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## The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech

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THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT  
IN THE MODERN AGE OF COMMERCIAL SPEECH

MARTIN H. REDISH\* & KELSEY B. SHUST\*\*

ABSTRACT

*The so-called right of publicity gives individuals a legally protected interest against commercially motivated communicators' use of their names or likenesses for purposes of commercial gain. Although the right is sometimes viewed as a subcategory of the right of privacy, it may be exercised by the best known celebrities, as well as by the most private individual. It is therefore more properly characterized as a property interest in one's name and likeness than a protection of one's privacy.*

*In order to satisfy the concerns of the First Amendment right of free expression, however, the statutory and common law development of the right has always been qualified by a "public interest" exception: the right does not extend to the commercial use of an individual's name or likeness when either is employed as part of a communication that furthers the public's interest in acquiring information. This public interest exception, however, has never been applied to the communication of a profit-motivated speaker when the name or likeness is used as part of the commercial promotion of the sale of a product or service. It has long been assumed that such communications are merely commercial advertising, that inherently lack the public importance of expression by the more traditionally protected communications media. This assumption has been made despite the fact that the commercial advertiser may be communicating the exact*

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*same information about a celebrity that was given First Amendment-like protection when disseminated by the equally commercially motivated media.*

*Although at the time these assumptions were made they were consistent with controlling First Amendment theory and doctrine, courts enforcing the right of publicity appear to have been operating in a time warp over the last thirty years, ignoring all but completely the evolution of a vigorous First Amendment protection of commercial speech. Application of currently accepted doctrinal precepts of commercial speech protection reveal that discrimination against commercial advertisers in invocation of the public interest exception is unambiguously unconstitutional. The only conceivable reason to discriminate against commercial advertisers when they communicate the exact same information about celebrities that is fully protected when disseminated by the commercially motivated communications media is the narrow profit motivation of the advertiser. This, however, is a constitutionally unacceptable basis for distinction; in no other area of First Amendment jurisprudence is a speaker disqualified because of his or her narrow self-interest—even when that interest is purely economic, as in the case of the commercial advertiser. This Article argues that the courts' willingness to incorporate established precepts of commercial speech protection into their right of publicity calculus is long overdue.*

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## INTRODUCTION

Celebrity images pervade our modern, media-consumed culture. From red carpet award shows to celebrity gossip websites to social media networks, American consumers crave glimpses of their icons—and both celebrities and profit-making corporations know it.<sup>1</sup> But when profit-making corporations seek to draw on the obvious and evoke celebrity images for commercial benefit, they run up against a decrepit free speech shackle known as the right of publicity.<sup>2</sup> In both its statutory and common law formulations, the right of publicity operates as a means for people to control and profit from the commercial use of their identities.<sup>3</sup> Plaintiffs' assertions of this right, however, can directly impede both speakers' rights to free expression and listeners' and readers' rights to be informed. It may seem that our most fundamental constitutional guarantee would safeguard speech interests in a contest with what are principally pecuniary interests in publicity. The unconventional doctrinal development of publicity rights, substantially detached from the modern theory and doctrine of the First Amendment is producing troubling, even bizarre results. Today, courts routinely prioritize the pecuniary interest in publicity rights over the First Amendment right of free expression. In so doing, courts and defendants are failing to

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1. See, e.g., James Franco, *Selfies: The Attention Grabber*, N.Y. TIMES, Dec. 29, 2013, at AR20 (“In this age of too much information at a click of a button, the power to attract viewers amid the sea of things to read and watch is power indeed. It’s what the movie studios want for their products, it’s what professional writers want for their work, it’s what newspapers want—hell, it’s what everyone wants: attention.”); Alex Ben Block, *Why New Award Shows Are Crowding TV’s Calendar*, HOLLYWOOD REPORTER (Jan. 9, 2014, 5:00 AM), <http://www.hollywoodreporter.com/news/golden-globes-why-new-award-668767> [<http://perma.cc/SNF4-L85K>] (describing demand for award shows); Scott Goodson, *The 30 Most Popular Celebrity Gossip Sites and Why Big Brands Love Them*, FORBES (May 24, 2013, 2:20 PM), <http://www.forbes.com/sites/marketshare/2013/05/24/the-30-most-popular-celebrity-gossip-sites-and-why-big-brands-love-them> [<http://perma.cc/R3EK-VUGU>] (“Celebrity drives viewership. No doubt. They are eyeball magnets. Celebrity content pulls tons of views. And nothing, it seems, attracts more eyeballs than celebrity gossip websites.”); see also Julie Creswell, *Nothing Sells Like Celebrity*, N.Y. TIMES, June 22, 2008, at BUN1 (“[C]orporate brands have increasingly turned to Hollywood celebrities and musicians to sell their products.”).

2. See *infra* Part I.A.

3. See *infra* Part I.B.3.

capitalize on nearly forty years of evolution in the law of commercial speech.

Recent cases involving celebrity avatars in video games illustrate the erroneous First Amendment applications at work. Just three years ago, the Supreme Court brought video games within the ambit of constitutionally protected expression.<sup>4</sup> Both the Third and Ninth Circuits have recently blinked, however, narrowing that protection in response to publicity rights claims.<sup>5</sup> The nature of the courts' contractions on free expression in video games has hinged on the purpose for which video game makers included celebrity identities and the courts' perceived value of those uses. In *Hart v. Electronic Arts, Inc.*, the Third Circuit highlighted the centrality of realistic football player depictions to both "the core of the game experience" and to its marketability.<sup>6</sup> In *In re NCAA Student-Athlete Name and Likeness Licensing Litigation*, the Ninth Circuit underscored how the interactive game featuring avatars of real athletes was just that—"a game, not a reference source" capable of providing informational value.<sup>7</sup> The video games in *Hart* and *In re NCAA* thus had less First Amendment worth, according to the Third and Ninth Circuits, because they were made by profit-making corporations to entertain, not to inform. The courts addressing right of publicity claims thus discriminated on both the basis of the speakers and the content of the speech at issue.

Such reasoning is flawed for several reasons. First, it is all but impossible to distinguish the "informational" from the "entertaining." Second, even if one somehow could draw such a distinction, the two are by no means mutually exclusive, as the Ninth Circuit implies. Finally, and perhaps most importantly, the courts' analyses completely ignore two key Supreme Court precepts: its caution against distinguishing between discourse on public matters and

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4. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices ... and through features distinctive to the medium (such as the player's interaction with the virtual world).").

5. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013).

6. *Hart*, 717 F.3d at 168.

7. *In re NCAA*, 724 F.3d at 1283.

entertainment,<sup>8</sup> and its oft-cited reminder that commercial motivation does not render speech unworthy of First Amendment protection.<sup>9</sup> These critical missteps on the part of the Third and Ninth Circuits, although problematic, are unfortunately not aberrational in the law of publicity rights. When it comes to adjudicating publicity rights claims against free speech interests, courts are stupefied.<sup>10</sup> They apply absurd distinctions, and they routinely discriminate against speech solely on the basis of speakers' profit motivation.<sup>11</sup>

How could the law possibly arrive at this point? In this Article, we find the culprit of this jurisprudence to be a surprisingly backwards right of publicity law, which has failed to keep pace with modern commercial speech development—in either doctrinal or theoretical terms—since 1976. Although jurists and scholars have bemoaned the confusing state of publicity rights doctrine and have conjured up many solutions for bringing order to the morass,<sup>12</sup> they continue to ignore a simple, basic principle that rings even truer in 2015: “Commercial speech is no longer the stepchild of the First Amendment.”<sup>13</sup> In fact, unless the commercial speech in question is deemed false or misleading, the level of constitutional protection courts extend to commercial speech differs very little, if at all, from the degree of

8. See, e.g., *Brown*, 131 S. Ct. at 2733 (“The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. ‘Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.’” (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948))).

9. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.” (quoting Joseph Burstyn, *Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952))).

10. See, e.g., *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514 (7th Cir. 2014) (“[T]here is no judicial consensus on how to resolve conflicts between intellectual-property rights and free speech rights.”).

11. See, *infra* Part II.A.1.

12. See, e.g., *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 954 (6th Cir. 2003) (Clay, J., dissenting) (“[T]he point of confusion most associated with the right of publicity law is its interplay with the First Amendment.”); Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 472 (2003) (“[T]he current legal landscape is a confusing morass of inconsistent, sometimes non-existent, or mutually exclusive approaches, tests, standards, and guidelines, with the confusion only increased by several recent rulings.”).

13. See Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 67 (2007).



protection extended to traditionally protected noncommercial speech.<sup>14</sup>

This conclusion leads us to a simple insight: both as a doctrinal and as a theoretical matter, commercially motivated expression is appropriately extended the same level of First Amendment protection against right of publicity claims as traditionally protected expression receives.<sup>15</sup> Thus, we do *not* argue that commercial speech will necessarily prevail over the competing right of publicity in all instances. We argue only that commercial speech appropriately deserves the doctrinal equivalent of “most favored nation” status when measured against fully protected noncommercial speech.

This Article contains three main sections. Part I focuses on the development of the right of publicity, charting its origin and studying its leading philosophical justifications. We illustrate how the right operates as an instrument for pursuing and protecting financial gain, in much the same manner as commercial speech does.<sup>16</sup> Part II explores the adversarial relationship between the right of publicity and the First Amendment, discussing areas of completely protected speech, the evolving balancing tests that now orient publicity rights and lesser protected “expressive” speech, and the complete absence of any commercial speech-based defenses. Finally, Part III challenges courts’ reflexive dismissal of commercial speech interests on a variety of levels. We demonstrate that the primary defect in the current status of the First Amendment limitation on publicity rights is the wholly unjustified assumption that speech contained in commercial advertisements is somehow less valuable—and therefore less protected—than traditionally protected categories of expression. Further, we invoke current commercial speech doctrine to show that even if our efforts to attack the courts’ reduced protection for commercial expression fail in the publicity rights context, the modern approach for evaluating commercially motivated speech is considerably more protective than recent publicity rights cases apparently assume. Ultimately, we conclude that courts’ dismissive approaches to commercially motivated expression relative to publicity rights derive from flawed assumptions

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14. See *infra* Part III.

15. See *infra* Part II.A.1.

16. See *infra* Part I.B.2.

concerning outdated thinking and doctrine. Modernizing courts' approaches to the law of commercial speech protection leads to the rejection of publicity rights claims in favor of First Amendment interests.

## I. FOUNDATIONS OF THE RIGHT OF PUBLICITY

Since the right of privacy doctrine's curious beginnings, scholars and courts have sought to make sense of the so-called right of publicity, questioning everything from its name to its relationship with constitutionally protected speech. This Part describes the foundations and growth of the right of publicity, beginning with its origin as a concept imbedded in the right to privacy.

### A. *Origins*

The origins of the right of publicity are bound with those of the right to privacy. When Samuel Warren and Louis Brandeis authored their famous article on the right to privacy in 1890, their conception of "the right to be let alone" contemplated an individual's power to decide what expression of herself, if any, she would make available for public consumption.<sup>17</sup> Although the focus of Warren and Brandeis's article concerned press intrusion into personal life, rather than the commercial use of a person's likeness for proprietary gain, their argument in defense of privacy provided fertile ground from which courts could glean a variety of protections.<sup>18</sup>

The very first court to consider remedying an allegedly infringed right to privacy in the manner Warren and Brandeis proposed, however, balked at the opportunity to do so. The Court of Appeals of New York in *Roberson v. Rochester Folding Box Co.* held that a

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17. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193, 198-99 (1890) ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.... It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.... In every such case the individual is entitled to decide whether that which is his shall be given to the public." (footnotes omitted)).

18. See Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1893 (2010) ("Although courts developed these early torts in response to Warren and Brandeis's article, the torts involved a different context from the one that Warren and Brandeis had envisioned.").

young woman asserting a cause of action in equity for the unauthorized publication of her photograph had no valid legal claim.<sup>19</sup> According to the court, the defendant's use of Abigail Roberson's likeness as part of an advertisement for Franklin Mills Flour did not libel her.<sup>20</sup> Further, because no precedent recognized a common law action for an invasion of a right to privacy, and the court believed that doing so would give rise to waves of litigation, it rejected her claim.<sup>21</sup> Enraged by the court's rejection, the New York State Legislature responded in short order. On September 1, 1903, a statutory right to privacy took effect, recognizing the unauthorized use of one's likeness "for the purposes of trade" to constitute both a misdemeanor and a tort.<sup>22</sup> Soon thereafter, the Supreme Court of Georgia rejected *Roberson* in a case with nearly identical facts, thereby becoming the first jurisdiction to recognize a common law right to privacy.<sup>23</sup> Strangely, both the New York State Legislature and the Supreme Court of Georgia found the label of "privacy" sufficient to also encompass a wholly pecuniary interest in controlling the commercial use of one's likeness.<sup>24</sup>

Despite these swift advancements, the right to privacy and its supposedly imbedded right of publicity held an uncertain place in tort law in the decades that followed. Treatises and casebooks treated privacy as a residual category of torts, protecting against intentional torts that were not otherwise covered.<sup>25</sup> The *Restatement*

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19. 64 N.E. 442, 448 (N.Y. 1902).

20. *Id.* at 447-48.

21. *Id.* at 443.

22. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1903) (amended 1921).

23. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) ("The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law.').

24. Like many others today, we reject a characterization of the right of publicity as anything other than a property right exercised by plaintiffs to make profits. Early suggestions that publicity rights are cut from the cloth of privacy rights misunderstand how plaintiffs might use privacy/publicity rights to seek profit, not shelter, from the limelight. In addition, they fail to comprehend the expansive reach of other tort protections, such as claims for defamation and false light. *See infra* Part I.B.1.b.

25. Richards & Solove, *supra* note 18, at 1894 nn.34-36 (collecting treatises and casebooks published between 1916 and 1933).

(*First*) of Torts in 1939 recognized a cause of action for “unreasonabl[e] and serious[.]” invasions of privacy.<sup>26</sup> But by 1940, only fourteen states recognized a right to privacy—twelve by common law and two by statute.<sup>27</sup> Early versions of Prosser’s treatise on torts similarly expressed uncertainty about the nature of the right to privacy. Prosser raised the possibility that the right would be swallowed up by the tort of intentional infliction of emotional distress,<sup>28</sup> and doctrinally, he placed privacy among other “[m]iscellaneous” topics at the end of his book.<sup>29</sup> Prosser’s earliest iteration on privacy nevertheless identified the discrete causes of action that the right of privacy encompassed, including: (1) intrusions on a plaintiff’s solitude; (2) publicity given to his name or likeness, or to private information about him; and (3) the commercial appropriation of elements of his personality.<sup>30</sup> In 1953, Prosser added the category of false light,<sup>31</sup> bringing the total to four causes of action for infringing a right of privacy, as it stands today.<sup>32</sup>

The same year that Prosser solidified his four-part understanding of privacy, Judge Jerome Frank penned the Second Circuit’s decision in *Haelan Laboratories v. Topps Chewing Gum*.<sup>33</sup> *Haelan* involved a contract dispute in which a baseball player gave the plaintiff chewing gum company the exclusive right to use his photograph, but the defendant rival chewing gum manufacturer induced the player to authorize that manufacturer to also use his photograph.<sup>34</sup> The court rejected the defendant’s contention that the plaintiff’s contract with the baseball player “created [no] more than a release of liability, because a ... legal interest in the publication of

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26. RESTATEMENT (FIRST) OF TORTS § 867 (1939).

27. Louis Nizer, *The Right of Privacy: A Half-Century’s Developments*, 39 MICH. L. REV. 526, 529-30 (1941).

28. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1053-54 (1st ed. 1941).

29. *Id.* at 1051.

30. *Id.* at 1054-56

31. WILLIAM LLOYD PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 119-20 (1954) (publishing five lectures from 1953). In 1960, Prosser lamented how Warren and Brandeis’s article had developed “four ... loosely related torts,” recognizing that “it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.” William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 422, 423 (1960).

32. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984).

33. 202 F.2d 866 (2d Cir. 1953).

34. *Id.* at 867.

his picture” did not exist outside of the right to privacy.<sup>35</sup> In so doing, Judge Frank articulated for the first time a “right of publicity.”<sup>36</sup> He wrote:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture .... This right might be called a ‘right of publicity.’ For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likeness, would *feel sorely deprived if they no longer received money* for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways.<sup>37</sup>

Judge Frank dismissed as “immaterial” whether the right of publicity should be labeled as a property right or some other type of right, and he spilled little ink justifying its philosophical footing.<sup>38</sup> But a bevy of commentators over the ensuing six decades have sought to fill that void.

### *B. Philosophical Justifications*

Courts and scholars offering justifications for the right of publicity—or misappropriation, as it is sometimes called—have defined its protection both narrowly (such as commodified celebrity goodwill)<sup>39</sup>

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35. *Id.* at 868.

36. *Id.*

37. *Id.* (emphasis added).

38. *Id.* He noted that “the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.” *Id.* But whereas Judge Frank preferred to create a new label and context for this right, Prosser continued to recognize “appropriation privacy,” a term he believed already encompassed the proprietary nature of the use of a plaintiff’s name and likeness as an aspect of her identity. See PROSSER, *supra* note 31, at 389.

39. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 666 (1991) (defining the right as “a property right that would safeguard the goodwill created by celebrities in their public persona”). Although Professor Post defines the right narrowly at the outset, he later addresses how “[t]he right of publicity ... divides a person in to two ... the objectified image ... which has become a thing of value capable of being owned and transferred,” and what he says Oliver Wendell Holmes would call “the ‘natural personality.’” *Id.* at 678 (citations omitted).

and broadly (such as encompassing both dignitary and economic interests).<sup>40</sup> Borrowing the framework that Professor Michael Madow first espoused,<sup>41</sup> this Part divides justifications recognizing publicity rights into both moral and economic categories. The “moral” category tracks the right’s substance as protecting something more than property, encompassing arguments relating to celebrities’ intrinsic personhood. Publicity rights thus are said to: (1) reward labor and, relatedly, prevent unjust enrichment; (2) protect individual autonomy and personal dignity; and (3) prevent value misrepresentation. The “economic” category concerns itself more with property rationales for justifying the right, including: (1) incentivizing socially useful activity; (2) promoting efficiency and avoiding rent dissipation; and (3) protecting against consumer confusion.

Although scholars and courts largely agree about the contours of these arguments, Madow suggests that their subtext involves something greater: “*control over the production and circulation of meaning* in our society.”<sup>42</sup> Some see exercising control through publicity rights as redistributing wealth and facilitating censorship of popular culture,<sup>43</sup> whereas others view control as properly returning

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40. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 227 (2012) (“The right of publicity encompasses rights far beyond the mere collection of income and entitlement to the economic value that flows from uses of a person’s identity. The right of publicity provides control over the use of a person’s identity and, therefore, ultimately over the person herself.”).

41. Michael Madow, *Private Ownership of Public Image: Popular Cultural and Publicity Rights*, 81 CALIF. L. REV. 125, 178 (1993). Professor Madow divided the main justifications for publicity rights into three categories: (1) moral arguments (reaping only what you have sown); (2) economic arguments (such as incentivizing creative effort and promoting allocative efficiency); and (3) consumer protection. *Id.* He argued that “the rationales most commonly advanced in support of the right of publicity nowadays are no more compelling than those put forward by Judge Frank and Melville Nimmer in the early 1950s.” *Id.* We have adopted the gist of this framework, making one slight revision. Because the consumer protection justification operates as a means of policing purchasing behavior, we have folded it into the economic category.

42. *Id.* at 142. Earlier in his article, Professor Madow distinguishes “cultural pessimists’ ... who [view] ... popular culture as a field in which dominant, repressive (in other words, consumerist, patriarchal, etc.) meanings are systematically reproduced and reinforced” from “cultural populists ... [who] view popular culture as contested terrain in which individuals and groups ... [seek] to make and establish their own meanings and identities.” *Id.* at 138-39. Siding with cultural populists, he challenges the right of publicity by arguing that the “[l]aw can accelerate the already powerful trend toward centralized, top-down management of popular culture, or it can fight a rearguard (and perhaps futile) action on the side of a more decentralized, open, democratic cultural practice.” *Id.* at 142.

43. *See, e.g., id.* at 136, 138.

to those whom associative value attaches, rather than transferring it to those merely seeking to profit.<sup>44</sup>

### 1. Moral Arguments

#### a. Rewarding Labor and Preventing Unjust Enrichment

Just one year after Judge Frank issued *Haelan Laboratories*, Melville Nimmer took up the cause of the right of publicity. Nimmer, at the time an attorney for Paramount Pictures, lauded *Haelan* as “a major step in the inexorable process of reconciling law and contemporary problems.”<sup>45</sup> Quite aware of efforts in Hollywood to persuade the American public that film stars owed their fame to old-fashioned hard work,<sup>46</sup> Nimmer carefully grounded the right of publicity as the product of a person’s creation:

[I]n most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. *It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.*<sup>47</sup>

Without specifically citing John Locke, Nimmer invoked the Lockean labor theory of property<sup>48</sup> to gift wrap the right of publicity for courts and legislatures.<sup>49</sup> Just as Locke once touted the labor of a

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44. See, e.g., Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 871-72 (1995). Professor Halpern dismisses Professor Madow’s “strong words” about wealth distribution and meaning control, writing that “the reliance on conjectural extrapolation rather than on examination of the right’s core paradigm leaves the burden still on those who would undo the work of the past forty years.” *Id.* at 872-73.

45. Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 223 (1954).

46. See Madow, *supra* note 41, at 176.

47. See Nimmer, *supra* note 45, at 216 (emphasis added).

48. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

49. More than forty years later, Professor Roberta Kwall described celebrity “construction” in a similar way, noting that “the effort in constructing the celebrity persona represents an intellectual, emotional, and physical effort on the part of the celebrity that requires protection.” Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 41 (1997).



person's body and the work of his hands as "his," many others similarly began to characterize a person's celebrity as "his."<sup>50</sup> According to the argument, a person invests his time, energy, and resources to amass his celebrity likeness, and therefore, the benefit from its appropriation rightly belongs to him.<sup>51</sup>

If the value resulting from a person's celebrity is the fruit of his labor, as these jurists and scholars suggested, then collecting and failing to return his profits constitutes unjust enrichment. The unjust enrichment argument, part and parcel of the labor theory, posits that no social purpose is served by allowing the defendant to freely take what the plaintiff could sell.<sup>52</sup> Rather, a third party who unjustly benefits under such a scenario, according to one court, is no better than an "average thief."<sup>53</sup> That third party has even committed "a form of commercial immortality [in reaping] where another has sown."<sup>54</sup>

This labor justification, however, depreciates in the modern media age. Achieving celebrity today can be as much about serendipity as it is about labor. Modern fame can reflect a person's timing and asininity, as much as his talent and intelligence.<sup>55</sup> Considering

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50. See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999) ("Both proponents and critics of the right of publicity generally perceive it as a property claim grounded in Lockean labor theory. Although other rationales are occasionally propounded, no serious attempt has been made to elaborate an alternative philosophical justification for the right.").

51. *Id.*

52. See Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966); see also *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) ("Vindication of the right will also tend to prevent unjust enrichment by persons ... who seek commercially to exploit the identity of celebrities without their consent."); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (noting that the right "prevents unjust enrichment by providing a remedy against exploitation of the goodwill and reputation that a person develops in his name or likeness through the investment of time, effort, and money").

53. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (quoting the district court judge in a case in which Bette Midler's voice was mimicked for an automobile advertisement with a "sound alike").

54. *Hirsch v. S. C. Johnson & Son, Inc.*, 280 N.W.2d 129, 134-35 (Wis. 1979) (internal quotation marks omitted) (ruling in favor of Elroy "Crazylegs" Hirsch for the unauthorized use of his nickname on women's shaving gel because Hirsch had "assiduously cultivated a reputation not only for skill as an athlete, but as an exemplary person").

55. As examples, one needs look no further than Paris Hilton, or Perez Hilton, or any number of stars who are, as Daniel Boorstin put it, famous for being famous. See DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 57 (1961); see also Neal Gabler, *Daniel Boorstin Got It Right in "The Image,"* L.A. TIMES (Apr. 15, 2012), <http://articles>.



these developments, one might predict that the unraveling of the labor theory would present grave problems for publicity rights. Their statutory iterations nevertheless endure. At least two courts have recognized the diminishing importance of the labor theory while simultaneously protecting plaintiffs' abilities to exploit their fortuitous worth. In *White v. Samsung Electronics America*, the Ninth Circuit took up Vanna White's right of publicity claim against an electronics company that had used a wig and jewelry clad robot in an advertisement.<sup>56</sup> Ruling for White, the court first recognized that sometimes celebrities expend "[c]onsiderable energy and ingenuity" to achieve and sell their value.<sup>57</sup> Even if that is not the case, and the celebrity has achieved her fame as a result of dumb luck, "[t]he law protects the celebrity's sole right to exploit this value."<sup>58</sup> In *Fraley v. Facebook*, the District Court for the Northern District of California similarly noted that California's right of publicity statute did not require that a plaintiff's "commercially exploitable value" be the result of the fruits of his talents or labor.<sup>59</sup> Rather, "[i]n a society dominated by reality television shows, YouTube, Twitter, and online social networking sites, the distinction between a 'celebrity' and a 'non-celebrity' seems to be an increasingly arbitrary one."<sup>60</sup>

Additional criticisms of the labor theory suggest that it gives celebrities too much recognition for building their fame when celebrity status actually derives from the meaning the public confers upon celebrity identities and achievements.<sup>61</sup> The public goes to the box office, buys tabloids, and clicks on entertainment website links, according to the argument; the public thus directs the beam of the

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latimes.com/2012/apr/15/entertainment/la-ca-neal-gabler-20120415 [http://perma.cc/YRB8-U93J].

56. 971 F.2d 1395, 1396 (9th Cir. 1992).

57. *Id.* at 1399.

58. *Id.*

59. 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011) (involving a class action lawsuit against Facebook for its advertising practice of "Sponsored Stories," which used members' names, profile pictures, and assertions that the people "liked" certain advertisers, along with the advertisers' logos, as part of other members' Facebook pages).

60. *Id.* For an argument that granting non-celebrities publicity rights is a "problematic expansion of the tort," see Alicia M. Hunt, Comment, *Everyone Wants to Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605 (2001).

61. See Madow, *supra* note 41, at 184-85.

spotlight and elevates the narratives supporting its gaze. As a result, the economic worth of publicity derives from a star's semiotic power to carry and provoke meaning, which reflects public values as much as it reflects celebrity efforts.<sup>62</sup>

*b. Protecting Individual Autonomy and Personal Dignity*

Another less prominent moral justification for the right of publicity lies with its ability to protect an individual's free, personal conception of the "self." One scholar has argued that the right of publicity implicates a person's interest in autonomous self-definition, which prevents others from interfering with the meanings and values that the public associates with her.<sup>63</sup> That argument posits that the value of celebrity stems not necessarily from the time and labor a person expends, but from "the messages conveyed by her associational decisions."<sup>64</sup> If a third party takes some control of the meaning associated with a celebrity, then the celebrity has to "live with that meaning and with what it says about her."<sup>65</sup> Justice Andrew Cobb of the Georgia Supreme Court articulated an even more dramatic understanding of this justification, writing that when advertisements use a person's name or likeness without his consent, "he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, 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."<sup>66</sup>

Critics have given little credence to arguments justifying publicity rights that rely on autonomy and dignity.<sup>67</sup> As a preliminary matter, it is possible that these justifications are premised upon a level of

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62. *See id.*; *see also* David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 HARV. J. SPORTS & ENT. LAW 1, 37 (2011) (noting that celebrity signs "transcend the human individuals who bear these names and are symbolic of the ideological hegemonies of social identities in contemporary society").

63. *See* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 282 (2005).

64. *See id.*

65. *Id.* at 283. J. Thomas McCarthy articulates a similar argument by equating a person's identity to property, saying that "[p]erhaps nothing is so strongly intuited as the notion that my identity is *mine*—it is my property to control as I see fit." J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 2.1 (2d ed. 2009).

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

67. *See infra* Part I.B.1.

control over one's identity that is simply not realistic in a free and open society. Third parties routinely take *some* control over the meaning associated with celebrities. Magazines choose which photographs to publish; bloggers and journalists frame reportage around dominant narratives, such as that of America's sweethearts or the NFL's biggest jerks. Stepping into the public eye has long been associated with relinquishing some aspect of self-definition in this regard.

Yet, even if wielding total control for self-definition were possible and publicity rights were deemed necessary for ensuring that control, then other critics should ask: Why is the right assignable? Publicity rights are routinely recognized as freely licensable and assignable, surviving the death of their owners.<sup>68</sup> Audrey Hepburn's posthumous cameo in a 2014 Dove Chocolate commercial illustrates this point.<sup>69</sup> Through the magic of computer-generated imagery, Dove digitally replicated the icon, gone for twenty-one years, for the lead role in a television advertisement for dark chocolate.<sup>70</sup> But one scholar has underscored the fatal inconsistency between justifying publicity rights as a means of maintaining autonomy and simultaneously allowing them to be assigned. She notes that "[a]lienating publicity rights from the underlying identity-holder defeats [the autonomy] justification entirely by removing the identity-holder's ability to make choices and take actions relevant to identity

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68. See *Haelan Labs. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); see also Rothman, *supra* note 40, at 186.

69. See Michael Hiltzik, *Introducing the Creepiest TV Commercial Ever Made*, L.A. TIMES (Mar. 4, 2014), <http://www.latimes.com/business/hiltzik/la-fi-mh-creepiest-tv-commercial-20140304-story.html> [<http://perma.cc/D43C-NSFG>] (describing Hepburn's reanimation "to shill for Dove chocolates"). According to Hiltzik, "[w]hat may be more interesting than the technology is what the commercial says about the exploitation of celebrities' images after their deaths. This has been a fast-changing area of legislation, driven almost entirely by commercial considerations—that is, the *opportunity for heirs and licensees to make money.*" *Id.* (emphasis added).

70. See *id.*; *Galaxy/Dove "Chauffeur,"* FRAMESTORE, <http://www.framestore.com/work/galaxy-choose-silk-chauffeur> [<http://perma.cc/UWY5-3E7X>] (last visited Mar. 25, 2015) (describing the process of developing the commercial, including efforts "to perfect the complex look of human skin" and tireless work "to recreate the icon's signature smile"). Gap similarly used Audrey Hepburn in 2006, mixing scenes from the movie *Funny Face* with AC/DC's "Back in Black" to advertise skinny black pants. See Danny Miller, *Audrey Hepburn: Dead is the New Alive*, HUFFINGTON POST (May 25, 2011, 11:55 AM), [http://www.huffingtonpost.com/danny-miller/audrey-hepburn-dead-is-th\\_b\\_29484.html](http://www.huffingtonpost.com/danny-miller/audrey-hepburn-dead-is-th_b_29484.html) [<http://perma.cc/4GWR-7T6Z>].

formation.”<sup>71</sup> For example, even if Audrey Hepburn would have chosen to lend Dove her image, any posthumous decision by her descendants to do so does not reflect the same expression of Hepburn’s autonomy.

Still others criticize publicity rights as insufficiently equipped to protect autonomy and dignity compared to other torts, like defamation and false light,<sup>72</sup> and find no basis for tying its proprietary nature to first principles. The Tenth Circuit, for example, rejected a right of publicity claim, noting “blind appeals to first principles carry no weight in our balancing analysis.”<sup>73</sup>

### *c. Preventing Value Misrepresentation*

The final moral justification for publicity rights relates to the desire to protect individual autonomy, but this time it focuses outward to the external harm a plaintiff faces when others wrongly believe that she approves of being associated with the product at issue. This was the harm alleged in both *Roberson v. Rochester Folding Box Co.* and *O’Brien v. Pabst Sales Co.* In *Roberson*, discussed earlier, a young woman disapproved of being depicted in an advertisement for Franklin Mills Flour.<sup>74</sup> In *O’Brien*, an all-American football player disapproved of being depicted in a football calendar alongside a bottle of Pabst Blue Ribbon Beer.<sup>75</sup> As a member of an organization devoted to discouraging alcohol use among young people, he asserted that he had refused previous opportunities to sell his endorsement for alcoholic beverages.<sup>76</sup>

71. Rothman, *supra* note 40, at 229.

72. Madow, *supra* note 41, at 182 n.271 (“To the extent this body of law is believed to provide insufficient protection to the celebrity’s legitimate interest in autonomy and dignity, the appropriate response is to amend it, rather than to commodify the celebrity personas.”).

73. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 975 (10th Cir. 1996). McCarthy asserts that “this is an astonishing statement for a court of law to make because it characterizes the intuitive and natural human feeling that everyone should have control over the commercial use of their identity.” MCCARTHY, *supra* note 65, §2.2.

74. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 442 (N.Y. 1902).

75. *O’Brien v. Pabst Sales Co.*, 124 F.2d 167, 168 (5th Cir. 1942).

76. *Id.* at 168-69. But the Fifth Circuit upheld a directed verdict for Pabst when it found no violation of the plaintiff’s right of privacy (since his university had consented) and no reason to construe the calendar as falsely stating that he used, endorsed, or recommended the product. *See id.* at 170.

The greatest critique of this justification lies with the way in which it overlaps the ends of publicity rights with that of defamation or even false light. Richard Epstein suggests that the tort at issue can be more like a “subtle form of defamation because plaintiffs assert that endorsements of these kinds necessarily imply that the plaintiffs lent themselves to a commercial enterprise, and the plaintiffs are allegedly compromised when the message is inconsistent with their personal values.”<sup>77</sup> If so, it seems hardly necessary to endow a plaintiff with multiple means of recovery for the same harm.

## 2. *Economic Arguments*

### a. *Incentivizing Socially Useful Activity*

The incentive justification for the right of publicity posits that entering the public eye to undertake socially useful activities requires economic incentives. The leading scholar in the area, J. Thomas McCarthy, finds this justification the most often relayed in case law. He summarizes the argument by stating that legal protection is “a needed incremental inducement to venture onto the stage of public opinion, where kudos and bouquets are often followed by brickbats and hisses.”<sup>78</sup> The Supreme Court also invoked this logic in its only right of publicity case to date, *Zacchini v. Scripps-Howard Broadcasting Company*. *Zacchini* involved a television broadcast of an entertainer’s entire human cannonball act.<sup>79</sup> Protecting the value of the entertainer’s act, according to the Court, provided “an economic incentive for him to make the investment required to produce a performance of interest to the public.”<sup>80</sup> The Fifth, Eighth, and Tenth Circuits have reiterated this justification, noting that protecting one’s name or likeness from misappropriation is socially beneficial because it “encourages people to develop special skills,”<sup>81</sup>

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77. See Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 469 (1978).

78. MCCARTHY, *supra* note 65, § 2.6.

79. 433 U.S. 562, 563 (1977).

80. *Id.* at 576.

81. *Matthews v. Wozencraft*, 15 F.3d 432, 437-38 (5th Cir. 1994) (holding that a nonfiction book accounting the life of a former undercover narcotics officer fell within First Amendment protection).

“encourage[s] a person’s productive activities,”<sup>82</sup> and “induce[s] people to expend the time, effort, and resources to develop the talents prerequisite to public recognition.”<sup>83</sup> Thus, according to the argument, “society has an interest in publicity rights similar to its interest in other intellectual property protections, such as copyright and patent law.”<sup>84</sup>

Some have expressed doubt that adding a right of publicity offers any additional motivation for celebrities to improve or expand upon the resources that make them famous.<sup>85</sup> The Eighth and Tenth Circuits, for example, have questioned whether publicity value can have the effect of incentivizing celebrities when they are already otherwise “handsomely” compensated.<sup>86</sup> McCarthy takes issue with rejections of the incentive justification on this basis, finding such determinations to amount to judicial redistribution between celebrities and profit-making entities seeking to exploit them.<sup>87</sup> Regardless of McCarthy’s critique, however, the fact remains that publicity rights might not always incentivize celebrities to partake in certain activities associated with their fame. For one, celebrities might find the activities to be low reward compared to their costs. Such a

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82. See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824, 826 (8th Cir. 2007) (holding that the First Amendment right of a fantasy major league baseball games producer to use players’ names and statistical information took precedence over players’ rights).

83. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 973 (10th Cir. 1996).

84. *Id.* (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977)).

85. See, e.g., Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 111 (1994); Eugene Volokh, *Freedom of Speech and Right of Publicity*, 40 HOUS. L. REV. 903, 911 (2003) (“[R]ight of publicity law certainly prohibits the creation of some new works (prints, sculptures, and the like) in order to provide a small speculative increase in the incentive to create other works (the works that would make a person famous). If the law’s goal is encouraging the production of new works, the right of publicity will likely disserve the interest more than it serves it.”); see also Madow, *supra* note 41, at 195 n.334 (noting that legal recognition of publicity rights simply “give[s] celebrities (or their assignees) an effective veto power over disfavored commercial appropriations or ‘readings’ of star images”).

86. *Cardtoons*, 95 F.3d at 973-74; see also *C.B.C. Distrib. & Mktg., Inc.*, 505 F.3d at 824 (“[M]ajor league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.”); Madow, *supra* note 41, at 209 (“[T]he particular activities in our society that generate commercially marketable fame are themselves, again with isolated exceptions, very handsomely compensated.”).

87. MCCARTHY, *supra* note 65, § 2.6.

calculus is prone to error when celebrities consider only their personal or economic return and not any greater societal benefit. Second, celebrities have little incentive to partake in activities that criticize or poke fun at themselves. Society, as a result, has to depend on First Amendment protections for those who wish to communicate about celebrities to ensure that these activities are not swallowed up by assertions of publicity rights.<sup>88</sup>

*b. Promoting Efficiency and Avoiding Rent Dissipation*

Another economic justification for publicity rights is to promote the most efficient use of scarce resources.<sup>89</sup> Celebrity status, according to this argument, is scarce and has economic value akin to property. Judge Richard Posner has argued that “[t]here is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it.”<sup>90</sup> Making the photograph a public good, he asserts, would not achieve this goal.<sup>91</sup>

Mark Grady likewise posits that “the right of publicity is needed to ensure that publicity assets are not wasted by a scramble to use them up as quickly as possible.”<sup>92</sup> Because the right of publicity privatizes public goods, it assures that celebrity appropriations will garner the greatest value.<sup>93</sup> Under Grady’s rent dissipation theory, uses of publicity that are most likely to depreciate the overall celebrity value should be prohibited.<sup>94</sup> This includes so-called “casual” uses—such as t-shirts, posters, coffee mugs, and calendars—to which people can be repeatedly exposed.<sup>95</sup> In contrast, uses that

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88. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

89. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29-32, 39 (3d ed. 1986); Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 356 (1967).

90. Richard A. Posner, *The Right of Privacy*, 12 *GA. L. REV.* 393, 411 (1978).

91. *Id.*

92. Grady, *supra* note 85, at 98.

93. *Id.*

94. *Id.* at 119.

95. *Id.*; see also *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978) (noting that books and movies, “more so than posters, bubble gum cards, or some other such ‘merchandise,’” have enjoyed certain constitutional protections).



increase publicity value by creating demand or attracting positive attention should be allowed.<sup>96</sup>

The flaws in these arguments are a product of the belief that celebrity identity, like other types of property, is used most efficiently when it goes to the highest bidder. These arguments fail to consider that speech depicting celebrities, such as the photograph to which Judge Posner alluded, also carry a suggested message of truth for audiences. Assume, for example, that the celebrity from Judge Posner's photograph prefers Folgers Coffee, but Starbucks will pay her more than Folgers to pose with its characteristic, mermaid-emblazoned cup. The most efficient use of her celebrity—the Starbucks advertisement—will sacrifice the message's truth value. The resulting loss of truth value under such circumstances, absent from Posner's efficiency calculus, is a potentially significant harm to our democratic society.<sup>97</sup> Furthermore, Grady's proposed method of distinguishing among uses that allegedly depreciate or appreciate celebrity status would quickly lead to courts debating the finer contributions of key chains and bobbleheads, rather than focusing on the speech at issue.

### *c. Protecting Against Consumer Confusion*

Finally, both courts and scholars have recognized consumer protection as an economic justification for publicity rights, centering on the possibility that consumers might wrongly perceive messages as celebrity endorsements when celebrities did not consent to such endorsements. One scholar contends that protecting a celebrity's right to control the advertising use of his name or likeness prevents consumers from being misled about the celebrity's willingness to associate himself with a product or service.<sup>98</sup> Others note how media

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96. Grady, *supra* note 85, at 120-23. Earlier in his article, Professor Grady points to the case of *Matthews v. Wozenraft* as an example. Grady, *supra* note 85, at 112 (discussing *Matthews v. Wozenraft*, 15 F.3d 432, 436-38 (5th Cir. 1994)). In *Matthews*, the defendant wrote a book invoking a celebrity and the court held that it increased, not decreased, the plaintiff's publicity value, resulting in no cause of action. Grady, *supra* note 85, at 112.

97. It is partially for this reason that our hypothetical baseline for discussing a commercial speech defense to an assertion of publicity rights assumes that the advertiser represents that a celebrity actually uses a product. See *infra* Part III.

98. See James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973).



portrayals using peoples' names or testimonials without their consent victimize both that individual and the public "because an unauthorized endorsement is essentially a false claim about the product."<sup>99</sup>

Like earlier justifications, however, these harms are already prohibited through other legal arenas, such as laws against deceptive trade practices and unfair competition. Free speech protections additionally necessitate the truthful nature of the speech at issue; the First Amendment does not protect false and misleading speech.<sup>100</sup> Thus, this justification does little to support an independent right of publicity that can overcome First Amendment defenses.

### *3. In the End, What Justifies the Right of Publicity?*

As this discussion reveals, none of the traditionally asserted "moral" justifications for the right of publicity, as it exists today, supports or explains the right. All that appears to remain, then, is the naked economic interest, which reserves the economic value of an individual's name and likeness as a property right for the individual. Because others are denied free use of a celebrity's name or likeness, the celebrity is in a position to sell either or both as a valuable asset.

In the abstract, nothing is inherently wrong or evil with such a rationale. When an individual can assert the property right in her name and likeness and disrupt the free flow of information and opinion, however, problems arise because the First Amendment right of free expression, for the most part, supersedes all but the most compelling competing interests. Courts have made some modifications to the right of publicity to consider the public's interest in the free flow of information and opinion.<sup>101</sup> But when speakers disseminate the exact same information and opinion to the exact same audience in the form of commercial advertisements, First Amendment protections quickly melt away, for no reason other than the speaker's commercial motivation. The irony is that the compet-

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99. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1600 (1979).

100. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980); see also *Gertz v. Welch, Inc.*, 418 U.S. 323, 340 (1974).

101. See *infra* Part II.

ing interest being protected against commercially motivated speech has at its root the same form of commercially motivated property interest.

In the Part that follows, we move from dissecting the bases for the right of publicity to exploring the ways in which the rights of publicity and free expression have interacted. This discussion will demonstrate how the summary categorical rejection of First Amendment protections for commercial speech is justified by neither doctrine nor theory.

## II. THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT COLLIDE

The right of publicity and the First Amendment are obvious adversaries. The former protects a listener's right to control what a speaker says, which consequently tends to invade the latter's constitutionally protected right to communicate truthful information and opinion. The Supreme Court has failed to directly define the rules governing this clash,<sup>102</sup> leaving lower courts to rely upon incomplete, often confusing direction and to employ numerous convoluted tests in attempts to reconcile the two rights.<sup>103</sup> Through these efforts, however, a familiar dichotomy emerges. Speech deemed "newsworthy," or in some cases "expressive," is generally afforded broad constitutional protection in the face of right of publicity claims, whereas expressions characterized as "commercial speech" receive much shorter shrift.<sup>104</sup> As this Part demonstrates, defendants are generally, and not surprisingly, eager to characterize their speech as a contribution to the debate over matters of public concern or as a communication having expressive value, but they are much less willing to reveal their economic motivations. We proceed to address how courts treat each of these types of speech in kind.

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102. In the Supreme Court's only case addressing the right of publicity, it ruled narrowly on the facts of the case. The Court's language provides little guidance to subsequent courts addressing the conflict. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574-75 (1977) ("Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.").

103. *See infra* Part II.B.

104. *See infra* Part II.A.

### A. Automatic Protection for Newsworthy and Public Affairs Speech

We begin at the top of the hierarchy. Even though right of publicity statutes across the country “present a crazy quilt of different responses at different times to different demands on the legislatures,”<sup>105</sup> a unifying commonality may be found in how their provisions automatically distinguish speech that is newsworthy or in the public interest from speech for commercial or trade purposes. California and New York, states with high volumes of cases on this subject, provide illustrative publicity rights schemes.

#### 1. California

California recognizes a newsworthiness exemption and a public interest defense to claims asserting violations of common law publicity rights and statutory misappropriation, respectively. The California public interest defense under common law is similar to the defense applicable to a statutory claim.<sup>106</sup> California Civil Code section 3344(d) provides that “a use of a name, voice, signature, photograph, or likeness in connection with *any news, public affairs, or sports broadcast or account*, or any political campaign, shall not constitute a use for which consent is required.”<sup>107</sup> Courts have construed this defense broadly,<sup>108</sup> in part because it exempts matters of both “news” and “public affairs.” As the California Court of Appeals explained, limiting the defense only to topics that might be covered in “news” would “jeopardize society’s right to know,” because the court may impose liability for using a person’s name or likeness in expressions about subjects that “do not relate to politics or public policy, and may not even be important, but are of interest.”<sup>109</sup> Thus,

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105. MCCARTHY, *supra* note 65, § 6.6.

106. *McKinney v. Morris*, No. B240830, 2013 WL 5617125, at \*19 (Cal. Ct. App. Oct. 15, 2013) (dismissing plaintiff’s cause of action for common law and statutory misappropriation for using her in a documentary that concerned a subject of widespread public interest); *see also* *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 111 (Ct. App. 2010); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 794 (Ct. App. 1993).

107. CAL. CIV. CODE § 3344(d) (West 2010) (emphasis added).

108. *McKinney*, 2013 WL 5617125, at \*19.

109. *See Dora*, 18 Cal. Rptr. 2d at 794; *see also* *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Ct. App. 1983) (“The scope of the privilege extends to almost all reporting of recent events even though it involves the publication of a purely private person’s name or likeness.”).

speech involving “public affairs” is protected in California, even when its content involves “something less important than news.”<sup>110</sup>

In contrast, commercial use of the exact same information, such as in an advertisement, automatically removes the use from the scope of the statutory exception. For example, in *Abdul-Jabbar v. General Motors Corp.*, General Motors used NBA superstar Kareem Abdul-Jabbar’s statistics and former name, Lew Alcindor, in a television commercial without his consent.<sup>111</sup> The Ninth Circuit held that “[w]hile Lew Alcindor’s basketball record may be said to be ‘newsworthy,’ its use is not automatically privileged. [General Motors] used the information in the context of an automobile advertisement, not in a news or sports account.”<sup>112</sup> Similarly, in *Fraley v. Facebook, Inc.*, Facebook’s repackaging of members’ activity in clicking to “like” certain content as sponsored stories with a commercial purpose removed the underlying actions from the newsworthiness privilege, even if they had newsworthy value.<sup>113</sup> The court noted that newsworthy material can still subject speakers to liability “when published for commercial rather than journalistic purposes.”<sup>114</sup> Thus, the exact same information conveyed to the exact same audience automatically loses its “newsworthiness” protection for no reason other than the speaker’s motivation to promote sales.

In addition to categorically excluding commercial advertisements from the “newsworthiness” protection, courts may now also choose to focus on whether the speech at issue constitutes a traditionally protected “broadcast or account.” Although California courts had previously focused little attention on such a distinction, the Ninth

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110. *Dora*, 18 Cal. Rptr. 2d at 794; *see also* *Doe v. Gangland Prod., Inc.*, 730 F.3d 946, 961 (9th Cir. 2013) (concluding that even if a documentary on gang activities was not “news” for the purpose of the statute, it fell within the public affairs exception).

111. 85 F.3d 407, 409 (9th Cir. 1996); *cf.* *Jordan v. Jewel Food Stores, Inc.*, 743 F. 3d 509 (7th Cir. 2014) (reversing a district court’s finding that a grocery store’s page in a commemorative magazine issue, which used Michael Jordan’s image without his consent, constituted noncommercial speech).

112. *Abdul-Jabbar*, 85 F.3d at 416. The U.S. District Court for the Northern District of Ohio favorably cited this proposition in a case concerning Ohio’s public affairs exception. *See* *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 924 (N.D. Ohio 2004).

113. 830 F. Supp. 2d 785, 805 (N.D. Cal. 2011); *see also* *Estate of Fuller v. Maxfield & Oberton Holdings, LLC*, 906 F. Supp. 2d 997, 1010-11 (N.D. Cal. 2012) (finding the use of a name “for purposes of selling and advertising” and “increasing sales” to constitute a commercial use beyond the scope of the newsworthiness exception).

114. *Fraley*, 830 F. Supp. 2d at 805.

Circuit in *In re NCAA* rejected both common law and statutory defenses for using celebrity depictions in video games, stating that those defenses protected only “the act of publishing or reporting.”<sup>115</sup> The Ninth Circuit reasoned that the defendant’s video game did not “publish” or “report factual data” as a reference source, and was simply “a means by which users can play their own virtual football games.”<sup>116</sup>

## 2. *New York*

In New York, the Court of Appeals rejected the existence of any common law rights of privacy;<sup>117</sup> instead, only a statutory right of publicity exists. Sections 50 and 51 of New York’s Civil Rights Law make it a misdemeanor to use a person’s name or portrait without consent “for advertising purposes, or for the purposes of trade,”<sup>118</sup> and allow for any person whose name, portrait, picture, or voice is used without consent for these purposes to sue.<sup>119</sup> The New York Court of Appeals has repeatedly observed that these provisions are strictly limited to nonconsensual commercial appropriations—“for advertising purposes or for the purposes of trade’ *only*, and nothing more.”<sup>120</sup> As a result, two exceptions have evolved: a newsworthiness

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115. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1282 (9th Cir. 2013).

116. *See id.* at 1283. The court’s preference for traditional reportage over entertaining speech illustrates its bias against profit-motivated, nontraditional speech. *See infra* Part III.B.1.

117. *See Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447-48 (N.Y. 1902).

118. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2012). The *Restatement (Third) of Unfair Competition* similarly characterizes the right of publicity tort in section 46 as appropriating the commercial value of a person’s identity without permission by using the person’s name, likeness, or other indicia of identity “for purposes of trade.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). The statement “[f]or purposes of trade” does not encompass using the person’s identity in news reporting, commentary, entertainment, or works of fiction or nonfiction, or in advertising that is incidental to such uses. *Id.* § 47. These exemptions reflect the fact that “[t]he use of a person’s identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person’s right of publicity.” *Id.* § 47 cmt. c.

119. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2012).

120. *Finger v. Omni Publ’ns Int’l, Ltd.*, 77 N.E.2d 141, 143 (N.Y. 1990) (citations and quotations omitted).

exception and an “incidental use” exception for works of art and advertising produced in connection with a protected use.<sup>121</sup>

The newsworthiness exception applies liberally, not only to reports of political events but also to consumer interest stories.<sup>122</sup> For example, in *Stephano v. News Group Publications, Inc.*, the court protected a defendant’s use of a plaintiff’s photograph in a column about clothing deals without the plaintiff’s consent.<sup>123</sup> Even though the plaintiff agreed to model for one article only and the defendant might have had a commercial motivation, “the availability of the clothing displayed” was an “event or matter of public interest.”<sup>124</sup> The court found the content of the column newsworthy; therefore it was not subject to liability as a trade usage. According to the Court of Appeals, a contrary rule “would unreasonably and unrealistically limit the exception to nonprofit or purely altruistic organizations which are not the only, or even the primary, source of information concerning newsworthy events and matters of public interest.”<sup>125</sup> Moreover, the Court of Appeals did not want judges resolving questions of “newsworthiness,” which are best left “to reasonable editorial judgment and discretion.”<sup>126</sup>

The First Amendment similarly drives the “incidental use” exception to allow speakers to publicize their own protected communications.<sup>127</sup> As a result, courts protect the use of a plaintiff’s photograph in promotional materials for a documentary about him as incidental,<sup>128</sup> but do not protect the use of a plaintiff’s picture on the cover of an unrelated fictional book cover.<sup>129</sup> Thus, neither New York

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121. See *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 350 & n.16, 353 (S.D.N.Y. 2002) (calling this exception the “ancillary use” or “incidental use” exception).

122. See *Finger*, 77 N.E.2d at 144.

123. See 474 N.E.2d 580, 586 (N.Y. 1984).

124. *Id.* at 585. Notably, the defendant was not making a profit from what it chose to feature in the column. See *id.*

125. *Id.*

126. *Finger*, 77 N.E.2d at 144. Simply because speech is presumably created and distributed for the purpose of making a profit does not confer upon it the title of “advertising” or “purposes of trade.” See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (interpreting New York law and finding that because “books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment” (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952))).

127. See *Groden v. Random House, Inc.*, 61 F.3d 1045, 1050-51 (2d Cir. 1995) (internal quotation marks omitted).

128. See, e.g., *Alfano v. NGHT, Inc.*, 623 F. Supp. 2d 355, 360 (E.D.N.Y. 2009).

129. See, e.g., *Yasin v. Q-Boro Holdings, LLC*, No. 13259109, 2010 WL 1704889, at \*2 (N.Y.

exception protects speech when courts find that the primary purpose for using the celebrity image is commercial in nature, regardless of the level of public interest involved. As the Court of Appeals stated, commercial entities “may not unilaterally neutralize or override the long-standing and significant statutory privacy protection by wrapping its advertising message in the cloak of public interest, however commendable the educational and informational value.”<sup>130</sup>

Like California and New York, other states’ statutory and common law publicity rights schemes exempt only so-called noncommercial uses from liability, such as uses related to news, public affairs, or sports broadcasts or accounts.<sup>131</sup> In this way, these statutory and doctrinal regimes reflect enmity toward commercial speech and, specifically, toward advertising.<sup>132</sup>

### *B. “Expressive” Speech Subjected to Balancing Tests*

Moving down the hierarchy of protection, we confront “expressive” speech, which is subject to various balancing tests to determine its First Amendment worth relative to publicity rights. The evolution of courts’ sloppy and often inconsistent tests for weighing the right of publicity and First Amendment rights can be traced back to the United States Supreme Court decision in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>133</sup> In a unique set of facts, petitioner, Hugo Zacchini, sought damages from a television station which broadcasted his human cannonball act, a fifteen second performance in which he was shot from a cannon into a net roughly two-hundred feet away.<sup>134</sup> The Ohio Supreme Court held that the First Amend-

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Sup. Ct. Apr. 23, 2010) (“[T]he use of Yasin’s image on the front cover of defendant’s book is purely for marketing and trade purposes; solely as a means to attract customers and generate sales.”).

130. *Beverly v. Choices Women’s Med. Ctr., Inc.*, 587 N.E.2d 275, 279 (N.Y. 1991).

131. *See, e.g.*, FLA. STAT. ANN. § 540.08(4) (West 2007); 765 ILL. COMP. STAT. ANN. 1075/35(b)(2) (West 2014); IND. CODE ANN. § 32-36-1-1(c)(1)(B) (West 2009); OHIO REV. CODE ANN. § 2741.02(D)(1) (West 2014); *see also* MCCARTHY, *supra* note 65, § 8.91.

132. *See, e.g.*, 765 ILL. COMP. STAT. 1075/30; 42 PA. CONS. STAT. ANN. § 8316(a) (West 2014); TENN. CODE ANN. § 47-25-1105(a) (West 2010). In Illinois, for example, a “commercial purpose” means holding out a person’s identity in connection with selling a product or service, advertising, or fundraising. 765 ILL. COMP. STAT. 1075/5 (West 2014).

133. 433 U.S. 562 (1977).

134. *Id.* at 563-64.



ment privileged the broadcast as a matter of public interest.<sup>135</sup> The United States Supreme Court, however, rejected this view:

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's *entire act* without his consent.... The broadcast of a film of petitioner's *entire act* poses a substantial threat to the economic value of that performance.<sup>136</sup>

In other words, the Court recognized that the television station, without compensating *Zacchini*, reproduced the entire narrative giving value to his performance—beginning, middle, and end—thereby removing it from the scope of First Amendment protection. But the Supreme Court did not clearly articulate the limitation of the public interest exception in this case, nor did the Court clearly explicate a test for measuring future conflicts between publicity rights and the First Amendment. Instead, the Court decided *Zacchini* narrowly on the “entire act” conception and suggested that relevant interests should be weighed, providing more confusion than clarity for lower courts.<sup>137</sup> After *Zacchini*, several analytical frameworks have taken shape across federal and state courts to perform the balancing inquiry *Zacchini* seemingly demanded, including (1) the Transformative Use Test, (2) the Predominant Use Test, and (3) the *Rogers* Test.

### 1. Transformative Use Test

The Transformative Use Test, formulated by the California Supreme Court, weighs publicity rights and First Amendment interests by asking whether the use “adds significant creative elements so as to be transformed into something more than a mere celebrity

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135. *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 461-62 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977).

136. *Zacchini*, 433 U.S. at 574-75 (emphasis added).

137. *See, e.g.*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 152 (3d Cir. 2013) (noting that *Zacchini* “sets the stage for our analysis of three systematized analytical frameworks that have emerged as courts struggle with finding a standardized way for performing this balancing inquiry”).



likeness or imitation.”<sup>138</sup> Only a transformative use can outweigh the interests of a person asserting his publicity rights, the court noted.<sup>139</sup> “[W]hen a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interests protected by the right of publicity.”<sup>140</sup> In devising the defense, the court emulated copyright law.<sup>141</sup> According to the court, copyright law was an apt body from which to draw because “both the First Amendment and copyright law have a common goal of encouragement of free expression and creativity, the former by protecting such expression from government interference, the latter by protecting the creative fruits of intellectual and artistic labor.”<sup>142</sup>

Courts subsequently applying the California Supreme Court’s Transformative Use Test have relied on at least five factors in determining whether a use is sufficiently transformative to obtain First Amendment protection.<sup>143</sup> They have looked to whether: (1) the celebrity likeness “is the very sum and substance of the work,” (2) the work is the artist’s creative expression, (3) the imitative elements predominate in the work, (4) the economic value is derived primarily from the celebrity’s fame, and (5) the overall goal is to exploit a celebrity’s fame.<sup>144</sup> On this basis, they have rejected as not sufficiently transformative t-shirts bearing a likeness of The Three Stooges,<sup>145</sup> video game avatars closely based on real singers,<sup>146</sup>

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138. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

139. *Id.* at 806-08.

140. *Id.* at 808.

141. *Id.* at 807.

142. *Id.* at 808. The Transformative Use Test in this way gives preference to the labor theory of justification for the right of publicity. See *supra* Part I.B.1.a.

143. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1274 (9th Cir. 2013).

144. See *id.*

145. *Comedy III Prods.*, 106 P.3d at 811 (“[The artist’s] undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame. Indeed, were we to decide that [the] depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements.”).

146. *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Ct. App. 2011) (“[T]he avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members.”).

college football players,<sup>147</sup> and a birthday card that mimicked a celebrity.<sup>148</sup> Yet, they have deemed as transformative comic book caricatures of celebrities<sup>149</sup> and video game avatars only apparently loosely based on real people.<sup>150</sup>

The exact relationship between this Transformative Use Test and a more general First Amendment defense is confusing, to say the least, because courts still reference the profit motivation inherent in the speech when they determine its worth. For example, when the Ninth Circuit in *Hoffman v. Capital Cities/ABC, Inc.* afforded full First Amendment protection, it conducted a traditional speech analysis and found that the speech at issue was “entitled to the full First Amendment protection awarded [to] noncommercial speech.”<sup>151</sup> Although *Hoffman* addressed the Transformative Use Test in a footnote, it suggested that the test was inapplicable because the speaker in *Hoffman* was a magazine, not an artist.<sup>152</sup>

When the Los Angeles Superior Court afforded full First Amendment protection to the *Call of Duty* video game’s use of an avatar resembling Manuel Noriega, it downplayed the video game company’s economic interest on its way to finding the speech protected over the publicity right at issue.<sup>153</sup> In this way, the transformative use analytical framework operates as yet another means for elbowing out speech that is primarily commercially motivated in the traditional sense. The test offers a means for elevating only that profit motivated speech that has been creatively altered to the court’s liking.<sup>154</sup>

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147. *In re NCAA*, 724 F.3d at 1276 ; *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013).

148. *Hilton v. Hallmark Cards*, 599 F.3d 894, 911 (9th Cir. 2009).

149. *Winter v. DC Comics*, 134 Cal. Rptr. 2d 634, 641 (Cal. 2003); *see also* *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (finding that an artist’s work combined images of a celebrity to describe a significant event in sports history and to convey a message about that event).

150. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 616 (Ct. App. 2006) (“[The avatar] is more than a mere likeness or literal depiction of [the singer].”); *Noriega v. Activision/Blizzard, Inc.*, No. BC551746, slip op. at 5 (Cal. Super. Ct. Oct. 27, 2014) (“The complex and multifaceted [video] game is a product of defendant’s own expression, with *de minimis* use of [the former Panama military dictator’s] likeness.”).

151. 255 F.3d 1180, 1189 (9th Cir. 2001).

152. *See id.* at 1184 n.2.

153. *See Noriega*, No. BC551746, slip op. at 5 n.3 (“Because the video game is transformative, economic considerations are not relevant.”).

154. *See id.* at 2 & n.2.

## 2. *Predominant Use Test*

The Predominant Use Test is less opaque about its intent to exclude protection for commercial speech. First articulated by the Missouri Supreme Court, the Predominant Use Test balances the rights at issue by distinguishing uses that predominantly exploit the commercial value of a celebrity's fame from uses that make expressive comments.<sup>155</sup> The court drew the language of the test from intellectual property litigator Mark Lee's law review article, in which he defended such an approach as "do[ing] justice to both the expressive and property interests" by protecting the "intellectual property that is being exploited by others" and permitting creative expression that makes meaningful comments.<sup>156</sup> The Missouri Supreme Court, sitting en banc, applied this test to find that the makers of a comic book used a hockey player's name predominantly in "a ploy to sell comic books and related products rather than an artistic or literary expression."<sup>157</sup> Under these circumstances, according to the court, "free speech must give way to the right of publicity."<sup>158</sup> The Missouri test constitutes an extremely problematic application of the public interest exception because its singular focus is profit motivation. If the predominant purpose of the speech is something other than conveying a judicially accepted expression, it receives no First Amendment protection.

Perhaps that is why courts have rejected opportunities to employ the Predominant Use Test, even levying sharp criticism in its direction.<sup>159</sup> The Third Circuit described the test as "subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics."<sup>160</sup> The Eastern District of Missouri managed to sidestep the test entirely in a subsequent case applying Missouri law.<sup>161</sup>

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155. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc).

156. Lee, *supra* note 12, at 500.

157. *Doe*, 110 S.W.3d at 374.

158. *Id.*

159. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 154 (3d Cir. 2013).

160. *Id.*

161. See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1096 n.26 (E.D. Mo. 2006); see also MCCARTHY, *supra* note 65, § 8:82 (condemning the test as "wrong," but as applied only to expressive and artistic uses).

### 3. *The Rogers Test*

In contrast to the Predominant Use Test, the *Rogers Test* looks to the relationship between the celebrity image and the use of the celebrity's identity as a whole.<sup>162</sup> Also called the Relatedness Test or the *Restatement Test*,<sup>163</sup> the test's namesake case involved dancer-actress Ginger Rogers's suit against the producers and distributors of a film called *Ginger and Fred* for infringing her right of publicity and for violating the Lanham Act.<sup>164</sup> In *Rogers v. Grimaldi*, the Second Circuit dismissed Rogers's right of publicity claim because the title of the film was "clearly related to the content of the movie and [was] not a disguised advertisement for the sale of goods and services or a collateral commercial product."<sup>165</sup> The Sixth Circuit, in applying the *Rogers Test* in a subsequent decision, linked the thrust of its relatedness inquiry to the *Restatement (Third) of Unfair Competition*.<sup>166</sup> Like the *Rogers Test*, the *Restatement* frowns upon exploitative uses of celebrity identity. Under the *Restatement*, "use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses" does not amount to a prohibited use,<sup>167</sup> but using a celebrity's identity "solely to attract attention" to something unrelated to that person can subject the user to liability.<sup>168</sup>

Recent evaluations of the *Rogers Test*, including the Third and Ninth Circuits' evaluations, have opted not to apply it in the context of publicity rights claims because of its perceived misplaced goal: protecting the consumer from confusion, rather than protecting the celebrity.<sup>169</sup> Although these recent cases are trending more towards

162. *Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2d Cir. 1989); see *Hart*, 717 F.3d at 154.

163. See *Hart*, 717 F.3d at 154 n.17.

164. *Rogers*, 875 F.2d at 996-97.

165. *Id.* at 1004-05.

166. *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003). Despite the Sixth Circuit's seeming adoption of the *Rogers Test* in *Parks*, the court opted to apply the Transformative Use Test within the same year. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003) (noting that the transformative elements test adopted by the Supreme Court of California "will assist us in determining where the proper balance lies between the First Amendment" and Tiger Woods's intellectual property rights).

167. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-47 (1995).

168. *Id.* § 47 cmt. c.

169. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280 (9th Cir. 2003); *Hart v. Elec. Arts, Inc.*, 717 F.3d 154, 158 (3d Cir. 2013).

the Transformative Use Test, the lack of clarity regarding the nature in which constitutional First Amendment rights are balanced against celebrities' pecuniary interests in publicity rights remains troubling.

### *C. Commercial Speech as a First Amendment Defense?*

Up to this point, we have discussed the most common First Amendment defenses for escaping liability when speakers are accused of infringing on publicity rights.<sup>170</sup> Yet, one defense is clearly absent from the discussion. Whether resulting from defendants' uneasiness in confronting statutory and common law animosity toward commercial speech, or resulting from their sheer ignorance of the modern version of the commercial speech doctrine, defendants are not looking to commercial speech arguments to protect their free expression rights.<sup>171</sup> Rather, defendants tout their speech's expressive value and ask courts to characterize it as noncommercial.<sup>172</sup> And courts are often willing to find speech to be noncommercial, usually with seemingly little analysis. In fact, the paucity of judicial

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170. See *supra* Part II.A-B.

171. Despite the 1677 cases Westlaw returned in winter 2014 with the search term, "right of publicity," a subsequent search using both the terms "commercial speech" and "right of publicity" yielded only ninety-eight cases (5.8 percent of right of publicity cases). Of those cases, roughly twenty affirmatively found the speech in question to be commercial in nature, but only one case found the speech at issue to be protected by the First Amendment. Even that case did not couch its holding in commercial speech reasoning. See *Hebrew Univ. of Jerusalem v. Gen. Motors*, 903 F. Supp. 2d 932, 942 (C.D. Cal. 2012). In *Hebrew Univ. of Jerusalem*, the U.S. District Court for the Central District of California considered a university's claim of exclusive control over Albert Einstein's name and likeness as a beneficiary under his will. *Id.* at 932-33. Noting in a footnote that General Motors's speech *was* commercial speech protected "to some extent," the court proceeded to find that the university had no right of publicity claim. *Id.* at 941 n.7. But the court did not anchor its holding in commercial speech reasoning. Instead, it prohibited the action by capping the maximum duration for claiming infringement of one's right of publicity at fifty years. *Id.* at 942.

172. Compare *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089, 1099 (E.D. Cal. 2009), with *Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001) (en banc). In *Dickerson*, a convicted felon plaintiff had no publicity claim against a detective agency that touted its role in her investigation and prosecution. *Dickerson*, 34 P.3d at 1004. The agency's use of her name in its advertising newsletter "related to a matter of public concern" and was "primarily noncommercial" in nature. *Id.* In *Yeager*, however, an emergency preparedness pamphlet that used the name of the plaintiff, a legendary test pilot, was "not purely informational in nature" and was "properly characterized as commercial speech." *Yeager*, 673 F. Supp. 2d at 1097, 1099.

decisions applying the Supreme Court's famed four-part *Central Hudson* test to determine the appropriate protection for speech relative to publicity rights claims is astounding.<sup>173</sup> Until very recently, courts in near universality avoided analyzing the juncture of commercial speech and publicity rights altogether.<sup>174</sup> Chief Judge Alex Kozinski poignantly characterized courts' circumvention of binding Supreme Court precedent in his dissent in *White v. Samsung Electronics*, the case regarding Vanna White.<sup>175</sup> "The Supreme Court didn't set out the *Central Hudson* test for its health," he wrote.<sup>176</sup> Furthermore, he stated:

Maybe applying the test would have convinced the majority to change its mind; maybe going through the factors would have shown that its rule was too broad, or the reasons for protecting White's "identity" too tenuous.... But we should not thumb our nose at the Supreme Court by simply refusing to apply its test.<sup>177</sup>

As the following Part will demonstrate, modern First Amendment jurisprudence not only demands that courts apply *Central Hudson*; it also prescribes a number of normative and doctrinal ways in

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173. See *infra* Part III.C. In a search of cases during winter 2014 citing *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), only thirty-six cases contained the terms "right of publicity" or "publicity rights." In publicity rights cases, when courts did find the speech at issue to be "commercial," it was unprotected. See, e.g., *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 928-29 (N.D. Ohio 2004); see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992); *Yeager*, 673 F. Supp. 2d at 1097; *Herman Miller, Inc. v. A. Studio S.L.R.*, No. 1:04-CV-781, 2006 WL 13079404, at \*9-10 (W.D. Mich. May 9, 2006). Most of the speech was deemed to be noncommercial, largely without thorough analysis. See, e.g., *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) (protecting expressive speech); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (protecting expressive speech); *Lane v. Random House, Inc.*, 985 F. Supp. 141, 152 (D.D.C. 1995) (protecting incidental speech); *Rogers v. Grimaldi*, 695 F. Supp. 112, 120-21 (S.D.N.Y. 1988) (protecting expressive speech); *Taylor v. Nat'l Broad. Co.*, No. BC110922, 1994 WL 762226 (Cal. Super. Ct. Sept. 29, 1994) (protecting expressive speech).

174. See *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014); *Dryer v. Nat'l Football League*, No. 09-2182 (PAM/FLN), slip op. (D. Minn. Oct. 10, 2014).

175. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (Kozinski, J., dissenting).

176. *Id.* at 1520.

177. *Id.* Judge Kozinski's disdain for his court's reverence of publicity rights is further evident in *Wendt v. Host Int'l*, 197 F.3d 1284, 1288-89 (9th Cir. 1999) (Kozinski, J., dissenting) ("[W]e again let the right of publicity snuff out creativity.... We pass up yet another opportunity to root out this weed. Instead, we feed it Miracle-Gro.").

which commercial speech-based arguments should invalidate publicity rights claims.

### III. ADDING A COMMERCIAL SPEECH PERSPECTIVE: WHAT THE MODERN LAW OF COMMERCIAL SPEECH TELLS US ABOUT THE RIGHT OF PUBLICITY, AND VICE VERSA

At the outset of our First Amendment analysis, we should make clear what we are *not* saying. We are not claiming that the First Amendment protection of commercial speech categorically and absolutely supersedes the right of publicity. In situations such as the one involved in *Zacchini*, for example,<sup>178</sup> it is reasonable to believe that the competing free speech interest—whether in the form of commercial or noncommercial speech—should give way. Determining exactly when the commercial speech right does or does not take precedence over the right of publicity is beyond the scope of our analysis. All we are claiming is that for a variety of reasons, at least when truthful commercial speech is involved, the commercial speech interest should receive the same level of First Amendment protection afforded to traditionally protected noncommercial speech.

The results in modern publicity rights cases do not always reflect this conclusion. If there is one recurring theme in publicity rights law, it is that courts accommodate First Amendment interests for so-called “newsworthy” uses of names or likenesses, but routinely and summarily penalize purely commercial uses as violations of the victims’ common law or statutory rights. Such summarily negative treatment of commercial speech, however, appears more suited to the constitutional law of forty years ago than it does to today’s First Amendment world. In the period since the Supreme Court first provided a significant level of constitutional protection to commercial speech,<sup>179</sup> the degree of commercial speech protection has grown exponentially. Indeed, the government has failed to win a single case involving a challenge to governmental suppression of commercial speech at the Supreme Court in over twenty years. And in that time, the Court has imposed substantial limitations on governmen-

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178. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

179. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).



tal power to control commercial expression.<sup>180</sup> One would think that at the very least, courts acting in the second decade of the twenty-first century would be far less negatively cavalier in their treatment of commercial speech than they have consistently been in expounding the law of the right of publicity.<sup>181</sup> As we shall demonstrate, simply applying well-established commercial speech doctrine would present enormous problems for such summary exclusion, and as a result, would necessarily alter existing law.

Even more importantly, applying current commercial speech theory to the current law of the right of publicity underscores important defects in the entire basis of that theory. Despite the fact that commercial speech today receives significant First Amendment protection, the level of that protection is undoubtedly distinctly lower than the level of protection extended to noncommercial speech.<sup>182</sup> Yet, application of the foundational theory of modern commercial speech doctrine to the right of publicity underscores the starkly irrational nature of the rationale for such reduced protection. Simply put, commercial speech receives reduced protection for no reason other than the profit motivation behind it.<sup>183</sup> As established publicity right doctrine demonstrates, however, equally profit-motivated speech—that of commercially driven media, which does not directly promote purchase of a particular commercial product or service—receives full First Amendment protection. Thus, the intersection of publicity rights with modern commercial speech law tells us a great deal about *both* the right of publicity and the current state of commercial speech protection. On the one hand, this intersection reveals that commercial speech protection—even in its current doctrinal form—presents a far greater problem for the right of publicity than courts enforcing that right currently understand.

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180. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-72 (2002) (rejecting regulations under *Central Hudson's* final prong, finding that alternative, less restrictive regulations on commercial speech were available); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188-89 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995).

181. See *supra* Part II.A-B.

182. Compare *United States v. Alvarez*, 132 S. Ct. 2537, 2445-47 (2012) (holding as unconstitutional the Stolen Valor Act, which criminalized false claims of receiving military decorations), with *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (“The government may ban forms of communication more likely to deceive the public than to inform it.”).

183. See *infra* Part III.A.



Commercially motivated right of publicity claims cannot so easily overcome commercial First Amendment protection.<sup>184</sup> On the other hand, by applying commercial speech doctrine to the right of publicity, we are able to highlight the fundamental flaws underlying reduced protection for commercial speech in the first place.

In developing these theoretical arguments, we in no way purport to resolve all conceivable conflicts between the right of publicity and the First Amendment. As *Zacchini* illustrates, not even the traditional media are constitutionally insulated from all liability under the right of publicity,<sup>185</sup> and we take no position on the correctness of those decisions. Our goal, rather, is to justify a type of “most favored nation” status for commercial invasions of the right of publicity: whatever level of First Amendment protection that traditionally protected media would receive for infringing the right of publicity, commercial advertisers should be deemed equally protected.

In this Part, we use as our hypothetical baseline a very limited form of a publicity rights violation: a commercial advertiser’s use—without permission from the individual in question—of an individual’s name and/or likeness to truthfully inform the public that that individual uses the advertiser’s product. To be sure, under current law such a commercial advertisement would constitute a constitutionally unprotected violation of either common law or statutory rights of publicity. But we seek to distinguish it, for First Amendment purposes, from a variety of other hypothetical violations of publicity rights: appropriation of another’s commercial work product as in *Zacchini*,<sup>186</sup> a knowingly or recklessly false assertion about an individual, and any violation of an individual’s physically defined privacy (for example, photos secretly taken in traditionally private areas). We make no claims for First Amendment protection in any of these contexts. We believe that, as a matter of both normative First Amendment theory and accepted First Amendment doctrine, the constitutional guarantee of free expression should trump any assertion of a right of publicity in our baseline situation.

We first consider the fundamental theoretical flaws in the commercial speech doctrine’s definitional divide between commercial

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184. See, e.g., *supra* Part II.B.1.

185. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977).

186. *Zacchini*, 433 U.S. at 575.

and noncommercial expression, and we apply that critique to the right of publicity context. We then consider how the right of publicity fares under existing commercial speech doctrine. We conclude that to the extent that commercial speech doctrine supports a reduced level of First Amendment protection for truthful commercial advertising, the existing doctrine is grounded in categorically insupportable rationales and must be rejected in favor of a more principled basis of constitutional analysis. We further conclude that even if we are to suspend disbelief and assume the validity of the current constitutional framework, the way in which publicity rights doctrine summarily rejects First Amendment protection for commercial speech is constitutionally improper, purely as a doctrinal matter.

*A. Profit Motivation and the First Amendment: The Flawed Theoretical Foundation of the Commercial Speech Doctrine*

*1. Evaluating Rationales for Stratifying Speech*

As already demonstrated, under well-established publicity rights doctrine, a sharp line divides prima facie violations by commercial advertisers from prima facie violations by traditionally recognized media.<sup>187</sup> It is black letter law that prima facie violations by traditional media are protected in most cases, if not directly by the First Amendment, then by a First Amendment-inspired common law or the statutory “newsworthiness” privilege.<sup>188</sup> Commercial advertisements, by comparison, are automatically vulnerable to liability, receiving neither First Amendment nor common law protection.<sup>189</sup> Although this stark division ignores the substantial level of First Amendment protection currently afforded to classic commercial speech,<sup>190</sup> in the generic sense this stratification in protection levels accurately reflects a dichotomy firmly established in the Supreme Court’s First Amendment jurisprudence.

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187. See, e.g., *supra* Part II.A.1.

188. See *supra* Part II.A.

189. See, e.g., *supra* notes 111-14, 130-32 and accompanying text.

190. See *infra* Part III.B.

After the Supreme Court first extended First Amendment protection to commercial advertising in 1976,<sup>191</sup> it made clear that commercial speech is deserving of only “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”<sup>192</sup> Under the four-part *Central Hudson* test,<sup>193</sup> at least in the early years of its application,<sup>194</sup> the Court was able to condone numerous restrictions on commercial speech that would almost certainly have been deemed impermissible in the world of noncommercial speech protection.<sup>195</sup> Thus, even though publicity rights doctrine pervades an almost cavalier dismissal of commercial speech that strangely and incorrectly understates even its most modest level of First Amendment protection in the post-*Virginia State Board* era,<sup>196</sup> courts enforcing publicity rights are surely accurate in their stratification of First Amendment concern on the basis of context. This stratification occurs when courts consider whether the alleged violation appears in a commercial advertisement promoting sale or in a more traditional medium of expression, such as a book, newspaper, or television or radio program. What makes no sense purely as a matter of First Amendment theory, however, is the stratification itself. In this sense, applying the commercial speech doctrine to the right of publicity tells us considerably more about problems with the commercial speech doctrine than it tells us about problems with the right of publicity.

In light of the Supreme Court’s established definition of commercial speech as speech that “does no more than propose a commercial transaction,”<sup>197</sup> understanding the logic implicit in the Court’s

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191. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

192. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

193. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

194. In more recent years this very same test has received a far more protective application. *See supra* Part II.A-B.

195. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507-11 (1981) (deferring to the city’s judgment in holding that an ordinance prohibiting billboards met *Central Hudson* requirements). In the years between *Virginia State Board of Pharmacy* and *Central Hudson*, the level of protection that the Court extended to commercial speech was also quite limited. *See, e.g., Friedman v. Rogers*, 440 U.S. 1, 12-14 (1979); *Ohralik*, 436 U.S. at 447.

196. *See supra* Part II.A-B.

197. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (Stewart, J., concurring). In reality, the inquiry is somewhat more complex. But ultimately, it comes down to some sort of focus on commercial motivation. *See Bolger v. Youngs*

commercial/noncommercial distinction requires employing a process of reverse engineering. We need to glean from the distinction some principled basis, grounded in acceptable premises of free speech theory, that justifies the protective dichotomy the Court has drawn between commercial and noncommercial expression. Such an analysis requires us to ask, in short, why as a matter of the theory of free expression, commercial speech is less deserving of First Amendment protection than noncommercial expression.

In answering this query, it is important at the outset to note that the Court's distinction does not turn on the *subject* or *content* of the expression in question.<sup>198</sup> The fact that the expression concerns the safety or effectiveness of a commercial service or product—as does much commercial advertising—is irrelevant to the distinction.<sup>199</sup> As long as the speaker is not motivated to promote commercial sale, under the Court's definition, the speech is not “commercial” and therefore does not deserve the reduced level of constitutional protection afforded to that expressive category.<sup>200</sup> This is so, regardless of the subject or content of the expression involved. For example, Ralph Nader's attacks on the Chevrolet Corvair's safety in his novel are *not* considered to be commercial speech,<sup>201</sup> even though they concern the merits of a commercially sold product. But General Motors' defenses of its product in response *are* considered to be commercial speech because they are part and parcel of a promotion of sale.<sup>202</sup> Nothing matters but the speaker's motivation, as the court so determines it.<sup>203</sup>

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Drug Prods. Corp., 463 U.S. 60, 66-67 (1983) (setting up a three-factor test to determine whether speech is to be deemed commercial). For an example of how complex the inquiry can become, see *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002). For a detailed discussion of *Bolger*, see Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1444-53 (1990).

198. See generally *Va. State Bd. of Pharmacy*, 425 U.S. at 776.

199. See *id.*

200. See *id.*

201. See RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

202. Cf. *Kasky*, 45 P.3d at 258-60. The California Supreme Court reasoned that Nike's statements were commercial speech “[b]ecause in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations.” *Id.* at 259.

203. See also Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1217-18 (1996) (discussing Andy War-

What is the logic behind such an entirely motivationally based distinction? Surely it cannot turn on the value of the expression because the speech of both Nader and General Motors concerns the exact same issue. Nor can it be grounded in some *ex ante* presumption that those attacking a commercial product or service tell the truth while those advocating purchases lie because no factual basis has supported either position.

Is it, as Robert Post has suggested, that commercial speech cannot be deemed protected “public discourse” because it “should be understood as an effort ... simply to sell products” and not an effort “to engage public opinion”?<sup>204</sup> For several reasons, this line of thought is sorely misguided. Initially, it ignores the simple fact that the participants *receiving* the information, opinion, and advocacy enrich that public discourse as much as those who contribute to the process.<sup>205</sup> This should hardly be a controversial assertion.<sup>206</sup> But if value lies in information *receipt*, then what possible difference can the speaker’s motivation make? Whether the speaker is Mother Theresa, Standard Oil, or Darth Vader, the information and opinion conveyed can play an equally legitimate role in shaping the citizenry’s views, thoughts, and positions and, in so doing, further the

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hol’s Campbell’s soup cans and arriving at the conclusion that “it is impossible to maintain a viable theory of commercial speech without substantial reliance on an intent-based test”).

204. Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 18 (2000). At another point in his analysis, Post asserts that his proposed dichotomy “is not ultimately a judgment about the motivations of particular persons, but instead about the social significance of a certain kind of speech.” *Id.* at 12. However, the reason he believes that commercial speech lacks sufficient “social significance” is “because we most naturally understand persons who are advertising products for sale as seeking to advance their commercial interests rather than as participating in the public life of the nation.” *Id.* Hence, we have come full circle because Post defines “social significance” in terms of speaker motivation. *Id.* For a more detailed critique of Post’s theory, see MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* 43-74 (2013).

205. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 42 (1965).

206. Indeed, some respected scholars have grounded their theories of the First Amendment on the assumption that the *only* relevant consideration for purposes of First Amendment protection is the listener, not the speaker. See *id.* at 56-57. Although we believe that this theory seriously understates the First Amendment benefit to the speaker, it surely is correct in recognizing the constitutional value to the recipient of expression. At a later point in his scholarship, Post recognized the First Amendment value of commercial speech in its conveyance of information about commercial products and services. See Post, *supra* note 204, at 28. The level of protection he extends such expression, however, is still reduced because of its failure to contribute directly to public discourse. See *id.* at 27.

democratic system's operation and the individual citizens' intellectual growth. Thus, once one recognizes the importance and value of an expression's receipt,<sup>207</sup> any distinction premised on the speaker's motivation is rendered completely incoherent.

Although that point alone should sufficiently demonstrate the wholly vacuous and misguided nature of Post's theory, other equally dispositive reasons support categorically rejecting his arguments. Even if we suspend disbelief on the speaker-recipient dichotomy and accept a theory favoring speech expressed for the purpose of contributing to public discourse, Post's theory remains flawed because it disregards speech's potential to reflect multiple motives. He denies that a speaker may speak for the purpose of advocating the sale of a product *and* for the purpose of affecting public opinion, when absolutely no basis to support such an assumption exists.<sup>208</sup> The commercial viability of books, movies, and even now video games proves quite the opposite. Consider also *Jordan v. Jewel Food Stores, Inc.*, a right of publicity district court case in which a grocery store designed a page for a *Sports Illustrated* commemorative issue devoted to celebrating Michael Jordan.<sup>209</sup> The grocery store's congratulatory page included both its logo and a play on words with its slogan.<sup>210</sup> Even though one could affirmatively distinguish the page's purpose from other traditional means of advocating product sales,<sup>211</sup> Judge Gary Feinerman wrote that to ascribe an "economic motivation" to a for-profit corporation like Jewel "is to state a truism."<sup>212</sup> The Seventh Circuit, although it reversed Judge Feinerman's commercial speech determination, likewise "recognize[d] the obvious: that Jewel had something to gain by conspicuously joining the chorus of congratulations on the much-anticipated occasion of Jordan's induction into the Basketball Hall of Fame."<sup>213</sup> Post, in

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207. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) ("[A] particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); see also *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish.")

208. See Post, *supra* note 204, at 27.

209. 851 F. Supp. 2d 1102, 1104 (N.D. Ill. 2012), *rev'd*, 743 F.3d 509 (7th Cir. 2014).

210. *Id.*

211. *Id.* at 1109.

212. *Id.* at 1111.

213. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 520 (7th Cir. 2014).

comparison, somehow manages to ignore this truth. Finally, even if we ignore the fatal problem of ascribing to a speaker a single motivation for purposes of evaluating Post's argument, the fact remains that no obvious evidentiary basis exists on which to determine a speaker's dominant motive.<sup>214</sup>

As a result of all of these flaws, Post's theory dangerously invites judges to abuse the process, allowing judges to punish speakers they dislike by concluding that the dominant motive underlying their speech is something other than an effort to contribute to public discourse. Any one of these flaws, standing alone, should sufficiently dispose of Post's theory. But when the dust settles, Post's theory is flawed because it turns exclusively on the speaker's motivation in speaking—an inquiry made in no other area of free speech law. Yet, speaker motivation inherently and unavoidably lies at the core of the Court's doctrinally embodied definition of commercial speech.<sup>215</sup> The conclusion is inescapable, then, that the Court's speaker-motivation basis for reducing commercial speech protection is fatally misguided.

## 2. *Sorrell and the Right of Publicity*

*Sorrell v. IMS Health, Inc.* adds a surreal quality to the Court's commercial speech jurisprudence.<sup>216</sup> In this case, the Court subjected a law penalizing commercial speech, but not noncommercial speech, to strict scrutiny because the law discriminated among speakers, favoring non-manufacturer expression regarding doctors' prescribing practices over drug manufacturer expression concerning identical subjects.<sup>217</sup> The Court wrote that "[t]he law on its face burdens disfavored speech by disfavored speakers."<sup>218</sup> Because the law censored only drug manufacturers' speech, it went "beyond mere

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214. In *Jewel*, Judge Feinerman identified this point when he noted how the conclusion regarding whether speech is commercial "rests in part on judgments regarding how reasonable readers would view the page." *Jewel*, 851 F. Supp. 2d at 1111. When critical data are consumer surveys and psychological analyses, however, such determinations quickly regress toward battles of the experts.

215. See *infra* Part III.A.2.

216. 131 S. Ct. 2653, 2656 (2011). For a more detailed discussion of *Sorrell*, see REDISH, *supra* note 204, at 116-17.

217. See *Sorrell*, 131 S. Ct. at 2667.

218. *Id.* at 2663.



content discrimination, to actual viewpoint discrimination.”<sup>219</sup> But in so holding, the Court completely ignored the fact that its own commercial speech doctrine commits the identical act of invidious discrimination: the exact same expression receives different levels of protection, solely on the basis of the speaker’s commercial motivation. In effect, the Court—to be sure, without knowing it—appears to have rendered its own preexisting doctrine unconstitutional. The consequence of the Court’s protective dichotomy between commercial and noncommercial speech is unavoidable: the very same information or opinion, conveyed to the exact same audience, receives more or less protection, solely because of the speaker’s motivation.<sup>220</sup>

Applying *Sorrell*’s holding to publicity rights further demonstrates the invidious discrimination inherent in commercial speech doctrine. As a preliminary matter, publicity rights offer perhaps the primary area of law in which one can argue that the level of constitutional protection indeed turns on the speaker’s economic purpose.<sup>221</sup> To the extent that one can rationalize publicity rights as a form of unjust enrichment, providing an economic advantage to the speaker-violator that rightfully belongs to the victim,<sup>222</sup> the doctrine arguably makes sense only when financial gain is the speaker’s purpose for using the victim’s name or likeness. But even in this context, competing unjust enrichment concerns should not automatically outbalance free speech interests. *Sorrell* suggests that a speaker’s commercial motivation does not negatively impact the level of First Amendment protection that the Court extends to that speech.<sup>223</sup> Because the value of speech may be significant regardless of the speaker’s motive, and fully protected expression can be restricted only to further a compelling interest, it is by no means clear that the economic interest in preventing unjust enrichment for a victim of infringed publicity rights trumps the speaker’s First Amendment interests.

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219. *Id.* (internal quotation marks omitted).

220. Compare *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089, 1099 (E.D. Cal. 2008), with *Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995, 1004 (Colo. 2001) (en banc).

221. See *supra* notes 167-68 and accompanying text.

222. See *supra* Part I.B.1.a.

223. See *Sorrell*, 131 S. Ct. at 2665.

Society can suppress fully protected expressions only when doing so would prevent a threat of imminent violence or other form of extreme harm.<sup>224</sup> If we proceed on the premise that commercial advertising deserves full First Amendment protection because no principled basis can distinguish it from fully protected categories of expression, then a compelling interest must support any burden on commercial expression. The concern in avoiding unjust enrichment pales in comparison to a concern in protecting the public's health. It is purely an individual's economic concern, and in that sense, it does not differ from economically motivated commercial speech. At the very least, under the analysis we advocate here, a court enforcing the right of publicity—at least in the context of our baseline hypothetical<sup>225</sup>—would struggle to reconcile competing interests within the framework of a compelling interest structure. If there is one thing we can be sure that courts enforcing the right of publicity have never done, it is expending any effort to perform such a difficult weighing function. To the contrary, when commercial speech interests are involved, courts fail to consider any possible First Amendment interests.

As the following Section demonstrates, however, there are more compelling reasons to invalidate right of publicity claims, even when pure commercial speech is involved. The simple fact is this: excluding commercial speech from full First Amendment protection constitutes unconstitutionally underinclusive discrimination among constitutionally similar categories of expression.

## *B. The Irrational Distinction Between Forms of Profit Motivation*

### *1. An Unprincipled Distinction Between Profit-Motivated Speakers*

Although right of publicity cases categorically exclude protection for commercial speech, they do not draw a strict dichotomy, for purposes of First Amendment (or at least First Amendment-like) protection, between those motivated by financial gain and those who

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224. See, e.g., *Brandenburg v. Ohio*, 385 U.S. 444, 447 (1969) (per curiam).

225. Recall that our baseline hypothetical includes only a commercial advertiser's use of a person's name and/or likeness, without consent, to convey truthful information about that person's use of the advertiser's product.

act out of purely altruistic purposes. Nor do these cases formally distinguish between those speakers concerned with profits and those concerned with promoting noncommercial types of self-interest. Rather, courts enforcing publicity rights draw speaker distinctions between those who use names or likenesses as part of commercial advertisements and those who use names or likenesses in more traditional profit-motivated communicative media.<sup>226</sup> In both situations, communicators seek to make a profit. Furthermore, we can even assume that the exact same information is communicated to the exact same audience. For example, if we say that Tom Cruise drives a BMW, the informational impact is the same, regardless of which of the two profit-making expressive forms conveys the communication. Yet, under long-accepted commercial speech doctrine, when this information is conveyed in an advertisement promoting sales of BMW, it receives less constitutional protection.<sup>227</sup> In the context of publicity rights, then, uses of a name or likeness in commercial advertisements receive absolutely no protection, whereas uses of a name or likeness in profit-making traditional media receive virtually absolute protection.<sup>228</sup>

The basis for constitutionally distinguishing between the two categories of expression for publicity rights is even weaker than the basis for differentiating between profit-motivated and non-profit-motivated expression, despite the fact that even that distinction is itself illogical and unjustified on the basis of any principled application of free expression theory.<sup>229</sup> Here, *both* expressive categories are motivated by profit. As Justice Brennan once perceptively noted, the fact that information comes in the form of an advertisement is no different, for First Amendment purposes, from “the fact that newspapers and books are sold.”<sup>230</sup> But this insight, brilliant in its simplicity and obviousness, has somehow been lost in the shuffle of time and the shifting sands of constitutional doctrine.<sup>231</sup>

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226. Compare *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992), with *Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995, 1004 (Colo. 2001) (en banc).

227. See *supra* Part II.

228. See *supra* Part II.A.

229. See *supra* Part III.A.

230. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

231. In fairness, Justice Brennan was speaking of an advertisement concerning a matter of political concern. See *id.* at 256. However, given that commercial speech today is not defined by the subject of the expression, but rather by the commercial motivation of the speaker, that

*Sorrell* highlights the need to revisit that insight, however inadvertently on the Court's part.<sup>232</sup> Recall that the *Sorrell* Court subjected a commercial/noncommercial distinction to strict scrutiny because the law imposed a speaker-based distinction. In *Sorrell*, the law at issue differentiated between academic researchers, who were permitted to use data-mined prescriber information, and drug manufacturers, who were prohibited from doing so.<sup>233</sup> Thus, the state sought to distinguish profit-motivated speakers from non-profit-making academics.<sup>234</sup> Yet, the Court held that the distinction should be subjected to the strict scrutiny test, which is almost impossible to satisfy.<sup>235</sup> Importing this baseline from *Sorrell* into publicity rights cases further demonstrates the absurdity of the speaker-based distinction. In contrast to *Sorrell's* commercial/noncommercial distinction, publicity rights differentiate between sub-forms of profit-motivated speech.<sup>236</sup> This distinction is even more dubious under the First Amendment than the distinction rejected in *Sorrell*. When the speaker in both cases—a commercial advertiser and a more traditional profit-making communications medium—acts out of a profit motivation to convey the exact same information to roughly the same audience, drawing a dichotomy for purposes of First Amendment protection, as Justice Brennan recognized in *Sullivan*, is wholly illogical.<sup>237</sup>

Is there *any* conceivably principled basis on which to distinguish, for purposes of the level of First Amendment protection, between profit-motivated speech that comes in the form of a commercial advertisement promoting sale and profit-motivated speech that comes in the form of a traditional medium of communication, even though both the communication's substance and the audience are identical? Ultimately, we conclude that the answer is no. However, we can imagine three conceivable arguments that scholars might fashion to justify such a distinction. The following Section illustrates the flaws in each argument.

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factor should play no role in determining the relevance of Justice Brennan's statement to other contexts. See *supra* Part III.A.1.

232. See *supra* Part III.A.2.

233. See *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663 (2011).

234. *Id.*

235. *Id.* at 2664.

236. See *supra* Part II.

237. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1969).

## *2. Rejecting Attempts to Justify the Distinction*

Three conceivable arguments could support the distinction between commercial advertisements and the communications media for both First Amendment and right of publicity purposes, even if both convey the exact same information to roughly the same audience. First, one could suggest that a commercial advertiser's speech is designed to persuade the listener to purchase a product or service, while the commercial success of the speech of the traditionally protected communicator generally does not turn on persuading a reader or viewer to do anything. Second, one could argue that, purely as a matter of constitutional tradition, commercial advertisements have received no or at least reduced protection, while expression conveyed in books, newspapers, and magazines, and on television and radio have received the highest level of First Amendment protection. Finally, one might argue that the latter category of expression receives the special protection that the First Amendment extends to the press, while commercial advertisements receive only the level of protection afforded to free speech. Even a casual examination of each of these arguments, however, reveals fatal flaws in their logic or accuracy.

### *a. The Persuasive Goal of Expression Does Not Reduce the Level of Protection*

As to the first suggested distinction, commercial advertisers, it can safely be assumed, always advocate purchase, while more traditional communications media are generally not so motivated. Of course, even if one conceded the logic of this distinction solely for purpose of this argument, the theory fails to explain the *ex ante* *categorical* distinction between the two communicators in situations in which the traditionally protected medium in fact strives to persuade the listener to purchase. But even putting that fatal flaw aside, it remains unclear why this difference in motivation, in and of itself, justifies stratification in the level of First Amendment protection. No logical bases exist to suggest that the First Amendment applies any less to speech used to persuade rather than merely to inform. Indeed, one of the classic justifications for free speech

protection is that it facilitates self-governing choices.<sup>238</sup> There is no basis for categorically assuming, *ex ante*, that the commercial advertiser's expression is more likely to be false or misleading than the traditional communications medium's expression. Such a conclusion would, of course, necessarily depend on an examination of the specific facts in each case. After all, purely political expression, which often appears in traditional communications media, is often self-promotional. Purely political expression often seeks to persuade the listener to take actions that will benefit the speaker,<sup>239</sup> but surely such speech does not lose protection as a result.

In the right of publicity context, the rationale makes even less sense because our hypothesis assumes that the expression is identical in both cases (for example, Tom Cruise drives a BMW). Speech, therefore, is no more likely to be false or misleading in one instance than in the other. Moreover, to the extent that courts assume publicity rights are grounded in unjust enrichment concerns, the danger of unjustly usurping profit is just as great when the speaker-violator is a profit-making communications entity as when it is a commercial advertiser.<sup>240</sup> Because courts afford the First Amendment privilege to traditional profit-motivated media in right of publicity cases, celebrities are denied the opportunity to benefit financially from the traditional media's use of their names or likenesses, even though those media outlets profit from that use.<sup>241</sup>

*b. Noncommercial Speech Does Not Deserve Special Treatment Because of "Tradition"*

The second asserted distinction, grounded in accepted notions of what modes of expression receive protection, is even more dubious. When the exact same expression is disseminated to the exact same audience, it does not make even the slightest bit of sense to rely on

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238. See MEIKLEJOHN, *supra* note 205, at 19-21.

239. In fact, political advertising has been borrowing strategies from commercial advertising since the 1950s. Andrew Rosenthal, *For the Idyllic Political Ad, A Fadeout*, N.Y. TIMES, June 21, 1987, at 22; see also Arthur Sandburg, *Creating Effective Political Ads*, in LIGHTS, CAMERA, CAMPAIGN! MEDIA, POLITICS, AND POLITICAL ADVERTISING 1-2 (David A. Schultz ed., 2004) (comparing successful product ads and political ads).

240. See *supra* Part I.B.1.

241. *Id.*

some mindless notion of historical practice. By this very reasoning, it is unclear why expressions disseminated on television, radio, or through the Internet receive full First Amendment protection which all of these can be considered relatively new media. Indeed, the Supreme Court's recent recognition that commercially motivated, violent video games deserve full First Amendment protection<sup>242</sup> renders any appeal to notions of tradition a hollow—or disingenuous—exercise.

*c. The “Press” Clause Does Not Lend Greater Protection to Noncommercial Speech*

Finally, the suggested distinction based on the added First Amendment protection afforded to the press makes no more sense than the other two asserted rationales. Purely as a doctrinal matter, the Court has never held that the “press” freedom provides greater protection than the speech clause.<sup>243</sup> Nor would it be reasonable for it to do so, especially in today's media climate. Expression that comes in the form of pure speech has never been deemed to take a back seat for protective purposes to printed expression.<sup>244</sup> Moreover, if one proceeded on the accuracy of this assumption, it is by no means clear that “press” protection should extend to new media, such as radio and television, both of which involve far more “speech” than they do printed word. Finally, efforts to distinguish expressive forms of communication and other forms of “press” would certainly be frustrated, for example, if a commercial advertiser chooses to publish a monthly magazine or sponsor a blog.

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242. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011).

243. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 681-83 (1968). In *Branzburg*, the Court rejected a reporter's argument that he should be immune from the obligation to reveal the criminal conduct of his confidential sources after a grand jury subpoena. *Id.* at 692. The Court reasoned that “[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” *Id.* at 684; *see also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 782-83 (1978) (“[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.... Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and dissemination of information and ideas.” (citations omitted))

244. *See First Nat'l Bank*, 435 U.S. at 783.



Once courts enforcing publicity rights reject the unprincipled distinction between different forms of profit-motivated expression, they arguably have an option. They can either subject the publicity right to First Amendment protection for profit-motivated speech or enforce the right against all profit-motivated speech. The latter route is clearly untenable, however, both as a practical matter and as a matter of First Amendment analysis. Therefore, the conclusion that the First Amendment protects commercial advertisers against liability for violating a right of publicity—at least in contexts in which it would also protect the expression of traditional media<sup>245</sup>—is logically inescapable.

*C. Applying Modern Commercial Speech Doctrine to the Right of Publicity*

Let us assume, for present purposes, that the existing doctrinal universe of First Amendment protection remains unchanged. Although much of this Article has been designed to explain the serious flaws in that framework, even under the doctrinal status quo, courts should hold that the current structure of the right of publicity violates the First Amendment. The problem is, simply, that once a court enforcing the right of publicity finds commercial speech involved, it automatically disposes of First Amendment concerns.<sup>246</sup> Although the Supreme Court currently provides a lesser standard of constitutional protection to commercial speech than it does to noncommercial expression, it would be a gross mistake to assume that the level of protection given to commercial speech is meager or nonexistent. To the contrary, although the Court continues to adhere to the four-pronged *Central Hudson* test,<sup>247</sup> that test as currently applied offers far more protection than it did in its early years.<sup>248</sup> Yet, in the context of publicity rights, courts somehow have not received the message. Once the modern version of the *Central Hudson* test is applied to right of publicity claims, the dichotomy in the existing doctrinal framework between commercial advertisers

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245. See *supra* Part II.A.

246. See *supra* Part II.A.

247. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

248. Compare *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 358 (2002), with *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 329 (1986).

and other forms of profit-motivated communication proves even more questionable.

In *Central Hudson*, the Court adopted a four-part test.<sup>249</sup> The first inquiry is whether the speech in question promotes the sale of an unlawful product or service, or is found to be false or misleading.<sup>250</sup> If the answer to either of these questions is in the affirmative, the court automatically excludes the expression from the First Amendment's protective reach.<sup>251</sup> If the answer to both questions is in the negative, the reviewing court proceeds to examine the remaining three factors.<sup>252</sup> Under the test's second prong, the government must demonstrate that its regulation of commercial speech serves a "substantial" governmental interest.<sup>253</sup> Once that inquiry has been satisfied, the court "must determine whether the regulation directly advances the governmental interest asserted."<sup>254</sup> The court should invalidate the regulation if it "only indirectly advance[s] the state interest involved."<sup>255</sup> The regulation must materially advance the state's interest.<sup>256</sup> The government has the burden of establishing, beyond mere speculation, that the regulation actually does so.<sup>257</sup> Even if the government satisfies this requirement, however, the court must then proceed to the test's fourth prong: whether the regulation is "[no] more extensive than is necessary to serve [the substantial governmental] interest."<sup>258</sup> The third and fourth prongs have often been grouped together under the heading of a "reasonable fit" requirement.<sup>259</sup> In applying the *Central Hudson* test since the mid-1990s, the Supreme Court has regularly invalidated regulations suppressing commercial speech.<sup>260</sup>

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249. *Cent. Hudson*, 447 U.S. at 566.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* Despite the seeming weaknesses of the moral and economic government interests advanced by publicity rights, this prong has not shown to be easily surmountable for commercial speech proponents. *See supra* Part I.B.

255. *Cent. Hudson*, 447 U.S. at 564.

256. *Id.* at 566.

257. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

258. *Cent. Hudson*, 447 U.S. at 566.

259. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001).

260. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard*, 533 U.S. at 525-26; *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); 44

The constitutional problem here for the right of publicity—what can appropriately be called the flaw of “under inclusion”—derives from the “reasonable fit” requirement. Although the Court in one of its earlier decisions stated that the government need not remove all causes of a problem to suppress commercial speech giving rise to that problem,<sup>261</sup> later decisions appear to have largely undermined this sweeping assertion. Under controlling commercial speech case law, the government cannot justify commercial speech suppression when a significant danger of the exact same harm would continue to exist.<sup>262</sup> For example, in *City of Cincinnati v. Discovery Network, Inc.*,<sup>263</sup> the Court invalidated the city’s prohibition of newsracks that distributed commercial advertising newspapers in the name of improving aesthetics because the commercial news racks “are no greater an eyesore than the newsracks permitted to remain on Cincinnati’s sidewalks.”<sup>264</sup> Similarly, in *Greater New Orleans Broadcasting Association, Inc. v. United States*,<sup>265</sup> the Court rejected the government’s argument that a prohibition on casino gambling advertising would deter gambling, in part on the basis of its conclusion that “any measure of the effectiveness of the Government’s attempt to minimize the social costs of gambling cannot ignore Congress’s simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce.”<sup>266</sup>

These decisions are important because they demonstrate that government may not discriminate against commercial speech by suppressing it when significant amounts of noncommercial expression giving rise to the exact same problem remain unregulated. In a certain sense, these decisions anticipated the Court’s subsequent

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*Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

261. *Bd. of Trs. v. Fox*, 492 U.S. 469, 479 (1989).

262. See *Greater New Orleans Broad. Ass’n*, 527 U.S. at 174; *Discovery Network, Inc.*, 507 U.S. at 411.

263. 507 U.S. at 410.

264. *Id.* at 425.

265. 527 U.S. at 173.

266. *Id.* at 189; see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (holding a prohibition on beer labels from displaying alcohol content unconstitutional “because of the overall irrationality of the Government’s regulatory scheme” in light of the law’s permission for the printing of alcoholic content on labels on distilled spirits).

holding in *Sorrell* that subjected expressive discriminations against commercial speakers to strict scrutiny.<sup>267</sup> Likewise, the decisions are foreboding for the right of publicity because existing doctrine imposes a stark and unjustified discrimination against commercial expression. Although courts have summarily denied First Amendment protection to profit-motivated commercial expression that uses a person's name or likeness, profit-motivated expression conveyed in a communications media that invades the victim's exact same interest receives full protection.

Whatever rationale one employs to justify the right of publicity, the harm caused by the expression is identical in both situations. We conclude that both moral and economic arguments underscoring publicity rights illustrate victims' primary concern for attaining and protecting financial gain.<sup>268</sup> These pecuniary concerns place people seeking to exercise publicity rights on the same level as traditional media speakers. If there were some basis for believing that the impact of a commercial advertiser's expression is more severe or invasive than that caused by traditional media and, in fact reflects privacy concerns, however, the distinction would be constitutional. But when motivations are financial, as we find them to be universally, publicity rights' constitutional flaw is identical to the one that led the *Discovery Network* Court to hold the city's selective exclusion of commercial newspaper boxes on its streets for aesthetics as unconstitutional.<sup>269</sup>

#### CONCLUSION

The right of publicity has a long and, some would say, venerable history in the jurisprudence of American tort law. For years it has been widely understood that the right potentially gives rise to First Amendment problems because of its obviously suppressive impact on the communication of information and opinion. But courts universally assume that the First Amendment interest is fully satisfied by recognizing a "newsworthiness" privilege, which categorically excludes any expression included in a commercial advertisement

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267. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2656 (2011); *see supra* Part III.A.2.

268. *See supra* Part I.B.3.

269. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993).

from its protective scope. This jurisprudence has proceeded, however, with mystifying ignorance of the last forty years of evolution and expansion in the level of First Amendment protection afforded to such speech.

We have demonstrated that the cavalier rejection of protection for commercial advertising ignores well-established doctrine and sound precepts of First Amendment theory. It is now time for the right of publicity to be introduced to the twenty-first century of First Amendment law.