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HOW CAN WE END #CANCEL CULTURE— TORT LIABILITY OR THUMPER’S RULE?

Nanci K. Carr*

I. WHAT IS CANCEL CULTURE?

We are living in a “cancel culture” where if someone, often a celebrity, does something either illegal or unethical, society is quick to “cancel” them, or lessen their celebrity standing or cultural capital.¹ According to Ohlheiser and Izadi:

Some people denounce it, pointing to instances of mob behavior and online infighting, or to situations where a career is jeopardized because of a bad tweet someone made as a teen. But it also can be used to describe how traditionally underrepresented and oppressed groups harness the Internet and social media to hold powerful people accountable when institutions won’t.... Being canceled happens when there is a mismatch between the thing someone said or did, and the ethical expectations of their audience.²

For example, Kevin Spacey is an Oscar-winning actor who was terminated from his film and television projects after he was accused of sexual assault in 2017.³

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¹ Leah Asmelash, *Why ‘Cancel Culture’ Doesn’t Always Work*, CNN (Sept. 21, 2019), <https://www.cnn.com/2019/09/21/entertainment/cancel-culture-explainer-trnd/index.html>; see also Aja Romano, *Why We Can’t Stop Fighting About Cancel Culture*, VOX (Dec. 20, 2019), <https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate> (explaining that a person being canceled means “culturally blocked from having a prominent public platform or career”).

² Abby Ohlheiser & Elahe Izadi, *A Step-by-Step Guide to Why People Can’t Stop Arguing About ‘Cancel Culture,’* WASH. POST (Sept. 18, 2019), <https://www.washingtonpost.com/arts-entertainment/2019/09/18/step-by-step-guide-why-people-cant-stop-arguing-about-cancel-culture/>.

³ Asmelash, *supra* note 1 (noting that Spacey was fired from Netflix’s *House of Cards* and cut from *All the Money in the World*, which is a film he had shot before the allegations arose); see also Althea Legaspi, *Kevin Spacey Removed from New Film ‘All the Money in*

Spotify has removed R. Kelly from its playlists following sexual assault and abuse charges against him,⁴ Rosanne Barr's television series was cancelled after she made racist remarks on Twitter,⁵ and Shane Gillis was fired from Saturday Night Live before he even started after some racist remarks he had made in the past resurfaced.⁶ Kevin Hart's dream came true when he was chosen as the host for the 2019 Oscars, saying "I am blown away simply because this has been a goal on my list for a long time.... To be able to join the legendary list of host[s] that have graced that stage is unbelievable."⁷ Within hours of the announcement, social media was filled with cries for apologies for homophobic jokes Hart had made ten years prior; people believed that without these, his soon to be fulfilled hosting dream should be cancelled.⁸ Comedian Billy Eichner said at the time that people should not rush to judgment and permanently cancel someone over something like this, but instead, people should be able to "[own] up to past

the World', ROLLING STONE (Nov. 9, 2017), <https://www.rollingstone.com/movies/movie-news/kevin-spacey-removed-from-new-film-all-the-money-in-the-world-126321/> (discussing how Kevin Spacey was fired from the Ridley Scott film, *All the Money in the World*, and will be replaced by Christopher Plummer even though the film is already finished); Jayme Deerwester et al., *Kevin Spacey Scandal: Netflix Dumps Actor from 'House of Cards,' Shelves Film*, USA TODAY (Nov. 3, 2017), <https://www.usatoday.com/story/life/people/2017/11/03/kevin-spaceys-agent-publicist-drop-him-client/828459001/> (stating that Netflix dumped Spacey from *House of Cards* after another cast member accused him of sexual assault).

⁴ Asmelash, *supra* note 1; *see also* Mahita Gajanan, *R. Kelly Is First Artist Removed from Spotify Playlists After Company Enacts 'Hateful Content and Conduct' Policy*, TIME (May 11, 2018), <https://time.com/5272727/r-kelly-removed-spotify-hateful-content-policy/> (discussing how Spotify removed R. Kelly from its playlists after enacting a new "Hateful Content and Hateful Conduct policy" that aims to remove anything that "expressly and principally promotes, advocates, or incites hatred or violence against a group or individual based on characteristics, including, race, religion, gender identity, sex, ethnicity, nationality, sexual orientation, veteran status, or disability").

⁵ Ohlheiser & Izadi, *supra* note 2; *see also* John Koblin, *After Racist Tweet, Roseanne Barr's Show Is Canceled by ABC*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/business/media/roseanne-barr-offensive-tweets.html> ("ABC abruptly canceled 'Roseanne' hours after Ms. Barr, the show's star and co-creator, posted a racist tweet about Valerie Jarrett, an African-American woman who was a senior adviser to Barack Obama throughout his presidency and considered one of his most influential aides.").

⁶ Ohlheiser & Izadi, *supra* note 2 (stating how comedian Jim Jefferies complained, "This is just cancel culture. The guy shouldn't have been fired.").

⁷ Stephen Daw, *A Complete Timeline of Kevin Hart's Oscar-Hosting Controversy, from Tweets to Apologies*, BILLBOARD (Jan. 10, 2019), <https://www.billboard.com/articles/events/oscars/8492982/kevin-hart-oscar-hosting-controversy-timeline>.

⁸ Kristopher Tapley, *Kevin Hart Steps Down as Oscar Host*, VARIETY (Dec. 6, 2018), <https://variety.com/2018/film/awards/kevin-hart-says-the-film-academy-has-given-him-an-ultimatum-apologize-or-well-find-another-oscars-host-1203083698/> ("Guys, I'm nearly 40 years old. If you don't believe that people change, grow, evolve as they get older, I don't know what to tell you. If you want to hold people in a position where they always have to justify the past, do you. I'm the wrong guy, man.").

mistakes, acknowledging blindspots and hurtful remarks, talking through it, discussing it, learning, moving past it and making progress together.”⁹

Leah Asmelash of CNN says, “Some people argue that cancel culture is justified because celebrities are facing repercussions for their actions. Other[s] complain that it’s an unfair form of ‘gotcha.’”¹⁰ Either way, it is fans letting celebrities and other public figures know that they will be held accountable for their actions. Often, “cancel culture ... treats conjecture as fact,”¹¹ which is particularly dangerous if the allegations are not true.¹² But even if the allegations are true, why dig up decade-old misstatements that may have been made in youthful ignorance? It is the societal interest in “gotcha” that is troubling. Why is society so interested in either pointing out or relishing in the past misdeeds of others? And who does not have skeletons in his or her closet that he or she would not want to be judged by today?

II. WHEN CANCEL CULTURE GOES TOO FAR

Carson King, a twenty-four-year-old Prairie Meadows Casino security guard,¹³ held up a sign at a college football game that read “Busch Light Supply Needs Replenished,” together with his Venmo username.¹⁴ To his surprise, he soon had \$600 in his account.¹⁵ He consulted with his family and decided to

⁹ Billy Eichner (@billyeichner), TWITTER (Dec. 9, 2018, 8:14 PM), <https://twitter.com/billyeichner/status/1071936262422949888/photo/4>.

¹⁰ Asmelash, *supra* note 1.

¹¹ Noe Padilla, “Cancel Culture” Should Be Cancelled, BOTTOM LINE (May 23, 2019), <https://thebottomline.as.ucsb.edu/2019/05/cancel-culture-should-be-cancelled>.

¹² *Id.*

¹³ Aaron Calvin, *Meet Carson King, the ‘Iowa Legend’ Who’s Raised More Than \$1 Million for Charity Off of a Sign Asking for Beer Money*, DES MOINES REG. (Sept. 25, 2019), <https://www.desmoinesregister.com/story/sports/college/iowa-state/football/2019/09/24/meet-carson-king-whos-raised-over-1-million-charity-asking-beer-money-childrens-hospital-tweet/2427538001/>; Nicole Lyn Pesce, *This 24-Year-Old Has Raised More Than \$600,000 for Charity – by Asking for Beer Money on National TV*, MARKETWATCH (Sept. 20, 2019), <https://www.marketwatch.com/story/this-24-year-old-has-raised-100000-for-charity-by-asking-for-beer-money-on-national-tv-2019-09-18>.

¹⁴ Julia Reinstein, *The Reporter Fired In the “Busch Light Buy” Scandal Said He Feels “Abandoned” by The Des Moines Register*, BUZZFEED NEWS (Sept. 27, 2019), <https://www.buzzfeednews.com/article/juliareinstein/des-moines-register-iowa-reporter-fired-aaron-calvin-carson>; Michael Brice-Saddler & Jacob Bogage, *A ‘College GameDay’ Sign Asked for Beer Money. It’s Raised Nearly \$1 Million for a Children’s Hospital Fundraiser*, WASH. POST (Sept. 21, 2019), <https://www.washingtonpost.com/sports/2019/09/18/college-gameday-sign-asked-beer-money-it-sparked-childrens-hospital-fundraiser/>; *How Venmo Works*, VENMO, <https://venmo.com/about/product/> (last visited Feb. 7, 2020) (explaining that Venmo is a mobile app used to “[p]ay family and friends with Venmo accounts using a phone number or email”).

¹⁵ Reinstein, *supra* note 14; Tom VanHaaren, *‘Beer Money’ Sign Still Chugging Along for Charity*, ESPN (Sept. 20, 2019), https://www.espn.com/college-football/story/_/id/

donate the money to the Stead Family Children's Hospital,¹⁶ which has enjoyed a long relationship with the University of Iowa football team since the hospital overlooks the field.¹⁷ At the end of the first quarter of every home game, thousands of fans in the Kinnick Stadium wave at the hospital's young patients in what has become known as the Hawkeye Wave.¹⁸ Following further developments, including pledges of matching funds from Venmo and Anheuser-Busch,¹⁹ King had raised \$1 million, toured the Busch headquarters in New York City, and appeared on *Good Morning America*, *Fox and Friends*, CNN, and NBC News.²⁰ Society was enjoying a feel-good story;²¹ that is until Aaron Calvin, a twenty-seven-year-old reporter for the *Des Moines Register*, decided to dig into King's background.²² He found two racist tweets posted by King

27645130/beer-money-sign-chugging-charity.

¹⁶ Brice-Saddler & Bogage, *supra* note 14 (quoting King as saying, "The kids deserve everything they can get.").

¹⁷ See Shelby Fleig, 'It Means Everything': Parents, Patients Anticipate Hawkeye Wave at Iowa Football Opener, DES MOINES REG. (Sept. 1, 2018), <https://www.desmoinesregister.com/story/sports/college/iowa/2018/08/30/hawkeye-wave-ui-stead-family-childrens-hospital-university-iowa-football-hawkeyes-hawks/1127504002/>.

¹⁸ See *id.* (noting that the Hawkeye Wave was started by Krista Young, who is not affiliated with either the hospital or the home team).

¹⁹ See *As Busch Distances Itself from Carson King, Other Businesses Pledge Their Support*, DES MOINES REG. (Sept. 26, 2019), <https://www.desmoinesregister.com/story/news/2019/09/25/carson-king-venmo-busch-light-gameday-sign-money-raised-university-iowa-stead-childrens-hospital/2443321001/> (stating that other contributors included Make-A-Wish Iowa, Goldie's Ice Cream Shoppe, Smokey Row Coffee Co., DeWit Construction, and Geneseo Brewing Co., the last stating "we have witnessed your growth through your later social media content and accept your apology"); @BuschBeer, TWITTER (Sept. 25, 2019, 11:16 AM), <https://twitter.com/BuschBeer/status/1176878181023985664> (explaining Anheuser-Busch would honor their promise to match King's donations until the end of September despite ending their relationship with King); @Venmo, TWITTER (Sept. 17, 2019, 3:41 PM), <https://twitter.com/venmo/status/1174045653443338241> (stating Venmo would join Busch's promise to match donations to King's Venmo).

²⁰ Calvin, *supra* note 13; *College Football Fan's Viral Sign Leads to Big Donation*, CNN (Sept. 18, 2019), <https://www.cnn.com/videos/us/2019/09/18/college-gameday-beer-venmo-sign-football-fan-iowa-childrens-hospital-donation-dnt-vpx.who-dt>; *College Student's Joke Turns into Viral Fundraiser for Children's Hospital*, NBC (Sept. 18, 2019), <https://www.nbcnews.com/nightly-news/video/college-student-s-joke-turns-into-viral-fundraiser-for-children-s-hospital-69289541990>; Christina Zdanowicz, *Almost \$3 Million in Donations Later, the Man Who Raised Money with a Beer Sign Has Ended His Campaign*, CNN (Oct. 1, 2019), <https://www.cnn.com/2019/10/01/us/carson-king-hospital-fundraiser-ends-trnd/index.html> (explaining the fundraiser ended on September 30, 2019 with a total of almost \$2.95 million, and donations ranging from five cents to thousands of dollars); *Football Fan Donates the Money He Received from Beer Sign*, GOOD MORNING AM. (Sept. 20, 2019), <https://www.goodmorningamerica.com/living/video/football-fan-donates-money-received-beer-sign-65740628>; *Football Fan Raises Big Money for Children's Hospital*, FOX & FRIENDS (Sept. 21, 2019), <https://video.foxnews.com/v/6088307134001#sp=show-clips>.

²¹ Reinstein, *supra* note 14.

²² *Id.*

when he was sixteen years old.²³ Consistent with the #cancelculture, he felt compelled to publicize the existence of the tweets,²⁴ confirming once again, that no good deed goes unpunished.²⁵ Calvin contacted King to inform him that he was going to publicize the tweets, so King held a press conference the night before, stating, “In re-reading it today—eight years later—I see it was an attempt at humor that was offensive and hurtful. I am embarrassed and stunned to reflect on what I thought was funny when I was 16 years old. I want to sincerely apologize.”²⁶ It was a graceful apology, but not enough for Anheuser-Busch, which was quick to join Calvin in #cancelculture and cut ties with King.²⁷

Readers attacked the newspaper and Calvin, who claims “[t]his event basically set my entire life on fire;”²⁸ Calvin argued that he was merely following procedure by searching King’s social media history, a process referred to as “backgrounding.”²⁹ Calvin even admits that after his editors advised him to ask King about the eight-year-old tweets he had made as a minor, Calvin found King to be “deeply regretful, and [Calvin] recognized that these were not representative artifacts of Carson.”³⁰ The *Des Moines Register* had not yet published the tweets, but social media was already blaming the newspaper for “doing King wrong and ruining a potential opportunity to continue raising millions of dollars to help sick children.”³¹

²³ *Id.* (characterizing the now deleted tweets as jokes “comparing black mothers to gorillas and another making light of black people killed in the Holocaust”).

²⁴ Calvin, *supra* note 13 (noting that while Calvin summarized the tweets, he did not quote them); Reinstein, *supra* note 14 (“[T]he reporter said he felt an obligation to share the information he’d uncovered with the public, but thought he did so in a ‘thoughtful’ way that showed the tweets no longer showed King’s worldview.”).

²⁵ ORIGINAL BROADWAY CAST OF WICKED, NO GOOD DEED (2003) (“No good deed goes unpunished, no act of charity goes unresented . . . all helpful urges should be circumvented.”).

²⁶ Reinstein, *supra* note 14; *Carson King Holds Press Conference on Hospital Fundraiser*, KCCI (Dec. 27, 2019), <https://www.youtube.com/watch?v=XkfQZnKj7mU>.

²⁷ Reinstein, *supra* note 14; *see As Busch Distances Itself from Carson King, Other Businesses Pledge Their Support*, *supra* note 19 (reneging on its promise to give a year’s supply of beer and put his face on beer cans, Busch Light severed ties with King, but kept its financial promise to match the contribution); Carol Hunter, *We Hear You. You’re Angry. Here’s What We Are Doing About It.*, *DES MOINES REG.* (Sept. 26, 2019), <https://www.desmoinesregister.com/story/opinion/columnists/from-the-editor/2019/09/26/carson-king-tweet-editor-response-investigation-iowa-childrens-hospital-donations/3780741002/> (“Busch Light made its decision independently of any news coverage on the tweets” and “it is honoring its financial pledge to the hospital, committing to donate more than \$350,000.”).

²⁸ Reinstein, *supra* note 14.

²⁹ *Id.*; *see Journalism as a Discipline of Verification*, AM. PRESS INST., <https://www.americanpressinstitute.org/journalism-essentials/verification-accuracy/journalism-discipline-verification/> (last visited Feb. 17, 2020).

³⁰ Reinstein, *supra* note 14.

³¹ Hunter, *supra* note 27; *see* Keith Murphy (@MurphyKeith), TWITTER (Sept. 24, 2019,

Calvin maintains that “[t]hroughout [the] entire process of the discovery and inclusion of the tweets, the editor knew, the editorial board knew, and the executive editor knew how I’d included them and handled them for the article, and as far as I knew, approved of that.”³² However, Calvin should not have thrown stones from his glass house as the outrage from what he published brought about an investigation into his tweeting history. It seems that in his youth, Calvin had produced his own series of objectionable tweets.³³ He acknowledged that they were “frankly embarrassing” but then asserted that they had been “taken out of context” to “wield disingenuous arguments against [him].”³⁴ It was necessary backgrounding in the case of King, but “wielding disingenuous arguments” against Calvin? What might a jury think of that?

After initially supporting Calvin, Carol Hunter, the executive editor of the *Des Moines Register*, headlined her response “we hear you,” and noted that the newspaper fired Calvin not for what he did to King, but based upon his own tweets that were inconsistent with the image that the newspaper wanted for its reporters.³⁵ Hunter wrote that the Register is

examining all of our processes with fresh eyes ... we’re focused on [o]ur policies for backgrounding individuals in stories, with particular attention to acts committed by juveniles³⁶ and to the newsworthiness of that information years later [and t]he shift in social media culture and how activities on those platforms reflect upon a person’s newsworthiness in general.³⁷

The #MeToo and the related movement were also born of the cancel culture.³⁸ Many brave women came forward to hold men accountable for acts that had long been kept secret.³⁹ But there were others who were inadvertently caught up in

9:03 PM), <https://twitter.com/MurphyKeith/status/1176663545234317312?s=20> (showing that the original post and its replies are filled with supportive comments for King and castigation for the *Des Moines Register* and Calvin).

³² Reinstein, *supra* note 14.

³³ *Id.* (“Calvin had used ‘gay’ as a pejorative, written ‘fuck all cops,’ and spelled out the word ‘niggas’ twice when he was quoting others . . . [and] ‘now that gay marriage is legal, I’m totally going to marry a horse.’”).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Hunter, *supra* note 27.

³⁷ *Id.*; see Osita Nwanevu, *The “Cancel Culture” Con*, NEW REPUBLIC (Sept. 23, 2019), <https://newrepublic.com/article/155141/cancel-culture-con-dave-chappelle-shane-gillis> (providing another example where Heisman Trophy winner Kyler Murray apologized after his teenage homophobic tweets were discovered, however, he survived cancellation to become the starting quarterback for the Arizona Cardinals).

³⁸ See generally Nwanevu, *supra* note 37.

³⁹ Anna North, *The #MeToo Movement and Its Evolution, Explained*, VOX, <https://www.vox.com/identities/2018/10/9/17933746/me-too-movement-metoo-brett-kavanaugh-weinstein> (last updated Oct. 11, 2018).

the maelstrom, including comedian Aziz Ansari.⁴⁰ *The Atlantic's* essayist, Caitlin Flanagan, wrote, “Twenty-four hours ago—this is the speed at which we are now operating—Aziz Ansari was a man whom many people admired and whose work, although very well paid, also performed a social good. Now he has been—in a professional sense—assassinated, on the basis of one woman’s anonymous account.”⁴¹ This situation raises the question: should the anonymous woman be subject to tort liability if it is revealed that her allegation is untrue?

While cancel culture is a relatively new phenomenon,⁴² “the human impulses propelling it are old.”⁴³ Consider the novel *The Scarlet Letter*, a seventeenth century representation of society’s impulse to publicly humiliate those who have fallen below society’s perceived norms of moral behavior.⁴⁴ While it is a fictional work, it is representative of the impulses behind cancel culture, since Hester Prynne’s town sought to cancel her reputation.⁴⁵ However, in 2019, in the “Internet-based cancel culture, anyone anywhere can launch an attack on anyone anywhere. Moreover, these attacks are available for all to see over an indefinite period of time.”⁴⁶ Due to the harm they can cause, these attacks must be moderated, if not eliminated.

III. TORT LIABILITY

Society has strictures to help control human impulses. It starts with mothers, who generally teach their children manners so that they know how to act in

⁴⁰ Nwanevu, *supra* note 37; Sopan Deb, *Aziz Ansari Addresses Sexual Misconduct Accusation During New York Set*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/arts/aziz-ansari-sexual-misconduct-accusation.html>.

⁴¹ Nwanevu, *supra* note 37; Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>.

⁴² Laura Berlinsky-Schine, *We Need to Talk About the Impact of Cancel Culture*, FAIRYGODBOSS, <https://fairygodboss.com/career-topics/cancel-culture#> (last visited Feb. 27, 2020) (“The precise origin of cancel culture is a bit hazy, but around 2015, #cancelled emerged as a hashtag on Twitter to expose people deemed problematic.”).

⁴³ Robert Henderson, *The Atavism of Cancel Culture*, CITY J. (Sept. 30, 2019), <https://www.city-journal.org/cancel-culture>.

⁴⁴ See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Brian Yothers ed., 1850); Robert McCrum, *The 100 Best Novels: No 16 – The Scarlet Letter by Nathaniel Hawthorne (1850)*, GUARDIAN (Jan. 6, 2014), <https://www.theguardian.com/books/2014/jan/06/scarlet-letter-nathaniel-hawthorne-100-best-novels> (“A young woman, Hester Prynne, is publicly disgraced for committing adultery and giving birth to an illegitimate child.... Forced to wear a scarlet ‘A,’ Hester slowly redeems herself in the eyes of Puritan society.”).

⁴⁵ McCrum, *supra* note 44.

⁴⁶ Fred Bauer, *Cancel Culture Impoverishes Both the Heart and the Intellect*, NAT’L REV., (Sept. 25, 2019), <https://www.nationalreview.com/2019/09/cancel-culture-impoverishes-heart-and-intellect/>.

society.⁴⁷ Saying “please” and “thank you,” basic table etiquette like using a napkin, and “if you can’t say something nice, don’t say nothing at all”⁴⁸ are standard lessons used by parents, friends, and coaches alike to instruct kids about proper manners.⁴⁹ The district court in *Eichenwald v. Rivello* recognized the value of manners and their relationship to civility when it stated, “The civil tort is a mechanism by which courts aid in the maintenance of a civil society, and as such ‘offensive contacts, or those which are contrary to all good manners, need not be tolerated.’”⁵⁰

In fact, “[t]he fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims.”⁵¹ Therefore, when one attempts to “cancel” another, should not our tort system deter that wrongful conduct and compensate the cancellee? Our society should hope that we learn from our mistakes and errors in judgment. To not only publicize those errors but to use them to cause harm to another is unreasonable conduct.

So far as there is one central idea [in tort law], it would seem that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others.⁵²

“[C]ancel culture [is not] simply about criticizing others on social media.

⁴⁷ Pam Myers, *The Importance of Teaching Manners to Kids*, CHILD DEV. INST. (Aug. 17, 2011), <https://childdevelopmentinfo.com/parenting/the-importance-of-teaching-manners-to-kids/#gs.wineb9>.

⁴⁸ See Isadora Fox, *Teaching Kids to Mind Their Manners*, PARENTS (July 2005), <https://www.parents.com/toddlers-preschoolers/development/manners/teaching-kids-to-mind-their-manners/>; David Langness, *If You Can’t Say Something Nice...*, BAHAI TEACHINGS.ORG (Dec. 25, 2016), <https://bahaiteachings.org/cant-say-something-nice> (noting that in the Disney film *Bambi*, after the rabbit Thumper comments that Bambi “is kinda wobbly” and “doesn’t walk too good,” Thumper’s mother tells him “if you can’t say something nice, don’t say nothing at all,” which is known as the Thumperian Principle or Thumper’s Rule).

⁴⁹ See Fox, *supra* note 48.

⁵⁰ *Eichenwald v. Rivello*, 318 F. Supp. 3d 766, 772 (D. Md. 2018) (citing *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802–03 (Tex. 2010)); *id.* at 772–73 (explaining also that Rivello sent Eichenwald “an image with the intent to cause Plaintiff to have a seizure ... conduct outside the bounds of a civil society, conduct that should be punished so as to deter its repetition, and conduct that causes a compensable harm”); see Jules Coleman et al., *Theories of Common Law Torts*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 22, 2003), <https://plato.stanford.edu/archives/win2015/entries/tort-theories/> (“Conceiving of torts in terms of the paradigmatic case invites the thought that tort law proceeds by identifying wrongs that share some important normative characteristics with either trespass or battery – for example, that a tort involves an intention to disregard certain protected rights of others.”).

⁵¹ *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003).

⁵² W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 6 (5th ed. 1984).

Instead, it is often about translating this digital criticism into real personal pain: to cause jobs to be lost, college admissions to be revoked, and media platforms to be shut down.”⁵³ “Certainly [being canceled] has ruined people’s reputations and chances at business opportunities. . . .”⁵⁴ According to recording artist Taylor Swift,

A mass public shaming, with millions of people saying you are quote-unquote *canceled*, is a very isolating experience. . . . I don’t think there are that many people who can actually understand what it’s like to have millions of people hate you very loudly. When you say someone is canceled, it’s not a TV show. It’s a human being. You’re sending mass amounts of messaging to this person to either shut up, disappear, or it could also be perceived as *Kill yourself*.⁵⁵

Given the significant negative impact of being canceled, cancel culture is socially unreasonable and, therefore, tort liability should be applicable. Of course, the next question is which tort should apply, but William Lloyd Prosser contends there is “no necessity whatever that a tort have a name.”⁵⁶ However, following the above concept of “unreasonable interference with the interests of others,”⁵⁷ the intentional interference torts might be applicable.⁵⁸

Generally, states recognize three types of tortious interference torts: tortious interference with an existing contract, tortious interference with business relations, and tortious interference with an economic advantage.⁵⁹ Tortious interference with an existing contract requires that a plaintiff allege “the existence of a contract between the plaintiff and a third party, the defendant’s

⁵³ Bauer, *supra* note 46.

⁵⁴ Logan Mahan, *Youthsplaining: Everything You Need to Know About Cancel Culture*, INSIDEHOOK (Aug. 20, 2019), <https://www.insidehook.com/article/internet/youthsplaining-everything-you-need-to-know-about-cancel-culture>.

⁵⁵ Abby Aguirre, *Taylor Swift on Sexism, Scrutiny, and Standing Up for Herself*, VOGUE (Aug. 8, 2019), <https://www.vogue.com/article/taylor-swift-cover-september-2019?verso=true> (describing Swift’s reaction to the campaign to cancel her in July 2016 resulting from a dispute with Kim Kardashian West over lyrics in Kanye West’s song “Famous.”).

⁵⁶ KEETON ET AL., *supra* note 52, at 3.

⁵⁷ *Id.* at 6.

⁵⁸ *Tortious Interference*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/tortious_interference (last visited Feb. 9, 2020) (“Tortious interference is a common law tort allowing a claim for damages against a defendant who wrongfully interferes with the plaintiff’s contractual or business relationships.”); see Robert B. Gigl Jr., *The Murky World Of Tortious Interference: What Are The Rules Of The Game?*, N.J. LAW., Feb. 2008, at 14, 14–15.

⁵⁹ AARON D. HALL & ZACHARY G. NEWMAN, STRAFFORD, TORTIOUS INTERFERENCE WITH CONTRACTS AND PROSPECTIVE BUSINESS ADVANTAGE: PROVING AND DEFENDING CLAIMS 8, 9, 11, 15 (2015), <http://media.straffordpub.com/products/tortious-interference-with-contracts-and-prospective-business-advantage-proving-and-defending-claims-2015-02-11/presentation.pdf>.

knowledge⁶⁰ of the contract, the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and damages to the plaintiff."⁶¹ Tortious interference with business relations does not require any actual contract between the parties.⁶² Instead, it requires that the plaintiff show it had a business relationship with a third party, the interfering party knew of that relationship, the interfering party intentionally interfered with it by using an improper or illegal means, and the interference caused injury to the relationship with the third party.⁶³ If a plaintiff cannot show either knowledge of a contract or a business relationship, some jurisdictions, such as New Jersey, will recognize interference with an economic advantage if the plaintiff can show:

- (1) a plaintiff's existing reasonable expectation of economic benefit or advantage, (2) the defendant's knowledge of that expectancy, (3) the defendant's wrongful, intentional interference with that expectancy, (4) the reasonable probability that the plaintiff would have received the anticipated economic benefit in the absence of interference, and (5) damages resulting from the defendant's interference.⁶⁴

This is also referred to as interference with business expectancy, which clarifies that "tortious interference with contract requires third-party interference with an *existing* contract between parties, whereas interference with business expectancy requires third-party interference with a *prospective* contract between parties."⁶⁵

The elements of a claim for intentional interference with prospective economic advantage ("IIPEA") may vary from state to state, but in California, for example, the elements are:

- (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;

⁶⁰ See *DBS Constr., Inc. v. New Equip. Leasing, Inc.*, No. 2:10-cv-225, 2011 U.S. Dist. LEXIS 32681, at *11 (N.D. Ind. Mar. 28, 2011) (noting that actual knowledge is required as "objective standards like implied knowledge or constructive knowledge are insufficient").

⁶¹ HALL & NEWMAN, *supra* note 59, at 9.

⁶² *Cole v. Homier Distrib. Co.*, 599 F.3d 856, 861 (8th Cir. 2010) ("Under Missouri law, a plaintiff need not have an existing contract with a third party to maintain a claim for tortious interference.").

⁶³ HALL & NEWMAN, *supra* note 59, at 1, 12; *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994) ("[A business relationship] 'is something less than a contractual right, something more than a mere hope' [and] exists if there is a reasonable probability that a contract will arise from the parties' current dealings." (quoting *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Pa. 1979)) (citing *Glenn v. Point Park College*, 272 A.2d 895, 898-99 (Pa. 1971))).

⁶⁴ See *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1167 (3d Cir. 1993).

⁶⁵ Larry Watkins, *Tort Law—Tortious Interference with Business Expectancy—A Trap for the Wary and Unwary Alike*, 34 U. ARK. LITTLE ROCK L. REV. 619, 620 (2012) (citing RESTATEMENT (SECOND) OF TORTS § 766B cmt. a (AM. LAW. INST. 1965)).

(2) the defendant's knowledge of the relationship; (3) intentional wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's actions.⁶⁶

As to the third element of an intentional wrongful act, the act must be "independently wrongful"⁶⁷ meaning "wrongful by some legal measure other than the fact of interference."⁶⁸ For instance, acts of defamation or disparagement are sufficiently independently wrongful to satisfy the third element of a claim for IIPEA.⁶⁹ In the case of Aaron Calvin, he knew that King had some form of business expectancy or pending contract with Busch Light as it was well publicized.⁷⁰ Arguably, however, there was no wrongful act to satisfy the third element, since Calvin was backgrounding pursuant to newspaper policy.⁷¹ Alternatively, in some cases, "[i]f one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer,"⁷² however, again, Calvin's backgrounding likely would not be deemed malicious.⁷³

If the interference torts are unsuccessful for combating #cancelculture, one might look to defamation or disparagement; however, defamation would not be appropriate in most cases of #cancelculture because the tweets or other statements are often true.⁷⁴ While to disparage means "[t]o bring discredit or

⁶⁶ *Deerpoint Grp., Inc. v. Agrigenix, L.L.C.*, 393 F. Supp. 3d 968, 987 (E.D. Cal. 2019).

⁶⁷ *Deerpoint Grp., Inc. v. Agrigenix, L.L.C.*, 345 F. Supp. 3d 1207, 1234 (E.D. Cal. 2018) (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 45 Cal. Rptr. 2d 436 (1995)).

⁶⁸ *Id.*

⁶⁹ *Deerpoint Grp., Inc. v. Agrigenix, L.L.C.*, 345 F. Supp. 3d 1207, 1234 (E.D. Cal. 2018) (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 131 Cal. Rptr. 2d 29 (2003)).

⁷⁰ See *Viral Venmo Guy Carson King Dumped by Beer Maker over Tweets*, MERCURY NEWS, <https://www.mercurynews.com/2019/09/25/viral-venmo-guy-carson-king-dumped-by-beer-maker-over-high-school-tweets/> (last updated Sept. 25, 2019, 9:37 AM); Sandy Hingston, *The Best Thing That Happened This Week: I Got Yer First Stone Right Here*, PHILA.: CITY LIFE (Sept. 28, 2019, 8:57 PM), <https://www.phillymag.com/news/2019/09/28/busch-light-carson-king/>.

⁷¹ Calvin, *supra* note 13.

⁷² *Angle v. Chicago*, 151 U.S. 1, 14 (1894).

⁷³ See RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW. INST. 1965) (explaining the elements for defamation, that a journalist could be held liable for committing); see also RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977) (explaining the elements for the "Publicly Placing Person in False Light" tort, that a journalist could be held liable for committing).

⁷⁴ RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1965) ("To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher...; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.").

reproach upon; to dishonour, discredit; to lower in credit or esteem,”⁷⁵ a claim for disparagement typically involves economic loss related to a product rather than the reputational damage of defamation.⁷⁶

A case might be made under false light publicity, or against “[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light.”⁷⁷ “To place someone in a false light does not necessarily mean that specifically false statements were made about the individual. Instead, misleading implications that the average person would find highly offensive are often enough.”⁷⁸ Although Carson King tweeted inappropriate statements in the past, by Aaron Calvin making these tweets public, he arguably showed King in a false light considering that Calvin notes how King had matured since making the tweets.⁷⁹ Part of the problem is that a newspaper in this type of situation might argue that old controversial tweets are newsworthy regardless of whether the author has changed.⁸⁰ But, mistakes that one made in his or her youth should not be newsworthy when he or she has clearly grown into the kind of person who is able to raise millions of dollars for a hospital. Did the newsworthiness of King’s background information outweigh his right to his relationship with Busch Light? Was the newsworthiness of those tweets sufficient to jeopardize the increasing donations to the children’s hospital? Or, under Thumper’s Rule, would it have been better to not say anything at all?

While Carol Hunter insists that “[t]he Register had no intention to disparage or otherwise cast a negative light on King,”⁸¹ that argument stretches the

⁷⁵ *FreeLife Int’l Inc. v. Am. Educ. Music Publ’n Inc.*, No. CV07-2210-PHX-DGC, 2009 U.S. Dist. LEXIS 97680, at *16 (D. Ariz. Oct. 1, 2009) (citing *Disparage*, OXFORD ENGLISH DICTIONARY (2d ed. 1989)).

⁷⁶ See RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1965).

⁷⁷ RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (AM. LAW INST. 1977) (“It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.”); see also *Pooley v. Nat’l Hole-In-One Ass’n*, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000) (“publicity which places plaintiff in false light in public eye.”).

⁷⁸ *Invasion of Privacy, False Light*, FINDLAW, <https://injury.findlaw.com/torts-and-personal-injuries/invasion-of-privacy—false-light.html> (last visited Feb. 18, 2020); RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

⁷⁹ Calvin, *supra* note 13; see also Carson King (@CarsonKing2), TWITTER (Sept. 24, 2019, 8:17 PM), <https://twitter.com/CarsonKing2/status/117665187648763904?s=20> (“I am embarrassed and stunned to reflect on what I thought was funny when I was 16-years-old. I want to sincerely apologize. Thankfully, high school kids grow up and hopefully become responsible and caring adults.”).

⁸⁰ See generally 62A AM. JUR. 2D *Privacy* § 155 (2020) (outlining the legal standards of newsworthiness as an exception to the right of privacy).

⁸¹ Hunter, *supra* note 27.

boundaries of credulity.⁸² When sharing King's tweets, what other purpose was there than to cast a negative light? Hunter goes on to say, "There have been numerous cases nationally of fundraising for a person experiencing a tragedy that was revealed as a scam after media investigated the backgrounds of the organizer or purported victim."⁸³ However, that fact is irrelevant here since the beneficiary of the donations was a well-established hospital.⁸⁴ King's tweets were not newsworthy, nor was reporting them good manners. Calvin and the newspaper knew of the rapid fame King was enjoying, as well as his relationship with Busch Light, which they destroyed with their backgrounding.⁸⁵ That disparagement and interference with business expectancy is the type of conduct that should be subject to tort liability in order to deter such conduct in the future.

IV. CONCLUSION

When referring to Carson King, *The Mercury News* claimed, "Social media made him a celebrity, and social media brought him down."⁸⁶ But that is not what really happened. True, it was his photograph going viral on social media that created enough attention to make him a fundraising celebrity, and it was eight-year-old tweets made on social media that took the story in a different direction.⁸⁷ However, it was also one reporter who learned that Carson King was "kinda wobbly" when he was young that led to King's downfall.⁸⁸ Trying to hide behind newsworthiness and the public interest, Calvin exposed those youthful tweets,⁸⁹ and he did so with knowledge of King's relationship with Busch Light, knowing that the tweets would likely end that relationship.⁹⁰ Unfortunately, neither Calvin nor the editorial staff of the *Des Moines Register* exercised Thumper's Rule. Calvin was not fighting the good fight or protecting the public because he admitted that King was not the same person he was when he wrote

⁸² See generally Keith N. Hylton, *Intent in Tort Law* 6–7, 11 (Bos. Univ. Sch. of Law, Working Paper No. 09-21, 2009) (outlining when intent can be inferred in a tort context).

⁸³ Hunter, *supra* note 27; see generally *Woman Pleads Guilty to GoFundMe Scam Involving Homeless Man*, ASSOCIATED PRESS (Apr. 5, 2019), <https://apnews.com/8100127aa6e544d4adf884c509cb4507> (outlining a recent example of a news story in which three individuals posted a fabricated feel-good story to garner media attention and fraudulently raise over \$400,000).

⁸⁴ Hunter, *supra* note 27.

⁸⁵ Calvin, *supra* note 13.

⁸⁶ *Viral Venmo Guy Carson King Dumped by Beer Maker over Tweets*, *supra* note 70.

⁸⁷ *Id.*

⁸⁸ Langness, *supra* note 48.

⁸⁹ Calvin, *supra* note 13.

⁹⁰ See generally Aaron Calvin, *Twitter Hates Me. The Des Moines Register Fired Me. Here's What Really Happened*, COLUM. JOURNALISM REV. (Nov. 4, 2019), https://www.cjr.org/first_person/aaron-calvin-viral-story-tweets.php.

those tweets.⁹¹ Rather, he was just drawing attention to himself as the one who brought down the Iowa Legend.⁹² Thankfully, King recovered, enjoying “Carson King Day” on September 28,⁹³ which was declared as such by Iowa Governor Kim Reynolds, who tweeted “You can make a mistake in your life, and still go on to do amazing things. @CarsonKing2, thank you for reminding us all of that! #IowaProud.”⁹⁴ In addition, the Stead Family Children’s Hospital enjoyed almost \$3 million in donations raised by King.⁹⁵ Still, the story could have easily ended in a very different manner. Since Thumper’s Rule is not working, it is time to think about imposing tort liability in this area, because if a risk of tort liability exists, people may think twice before engaging in #cancelculture.

⁹¹ Calvin, *supra* note 13.

⁹² Vanessa Miller, *Carson King Forgoes Cut of ‘Iowa Legend’ Bobblehead*, GAZETTE (Oct. 14, 2019), <https://www.thegazette.com/subject/news/carson-king-bobblehead-iowa-legend-ui-childrens-hospital-20191014>.

⁹³ *As Busch Distances Itself from Carson King, Other Businesses Pledge Their Support*, *supra* note 19.

⁹⁴ Kim Reynolds (@KimReynolds), FACEBOOK (Sept. 25, 2019, 3:12 PM), <https://www.facebook.com/KimReynoldsIA/photos/a.653310204719907/2672908849426689/?type=3&theater>.

⁹⁵ Zdanowicz, *supra* note 20.