

BRINGING DIGNITY BACK TO LIGHT: PUBLICITY RIGHTS AND THE ECLIPSE OF THE TORT OF APPROPRIATION OF IDENTITY

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I. INTRODUCTION

Popular singer Bette Midler sued Ford for using a sound-alike to mimic her voice in a car commercial on television.¹ Former First Lady Jacqueline Onassis sued Christian Dior for using a look-alike to sell its products in a print advertisement.² Actor Clint Eastwood sued the National Enquirer for exploiting his name and image solely to sell newspapers.³ Today, when we think of torts involving the use of someone's name or image without her consent, these are the types of cases that come to mind: celebrities seeking to control the exploitation of their fame for profit. Most likely, such cases are framed in terms of the right of publicity, a property-based right involving the commercial value of celebrity identity.⁴ Indeed, so prominent is the right of publicity that it has come to eclipse the existence of another cause of action that may arise from the very same set of facts: the tort of appropriation of identity.

While publicity is grounded in property rights,⁵ appropriation of identity involves the personal right to privacy.⁶ Publicity rights implicate monetary interests.⁷ In contrast, privacy rights protect and vindicate less tangible personal interests in dignity and integrity of the self.⁸ However, both rights are clearly linked and find their common origin in American law around the turn of this century.⁹ Yet over the years, the privacy-based tort of appropriation has receded into the background as its flashier cousin, publicity,

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¹ See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

² See *Onassis v. Christian Dior of N.Y., Inc.*, 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984).

³ See *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983).

⁴ See Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 654 (1991).

⁵ See *id.* at 666.

⁶ See RESTATEMENT (SECOND) OF TORTS § 625C (1976).

⁷ See Post, *supra* note 4, at 667.

⁸ See *id.*

⁹ See Robert C. Post, *The Social Foundations of Privacy Law: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 958 (1989).

has risen to prominence. Such is perhaps to be expected in a world where seemingly everything has been turned into a saleable commodity. As celebrities perpetually trade on their names and images in the open market, it may seem quaint, at best, to invoke dignity as a basis for protecting personal identity. But this is exactly what happens. Midler, Onassis, and Eastwood each had valid publicity claims, but more important to them was the vindication of a personal right to control the meaning and substance of their identities.¹⁰ In case after case, even while demanding restitution for the converted monetary value of their names and images, celebrities invoke dignitary concerns as a prime motivation for their attempt to protect and vindicate the integrity of their identities before the law.¹¹ Moreover, for average citizens, the power to control the use of their name or image can be critical to maintaining the integrity of their identities.

The courts recognize this, but they all too frequently subsume all such claims under the rubric of publicity. Even when acknowledging the privacy interest involved, courts tend to confuse and blur the boundary between the two causes of action, with the inevitable result being that the more prominent and tangible right of publicity comes to eclipse the privacy-based concerns for identity.¹² I say "eclipsed" quite deliberately, because while these latter concerns persist throughout and animate much of the courts' reasoning, they remain obscured. Because these concerns are never fully articulated, their implications are never fully explored.

This Article aims to bring the tort of appropriation back into the light. The task is to disentangle publicity and privacy, the conjoined twins of our modern media-saturated society. By examining their origins and development I will show how courts have consistently, if often obliquely, granted legal recognition to identity as a dignitary interest. In bringing such interests to the fore, I hope to revitalize our concern for and examination of intangible, noncommercial values as they inform and guide the legal management of identity. Indeed, the legal recognition of dignitary interests manifested in the jurisprudence of appropriation has created and maintained a legally sanctioned space that places control over the self beyond the reach of the market.

¹⁰ See Post, *supra* note 4, at 667.

¹¹ See *id.*

¹² "The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona.'" *Id.* at 666 (quoting *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978)). For a more detailed discussion of *Ali*, see *infra* notes 282-87 and accompanying text.

As we choose our legal values, we locate power to interpret and enforce the law. While both publicity and appropriation involve fairly straightforward methods to determine whether someone's name or image has been used without her consent, they call upon significantly different sources of authority to assess the nature and degree of harm caused by such misuse. Publicity rights demand accountants and other relevant experts from the realm of celebrity and marketing to determine damages. Appropriation calls upon the local community to consider whether an outrage or affront to relevant social norms has occurred. The former involves the virtues and vices of expert management. The latter similarly involve the virtues and vices of local democratic control. As Robert Post has noted, democracy and expert management exist in a deep tension that pervades our contemporary legal and political system.¹³ The following examination of the relationship between publicity and appropriation illuminates the tensions between democracy and management, even as it provides new insights into the legal relationship between the fungible and non-fungible aspects of our identities. In assessing the legal status of identity it is imperative to articulate and engage the tradition of concern for such intangible values as dignity and integrity as integral parts of our legal system. The jurisprudence of publicity and appropriation provide a unique and powerful avenue to explore such issues.

II. APPROPRIATION OF IDENTITY

A. *Origins*

The tort of appropriation of identity is grounded in the right to privacy.¹⁴ That right was given its most authoritative early elaboration in 1890 by Samuel Warren and Louis Brandeis in a now legendary law review article.¹⁵ Discussing privacy as a free standing, undifferentiated right, Warren and Brandeis focused their concern on providing legal protection for "man's spiritual nature."¹⁶ To these genteel legal elites, privacy did not involve property so much as the "more general immunity of the person — the right to one's personality."¹⁷ As articulated by Warren and Brandeis, the right to privacy was meant to provide a means whereby local communities

¹³ See generally ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 1-22 (1995).

¹⁴ See RESTATEMENT (SECOND) OF TORTS § 652C (1976).

¹⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁶ *Id.* at 193.

¹⁷ *Id.* at 205.

could invoke the power of the state to protect individual dignity against the encroachment of the powerful institutions of modern urban industrial life.¹⁸ Perhaps foremost among these was the ever expansive national market economy which, by the turn of the century, seemed poised to engulf all aspects of American society.¹⁹

The right to privacy was, in large measure, invoked to create a legally sanctioned space beyond the reach of market forces. Such a conception of privacy was not anti-capitalist. Rather, it sought to contain the market within its proper boundaries. Anxiety about the dangers of commodifying private life (or “man’s spiritual nature”)²⁰ is evident in *Pavesich v. New England Life Insurance Co.*,²¹ the first court case to recognize the right to privacy. In this 1905 Georgia case, Paolo Pavesich brought suit to recover damages for the unauthorized use of his name and image in an advertisement for insurance. In the course of a remarkable opinion that analogized appropriation of identity to enslavement, the court made it clear that such commercial exploitation of Pavesich’s identity constituted a dignitary harm insofar as it deprived him of control over his identity. Thus, the court stated:

The knowledge that one’s features and form are being used for such a purpose and displayed in such places as advertisements are often liable to be found brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him, and as long as the advertiser uses him for these purposes, he cannot otherwise than be conscious of the fact that he is, for the time being, under the control of another, and that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even ordinary sensibilities, no one can be more conscious of his complete enthrallment than he is.²²

The defendant in effect had coerced Pavesich himself by forcing his identity into service. Moreover, the court identified the commercial context of an advertisement as a distinctive threat to the integrity of his persona.²³ Forcing Pavesich’s identity into the market rendered his unique individuality into a fungible commodity,

¹⁸ *Id.* at 195.

¹⁹ For a more complete discussion of the origins of the tort, see Jonathan Kahn, *Enslaving the Image: The Origins of the Tort of Appropriation of Identity Reconsidered*, 2 *LEGAL THEORY* 301 (1996).

²⁰ Warren & Brandeis, *supra* note 15, at 197.

²¹ 50 S.E. 68 (Ga. 1905).

²² *Id.* at 80.

²³ *See id.* at 80-81.

capable of being bought and sold. In this context, privacy rights have their roots in a regard not simply for dignity in general, but more specifically in dignity as manifest in the integrity of one's individual identity or persona.

Legal historian Lawrence Friedman develops his analysis of the United States as a republic of choice around a contrast between the self-disciplined individualism of the nineteenth century and the self expressive individualism of the twentieth.²⁴ The latter was grounded in an ideal of self expression and personality which asserted individual rights as a means to fulfill one's lifestyle choices.²⁵ In contrast, "the ideal of the nineteenth century individual . . . included a strong belief in massive self control — temperance and moderation in all things."²⁶ Freedom and choice were both seen to depend on such self control. Self control was maintained in the North by an internalized cultural norm of "dignity" and in the South by a sense of "honor" which focused on one's standing in the eyes of others.²⁷ With respect to the *Pavesich* court's concerns about the commodification of Pavesich, it is helpful to note that Robert Post's recent work on privacy and defamation law argues that "honor cannot be converted into a continuous medium of exchange. It cannot be bought and sold"²⁸

Friedman characterizes the twentieth century republic of choice as "a world in which the right to 'be oneself' to *choose* oneself, is placed in a special and privileged position[, one] in which *expression* is favored over [nineteenth century] *self control*."²⁹ Common law privacy in general and the tort of appropriation in particular stand between Friedman's two types of individualism: they mark a shift from a social concern for self-control to the articulation of a legal right to control over the self. Cases of appropriation

²⁴ See LAWRENCE FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY AND CULTURE* 27-31, 35-41 (1990).

²⁵ See *id.* at 35-41.

²⁶ *Id.* at 31.

²⁷ *Id.* at 27-31, 35-41. Friedman's contrast echoes the categories elaborated by Robert Bellah, Richard Madsen, and William Sullivan. See ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985). In particular, *Habits of the Heart* notes the rise of expressive individualism in the twentieth century. See *id.* at 27-54, 142-66. Expressive individualism is marked by a therapeutic ideal of individual self realization. See *id.*

More generally, it must be noted that Friedman's characterization of the contrasting ideals of American individualism is broadly drawn and glosses over much of the variability and resulting conflict that permeated American society. Nonetheless, Friedman's work provides a useful summary of the views of the white male elites who controlled much of society at the time, and who certainly controlled the apparatus of the legal system.

²⁸ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 700 (1986).

²⁹ FRIEDMAN, *supra* note 24, at 3.

involved individuals trying to assert control over themselves through controlling the uses and representations of their identities. Where once a person maintained his status in society through discipline and moderation, now he would use the law to insure that he could choose himself.³⁰

B. *Appropriation, Dignity, and Personhood*

Of all torts, appropriation of identity is concerned most explicitly with identity as a marker and container of our unique selves. In this regard, legal identity may be seen as an aspect of personhood. Personhood, in turn, may be conceived, like Alan Gewirth's definition of inherent dignity, as "a kind of intrinsic worth that belongs equally to all human beings as such."³¹ Identity, in contrast, is not shared "equally,"³² rather, it is what makes each individual distinc-

³⁰ Randall Bezanson similarly sees a disjunction between Warren and Brandeis's conception of privacy as rooted in the social habits and institutions of nineteenth century elites, and contemporary privacy as rooted in values of "individualism" that must function in "dramatically changed circumstances marked by the complex social arrangements and technologies of our post-industrial society." Randall Bezanson, *The Right to Privacy Revisited: Privacy, News and Social Change*, 80 CAL. L. REV. 1133, 1135 (1992). This is a useful contrast but Bezanson goes on to characterize the Warren and Brandeis conception of privacy as rooted in "rural" values. *See id.* This is an odd descriptor for two very cosmopolitan professionals living in Boston, one of the foremost American urban centers of the era. Bezanson rightly situates the Warren and Brandeis conception of privacy in its social and historical context, but he does not go on to develop a nuanced consideration of that context. Warren and Brandeis's genteel ideals of "culture" (in the sense used by Matthew Arnold), were hardly rural. They did not simply oppose urbanization but, rather, they were quite selectively concerned with resisting only those aspects of urban life which they perceived as a threat to their refined views of civilized, cultured society.

³¹ Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 10, 12 (Michael J. Meyer & William A. Parent eds., 1992). Margaret Radin provides a useful summary of several philosophical theories of the person. Radin observes that "[f]or Kant, the person is a free and rational agent whose existence is an end in itself." Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 962-63 (1982) [hereinafter Radin, *Property and Personhood*]. Locke's view of the person "makes its essential attributes self-consciousness and memory." *Id.* at 963. In contrast to the disembodied conceptions of the person, Radin identifies the view that "to recognize something as a person is, among other things, to attribute bodily continuity to it." *Id.* Finally, Radin identifies theorists who suggest the "individual's ability to project a continuing life plan into the future is as important as memory or continuing consciousness." *Id.* at 962-63.

Elsewhere, Radin also alludes to theories of personhood from other disciplines and walks of life. *See* MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996) [hereinafter RADIN, *CONTESTED COMMODITIES*]. Thus, for psychologists, personhood may be viewed as a function of the relation between the constants in human life and the development of broad personality structures; for welfare rights activists it may be a function of access to the minimum necessary resources for a fully human life; for medical ethicists it may involve determining at what point life ceases to be worth living; and for some political theorists personhood may be defined in terms of establishing the basic of individuality the state should recognize and/or underwrite; finally, Radin notes that when parents think about personhood, they might ask "what part do I play in making the best possible life for my children?" *Id.* at 55.

³² Gewirth, *supra* note 31, at 12.

tive and different. The articulation and development of an individual identity may be seen as necessary and critical to the realization of personhood, but upon the common foundation of personhood they build a unique self-conscious human being.

Thus, Margaret Radin notes, for Kantian liberals “all of us are identical as persons” insofar as we all share free will and reason.³³ Yet personhood is not the same as identity. Indeed, Radin goes on to observe that many philosophers of mind think about personhood when they try to figure out what constitutes personal identity. She asserts, “[f]or many of these philosophers, personal identity means having a continuous life story that incorporates a past and future for oneself. From the point of view of personal identity, all of us are different — unique — as persons.”³⁴ Personhood, then, is something we all share in common and in like degree. Identity is unique to each of us; it is what makes us distinct individuals.

I argue that where dignity broadly implicates a consideration of the inherent value of human beings, a respect for their personhood, as it were, privacy involves the more focused rights to protect the conditions necessary to individuation. That is, where dignity broadly conceived is a condition of personhood, privacy is an attribute of individuality. The two are connected in the liberal tradition in so far as it posits that the full realization of one’s personhood involves articulating and developing one’s individual identity. Assaults on identity affront dignity insofar as they deny the conditions of individuation necessary to the proper respect for and development of one’s personhood. Invasions of privacy, therefore, affront dignity insofar as they undermine the integrity of one’s identity by forcing the manifestation of a partial or reductive version of one’s individuality, or by more thoroughly effacing one’s individuality or otherwise rendering the individual as fungible and non-distinct. Privacy implicates that aspect of dignity grounded in the belief that a full realization of one’s personhood requires the recognition of and respect for the conditions necessary for each person to realize her distinctive individual identity.

In this regard, while we may consider all affronts to personhood as leading to dignitary harms, we need not necessarily consider all affronts to identity as necessarily undermining one’s

³³ RADIN, *CONTESTED COMMODITIES*, *supra* note 31, at 55.

³⁴ *Id.* C. Fred Alford notes that for Locke, “[a] person is a man who is responsible for his own actions, who claims and exerts ownership over them. In this *personal identity* is founded *Men* are God’s property, *person’s* are not.” C. FRED ALFORD, *THE SELF IN SOCIAL THEORY* 115-116 (1991).

personhood. An ethnic joke, for example, might degrade someone's identity without necessarily threatening the conditions necessary for individuation. More extreme forms of hate speech however, or more forcefully, state-sanctioned stigma (such as legally mandated racial segregation in public schools) may constitute identity-based dignitary harms, particularly as they serve to exclude individuals from the community based on one or more aspects of their identity. In the tort of appropriation of identity we will see similar distinctions based on the difference between a newsworthy use of a person's name or image as opposed to a commercial use. The former may insult or demean one's identity without threatening its integrity. The latter may undermine a core value of individuation by rendering the individual into a fungible commodity.

There is a danger here of reducing privacy to a merely instrumental right that serves the larger goal of protecting dignity or identity. But perhaps the problem lies more with current understandings of the term "privacy." Warren and Brandeis, in first setting forth the right, were less concerned with protecting "privacy" *per se*, than with protecting a particular conception of human dignity embodied in the "spiritual nature of man" which manifested itself in the valued attributes of a "cultured" individual and required a certain type of genteel bourgeois community to flourish.³⁵ Our contemporary understanding of the attributes of a cultured individual and of the context she needs to flourish may have changed, but the concern for the principle of human dignity remains.

Justice William Brennan expressed similar sentiments when he wrote that "the Constitution embodies the aspiration to social justice, brotherhood and human dignity that brought this nation into being."³⁶ Brennan realized, however, that particular manifestations of that aspiration might vary across time, even as the principle endured. Thus, he noted, "until the end of the nineteenth century, freedom and dignity in our country found meaningful protection in the institution of real property. In a society still largely agricultural, a piece of land provided men not just with sustenance but with the means of economic independence, a necessary precondition of political independence and expression."³⁷ But, he observed, we are no longer such a nation and now "hundreds of thousands of Americans live entire lives without any real prospect

³⁵ See Kahn, *supra* note 19, at 306-14, 323-24.

³⁶ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION 23, 23 (Jack N. Rakove, ed. 1990).

³⁷ *Id.* at 29.

of the dignity and autonomy that ownership of real property could confer."³⁸ Brennan, therefore, concluded that "protection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state."³⁹

Warren and Brandeis stood precisely at the historical juncture identified by Brennan. Although their focus was on relations between the individual and society (rather than on relations between the individual and the state), their concerns were similar to Brennan's: the old property-based forms of recognizing and protecting human dignity were inadequate to the shifting exigencies of urban industrial life in an increasingly diverse society.⁴⁰ Kenneth Vandavelde has shown that this same period saw the development of a new "dephysicalized" concept of property which identified property as a valuable interest rather than a physical thing.⁴¹ Similarly, Warren and Brandeis articulated a dephysicalized conception of human dignity as a legal interest that did not inhere simply in physical property but in such intangibles as spirit, feelings, and intellect.⁴² Privacy, then, was used by Warren and Brandeis as a concept to encompass and articulate their deeper concerns to invoke the power of the state through the legal system to recognize and protect dignitary interests in maintaining the integrity of one's persona, or, as they put it, "the more general right to the immunity of the person, the right to one's personality."⁴³ As Brennan's words indicate, similar concerns continue to inform contemporary readings of rights, the Constitution, and the role of the law in modern society.

From its inception, the tort of appropriation involved distinguishing between fungible and non-fungible attributes of identity.⁴⁴ The distinction, however, was not abstract or timeless. It was grounded in a *fin-de-siècle* apprehension over the expansion of impersonal market forces into all areas of life. In a world where everything was being turned into a commodity, champions of privacy felt a pressing need to identify and protect the non-fungible "spiritual nature"⁴⁵ of man. "Identity" in particular was increasingly becoming subject to commodification as advertisers devel-

³⁸ *Id.*

³⁹ *Id.* at 25.

⁴⁰ *See id.* at 30.

⁴¹ Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 328-29 (1980).

⁴² *See* Warren & Brandeis, *supra* note 15, at 193.

⁴³ *Id.* at 207.

⁴⁴ *See id.* at 193.

⁴⁵ *Id.*

oped the use of "brand name" recognition to sell products in a national market where consumers otherwise had no means to identify the source or quality of a product.⁴⁶

With the rise of a national (and later global) economy, identity itself began to become disembodied from local space and time. Where traditionally identity had been formed locally through community associations, modern advertising in the national market took specific individual identities out of their local context and imbued them with meanings created by distant experts. What began with Paolo Pavesich has since developed into the phenomenon of Michael Jordan, where almost every aspect of the celebrity individual seems to be manufactured and marketed by advertising executives for a global economy. Moreover, not only does advertising take a limited number of particular individuals out of their local context, it also intrudes distantly manufactured visions of identity into localities, providing nationally or globally available resources from which all individuals may construct their identity.

Robert Post argues that there is a need to reformulate the tort of appropriation in normative terms to incorporate the element of offensiveness, but he cautions that the tort "makes sense only on the presupposition that we inhabit a society supported by a coherent structure of communal norms. Yet such a structure may be purely fictitious in a culture as diverse and dynamic as our own."⁴⁷ Warren and Brandeis were able so confidently to assert the normative value of privacy precisely because they ignored or effaced the diversity of their own society. In place of diversity, they simply asserted the dominance of their own community norms. Elsewhere, Post distinguishes between "expressive" and "hegemonic" functions of the law.⁴⁸ The former gives voice and force to broadly accepted norms; the latter imposes dominant norms on a cultural minority.⁴⁹ Warren and Brandeis's article purported to serve an expressive purpose, explicitly articulating broad principles that had long been developing in Anglo-American jurisprudence.⁵⁰ To a certain degree their article served this purpose admirably. But in asserting the primacy of Warren and Brandeis's genteel norms of civility, the article also powerfully served a hegemonic function that not only imposed these dominant norms, but also aimed to erase the legiti-

⁴⁶ See JAMES D. NORRIS, *ADVERTISING AND THE TRANSFORMATION OF AMERICAN SOCIETY 1865-1920* 97-98 (1990).

⁴⁷ Post, *supra* note 4, at 676.

⁴⁸ Post, *supra* note 9, at 977.

⁴⁹ See *id.* at 977-78.

⁵⁰ Warren & Brandeis, *supra* note 15, at 193.

macy of all competing norms of civil community. A critical alternative never considered was whether cultural norms of offensiveness might be negotiated through diverse groups having access to a dialogue over their formulation. As diverse plaintiffs came to bring claims under the right to privacy, new voices were heard. The history of the development of privacy rights has, in part, been the history of contesting and negotiating the legal meaning and significance of dignity. In the realm of social interaction (as opposed to state action) the jurisprudence of appropriation provides special insight into this historical process.

C. *Development*

In the years since *Pavesich*, this early association of appropriation claims with such intangible, non-commensurable attributes of the self as dignity and the integrity of one's persona seems to have been lost, or at least misplaced, as property-based conceptions of the legal status of identity have come to the fore. The credit for fully articulating appropriation of identity as a separate property-based tort belongs to William Prosser. In 1960, Prosser wrote a powerfully influential article, simply titled *Privacy*,⁵¹ which, combined with its effective incorporation in the *Second Restatement of Torts*, came to supplant Warren and Brandeis's work as the touchstone of privacy jurisprudence. Prosser fractured privacy into a complex of four sub-torts: intrusion, public disclosure of private facts, false light, and appropriation of identity.⁵² He did not discern a unifying principle behind these actions. To the contrary, he identified and named each tort independently precisely because he believed they actually dealt with different causes of action.⁵³ Fundamentally, Prosser viewed privacy as a derivative right that supplemented and made it easier to establish such existing torts as trespass, intentional infliction of mental distress, defamation, nuisance, and infringement of copyright. He was critical of privacy, and worried that it was becoming a fast and loose catch-all in tort law. His classificatory system was aimed at reigning in the right to privacy, and subordinating it to other torts which he deemed more substantial.⁵⁴

⁵¹ William Prosser, *Privacy*, 48 CAL. L. REV. 383, 383-423 (1960).

⁵² See *id.* at 389.

⁵³ "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . ." *Id.*

⁵⁴ See *id.* at 398-403, 422. For example, in discussing the tort of intrusion, Prosser stated that "[i]t has been chiefly useful to fill in the gaps left by trespass, nuisance, the intentional

Most significantly for our purposes, Prosser, while recognizing the importance of a person's name "as a symbol of his identity," recast the interest protected by the tort of appropriation as "not so much a mental one as a proprietary one."⁵⁵ Prosser thereby effectively redefined the right to privacy implicated by appropriation of identity as the equivalent of the right of publicity. In subsequent case law on appropriation of identity, the privacy interests of dignity and integrity of the individual would persist, but almost always implicitly so while being overshadowed by the property interests associated with celebrity publicity rights.⁵⁶

In response to Prosser, Edward Bloustein argued that privacy must be recognized as an independent right, implicating not property but one's very self or individuality.⁵⁷ The basic social value underlying all torts of invasion of privacy, Bloustein asserted, was a concern for human dignity.⁵⁸ Bloustein accepted Prosser's identification of appropriation as a distinct cause of action but he sought

infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights." *Id.* at 392. Similarly, he referred to the interest protected by the tort of false light as "clearly that of reputation, with the same overtones of mental distress as in defamation." *Id.* at 400.

Ruth Gavison elucidates the flaws in Prosser's logic pointing out that

[i]t may be true that the law tends to protect privacy only when another interest is also invaded, whereas invasions of other interests may compel protection of their own. It does not follow from this that the presence of privacy in a situation does not serve as an additional reason for protection.

Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 463 (1980).

⁵⁵ Prosser, *supra* note 51, at 406.

⁵⁶ Hyman Gross generally criticized Prosser's categorization of the privacy torts as tautological. Gross pointed out that Prosser tended to create the categories by grouping common features from diverse actions that were not, in fact, the true basis of the plaintiff's claim. See Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 49-51 (1967). Gross argued that Prosser's categories were driven merely by a logic of categorization, not by legal principle. See *id.* Thus, if Prosser found a group of cases that did not seem to fit into any existing category, he could simply create a new one. See *id.*

More specifically, Gross took Prosser to task for his characterization of the tort of appropriation as merely infringing upon a proprietary right of the plaintiff. Echoing Warren and Brandeis (and Bloustein), Gross argued that "this is a serious mislocation of the gravamen of the wrong. The offense is to sensibility; and, more particularly, to those sensibilities of a person which are offended by another's use of his personality *regardless of any advantage.*" *Id.* at 50. Gross rightly chastises Prosser for mischaracterizing the intangible nature of the interest involved, but he himself then goes on to articulate a fairly cramped and reductive notion of the interests implicated by the tort of appropriation.

Clearly, then, it is not the value of the name to user or to bearer which matters here, but the unauthorized use itself. "Appropriation," then, is nothing more than unauthorized use, and this species of invasion of privacy is nothing more than unauthorized publicity given a person's name or image.

Id. at 51. Here we see that even where a commentator identifies the intangible nature of the interest involved in appropriation, there remains a tendency to entangle this privacy-based interest with the rhetoric or publicity. Gross misses the basic issue of how and why unauthorized use may cause harm, and why the legal system recognizes such harm.

⁵⁷ See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 962-64 (1964).

⁵⁸ See *id.* at 962-64.

to infuse it with a concern for the commodification of the individual persona. The tort, Bloustein argued, was "not about appropriating something of monetary value,"⁵⁹ it was about "demeaning and humiliating" the individual through "the commercialization of an aspect of personality."⁶⁰ Prosser's work, in short, exhibited no hint of Bloustein's concern that using a person's name or likeness against her will was "degrading."⁶¹ Nonetheless, Prosser was hardly alone in his confusion. As Robert Post noted some three decades after Prosser's article, the tort of appropriation, in contrast to other privacy torts, "remains . . . uniquely undifferentiated from concepts of property."⁶²

Post also observed that for appropriation, as with the tort of intrusion, there exists a majority and minority view among the courts. The majority view, represented by Prosser and the *Restatement*, constructs appropriation in descriptive rather than normative terms. That is, it assumes appropriation can be established by empirical facts, the context or offensiveness of the use being largely secondary. The minority view, represented by Bloustein, constructs the tort normatively as an affront to dignity. The two views have been confused and intermingled from the outset: *Pavesich*, the first case recognizing the tort, stated its elements in descriptive terms but employed a normative analysis to establish dignitary harm.⁶³ Post's categorization has much to recommend it, but it is overly dualistic. It might be more useful to conceive of the construction of the tort of appropriation along a continuum between the descriptive and normative, where courts blend and mix the two to varying degrees depending on the context of the case and the outlook of the court.

Nonetheless, Prosser's formulation of the tort as derivative of property interests has continued to be the majority view.⁶⁴ Indeed, some commentators have gone so far as to assert that the tort of appropriation has, for all intents and purposes, been largely swallowed up by the property-based right of publicity while the remain-

⁵⁹ *Id.* at 968.

⁶⁰ *Id.* at 987. Bloustein's work, in turn, was subject to much criticism. Most of it was a sympathetic appreciation of his concern for dignity that, nonetheless, asserted that such an interest was simply too broad and amorphous to be of practical use. *See, e.g.*, Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 250-53, 259 (1977); Tim Frazer, *Appropriation of Personality — A New Tort?*, 99 L. Q. REV. 281, 296 (1980); Dianne Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 339 (1983).

⁶¹ Bloustein, *supra* note 57, at 988.

⁶² Post, *supra* note 4, at 652-53.

⁶³ *See id.* at 670-71.

⁶⁴ *See id.* at 670.

der has been rendered inconsequential through the expansion of free speech rights to publish matters of public interest.⁶⁵ Thus, together with the articulation of an independent property-based right of publicity by Melville Nimmer some few years earlier in 1954,⁶⁶ Prosser set the stage for the eclipse of privacy-based concerns for dignity by an interest in the material value of celebrity identity. This tendency has been reinforced by the fact that, in practice, personal and property interests in one's identity can be very difficult to sort out. As discussed below, we will see that since the emergence of the modern right of publicity, courts increasingly have employed a seemingly more manageable property rights analysis in appropriation cases. This is despite the fact that privacy-based concerns for dignity continue implicitly to inform their opinions.

The tendency to construe appropriation as a harm to property eludes the significance of identity as the actual subject of the tort. Prosser focuses on name and likeness as objects of property, not as manifestations of identity.⁶⁷ Yet from its first judicial recognition in *Pavesich*, courts have explicitly construed the tort of appropriation to implicate the integrity of a person's identity as a legal interest.⁶⁸

III. THE RIGHT OF PUBLICITY

As defined by J. Thomas McCarthy, the right of publicity "is simply the right of every person to control the commercial use of

⁶⁵ See, e.g., Zimmerman, *supra* note 60, at 291-376; Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS 326, 326-41 (1966).

⁶⁶ See Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 204 (1954).

⁶⁷ Prosser, *supra* note 51, at 406.

⁶⁸ William Parent takes a position similar to Prosser, arguing that it is a mistake even to conceive of appropriation cases in terms of privacy because they don't involve personal facts. See William Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305 (1983). Rather, most appropriation cases "have essentially to do with the issue of financial remuneration and consequently should be handled as property cases." *Id.* at 324-25. Nor should we be surprised to see an advocate from the law and economics school such as Richard Posner characterize appropriation in terms of property rights as a claim involving an aversion to not being remunerated for the use of one's image. See Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978).

Richard Epstein exhibits a more nuanced, if still property-based understanding, of the tort. See Richard Epstein, *A Taste For Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665 (1980). Comparing appropriation to property-based patents or copyrights, Epstein notes that

analogous rules can be, and have been, developed for name and likeness, if only because of the general deep-seated conviction that they are almost as much a part of a person as an arm or a leg. The tort of improper appropriation is thus perceived as an outer bulwark for the protection of self.

Id. at 669. Epstein here appreciates the significance of contemporary cultural constructions of identity through which name or likeness are seen to contain a part of one's self.

his or her identity.”⁶⁹ McCarthy’s definition is deceptively simple. Thus, parallel to McCarthy’s definition of publicity, is William Prosser’s definition of the privacy-based tort as “appropriation, for the defendant’s advantage, of the plaintiff’s name and likeness.”⁷⁰ Like McCarthy, Prosser ultimately reduces the tort to a property-based interest in the material value of one’s name or image. Together, these definitions obscure the tradition of legal recognition of dignitary interests in identity stretching back to *Pavesich*. Both privacy and publicity may involve the appropriation of identity.⁷¹ The difference lies in the purposes for which control is sought and the uses to which the identity is put.

Paolo Pavesich wanted control in order to protect his identity from being degraded through subordination to market forces. Today, the typical case of publicity rights would likely involve a celebrity suing over the unauthorized use of her name or image in connection with the commercial promotion of a particular product. In such a case the subject does not seek to prevent her identity from being commercialized, but rather seeks to control the terms and conditions of its commercialization. An invasion of privacy constitutes a personal harm to one’s identity; a violation of publicity rights, in contrast, involves a person’s (typically a celebrity’s) property in the commercial value of her persona.

George Armstrong, Jr. comments on the newness of the modern right of publicity, noting that as recently as 1971, “a celebrity had no cause of action against an advertiser who imitated her voice.”⁷² Armstrong also noted that until the 1970s the commercial value of celebrity entered the public domain after death.⁷³ That is, the property right in one’s celebrity persona was not descendible. During the past two decades, however, the celebrity persona has, by and large, fully become a “thing,” a piece of property which is assignable and descendible like any other more tangible piece of property.⁷⁴ By 1995, the right of publicity of living persons had been recognized under common law or statute in twenty-five states, while a “post mortem” right of publicity (that is, its

⁶⁹ J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, COLUM.-VLA J.L. & ARTS 19, 130 (1995).

⁷⁰ Prosser, *supra* note 51, at 389.

⁷¹ *See id.* at 403.

⁷² George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443 (1991). Armstrong was referring in particular to the case of *Sinatra v. Goodyear*, 435 F.2d 711 (9th Cir. 1970), in which the court denied relief to Nancy Sinatra, who had sued Goodyear Tire Company for hiring a singer to imitate Sinatra’s voice while singing a version of her hit song “These Boots Are Made for Walking” for a television commercial.

⁷³ Armstrong, *supra* note 72, at 443.

⁷⁴ *See id.* at 443-44.

descendability as a property right) had been recognized as the law in thirteen states.⁷⁵

The recent ascendance of the right of publicity roughly parallels the resurgence of the American right since the election of Ronald Reagan as President in 1980. In stark contrast to the social movements of the 1960s and Lyndon Johnson's Great Society programs, Reagan's America focused instead on the market, elevating it from a descriptive economic theory to a normative ideology. In the legal realm this move was reflected in the rise of "law and economics," with its attendant focus on efficiency as a measure of justice.⁷⁶ In a social and legal context of triumphant commercialism, where all relations are increasingly reduced to a function of the market, the courts have tended to reach first for market rhetoric as a basis for invoking the power of the legal system to mediate social relations.

A. *Origins*

The history of marketing the images of famous persons goes back at least to the eighteenth century when Josiah Wedgwood sold small portrait medallions of "illustrious moderns."⁷⁷ In the 1770s, Benjamin Franklin, then the toast of Parisian society, had his image marketed throughout France.⁷⁸ And in the young American Republic, the founding fathers accepted the broad dissemination of their images as a means to further the cause of independence and patriotic nation-building.⁷⁹ The Founders, however, viewed their images as a kind of common republican property being deployed to promote civic virtue. Commodification does not appear to have been among their concerns.⁸⁰ Historian Neil Harris has noted that explicit commercial exploitation of

⁷⁵ See McCarthy, *supra* note 69, at 132.

⁷⁶ The literature in the area of law and economics is extensive. Among its most prominent exponents is Richard Posner. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977). In addition, Margaret Radin provides a cogent analysis of what she calls "commodification as a world view" and its relation to the school of law and economics. See RADIN, *CONTESTED COMMODITIES*, *supra* note 31, at 2-12; see also G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 218-35 (1985) (discussing the rise of this school of thought). Morton Horwitz also comments on the rise of law and economics as a claimant to the legacy of legal realism as narrowly manifested in its emphasis on objective "methodology" or "technology." See Morton Horwitz, *Transformation of American Law* 269-72 (1992).

⁷⁷ See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993).

⁷⁸ See *id.* at 149.

⁷⁹ See *id.* at 150.

⁸⁰ Robert Bellah argues for the resurrection of a similarly republican conception of reputation. Reputation, he argues, is not property but rather a relationship between persons. He sees reputation as a community asset, especially with respect to such public

famous persons became more common in the nineteenth century with the likes of Jenny Lind and Wild Bill Hickock becoming popular celebrities.⁸¹ "Some unspoken assumption," writes Harris, "made famous people . . . a species of common property whose commodity exploitation required little control."⁸²

All this began to change, however, in the late nineteenth century with the rise of law suits over the control of public images.⁸³ Most late nineteenth century cases, however, primarily involved either embarrassment or the material harm of damage to reputation, which was essentially the economic manifestation of embarrassment. The cases did not directly address the issue of appropriation of the commercial value of identity, that is, the right of publicity.⁸⁴ The rise of new technologies of printing and reproduction (especially new half-tone photographic reproduction techniques developed in the 1890s which allowed for mass circulation of images), as well as the development of celebrity endorsements to advertise brand name products in a rapidly expanding national market soon increased demands for legal protection of names and images. Michael Madow also notes that the powerful influence of the broad cultural shift from a word-based to an image-based culture created a new type of celebrity eminence. He observes that by the late nineteenth century, celebrity took on greater commercial value as it could be fabricated and closely linked with consumption.⁸⁵

Quite appropriately, it was Thomas Alva Edison, an early master of self-promotion and a ruthless businessman, who, in 1903, brought the law suit which led to "perhaps the earliest judicial statement of the view that the interest infringed by unauthorized commercial exploitation of a public figure's identity is economic."⁸⁶ Edison, who, as the court noted, enjoyed "a worldwide

figures as the Founding Fathers. See Robert Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 744-45 (1986).

⁸¹ See Neil Harris, *Who Owns Our Myths?*, 52 SOC. RES. 241, 251 (1985).

⁸² *Id.*

⁸³ See Madow, *supra* note 77, at 152-53.

⁸⁴ See, e.g., *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240 (N.Y. Sup. Ct. 1891). In this case, the court granted an injunction to a doctor to stop the unauthorized use of a facsimile of his signature to advertise a medicine. The court defined the harm as "damage to his professional standing and income as a physician, and an infringement of his right to the sole use of his name." *Id.* at 249. Even here, the court is mixing together property and personal harms. It recognizes damage to reputation which causes economic loss, but it also alludes to a right to the sole use of one's name. Just what harm comes from an infringement of that right the court does not clearly define, but a personal harm to individual autonomy is implied.

⁸⁵ See Madow, *supra* note 77, at 156-66; Armstrong, *supra* note 72, at 457-59; ALAN WESTIN, *PRIVACY AND FREEDOM* 334-37 (1968).

⁸⁶ Madow, *supra* note 77, at 156. The case, *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392

reputation" as an inventor, sued the Edison Polyform Manufacturing Company in connection with that company's marketing of a "medicinal preparation intended to relieve neuralgic pains by external application."⁸⁷ Each bottle displayed a label with Edison's picture and the words: "Edison Polyform, I certify that this preparation is compounded according to the formula devised and used by myself. Thos. A. Edison."⁸⁸ Although the formula was, in fact, based on a preparation originally concocted and licensed by Edison in the 1870s, he had never consented to its marketing by this company under his name or picture nor had he ever made or authorized the endorsement.⁸⁹ Edison sued to enjoin the company from using his name either in its title or on the medicine it was selling.⁹⁰

In granting the injunction, the court reasoned:

If a man's name be his own property, as no less an authority than the United States Supreme Court says it is, it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it.⁹¹

Significantly, Edison sought only the equitable relief of an injunction, foregoing any suit for monetary damages. The injunction vindicated Edison's personal right to control his identity in the commercial realm, a valuable consideration. But the case did not focus on the actual economic value of the "property" taken from Edison. Rather, the court implicitly blurred the boundary between personal and property rights by asserting that "the term 'property right' is not to be taken in a narrow sense."⁹²

The 1920s saw a rise in publicity-based law suits for damages in terms of compensation (the equivalent of unjust enrichment), indicating a growing recognition of the economic value of celebrity images.⁹³ But the right remained largely derivative of the right of privacy. As late as the 1940s, no court had articulated a clear right

(N.J. 1907), was not heard until 1907, probably because of the death of Edison's lawyer. For an insightful analysis of Edison as a popular icon, and of Edison's own role in promoting his heroic image, see WYN WACHHORST, *THOMAS ALVA EDISON: AN AMERICAN MYTH* (1981).

⁸⁷ *Edison*, 67 A. at 392.

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 392.

⁹¹ *Id.* at 394.

⁹² *Id.* at 395.

⁹³ *See Armstrong, supra note 72, at 459.*

to control the property value of celebrity images.⁹⁴

B. *Haelan Laboratories and the Modern Right of Publicity*

The modern right of publicity, as understood by commentators such as McCarthy, was first recognized by the courts in the 1953 case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁹⁵ Here the federal court, applying New York law, found that in addition to the statutory right of privacy, "a man has a right in the publicity value of his photograph."⁹⁶ Moreover, that right was held to be an assignable property right.⁹⁷

Following upon the heels of *Haelan*, Melville Nimmer wrote a highly influential article, *The Right of Publicity*, which formally elaborated the new right and provided the groundwork for its further development.⁹⁸ Nimmer wrote of publicity as the flip side of privacy, but he saw publicity as primarily the concern of celebrities who, he assumed, had largely waived their right to privacy by voluntarily subjecting themselves to the gaze of the public. Traditional theories of privacy rights were, therefore, inadequate to deal with the problems of controlling the use of celebrity images. Publicity, he argued, must be clearly established as a property right. He saw Warren and Brandeis's conception of invasion of privacy as based on the offensiveness of an intrusion. A violation of the right of publicity, in contrast, involved unjust enrichment — the wrongful conversion of the economic value of a celebrity's image.⁹⁹

As expounded by Nimmer, the right of publicity became not merely the flip side of privacy but its subversion — especially with regard to appropriation of identity.¹⁰⁰ In discussing the 1947 case

⁹⁴ See Nimmer, *supra* note 66. Nimmer notes that this was due in large part to the courts' tendencies to infer a waiver of privacy rights by celebrities who held themselves out for public viewing. See, e.g., *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941) (denying relief to the plaintiff, a famous football player, to prevent the use of his photograph in a football calendar, on the grounds that by achieving fame he had effectively surrendered his right of privacy).

⁹⁵ 202 F.2d 866 (2d Cir. 1953). For discussions regarding the origins of the right of publicity, see Note, *An Assessment of the Commercial Exploitation Requirement As a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703 (1983); Larry Saret & Martin Stern, *Publicity and Privacy — Distinct Interests on the Misappropriation Continuum*, 12 LOY. U. CHI. L.J. 675 (1981); JANET GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE AND THE LAW* (1991).

⁹⁶ *Haelan*, 202 F.2d at 868.

⁹⁷ See *id.* at 868-70.

⁹⁸ Nimmer, *supra* note 66.

⁹⁹ See *id.* at 204-17. Nimmer allowed that non-celebrities also had a right of publicity. He assumed, however, that they would produce few cases because, being ordinary people with no particular cachet to their names or images, the dollar value of damages for use of their identities would be so slight as to be not worth the trouble of bringing suit. See *id.* at 217.

¹⁰⁰ *Id.* at 204-10.

of *Cason v. Baskin*,¹⁰¹ Nimmer concluded that the court refused to award damages “because there was no mental anguish — no loss of friends — no loss of respect in the community — no loss of character or reputation.”¹⁰² Nimmer’s more or less accurate interpretation of the case overlooked the court’s own confusion of the issue. The defendant in *Cason* was not using the plaintiff’s name for commercial purposes or in any way imposing a false or unwanted identity upon her. Nimmer’s own focus on mental anguish as a measure of harm testifies to the influence of Prosser’s earlier articulation of the tort of mental suffering as distinct from the dignitary harms articulated by Warren and Brandeis.¹⁰³ Moreover, Nimmer’s reference to reputation (a property-based harm) conflated the harm of appropriation with that of defamation. Nowhere did he consider whether the use of the plaintiff’s name constituted an affront to her dignity, to her own sense of self. Indeed, one’s appropriated image might be presented in a highly flattering light, perhaps even to the point of enhancing one’s standing in the community. That still, however, would not mitigate the type of harm identified in *Pavesich*, because one’s identity would still be “enslaved” by another.

Nimmer instead looked only at the psychological and reputational harms to the plaintiff; significant harms no doubt, but not the harms discussed by Warren and Brandeis, nor by the courts in *Pavesich* and other early privacy cases. Moreover, by reducing invasions of privacy to offensiveness, Nimmer aestheticised the harm as a simple matter of bad taste. Warren and Brandeis’s concerns for the spiritual nature of man seem to have exited the scene completely.

All courts, however, did not immediately embrace Nimmer’s conceptions of privacy and publicity. A 1955 California case, *Fairfield v. American Photocopy Equipment Co.*,¹⁰⁴ maintained a more nuanced approach to the problems of appropriation. Fairfield sued American Photocopy for using his name in an advertisement implying that he was a satisfied customer.¹⁰⁵ The court found that Fairfield had stated a valid cause of action for the unauthorized appropriation of his “personality” for “pecuniary gain or profit.”¹⁰⁶

¹⁰¹ 30 So.2d 635 (Fla. 1947) (involving a suit for invasion of privacy for publication of a memoir which referred to the plaintiff by name).

¹⁰² Nimmer, *supra* note 66, at 208.

¹⁰³ See William Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

¹⁰⁴ 291 P.2d 194 (Cal. 1955).

¹⁰⁵ See *id.* at 196.

¹⁰⁶ *Id.* at 197.

Echoing *Pavesich*, the court defined the right of privacy as “the right of a person to be free from unwanted publicity,” and found that the “commercial exploitation of another’s personality for commercial purposes constitutes one of the most flagrant and common means of invasion of privacy.”¹⁰⁷

In assessing the harm of appropriation, the court clearly recognized its difference from defamation, declaring that

[t]he gist of the cause of action in privacy cases is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community.¹⁰⁸

Yet even here, as the court appears to be carrying forth the legacy of Warren and Brandeis, its opinion adopts medical rather than dignitary metaphors by characterizing the harm as “mental” rather than spiritual. The right of privacy, argued the court, “concerns one’s own peace of mind,” and “impairs the mental peace and comfort of a person.”¹⁰⁹ The court still recognized the significance of harm from commercialization of the identity, but it was now characterizing that harm in terms of mental discomfort rather than as affront to the integrity of the persona or to one’s dignity.

IV. THE PERSISTENCE OF DIGNITY

Despite the apparent triumph of publicity rights analyses of appropriation claims in recent years, a closer look at several important cases in this area reveals that triumph to be more rhetorical than substantive. That is, while property-based analyses of appropriation have certainly become prominent, they remain entwined with an ongoing concern for identity-based dignitary interests in the integrity of the persona. Publicity rights have obscured privacy rights in this arena, but they have not eliminated them. To the contrary, as we will see below, many modern appropriation cases are driven in significant part by a logic of privacy rights even as they employ the rhetoric of publicity.

A. *Freedom from Commercial Exploitation*

The persistence of dignitary concerns in the midst of property-based analysis is perhaps most evident in cases decided under sec-

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

tion 51 of New York's Civil Rights Law.¹¹⁰ This law originated in 1903 in response to *Roberson v. Rochester Folding Box Co.*¹¹¹ In *Roberson*, a young woman sued a company engaged in the sale and manufacture of flour for using her photograph on an advertising bill, the caption of which stated "Flour of the Family."¹¹² She alleged that such use of her image subjected her to ridicule and humiliation and caused her to experience "nervous shock" among other injuries.¹¹³ In denying her claim, New York's highest court explicitly declined to recognize a common law right to privacy that would protect her interests.¹¹⁴ The resulting public outcry led the New York State legislature to enact a statutory right to privacy. The new law provided both civil and criminal penalties against "[a] person, firm, or group that uses for advertising purposes, or for the purposes of trade, the name, portrait, or picture of any living person without having first obtained the consent of such person."¹¹⁵

As early as 1937, the New York Supreme Court interpreted the statute to "embod[y] a legal recognition . . . of the right of a person to be let alone, a right directed 'against the commercial exploitation of one's personality.'"¹¹⁶ Thus articulated, the right embodies the privacy-based concern to prevent one's identity from being commodified rather than the publicity-based goal of controlling the terms commodifying one's identity. Similarly, in 1959, the court in *Flores v. Mosler Safe Co.*¹¹⁷ noted that "the primary purpose of this legislation [enacting sections 50 and 51] was to protect the sentiments, thoughts and feelings of an individual."¹¹⁸ In *Flores*, the defendant published an advertisement for a fireproof safe that consisted of a reprint of a news photograph showing the plaintiff in front of a burning building together with the accompanying news account which mentioned the plaintiff's name and occupation sev-

¹¹⁰ N.Y. CIV. RIGHTS LAW § 51 (McKinney 1998).

¹¹¹ 64 N.E. 442 (N.Y. 1902).

¹¹² *Id.* at 442.

¹¹³ *See id.*

¹¹⁴ *See id.* at 444.

¹¹⁵ Laws of the State of New York, 126th Sess., Ch. 132 (1903). The constitutionality of this law was upheld by the New York Court of Appeals in *Rhodes v. Sperry & Hutchinson Co.*, 85 N.E. 1097 (N.Y. 1908).

¹¹⁶ *Sarat Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 385 (N.Y. Sup. Ct. 1937) (quoting Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 731 (1937)). This case involved an action for damages by a then well-known "Hindu musician and entertainer" arising out of the publication of a professional photograph of the plaintiff in conjunction with a feature story purporting to "expose" that the "Indian rope trick" was performed by way of an illusion. *See id.* at 383. The court found no violation because there was a legitimate public interest in the information, and it was not used to increase the value of the newspaper, that is, there was no "commercial purpose" involved. *See id.* at 386.

¹¹⁷ 164 N.E.2d 853 (N.Y. 1959).

¹¹⁸ *Id.* at 855.

eral times.¹¹⁹ Nowhere in the advertisement was there any indication that the plaintiff endorsed the product nor was it alleged that he was a person whose name would attract greater attention to the advertisement. In short, Flores was not a celebrity.¹²⁰

The court found that Flores stated a valid cause of action under the Civil Rights Law.¹²¹ It noted that the original passage of the law was "rooted in popular resentment at the refusal of the courts [in *Roberson*] to grant recognition to the newly expounded right of an individual to be immune from commercial exploitation."¹²² The court was quite clear that the right of privacy articulated in the New York statute was not simply a matter of proprietary control over the commercial value of one's identity. Rather, the court situated the right in its historical context as culturally conditioned by popular conceptions of the need to provide some protection from the expanding and pervasive forces of the market which threatened to commodify all things.¹²³

Precisely because Flores was not a celebrity, the court did not need to engage in an extended analysis of his property-based publicity rights. Later cases, however, did involve some major celebrities whose names had great commercial value. In suits for appropriation, the courts have struggled to sort out property and privacy interests. In New York the existence of a clear statute helped the courts maintain an appreciation for the celebrities' dignitary interests. Nonetheless, as the plaintiffs become more prominent so too do property-based publicity claims.

By the time movie star Cary Grant brought a suit against *Esquire, Inc.*,¹²⁴ the publisher of *Esquire* magazine, the right of publicity had long since been clearly articulated and was beginning to gain wide acceptance. In this 1973 case, Grant sued over *Esquire's* publication of a photo-montage that placed an image of the star's head (from a photograph taken in 1946) on the body of a model clothed in a cardigan sweater-jacket.¹²⁵ The photo-montage was part of an article on men's style and did not comment on Grant other than to identify him in the caption.¹²⁶ The federal district court applied New York law to a claim alleging libel, invasion of

¹¹⁹ *Id.* at 854.

¹²⁰ *See id.* at 855.

¹²¹ *See id.*

¹²² *Id.* at 855 (citing *Sarat Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 385 (N.Y. Sup. Ct. 1937)).

¹²³ *See id.* at 389-90.

¹²⁴ *See Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973).

¹²⁵ *See id.* at 877.

¹²⁶ *See id.* at 878.

privacy, and violation of the right of publicity.¹²⁷ Its analysis, perhaps reflecting the fact that it was a federal, rather than a state court, somewhat muddled the privacy and publicity claims, reducing the former to a function of the latter.¹²⁸ The court concluded that the use of Grant's face "serves no function but to attract attention to the article."¹²⁹

The *Grant* court dismissed the claim for libel, but held that actions may lie under the rights of privacy and publicity if it were established at trial that the magazine used the photograph for the purposes of trade.¹³⁰ Nonetheless, the court belittled Grant's privacy claim declaring that

if the jury decides in plaintiff Grant's favor he will of course be entitled to recover for any lacerations to his feelings that he may be able to establish. More importantly, however, he will be able to recover the fair market value of the use for purposes of trade of his face, name and reputation.¹³¹

Clearly the court considered the harm to Grant's identity or "spiritual nature"¹³² to be negligible. It exhibits none of the *Flores* court's concern that a person has a right to be "immune from commercial exploitation,"¹³³ nor the *Pavesich* court's concern for enslavement of one's identity.¹³⁴ What mattered most here was Grant's image as property. In the court's eyes, the primary harm caused by *Esquire's* appropriation was commercial, and Grant could be made whole primarily by monetary damages gauged to that commercial value.¹³⁵

This attitude is ironic given the court's own notice of Grant's assertion that "he does not want anyone — himself included — to profit by the publicity value of his name and reputation."¹³⁶ What clearer indication could there be of a plaintiff's desire to be "immune from commercial exploitation?"¹³⁷ Grant did not simply want to be paid for the commercial use of his image. He wanted no such use to be made in the first place. It was the very act of

¹²⁷ See *id.* at 880-81.

¹²⁸ See *id.* at 880.

¹²⁹ *Id.* at 878.

¹³⁰ See *id.* at 880-81.

¹³¹ See *id.* at 881.

¹³² Warren & Brandeis, *supra* note 15, at 193.

¹³³ *Flores v. Mosler Safe Co.*, 164 N.E.2d 853, 855 (N.Y. 1959).

¹³⁴ See *Pavesich v. New England Life Ins. Co.*, 50 S.E.68, 80 (Ga. 1905).

¹³⁵ The court's reduction of Grant's claim to a property right is reinforced by the court's direct comparison of Grant's right to his image to an owner's rights to use his land as he sees fit. See *Grant*, 367 F. Supp. at 880.

¹³⁶ *Id.*

¹³⁷ *Id.*

commercialization to which he objected. And yet the court denigrated this concern by deliberately shifting its focus “from the reticent Mr. Grant”¹³⁸ to consider the property-based issues of publicity rights.¹³⁹ The court was uncomfortable with addressing Grant’s privacy-based dignitary concerns, so it minimized them by fiat and elevated what it assumed to be far more significant material issues of publicity — more significant to the court, that is, not necessarily to Grant, or even to the tradition of the New York Civil Rights Law. Ultimately, the court was able to minimize Grant’s dignitary concerns because it adopted Prosser’s psychologized approach to the tort. The court could easily denigrate any mental distress as mere “lacerated feelings,”¹⁴⁰ but as Ruth Gavison notes, one would be hard pressed to find an equivalent “petty manifestation”¹⁴¹ of a harm conceived of as an “affront to dignity.”¹⁴²

Ten years later, when Jacqueline Onassis sued Christian Dior over an advertisement that used a look-alike of Onassis together with other celebrities, there was no doubt that the company was trying to trade on Onassis’s fame.¹⁴³ Like Grant, however, Onassis, was not concerned about issues of unjust enrichment or missed opportunities to capitalize on her celebrity. To the contrary, in her affidavit she asserted “that she has never permitted her name or picture to be used in connection with the promotion of commercial products.”¹⁴⁴ She objected to the commercialization of her persona in any form. Onassis did not assert an infringement of her right to publicize her identity but of her right to protect her identity from being commercialized. Therefore, she sought only the equitable relief of an injunction, foregoing any claim for monetary damages.¹⁴⁵

In this case, the New York Supreme Court proved far more sympathetic to Onassis’s privacy-based concerns when it enunciated the guiding principle behind the Civil Rights Law

that all persons, of whatever station in life, from relatively unknown to the world famous, are to be secured against rapacious commercial exploitation. . . . [The statute] is intended to pro-

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 881.

¹⁴¹ Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437, 451 (1992).

¹⁴² *Id.*

¹⁴³ *See Onassis v. Christian Dior of N.Y., Inc.*, 472 N.Y.S.2d 254, 257 (N.Y. Sup. Ct. 1984).

¹⁴⁴ *Id.* The court supplemented Onassis’s statement, adding that this fact about her is “well-known . . .” *Id.*

¹⁴⁵ *See id.* at 258.

tect the essence of a person, his or her *identity* or *persona* from being unwillingly or unknowingly misappropriated for the profit of another.¹⁴⁶

In granting Onassis's request for an injunction, the court sought to restore her intangible "essence."¹⁴⁷ It certainly could not have hurt Onassis's case that she was one of the most revered popular icons of her time. American culture holds "Jackie" in awe. She was the closest thing we had to royalty.¹⁴⁸ In protecting Onassis, the court was also, perhaps, protecting the country's nostalgia for the cultured court of John F. Kennedy's "Camelot." Warren and Brandeis would have been pleased.¹⁴⁹

Beyond New York and its distinctive statutory regime there is continuing confusion, but also a similar persistence of privacy-based dignitary claims being asserted by plaintiffs and redressed by the courts. The cases of singers Bette Midler¹⁵⁰ and Tom Waits¹⁵¹ are particularly illustrative of this dynamic. In the late 1980s, Bette Midler sued the Ford Motor company for a television commercial which used a "sound-alike" who performed a song imitating Midler's distinctive voice.¹⁵² The California Ninth Circuit Court of Appeals found that she had a cause of action under the common law tort of appropriation because "to impersonate her voice is to pirate her identity."¹⁵³ The court noted that Midler was not suing for infringement of any copyright but that "what is put forward as protectable here [i.e., her voice] is more personal than any work of authorship."¹⁵⁴ The court went on to assert that "the human voice is one of the most palpable ways identity is manifested."¹⁵⁵ The court also noted that Midler, when originally approached by the advertising agency to do the commercial herself, had refused be-

¹⁴⁶ *Id.* at 260 (first emphasis added).

¹⁴⁷ *Id.* at 261.

¹⁴⁸ *See id.* at 262.

¹⁴⁹ In this context, Richard Posner's suggestion that a claim for appropriation simply involves an aversion to not being remunerated for the use of one's image, *see supra* note 68, seems ludicrous. The idea that Grant or Onassis would have been perfectly happy with the uses made of their images, if only they had been paid, completely contradicts the basis of their claims. Indeed, Posner's conception of the tort implies that consent is not even needed so long as payment is made. What sort of respect for the rights of the individual does this indicate? I suppose it means that if I reduce your rights to a fungible commodity which can be quantified, then I can deprive you of those rights without your consent so long as I pay you the equivalent amount in dollars.

¹⁵⁰ *See* *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

¹⁵¹ *See* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). For a detailed discussion of this case, *see infra* notes 160-69 and accompanying text.

¹⁵² *See Midler*, 849 F.2d at 461.

¹⁵³ *Id.* at 463.

¹⁵⁴ *Id.* at 462.

¹⁵⁵ *Id.* at 463.

cause she "did not do television commercials."¹⁵⁶ The commercial, therefore, did not undermine the commercial value of her name because she chose not to commercialize her name in this manner in the first place. Midler apparently was not primarily interested in the money. Rather, like Grant and Onassis, she wished her identity to remain immune from commercial exploitation.

Yet for all this, the court analogized her claim to property right and framed the value of her appropriated identity in terms of "what the market would have paid for Midler to have sung the commercial in person."¹⁵⁷ The court's confusion is as "palpable"¹⁵⁸ as Midler's voice. A property-based publicity claim derives from the unjust exclusion of a plaintiff from participating in the commercial exploitation of her identity. Midler, however, had no desire to be included. Driven by privacy-based concerns, Midler brought the action precisely because she wanted to keep her voice beyond the reach of market forces. She did not want her identity traded upon; she did not want a price put on her persona. These are privacy-based concerns for dignitary harms. The court here recognized the value of identity yet resisted embracing its implications. The right of publicity seems so much more concrete and easy to manage that it eclipses Midler's privacy claim even while appropriating its logic.¹⁵⁹

In the 1992 case of *Waits v. Frito Lay, Inc.*,¹⁶⁰ a differently composed panel of the Ninth Circuit Court of Appeals similarly upheld singer Tom Waits's claim based on a radio commercial selling SalsaRio Doritos corn chips which featured a vocal performance imitating Waits's "raspy singing voice."¹⁶¹ Like Midler, Waits did not do commercials.¹⁶² The court emphasized that Waits

has maintained this policy consistently during the past ten years, rejecting numerous lucrative offers to endorse major products. Moreover, Waits's policy is a public one: in magazine, radio, and newspaper interviews he has expressed his philosophy that musical artists should not do commercials because it detracts from their artistic integrity.¹⁶³

¹⁵⁶ *Id.* at 462.

¹⁵⁷ *Midler*, 849 F.2d at 463.

¹⁵⁸ *Id.*

¹⁵⁹ This is especially ironic considering that the author of the opinion, Judge John Noonan, has written several eloquent and influential books on the moral and humanistic dimension of the law. See, e.g., JOHN NOONAN, *PERSONS & MASKS OF THE LAW* (1976); JOHN NOONAN, *BRIBES* (1988).

¹⁶⁰ 978 F.2d 1093 (9th Cir. 1992).

¹⁶¹ *Id.* at 1096.

¹⁶² See *id.* at 1097.

¹⁶³ *Id.* at 1097. The court also compared Waits to Cary Grant, noting that both "had

Waits, then, consciously chose not to commercialize his identity because he saw the market as a threat to the integrity of his artistic persona. The harm he felt was not simply material, it was dignitary. Yet the court again confused, or conflated, the privacy and publicity interests at stake when it characterized Waits's claim as "one for invasion of a personal property right: his right of publicity to control the use of his identity as embodied in his voice."¹⁶⁴ The confusion lies in the fact that the court went on to recognize and affirm the legitimacy of the jury's grant to Waits of compensatory damages for injury to his "peace, happiness and feelings."¹⁶⁵ Indeed, this award, \$200,000, was double the amount awarded for the conversion of the fair market value of his services.¹⁶⁶ Normally, the use of someone else's property without their consent does not harm their feelings. The jury and the court recognized that something more than market value was at stake in the theft of Waits's identity.¹⁶⁷ Emphasizing Waits's principled public stand against doing commercials as a key component in assessing damages for mental distress, the court properly moved toward considering the privacy-based nature of the harm. But then it retreated into a defamation-like focus on the commercial's "embarrassing impact"¹⁶⁸ upon the plaintiff. Waits was not simply embarrassed, he was outraged. His distress was not mental but spiritual or philosophical. He felt that the commercialization of his voice undermined the integrity of his persona.¹⁶⁹ Such a harm has nothing to do with embarrassment; it has to do with an individual's ability to sustain a coherent and integrated sense of self.

Somewhat more problematic than *Waits* is *Carson v. Here's Johnny Portable Toilet, Inc.*,¹⁷⁰ which involved a celebrity who freely traded on his fame but objected to one particular commercial use of his identity as both an insult and a conversion of his proprietary interest in his celebrity.¹⁷¹ From the time he first began hosting the *Tonight Show* on television in 1962, Johnny Carson had been introduced each night with the phrase "Here's Johnny."¹⁷² The phrase, the court noted, "is generally associated with Carson by a

taken a public position against reaping commercial profits from the publicity value" of their identities. *Id.* at 1103.

¹⁶⁴ *Id.* at 1100.

¹⁶⁵ *Id.* at 1103.

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ 698 F.2d 831 (6th Cir. 1983).

¹⁷¹ *See id.* at 835.

¹⁷² *Id.* at 832-45.

substantial segment of the television viewing public.”¹⁷³ Over the years, Carson had traded on his celebrity and had specifically licensed the phrase “Here’s Johnny” to sell a line of men’s toiletries.¹⁷⁴ But in 1976, a Michigan corporation engaged in a new and unauthorized use of the phrase.¹⁷⁵ The company manufactured portable toilets and its founder thought it made “a good play on a phrase” to call his company “Here’s Johnny Portable Toilets, Inc.,” and to couple the name with a second phrase, “The World’s Foremost Comedian.”¹⁷⁶

Carson was not amused. He sued, alleging unfair competition under the Lanham Act¹⁷⁷ and infringements of his right to privacy and right of publicity.¹⁷⁸ A Federal District Court dismissed his complaint,¹⁷⁹ but on appeal, the Sixth Circuit Court of Appeals found that Carson’s right of publicity had indeed been invaded.¹⁸⁰ The court, however, thought it unlikely that any privacy right had been invaded. It acknowledged that Carson was embarrassed and “considers it odious”¹⁸¹ to be associated with the product, but it simply concluded without further discussion that this did not appear to amount to an invasion of any interests protected by the right of privacy.¹⁸² The court reached this conclusion, however, only after discussing William Prosser’s division of the right of privacy into four distinct interests, the first three involving the “right to be left alone” and the fourth being appropriation of identity.¹⁸³ The court identified this last interest as more or less synonymous with the right of publicity.¹⁸⁴ The court’s failure to appreciate the dignitary interest implicated by the appropriation of one’s identity, whether celebrity or not, blinded it to a key aspect of Carson’s claim. It apparently considered Carson’s embarrassment simply to be a matter of exposure to the public, apparently an interest he surrendered upon becoming a celebrity. It did not, however, consider that the “odious[ness]”¹⁸⁵ of the association might derive not only from public exposure, but from Carson’s own sense that his

¹⁷³ *Id.* at 823-33.

¹⁷⁴ *See id.* at 833.

¹⁷⁵ *See id.*

¹⁷⁶ *Id.*

¹⁷⁷ 15 U.S.C. §§ 1051-1128 (1976).

¹⁷⁸ *See Carson*, 698 F.2d at 833.

¹⁷⁹ 498 F. Supp. 71 (E.D. Mich. 1980).

¹⁸⁰ *See Carson*, 698 F.2d at 836.

¹⁸¹ *Id.* at 834.

¹⁸² The court did not ultimately dispose of that claim because of its finding that Carson’s right of publicity had been invaded. *See id.* at 834.

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *Id.*

identity was being tainted by the association. Carson apparently was outraged at having his identity forcibly associated with this particular type of product. From the terms used by the court, it appears that Carson considered his identity to be polluted by the association with the toilets. This concern does not involve reputation, or a sense of unwanted exposure. Rather, it implicates a dignitary harm to the persona.

In all these cases, the courts might have done well to refer back to Warren and Brandeis's original articulation of the interests implicated by the right to privacy. Discussing the basis of an author's right to prevent the publication of manuscripts or works of art, Warren and Brandeis, while conceding an obvious property interest in benefitting from the reproduction of such works, pointed out that:

Where the value of the production is not in the right to take profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptance of that term.¹⁸⁶

While Carson's case may be equivocal in this regard, Onassis, Grant, Midler, and Waits clearly were primarily interested in preventing any publication at all. They did not seek profits. To the contrary, they were trying to resist the commodification of their identities. Their concern and their interest were to maintain their peace of mind (or, alternatively, the integrity of their personae) by keeping their identity out of the marketplace.

V. PROBLEMATIZING PUBLICITY

Returning now to McCarthy's definition of the contemporary right of publicity as "the right of every person to control the commercial use of his or her identity,"¹⁸⁷ we see that the genealogy of that right renders it far more problematic than his concise definition indicates. Sheldon Halpern, for example, notes that the right of publicity as we understand it today, "is peculiarly celebrity based, arising only in the case of an individual who has attained some degree of notoriety or fame."¹⁸⁸ He observes that courts following the privacy-based notion of appropriation as harm to identity have tended to find a waiver of the right with respect to celebrities who

¹⁸⁶ Warren & Brandeis, *supra* note 15, at 200-01.

¹⁸⁷ McCarthy, *supra* note 69, at 130.

¹⁸⁸ Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1200 n.3 (1986).

actively seek the limelight. But he finds that courts compensated for this problem by developing the property-based right of publicity.¹⁸⁹ He argues that the commercial value of celebrity has two components: “[I]t is marketable both for itself directly and for the associative spillover that follows from our interests in celebrity.”¹⁹⁰ Halpern focuses on the associative value of celebrity as more interesting and complex than direct appropriation of the celebrity’s identity. He recognizes that close association of a product with symbols of the celebrity should be enough to constitute an exploitation of the celebrity’s identity.¹⁹¹

This is all well and good with respect to the right of publicity, but Halpern (and the many courts that have followed similar reasoning) wholly misconstrues the basic nature of the privacy interest involved in appropriation of identity. Halpern begins by interpreting the personal interest involved in appropriation solely in terms of the right to be protected from the public gaze. Those who have willingly subjected themselves to that gaze, he assumes (and not unreasonably), have implicitly waived any right to claim injury from having their image displayed by others. Within this framework of analysis, the harm of appropriation is essentially the psychological harm of mental distress or embarrassment from public exposure. Halpern’s framework fails to account for the dignitary harms of the sort identified in *Pavesich*. Also absent from this interpretation is the *Pavesich* court’s concern for the effacement of individuality caused by the forcible commodification of identity as a fungible object of market exchange.¹⁹² A celebrity may suffer these types of harm just as readily as the average person on the street. As philosopher Avishai Margalit recently put it, even “powerful, famous people . . . have human dignity, and in a decent society they can and should be allowed to protect their dignity.”¹⁹³

McCarthy, providing an interesting twist to his conception of publicity rights, specifies two categories of cases: those cases which “use . . . a person’s identity for its identification value,”¹⁹⁴ as in

¹⁸⁹ See *id.* at 1206-07.

¹⁹⁰ *Id.* at 1240.

¹⁹¹ See *id.* at 1242-47.

¹⁹² See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80-81 (Ga. 1905).

¹⁹³ AVISHAI MARGALIT, *THE DECENT SOCIETY* 206 (1996). Margalit goes on to make this useful distinction: “The question, however, is whether gossip puts famous people in their place as basically ordinary people — insulting them perhaps, but not humiliating them — or whether it actually makes them seem nonhuman. Does gossip affect only the celebrities’ public image, or does it affect their self-image as well?” *Id.* at 206-07. I would argue that the effacement of individuality occasioned by the forced commodification of a celebrity’s persona precisely renders her “nonhuman” by turning her into a fungible commodity.

¹⁹⁴ McCarthy, *supra* note 69, at 130.

advertisements; and those which use “a person’s performance for its performance value,”¹⁹⁵ as with Elvis Presley impersonators or “Beatlemania.”¹⁹⁶ McCarthy, however, does not stop with an elaboration of the right of publicity. He goes on to tout it as superior to the right to privacy with respect to claims for appropriation of identity:

Even for the non-celebrity whose identity is used without permission in an ad, it is usually preferable to use the right of publicity rather than [to] assert a privacy claim. To prove a privacy claim, the non-celebrity plaintiff will have to present evidence of snide remarks by co-workers, sleepless nights and embarrassing aspects of plaintiff’s personal life which has [sic] little to do with the real nature of the grievance. In most such cases, the real nature of the grievance is that something of value was taken without payment. So we should focus on the value of that “something” and forget about trying to prove mental distress.¹⁹⁷

Where Halpern makes privacy-based rights of identity extraneous for celebrities, here McCarthy extends privacy’s irrelevance to cover non-celebrities as well. McCarthy thus reduces the personal harm from appropriation of identity to a mere trifle.

McCarthy, however, like Halpern, seriously mischaracterizes the personal interest involved in appropriation of identity. First, like Halpern, he reduces the personal harm of appropriation to mental distress, which he trivializes as snide remarks and sleepless nights. He thereby limits any personal harm to discreet events which appear relatively inconsequential and transitory. The contrast with *Pavesich* could not be starker. There is no dignitary harm for McCarthy, nor damage to the integrity of the persona. For McCarthy, appropriation of identity involves a merely fleeting psychological discomfort, which in any event, is too difficult to quantify to merit serious attention. His real concern is that something of monetary value has been taken without payment. He completely misses the privacy-based concern that the act of turning one’s identity into something of monetary value (a commodity or similarly continuous medium of exchange) may itself constitute a harm. He further overlooks the issue of consent: where lack of payment is the only problem, then consent to use a person’s identity is irrelevant so long as payment is made. It would seem that to McCarthy hav-

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 133.

¹⁹⁷ *Id.* at 134 (citation omitted).

ing your image enslaved (i.e., put in the service of another without your consent) is fine so long as your master pays you.

Michael Madow and Rosemary Coombe¹⁹⁸ each offer powerful critiques of the right of publicity. Both, however, focus primarily on the property-based interests in identity. To Madow, the emergence of the right of publicity reflects “the triumph of a market-oriented, instrumentalist, individualistic understanding of fame over an older, more communitarian conception.”¹⁹⁹

Embedded in this contrast of individualism versus community lie deeper issues of who controls the definition of legal harm. Under a more communitarian conception of publicity, local social elites historically defined legal interests and harms by appeal to established community norms and traditions.²⁰⁰ Under the more modern, individualistic understanding of publicity, market values play a prominent role in defining legal harm. Such values, though seemingly within the “common sense”²⁰¹ understanding of the average citizen, ultimately are defined and interpreted by economic managers, accountants, or other relevant experts.

Madow identifies three ways in which “celebrity” generates economic value: (1) through demand for information about the lives and doings of celebrities; (2) by the merchandising of the celebrity’s name or image; and (3) by advertizing collateral objects using celebrity endorsements.²⁰² The latter two uses correspond roughly to Halpern’s categories. The first does not involve direct commodification of identity but, rather, concerns generally newsworthy information, the legal rights to which, as Madow notes, belong to the public domain.²⁰³ Madow also identifies and then critiques three standard justifications for publicity rights: (1) a moral right to benefit from the fruits of your labor, the concomitant injury being the unjust enrichment of the person who exploits your image without permission; (2) to provide an economic incen-

¹⁹⁸ Rosemary J. Coombe, *Author/izing Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365 (1992). For an extended discussion of Coombe’s critique, see *infra* notes 219-23 and accompanying text.

¹⁹⁹ Madow, *supra* note 77, at 135. In this he echoes Robert Bellah, who conceives of the “reputation of public figures as a public good.” BELLAH ET AL., *supra* note 27, at 745. Both Bellah and Madow refer to the use of images of the founding fathers to promote patriotism during the early Republic as examples of a more communitarian approach to fame. See *id.*; Madow, *supra* note 77, at 150-52.

²⁰⁰ This certainly was the case for Warren and Brandeis as they tried to gain legal sanction for a right of privacy that they defined in a manner calculated to preserve the sort of genteel bourgeois community with which they identified. See Kahn, *supra* note 19, at 306-14.

²⁰¹ Madow, *supra* note 77, at 136.

²⁰² See *id.* at 129.

²⁰³ See *id.* at 129-30.

tive to creative effort and achievement, and to promote the efficient use of existing scarce resources in "celebrity" (the logic here largely paralleling that of copyright protection); and (3) an interest in consumer protection by promoting truth in advertising with respect to celebrity endorsement, a goal largely achieved now through the Lanham Act.²⁰⁴

As for the moral justification, Madow first argues that fame is no sure test of merit. He considers how many so-called celebrities gained commercially marketable fame through "criminal or grossly immoral conduct."²⁰⁵ Madow goes on to note that many other more savory public persons, such as Albert Einstein, have had fame thrust upon them and have played only a small role in producing the celebrity value of their personae. Finally, even most classic movie star celebrities cannot justly take all the credit for manufacturing their public personae because of the effort put in by countless publicists and support staff in developing and marketing celebrity identities. Madow also undermines the justification of preventing unjust enrichment by arguing that cultural production is always a matter of reworking existing images and ideas. Therefore, those who appropriate celebrity images may actually be adding to their value through their own labor, which further adds to the meaning of the images.²⁰⁶

Madow dismisses the justification of providing an economic incentive for creativity as unsupported by any evidence.²⁰⁷ He finds the analogy to copyright erroneous because publicity rights are a collateral benefit of the activity which makes you famous.²⁰⁸ He asserts that it is unlikely that actors, for example, would cease trying to be great actors if they could not control the use of their images.²⁰⁹ Instead, monopoly control of publicity leads to an over investment in celebrity-production and skews the distribution of benefits to a few at the top.²¹⁰

Monopoly control, in fact, is the true focus of Madow's critique of publicity rights.²¹¹ He argues that the right of publicity threatens cultural pluralism by restricting the broad and diverse use of powerful cultural icons.²¹² One consequence of this monop-

²⁰⁴ See *id.* at 178.

²⁰⁵ *Id.* at 179.

²⁰⁶ See *id.* at 179-96.

²⁰⁷ See *id.* at 208-15.

²⁰⁸ See *id.* at 206-08.

²⁰⁹ See *id.*

²¹⁰ See *id.* at 210-19.

²¹¹ See *id.* at 238-40.

²¹² See *id.*

oly is that it redistributes the wealth generated by celebrity upward, thus facilitating private censorship of popular culture. Censorship is especially important to Madow because, as he notes, publicity rights are not just about ownership, they are also about meaning:

“Who owns ‘Madonna’?” is not just a question about who gets to capture the immense economic values that attach to her persona. The question is also, even chiefly, about who gets to decide what Madonna will *mean* in our culture. . . . By centralizing this meaning-making power in the celebrity herself or her assignees, the right of publicity facilitates top-down management of popular culture and constricts the space available for alternative and oppositional cultural practice.²¹³

Madow adopts a populist view of popular culture as an arena of contested meanings and the “recoding”²¹⁴ of messages by a popular audience. He sees publicity rights as constricting the space for alternative cultural practices. He notes that individuals and groups often use “star signs”²¹⁵ to communicate meanings of their own making, especially for groups outside the mainstream.²¹⁶

As an example of the suppression of such alternative constructions of celebrity, Madow discusses a gay, camp postcard of John Wayne with the caption, “It’s such a bitch being butch.”²¹⁷ When the New York State legislature was holding hearings to consider a bill to create a descendible right of publicity, Wayne’s children, among others, objected to the card as tasteless and demeaning. Madow objects that vesting a descendible right of publicity in “Wayne Enterprises” (a family-owned partnership which purchased from John Wayne the exclusive right to his identity), would empower it “to fix, or at least try to fix, the meaning that ‘John Wayne’ has in our culture: his meaning *for us*.”²¹⁸

Rosemary Coombe, arguing that the traditional rationales do not adequately justify the current extent of legal protection for publicity rights, notes that “the law constructs and maintains fixed, stable identities authored by the celebrity subject.”²¹⁹ Like Madow, one of Coombe’s primary concerns is the notion of authorship itself.²²⁰ She too notes that celebrities do not single handedly “cre-

²¹³ *Id.* at 134.

²¹⁴ *Id.* at 139.

²¹⁵ *Id.* at 43.

²¹⁶ *See id.* at 139-45.

²¹⁷ *Id.* at 144.

²¹⁸ *Id.* at 144-45.

²¹⁹ Coombe, *supra* note 198, at 365.

²²⁰ *See id.* at 365-66.

ate" all the value inherent in their images.²²¹ Looking to the example of the studio system of Hollywood's golden era, Coombe effectively demonstrates that star images have multiple authors.²²² Madonna, seemingly the favorite icon of critics of popular culture, provides a further example of the continuing appropriation and reappropriation of star images, as she remakes her own public identity by incorporating such Hollywood icons as Jean Harlow and Marilyn Monroe.²²³

Madow and Coombe raise very important issues by focusing on the production of cultural meaning but, ironically, they are so bound by a property-based approach to identity that they fail to consider fully that the context and purpose of appropriation of identity themselves affect meaning. Thus, for example, using Madonna's image to help sell a product implicates a very different set of meanings than using her image as part of a news story. Madow himself notes that rights to information about a celebrity remain in the public domain.²²⁴ But he does not consider that the rationale for this lies not only in the First Amendment, but also in the historical distinction between commercial and non-commercial uses of identity. Hence, when he objects to the attack on the John Wayne post card as the tyranny of a preferred meaning, he does not consider that the same post card, with the same message, might well be protected if it were displayed as part of an art exhibition.²²⁵ Certainly paintings too are sold, but the nature and degree of commodification is different. Indeed, I would argue that even the post card deserved, and in many court rooms would probably receive, protection as parody rather than mere commercial exploitation.²²⁶

More significantly, neither Coombe nor Madow adequately considers the difference between celebrity and persona.²²⁷ Perhaps this is because they, like Halpern, seem guided by the notion

²²¹ See *id.* at 366.

²²² See *id.* at 365-66.

²²³ See *id.* at 368-71.

²²⁴ See Madow, *supra* note 77, at 130.

²²⁵ See *id.* at 145-46.

²²⁶ As early as 1979, Peter Felcher and Edward Rubin noted a pattern of court decisions which protected the use of celebrity images for informational or cultural purposes. They found that parody, in particular, would receive protection to the extent that it involved the creative use of a celebrity image as part of a larger independent presentation. See Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1605 (1979). As certain Elvis Presley impersonators have learned, however, the law distinguishes between parody and imitation. Thus, for example, when the Estate of Presley sued Rob Russen, producer of "THE BIG EL SHOW," the Federal court in New Jersey found the show's use of an Elvis impersonator to be primarily commercial in character, lacking the type of "creative comment" one would find in parody or satire. See *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981).

²²⁷ See Madow, *supra* note 77, at 143.

that famous people have waived the right of privacy. They therefore do not fully consider the special nature of the relationship between anyone, including a celebrity, and his or her image. Madow and Coombe see control over celebrity images as primarily a matter of control over their commercial and cultural power. They do not consider the privacy-based value of personal identity which an individual may invest in a public persona. An entire publicity department may help to create a "star image" but the star herself may be uniquely invested in that image. It is, after all, an image of *her*, and of no one else. Its forced commodification may deprive the publicists of the monetary value of their efforts to create "celebrity," but it may also distinctively implicate the star's persona in a deeper and more affecting way. To the extent it does, the star, and no one else, may have a special claim, based not on commercial value but on protecting the integrity of the individual persona.

VI. PRIVACY, NEWSWORTHINESS, AND THE COMMERCIAL VALUE OF IDENTITY

The differences between appropriation of identity and publicity rights may be further illuminated by considering the relationship between privacy, newsworthiness, and the commercial value of identity. In critiques of privacy rights that in some ways complement Madow's and Coombe's critique of publicity rights, Harry Kalven and Dianne Zimmerman have each argued that the growing privilege for newsworthy material has all but swallowed up the tort of invasion of privacy, rendering it irrelevant.²²⁸ They find privacy to be an ill-defined concept and have little patience for the notion that the similarly hard to define concept of "dignity" should be the basis for granting relief.²²⁹ Zimmerman's analysis, however, mistakenly reduces privacy to a simple matter: "the right to be free of true but embarrassing publicity."²³⁰ Zimmerman's narrow view

²²⁸ Harry Kalven, Jr., *supra* note 65; Zimmerman, *supra* note 60; Dianne L. Zimmerman, *Musings on a Famous Law Review Article: The Shadow of Substance*, 41 CASE W. RES. L. REV. 823 (1991).

²²⁹ See Kalven, *supra* note 65, at 327-34; Zimmerman, *supra* note 60, at 292-94, 339-50; Zimmerman, *supra* note 228, at 825-26.

²³⁰ Zimmerman, *supra* note 60, at 294. James Rachel notes that there are many types of activities that are not shameful, unpopular, or embarrassing, but whose publication would invade privacy. Conversely, there are many public facts that are embarrassing. The operative issue then is not embarrassment, but the private nature of the facts as socially understood at the time. See James Rachel, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 323, 325 (1975). I might add the example of a philanthropic donor who wishes to remain anonymous. The disclosure of her name would likely bring praise not embarrassment, yet the disclosure would, nonetheless, violate her sense of privacy.

of the harm of appropriation naturally leads to her expansive view of the privilege of newsworthiness. Ruth Gavison, responding to Zimmerman, rightly notes that Prosser failed to appreciate that more than “mental distress” was at stake in privacy actions.²³¹ She argues that construing an invasion of privacy as an “affront to dignity” is more focused and has none of the “petty manifestations” which might attend claims of mental distress.²³² Taking Gavison’s broader view of appropriation as an affront to dignity opens the way to a more nuanced and bounded understanding of the privilege of newsworthiness.

If we understand appropriation as a dignitary harm deriving in large part from the forced commodification and public marketing of the self, we can see that it is complemented by the privilege of newsworthiness, not consumed by it. Newsworthiness, in part, is a measure of the non-commercial informational value to the public in the exposure of an image. The privacy-based tort of appropriation of identity similarly involves the non-commercial value of the integrity of the persona. Both newsworthiness and privacy challenge commercial control of identity by deriving their value from a realm beyond market forces. Existing beyond the market, newsworthiness and privacy interests provide a basis for breaking Madow’s detested monopoly control over celebrity while remaining sensitive to the need to protect the integrity of all people’s identities.²³³ Newsworthy uses of identity remain part of the public domain, therefore, not simply because of the First Amendment, but also because they do not forcibly commodify the self. Other creative uses of identity, whether in parody or art, are similarly privileged. It is precisely because such uses do not violate the privacy-based rights of integrity of the persona that they remain beyond the reach of the property-based right of publicity. That is, as uses which do not implicate commercial values, they do not infringe upon any publicity rights. Under this approach, the right of publicity becomes, in part, a function of the boundaries of privacy rather than vice versa.

Courts regularly must identify and define “commercial use” and its relation to newsworthiness in articulating the scope of property and privacy interests implicated by appropriation of identity. This is especially clear in suits brought under the New York Civil Rights Statute, which requires a use “for the purpose of trade” to

²³¹ See Gavison, *supra* note 141.

²³² See *id.* at 451.

²³³ See Madow, *supra* note 77, at 239-40.

find a violation.²³⁴ Thus, for example, in the 1931 case *Martin v. New Metropolitan Fiction, Inc.*,²³⁵ the mother of the victim of a crime sued over the publication of a photograph of an actual courtroom scene used to illustrate an article titled "Tropic Vengeance" in a monthly magazine called *True Detective Mysteries*.²³⁶ The court upheld the plaintiff's claim, finding that there was no legitimate, relevant justification for the use of her picture, even though the article was a "legitimate historical chronicle of an actual happening."²³⁷ That is, the story may have been newsworthy, but the plaintiff's identity was not.²³⁸

Interpreting the phrase "for purposes of trade" in the New York statute, the court noted:

[F]rom the standpoint of the reader of the magazine, the conclusion would be, ordinarily, that the picture of the plaintiff with its accompanying lurid and passionate quotation attributed to her ["I could kill that man with my own hands!"] was inserted simply to add to the attractiveness and sale of the publication. Such a use I do not believe to be legitimate, but rather a commercial one.²³⁹

The court here appealed to general community perceptions of the article to establish the commercial nature of the defendant's use of Martin's picture. The court ultimately defined the use as commercial because it could not imagine the public seeing it as relevant to the news value of the story. Thus, where newsworthiness is at issue, local social practices and understandings guide the courts' efforts to circumscribe the reach of the market.

The relationship between newsworthiness and local norms of civility was further elaborated upon by the California Supreme Court in 1931 in the notorious case of *Melvin v. Reid*.²⁴⁰ The case involved the release of a film, *The Red Kimono*, in 1925, which depicted the true story of a prostitute who was tried and acquitted of

²³⁴ N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992).

²³⁵ 248 N.Y.S. 359 (N.Y. Sup. Ct.), *aff'd*, 254 N.Y.S. 1015 (N.Y. App. Div. 1931) (mem.).

²³⁶ *See Martin*, 248 N.Y.S. at 360.

²³⁷ *Id.* at 362.

²³⁸ For a roughly contemporary case from outside of New York that makes a similar distinction, see *Barber v. Time*, 159 S.W.2d 291 (Mo. 1942). This case involved a magazine that reported the plaintiff's name and picture in an article concerning her hospitalization for an eating disorder. *See id.* at 293. In finding a violation of the plaintiff's right to privacy, the court noted that "while plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered this ailment was not." *Id.* at 295.

²³⁹ *Martin*, 248 N.Y.S. at 362.

²⁴⁰ 297 P. 91 (Cal. 1931).

murder in 1918.²⁴¹ The film used the true maiden name of the prostitute, Gabrielle Darley.²⁴² The real Darley had since married, taken her husband's name, "Melvin," and made a concerted effort to put her past behind her.²⁴³ Through the film, Gabrielle Melvin's friends learned of her past for the first time.²⁴⁴ Melvin sued, claiming that the film caused her great mental suffering by invading her privacy and causing her friends to scorn and abandon her.²⁴⁵ The court found in her favor, recognizing a right to privacy under the California State constitution as "an incident of the person and not of property" that accrued "when the publication [of private information] is made for gain or profit."²⁴⁶

The action here involved the recreation of a true event. Again, there was the intervention of an outside actor who forcibly placed the plaintiff's identity in its service for a commercial purpose. As with *Martin*, however, the *Melvin* court drew the further distinction that while the *incidents* depicted in the movie might be newsworthy, the use of Melvin's true maiden *name* was not and could, therefore, give rise to a cause of action.²⁴⁷ Here the court distinguished between types of information conveyed. Publicizing the story itself might conceivably upset Melvin, but it was the use of her name that actually harmed her. The harm, moreover, was not simply a matter of embarrassment. Rather, it involved the application of community norms of civility to determine under what conditions an individual had the right to control the use of her identity.²⁴⁸

Central to the court's analysis was the fact that Melvin had abandoned her life of shame, had rehabilitated herself, and had taken her place as a respected and honored member of society. This change having occurred in her life, she should have been permitted to continue its course without having her reputation and social standing destroyed by the publication of the story of her former depravity with no other excuse than the expectation of private gain by the publishers.²⁴⁹

²⁴¹ See *id.* at 91.

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ *Id.* at 297.

²⁴⁷ See *id.*

²⁴⁸ The court in *Barber v. Time*, 159 S.W.2d 291 (Mo. 1942), made a similar distinction. See *supra* note 238.

²⁴⁹ *Melvin*, 297 P. at 93.

Melvin was now a virtuous woman, upstanding by current social standards and therefore deserving of that state's protection.

While implying that "good" citizens deserved greater privacy protection than "bad" ones, the *Melvin* court echoed an earlier Louisiana case where a man sought to enjoin the local inspector of police from putting his picture in a rogues' gallery pending the outcome of his trial.²⁵⁰ In granting a preliminary injunction, the court asserted that, "[e]very one who does not violate the law can insist upon being let alone (the right of privacy). In such a case the right of privacy is absolute."²⁵¹ The right to privacy thereby became a function of one's standing in the community. The purpose of privacy being the maintenance of a "civilized" community, only those who conformed to civilized norms of behavior merited its protection.

The *Melvin* opinion was also hortatory, aimed not only at the parties but at society as a whole. Thus, the court asserted:

[W]here a person has by his own efforts rehabilitated himself, we, as *right-thinking members of society*, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime. Even the thief on the cross was permitted to repent during the hours of his final agony.²⁵²

In pronouncing how "right-thinking members of society"²⁵³ should act, the court implied that newsworthiness was not simply a function of what the public was interested in, but of what it *should* be interested in.²⁵⁴ Privacy doctrine here became a means of enforcing standards of moral conduct and taste across the entire community. It also placed the determination of newsworthiness beyond market definition. That is, news was not "whatever sells," but what judicial arbiters of social taste determined was appropriate for the public to see.

In a sense, *Melvin* involves a question of multiple identities.

²⁵⁰ See *Itzkovich v. Whitaker*, 39 So. 499, 500 (La. 1905).

²⁵¹ *Id.* at 500. In *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court denied relief under 42 U.S.C. section 1983 for a claim against a police officer who inaccurately circulated the plaintiff's photograph to local merchants as someone "known" to be an active "shop lifter." The Court stated that sufficient relief could be obtained at the state level. See *id.* at 697. In discussing the result, Laurence Tribe commented that "the Court evidently believed that any contrary result would have the unthinkable consequence of federalizing the entire state law of torts whenever government officers are the wrongdoers." LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 970 (1988).

²⁵² *Melvin*, 297 P. at 93 (emphasis added).

²⁵³ *Id.*

²⁵⁴ In contrast, the *Martin* court seemed ready to defer to the "the standpoint of the reader of the magazine." *Martin v. New Metropolitan Fiction, Inc.*, 248 N.Y.S 359, 362 (N.Y. Sup. Ct. 1931).

The Red Kimono presented a past identity which Melvin had worked hard to shed.²⁵⁵ The harm seemed to emanate from the way in which the film imposed a past identity upon Melvin; hence, the significance of her rehabilitation. If she still had substantially the same identity as the “depraved”²⁵⁶ prostitute she once was, the court presumably would have viewed her claim much less favorably. Where *Pavesich* involved the enslavement of one’s image, *Melvin* involved enslavement to an image. It was the forced identification of her self with a particular past identity that harmed her.²⁵⁷

As Anita Allen and Erin Mack have noted, *Melvin* was a highly gendered case.²⁵⁸ *The Red Kimono* affronted a distinctively feminized manifestation of dignity, and the court cast itself as the champion of a woman’s virtue.²⁵⁹ It upheld Melvin’s claim in large part because she had conformed her life to the norms in polite society of 1930s America.²⁶⁰ She therefore deserved protection for her dignity as a “proper” woman.²⁶¹ The case afforded women a measure of empowerment even as it forced them to submit to paternalistic social norms.²⁶² It granted to women who abided by community standards of propriety, some control over the characterization of their public identity.

Melvin got special credit for making the conscious effort to reject her immoral past and work to rehabilitate herself.²⁶³ She was welcomed into the fold, the prodigal daughter returned. Rights here become conditioned upon conformity. Conformity, indeed,

²⁵⁵ *Melvin*, 297 P. at 91.

²⁵⁶ *Id.* at 93.

²⁵⁷ In this the court presages such cases as *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1942), where the Supreme Court held that a compulsory flag salute in schools amounted to “a compulsion of students to declare a belief” which violated students’ First amendment rights. *See id.* at 631. A coerced confession of belief, like the resurrection of Melvin’s past, intrudes upon an individual’s ability to control the formation and maintenance of her own identity.

²⁵⁸ Anita Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 470 (1990).

²⁵⁹ *See id.*

²⁶⁰ *See id.*

²⁶¹ *See id.* at 470-71.

²⁶² Frances Olsen argues against generalizations with respect to feminist claims of the merits of sameness versus difference, or paternalism versus equality, in resolving legal cases. *See* Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois, 1869-1895*, 85 MICH. L. REV. 1518, 1533-35 (1986). Olsen examines gender specific labor legislation in Illinois between 1869 and 1895, and finds that preliminary characterizations of legal regimes as “paternalistic” or “equal” do not illuminate the true power dynamics involved in the particulars of specific cases. *See id.* at 1534. Thus, for example, the paternalistic rhetoric may be used to “protect” women by excluding them from the legal profession, or the “equal right” to freedom of contract may be invoked to strike down protective labor legislation for women. *See id.* at 1534-35. In each case, Olsen argues, a “false paternalism” or a “false equality” may legitimate the oppression of women. *See id.*

²⁶³ *See Melvin v. Reid*, 297 P. 91, 93 (Cal. 1931).

is a critical component of privacy jurisprudence insofar as the latter aims to maintain a particular normative conception of community. The right to privacy, thereby, becomes a tool of community maintenance and control by extending only to those who accept, abide by, and embody its norms.

Allen and Mack effectively contrast Melvin's case with the roughly contemporary case of William James Sidis, a childhood mathematics prodigy who graduated from Harvard College at age sixteen, but soon thereafter faded into obscurity.²⁶⁴ In 1937, *The New Yorker* published a biographical sketch of Sidis in its "Where Are They Now" section.²⁶⁵ Sidis, who had jealously guarded his privacy over the years, sued for this invasion but the Second Circuit Court of Appeals denied his claim, finding that there was a legitimate public interest in the information about his past.²⁶⁶ *Melvin and Sidis*, then, had roughly analogous facts, but different results. Allen and Mack assert that, "viewed in social context, the woman who wished to conceal a past of prostitution may have presented a more compelling claim than a man who wanted to conceal that he had failed to have the brilliant career anticipated, precisely because she was a woman and he was a man."²⁶⁷ The authors conclude that "the privacy tort as applied to women has often functioned to reinforce the social rules of inaccessibility applicable to females."²⁶⁸ I would argue in the case of Melvin that the court applied privacy to reinforce her inaccessibility in large part because she was respectably married. The court was, perhaps, less concerned to protect Gabrielle Melvin, than to protect Mr. Melvin's wife.²⁶⁹

²⁶⁴ See *Sidis v. F.R. Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940).

²⁶⁵ See *id.* at 807.

²⁶⁶ See *id.* at 807-09.

²⁶⁷ Allen & Mack, *supra* note 258, at 470.

²⁶⁸ *Id.* at 472-73.

²⁶⁹ My argument here echoes Allen and Mack's own analysis of a much earlier privacy case, *DeMay v. Roberts*, 9 N.W. 146 (Mich. 1881). In this case, DeMay, a physician, brought a Mr. Scattergood along with him to help him attend to the confinement of Mrs. Roberts, a poor married woman. See *id.* at 146. Scattergood, however, was an "unprofessional young unmarried man." See *id.* at 148. Roberts discovered these facts after the birth, sued, and won at trial. See *id.* at 146. The appeals court upheld her claim and the jury's finding that she suffered "shame and mortification" as a result of Scattergood's intrusion on her privacy. See *id.* at 149. This was despite the fact that all parties agreed that Scattergood behaved with propriety and in a "becoming manner." *Id.* at 146-48.

Allen and Mack argue that the true transgression in the eyes of the court was the fact that Scattergood's presence constituted an affront to Mr. Roberts' household authority. See Allen & Mack, *supra* note 258, at 454. William Parent characterizes *DeMay* as involving the invasion of privacy through the acquisition of undocumented knowledge without the consent of the plaintiff. See William A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305, 323-29 (1983). Parent acknowledges that such information is deemed private "as a function of existing cultural norms and social practices," *id.* at 307, but he does not fully

In contrast to *Melvin*, the *Sidis* court found *The New Yorker's* disclosures regarding the child mathematics prodigy's life since he left the limelight to be, in effect, newsworthy.²⁷⁰ Robert Post notes that the court's analysis in *Sidis* assumes "that the public has a right to inquire into the significance of public persons and events."²⁷¹ He concludes that the decision

[u]ltimately rests on what might be termed a normative theory of public accountability, on the notion that the public *should* be entitled to inquire freely into the significance of public persons and events, and that this entitlement is so powerful that it overrides individual claims to the maintenance of information preserves.²⁷²

As noted above, however, the gendered aspects of privacy indicate that a different "normative theory"²⁷³ might have been at work in Gabrielle Melvin's case, where the court found, in effect, that the public *should not* be entitled to specific information about her past.²⁷⁴

The 1971 case *Briscoe v. Reader's Digest Association*²⁷⁵ provides a more recent complement to *Melvin*. This case involved the publication of the plaintiff's name in connection with a truck hijack that had occurred eleven years earlier.²⁷⁶ The court found that the plaintiff had stated a valid cause of action because a jury could reasonably find that the plaintiff's past identity as a criminal was not newsworthy, even if the event itself was.²⁷⁷ In the course of its opinion, the court recognized the dignitary nature of the privacy interest involved, defining the claim as "not so much one of total secrecy as . . . of the right to *define* one's circle of intimacy."²⁷⁸ The court concluded that "loss of control over which 'face' one puts on may result in a literal loss of self identity."²⁷⁹ The court here is simply not concerned with which persona one presents to the outward world. Rather, its primary focus is on the implications of that

consider how those norms and practices might be at work in this case. Nor does he consider the dignitary affront involved by the invasion. The harm was not caused simply by the knowledge the defendant and his companion gained; it was caused by the very presence of Scattergood, who simply was not the type of person who was supposed to be there.

²⁷⁰ *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 807 (2d cir. 1940).

²⁷¹ Post, *supra* note 9, at 1000.

²⁷² *Id.* at 1001.

²⁷³ *See id.*

²⁷⁴ *Melvin v. Reid*, 297 P. 91, 93 (Cal. 1931).

²⁷⁵ *Briscoe v. Reader's Digest Ass'n.*, 483 P.2d 34 (Cal. 1971).

²⁷⁶ *See id.* at 36.

²⁷⁷ *See id.* at 43-44.

²⁷⁸ *Id.* at 37.

²⁷⁹ *Id.*

control for maintaining the integrity of one's own identity. Loss of such control may undermine identity and ultimately personhood by denying the conditions necessary for individuation.

In this regard, there are interesting parallels between appropriation identity and Drucilla Cornell's analysis of the right to abortion as a matter of maintaining bodily integrity.²⁸⁰ Cornell argues that

the denial of the right to abortion should be understood as a serious symbolic assault on a woman's sense of self precisely because it thwarts her projection of bodily integration and places the woman's body in the hands and imaginings of others who would deny her coherence by separating her womb from her self.²⁸¹

Like the *Briscoe* court, Cornell is concerned with maintaining the conditions necessary to individuation. Both common law privacy and constitutional privacy here gain meaning not simply as matters of controlling access to information or territory, but as they bear on regulating the state and society so as to allow the individual to develop and sustain a coherent, distinctive identity.

Most recent appropriation cases, however, tend to follow the logic of *Martin* more than that of *Melvin*. They focus less on the "legitimacy" of the use (as defined by the moral standards of upstanding judges) and more on the way in which the use functions in the marketplace from the standpoint of general "readers." That is, where the *Melvin* court considered whether the name or image conveyed information of a type that was appropriate for public consumption, more recent opinions focus on whether the name or image convey any information at all or are merely used to attract attention to a product.

For example, in the 1978 case *Ali v. Playgirl, Inc.*,²⁸² the court asserted that "the unauthorized use of an individual's picture is not for a 'trade purpose', and thus not violative of section 51, if it is 'in connection with an item of news or one that is newsworthy.'"²⁸³ In *Ali*'s case, the court found "no such informational or newsworthy dimension to defendants' unauthorized use of *Ali*'s likeness" — a nude drawing that accompanied a "plainly fictional and allegedly

²⁸⁰ See Drucilla Cornell, *Bodily Integrity and the Right to Abortion*, in IDENTITIES, POLITICS, AND RIGHTS 21, 27 (Austin Sarat & Thomas R. Kearns, eds., 1995).

²⁸¹ *Id.*

²⁸² 447 F. Supp. 723 (S.D.N.Y. 1978).

²⁸³ *Id.* at 724 (quoting *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952)) (other citations omitted).

libelous bit of doggerel.”²⁸⁴ The court concluded that *Playgirl* used Ali’s portrait, just as *Esquire* used Cary Grant’s, “solely ‘for the purposes of trade — e.g., merely to attract attention.’”²⁸⁵ It seems that the court distinguished news from commerce by the latter’s drive merely to attract attention, whereas the former must involve “‘the unembroidered dissemination of facts’ or ‘the unvarnished, unfictionalized truth.’”²⁸⁶

It should be noted that throughout the *Ali* court’s discussion of newsworthiness the court does not invoke the First Amendment. In the context of appropriation, newsworthiness matters not because it implicates free speech, but because it does *not* implicate the harm of commercialization of the plaintiff’s identity. The court refers back to *Flores* to reinforce that the interest at stake is the right of a person to protect her “sentiments, thoughts and feelings” from unwanted “commercial exploitation.”²⁸⁷ A newsworthy use does not commercially exploit the identity. Therefore, it does not cause a legally cognizable harm.

Merely cloaking the appropriation of identity in a news-like form is not sufficient to establish a non-commercial use. In the California case *Eastwood v. Superior Court*,²⁸⁸ movie star Clint Eastwood sued the *National Enquirer* over the use of his name and photograph in a cover story.²⁸⁹ The tabloid’s cover story was a typically sensational and largely fabricated account of Eastwood’s supposed entanglement in a love triangle.²⁹⁰ Eastwood alleged that the *National Enquirer* used his name and photograph in effect as advertisements in order to boost sales.²⁹¹ He asserted that the use “damaged him in his right to control the commercial exploitation of his name, photograph, and likeness, in addition to injuring his feelings and privacy.”²⁹² The court found that the *Enquirer*’s use

²⁸⁴ *Id.* at 727.

²⁸⁵ *Id.* (quoting *Grant v. Esquire, Inc.*, 367 F. Supp. 867, 881 (S.D.N.Y. 1973)).

²⁸⁶ *Id.* (citations omitted). Courts have applied a similar logic in evaluating the newsworthiness of fictional stories that mention real life individuals. Thus, the single use of a person’s name in a novel may not give rise to a claim of appropriation. See *Damron v. Doubleday, Doran, & Co.*, 231 N.Y.S. 444 (N.Y. Sup. Ct. 1928). However, the publication of a fictionalized biography of a real person will be construed as essentially a commercial appropriation of that person’s identity. See *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (N.Y. 1966). The implication is that where the mention of a person’s name is incidental to the larger work of fiction, no appropriation will be found. But, where the name is used to define and call attention to the work, court’s will find appropriation.

²⁸⁷ *Ali*, 447 F. Supp. at 728 (citing *Flores v. Mosler Safe Co.*, 164 N.E. 2d 853 (N.Y. 1959)).

²⁸⁸ 198 Cal. Rptr. 342 (Cal. Ct. App. 1983).

²⁸⁹ See *id.* at 344.

²⁹⁰ See *id.* at 345.

²⁹¹ See *id.*

²⁹² *Id.*

constituted commercial exploitation and that it was not exempt from liability as a news account under statutory law, nor was it protected by constitutional considerations of free speech.²⁹³ In effect, the court found that the use of Eastwood's name and photograph, like *Playgirl's* use of Ali or *Esquire's* use of Grant, was calculated to draw attention to the publication but not to otherwise impart newsworthy information. The mere fact that the *Enquirer* called its story "news" and presented it in a format that resembled a newspaper story did not blind the court to its true "identity" as a commercialization of the star's persona.

The courts' reasoning in defining the relationship between appropriation, newsworthiness, and commercial use easily blurs into First Amendment analysis of Constitutional protections afforded to publication of names and images. As the *Midler* court noted, "the purpose of the media's use of a person's identity is central. If the purpose is 'informative or cultural' the use is immune [on First Amendment grounds]; 'if it serves no such function but merely exploits the individual portrayed, immunity will not be granted.'"²⁹⁴ Nonetheless, the two issues are distinct. A newsworthy use of a person's identity does not implicate historically elaborated privacy-based dignitary interests because, by definition, it does not commodify the subject. Indeed, we might turn Dianne Zimmerman's argument on its head and argue that under this analysis, First Amendment privileges become almost redundant.

When the United States Supreme Court was called upon to interpret the relationship between the New York Civil Rights Law and the First Amendment in the 1967 case *Time v. Hill*,²⁹⁵ Justice Brennan identified the significance of commercial use in establishing appropriation. He said that limiting the application of the New York Civil Rights Law to incidents of commercial use "would present different questions from the violation of the constitutional protections for free speech and press."²⁹⁶ Yet, perhaps oversensitive to more recent cases that broadly interpreted the scope of the Civil Rights Law, Brennan then moved beyond it to write a sweeping opinion that effectively applied the libel standard of *New York Times v. Sullivan*²⁹⁷ to invasion of privacy cases. His majority opinion extended protection to all reports of matters of public interest "in the

²⁹³ See *id.* at 352.

²⁹⁴ *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (quoting Felcher & Rubin, *supra* note 226, at 1596).

²⁹⁵ 385 U.S. 374 (1967).

²⁹⁶ *Id.* at 381.

²⁹⁷ 376 U.S. 254 (1964).

absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.”²⁹⁸ Casting the matter as an issue of protecting free speech to maintain a free society, Brennan asserted that “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.”²⁹⁹ Brennan’s concern for the nature of civilized community seems to resonate with Warren and Brandeis’s analysis of the right to privacy.³⁰⁰ But where Warren and Brandeis emphasized protection from exposure as a key incident of civilized life, Brennan focuses on openness as primary.

In a forceful dissent, Justice Fortas invoked the spirit of Brandeis to support his criticism of Justice Brennan’s opinion for “totally immunizing the press . . . in areas far beyond the needs of the news.”³⁰¹ In contrast to such cases as *Martin* and *Melvin*, Brennan expressed a marked reluctance to draw lines between newsworthy and other uses of information.³⁰² In both *Martin* and *Melvin*, the courts’ willingness to police the boundaries of newsworthy informa-

²⁹⁸ *Time*, 385 U.S. at 388.

²⁹⁹ *Id.*

³⁰⁰ See Warren & Brandeis, *supra* note 15.

³⁰¹ *Time*, 385 U.S. at 420.

³⁰² Brennan, for example, joined a dissent in the later case of *Zachinni v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1979), where the majority found that the First Amendment did not immunize the broadcast company from liability for the rebroadcast of the plaintiff’s entire human cannonball act. The majority distinguished *Time v. Hill* as dealing with the right of privacy, whereas *Zachinni*’s case involved a publicity rights claim. See *id.* at 571. Here, the majority analogized *Zachinni*’s claim to the copyrighted broadcast of a baseball game and found that the rebroadcast of the entire act, even though on a news show, “poses a substantial threat to the economic value of that performance.” *Id.* at 575. It also noted that the plaintiff did not seek to enjoin the broadcast, “he simply wants to be paid for it.” *Id.* at 578. Justice Powell’s dissent, joined by Brennan and Marshall, essentially disagreed with the way in which the majority drew the line between newsworthy and other broadcasts. Powell expressed concern that this holding would serve to restrict the free flow of information to the public. He argued that the focus should not be on how much of the act was rebroadcast, but rather, should require “a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.” *Id.* at 581 (Powell, J., dissenting, joined by Brennan & Marshall, JJ.). Powell’s logic was later reflected by the opinion in *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983), which found just such a subterfuge on the part of the *National Enquirer*. See *id.* at 350-52. Ultimately, First Amendment protections, it seems, are a function of whether the use is for commercial or other private purposes.

The main difference between the majority and the dissent in *Zachinni* turns on where the line is drawn and who bears what burden of proof in drawing it. Just as the jurisprudence of privacy carves out an area for protection from the market, First Amendment jurisprudence excludes market uses from its protection. Note also that this does not involve commercial speech of the type implicated by *Central Hudson Gas v. Public Serv. Comm. of N.Y.* 447 U.S. 557 (1980), and its progeny. Publicity rights cases such as *Zachinni* do not involve the right to advertise or otherwise convey information about one’s business. Rather, they involve the commercial exploitation of information produced by other parties.

tion bespeaks a somewhat paternalistic presumption of maintaining community standards of propriety. And yet, such paternalism, harking back to Warren and Brandeis, also served to protect individual identities from rampant commercialization. Brennan's justifiable concern that such policing might inhibit the free flow of information so important to a free society, nonetheless ultimately turns over the construction of newsworthiness to market forces.³⁰³ Under this regime, as we can see in current tabloid press, news has become whatever sells.

The contrast between Brennan and Brandeis becomes especially stark when the former's majority opinion in *Time* is contrasted with Brandeis's famous dissent of *Olmstead v. United States*.³⁰⁴ Arguing that government wiretaps violated the Fourth and Fifth Amendments to the United States Constitution, Brandeis asserted:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be left alone — the most comprehensive of rights and the right most valued by civilized men.³⁰⁵

Moving beyond the common law analysis of his article with Warren, Brandeis here attempted to ground privacy-based principles recognizing dignitary interests in the Constitution.³⁰⁶ Consistent with his earlier article, Brandeis construed privacy as both a mark of civilized behavior and itself a civilizing force, especially in the face of intrusive modern society. But where the common law right of privacy protected against the market and urban masses, the constitutional right of privacy would protect against the state. Brandeis first invoked the state to protect the individual against the advance of modern urban industrial society. Yet, ironically, to continue to regulate the advance of that society, the state itself grew and adopted techniques of control and surveillance that similarly

³⁰³ Edward Bloustein, writing just one year after *Time v. Hill*, argues that making a distinction between the newsworthiness of an event and the identities of the people involved in the event need pose no threat to concerns for democratic self governance. Indeed, he argues that newsworthiness can and should be defined in terms of the information's relevance to self governance. See Edward Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis's Tort Petty and Unconstitutional As Well?*, 46 TEX. L. REV. 611 (1968).

³⁰⁴ 277 U.S. 438 (1927).

³⁰⁵ *Id.* at 478 (Brandeis, J., dissenting).

³⁰⁶ See *id.*

threatened the private world so dear to Brandeis. In 1890, Brandeis was concerned about the new technologies of printing and photography that enabled the media to become both more pervasive and more intrusive.³⁰⁷ In 1927, he was alarmed by new electronic technologies that brought the state into the home.³⁰⁸ In each case, Brandeis opposed “man’s spiritual nature” to the triumphant advance of a modern, technology-driven materialism.

Brennan saw free speech as essential to maintaining a civilized community. He focused more on the political values of access to information as the basis for civilized life, whereas Brandeis saw protection of the individual spirit as the key to dignity. For Brennan, free political discussion constructed and maintained a free society. The state recognized individual dignity, in part, by promoting individual inclusion in that discussion. For Brandeis, recognition of the spiritual nature of man was more important to individual dignity than democratic inclusion. Brennan’s views resonate with Holmes’s notion of a free market place of ideas. Brandeis, however, used privacy to resist the expansive forces of the market and its metaphors.

Brennan’s views certainly seem to be more democratic than Brandeis’s attachment to a genteel ideal of civilized community. Yet Brennan, more classically liberal than Brandeis, implicitly opposes privacy to inclusion in the community. Legal scholar C. Keith Boone argues, however, that privacy helps to maintain liberal community by protecting the associations necessary to civil society.³⁰⁹ “Logically,” he argues, “the opposite of privacy is not community, but publicity. Conversely, the opposite of community is not privacy, but rather something like alienation.”³¹⁰ It was the spiritual alienation of lost community that troubled Brandeis. It was the political alienation of suppressed speech that troubled Brennan.

Speech, however, is not necessarily the same thing as publicity. As we see in the tradition of the jurisprudence of appropriation, publicity involves the direct commodification of identity. In his interpretation of the New York Civil Rights Law, Brennan was willing to make this distinction.³¹¹ Nonetheless, the contrast between

³⁰⁷ See Warren & Brandeis, *supra* note 15, at 209.

³⁰⁸ Brandeis noted that the “progress of science” had furnished the state with an ever-growing power to intrude into people’s private lives. *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting).

³⁰⁹ See C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 7-8 (1983); see also, Post, *supra* note 9, at 959-63, 974.

³¹⁰ Boone, *supra* note 309, at 3.

³¹¹ See *Time v. Hill*, 385 U.S. 374, 380-91 (1967).

Brennan and Brandeis does present difficulties, and, perhaps reflects some of the tensions and confusions embedded in contemporary analyses of the relation between the spiritual and material interests implicated by the appropriation of identity.

VII. DISENTANGLING PRIVACY AND PUBLICITY

Alisa Weisman has provided an interesting justification for the tort of appropriation based in First Amendment jurisprudence.³¹² "Unauthorized publicity . . . affects the individual's identity by associating him with a concept. . . . An individual should not be denied the right to shape his personality and decide matters affecting this crucial right."³¹³ Weisman concludes that the harm of appropriation lies in denying the victim any consultative role in developing associations that affect her "self concept."³¹⁴ Unauthorized publicity, therefore, amounts to an "intrusion into the individual's sphere of decision-making which is central to him as an autonomous member of society."³¹⁵

Weisman connects this conception of appropriation to the First Amendment by likening it to forced speech of the sort struck down by the Supreme Court in *West Virginia State Board of Education v. Barnette*.³¹⁶ In that 1943 case, a group of Jehovah's Witnesses challenged local regulations requiring students to salute the flag as offensive to their religious convictions.³¹⁷ Although the plaintiffs' claim was based primarily in their concerns about free exercise of religion, the Supreme Court struck down the regulations as violative of free speech protections by, in effect, coercing the plaintiffs to speak against their will.³¹⁸ "If there is any fixed star in our constitutional constellation," wrote Justice Jackson for the majority, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."³¹⁹ Appropriation of identity, Weisman argues, is the private law analogue of forcing someone to speak, in this case, by associating her image with an object or concept without her consent.³²⁰

³¹² See Alisa Weisman, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. CAL. L. REV. 727, 728-29 (1982).

³¹³ *Id.* at 729.

³¹⁴ *Id.* at 730.

³¹⁵ *Id.*

³¹⁶ 319 U.S. 624 (1943).

³¹⁷ See *id.* at 624.

³¹⁸ See *id.* at 642.

³¹⁹ *Id.*

³²⁰ See Weisman, *supra* note 312, at 757.

Weisman's use of *Barnette* is illuminating but limited. State coercion is not the same thing as a private appropriation. Plaintiffs ranging from Onassis to Waits certainly objected to having their images forced to "speak" without their consent.³²¹ But, unlike the case of the Jehovah's Witnesses, the state was not directly implicated in such coercion. Therefore, there must be something distinctive about the nature of the harm caused by appropriation to justify its regulation by tort law. Many actions that do not amount to actionable torts may intrude on an individual's "sphere of decision making."³²² Moreover, Weisman does not address the problem of newsworthy uses of names and images. Such uses "coerce" speech by publicly associating an individual with events, objects, or ideas without her consent, yet they do not necessarily harm an individual's autonomy. Indeed, every time one person even mentions another, she is likely to associate his name or image with objects of ideas without his consent. What Weisman has missed is the special harm of commodification caused by the commercial use of identity. To establish harm from private appropriations of identity we must look back to the *Pavesich* notion of "enslavement" of identity.³²³ This explains the general requirement that appropriations be to the defendant's commercial advantage. The harm, then, derives not simply from "coercing speech" or associating a person with a concept without her consent, but also, and more specifically, from undermining the integrity of that person's persona by effacing her individuality through the commodification of her identity.

The unauthorized use of a person's identity may implicate the right of publicity to the extent that such identity has commercial value, but it will also implicate the right of privacy to the extent that such identity has non-commercial value relevant to maintaining the integrity of the subject's persona. This is true even of celebrities. Indeed, as my previous discussion of cases such as *Onassis* and *Midler* demonstrates, many courts recognize that celebrities can suffer dignitary harms through appropriation of identity.³²⁴ Such recognition, however, is largely implicit and its implications are rarely elaborated. The problem is that the courts' considerations of privacy-based identity harms are usually entangled with and largely subsumed by their analyses of the property-based rights of publicity which are also, and perhaps more clearly, propelling such causes of action.

³²¹ See *id.* at 749.

³²² See *id.* at 730.

³²³ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).

³²⁴ See *supra* notes 143-59 and accompanying text.

Both privacy and publicity rights are mutually implicated in most contemporary cases of appropriation of identity. To help disentangle them, it is useful first to look at the nature of the remedy sought by the plaintiff in appropriation cases. In discussing the social foundations of defamation law, Robert Post distinguishes dignity from property, asserting that "dignity is not the result of individual achievement and its value cannot be measured in the marketplace. It is, instead, 'essential' and intrinsic in every human being."³²⁵ Because dignity is not like property, Post argues, the appropriate remedy is not money damages but vindication and rehabilitation of reputation.³²⁶ Courts are especially well-suited to serve this function because a formal ruling, in this context, may designate the plaintiff as worthy of respect and full inclusion in the "community of civility."³²⁷

Post's distinctions are useful when we return to the case of Jacqueline Onassis. Onassis's primary concern was to obtain the equitable relief of an injunction to prevent the further dissemination of her image in Christian Dior advertisements.³²⁸ In this situation, an injunction serves as a vindication and declaration to the world that the advertisement did not rightfully use her image. As in a defamation action, the injunction restores Onassis's good name. But where defamation is concerned primarily with reputation, Onassis's victory allowed her to reclaim her very identity.

Where damages are sought, there are further distinctions to be made. Edward Bloustein, in his valiant attempt to rescue the right of privacy from a purely psychological construction, likens invasion of privacy to other dignitary torts, such as assault and battery, rather than to a compensatory tort like negligence.³²⁹ "As such, it involves general damages rather than special damages. And where recovery is given for emotional disturbance or any other element of special damage, that recovery is parasitic rather than at the root of the tort."³³⁰ Bloustein's argument follows the

³²⁵ Post, *supra* note 28, at 712.

³²⁶ See *id.* at 968.

³²⁷ *Id.* at 712-13. In this rehabilitatory function, the courts serve as wardens, policing the boundaries of the community of civility. In deciding a case involving a dignitary tort, courts are deciding the rules of civility and respect, and whether a particular individual deserves to have a somehow damaged reputation rehabilitated to allow effective reentry into the community.

³²⁸ See *Onassis v. Christian Dior of N.Y., Inc.*, 472 N.Y.S.2d 254, 263 (N.Y. Supt. Ct. 1984). Of course, being Jacqueline Onassis, she may not have needed monetary damages, but wealth has not stopped many other celebrities from seeking extensive damages for unjust enrichment.

³²⁹ Bloustein, *supra* note 57, at 967-74.

³³⁰ EDWARD BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 54 (1978). Bloustein asserts that the harm from invasion of privacy is not merely transitory emotional discomfort, as with

reasoning of *Pavesich*, which held that invasion of privacy “is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover.”³³¹ In practice, plaintiffs tend to seek all possible remedies: injunction, general, and special damages. But paying attention to which damages are being sought and why may help to sort out the plaintiffs’ concerns in bringing the case and the degree to which they feel an appropriation implicates their privacy-based dignitary interests in maintaining the integrity of their personae. Thus, for example, in the case of Tom Waits, in addition to upholding a jury award of \$100,000 for the fair market value of his services, the court also upheld the award of \$200,000 to compensate Waits for injury to his “peace, happiness and feelings.”³³² The court used psychological rather than dignitary metaphors in assessing the “propriety of mental distress damages,”³³³ but Waits asserted his claim in terms of having his principles violated through the commodification of his identity. The appropriation did not bruise his “feelings,” but rather, undermined the integrity of his artistic persona.³³⁴ The jury award recognizes this, even if the court’s discussion of it invokes ideas of “mental distress.”³³⁵

To further refine the relationship between privacy and publicity rights, it is useful to turn to Margaret Jane Radin and her work on “property and personhood” and “market inalienability.”³³⁶ Radin begins with the premise that “to achieve proper self-development — to be a *person* — an individual needs some control over resources in the external environment.”³³⁷ Some resources are more closely bound up with a person than are others. Radin uses the examples of a wedding ring and a family heirloom as representative of the types of objects which people may “feel are almost a part of themselves.”³³⁸ The greater the degree to which an object is bound up with an individual’s identity, the less fungible it becomes. To a jeweler, a wedding ring may be merely a commodity,

the tort of intentional infliction of emotional distress, but rather is a blow to one’s very sense of self. *See id.* at 55.

³³¹ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 73 (Ga. 1905)

³³² *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992).

³³³ *Id.*

³³⁴ *See id.* at 1097.

³³⁵ *Id.* at 1103.

³³⁶ Radin, *Property and Personhood*, *supra* note 31, at 957-1015; Margaret Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market Inalienability*]. These two articles are included with other useful essays in a collection of Radin’s work. MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993) [hereinafter RADIN, *REINTERPRETING PROPERTY*]. *See also* RADIN, *CONTESTED COMMODITIES*, *supra* note 31.

³³⁷ Radin, *Property and Personhood*, *supra* note 31, at 957.

³³⁸ *Id.* at 959

but to a newlywed the same ring may be irreplaceable. Radin argues that "once we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that thing."³³⁹ Such control is necessary to promote a social ideal which Radin terms "human flourishing."³⁴⁰

Radin elaborates her definition of personal, as distinguished from fungible, property as describing

specific categories in the external world in which holders can become justifiably self-invested, so that their individuality and selfhood become intertwined with a particular object. The object then cannot be replaced without pain by money or another similar object of equivalent market value; the particular object has unique value for the individual.³⁴¹

This notion of personal property echoes Michael Walzer's critique of the market, in which he notes that it is not and never has been a "complete distributive system."³⁴² Walzer concludes that "the old maxim according to which there are some things money can't buy is not only normatively but also factually accurate."³⁴³ In the context of appropriation, we might argue that insofar as one's identity is something that money can't buy, its forced commodification constitutes a legally cognizable dignitary harm. The "enslavement" of Pavesich, therefore, may be seen as involving a version of "the use of things for the purposes of domination" that Walzer saw at the heart of injustice.³⁴⁴

One problem with Radin's approach has to do with who defines what is justifiable self-investment and by what means. This brings us back to the danger of majoritarian tyranny where local norms determine legal applications. We must, in short, be wary of what Robert Post has identified as the "hegemonic" functions of law, which may lead to the imposition of dominant norms on cultural or political minorities.³⁴⁵ Picking up on this difficulty, Stephen Schnably argues that Radin's analysis assumes a social consensus about the norms of "human flourishing" which "both

³³⁹ *Id.* at 960.

³⁴⁰ *Id.* at 957-60; see also Radin, *Market Inalienability*, *supra* note 336, at 1851.

³⁴¹ RADIN, REINTERPRETING PROPERTY, *supra* note 336, at 81.

³⁴² MICHAEL WALZER, SPHERES OF JUSTICE 4 (1983).

³⁴³ *Id.*

³⁴⁴ *Id.* at xii-xv.

³⁴⁵ Post, *supra* note 9, at 977.

hides and glorifies power.”³⁴⁶ While drawn to her ideas, Schnably is wary of their tendency to affirm the status quo. He proposes two ways to move beyond the conservative implications of Radin’s work: first, he asserts that we ought to look for tensions within those ideals where social consensus seems strongest, being particularly sensitive to the power relations that contribute to their formation; and second, he urges that “rather than attempt to ferret out ways in which the law purportedly recognizes ideals of human flourishing, we should focus on people’s struggles to constitute personhood in conformity with their differing ideals of what it should be.”³⁴⁷ Schnably considers Radin’s vision to be static and a-contextual. Finally, he finds her distinction between fungible and personal property to be an “empty one” because in today’s “system of consumer culture, all commodities have implications for personhood.”³⁴⁸ Instead, he concludes, “the whole *system* of commodities — the kind of personhood it produces and the ways that it can be resisted — must be considered.”³⁴⁹

Radin openly asserts that a “moral judgment” is required to “tell us which items are (justifiably) personal.”³⁵⁰ But she argues that such judgment is not simply a matter of the subjective preference of a particular judge. Rather, she asserts that “[w]hether or not something is appropriately considered personal . . . depends upon whether our cultural commitments surrounding property and personhood make it justifiable for persons and a particular category of thing to be treated as connected.”³⁵¹ Radin here is, in effect, calling upon judges to act the role of cultural anthropologists, analyzing and divining the nature and scope of our “cultural commitments.”³⁵² This strikes me as both a reasonable interpretation of a significant aspect of what judges actually do, and also as an attractive metaphor to guide further action. Nonetheless, Radin continues to beg the question, so important to Schnably, of *whose* cultural commitments she means by the word “our.”

Here is where Radin’s assumption of consensus becomes most problematic. Some core commitments to such things as “fundamental rights” may be necessary to hold a pluralistic liberal polity together. But to avoid a tyrannical homogenization of our society,

³⁴⁶ Steven Schnably, *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, 45 STAN. L. REV. 347, 361 (1993).

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 362.

³⁴⁹ *Id.* at 391.

³⁵⁰ Radin, *Market Inalienability*, *supra* note 336, at 1908.

³⁵¹ RADIN, REINTERPRETING PROPERTY, *supra* note 336, at 18.

³⁵² *Id.*

we must also recognize and even foster spaces for diverse cultural practices. For example, in the arena of appropriation of identity, the dangers of relying on a cultural consensus about the fungibility of objects are clearly evident in a case such as *Bitsie v. Waltson*.³⁵³ The plaintiff, the mother of a Navaho child, brought an action for invasion of privacy against a man who caused a picture of a sketch of the child to be published in a local newspaper, in a story to promote the sale of a note card to raise funds for the United Cerebral Palsy Association. The plaintiff alleged that according to *her* beliefs, the use, without permission, of the photograph for such purposes was highly offensive and that, according to *Navaho* beliefs, it was bad luck to have one's picture associated with an illness.³⁵⁴ The court rejected the claim, holding that, "the tort [of appropriation] relates to the custom of New Mexico at this time and does not extend to 'traditional' beliefs."³⁵⁵ Such narrow-minded assertion of dominant community norms reveals the pitfalls of consensus-based approaches to defining valid claims.

Radin's analysis may nonetheless be of great use, provided that we try to assess "cultural commitments surrounding property and personhood"³⁵⁶ in terms of the relevant cultural system within which the particular individual whose identity is at issue belongs. Thus, in *Bitsie*, the court may have been guided by a fundamental societal commitment to the belief that objects which are intimately bound up with the identity of a person should not be commodified without that person's consent. Applying the customs of the dominant society, the court found no such relation sufficient to justify a finding of redressable harm. Yet, without any threat to the dominant society's core values, the court could also have tried to extend the legal principle of protecting individuals from harmful appropriations of their images in the Navaho context, and then assess whether such a relationship (causing harm to the plaintiff) existed from the cultural standpoint of the particular Navaho woman and child whose identities were at stake.

Schnably, therefore, is right to focus on the importance of contextualizing particular definitions of personhood and of the need for openness to pluralistic ideals of human flourishing. But to address his concerns we need not discard the search for existing

³⁵³ 515 P.2d 659 (N.M. Ct. App. 1973).

³⁵⁴ *See id.* at 659.

³⁵⁵ *Id.* at 662. *See also* J. William Moreland, *American Indians and the Right to Privacy: A Psycholegal Investigation of the Unauthorized Publication of Portraits of American Indians*, 15 AM. INDIAN L. REV. 237 (1991).

³⁵⁶ RADIN, REINTERPRETING PROPERTY, *supra* note 336, at 18.

areas where law has recognized human flourishing. To the contrary, we are working within the American legal system. It is imperative, therefore, to explore existing legal pathways in order to extend out their implications to new areas of application — just as Warren and Brandeis did; just as Prosser did.

Schnably's points with regard to contemporary consumer culture are also well made, but they are unnecessarily dualistic. Commodification or fungibility need not be all-or-nothing propositions. Indeed, Radin's whole approach to property is grounded in a critique of a Kantian liberal subject/object dichotomy that clearly demarcates "things internal from things external to the person."³⁵⁷ She argues that things important to personhood should be "market-inalienable."³⁵⁸ "Market-inalienability does not render something inseparable from the person, but rather specifies that market trading may not be used as a social mechanism of separation."³⁵⁹ Market-inalienability, she specifies, is not an all-or-nothing proposition.³⁶⁰ Radin allows that "we may decide that some things should be market-inalienable only to a degree, or only in some respects."³⁶¹ Radin also speaks of a "continuum reflecting degrees of commodification that will be appropriate in a given context."³⁶²

To the degree that an object is bound up with the identity of a subject, the line between them blurs. The two do not become the same, yet they partake of one another. In different contexts particular objects will be more or less intimately tied to a subject. Schnably's observation that all commodities have implications for personhood in today's society may be valid, but he fails to appreciate that such implications may vary; and that such variance may make all the difference.

VIII. CONCLUSION

Taking our cue from Radin, therefore, we may conceive of one's name or image as ranged along a continuum of fungibility: the more intimately a name or image is bound up with one's self, the more its appropriation implicates privacy-based personal iden-

³⁵⁷ Radin, *Market Inalienability*, *supra* note 336, at 1891-92. Radin also problematizes the subject/object boundary in urging us to "understand many kinds of particulars — one's politics, work, religion, family, love [etc.] . . . — as integral to the self. To understand any of these as monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human." *Id.* at 1905-06.

³⁵⁸ *Id.* at 1852.

³⁵⁹ *Id.* at 1854.

³⁶⁰ *See id.* at 1855.

³⁶¹ *Id.* at 1854-55.

³⁶² *Id.* at 1918.

tity rights; the more one is willing or able to conceive of one's name or image as a marketable commodity, the more its use implicates property-based rights of publicity. Indeed, the law of appropriation, as informed by Radin's analysis of property and personhood, may provide precisely the kind of "resistance" to pervasive commodification for which Schnably calls.³⁶³

Radin's argument implicitly informs much of the early construction of the right to privacy as implicated by the tort of appropriation. Her conception of market-inalienability is especially apropos of the historical concern in appropriation cases for commodification of identity. The unauthorized commodification of identity forces an object which, by community norms, is market-inalienable into the market place. Similarly, publicity rights may be understood as involving those aspects of the celebrity image which, by community norms, are market-alienable.

The reasoning of a case such as *Pavesich* assumes a very special relation between one's image and one's self, so much so that control of the image amounts to a form of control over the self. As the external manifestation of identity, one's name and image become, perhaps, the ultimate form of personal property. One's celebrity image, however, may be quite another matter. The law of publicity seems to indicate a much more fungible relation between self and image. The celebrity may find no harm, other than monetary, from the appropriation of her name or image for commercial purposes. In such cases, the celebrity subject clearly does not consider herself to be intimately "bound up" or "intertwined" with her image. And yet, a celebrity may feel personally invested in her image in some contexts or for some purposes, but not for others. It seems that the same external object, a name or image, may partake of both personal and fungible attributes.

³⁶³ Larry Saret and Martin Stern also propose that publicity and privacy be viewed along a continuum:

The right of privacy. . . and publicity should be viewed as distinct but not mutually exclusive interests on a single continuum of the cause of action for misappropriation of name or likeness. Before a person commercially exploits his or her personality, a personal interest exists in the control of his or her likeness, which is entitled to protection against misappropriation. This interest is more properly labeled a right of privacy. . . . The publicity right arises once a person has commercially exploited his or her name and likeness.

Saret & Stern, *supra* note 95, at 702-03. One problem here is that Saret and Stern seem precisely to have made privacy and publicity mutually exclusive, their assertions to the contrary notwithstanding. *See id.* at 676-84. According to them, once a person seeks to commercially exploit her name or image she apparently loses any privacy-based interest in her identity. *See id.* at 696. Their analysis ultimately fails to disentangle privacy and publicity, as this Article has shown. Radin's continuum, I believe, is far more useful and less static, because it turns not on a simple act of commercial exploitation but on on-going personal and social valuations of the relationship between identity and self.

Thus, for example, some images, such as that of Madonna, may be highly commodified and fungible, while others, such as that of Pavesich, may be very personal and unique. Yet, the degree to which each image is fungible or unique may vary across time and space. Context makes a difference. Even Madonna might feel the integrity of her persona undermined by certain commercial uses of her image.³⁶⁴ Similarly, Pavesich's dignity might not be affronted by a commercial use of his image to which he had consented. Finally, to complicate matters a bit further, it is possible for the same use of an image to implicate *both* privacy and publicity rights. For example, singer Tom Waits found the commodification of his image to be an affront to his dignity as an artist because he did not believe in doing advertisements, but he also sought and obtained a hefty damage settlement for appropriation of the commercial value of his image.³⁶⁵

In making use of Radin's notions of property and personhood, I may seem to capitulate to Prosser's and McCarthy's views of privacy by recasting it as a subordinate species of property right. Using a continuum of fungibility or of commodification to analyze the interests implicated by an appropriation of identity, however, does not reduce one's privacy-based claim in an image to a mere possessory interest. Rather, it helps to characterize the nature of those interests and the roles they play in the subject's life. Arraying privacy and publicity along a continuum allows us to recognize the ways in which they interrelate. It also enables us to disentangle them by situating them along the continuum according to the contingencies of each particular case. In so doing, we may recognize the power and relevance of market values without allowing them to swallow up the entire terrain of identity-based legal claims. In the jurisprudence of the tort of appropriation we find an established tradition of legal concern for personal identity. By exploring this tradition and its implications, I have tried to bring back to light an area of the law where concerns for dignity and the integrity of one's identity have been, and continue to be, used to circumscribe, or even resist, the commodification of the self.

³⁶⁴ One might imagine her image being used to raise money for a cause she strongly opposed, such as a campaign against AIDS research.

³⁶⁵ See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1093 (9th Cir. 1992). J. Thomas McCarthy reported that upon remand, a Los Angeles jury awarded Waits \$2,500,000 in damages. The Ninth Circuit Court of Appeals affirmed the award. See McCarthy, *supra* note 69, at 130.