes, I am merely making a limited argument that the false light invasion of privacy tort would be better framed as a tort not just about privacy but as also covering reputational and identity

62. See, for instance, Garcia's Complaint, Sup Ct, *supra* note 14 ("California's Right of Publicity Statute, California Civil Code § 3344 et seq, protects persons from the unauthorized appropriation of the person's identity by another for commercial gain" at para 38). Note also as to the common law right of publicity, *Midler v Ford Motor Co*, 849 F 2d 460, 462 (9th Cir 1988) (US) ("California will recognize an injury from 'an appropriation of the attributes of one's identity'", citing *Motschenbacher v RJ Reynolds Tobacco Co*, 498 F 2d 821 (9th Cir 1974) (US)).
63. Query whether the right of publicity, being confined generally to publicity in advertising or trade (as, for instance, under Cal Civ Code § 3344 (US)) should extend to the posting of a film on YouTube, despite Garcia's argument that a commercial or other purpose should suffice.
64. See Waldron, "How Law Protects Dignity", *supra* note 53.
65. As well as providing more effective protection to these rights in some instances where other laws may fall short: for instance, regarding the right to reputation under the ECHR, *supra* note 45, see David Erdos, "Data Protection and the Right to Reputation: Filling the "Gaps" After the Defamation Act 2013" (2014) 73:1 Cambridge Law Journal 536.
66. See Stefano Rodotà, "Data Protection as a Fundamental Right" in Serge Gutwirth, Yves Poullet, Paul De Hert, Cécile de Terwangne & Sjaak Nouwt, eds, *Reinventing Data Protection?* (Amsterdam: Springer, 2009) ch 3.

harms in ways that egregiously breach social norms about what can and what cannot be deemed to be acceptable within the boundaries of free speech.[67] As such, I believe the tort would not only provide a more appropriate model for dealing with cases such as Garcia's where the essential complaint was the way she was represented publicly, using her as "a puppet", in a manner repugnant to her self-proclaimed identity as someone who would "never debase another person's religious beliefs".[68] It would also provide a useful model for courts in other jurisdictions which from time to time look to US legal innovations in refashioning their laws to better address and deal with the exigencies of modern life.

V. Conclusion

I have argued in this essay that a false light invasion of privacy tort conceived as a way of protecting identity makes the best sense of Garcia's claim in her case against Nakoula, focussing us more sharply on what Garcia alleged to be Nakoula's extreme wrongful conduct in changing the innocent and banal message of Desert Warrior and overdubbing the lines of her character to give it a darker and more dubious role in Innocence of Muslims, exemplified by her repeated complaint that he had treated her as his "puppet", or "virtual puppet", in "an egregious breach of social norms". Perhaps it is no accident that a filmmaker especially would conceive of a character as potentially subject to his dominion and control, and that a performer especially would notice and object to being treated as a puppet? Performance may be a metaphor for the presentation of the self in everyday life, as Goffman has said.[69] But as Garcia's case shows,

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67. Bearing in mind that the standards of "actual malice", resistance to prior restraints, and s 230 of the *Communications Decency Act,* 47 USC § 230 (1996) would apply and would likely be sufficient to rule out the injunction sought by Garcia, see Garcia's Complaint, Sup Ct, *supra* note 14. Whether that would preclude a more limited injunction, *e.g.* disclaiming her endorsement of Nakoula's views, is another question.
68. See Garcia's Complaint, CD Cal, *supra* note 6; Garcia's Complaint, Sup Ct, *supra* note 14.
69. See Goffman, *Presentation of Self*, *supra* note 33 at 254 (my concern is "the structure of social encounters").

in the expansive theatre of the internet performance and life can easily become blended — and one useful contribution we find in this case is a vocabulary to talk about some of the problems, or as Goffman puts it, "an apt terminology for the interactional tasks that all of us share".[70]

The theatrical terminology also helps us to think about the role assumed by Google and YouTube in all this. In cases such as Garcia's they like to present themselves as merely passive conduits in a production being staged and performed by others for the benefit of an audience, no more than the bricks and mortar of the physical theatre. This is a useful technique in bringing themselves within the terms of Section 230 of the *CDA* which has repeatedly been justified as a bulwark of freedom of speech. And if the value of free speech includes preserving "unpopular speech", as Judge McKeown has said with respect to *Garcia v Google*,[71] then perhaps restraints should not readily be imposed based on the quality of speech. On the other hand, so long as we maintain the position that free speech is justified by values such as individual flourishing, democratic participation, aversion of violence and truth coming out of the market place of ideas, then at very least there needs to be fresh consideration of how those values work in practice. For instance, whether freedom of speech for some people becomes a way of disrupting attempts of other people to fashion their identities, participate in public discussions and democratic processes, avoid violence and maintain truth. Or is it that free speech values are changing? Google/YouTube's policy of publishing everything sometimes makes me wonder whether we are moving into a world where the value of free speech is just free speech. A world of "The Library of Babel", to adopt another metaphor from another sociologist of the post-war period: a world whose disorder repeated over eternity eventually becomes "the Order".[72]

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70. *Ibid* at 255.
71. Hon McKeown, *supra* note 10 at 16.
72. Jorge Luis Borges, "The Library of Babel" (first published as 'La biblioteca de *Babel' in El jardín de senderos que se bifurcan*. *Sur*, 1941), translated by James E Irby, *Labarynths* (London: Penguin, 2011) at 78, 86.