

A Face Only an Attorney Could Love: Madison Square Garden's Use of Facial Recognition Technology to Ban Lawyers with Pending Litigation

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**A FACE ONLY AN ATTORNEY COULD LOVE: MADISON
SQUARE GARDEN’S USE OF FACIAL RECOGNITION
TECHNOLOGY TO BAN LAWYERS WITH PENDING
LITIGATION**

MICHAEL CONKLIN & BRIAN ELZWEIG*

“I think people have the right, private parties, have the right to
decide not to do business with people who sue them.”
-Attorney for Madison Square Garden Entertainment¹

In 2022, MSG Entertainment implemented an attorney ban at all of its venues. This policy banned all attorneys working at law firms that represent a plaintiff against MSG Entertainment, and it has been enforced through the implementation of facial recognition technology. The ban was widely criticized by the attorneys involved (some of whom filed suit against MSG Entertainment), politicians, and judges. Prominent Delaware Judge Kathaleen McCormick referred to MSG Entertainment’s practice as “the stupidest thing I’ve ever read” and “presumptively vindictive.” In November 2022, New York State Supreme Court Justice Lyle Frank explained, “[t]here appears to be no rational basis for the policy instituted by [MSG Entertainment] except to dissuade attorneys from bringing suit.”

This Article discusses the numerous issues the controversial attorney ban elicits, such as potential legal recourse under a variety of theories, discriminatory effects of facial recognition technology, psychological harm from living in a surveillance state, the risk of security breaches and intentional data disclosures from entities that maintain biometric identification data, and MSG Entertainment as a state actor. This Article provides a valuable framework for considering the legal and practical implications of biometric identification as well as corporate retaliation against law firms. Finally, the Article concludes by evaluating how the rapid

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1. Alison Frankel, *Madison Square Garden Doubles Down on Plaintiffs Lawyer Ban, Even After It Backfires*, REUTERS (Nov. 15, 2022, 4:55 PM), <https://www.reuters.com/legal/legalindustry/madison-square-garden-doubles-down-plaintiffs-lawyer-ban-even-after-it-backfires-2022-11-15>.

adoption of biometric identification might affect society and the law in the near future.

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INTRODUCTION

Madison Square Garden Entertainment Corp. (“MSG Entertainment”) has used facial recognition technology to exclude people from Madison Square Garden since 2018.² In the summer of 2022, MSG Entertainment sent notices to around ninety law firms who represent plaintiffs with pending litigation against it, informing them that “[n]either you, nor any other attorney employed at your firm, may enter the Company’s venues until final resolution of the litigation.”³ This includes Madison Square Garden, Radio

2. Claudia Rosenbaum, “*He Is Known for Being Petty*”: James Dolan’s Madison Square Garden Saga Is Getting Messier by the Minute, *VANITY FAIR* (Feb. 10, 2023), <https://www.vanityfair.com/news/2023/02/james-dolan-madison-square-garden-move-saga-face-recognition>.

3. Kashmir Hill, *Lawyers Barred by Madison Square Garden Found a Way Back In*, *N.Y. TIMES* (Jan. 16, 2023), <https://www.nytimes.com/2023/01/16/technology/madison-square-garden-ban-lawyers.html>.

City Music Hall, the Beacon Theatre, the Theater at MSG, and the Chicago Theatre.⁴ Enforcement of this ban was accomplished through the use of facial recognition technology at the entrances of Madison Square Garden and the creation of a database of banned attorneys by downloading the headshot pictures from the law firm's website.⁵ MSG Entertainment refers to this as an "adverse attorney policy."⁶

MSG Entertainment alleges that the purpose of the ban is to "provide a safe and secure environment for our customers and ourselves"⁷ and to protect against "improper disclosure and discovery."⁸ However, this appears to be inconsistent with the scope of the ban, which applies to lawyers not working on a case against MSG Entertainment, and how the ban includes numerous properties other than Madison Square Garden.⁹

A court granted a preliminary injunction on November 14, 2022, allowing banned attorneys to attend any non-sporting event at an MSG-Entertainment-owned venue if they possess a valid ticket.¹⁰ This was based on the court's agreement with the plaintiffs' interpretation of New York Civil Rights Law Section 40(b), Wrongful Refusal of Admission to and Ejection from Places of Public Entertainment and Amusement.¹¹ The reason sporting events were not included in the court's injunction is that the language of 40(b) implies their exclusion by only mentioning "legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."¹² Proposed legislation would add "sporting events" to the statute.¹³ On the same day the

4. MADISON SQUARE GARDEN ENT., <https://www.msgentertainment.com> (last visited Nov. 9, 2023).

5. Rosenbaum, *supra* note 2.

6. *Statement from MSG Entertainment Regarding the Adverse Attorney Policy*, MADISON SQUARE GARDEN ENT. (Feb. 6, 2023), <https://www.msgentertainment.com/statement-from-msg-entertainment-regarding-the-adverse-attorney-policy>.

7. Jeanette Settembre, *James Dolan's Facial ID Tech Snags Another Lawyer Who Says He Was Booted from Knicks Game*, N.Y. POST (Dec. 21, 2022, 6:44 PM), <https://nypost.com/2022/12/21/lawyer-flagged-by-msg-facial-recognition-removed-from-knicks-game>.

8. Associated Press, *New York AG Says MSG's Lawyer Ban May Violate Anti-Bias Laws*, NBC NEWS (Jan. 26, 2023, 8:16 AM), <https://www.nbcnews.com/news/us-news/new-yorks-ag-says-msg-lawyer-ban-may-violate-anti-bias-laws-rcna67598>.

9. *Id.*

10. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 3–4, *Hutcher v. Madison Square Garden Ent. Corp.*, No. 653793/2022 (N.Y. Sup. Ct. Dec. 16, 2022), <https://relix.com/news/detail/multiple-lawfirms-file-suit-against-msg-entertainment-after-face-scanning-technology-boots-associates/> [hereinafter Plaintiffs' Memorandum of Law].

11. *Id.* at 4.

12. N.Y. CIV. RIGHTS LAW § 40-b (McKinney 2023).

13. Faith Logue, *New York Lawmakers Looking to End Madison Square Garden's Use of Facial Recognition to Deny Entry*, NYS MUSIC (Jan. 25, 2023), <https://nysmusic.com/2023/01/25/new-york-lawmakers-are-looking-to-remove-madison-square-gardens-lawyer-ban>.

court issued this preliminary injunction, MSG Entertainment stated that all previously banned attorneys are hereby notified that all tickets “previously acquired or acquire[ed] in the future—whether purchased directly by an Affected Attorney, purchased through a reseller, or acquired through a third party—are hereby revoked and deemed revoked, void and invalid . . . and the Company will not permit any Affected Attorneys to be admitted into the venue.”¹⁴

The 2022 attorney ban is not the first time MSG Entertainment faced litigation for questionable practices regarding attendance at Madison Square Garden events. MSG Entertainment attempted to revoke and redistribute Knicks and Rangers season tickets for the 2016–2017 seasons from certain holders engaged in reselling practices that MSG Entertainment disapproved of.¹⁵ In what is perhaps a precursor of the present case, the court noted how “[t]his exercise of arbitrary authority by MSG is unreasonable” because there was no “reasonable and verifiable basis” for the action.¹⁶ Further relevant to the present case is that the court issued this injunction while explicitly acknowledging that these tickets are a revocable license.¹⁷

Understanding the person who implemented this controversial attorney ban helps illuminate the motivation behind it. Executive chairman and CEO of the Madison Square Garden Company, James L. Dolan, has a reputation for aggressively going after his enemies,¹⁸ an autocratic leadership style,¹⁹ and pettiness.²⁰ Even before the 2022 attorney ban, Dolan was known as “the master of public relations disasters.”²¹ He lost a hostile work environment sexual harassment lawsuit in 2007 filed by a female executive.²² The plaintiff was awarded \$6 million for the harassment and an additional \$5.6 million for Dolan’s decision to fire the executive for alleging the harassment.²³ Dolan blames this result on the jury and his lack of involvement in the case.²⁴ He has referred to the attorneys he banned as “ambulance chasers.”²⁵ In response

14. Plaintiffs’ Memorandum of Law, *supra* note 10, at 4.

15. *Id.* at 10.

16. *Smile for Kids, Inc. v. Madison Square Garden Co.*, 32 N.Y.S.3d 866, 869, 871 (N.Y. Sup. Ct. 2016).

17. *Id.* at 869.

18. Ian O’Connor, *James Dolan, Unplugged*, ESPN (Dec. 17, 2018), https://www.espn.com/espn/feature/story/_/id/25519902/james-dolan-unplugged.

19. Neil C. Hughes, *Madison Square Garden’s Facial Recognition and Dangerous Surveillance Trends*, CYBERNEWS (Feb. 12, 2023), <https://cybernews.com/privacy/madison-square-gardens-facial-recognition>.

20. Rosenbaum, *supra* note 2.

21. O’Connor, *supra* note 18.

22. *Id.*

23. *Id.*

24. *Id.*

25. Rosenbaum, *supra* note 2.

to a potential threat that the state may revoke his liquor license because of the attorney ban, Dolan accused the New York State Alcohol Authority CEO of “grandstanding” and dared the board to revoke his license.²⁶ Dolan has stated that “we will not back down” regarding the attorney ban and that “[t]he Garden has to defend itself—our values are important to us.”²⁷ He also commented, “[i]f you’re being sued, it’s a personal thing.”²⁸

Part I of this Article provides background into the history and pragmatic aspects of biometric identification. Part II examines the defense provided by MSG Entertainment for the attorney ban. Part III analyzes whether Madison Square Garden could be considered a state actor. Part IV looks at the practicality of MSG Entertainment’s attorney ban in light of its stated reason for the practice. Part V considers the likelihood of security breaches and intentional data disclosures from private entities that maintain biometric identification data. Part VI considers religious concerns about photographic images. Part VII evaluates the racial and gender discriminatory effects from facial recognition technology and potential legal recourse. Part VIII examines how the attorney ban could give rise to a claim of tortious interference with business relations because it interferes with the relationship between a law firm and potential clients who want to sue MSG Entertainment. Part IX looks at other potential causes of action. Part X documents the psychological harm from living in a surveillance state. Finally, Part XI imagines how increased adoption of biometric identification will affect society and the law in the near future.

I. BIOMETRIC IDENTIFICATION BACKGROUND

Biometrics are defined as “personal information generated from processing unique biological, physical, or physiological characteristics.”²⁹ Biometric data includes facial features and facial symmetry, fingerprints, heart rate, voice print, and retinal scans.³⁰ The term “facial recognition technology” covers a variety of automated facial detection programs, whether

26. *Id.*

27. *Madison Square Garden Bans Lawyers – If They Are Suing It*, L. SOC’Y GAZETTE: OBITER BLOG (Feb. 9, 2023), <https://www.lawgazette.co.uk/obiter/madison-square-garden-bans-lawyers-if-they-are-suing-it/5115083.article>.

28. Natalie O’Neill, *James Dolan Gives Fiery Interview Defending Facial Recognition Tech at MSG*, N.Y. POST (Jan. 26, 2023, 12:22 PM), <https://nypost.com/2023/01/26/james-dolan-gives-fiery-interview-defending-facial-recognition-at-msg>.

29. Hannah Quay-de la Vallee, *Public Agencies’ Use of Biometrics to Prevent Fraud and Abuse: Risks and Alternatives*, CTR. FOR DEMOCRACY & TECH. (June 7, 2022), <https://cdt.org/insights/public-agencies-use-of-biometrics-to-prevent-fraud-and-abuse-risks-and-alternatives>.

30. Kirsten Flicker, *The Prison of Convenience: The Need for National Regulation of Biometric Technology in Sports Venues*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 985, 989 (2020). For more information about voice prints, see Quay-de la Vallee, *supra* note 29.

used for identification or classification.³¹ The technology generally functions by departmentalizing the image into features such as nose, mouth, eyes, and the various distances between them.³² The use of biometric identification is over 130 years old but was largely limited to fingerprints for most of that history.³³ In 1892, Sir Francis Galton created the first classification system for fingerprints.³⁴ In 1903, prisons in New York began using fingerprints as a means of identifying prisoners and criminal suspects.³⁵ In 1969, the FBI began to automate fingerprint recognition.³⁶ In the twenty-first century, advances in computing power, artificial intelligence, and imaging technologies have allowed for exponential growth in biometric identification.³⁷ Today, various forms of biometric identification are used by governments, law enforcement, and the private sector.³⁸

A. U.S. Government and Law Enforcement Usage

There is a long history of biometric data uses in the United States.³⁹ The COVID-19 pandemic functioned to accelerate the adoption of biometric technology as more governmental functions that were previously performed in person were done virtually.⁴⁰ Additionally, the widespread fraud in COVID-19 relief programs demonstrated the need for more accurate identification procedures.⁴¹ Estimates from COVID-19 relief funding fraud are over \$250 billion, much of which went to international fraudsters.⁴²

In the United States, the Office of Biometric Identity Management maintains a databank of more than 260 million unique identifiers and processes more than 350,000 biometric transactions every day.⁴³ At least twenty-one states use ID.me facial recognition technologies to detect

31. Lindsey Barrett, *Ban Facial Recognition Technologies for Children—And for Everyone Else*, 26 B.U. J. SCI. & TECH. L. 223, 230 (2020).

32. *Id.* at 231.

33. *Biometrics*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/biometrics> (last visited Nov. 9, 2023).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Everything You Need to Know About the Future of Biometrics*, HYPERVERGE (Jan. 25, 2023), <https://hyperverge.co/blog/future-of-biometrics/>.

38. *See Biometrics*, *supra* note 33.

39. *Everything You Need to Know About the Future of Biometrics*, *supra* note 37.

40. Quay-de la Vallee, *supra* note 29.

41. Ken Dilanian & Laura Strickler, 'Biggest Fraud in a Generation': The Looting of the Covid Relief Plan Known as PPP, NBC NEWS (Mar. 28, 2022, 3:59 PM), <https://www.nbcnews.com/politics/justice-department/biggest-fraud-generation-looting-covid-relief-program-known-ppp-n1279664>.

42. *Id.*

43. *Biometrics*, *supra* note 33.

fraudulent benefit claims.⁴⁴ In 2021, about half of all federal agencies that employ law enforcement officers used facial recognition technologies.⁴⁵ It is estimated that over 1,000 police departments engage in aerial monitoring by drones.⁴⁶ A majority of states allow facial recognition searches on driver's license photographs.⁴⁷ Some police departments are using images of celebrity doppelgängers when an image of the suspect is not available, and then pursuing matches generated from the celebrity image.⁴⁸

The public/private distinction is somewhat blurred because government agencies sometimes use third parties from the private sector to gather and store the biometric data.⁴⁹ The largest commercial provider of facial recognition technology to law enforcement is Clearview AI, which has a database of approximately 10 billion images scraped from social media websites.⁵⁰ This is more than ten times the images in the FBI database.⁵¹ And, of course, law enforcement has the ability to obtain private-sector images through court orders.⁵² In the first half of 2020 alone, law enforcement agencies issued over 112,000 requests for data from Apple, Google, Facebook, and Microsoft.⁵³

Law enforcement's use of biometric data has led to some high-profile arrests. For example, in 2018 the Golden State Killer was apprehended for murders and rapes committed in the 1970s and 1980s.⁵⁴ This was made possible by accessing genetic information collected by two for-profit genetic

44. Todd Feathers, *Facial Recognition Failures Are Locking People Out of Unemployment Systems*, VICE (June 18, 2021, 3:27 PM), <https://www.vice.com/en/article/5dbywn/facial-recognition-failures-are-locking-people-out-of-unemployment-systems> (noting widespread identification problems leading to withholding of desperately needed government benefits).

45. Nicol Turner Lee & Caitlin Chin-Rothmann, *Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color*, BROOKINGS (Apr. 12, 2022), <https://www.brookings.edu/research/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color>.

46. Matthew Guariglia, *How Are Police Using Drones?*, ELECTRONIC FRONTIER FOUND. (Jan. 6, 2022), <https://www EFF.ORG/deeplinks/2022/01/how-are-police-using-drones>.

47. Barrett, *supra* note 31, at 240.

48. Jon Schuppe, *NYPD Used Celebrity Doppelgängers to Fudge Facial Recognition Results, Researchers Say*, NBC NEWS (May 16, 2019, 3:07 PM), <https://www.nbcnews.com/news/us-news/nypd-used-celebrity-doppelg-angers-fudge-facial-recognition-results-researchers-n1006411>.

49. Quay-de la Vallee, *supra* note 29.

50. Lee & Chin-Rothmann, *supra* note 45.

51. *Id.*

52. *Id.*

53. *Id.*

54. Emily Shapiro, *The 'Golden State Killer': Inside the Timeline of Crimes*, ABC NEWS (Oct. 30, 2020, 9:39 AM), <https://abcnews.go.com/US/inside-timeline-crimes-golden-state-killer/story?id=54744307>.

testing companies.⁵⁵ Biometric data was also effectively used in the largest criminal investigation in U.S. history: the January Sixth Capitol Attack.⁵⁶ The criminal investigation, which involved the use of facial recognition technology, has produced criminal charges against over 900 people.⁵⁷

In response to heightened concern regarding police use of facial recognition technology after George Floyd's murder in 2020, technology companies, including Amazon, IBM, and Microsoft, pledged to cease their use of the technology, at least temporarily.⁵⁸ Despite this negative publicity, only twenty-seven percent of Americans believe that the widespread use of facial recognition technology by police is a "bad idea."⁵⁹ It is estimated that by 2025 law enforcement will be spending \$375 million in facial recognition technology implementation.⁶⁰

B. Private Sector Usage

The twenty-first century has experienced a boom in private-sector companies offering biometric identification services. Some health insurance companies implement the use of wearable biometric monitors to incentivize healthy behavior by those they insure.⁶¹ Delta Air Lines uses facial recognition technology at nearly every stage of the flying process.⁶² In 2012,

55. Paige St. John, *The Untold Story of How the Golden State Killer Was Found: A Covert Operation and Private DNA*, L.A. TIMES (Dec. 8, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-12-08/man-in-the-window>.

56. Kashmir Hill, *The Facial-Recognition App Clearview Sees a Spike in Use After Capitol Attack*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/09/technology/facial-recognition-clearview-capitol.html>.

57. See Alan Feuer, *In Capitol Attack, Over 900 People Have Been Criminally Charged*, N.Y. TIMES (Dec. 19, 2022, 12:54 PM), <https://www.nytimes.com/2022/12/19/us/politics/jan-6-capitol-attack-charges.html>. On the use of facial recognition technology to investigate the attack on the U.S. Capitol, see KRISTIN FINKLEA & KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., IN11614, U.S. CAPITOL ATTACK AND LAW ENFORCEMENT USE OF FACIAL RECOGNITION TECHNOLOGY (2021).

58. Jeffrey Dastin, *Amazon Extends Moratorium on Police Use of Facial Recognition Software*, REUTERS (May 18, 2021, 2:12 PM), <https://www.reuters.com/technology/exclusive-amazon-extends-moratorium-police-use-facial-recognition-software-2021-05-18>.

59. Lee Raine et al., 2. *Public More Likely to See Facial Recognition Use by Police as Good, Rather than Bad for Society*, PEW RSCH. CTR. (Mar. 17, 2022), <https://www.pewresearch.org/internet/2022/03/17/public-more-likely-to-see-facial-recognition-use-by-police-as-good-rather-than-bad-for-society/> (noting that 46% said "good idea," 27% said "not sure," and 27% said "bad idea").

60. Jon Schuppe, *How Facial Recognition Became a Routine Policing Tool in America*, NBC NEWS (May 11, 2019, 4:19 AM), <https://www.nbcnews.com/news/us-news/how-facial-recognition-became-routine-policing-tool-america-n1004251>.

61. Stephanie O'Neill, *As Insurers Offer Discounts for Fitness Trackers, Wearers Should Step with Caution*, NPR (Nov. 19, 2018, 4:59 AM), <https://www.npr.org/sections/health-shots/2018/11/19/668266197/as-insurers-offer-discounts-for-fitness-trackers-wearers-should-step-with-caution>.

62. Jennifer Leigh Parker, *First Look: Delta, TSA Launch Facial Recognition at Atlanta Airport*, FORBES (Oct. 27, 2021, 8:30 AM),

a tech company called SceneTap used biometric data to report gender ratios at local bars to inform potential customers where to go.⁶³ Cell phones offer fingerprint and facial recognition to unlock.⁶⁴ Amazon's "just walk out" technology tracks consumers and what they put in their basket at a store, allowing them to walk out and be automatically billed without any checkout.⁶⁵ There are multiple companies that offer relatively inexpensive DNA testing kits to the public.⁶⁶ Companies offer smart door locks that allow access with a facial scan⁶⁷ or a thumbprint.⁶⁸

Retail stores are adopting facial recognition technology to identify shoplifters.⁶⁹ Grocery stores are adopting facial recognition technology to monitor employee efficiency⁷⁰ and potentially even to attempt to infer the intent to shoplift by analyzing facial expressions.⁷¹ Some companies that allow employees to work from home require facial recognition monitoring.⁷²

<https://www.forbes.com/sites/jenniferleighparker/2021/10/27/first-look-delta-tsa-launch-facial-recognition-at-atlanta-airport/?sh=74b26a0f4dc2>.

63. Justin Meyers, *Scope Out the Male-to-Female Ratio at Bars from Your Smartphone*, BUS. INSIDER (June 9, 2011, 8:59 AM), <https://www.businessinsider.com/barhopping-with-scenetap-scope-out-bars-right-from-your-smartphone-2011-6>.

64. Pavelas, *Fingerprint and Facial Recognition on Mobile Phones*, SKY BIOMETRY (Jan. 11, 2018), <https://skybiometry.com/facial-recognition-mobile-phones>.

65. Paula Rosenblum, *Just Walk Out – Just in Time or Just Too Soon?*, RETAILWIRE (Dec. 22, 2022), <https://retailwire.com/discussion/just-walk-out-just-in-time-or-just-too-soon>.

66. Justin Jaffe & Taylor Leamey, *Best DNA Test for 2023*, CNET (Aug. 30, 2023, 11:00 AM), <https://www.cnet.com/health/medical/best-dna-test>.

67. Krista Bruton, *Smart Door Locks with Facial Recognition*, BRINKS HOME (Sept. 14, 2020), <https://brinkshome.com/smartcenter/smart-door-locks-with-facial-recognition>.

68. Luke Baker, *Best Biometric Locks: Roll Your Fingerprints over These Top Security Devices*, POCKET-LINT (Aug. 7, 2023), <https://www.pocket-lint.com/smart-home/buyers-guides/154026-best-biometric-locks>.

69. Chavie Lieber, *Your Favorite Stores Could Be Tracking You with Facial Recognition*, RACKED (May 22, 2018, 4:00 PM), <https://www.racked.com/2018/5/22/17380410/facial-recognition-technology-retail>; Tom Chivers, *Facial Recognition... Coming to a Supermarket Near You*, OBSERVER (Aug. 4, 2019, 4:00 PM), <https://www.theguardian.com/technology/2019/aug/04/facial-recognition-supermarket-facewatch-ai-artificial-intelligence-civil-liberties>.

70. See Esther Fung, *Shopping Centers Exploring Facial Recognition in Brave New World of Retail*, WALL ST. J. (July 2, 2019, 8:00 AM), <https://www.wsj.com/articles/shopping-centers-exploring-facial-recognition-in-brave-new-world-of-retail-11562068802> [<https://perma.cc/J35Y-MXJW>].

71. *Artificial Intelligence: Societal and Ethical Implications: Hearing Before the H. Comm. on Sci., Space, & Tech.*, 116th Cong. 2–4 (2019) (written testimony of Meredith Whittaker, Co-Founder and Co-Director, AI Now Inst., N.Y.U.); see also Shane Reid et al., *Using Social Signals to Predict Shoplifting: A Transparent Approach to a Sensitive Activity Analysis Problem*, 21 SENSORS 6812, 6815 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8541608/pdf/sensors-21-06812.pdf>.

72. Danielle Abril & Drew Harwell, *Keystroke Tracking, Screenshots, and Facial Recognition: The Boss May Be Watching Long After the Pandemic Ends*, WASH. POST (Sept. 24, 2021, 7:00 AM), <https://www.washingtonpost.com/technology/2021/09/24/remote-work-from-home-surveillance>.

Some hospitals use facial recognition technology to identify patients.⁷³ Some landlords use facial recognition technologies to identify tenants.⁷⁴ Public schools are considering the adoption of facial recognition technology.⁷⁵

The twenty-first century also provides a rich history of biometric identification used at gambling and sports venues. The Raymond James Stadium in Tampa Bay, Florida, used FaceTrac to identify those with a criminal record at Superbowl XXXV without notifying attendees.⁷⁶ As a result, the event was labeled the “Snooper Bowl,” and the American Civil Liberties Union became involved.⁷⁷ Pay By Touch was a company created in 2002 to apply biometric payments at sports venues.⁷⁸ The company declared bankruptcy five years later after an unacceptable amount of misidentifications and false rejections.⁷⁹ In 2017, the Dallas Mavericks introduced facial recognition software to gain access to the team’s locker rooms.⁸⁰ Fancam uses facial recognition technology at sports venues to customize the advertising and music based on the demographics of those in attendance.⁸¹ Fingerprint biometric ticketing has been implemented at some Major League Baseball, Major League Soccer, National Football League, and National Basketball Association stadiums.⁸² Some of these venues are even using biometric data for concession purchases, where a fingerprint can both verify the age and payment method of the customer.⁸³ Finally, some casinos have implemented facial recognition technologies to keep an eye on at-risk attendees and to identify and capitalize on high rollers.⁸⁴

73. Naomi Diaz, *Geisinger Hospitals Using Facial Recognition Technology to ID Patients*, BECKER’S HOSPITAL REV. (June 6, 2022), <https://www.beckershospitalreview.com/healthcare-information-technology/geisinger-hospitals-using-facial-recognition-technology-to-id-patients.html>.

74. Brian Wang, *Why Landlords Should Use Technology Sparingly*, NEXT BIG FUTURE (Apr. 7, 2022), <https://www.nextbigfuture.com/2022/04/why-landlords-should-use-technology-sparingly.html>.

75. Nila Bala, *The Danger of Facial Recognition in Our Children’s Classrooms*, 18 DUKE L. & TECH. REV. 249 (2020).

76. Ryan Singel, *Jan. 28, 2001: Hey, Don’t Tampa with My Privacy*, WIRED (Jan. 28, 2010, 12:00 AM), <https://www.wired.com/2010/01/0128tampa-super-bowl-facial-recognition/>.

77. *Id.*

78. Flicker, *supra* note 30, at 993.

79. *Id.*

80. Michelle R. Martinelli, *Mark Cuban Introduces Mavericks Locker Room’s New Facial Recognition Software*, USA TODAY SPORTS (Sept. 30, 2017, 6:44 PM), <https://ftw.usatoday.com/2017/09/mark-cuban-dallas-mavericks-new-locker-room-facial-recognition-software-nba>.

81. *See* FANCAM, <https://fancam.com> (last visited Nov. 11, 2023).

82. Flicker, *supra* note 30, at 991–92.

83. *Id.* at 992.

84. Jacob Solis, *How AI and Facial Recognition Could Reshape Las Vegas Casinos*, NEV. INDEP. (Jan. 21, 2020, 2:00 AM), <https://thenevadaindependent.com/article/how-new-ai-and-facial-recognition-tech-could-reshape-las-vegas-casinos>.

C. Biometrics in Other Countries

Considering the trajectory of how biometric identification in other countries has evolved may serve as a warning for what safeguards are needed in the United States. In India, biometric data from over 1.2 billion people has been collected and stored through the Aadhaar program.⁸⁵ In Pakistan, biometric data is used to record teacher and student attendance.⁸⁶ In Uganda, a biometric ID card must be presented to open a bank account, get a passport, and obtain a student loan.⁸⁷ Of the countries with the most limited use of biometric data, this is often more a function of technological and financial limitations rather than principled positions on biometric data privacy.⁸⁸

China is largely leading the world in the use of facial recognition technology applications. One Chinese insurance company uses facial recognition technology to evaluate the health and honesty of potential clients.⁸⁹ Another uses facial recognition technology to identify smokers.⁹⁰ Chinese financial institutions use facial recognition technology to assess loan applicants for “eye-shifting or other suspicious behavior.”⁹¹ Jaywalkers in China are detected through facial recognition technology and sent instantaneous fines.⁹² A facial scan is even required to access the internet.⁹³ China allows employers to monitor the brainwaves of workers to increase productivity,⁹⁴ and the Chinese government performs brainwave scans on

85. K. Sudhir & Shyam Sunder, *What Happens When a Billion Identities Are Digitized?*, YALE INSIGHTS (Mar. 27, 2020), <https://insights.som.yale.edu/insights/what-happens-when-billion-identities-are-digitized>.

86. Lisa Hsu, *Advancements in Biometrics Make a Breakthrough in School Applications in Pakistan*, ASMAG.COM (Feb. 25, 2016), <https://www.asmag.com/showpost/19962.aspx>.

87. Paul Bischoff, *Biometric Data: 100 Countries Ranked by How They're Collecting It and What They're Doing with It*, COMPARITECH (Aug. 30, 2023), <https://www.comparitech.com/blog/vpn-privacy/biometric-data-study>.

88. *Id.*

89. Zhou Wei, *What Your Face May Tell Lenders About Whether You're Creditworthy*, WALL ST. J. (June 10, 2019, 10:05 PM), <https://www.wsj.com/articles/what-your-face-may-tell-lenders-about-whether-youre-creditworthy-11560218700>.

90. *Id.*

91. *Id.*

92. Christina Zhao, *Jaywalking in China: Facial Recognition Surveillance Will Soon Fine Citizens via Text Message*, NEWSWEEK (Mar. 27, 2018, 9:34 AM), <https://www.newsweek.com/jaywalking-china-facial-recognition-surveillance-will-soon-fine-citizens-text-861401>.

93. Rosie Perper, *Chinese Government Forces People to Scan Their Face Before They Can Use Internet as Surveillance Efforts Mount*, BUS. INSIDER (Dec. 2, 2019, 1:46 AM), <https://www.businessinsider.com/china-to-require-facial-id-for-internet-and-mobile-services-2019-10>.

94. Kathy Gurchiek, *Chinese Employers Monitor Workers' Brainwaves to Read Emotions*, SOC'Y FOR HUM. RES. MGMT. (May 3, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/technology/pages/chinese-employers-monitor-workers%E2%80%99-brainwaves-to-read-emotions.aspx>.

those in the military.⁹⁵ Facial recognition technology also played a role in targeting the Uighur population and forcibly relocating them to concentration camps.⁹⁶ It is unclear if the extensive use of these technologies results more from a trusting and compliant populace or from the absence of legal protections in place to limit the practice.⁹⁷

D. Advantages to Using Biometrics

This Article provides numerous criticisms of biometric identification. It is important to note that there are benefits to the practice that must also be considered. Biometric identifications allow for numerous marketplace efficiencies in the private sector, such as expedited lines for entry and concessions purchases at sports arenas.⁹⁸ And in the public sector, the practice can help identify and convict guilty parties. For example, fingerprint and DNA evidence have led to the conviction of countless defendants.⁹⁹ Likewise, increased implementation of newer biometric identification technology, such as facial recognition, will serve as a valuable prosecutorial tool.

The use of biometric identifiers is not just limited to more efficient prosecutions. The record of a facial scan at a given time and location could be definitive alibi evidence for someone falsely accused of criminal activity. For example, a man avoided the death penalty after producing footage recorded for *Curb Your Enthusiasm* that proved he was at a Dodgers baseball game at the time of the murders.¹⁰⁰ The ability to produce such evidence is not only beneficial to those falsely accused of criminal activity. It also

95. *Id.*

96. Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html>.

97. Elizabeth A. Rowe, *Regulating Facial Recognition Technology in the Private Sector*, 24 STAN. TECH. L. REV. 1, 23 (2020) (“Seemingly unconstrained by regulations, Chinese authorities could conceivably use facial recognition technology everywhere: streets, subway stations, airports, and border check points.”).

98. Andrew Cohen, *Facial Recognition in Sports: The Biometrics Technology Shaping Ticketing, Payments, Security, More*, SPORTS BUS. J. (Feb. 16, 2023), <https://www.sportsbusinessjournal.com/Journal/Issues/2023/01/09/Technology/facial-recognition-technology-sports-stadiums.aspx>.

99. However, both fingerprint and DNA evidence are not flawless. “The prosecutor’s fallacy” is generally associated with DNA evidence, and fingerprint analysis poses problems as well. Ray Johns, *The Prosecutor’s Fallacy: Conditional Probability in the Courtroom*, TOWARDS DATA SCI. (June 12, 2019), <https://towardsdatascience.com/the-prosecutors-fallacy-cb0da4e9c039>; Trina Arpin, *Faulty Fingerprints*, TRIPLEPOINT, <https://www.bu.edu/sjmag/scimag2005/opinion/fingerprints.htm> (last visited Nov. 11, 2023).

100. Kirsten Fleming, *How ‘Curb Your Enthusiasm’ Saved This Man from Prison*, N.Y. POST (Sept. 23, 2017, 4:08 PM), <https://nypost.com/2017/09/23/how-curb-your-enthusiasm-saved-this-man-from-prison>.

benefits society in general by increasing the efficiency of criminal investigations and courthouse resources. Instead of wasting time investigating and prosecuting an innocent person, the increased usage of biometric identification by both public and private entities allows for a quicker and more accurate assessment of where to target these limited resources.

II. MSG ENTERTAINMENT'S CASE

MSG Entertainment alleges that its attorney ban is lawful based on New York Rule of Professional Conduct 4.2, which typically prevents attorneys from contacting other parties in a lawsuit.¹⁰¹ However, case law has rejected the notion of “blanket rules” under which all employees of a corporation are shielded by Rule 4.2.¹⁰² A plain reading of Rule 4.2 supports this interpretation:

In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.¹⁰³

The comments to this section explain, “[t]his Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer.”¹⁰⁴ But a hot dog vendor or security guard at Madison Square Garden is likely not considered to be represented by an attorney. Furthermore, they are not named plaintiffs in the litigation at issue. The comments to Rule 4.2 explicitly state:

In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization’s lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.¹⁰⁵

Again, hot dog vendors and security guards likely do not rise to this level.

101. Emily Saul, *Plaintiffs’ Law Firm Sues Madison Square Garden, Alleging Ban Was Imposed on Its Attorneys*, N.Y.L.J. (Dec. 9, 2022, 4:57 PM), <https://www.law.com/newyorklawjournal/2022/12/09/plaintiffs-law-firm-sues-madison-square-garden-alleging-ban-was-imposed-on-its-attorneys>.

102. Niesig v. Team I, 76 N.Y.2d 363, 372–73 (1990).

103. N.Y. RULES OF PRO. CONDUCT r. 4.2(a) (N.Y. STATE BAR ASS’N 2021).

104. *Id.* at r. 4.2 cmt. [1].

105. *Id.* at r. 4.2 cmt. [7].

A preliminary injunction was issued in late 2022, allowing attorneys on the excluded list to attend concerts and theatrical performances under a 1941 New York civil rights law passed to protect theater critics.¹⁰⁶ But because the statute does not cover sporting events, lawyers on the excluded list are still barred from attending those.¹⁰⁷ A bill was introduced in 2023 to include sporting events in the protected categories.¹⁰⁸ An MSG Entertainment spokesperson referred to the state civil rights legislation as “poorly worded and misinterpreted.”¹⁰⁹

In response to the Civil Rights Law Section 40(b) claim discussed in the introduction, MSG Entertainment is largely silent. It does allege that Section 40(b) is not applicable to the banned attorneys because it is limited to civil rights violations.¹¹⁰ MSG Entertainment provides a single case in support of this claim, *O'Connor v. 11 West 30th Street Restaurant Corp.*¹¹¹ This is peculiar, as the case in no way supports the claim that Section 40(b) is only applicable to civil rights violations.¹¹²

III. IS MADISON SQUARE GARDEN A “STATE ACTOR” FOR CONSTITUTIONAL PURPOSES?

The analysis as to the legality of MSG Entertainment’s attorney ban largely depends on whether MSG Entertainment is held to be a state actor. The general rule is that private companies are not government actors that implicate constitutional protections.¹¹³ However, this is a somewhat amorphous area of law, with no clear, objective formula to produce undisputed answers. The Supreme Court explained how “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”¹¹⁴

The banned attorneys could attempt to demonstrate that Madison Square Garden is so inextricably intertwined with the State of New York that it

106. Plaintiffs’ Memorandum of Law, *supra* note 10, at 3–4.

107. *Id.* at 1, 7.

108. Courtney Gross, *Albany Takes on Attorney Ban at Madison Square Garden*, SPECTRUM NEWS NY1 (Jan. 24, 2023, 7:45 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2023/01/25/albany-takes-on-attorney-ban-at-madison-square-garden>.

109. *Id.*

110. Plaintiffs’ Memorandum of Law, *supra* note 10, at 15.

111. Nos. 94 Civ. 2951, 93 Civ. 8895, 1995 WL 354904 (S.D.N.Y. June 13, 1995).

112. Plaintiffs’ Memorandum of Law, *supra* note 10, at 15.

113. The Supreme Court explained that the Fourteenth Amendment “erects no shield against merely private conduct, however discriminatory or wrongful.” *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Rather, “[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.” *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

114. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

should be considered a state actor, and therefore constitutional protections apply. The state action requirement states that in order for a plaintiff to have standing to bring a constitutional claim, he or she must demonstrate that the government was responsible, not a private actor.¹¹⁵ The Supreme Court has maintained that the actions of a private actor may be considered a government action when the “governmental authority [] dominate[s] an activity to such an extent that its participants must be deemed to act with the authority of the government.”¹¹⁶ Madison Square Garden receives numerous benefits from the state of New York. Not only do state police provide protection during events at the venue, but the overall existence of a criminal justice system in the state is a great benefit. Madison Square Garden also benefits from New York’s civil courts, as they provide recourse in the event a dispute arises with a vendor or performer. Fire and ambulatory services are also provided by the state. Madison Square Garden benefits from infrastructure, such as roads and subways, the New York City Airport, electrical grid, water, and sewage. Madison Square Garden also maintains a valuable liquor license issued by the state.¹¹⁷ Finally, New York State provides Madison Square Garden with a tax abatement valued at approximately \$43 million annually.¹¹⁸

While Madison Square Garden receives immense benefits from the state of New York, it is likely not enough to be considered a state actor. Generally, state action is not found simply from the existence of financial assistance and tax benefits. For example, in two 1982 Supreme Court cases, the Court found no state action in a private school and a private nursing home despite both receiving at least ninety percent of their budgets from the state.¹¹⁹ The Supreme Court in *Jackson v. Metropolitan Edison Co.*¹²⁰ explains that, rather than financial assistance, tax benefits, and strict regulations, “the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”¹²¹

115. *State Action Requirement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/state_action_requirement (last visited Nov. 13, 2023).

116. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

117. Alison Frankel, *Madison Square Garden Sues to Block Liquor Board’s Access to CEO’s Testimony in Lawyer Ban Flap*, REUTERS (Feb. 6, 2023, 8:16 PM), <https://www.reuters.com/legal/madison-square-garden-sues-block-liquor-boards-access-ceos-testimony-lawyer-ban-2023-02-06>.

118. Brad Hoylman-Sigal, *Elected Officials & Privacy Advocates Demand MSG Entertainment End Use of Facial Recognition Technology on Fans*, N.Y. STATE SENATE (Jan. 15, 2023), <https://www.nysenate.gov/newsroom/articles/2023/brad-hoylman-sigal/elected-officials-privacy-advocates-demand-msg>.

119. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982).

120. 419 U.S. 345 (1974).

121. *Id.* at 351.

There remain two potential avenues for labeling a private company a state actor: state coercion and the public function exception. In *Marsh v. Alabama*,¹²² the Supreme Court maintained a public function exception whereby if the private company is exercising a public function—such as a private town—the private company may be held to be a state actor.¹²³ While Madison Square Garden is owned in conjunction with other New York City businesses, it does not rise to the level of the private town in *Marsh*.¹²⁴ Someone living in New York City could relatively easily choose not to patronize any MSG Entertainment-owned companies.

If the state somehow coerced Madison Square Garden into the behavior in question, this could potentially satisfy the state actor requirement. As explained by the Supreme Court in *Blum v. Yaretsky*,¹²⁵ “a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”¹²⁶ This standard is clearly not met with the MSG Entertainment attorney ban, because state politicians are overwhelmingly opposed to the ban.¹²⁷

IV. PRACTICALITY OF MSG ENTERTAINMENT’S ATTORNEY BAN

Considering the practicality of how the MSG Entertainment ban would contribute toward MSG Entertainment’s stated purpose provides insight into the true rationale for implementing the ban. This analysis will set aside the practicality of angering the very demographic that has the experience and resources to sue and focus on the other shortcomings of this strategy.¹²⁸ It

122. 326 U.S. 501 (1946).

123. *Id.* at 502.

124. Additionally, the “public function” doctrine appears to have been largely curtailed in subsequent cases. *See, e.g.*, *Amalgamated Food Emps. Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), *limited in* *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976). The *Marsh* principle is good only when private property has taken on all the attributes of a municipality. *See Hudgens*, 424 U.S. at 516–17.

125. 457 U.S. 991 (1982).

126. *Id.* at 1004.

127. *See, e.g.*, Hoylman-Sigal, *supra* note 118.

128. Jeanette Settembre & Natalie O’Neill, *Dolan’s Radio City Facial Software a Gross ‘Privacy Invasion,’ Could Bring Suit: Booted Lawyer’s Attorney*, N.Y. POST (Dec. 21, 2022, 4:57 PM), <https://nypost.com/2022/12/21/radio-city-facial-recognition-debacle-poses-privacy-invasion-lawyer/> (noting how it “[t]urns out booting lawyers only creates more potential lawsuits”); Hill, *supra* note 3 (“The problem with going to battle against thousands of lawyers is that it is likely to lead to lawsuits. And then the battle will inevitably head to their home turf.”). Additionally, this may be unwise because the matter will likely be adjudicated by a judge, who will likely not view favorably discriminatory treatment against those in the legal profession.

will further set aside the costs of engaging in—and perhaps losing—litigation against these ninety law firms it banned.¹²⁹

First, lawyers would not likely purchase tickets for and travel to an event at Madison Square Garden in an attempt to interrogate a vender or security guard about pending litigation. These employees of Madison Square Garden are unlikely to stop working to engage in detailed discussions regarding specifics from months ago. Attempting to talk to these people as they are coming from or going to work would likely be far more productive, and the attorney ban would be rendered ineffective at stopping such an interaction. Perhaps an attorney would attempt to gain entrance to Madison Square Garden to survey the physical layout of his or her client's incident. But for both of these purposes—interviewing workers and surveying the physical layout of the arena—a paralegal from the firm could likely accomplish such a task (only attorneys working at the firms are barred from entry). Additionally, if surveying the physical layout of the arena and interviewing Madison Square Garden employees were truly pivotal to the pending litigation, then it would likely be allowed in discovery. And the MSG Entertainment exclusions apply to all MSG-Entertainment-owned venues, not just the venue where the pending litigation occurred.¹³⁰ It is unclear how banning an attorney from Radio City Music Hall and various restaurants helps MSG Entertainment limit information regarding litigation stemming from an event that occurred at Madison Square Garden.

The attorney-ban policy also seems to be counterintuitive to MSG Entertainment's stated reason as to why it uses facial recognition technology. It claims that it is to "provide a safe and secure environment for our customers and ourselves."¹³¹ And while the use of this technology to exclude people who have been kicked out for violent acts at Madison Square Garden does contribute toward this goal, it is unclear how excluding all attorneys from a firm with pending litigation against Madison Square Garden accomplishes this. For example, one of the attorneys was blacklisted because he worked at a law firm that represents a plaintiff who fell from a balcony at a Billy Joel concert at Madison Square Garden.¹³² Another attorney was blacklisted for working at a law firm that is representing a patron who was assaulted after a hockey game at Madison Square Garden.¹³³ A third attorney was blacklisted

129. Rowe, *supra* note 97, at 46 ("The lack of federal regulations, however, raises many concerns such as how to avoid liability (for collection, storage, sharing, use, etc.) and the inefficiency of dealing with a patchwork of state legislation and court rulings.").

130. Hill, *supra* note 3.

131. Settembre, *supra* note 7.

132. *Id.*

133. Priscilla DeGregory, *Lawyers Sue MSG Over Ban, Fight to Attend Jerry Seinfeld and Christmas Shows*, N.Y. POST (Dec. 8, 2022, 7:37 PM), <https://nypost.com/2022/12/08/lawyers-sue-over-madison-square-garden-ban>.

for working at a law firm that represents a plaintiff suing MSG Entertainment over the practice of reselling tickets.¹³⁴ If anything, lawsuits like these would likely enhance public safety at Madison Square Garden. Therefore, by disincentivizing such lawsuits with attorney bans, MSG Entertainment is likely decreasing public safety at its venue.

Therefore, this attorney-exclusion policy appears to only serve the function of intimidating law firms to not pursue litigation against MSG Entertainment or to coerce law firms with existing litigation against MSG Entertainment to accept a settlement. In November 2022, New York State Supreme Court Justice Lyle Frank explained, “there appears to be no rational basis for the policy instituted by [MSG Entertainment] except to dissuade attorneys from bringing suit.”¹³⁵ Judge Kathaleen McCormick of Delaware referred to the policy as “presumptively vindictive.”¹³⁶ And a 2023 letter written by a group of state legislators agreed, noting, “[t]here is absolutely no security purpose in ejecting a young mother from chaperoning her daughter’s Girl Scout troop field trip to the Rockettes.”¹³⁷

V. SECURITY BREACHES AND INTENTIONAL DATA DISCLOSURES

Beyond the ban’s lack of legitimate legal purpose, it creates a host of potential risks for attendees. MSG Entertainment alleges that it only maintains a database of faces for those people identified as a security risk from previous misconduct.¹³⁸ Regardless, the issue of security breaches from the use of facial recognition technology is relevant. As cyber-security experts point out, data breaches are largely inevitable: “[I]t is not if, but when.”¹³⁹ Biometric security breaches are particularly troublesome, as the victims cannot simply change their biometric data (such as fingerprint and facial features) as one would a password.¹⁴⁰ The twenty-first century has seen numerous biometric security breaches. In 2019, a Biostar 2 breach resulted in the fingerprints of over 1 million people being made public.¹⁴¹ In 2021, a slot machine company named Dotty’s announced a security breach involving

134. Hill, *supra* note 3.

135. *Hutcher v. Madison Square Garden Ent. Corp.*, No. 653793, 2022 WL 16924087, at *2 (N.Y. Sup. Ct. Nov. 14, 2022).

136. Plaintiffs’ Memorandum of Law, *supra* note 10, at 18.

137. Hoylman-Sigal, *supra* note 118.

138. Gross, *supra* note 108.

139. See, e.g., MARK DEEM & PETER WARREN, *AI ON TRIAL* 99 (2022).

140. Barrett, *supra* note 31, at 225.

141. Jon Porter, *Huge Security Flaw Exposes Biometric Data of More than a Million Users*, THE VERGE (Aug. 14, 2019, 6:58 AM), <https://www.theverge.com/2019/8/14/20805194/suprema-biostar-2-security-system-hack-breach-biometric-info-personal-data>.

customers' biometric data.¹⁴² In 2022, a Samsung breach resulted in 200 gigabytes of confidential data being made public, including source code and algorithms for biometric unlock operations.¹⁴³ In 2022, it was discovered that 1,859 publicly available cell phone apps allowed for unauthorized access to more than 300,000 user fingerprints.¹⁴⁴

Unfortunately, a security breach is not the only way private user data can be disseminated. Companies may choose to sell this data for profit. With the decline of print media and cable television, viewership of commercials is down.¹⁴⁵ Advertisers have been turning to alternative avenues of reaching customers, such as more targeted campaigns.¹⁴⁶ Therefore, personalized data about consumers is highly sought after for marketing purposes.¹⁴⁷ Such data allows for algorithmic analysis allowing for highly targeted marketing. For example, a sports venue could potentially collect and sell very specific data regarding those in attendance containing the following identifiers: historical and recent weight gain and weight loss; financial status (price and frequency of tickets, whether they only buy concessions after payday); wear glasses or contacts; religion (whether they only purchase kosher foods, never attend events on the Sabbath); whether they generally stay up late (dark circles under the eyes, yawning); whether they are a vegetarian (concessions purchases); what their history is of going on diets (concession purchases); geographic area (from billing address); musical preferences (which concerts they attend); kidney health (frequent trips to the bathroom relative to liquid consumed); whether they wear jewelry; whether they recently had plastic surgery; family status; how their mood changes based on day of the week, time of day, type of event, opposing team, who is accompanying them to the event, etc. The market value for this information would be high given that data about the type of people who can afford to attend events at Madison Square Garden is likely highly sought after.¹⁴⁸ The selling of this information

142. Alessandro Mascellino, *Slot Machine Chain Exposes Customer Biometrics in Data Breach*, BIOMETRICUPDATE.COM (Sept. 20, 2021, 8:38 AM), <https://www.biometricupdate.com/202109/slot-machine-chain-exposes-customer-biometrics-in-data-breach>.

143. *Samsung Confirms Data Breach of Source Code and Biometric Unlock Operations*, INT'L ASSN' OF PRIVACY PROS. (Mar. 9, 2022), <https://iapp.org/news/a/samsung-confirms-data-breach-of-source-code-and-biometric-unlock-operations>.

144. Jessica Lyons Hardcastle, *Here's How 5 Mobile Banking Apps Put 300,000 Users' Digital Fingerprints at Risk*, REGISTER (Sept. 1, 2022, 10:04 UTC), https://www.theregister.com/2022/09/01/mobile_apps_leaked_biometrics.

145. Adam Grundy, *Service Annual Survey Shows Continuing Decline in Print Publishing Revenue*, U.S. CENSUS BUREAU (June 7, 2022), <https://www.census.gov/library/stories/2022/06/internet-crushes-traditional-media.html>.

146. Leslie K. John et al., *Ads That Don't Overstep*, HARV. BUS. REV. (Jan.-Feb. 2018), <https://hbr.org/2018/01/ads-that-dont-overstep>.

147. *Id.*

148. *Id.*

might also find the banned attorneys on other banned lists that have no connection to MSG Entertainment.¹⁴⁹ The threat of a corporation selling biometric data is not purely hypothetical. In 2007, the company Pay By Touch was going through bankruptcy and attempted to sell its fingerprint and financial dataset.¹⁵⁰ This led to the swift passing of the Biometric Information Protection Act as state law in Illinois.¹⁵¹

VI. RELIGIOUS DISCRIMINATION CONCERNS

Some religious minority groups object to having their photograph taken, thus implicating the Free Exercise Clause of the U.S. Constitution and the Religious Freedom Restoration Act in the use of facial recognition technologies.¹⁵² For example, the Amish view images of their face as a violation of the Ten Commandments, which prohibits the making of “graven images.”¹⁵³ Some Muslims believe that to photograph humans is forbidden because, among other things, it is an imitation of Allah’s creation.¹⁵⁴ Because the MSG policy requires the storage of facial images, similar Free Exercise Clause concerns could be implicated.

This has led to issues with state driver’s license photos and voter ID laws. In the 1984 case of *Jensen v. Quaring*,¹⁵⁵ the Supreme Court was evenly split, so the Eighth Circuit’s decision requiring the issuance of a driver’s license without a photograph due to a religious objection stood.¹⁵⁶ However, in the post-9/11 landscape, photo requirements have largely been upheld over religious objections.¹⁵⁷ For example, in the 2017 case of *Equal Employment Opportunity Commission v. Consol Energy*,¹⁵⁸ the private-sector employer’s mandatory use of a biometric hand scanner was objected to on religious

149. As a group of New York lawmakers pointed out, “[i]f New Yorkers can be banned from a Rangers game, they can be banned from the grocery store or the pharmacy.” Hoylman-Sigal, *supra* note 118.

150. Matthew B. Kugler, *From Identification to Identity Theft: Public Perceptions of Biometric Privacy Harms*, 10 U.C. IRVINE L. REV. 107, 130 (2019).

151. *Id.* at 131–32.

152. U.S. CONST. amend. I; 42 U.S.C. § 2000bb to 2000bb-4.

153. *The Amish and Photography*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/amish-photography> (last visited Nov. 15, 2023).

154. *Is Taking Pictures Haram?*, ISLAM QUESTION & ANSWER (May 15, 1998), <https://islamqa.info/en/answers/365/is-taking-pictures-haram>.

155. 472 U.S. 478 (1985).

156. *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984).

157. CYNTHIA BROUGH, CONG. RSCH. SERV., R40515, LEGAL ANALYSIS OF RELIGIOUS EXEMPTIONS FOR PHOTO IDENTIFICATION REQUIREMENTS 10 (2012).

158. 860 F.3d 131 (4th Cir. 2017).

grounds. The Fourth Circuit upheld the trial court's verdict in favor of the employee.¹⁵⁹

VII. DISCRIMINATORY EFFECTS

Another problem with the use of facial recognition technology is that it produces varying levels of accuracy for different demographic groups. Artificial intelligence ("AI") learning is similar to human learning in that the more experience is gained, the more accurate the results are. Since there are disproportionately more images of white males used to train the AI, this demographic receives the most accurate identifications.¹⁶⁰ Conversely, the algorithms are less accurate for a variety of other groups; particularly troubling is that these are predominantly marginalized groups. Demographic groups that AI is less accurate at identifying include people of color,¹⁶¹ transgender individuals,¹⁶² the elderly,¹⁶³ women,¹⁶⁴ and children.¹⁶⁵ The New York Attorney General pointed to these disparate outcomes in a January 25, 2023, letter to MSG Entertainment asking for a response regarding how the company will ensure compliance with applicable anti-discrimination laws in light of this.¹⁶⁶

The diminished accuracy among these traditionally marginalized groups could result in further discriminatory treatment. Less accurate facial recognition leads to more false positives, which is when the facial recognition technology incorrectly identifies someone as someone else.¹⁶⁷ Title II of the Civil Rights Act of 1964 requires "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."¹⁶⁸ If MSG Entertainment's

159. *Id.* at 137.

160. Steve Lohr, *Facial Recognition Is Accurate, If You're a White Guy*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html>.

161. *Id.*

162. Os Keyes, *The Misgendering Machines: Trans/HCI Implications of Automatic Gender Recognition*, 2 PROC. OF THE ACM ON HUMAN-COMPUTER INTERACTION 1, 4 (2018).

163. PATRICK GROTH, MEI NGAN & KAYCEE HANAOKA, NAT'L INST. OF STANDARDS & TECH., NISTIR 8280, FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS 2, 8, 17 (2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf>.

164. Barrett, *supra* note 31, at 250 (explaining how false positives are two to five times more likely with women than with men).

165. GROTH ET AL., *supra* note 163, at 2.

166. Associated Press, *New York AG Says MSG Lawyer Ban May Violate Anti-Bias Laws*, SPECTRUM NEWS NY1 (Jan. 25, 2023, 6:19 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2023/01/25/new-york-ag-says-msg-lawyer-ban-may-violate-anti-bias-laws>.

167. Barrett, *supra* note 31, at 232.

168. 42 U.S.C. § 2000a(a).

implementation of facial recognition technology results in disproportionately more minorities being misidentified and therefore excluded from the venue or otherwise detained for further identification, then these protected classes could be accurately described as not receiving the full enjoyment of Madison Square Garden that their white counterparts receive. However, Title II has been described as an “imperfect tool against the broad deployment of facial recognition technologies.”¹⁶⁹ This is because Title II only provides for injunctive relief rather than compensatory or punitive damages.¹⁷⁰ And it is not yet settled as to whether plaintiffs may use a theory of disparate impact to demonstrate harm, which is generally how a race-based facial recognition technology case would manifest.¹⁷¹

This theory of enforcement under Title II of the Civil Rights Act of 1964 is similar to claims made that Title VII could be used to prohibit facial recognition technology for job interviews on the grounds that the practice disproportionately harms minority applicants.¹⁷² Unfortunately, the likely disproportionate effects of facial recognition technology on minorities have implications far beyond being unjustifiably refused admission to Madison Square Garden. False positives and false negatives from facial scans could result in being detained by police, locked out of one’s cell phone, unable to access one’s bank account, or unable to enter one’s apartment.¹⁷³

VIII. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

The attorneys who were banned from MSG claimed that the ban constituted tortious interference with their business relations.¹⁷⁴ The claim was based on the assertion that those attorneys who did not have cases against MSG, but were members of firms who did, were maliciously banned to harm their reputations and to quell their ability to retain new business.¹⁷⁵

Tortious interference with business relations evolved from property rights.¹⁷⁶ Business interests are property rights, and both receive protection from unjustified tampering.¹⁷⁷ The interference can arise from either

169. Barrett, *supra* note 31, at 270.

170. Robert B. Duncan & Karl M.F. Lockhart, *The Washington Lawyers’ Committee’s Fifty-Year Battle for Racial Equality in Places of Public Accommodation*, 62 HOW. L.J. 73, 116 (2018).

171. *Id.* at 119.

172. Barrett, *supra* note 31, at 267–68.

173. *Id.* at 251.

174. Plaintiffs’ Memorandum of Law, *supra* note 10, at 21.

175. *Id.*

176. Jessica Gallegos, Note, *A New Role for Tortious Interference in the Digital Age: A Model to Enforce End User License Agreements*, 38 FLA. ST. U. L. REV. 411, 414–15 (2011).

177. *Id.* at 415.

contractual relationships or business relationships.¹⁷⁸ Some states require pleading interference with a contract relationship and interference with a business relationship as separate torts, while others have combined them into a single cause of action.¹⁷⁹ In New York, for example, they are pled as separate torts.¹⁸⁰ Most states use a variation of the *Restatement (Second) of Torts* to establish the elements of tortious interference with business relations.¹⁸¹ This is found in section 766B, which recognizes:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

- (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
- (b) preventing the other from acquiring or continuing the prospective relation.¹⁸²

Using the Restatement as guidance, New York requires a plaintiff to prove the following four elements for a tortious interference with business relations claim: “(1) a plaintiff’s business relationship with a third party; (2) the defendant’s interference with that business relationship; (3) a showing that the defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship.”¹⁸³

Unlike a contract interference claim, to prove the first element, the plaintiff must show that there was an existing business relationship.¹⁸⁴ A tortious interference with a contract claim requires a plaintiff to cite the actual contractual relationship interfered with.¹⁸⁵ Tortious interference with business relations requires only the showing of an expectancy of the business relationship.¹⁸⁶ However, the expectancy claim must be supported by specific facts regarding the business relationship.¹⁸⁷

178. Orrin K. Ames III, *Tortious Interference with Business Relationships: The Changing Contours of This Commercial Tort*, 35 CUMB. L. REV. 317, 326 (2005).

179. *Id.* at 326–27.

180. *See, e.g.*, ValveTech, Inc. v. OHB Sys. AG, 19-CV-6829, 2023 WL 24056, at *1 (W.D.N.Y. Jan. 3, 2023).

181. Ames, *supra* note 178, at 325.

182. RESTATEMENT (SECOND) OF TORTS § 766B (AM. L. INST. 1979) (emphasis added).

183. CapLOC, LLC v. McCord, 17 Civ. 5788, 2018 WL 3407708, at *5 (S.D.N.Y. June 12, 2018).

184. *See* Westside Ctr. Assocs. v. Safeway Stores 23, Inc., 49 Cal. Rptr. 2d 793, 802 (Cal. Ct. App. 1996).

185. *Id.*

186. *See* Honigmann v. Hunter Grp., Inc., 733 S.W.2d 799, 806 (Mo. Ct. App. 1987).

187. *See* Steiner Sports Mktg., Inc. v. Weinreb, 930 N.Y.S.2d 186, 187 (N.Y. App. Div. 2011).

The third element of tortious interference with business relations requires that the defendant acted solely to harm the plaintiff or that the defendant's interference was dishonest, unfair, or through improper means. This element is a particularly high bar to meet.¹⁸⁸ The defendant's motive must be examined because interference with business relations is an intentional tort.¹⁸⁹ The motive is analyzed in light of whether the interference is performed by a noncompetitor or a market competitor.¹⁹⁰ Noncompetitors may be subject to liability regardless of whether the interference is done by improper means.¹⁹¹ For competitors, on the other hand, to protect free market competition, interference that "concerns a matter involved in the competition between the [parties]" requires the additional element that the interference took place through "wrongful means."¹⁹² However, greater protection is afforded to existing contracts than is afforded to speculative interests in future relationships.¹⁹³ The speculative nature of interfering with business relationships that have not yet been established would require proof that noncompetitors, as well as competitors, acted through wrongful means.¹⁹⁴ The banned attorneys were not competitors with MSG, and instead their claims that the ban harmed their ability to attract new clients was speculative, so to be successful, they would have to prove that motive of wrongful means.

Based on the high bar for proving tortious interference with a business relationship, it is not surprising that the court in one of the current lawsuits over this issue granted MSG Entertainment's motion to dismiss on this claim.¹⁹⁵ The court determined that the first and third elements were not met because the "allegations are vague and conclusory and fail to identify a specific business relationship that was allegedly adversely affected, nor do they show that defendants acted with the sole purpose of harming the plaintiff."¹⁹⁶ One could argue that MSG Entertainment intended to harm the plaintiffs, in the sense of causing discomfort, in an effort to incentivize them to settle existing claims against MSG Entertainment. However, this is different from the plaintiffs pointing to an existing or likely future business relationship that was adversely affected by MSG Entertainment. Additionally, attempting to apply this cause of action to the MSG Entertainment case would be difficult because it would be the plaintiffs

188. 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 262 (2d Cir. 2015).

189. RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (AM. L. INST. 1979).

190. Carvel Corp. v. Noonan, 818 N.E.2d 1100, 1106 (N.Y. 2004) (Grafteo, J., concurring).

191. *Id.*

192. *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 768(1)).

193. Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445, 449 (N.Y. 1980).

194. *Id.*

195. *Hutcher v. Madison Square Garden Ent. Corp.*, No. 653793/2022, 2022 WL 17977450, at *1 (N.Y. Sup. Ct. Dec. 23, 2022).

196. *Id.* at *4.

themselves (the law firms) who are the ones avoiding the business relationships (by choosing to not take on cases against MSG Entertainment in order to avoid being placed on the attorney-ban list). This runs counter to a traditional tortious interference with business relationship case in which it is the defendant who entices the third party to break off an existing business relationship or forgo a future business relationship with the plaintiff.

IX. OTHER POTENTIAL CAUSES OF ACTION

This Part discusses other potential causes of action such as invasion of privacy, the Children's Online Privacy Protection Act, the Gramm-Leach-Bliley Act, the Stored Communications Act, a New York Arts and Cultural Affairs Law, and unfair or deceptive trade practices legislation. One could potentially argue an invasion of privacy cause of action for intrusion upon seclusion.¹⁹⁷ However, such a claim would likely fail as long as MSG Entertainment provided proper notice that facial recognition technology is in use.¹⁹⁸ Furthermore, even if notice was not given, the limited nature of how MSG Entertainment uses the technology would likely not rise to the level of satisfying the requirement that "the intrusion . . . be highly offensive to a reasonable person."¹⁹⁹

The Children's Online Privacy Protection Act ("COPPA") could potentially be used to limit the use of facial recognition software on minors, as it appears MSG Entertainment does not provide parents of minors entering the venue and being face scanned with the required notice, nor does it obtain their consent.²⁰⁰ However, COPPA may not be applicable because it is explicitly limited to activities on the internet.²⁰¹ It is likely that MSG uses some type of cloud storage for all of the images, but it is unclear if this counts as online activity as the images would not be accessible to others.

The Gramm-Leach-Bliley Act—which mandates disclosure of information-sharing practices to customers—may offer some protections at the federal level but is only applicable to financial institutions.²⁰² The Stored Communications Act is another federal statute that could potentially apply to the use of facial recognition software by private companies.²⁰³ However, it is unclear if the statutory requirement that the data transfer be made as part of

197. See, e.g., Stacy Norris, Note, ". . . And the Eye in the Sky Is Watching Us All" – The Privacy Concerns of Emerging Technological Advances in Casino Player Tracking, 9 UNLV GAMING L.J. 269, 281–82 (2019).

198. *Id.*

199. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

200. Barrett, *supra* note 31, at 271–72; see 15 U.S.C. §§ 6501–08.

201. 15 U.S.C. § 6502(a)(1).

202. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

203. 18 U.S.C. §§ 2701–13.

a communication is satisfied in MSG Entertainment's application of facial recognition technology.²⁰⁴

Plaintiffs in one of the lawsuits against MSG Entertainment alleged a violation of New York Arts and Cultural Affairs Law §25.30(2).²⁰⁵ This statute largely limits venues' rights to revoke or restrict season tickets for reasons relating to violations of venue policies and to the extent the operator may deem necessary to address fraud, misconduct, or safety.²⁰⁶ The court denied MSG Entertainment's motion to dismiss this §25.30(2) claim.²⁰⁷

Similarly, biometric data could potentially be considered an unfair or deceptive trade practice. Section 45 of the Federal Trade Commission Act defines a practice as unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."²⁰⁸ Deceptive practices are defined as those "involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances."²⁰⁹ But again, adequate disclosures that facial recognition technology is in use would make this claim difficult. The demonstration of how the act is "likely to cause substantial injury to consumers" would also be challenging. A plaintiff could claim that a potential security breach or mental health problems from being surveilled satisfy this element, but that seems unlikely to rise to the level of injury required.

X. PSYCHOLOGICAL HARM

Finally, often overlooked in the debate over facial recognition technology are the potential negative psychological effects from living under a surveillance state. It is well documented that the act of surveillance leads to numerous negative consequences, such as increases in stress, fatigue, and anxiety.²¹⁰ The encroaching surveillance state has blurred the line between

204. *Id.*

205. Plaintiffs' Memorandum of Law, *supra* note 10, at 11–14.

206. N.Y. ARTS & CULT. AFF. LAW § 25.30(2) (McKinney 2022).

207. Plaintiffs' Memorandum of Law, *supra* note 10, at 14.

208. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last updated May 2021) (quoting 15 U.S.C. § 45(n)).

209. *Id.*

210. Chris Chambers, *NSA and GCHQ: The Flawed Psychology of Government Mass Surveillance*, GUARDIAN (Aug. 26, 2013, 6:15 AM), <https://www.theguardian.com/science/head-quarters/2013/aug/26/nsa-gchq-psychology-government-mass-surveillance>.

anxiety as a typical human emotion and anxiety as a mental disorder.²¹¹ It has also been linked to reductions in worker productivity.²¹² And surveillance may lead to a sense that the social contract has been broken, creating distrust and an antagonistic relationship between the surveilled and the surveyors.²¹³ This lack of trust can become counterproductive by functioning to undermine respect for authority.²¹⁴ Unfortunately, the risk of psychological harm is particularly acute in the cognitive development of minors.²¹⁵

XI. FUTURE OF BIOMETRIC IDENTIFICATION

With rapidly advancing technologies, any consideration of current restraints on biometric identification must also consider what could soon be accomplished with technological advancements. Attempts have already been made to accurately identify a person's sexual orientation from a facial scan.²¹⁶ AI could potentially even predict a person's political affiliation from biometric data.²¹⁷ Companies are beginning to experiment with facial recognition technologies for hiring and lending decisions.²¹⁸ Using AI for hiring decisions is problematic, as illustrated when Amazon's AI job recruiting tool taught itself to be biased against women applicants because it was programmed to observe patterns in resumes based on prior hiring decisions.²¹⁹

Policies such as the use of facial recognition scans to exclude adverse attorneys may produce a significant negative externality. The use of new technologies for such purposes is often viewed negatively, which in turn creates increased skepticism toward the adoption of novel, advanced

211. Brett Friedman, *What Are the Effects of Invasion of Privacy—Social Media and Mental Health*, FHE HEALTH (July 16, 2020), <https://therehab.com/learning/public-exposure-and-mental-health>.

212. *Id.*

213. *Id.*

214. *Id.*

215. Barrett, *supra* note 31, at 254–58.

216. Heather Murphy, *Why Stanford Researchers Tried to Create a 'Gaydar' Machine*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/science/stanford-sexual-orientation-study.html>.

217. Jamie Condliffe, *Facial Recognition Is Getting Incredibly Powerful, and Even More Controversial*, BUS. INSIDER (Sept. 8, 2017, 8:07 PM), <http://www.businessinsider.com/facial-recognition-controversy-improvement-2017-9>.

218. Lohr, *supra* note 160.

219. Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, REUTERS (Oct. 10, 2018, 7:04 PM), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G>. For example, the AI taught itself to downgrade resumes that included the word “women’s,” as in “women’s chess club captain.” *Id.* It also downgraded graduates of all-women’s colleges. *Id.*

technologies in general.²²⁰ This is harmful because many of these new technologies, such as self-driving cars,²²¹ RNA vaccines,²²² and AI-assisted radiological evaluations,²²³ could save thousands of lives. The Luddite riots of the early 1800s should perhaps serve as a warning to what can result from widespread panic of new technologies.²²⁴

The ability of private companies to exclude customers is rapidly increasing. Facial recognition technology companies have already scraped social media to create large databases of facial images.²²⁵ Therefore, venues like Madison Square Garden could engage in data mining social media posts, identify negative comments about the arena and its owner through textual analysis, and include those people in its excluded list. Perhaps a given venue is owned by a strong pro-life advocate who wants to ban pro-choice advocates or an immigrant who wants to ban people in favor of limiting migration into the United States or a sports team owner who wants to ban people who criticized a recent trade.

This enhanced ability to exclude based on political ideology has the potential to do far more harm than just depriving someone of the ability to visit a venue. Rising consumer boycotts²²⁶ likely contribute to the increased political segregation of America.²²⁷ For example, conservatives are encouraged to boycott Starbucks and instead purchase coffee from Black

220. See, e.g., DEEM & WARREN, *supra* note 139, at 7–8 (explaining how the biggest impediment to the adoption of AI technologies is the mostly irrational fear of AI).

221. Iyad Rahwan & Azim Shariff, *Self-Driving Cars Could Save Many Lives. But Mental Roadblocks Stand in the Way*, WALL ST. J. (Apr. 6, 2021, 2:00 PM), <https://www.wsj.com/articles/self-driving-cars-could-save-many-lives-but-mental-roadblocks-stand-in-the-way-11617732000>.

222. Jen Christensen, *Covid-19 Vaccines Have Saved More Than 3 Million Lives in US, Study Says, but the Fight Isn't Over*, CNN (Dec. 13, 2022, 3:55 PM), <https://www.cnn.com/2022/12/13/health/covid-19-vaccines-study/index.html>.

223. Erin McNemar, *Top Opportunities for Artificial Intelligence to Improve Cancer Care*, HEALTH IT ANALYTICS, <https://healthitanalytics.com/features/top-opportunities-for-artificial-intelligence-to-improve-cancer-care> (last visited Nov. 15, 2023).

224. Evan Andrews, *Who Were the Luddites?*, HISTORY (Aug. 21, 2023), <https://www.history.com/news/who-were-the-luddites>.

225. Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html>.

226. Elisabeth Braw, *Do Rising Consumer Boycotts Threaten Corporate Geopolitical Neutrality?*, WTW (Nov. 23, 2022), <https://www.wtwco.com/en-BM/Insights/2022/11/do-rising-consumer-boycotts-threaten-corporate-geopolitical-neutrality>.

227. See, e.g., Christina Pazzanese, *Democrats and Republicans Do Live in Different Worlds*, HARV. GAZETTE, (Mar. 16, 2021), <https://news.harvard.edu/gazette/story/2021/03/democrats-and-republicans-live-in-partisan-bubbles-study-finds>.

Rifle Coffee Company, the “Starbucks of the right.”²²⁸ Instead of supporting Harry’s Shave Club or Dollar Shave Club, conservatives are encouraged to purchase “100% woke free” razors from Jeremy’s Razors.²²⁹ After Hershey’s released new packaging promoting a transgender woman, a “non-woke” chocolate provider emerged.²³⁰ Donald Trump’s Truth Social was created as a conservative alternative to Twitter and Facebook.²³¹ Conservative media outlet Daily Wire even created a streaming service with movies produced in-house to provide an alternative to what it perceives as liberal streaming platforms.²³² These political boycotts by consumers not only lead to market inefficiencies but, when combined with the potential for businesses to boycott consumers for their political viewpoints, along with political segregation in housing,²³³ mean that people will become more isolated in their political bubbles. This is highly problematic because it means that the only significant exposure a person is likely to have to those in the other political party are the most extreme depictions produced by their segregated media outlets.

There currently exists great uncertainty as to the legal limits of facial recognition technology utilized by private companies.²³⁴ A few states have regulations that impose varying levels of notice, consent, and data security requirements for biometric information.²³⁵ Illinois’s Biometric Information Privacy Act is the most stringent, allowing for a private action to recover

228. Emma Balter, ‘Starbucks of the Right’ Black Rifle Coffee Is Expanding Its Footprint in Houston Suburbs, CHRON (Apr. 1, 2022, 11:35 AM), <https://www.chron.com/food/article/Black-Rifle-Coffee-Houston-location-FM1960-17046696.php>.

229. Precision 5 + One Year of Blade Refills, JEREMY’S RAZORS, <https://www.jeremysrazors.com/collections/holiday-sale-2023/products/precision-5-one-year-of-blade-refills-v2> (last visited Dec. 13, 2023).

230. ‘Non-Woke’ Chocolate Bars a Hit After Hershey’s Goes Woke, FOX NEWS (Mar. 7, 2023), <https://www.foxnews.com/video/6322080604112>.

231. Brian X. Chen, Truth Social Review: Trump’s Uncensored Social App is Incomplete, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/technology/personaltech/truth-social-review-trump.html>.

232. Joseph Bernstein, Can Nashville be Hollywood for Conservatives?, N.Y. TIMES (Dec. 9, 2022), <https://www.nytimes.com/2022/12/07/style/daily-wire-nashville-conservative-media.html>.

233. See, e.g., Pazzanese, *supra* note 227.

234. Rowe, *supra* note 97, at 7 (explaining how the rise of facial recognition technology and lack of federal regulation “has created uncertainty for companies, especially because there are wide-ranging business applications for this technology, the expansion of which may be impeded as a result of the legal uncertainty”).

235. Christina Lamoureux et al., Madison Square Garden’s Use of Facial Recognition Software to Create “Enemy Ban” for Adverse Attorneys Draws Scrutiny, Reflects Changing Uses of Biometric Software, NAT’L L. REV. (Feb. 1, 2023), <https://www.natlawreview.com/article/madison-square-garden-s-use-facial-recognition-software-to-create-enemy-ban-adverse>.

statutory damages.²³⁶ Portland, Oregon, became the first U.S. jurisdiction to ban the use of facial recognition in the private sector.²³⁷

In the absence of a state statute, there is little in the way of a limiting principle for facial technology use, especially when consent is given. As the technology becomes more ubiquitous, this could lead to problematic outcomes. As a group of concerned legislators in New York complained, “[i]f New Yorkers can be banned from a Rangers game, they can be banned from the grocery store or the pharmacy.”²³⁸ There is also no concrete limiting principle for the practice to expand far beyond just attorneys at adverse law firms and people who have committed violence on the premises previously. A business may want to ban customers who have posted negative comments on social media regarding that company. Or a company may want to be more proactive and utilize predictive AI to identify individuals who are at an increased risk of committing violent acts based on their biometric and online history profile and ban them, even if they have no history of violence. Finally, the decision of private companies of whether and how to utilize facial recognition technology could become even more contentious based on the argument that it is negligence per se for venues to not implement biometric identification to exclude known violent persons.²³⁹

CONCLUSION

This Article provides a valuable framework for considering the legal and practical implications of biometric identification as well as corporate retaliation against law firms. This will hopefully serve as a powerful catalyst for future discussion on this rapidly evolving issue. The implications of biometric identification and the extent to which corporations can exclude people from their premises extend far beyond an attorney being unable to watch a New York Knicks game. The jurisprudence adopted in the next few years on this issue will have ramifications for the mental health of those vulnerable to the psychological harm of living in a surveillance state, potential racial discrimination law regarding facial recognition’s

236. *Id.*; Norris, *supra* note 197, at 291 (“Illinois’ Biometric Information Privacy Act is a great example of legislation that allows for the use of biometric technology if people are given notice that their information is being collected, notice of what that information will be used for and how long, and the ability to consent or refuse consent to the collection and use of their data.”).

237. Lamoureux et al., *supra* note 235.

238. Hoylman-Sigal, *supra* note 118.

239. See, e.g., Michael Conklin, *The Reasonable Robot Standard: Bringing Artificial Intelligence Law into the 21st Century*, YALE J.L. & TECH. (Sept. 4, 2020), <https://yjolt.org/blog/reasonable-robot-standard> (explaining how someone who turns off the self-driving feature on his car could potentially be liable for negligence if he then is involved in an accident, even if the accident could not have been avoided by a human driver but could have been avoided by the self-driving feature).

disproportionate inaccuracies, religious minorities' rights, a more ideologically segregated society, and the normalization of corporations retaliating against law firms for offering legal representation to adverse parties.