Patel v. Facebook, Inc.: Biometric Data Collection Changes the Interpretation of Concrete Injury for Intangible Harms

I. OVERVIEW

The Illinois State legislature passed the Biometric Information Privacy Act (BIPA) in 2008, which codified Illinois citizens' rights to their biometric information.[1] The statute provided a "right of action" for any Illinoisan whose biometric identifiers or information were collected by a "private entity" that did not first notify the citizen of the collection, inform them of the length and purpose of the capture, and receive their written permission for capture.[2]

Two years after BIPA was enacted, Facebook created Tag Suggestions, a new feature for photos shared on their platform.[3] Although Facebook already allowed users to "tag" friends in their photos, Tag Suggestions used facial-recognition technology to automatically recommend tags of Facebook friends in an uploader's photos.[4] Tag Suggestions, once enabled (or "turned on"), "extract[ed] the various geometric data points that make a face unique" to create a signature of a user's face.[5] "The technology then compare[d] the face signature to faces in Facebook's database of user face templates" that were already matched to user profiles."[6] If there was a match between the face signature and face template, Facebook suggested that the uploader tag specific friends.[7]

Three Illinois citizens filed suit in the Northern District of California against Facebook for the collection, use, and storage of their biometric identifiers from their uploaded photos without written permission "and

1. Patel v. Facebook, Inc., 932 F.3d 1264, 1268 (9th Cir. 2019), *cert. denied*, Facebook, Inc. v. Patel, No. 19-706, 2020 WL 283288, at *1 (S. Ct. Jan. 21, 2020).
2. *Id.*
3. *Id.*
4. *Id.* at 1267 ("A tag identifies the friend in the photo by name and includes a link to that friend's Facebook profile.").
5. Geometric data points included "the distance between the eyes, nose, and ears, to create a face signature or map." *Id.* at 1268.
6. *Id.*
7. *Id.*

without a compliant retention schedule."[8] After each plaintiff uploaded photos to Facebook while in Illinois, they alleged Facebook violated the BIPA after the company used the uploaded photos to create a unique facial signature.[9] The district court denied Facebook's motion to dismiss for lack of Article III standing.[10] The district court also certified the plaintiffs as a class "of Facebook users located in Illinois for whom Facebook created and stored a face template after June 7, 2011."[11] In the noted case, the Court of Appeals for the Ninth Circuit *held* that the plaintiffs had sufficient injury-in-fact to establish Article III standing. Patel v. Facebook, Inc., 932 F.3d 1264 (9th Cir. 2019), *cert. denied*, Facebook, Inc. v. Patel, No. 19-706, 2020 WL 283288, at *1 (S. Ct. Jan. 21, 2020).

II. BACKGROUND

Article III, Section 2 of the Constitution limits the actions that federal courts can hear to "cases" and "controversies."[12] A plaintiff must have standing to bring a case or controversy.[13] Three elements comprise standing: 1) the sufferance of an actual injury; 2) traceability of the injury to the named defendant's conduct; and 3) the court's ability to redress the injury.[14]

Under the first element, an injury must be actual or imminent as well as concrete and particularized.[15] Actuality or imminence concerns the timing of the injury; the injury cannot be hypothetical, and the plaintiff must be in immediate danger if they have not already suffered harm.[16] A concrete and particularized injury "expresses a 'real need' for judicial review to protect [the plaintiff's] interests."[17] Tangible injuries, which generally produce "economic or physical harm," satisfy the concreteness

8. *Id.*
9. *Id.*
10. *Id.* at 1269.
11. *Id.* (quoting *In re* Facebook Biometric Info. Privacy Litig., No. 3:15-cv-03747-JD, 2018 WL 1794295, at *4 (N.D. Cal. Apr. 16, 2018)).
12. U.S. CONST. art. 3, § 2; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559 (1992).
13. Benjamin West, Note, *No Harm, Still Foul: When an Injury-in-Fact Materializes in a Consumer Data Breach*, 69 HASTINGS L.J. 701, 704 (2018).
14. *Id.*
15. Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017) ("A plaintiff establishes injury in fact, if he or she suffered '"an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."'" (quoting *Lujan*, 504 U.S. at 560)); West, *supra* note 13, at 704-05.
16. Vanessa K. Ing, Spokeo, Inc. v. Robins*: Determining What Makes an Intangible Harm Concrete*, 32 BERKELEY TECH. L.J. 503, 505 (2017); *see also Lujan*, 504 U.S. at 564.
17. Ing, *supra* note 16, at 506 (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974)); *see also Lujan*, 504 U.S. at 563.

requirement without issue.[18] Intangible injuries, on the other hand, require further analysis.

Originally, the Supreme Court recognized that Congress created injuries through legislation.[19] For example, violation of an enacted statute could be, of itself, an injury.[20] However, the Court in *Spokeo, Inc. v. Robins* amended the analysis of concreteness for intangible injuries.[21] In *Spokeo*, the plaintiff sued a "people search engine" website for a breach of the Fair Credit Reporting Act (FCRA) after the plaintiff used the website and found inaccurate information about himself, including incorrect marital and employment status, age, income, and educational level.[22] While these inaccuracies violated the FCRA, they did not amount to an injury that satisfied the concreteness component of standing because the misinformation did not cause the plaintiff substantive harm.[23] Justice Alito, writing for the majority, found that a "bare procedural violation" did not automatically constitute a concrete injury-in-fact and required further examination of the intangible harm's historical context and legislative intent.[24]

Upon remand, the Ninth Circuit Court of Appeals asked two questions to determine whether an intangible harm satisfied the concrete requirement of standing: "(1) whether the statutory provisions at issue were established to protect [a plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests."[25] To determine whether a statute violated the plaintiff's procedural rights or substantive rights, the court examined whether the harm at issue was historically a basis for suit and explored congressional intent behind the statute's creation.[26] The court concluded that the FCRA did protect the plaintiff's concrete interests based upon previous decisions regarding the FCRA, congressional documents, and the FCRA's purpose in protecting a harm that had been historically concrete.[27]

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18. Ing, *supra* note 16, at 507.

19. Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM & MARY L. REV. 2285, 2295 (2018).

20. *Id.*; *see also Lujan*, 504 U.S. at 578.

21. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

22. *Id.* at 1546.

23. Substantive harm is when there is a "material risk of harm" compared to a procedural harm, which is the violation of statute meant to protect a substantive harm. *Id.* at 1550.

24. *Id.* at 1549.

25. Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017).

26. *Id.*

27. *Id.* at 1113-15.

Most federal courts have adopted the *Spokeo* two-part test.[28] Through implementation of the *Spokeo* test, federal courts recognized the importance of analyzing the statute's historical importance and Congress's intent when implementing the statute to delineate substantive harm from procedural violations.[29]

For example, the Ninth Circuit distinguished a bare procedural violation from a substantive right injury in *Bassett v. ABM Parking Services, Inc.*[30] In that case, the plaintiff received a parking garage receipt with his credit card's expiration date.[31] The plaintiff sued the garage for violation of the FCRA because the statute contained a provision that barred a merchant from printing the expiration date of a customer's credit card on a receipt.[32] Despite this violation, the plaintiff did not have a concrete injury to satisfy Article III standing requirements because the violated right was merely procedural.[33] The presence of the expiration date on the receipt did not create an injury that was "supported by historical practice."[34] Moreover, the information was only exposed to the information holder, the plaintiff, and not a third party.[35] Without third-party exposure, the plaintiff's rights were not infringed.[36]

Moreover, the court looked to Congress's intent behind the FCRA and found that it was enacted to protect consumers against "identity theft or credit card fraud."[37] However, when Congress passed the Credit and Debit Card Receipt Clarification Act, they noted that exposure of a credit card expiration date does not raise a consumer's risk of theft or fraud if the

28. *See* Susinno v. Work Out World, Inc., 862 F.3d 346, 351-52 (3d. Cir. 2017) (holding that the plaintiff suffered a concrete injury-in-fact because it fell squarely within the congressional statute's intended protection and the statute protected a historically recognized right); Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017); Nicklaw v. CitiMortg., Inc., 839 F.3d 998 (11th Cir. 2016) (holding the plaintiff's injuries were not concrete to satisfy Article III standing because there was no federal statute under which to evaluate the injury and the bare procedural violation of a state law was not concrete; also, due to the facts of the case, the injury was not historically recognized as a protected right).

29. Bassett v. ABM Parking Servs., LLC, 883 F.3d 776, 780 (9th Cir. 2018) (explaining the decision-making process by the Seventh and Second Circuits concerning concreteness and agreeing with their sister circuits that "history and congressional judgment 'play important roles' in [their] analysis of whether an injury is concrete").

30. *Id.* at 781.

31. *Id.* at 778.

32. *Id.*

33. *Id.* at 783.

34. *Id.* at 780.

35. *Id.*

36. *Id.*

37. *Id.* at 781 (citing Credit and Debit Card Receipt Clarification Act, Pub. L. No. 110-241, 122 Stat. 1565 (2008)).

receipt does not expose a full credit card number.[38] In *Bassett*, the plaintiff's credit card number was properly truncated on the receipt, and he was the only recipient of that receipt.[39] Therefore, the mere procedural violation of printing the expiration date did not create an imminent risk of theft or fraud, the true substantive right that Congress aimed to protect.[40]

In *Bassett*, the Ninth Circuit also highlighted how the listing of a procedural right in a statute did not create a substantive right and would not change a case's outcome.[41] According to the court, the violated procedural right would be substantive only if the FCRA had intended to protect a person's "right to be free from receiving a receipt showing his credit card expiration date."[42] But "[s]uch a framing-dependent exercise is arbitrary" because the text of the FCRA outlined procedural obligations for the ultimate protection of a substantive right.[43] The listing of procedural violations did not change the statute's ultimate intent.

Unlike *Bassett*, *Van Patten v. Vertical Fitness Group, LLC* established how a procedural violation could also be a violation of a substantive right because that violation constituted a *de facto* injury.[44] In *Van Patten*, the plaintiff received several unauthorized text messages from a gym where he had canceled his membership.[45] The Ninth Circuit found that these messages constituted a concrete injury-in-fact because the Telephone Consumer Protection Act of 1991 specifically protected against such privacy intrusions like telemarketing calls.[46] Moreover, courts have historically recognized the intrusion of one's privacy as a basis for a lawsuit.[47]

Similarly, the Illinois Supreme Court in *Rosenbach v. Six Flags Entertainment Corp.* held that a violation of BIPA's explicit provisions did not require "more" to confer Article III standing for an aggrieved party.[48] Section 15 of BIPA requires that a private corporation inform the owner of biometric information, in writing, that their information is being collected or stored, the purpose of that collection, storage, or usage, and receive the

38. *Id.*
39. *Id.* at 778, 781.
40. *Id.* at 781.
41. *Id.* at 782.
42. *Id.*
43. *Id.* at 782-83.
44. Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017).
45. *Id.* at 1041.
46. *Id.* at 1043.
47. *Id.*
48. Rosenbach v. Six Flags Entm't Corp., 129 N.E.3d 1197, 1207 (Ill. 2019).

owner's written permission.[49] The plaintiff was a minor whose mother had purchased him a season pass to a Six Flags amusement park in Gurnee, Illinois.[50] The minor had to scan his fingerprint to enter the park and use his season pass.[51] However, the park collected the minor's biometric data without written permission from the minor or his parents.[52] Furthermore, the park did not disclose how they would use the biometric information or how long they would store the information.[53]

To recover under BIPA, a person must be "aggrieved by a violation of th[e] Act."[54] The Illinois Supreme Court defined an aggrieved person based on its plain language definition because the Illinois General Assembly did not require additional injury to a statutory violation to make a plaintiff "aggrieved" in the BIPA statute.[55] The court understood the legal, popular, and historical meaning of aggrieved as a person who had suffered "from an infringement or denial of legal rights."[56] Therefore, the minor in *Rosenbach* was aggrieved when his legal right was violated after his biometric information was collected without informed, written consent.[57] While the violation was procedural, the right violated was substantive and did not require additional harm to constitute standing.[58]

Despite the established two-part substantive rights test, there is no consensus among federal courts regarding the definition of harm while some courts have conflated concreteness with imminence.[59] As the Ninth Circuit explained in *Bassett*, a mere procedural harm needs more to satisfy

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49. *Id.* at 1203 (citing Biometric Information Privacy Act (BIPA), 740 ILCS 14/1, § 15 (2008)).

50. *Id.* at 1200.

51. *Id.* ("[Defendant's] system 'scans pass holders' fingerprints; collects, records, and stores "biometric" identifiers and information gleaned from the fingerprints; and then stores that data in order to quickly verify customer identities upon subsequent visits by having customers scan their fingerprints to enter the theme park.'").

52. *Id.* at 1200-01.

53. *Id.* at 1201.

54. *Id.* (citing BIPA, 740 ILCS § 20).

55. *Id.* at 1204.

56. The court referenced *Merriam-Webster's Dictionary* to determine the common meaning. *Id.* at 1205.

57. *Id.* at 1206.

58. *Id.*

59. *See* Meyer v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 727 (7th Cir. 2016) (using the reasoning in *Spokeo* and an analysis of congressional intent to conclude that the plaintiff's injury did not satisfy the concreteness requirement of standing because the printing of his credit card's expiration date on his receipt did not increase his risk of harm); *see also* Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 691 (8th Cir. 2017) (using comparable analysis to hold that a plaintiff did have a concrete injury-in-fact because "the concrete injury can be the risk of real harm" (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016))); Crupar-Weinmann v. Paris Baguette Am., 861 F.3d 76, 81 (2d Cir. 2017).

the concreteness requirement of standing.[60] For example, since the plaintiff "did not allege that another copy of the receipt existed, that his receipt was lost or stolen, that he was the victim of identity theft, or even that another person apart from his lawyers viewed the receipt," the plaintiff was not in risk of real harm.[61] The "risk of real harm" analysis required of a mere procedural violation forces federal courts to analyze the imminence of the injury under a different language.

In the noted case, the Court of Appeals for the Ninth Circuit relied on the two-step analysis developed through *Bassett* and *Van Patten* and held that the defendants had a substantive privacy right because privacy has historically provided "a basis for lawsuit in English or American courts" and because Facebook's actions violated what the BIPA statute explicitly protected.[62]

III. COURT'S DECISION

The court began their analysis by describing the two-step test and the fundamentals of a concrete injury.[63] *Spokeo* governed the court's decision, including their definition of injury and their adoption of the two-step analysis.[64] The court then cited *Van Patten* to describe that the violation of a privacy right did not require additional allegations of harm because a privacy violation is itself sufficient for a concrete injury-in-fact.[65] They then contrasted *Van Patten* with *Bassett* to highlight the difference between a violation of a substantive right from a mere procedural violation.[66]

Turning to the first question of the two-step analysis, the court analyzed whether Facebook's collection of the plaintiffs' biometric information constituted a historical basis for suit. The court examined the history of privacy rights in American courts.[67] Common law has included privacy as a right since 1890 and "the existence of a right of privacy [was] recognized in the great majority of the American jurisdictions that have considered the question."[68]

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60. Bassett v. ABM Parking Servs., LLC, 883 F.3d 776, 783 (9th Cir. 2018).
61. *Id.*
62. Patel v. Facebook, Inc., 932 F.3d 1264, 1273-74 (9th Cir. 2019), *cert. denied*, Facebook, Inc. v. Patel, No. 19-706, 2020 WL 283288, at *1 (S. Ct. Jan. 21, 2020).
63. *Id.* at 1270.
64. *Id.* at 1270-71.
65. *Id.* at 1271.
66. *Id.*
67. *Id.* at 1272.
68. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (AM. LAW INST. 1977)).

The court also looked to the Supreme Court's recognition of a privacy right.[69] They cited recent Supreme Court cases that acknowledged how the advent of technology can circumvent laws governing traditional privacy intrusions because the technological methods of collecting information are significantly more advanced.[70] The Ninth Circuit's reasoning included the "constitutionally protected zones of privacy" created by the First and Fourth Amendments.[71] The technology in the noted case had the ability to identify an individual, find their likeness among the hundreds of thousands of uploaded Facebook photos, pinpoint their location, and identify the time that they were present at that location.[72] As the invasion of privacy has historically been recognized as a concrete basis for a lawsuit, and the technology's current capacity to invade an individual's privacy, as well as the potential for future invasion as the technology progresses, the court found the harm in the noted case was substantive.[73]

The court next examined the Illinois General Assembly's rationale for the creation of BIPA. The Assembly enacted BIPA to protect Illinois citizens' "welfare, security, and safety" by regulating the collection of biometric information.[74] This desire was also recognized by the Illinois Supreme Court, who, in *Rosenbach*, declared that a violation of BIPA was a substantive harm that required no additional loss to establish an injury-in-fact.[75] The harm in the noted case violated the intent behind BIPA and the statute's specific requirements because Facebook created a biometric template of Illinois users' faces without notifying the users and receiving their written permission.[76]

The court ended their analysis of concreteness by questioning "whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to [concrete] interests."[77] As described above, the Illinois Supreme Court already answered this question.[78] Any of the procedural elements of BIPA serve the ultimate

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69. *Id.*

70. *Id.* at 1272-73; *see* Carpenter v. United States, 138 S. Ct. 2206, 2215 (2018); Riley v. California, 573 U.S. 373, 386 (2014); Kyllo v. United States, 533 U.S. 27, 34 (2001); *see also* United States v. Jones, 565 U.S. 400, 416, 418 (2012).

71. *Patel*, 932 F.3d at 1272.

72. *Id.* at 1273.

73. *Id.*

74. *Id.* at 1273-74.

75. *Id.*; *see* Rosenbach v. Six Flags Entm't Corp., 129 N.E.3d 1197, 1206 (Ill. 2019).

76. *Patel*, 932 F.3d at 1273-74.

77. *Id.* at 1274 (citing Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017)).

78. *Id.*

purpose of protecting an Illinoisan's substantive right to privacy, and therefore the violation of BIPA was a *de facto* concrete injury.[79]

IV. ANALYSIS

The Ninth Circuit's conclusion in *Patel* properly recognized plaintiffs' concrete injury when their biometric information was collected, used, or stored. However, the rigorous analysis the court imposed evaluated the actuality and imminence of the injury rather than the injury's concreteness. Such a conflation between concreteness and imminence leads to the improper categorization of an intangible injury as non-concrete for purposes of Article III standing.

In the noted case, the Ninth Circuit recognized that the advancement of the face-mapping technology had serious privacy concerns because the future development of the technology could lead to further privacy invasions.[80] This recognition considered the imminence of the injury without the language of actuality or imminence and found the intangible injury of face-mapping to be concrete.[81]

Yet the Fourth Circuit held in *Beck v. McDonald* that an increased risk of identity theft is neither an impending risk nor substantial risk.[82] *Beck* concerned two data breaches at a Veterans Affairs Medical Center.[83] The plaintiffs sued the medical center and tried to establish Article III standing based on the "increased risk of future identity theft and the cost of measures to protect against it."[84] According to the court, the multiple data breaches did not satisfy the requirements of a concrete injury because the information accessed in the hacks was not used, and without the *use* of the misplaced or stolen information, the risk of identity theft was hypothetical.[85]

Such reasoning is common of federal circuits who do not believe that an increased risk of identity theft equates to impending or substantial risk.[86] These courts find that the increased risk of injury is too attenuated

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79. *Id.*; *see Rosenbach*, 129 N.E.3.d at 1206.
80. *Patel*, 932 F.3d at 1273.
81. *Id.*
82. Beck v. McDonald, 848 F.3d 262, 275 (4th Cir. 2017).
83. *Id.* at 266.
84. *Id.* at 266-67.
85. *Id.* at 275-76.
86. *See* George Lynch, *Considering Standing Law and Future Risk of Harm in Data Breach Litigation*, BIG L. BUS. (Feb. 23, 2018), http://biglawbusiness.com/considering-standing-law-and-future-risk-of-harm-in-data-breach-litigation (explaining that the First, Second, Third, Fourth, and Eighth Circuits all found that an "increased risk of future fraud and identity theft [are] insufficient to establish standing").

between hack and harm to satisfy standing requirements. Thus, they completely bypass the first question of whether the violated right was substantive, as required by *Spokeo*, and assume the harm is a procedural violation by their examination of a risk of future harm.

This argument puts consumers at substantial risk and relieves companies of their responsibility to protect users' information because the equation of concreteness with imminence for intangible privacy violations bypasses the two-step analysis required by *Spokeo*. When one's personal information—particularly biometric information—is collected, stored, or used without the users' explicit permission, their right to privacy has been concretely violated.[87] Whether or not this collection, storage, or use leads to a future injury or increases the person's future risk of injury should not affect the concreteness of that injury, but be a separate analysis to determine actuality or imminence.

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87. Patel v. Facebook, Inc., 932 F.3d 1264, 1275 (9th Cir. 2019).

* © 2020 Rebecca Schwartz. J.D. candidate, 2021, Tulane University Law School; B.A., Sociology, 2016, Tulane University. Rebecca would like to thank her parents for their unending support, her Bubbie for her tenacity, and all her family and friends for their encouragement. She also thanks the *Journal of Technology and Intellectual Property* for their patience.