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Rights on Publicity as Remarkably Insignificant

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RIGHTS OF PUBLICITY AS REMARKABLY INSIGNIFICANT

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ABSTRACT

This Article introduces the right of publicity through a brief consideration of high profile cases involving, respectively, Paris Hilton, human cannonball Hugo Zacchini, and the famous actress Olivia de Havilland. With this background understanding, the Article considers the supposed risks to freedom of speech posed by recognizing rights of publicity in a private party. From there, the Article addresses the nagging concern that the publicity rights cases promote a harmful "celebrification" of culture. Finally, the Article considers whether allowing for meaningful damage recoveries in publicity rights cases appropriately compensates victims in ways promoting the broad public interest.

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I. INTRODUCTION

To qualify as insignificant, a right should neither substantially promote the general well-being, nor impose substantial social costs.[1] Despite its visibility, the right of

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[1] Very roughly, publicity rights claims involve the non-consensual commercial use, short of false endorsement, of one's name or identity. *See infra* text accompanying notes 23, 28. The visibility of right of publicity claims often flows in part from the popular familiarity of one or both contending parties.

publicity qualifies in both respects and thus deserves neither celebration, nor denunciation, but instead, obscurity.[2]

This Article introduces the right of publicity through a brief consideration of high profile cases involving, respectively, Paris Hilton,[3] human cannonball Hugo Zacchini,[4] and the famous actress Olivia de Havilland.[5] With this background understanding, the Article considers the supposed risks to freedom of speech posed by recognizing rights of publicity in a private party.[6] From there, the Article addresses the nagging concern that the publicity rights cases promote a harmful "celebrification" of culture.[7] Finally, the Article considers whether allowing for meaningful damage recoveries in publicity rights cases appropriately compensates victims in ways promoting the broad public interest.[8]

Taken together, these considerations establish the jurisprudential insignificance, in general, of familiar publicity right claims.[9] These claims involve neither significant good, nor significant harm, to basic values, crucial interests, or to our sense of fundamental justice.[10] Instead, publicity right claims are best thought of as a mere legal accretion.[11] In hopes, then, of discouraging further attention of the subject, we turn to the nature of publicity right claims in general.

II. THE NATURE OF RIGHT OF PUBLICITY CLAIMS

Right of publicity claims arise in a range of contexts. No single case can be illustrative of all others in all respects. But for the sake of an initial appreciation of the nature of publicity right claims, consider first the familiar protagonists in *Hilton v. Hallmark Cards*.[12] Paris Hilton initiated this litigation because of Hallmark's sale of a birthday card described by the court in these terms:

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[2] Kelli L. Sager, *Summary of Right of Publicity Issues*, DAVIS WRIGHT TREMAINE LLP (2012), https://law.ku.edu/sites/law.ku.edu/files/docs/media_law/Summary_of_Right_of_Publicity_Issues.pdf.

[3] *See infra* text accompanying notes 12–29.

[4] *See infra* text accompanying notes 30–53.

[5] *See infra* text accompanying notes 55–80.

[6] *See infra* Section III.

[7] *See infra* Section IV.

[8] *See infra* Section V.

[9] *See infra* Section VI.

[10] *See id.*

[11] *Accretion*, BLACK'S LAW DICTIONARY (10th ed. 2014) (referring to a gradual, cohesive accumulation). "Accretion" refers to a process that is more neutral in its connotations than, say, "excrescence," which suggests not just growth, but unattractiveness or abnormality as well. *Id.*

[12] Hilton v. Hallmark Cards, 599 F.3d 894 (9th Cir. 2010).

> The front cover of the card contains a picture above a caption that reads "Paris' First Day as a Waitress."[13] The picture depicts a cartoon waitress complete with apron, serving a plate of food to a restaurant patron. An oversized photograph of Hilton's head is super-imposed on the cartoon waitress' body. Hilton says to the customer, "Don't touch that, it's hot." The customer asks, "What's hot?"[14] Hilton replies, "That's hot."[15] The inside of the card reads "Have a smokin' hot birthday."[16]

The inspiration for the Hallmark card in question was apparently a particular episode of "The Simple Life"[17] and from Hilton's association with the phrase "that's hot." The court observed that in many of her show's episodes, "Hilton says 'that's hot' whenever she finds something interesting or amusing." [18] In fact, Hilton had registered the phrase as a trademark with the United States Patent and Trademark Office.[19]

Our concern, though, is not with trademark infringement issues but with right of publicity actions. In this case, Paris Hilton sued under California state common law,[20] as distinct from California state statutory law.[21] In general, a right of publicity refers to "the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and prevent others from unfairly appropriating this value for commercial benefit."[22] Most concisely, "[p]ublicity rights . . . are a form of property protection that allows people to profit from the full commercial value of their identities,"[23] while generally exempting newsworthy, public interested, or merely incidental commercial use of that

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[13] This language was taken to refer to the Paris Hilton and Nicole Richie joint television venture entitled "The Simple Life." *See id.* at 898.

[14] One might imagine that under the circumstances, the answer would have been obvious, but matters are, on the trademark front, a bit more complicated. *See id.*

[15] Invoking thereby a trademark infringement issue. *See id.*

[16] *Id.*

[17] *See Hilton*, 599 F.3d at 899.

[18] *Id.* at 898.

[19] *See id.*

[20] *See id.*

[21] *See* CAL. CIV. CODE § 3344 (1971); *see also id.* § 990 (1984).

[22] McFarland v. Miller, 14 F.3d 912, 918 (3d Cir. 1994).

[23] Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996).

identity.[24] The right of publicity does not, for our purposes, rely on the claim that the plaintiff uses, endorses, or has any relation to the commercial venture at issue.[25]

The plaintiff in right of publicity cases need not be a nationally recognized celebrity or other public figure,[26] but the plaintiff typically bears the burden of showing that there is economic value in associating their identity with the commercial activity of the defendant.[27] In some states, publicity rights can be held as property for a specified period of years post-mortem.[28] Typically, the plaintiff's consent to the defendant's use of his or her identity understandably precludes a claim of wrongful appropriation.[29]

Historically, the well-known case of *Hugo Zacchini v. Scripps-Howard Broadcasting Co.* gave the right of publicity momentum.[30] This case involved the defendant's single local television broadcast of the entirety of Zacchini's fifteen second circus act[31] in which Zacchini, the "human cannonball,"[32] was shot out of a cannon into a net some 200 feet distant.[33] The film in question was taken at the Geauga

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[24] *See id.* at 969.

[25] *See id.* at 967–68; Comedy III Prod., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802 (Cal. 2001) (noting that the right of publicity is often loosely invoked "when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing the product."). False and misleading claims of celebrity product endorsement are separately actionable as consumer fraud, or as unfair competition, under state or federal law. Trademark infringement cases typically involve questions of consumer confusion over whether the plaintiff is somehow affirmatively associated with the defendant's allegedly infringing mark. *See, e.g.*, Mutual of Omaha, Inc. v. Novak, 835 F.2d 397 (8th Cir. 1987); Jordache Enterprises v. Hogg Wyld, Ltd., 828 F.2d 1482 (10th Cir. 1987); WSM, Inc. v. Hilton, 724 F.2d 1329 (8th Cir. 1984).

[26] *See, e.g.*, Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 624 (6th Cir. 2000). Query whether the bearer of the publicity right need be a human, or even a non-fictional person. *See* Dawn H. Dawson, *The Final Frontier: Right of Publicity in Fictional Characters*, 2001 U. ILL. L. REV. 635, 645 (2001).

[27] *See Landham*, 227 F.3d at 624.

[28] *See, e.g.*, Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1544 (11th Cir. 1983)*; see also* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 9:17 (2d ed. 2017) (providing more comprehensive coverage). *But see* Memphis Dev. Found. v. Factors Etc., Inc., 616 F. 2d 956, 959–60 (6th Cir. 1980) (rejecting a postmortem right of publicity).

[29] *See, e.g.*, Pratt v. Everalbum, Inc., 283 F. Supp. 3d 664, 669 (E.D. Ill. 2017); JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 1 (2018) ("[t]he right of publicity is something we all have—it is the right to stop others from using our identities, particularly our names and likenesses, without permission. It is sometimes thought of as a property right in one's personality.").

[30] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

[31] *See id.* at 563.

[32] *See id.*

[33] *See id.*

County Fair in Burton, Ohio.[34] The film was broadcasted as part of the local 11:00 p.m. news, along with favorable promotive commentary.[35]

As it happened, the fair charged no separate fee, beyond that of general admission to the county fair itself, in connection with Zacchini's act.[36] Zacchini sought money damages,[37] however, on a number of related theories,[38] with the Ohio Supreme Court focusing on the theory of "the right to the publicity value of his performance."[39] Zacchini sought to draw a general distinction between the protected or privileged broadcast of newsworthy events on the one hand,[40] and what amounts to the non-consensual appropriation of a performer's entire act on the other.[41]

Zacchini's right of publicity claim focused, understandably in this particular case, not on wounded feelings, emotional reactions, damage to reputation, or to a sense of personal violation or indignity,[42] but on a sense of entitlement to the restoration of his pecuniary losses.[43] The United States Supreme Court declared that the unauthorized broadcast of Zacchini's entire act amounted to "a substantial threat to the economic value"[44] of that act. The Court assumed that "if the public can see the act free on television, it will be less willing to see it at the fair."[45] The defendant's broadcast was

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[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *Id.* at 565 (quoting Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454, 455 (Ohio 1979)).

[40] *See id.* at 569.

[41] *See id.* This dichotomy does not address whether, for right of publicity purposes, a performance could be newsworthy, and thus perhaps privileged, in its entirety, above and beyond any excerpts or selections therefrom. In the related context of copyright, see *More Information on Fair Use*, COPYRIGHT.GOV (Jul. 2018), https://www.copyright.gov/fair-use/more-info.html (amount or substantiality, including entirety, of use as a statutorily balanceable fair use factor) (citing the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, codified at 17 U.S.C. § 107 (2018)).

[42] *See Zacchini*, 433 U.S. at 573. By way of a possible partial contrast, consider the nature of actress Olivia de Havilland's claim in *de Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625 (Cal. Ct. App. 2018) (re depiction of plaintiff, perhaps with regard to her famous sister).

[43] *See Zacchini*, 433 U.S. at 573.

[44] *Id.* at 575.

[45] *Id.*

thus said to function similarly to a prohibition on Zacchini's charging a fee to witness his performance.[46]

There is much to say about Zacchini's claim of economic injury in this case. We address this claim, as well as broader concerns over damages recoveries in right of publicity cases, more generally below.[47] In *Zacchini* itself, the Court was open to an economic damages recovery for a broadcast of the plaintiff's entire act.[48]

The United States Supreme Court in *Zacchini* recognized that constitutional issues of freedom of speech and freedom of the press were connected with the case.[49] Entertainment, the Court declared, can overlap with the category of "important news."[50] The Court more strongly asserted that "[t]here is no doubt that entertainment as well as news, enjoys First Amendment protection."[51] The Court assumed, however, that some sort of licensing or payment to the plaintiff could allow for broadcasting of the act in question.[52] We shall address these issues, as well the broader First Amendment status of entertainment speech, below.[53]

With the proliferation of the right of publicity post-*Zacchini*,[54] a wide range of circumstances and issues have arisen. These issues were on display in the contemporary case of *de Havilland v. FX Networks, LLC*.[55] The *de Havilland* case proceeded on several distinct theories of recovery,[56] but most importantly on a

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[46] *See id.* at 575–76.

[47] *See infra* Section V.

[48] *Zacchini*, 433 U.S. at 576–77

[49] *See id.* at 577–79.

[50] *See id.* at 578.

[51] *Id.*; *see also* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (nude dancing case); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (constitutional protection of even purely instrumental music); Barnes v. Glen Theatre, 501 U.S. 560 (1991) (commercial barroom nude dancing); Brown v. Entertainment Merchants, 564 U.S. 786 (2011) (violent video games rented to teenagers). In the right of publicity context, see de Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 637 (Cal. Ct. App. 2018) ("entertainment is entitled to the same protection as the exposition of ideas"); Gugliemi v. Spelling-Goldberg Prods., 603 P.2d 454, 459 (Cal. 1979). For more information, see Dora Georgeseu, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 FORDHAM L. REV. 907, 918 (2014).

[52] *See Zacchini*, 433 U.S. at 578.

[53] *See infra* Section III.

[54] *See Gugliemi*, 603 P.2d at 454; *de Havilland*, 239 Cal. Rptr. 3d at 625; *see also* Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013); Wis. Interscholastic Ath. Ass'n v. Gannett Co., 658 F.3d 614 (7th Cir. 2011); Armstrong v. Eagle Rock Entm't, Inc., 655 F. Supp. 2d 799 (2009).

[55] *de Havilland*, 230 Cal. Rptr. 3d at 625.

[56] *Id.* at 631. Damages were sought for emotional distress, harm to reputation, past and future economic losses, profits attributable to the defendant's unauthorized use of the plaintiff's identity, along with punitive damages, attorney fees, and a permanent injunction. *See id.* Recovery was predicated on theories of the common law privacy tort known as misappropriation, the California state statutory privacy right, the privacy tort known as "false light," and unjust enrichment. *See id.*

California state statutory right of publicity claim.[57] The case focused on the television broadcast of an eight-part docudrama,[58] ultimately nominated for eighteen Emmy Awards,[59] entitled "Feud: Bette and Joan."[60] The title names referred respectively to the actresses Bette Davis and Joan Crawford,[61] on whom the docudrama crucially focused.[62] The entire docudrama ran for a total of 392 minutes,[63] with the Olivia de Havilland character, played by Catherine Zeta-Jones,[64] appearing on screen for seventeen of those minutes.[65]

Overall, the de Havilland character is portrayed as "beautiful, glamorous, self-assured, and considerably ahead of her time in her views on the importance of equality and respect for women in Hollywood."[66] The plaintiff did indeed object to the substance of some of her character's dialogue, including an allegedly false and vulgar reference to de Havilland's sister, the actress Joan Fontaine.[67]

Important for our purposes, though, is that the plaintiff's objections to several lines of her character's dialogue,[68] including that concerning her sister, were evidently raised not under a right of publicity theory, but under the separate and distinct claim of "false light" invasion of privacy.[69] False light privacy invasion claims, as a separate and distinct tort, are widely recognized in the law.[70]

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[57] *See id.* The most relevant California right of publicity statute is again Cal. Civ. Code § 3344 (1971); *see also id.* § 990 (1984) (providing for descendibility of the statutory right).

[58] *See de Havilland*, 230 Cal. Rptr. 3d at 630.

[59] *See id.* at 631.

[60] *See id.* at 630.

[61] *See id.*

[62] *See id.* at 630–31.

[63] *See id.* at 630.

[64] *See id.*

[65] *See id.*

[66] *Id.*

[67] *See id.* at 633.

[68] *See id.*

[69] *See id.*

[70] *See generally* William L. Prosser, Privacy, 48 CAL. L. REV. 383, 398–401 (1960) (discussing false and objectively highly offensive characterizations of a plaintiff tending to impair the plaintiff's reputation, as well as to impose psychological harms, where the false statement need not be defamatory); *see also* Time, Inc. v. Hill, 385 U.S. 374, 387 (1967) (requiring as well the showing, in a false light invasion of privacy case, of actual malice on the part of the defendant publisher when the speech involves matters of interest to the public); Welling v. Weinfeld, 866 N.E.2d 1051, 1058 (Ohio 2007) (recognizing the tort of false light invasion of privacy under Ohio state law).

Under California right of publicity law,[71] crucial to the disposition of de Havilland's claim, is whether the defendant's use of the plaintiff's identity was merely appropriative and imitative, or else was creatively "transformative"[72] of that identity, such that the value of the defendant's product—with specific reference to the use of the plaintiff's identity—derives more from the defendant's own creativity than from the pre-existing economic value of the plaintiff's identity.[73]

In de Havilland's case, the court determined that the entirety of the Zeta-Jones and de Havilland portion of the docudrama amounted to about 4.2% of the docudrama's total content.[74] The court found "no evidence that de Havilland as a character was a significant draw"[75] to overall viewership or the general market stature of the docudrama.[76] Thus, the court concluded that whatever reception the docudrama received, at least in financial terms, was attributable less to the plaintiff's pre-existing identity than to the defendant's artistically creative transformation of that identity, assuming that either of these elements contributed in any distinctive way to the economic value of the overall docudrama.[77]

Going further, the court immunized not just the docudrama itself, but also the defendant's use of de Havilland's name in related "social media promotion,"[78] or what amounts to mere commercial advertising, of the docudrama in question.[79] We address issues of the constitutional value of commercial speech, of entertainment speech, of speech that is in some sense on a matter of public interest, and of theories of publicity rights injuries and damages below.[80]

On the basis, then, of this brief look at how courts have addressed the publicity right claims of, respectively, Paris Hilton,[81] Hugo Zacchini,[82] and Olivia de

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[71] *See* Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802 (Cal. 2001).

[72] *de Havilland*, 230 Cal. Rptr. 3d at 640 (quoting *Comedy III*, 21 P.3d at 404).

[73] *See id.* We do not herein take issue with any version of the "creative transformation" test, or any other particular approach to reconciling publicity rights and free speech rights. For a discussion on that issue, see text accompanying *infra* note 98.

[74] *Id.* at 641. Virtually all of the major characters, as well as the major actors portraying those characters, and even some persons otherwise associated with the production, were famous or popular in their own right. *See id.*

[75] *See id.*

[76] *Id.*

[77] This analysis thus does not rely on a claim that substituting some other character in place of de Havilland would have worked as well artistically or economically. It is possible that the defendant's creative transformation of the de Havilland character worked better than an attempt to creatively transform the identity of some other actor.

[78] *de Havilland*, 21 Cal. Rptr. 3d at 639.

[79] *See id.* (citing Montana v. San Jose Mercury News Inc., 40 Cal. Rptr. 2d 639, 643 (1995)).

[80] *See infra* Section III.

[81] *See supra* text accompanying notes 12–29.

[82] *See supra* text accompanying notes notes 30–53.

Havilland,[83] we proceed to consider the most crucial dimensions of the commonly claimed significance,[84] and the actual insignificance, of publicity right claims in general. In particular, we focus first on the widespread—if not universal assumption—that typical publicity rights cases importantly implicate, in one way or another, crucial concerns underlying the protection of freedom of speech.[85]

III. RIGHT OF PUBLICITY CASES AND THE SUPPOSED RISKS TO FREEDOM OF SPEECH

Courts and commentators have claimed to detect significant conflicts, actual or potential, between otherwise appropriate recoveries for publicity rights violations and important free speech values.[86] Thus, a leading expert has argued that "[a]s courts have expanded the right of publicity, the doctrine has come into conflict with the First Amendment more and more often."[87] The "creative transformation" inquiry discussed above[88] is merely one kind of response to the conflict between right of publicity claims and free speech claims.[89] But it has been argued that California's creative transformation test in particular is insufficiently protective of free speech rights.[90]

More generally, it is feared that commercial and even political and social content is threatened by enforcement of publicity rights. Thus, the distinguished scholars Mark Lemley and Eugene Volokh argue that commercial and non-commercial uses of a person's identity can have "clear political or social content that would be stifled by application of the right of publicity."[91] Professors Lemley and Volokh question the constitutionality, under First Amendment challenge, or publicity rights in general:[92]

> In particular, the speech-restrictive potential of the right of publicity goes much further than that of trademark law, and even libel law, and it may

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[83] *See supra* text accompanying notes 55–80.

[84] *See de Havilland*, 230 Cal. Rptr. 3d at 631.

[85] *See* Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001).

[86] *Id.*

[87] Mark Lemley, *Reining in the Right of Publicity: Reflections by a Leading Scholar*, 8 LANDSLIDE 26, 27 (2016) (interview with Stanford Law Professor Mark Lemley).

[88] *See supra* text accompanying notes 77–80.

[89] *See id.*; *Comedy III Productions*, 21 P.3d at 809.

[90] *See, e.g.*, Thomas E. Kadri, *Fumbling the First Amendment: The Right of Publicity Goes 2-0 Against Freedom of Expression*, 112 MICH. L. REV. 1519, 1529 (2014).

[91] Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 225 (1998).

[92] *See id.* at 227.

> mean that the doctrine as a whole is substantively unconstitutional, at least as to noncommercial speech but perhaps even as to commercial speech.[93]

Similarly, Professor Michael Madow argued that "publicity rights exact a higher cost in important competing values (notably free expression and cultural pluralism) than has generally been appreciated."[94]

The strongest case for such concerns would seem to involve distinctively political identities, as in the case of the estate of civil rights icon Rosa Parks.[95] But the concern extends as well to evocations of large numbers of college football players,[96] celebrity game show letter-turners,[97] and to media of all sorts, including entertainment-oriented video games.[98]

The extent to which the basic purposes for specially protecting speech are really implicated in publicity rights cases is, however, doubtful in the extreme. By consensus, the basic reasons for constitutionally protecting speech, beyond merely a typical legislative cost-benefit analysis, are several.[99] These reasons, or values, are commonly thought to include the pursuit of meaningful truths,[100] the pursuit of

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[93] *Id.*; *see also* Brief On Behalf of Law Professors as Amici Curiae in Support of Defendants-Respondents, Gravano v. Take-Two Interactive Software, Inc., 97 N.E.3d 389 (N.Y. 2017) (on behalf of fourteen well-recognized IP and First Amendment professors) (case featuring celebrity Lindsay Lohan as a primary plaintiff).

[94] Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 134, 145 (1993) ("the power to license is the power to suppress" and to some degree to control meaning).

[95] *See* Rosa and Raymond Parks Inst. For Self-Development v. Target Corp., 812 F.3d 824, 832 (11th Cir. 2016) ("[t]he use of Rosa Parks' name and likeness in the books, movie, and plaque is necessary to chronicling and discussing the history of the Civil Rights Movement").

[96] *See, e.g.*, Kadri, *supra* note 90 (discussing NCAA football-oriented video games using unnamed player uniform numbers, quantitative data, player performance statistics, *etc.*, for many players and teams).

[97] *See* White v. Samsung Elect. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (appropriation of a famous game show letter-turner's identity, at least in some loose, futuristic, but recognizable sense, for the primary purpose of enhancing the sale of Samsung VCRs); *see also* Lemley & Volokh, *supra* note 91, at 225–27.

[98] *See* Kadri, *supra* note 90; Mark Joseph Stern & Nat Stern, *A New Test to Reconcile the Right of Publicity with Core First Amendment Values*, 23 J. INTELL. PROP. L. 93, 95 (2015) ("the very thing that makes video games so revolutionarily expressive—their ability to realistically depict interactive, fictional worlds—also puts them at a heightened risk of censorship under the guise of lawsuits.").

[99] For mainstream accounts, see generally FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

[100] *See* Frederick Schauer, *Free Speech: The Search For Truth, and Collective Knowledge*, 70 SMU L. REV. 231, 232 (2017); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 652 (1986).

genuinely democratic self-government,[101] and the pursuit of some version of self-realization or autonomy.[102]

Invoking the value of the pursuit of meaningful truth in the the cases of Paris Hilton,[103] Hugo Zacchini,[104] or Olivia de Havilland[105] and others would be implausible. No doubt there is some truth of the matter regarding many aspects of celebrities and non-celebrities. Statements about celebrities may be true or false. Nor is there any doubt that some persons are inclined to pursue, or at least attempt to profit from, such truths. But this involves, as the cases above imply, a pursuit of truth in only a distinctly limited sense.[106] In particular, the pursuit of truth is typically involved in right of publicity cases, as distinct from other sorts of related tort and property cases, only in a sense that is not worthy of special constitutional protection.

Even more clearly, it is implausible to suggest that the publicity rights cases typically involve attempts to contribute to democratic self-government, at least beyond the culture of commercialized amusements.[107] Trading upon a celebrity's image is not, and is not intended to be, a contemporary cultural equivalent of, say, the Lincoln-Douglas debates.[108] If we were to classify commercial attempts to partially appropriate celebrity images as attempted contributions to democratic self-government, we would jeopardize the very meaning of democratic self-government, as distinct from popular commercial culture itself.[109]

In contrast, there is superficial plausibility in attempting to link the commercial appropriation of publicity rights with the free speech value of autonomy or self-

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[101] *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011); James Weinstein, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 491, 493 (2011).

[102] *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 265 (2011); Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 314 (1988); Brian Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 444 (1998).

[103] *See supra* text accompanying notes 12–29.

[104] *See supra* text accompanying notes 30–53.

[105] *See supra* text accompanying notes 55–80.

[106] *See* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group, 515 U.S. 557, 569 (1995) (one of a number of cases extending free speech protection to speech that does not attempt to convey any discernable particularized idea or truth-claim); Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001) ("[E]ntertainment . . . is entitled to constitutional protection irrespective of its contribution to the marketplace of ideas").

[107] *See* White v. Samsung Elect. Am., Inc., 989 F.2d 1512, 1518 (9th Cir. 1993).

[108] *See generally* ABRAHAM LINCOLN & STEPHEN A. DOUGLAS, THE LINCOLN-DOUGLAS DEBATES (Bob Blaisdell, ed., 2004).

[109] *See White*, 989 F.2d at 1520.

realization.[110] There may be some minimal autonomy loss for the plaintiff whose identity is being partially appropriated.[111] To be non-consensually, if only minimally, associated with any commercialized enterprise hardly advances the autonomy of that person.[112]

The appropriating defendant is sometimes said to be pursuing its own individual or corporate autonomy, at least in some sense.[113] There is certainly a sense in which choosing, as an individual or as a corporate entity, to borrow another person's image can be said to reflect the chooser's autonomy.[114] But if this is what autonomy means, it is inevitably involved at least minimally on both sides of any case involving any social interaction, even if the case does not involve freedom of speech.[115]

The deeper problem is that if autonomy is defined as anything like the ability to act as one chooses, it ceases to be a distinctive free speech value. Freedom of speech does not imply broader freedom of action and choice. We have a free speech clause, but there can be no general constitutional protection for freedom of action and choice, partly because of our inability to enshrine everyone's conflicting choices,[116] and partly because it is far from clear what a supposedly libertarian, or a freedom of choice-oriented society, would look like.[117]

The broader point is that if the values of meaningful truth, democratic self-government, and autonomy are understood in constitutionally relevant senses, they will typically be implicated not at all, only minimally, or quite modestly on both sides

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[110] *See supra* text accompanying note 102. In the publicity right context, see generally Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 171 (2010). The autonomy of the plaintiff is typically more meaningfully at stake in consumer fraud, deception, and false endorsement cases.

[111] *Id.*

[112] *See, e.g.*, Joel Feinberg, *Autonomy*, *in* THE INNER CITADEL 27, 32 (John Christman ed., 2014) ("[t]o the degree to which a person is autonomous he is not merely the mouth piece of other persons or forces"); Roberta Rosenthal Kwall, *A Perspective On Human Dignity, The First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1365 (2009).

[113] *See* Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 803 (Cal. 2001) (referring to "mental exploration" and "the affirmation of the self").

[114] *See, e.g.*, R.S. Downie & Elizabeth Telfer, *Autonomy*, 46 PHIL. 293, 293 (1971) (one sense of autonomy as focusing on "the capacity to choose what to do"); Thomas Hurka, *Why Value Autonomy?*, 13 SOCIAL THEORY & PRAC. 361, 361 (1987) (one concept of autonomy as involving the capacity "to direct oneself where different directions are possible"). For a metaphysically rich understanding of the idea of autonomy, see IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 114–16 (H.J. Paton trans., 1948) (1785).

[115] *See* R. George Wright, *Why Free Speech Cases Are as Hard (And as Easy) as They Are*, 68 TENN. L. REV. 335, 342 (2002) (noting more generally the typical presence, in one manifestation or another, of autonomy and other free speech values on both sides of free speech cases).

[116] My genuine preference as to choice and action would likely place me in the best seat at the popular concert. This preference cannot be fulfilled, in parallel fashion, for all concert goers.

[117] *Contra* ROBERT NOZICK, ANARCHY, STATE & UTOPIA (1974); MICHAEL OTSUKA, LIBERTARIANISM WITHOUT INEQUALITY (2005); LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds. 2001).

of the typical publicity rights case.[118] If we focus, thus, on the underlying reasons for constitutionally protecting speech, we see that there is surprisingly little of free speech constitutional significance at stake in of the typical publicity rights case.

The problem, at the most fundamental level, is that courts often seek to protect non-commercial speech where that speech, however interesting, is trivial from the standpoint of free speech values. Courts often declare instances of speech to be addressing a matter of genuine public interest and concern not by linking the speech to any fundamental values, but by concluding that some segment of the public might well happen to merely take an interest, for whatever reason, in the subject of the speech in question.[119] The category of strongly protected speech is then said to include not merely political speech, even in a broad sense, but all "expressive" speech.[120] Expressive speech is thus strongly protected,[121] as distinct from the lesser protection[122]

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[118] *See generally* White v. Samsung Electronics Am., Inc., 989 F.2d 1512, 1515 (9th Cir. 1993); *Comedy III*, 21 P.3d at 797.

[119] *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 567–68 (1977) (referring generally to a "public right to be informed of matters of public interest and concern"); Daniels v. FanDuel, Inc., 884 F.3d 672, 673–74 (7th Cir. 2018); Sarver v. Chartier, 813 F.3d 891, 902 (9th Cir. 2016) (explaining conduct of and experiences in the Iraq War as "an issue of public concern"); Hilton v. Hallmark Cards, 599 F.3d 894, 907 (9th Cir. 2010) ("[T]here is no dispute that Hilton is a person 'in the public eye' and 'a topic of widespread interest,' and . . . [t]hus, Hallmark's card is 'in connection with a public issue or an issue of public interest'"); Cardtoons, L.C. v. Major League Baseball Player's Ass'n, 95 F.3d 959, 969 (10th Cir. 1996) ("Cardtoons' parody trading cards receive full protection under the First Amendment. The cards provide social commentary on public figures, major league baseball players, who are involved in a significant commercial enterprise"); Nichols v. Moore, 334 F. Supp. 2d 944, 956 (E.D. Mich. 2004) (quoting the court's opinion in the case of a well-known actress in Rogers v. Grimaldi, 695 F. Supp. 112, 117 (S.D.N.Y 1988), *aff'd*, 875 F.2d 994 (2d Cir. 1989)) ("[T]he scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in the most liberal and far-reaching terms").

[120] *See* Dora Georgescu, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 FORDHAM L. REV. 907, 916 (2014) (citing numerous cases); *Cardtoons, L.C.*, 95 F.3d at 969–70.

[121] *See supra* text accompanying note 120.

[122] *See, e.g.*, Jordan M. Blanke, *No Doubt About It: You've Got to Have Hart*, 19 B.U. J. SCI. & TECH. L. 26, 65 (2013) ("Right of publicity claims arising in connection with commercial speech must satisfy intermediate scrutiny, while claims arising in connection with noncommercial speech must satisfy strict scrutiny"). For publicity rights cases turning on whether the defendant's speech counts as "expressive" or instead merely as commercial speech, see Jordan v. Jewell Food Stores, Inc., 743 F.3d 509, 512 (7th Cir. 2014) (a case involving a post-retirement Michael Jordan); *see also* Vrdolyak v. Avvo, Inc., 206 F. Supp. 3d 1384, 1389 (N.D. Ill. 2016).

that is accorded to commercial, and thus presumably somehow non-expressive, speech.[123]

This means, however, that along with wealth inequality, global migration, climate change, discrimination, civic insolvency, and political fragmentation, the re-use of Paris Hilton's endorsement of one thing or another as "hot"[124] counts, for constitutional purposes, as speech on a matter of public interest and concern.[125] An observer might instead judge the question of the non-consensual use of transient catchphrases such as "that's hot" to be merely tangential to the fate of the Republic and to the consensually basic free speech values.[126]

Certainly, though, there are cases in which the publicity right claimant and the defendant in the case can show that one or more of the basic free speech values is meaningfully implicated in the case. Among such cases are those involving the estates of Dr. Martin Luther King, Jr.[127] and Rosa Parks,[128] of the 1960's Civil Rights Movement.

However, common sense suggests that in such cases, the defendant can typically make whatever political points the defendant wishes to make as clearly, undistortedly, forcefully, and subtly in one or more other ways that do not impair the plaintiff's legitimate publicity rights.[129] In a phrase, the defendant will typically have available constitutionally adequate alternative channels or venues for making whatever public interest point is sought to be made,[130] such that protecting the publicity right in question imposes at worst *de minimis* free speech harm on the defendant.[131]

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[123] The Supreme Court established the test for protection of "pure" commercial speech in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–64 (1980), as clarified in *Bd. of Trustees v. Fox*, 492 U.S. 469 (1991). If commercial speech allegedly infringing the plaintiff's publicity rights is deemed to be false, misleading, or deceptive, such commercial speech can on that basis be restricted without any further inquiry, or any interest balancing, thus protecting any plaintiff interests. *See Central Hudson*, 447 U.S. at 563–64. For extended further discussion of the broader questions provoked by these attempted distinctions, see generally R. George Wright, *Judicial Line Drawing and the Broader Culture: The Case of Politics and Entertainment*, 49 SAN DIEGO L. REV. 341 (2012); R. George Wright, *Speech On Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987).

[124] *Hilton*, 599 F.3d at 908.

[125] *See id.* at 908–09.

[126] *See supra* text accompanying notes 93–95.

[127] *See, e.g.*, Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982); Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 508 F. Supp. 854 (N.D. Ga. 1981) (previous litigation between the parties discussing rights to commercial sales of busts and speech excerpts).

[128] *See, e.g.*, Parks v. Laface Records, 329 F.3d 437 (6th Cir 2003); Rosa and Raymond Parks Inst. for Self-Development v. Target, Corp., 812 F.3d 824, 832 (11th Cir. 2016).

[129] *Parks*, 329 F.3d at 448.

[130] For elaborate background, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

[131] *See id.* at 89.

Thus, it is difficult to imagine that anyone wishing to make any meaningful point about, say, the historical roles of Dr. King or Rosa Parks must be frustrated in doing so, in terms of the consensual free speech values,[132] unless allowed to invade an otherwise protection-worthy right of publicity.[133] This sensible concern for the defendant's realistic speech alternatives has some degree of support in one context or another.[134] Whether the courts actually pay any attention to what one might call the free speech opportunity cost a given user faces[135] is, for our purposes, of limited importance. More important is that in most, if not all, publicity rights cases, the free speech values at stake, even from the defendant user's own perspective, would not be significantly impaired by requiring the defendant to use some expressive means that does not violate the plaintiff's publicity rights.[136] It is fair to conclude, then, that despite the standard rhetoric,[137] the actual free speech stakes in typical publicity rights cases is minimal to non-existent.

But one might still argue that the publicity rights cases are of genuine social significance on either of two remaining grounds. First, one might argue that apart from freedom of speech concerns, publicity rights cases in one way or another harmfully promote what one might call the celebrification of culture. We address this concern immediately below in Section IV.

And second, one might argue for the significance of publicity rights cases in terms of the net social value of the damages recoveries thereby made available to plaintiffs. We take up this final concern in Section V below.

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[132] *See supra* text accompanying notes 93–95.

[133] Jason K. Levine, *Can the Right of Publicity Afford Free Speech? A New Right of Publicity Test for First Amendment Cases*, 27 HASTINGS COMM. & ENT. L.J. 171, 212 (2004).

[134] *See id.* at 211–14 (discussing publicity rights cases); Russell S. Jones, *The Flip Side of Privacy: The Right of Publicity, the First Amendment, and Constitutional Line Drawing—A Presumptive Approach*, 39 CREIGHTON L. REV. 939, 959 (2006) ("The appropriate balance should include considering whether the user of a celebrity's rights in an expressive manner has reasonable available alternatives; put another way, whether the user could express his message in a different way"). *But see* Cardtoons, L.C. v. Major League Baseball Player's Ass'n, 95 F.3d 959, 971 (10th Cir. 1996) (explaining a focus on the user's adequate alternatives, or the lack thereof, as insufficiently protective of the broad interest in freedom of speech); Rogers v. Grimaldi, 875 F.2d 994, 998 (2d Cir. 1989). *See also* Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 79 IND. L.J. 47, 113–14 (1994) (discussion of publicity rights cases).

[135] Jones, *supra* note 134, at 944.

[136] *Cardtoons, L.C.*, 95 F.3d at 971.

[137] Roberta Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 48, 56–57 (1995).

IV. BUT DON'T THE PUBLICITY RIGHTS CASES PROMOTE THE HARMFUL CELEBRIFICATION OF CULTURE?

The concern that publicity rights cases damage the broader culture by promoting what we might call the celebrification of culture could come in either a plaintiff's version, or a defendant's version, or both. On the plaintiff's version, the claim is that the defendant's non-consensual, perhaps uninhibited,[138] commercialized use of some aspect of the plaintiff's identity contributes to this broader excessive celebrification.[139] On the defendant's version, any undue celebrification effects would instead be attributed to the law's recognition of the celebrity's publicity rights, often of a rather broad scope,[140] in the first place.

It would certainly be possible for a reasonable person to detect today a substantial and perhaps increasing level of what we might label broad cultural celebrification. It is judicially thought that, at least at a given time, Paris Hilton's "that's hot" assessments amounted to speech on matters of genuine public concern.[141] A partial explanation of this intriguing legal judgment might well involve what we could call the phenomenon of pervasive, normalized cultural celebrification.[142]

As the term is used in this context, "celebrification" distinguishes the public's response to a person's desire for mere fame itself from a person's "desire to be admired, appreciated, or respected for [their] skills or accomplishments."[143] Celebrification refers only to the former. Celebrification may be related to, but is also distinct from, the broad phenomenon known as commodification.[144] Whether our

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[138] The negative and positive externalities of rights of publicity, and their efficient use over time, should not systematically vary as long as the relevant rights are clearly assigned to either the plaintiff or the defendant in these cases. *See generally* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[139] David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn lrom Cultural Studies*, 25 CARDOZO ARTS AND ENT. L. J. 913, 947 (2008).

[140] *See, e.g.*, Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity*, LOY. L. SCH. (Dec. 14, 2017), www.rightofpublicityroadmap.com/law/california (discussing the important California common law and statutory publicity rights).

[141] *See supra* text accompanying notes 12–16, 113–115.

[142] Tan, *supra* note 139, at 947.

[143] RICHARD KRAUT, WHAT IS GOOD AND WHY: THE ETHICS OF WELL-BEING 186 (2007).

[144] *See, e.g.*, MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY (2012); Joseph E. Davis, *The Commodification of Self*, 5 THE HEDGEHOG R. 41 (2003), http://iasc.culture.org/THR/archives/Commodification/5.2Davis.pdf (explaining self-commodification, marketing of the person, "personal branding," and image cultivation aimed at pecuniary gain); Olivier Driessens, *The Celebritization of Society and Culture: Understanding the Structural Dynamics of Celebrity Culture*, 15 INT'L. J. CULTURAL STUDIES 641 (2013) (addressing celebrity commodification in several senses); Colin Leys & Barbara Harriss-White, *Commodification: The Essence of Our Time*, OPENDEMOCRACYUK (Apr. 2, 2012), www.opendemocracy.net/ourkingdom/colin-leys-barbara-harriss-white/commodificationwww.opendemocracy.net/ourkingdom/colin-leys-barbara-harriss-white/commodification_("[T]he logical outcome of this process is the commodification of everything, unless political or social barriers prevent it").

collective interest in mere celebrities, as distinct from cultural high achievers, is considered excessive[145] or not, the phenomenon of celebrification does seem real.[146]

It has been suggested more specifically that "[t]he cult of celebrity is producing a generation that believes education and hard work are not important in achieving success."[147] In remarkable numbers, children, if not also adults, hope for careers as popular entertainers, if not as mere celebrities.[148] Clearly, the broader culture confers status upon persons deemed entertaining and amusing,[149] whether all such persons are also thought of as genuinely talented or not.

Perhaps interest in mere celebrity increases to the extent that success through more traditional employment and career options comes to seem more dubious.[150] Perhaps any increased interest in celebrity is, fittingly, itself something of a passing fad, or a generational phenomenon.[151] Perhaps the harmless or favorable elements of celebrification counterbalance its harm. Perhaps celebrification is actually caused by other harmful cultural phenomena, rather than itself being independently harmful.[152]

Most crucially, though, whatever the cultural disvalue of celebrification in general, the availability of a publicity rights cause of action, as distinct from other tort and

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[145] *See, e.g.*, GRAEME TURNER, UNDERSTANDING CELEBRITY 3 (2d ed. 2014).

[146] *See id.* at 3–4, 18, 94, 155.

[147] Lucy Cockcroft, *Cult of Celebrity 'Is Harming Children*,' THE TELEGRAPH (Mar. 18, 2008), www.telegraph.co.uk/news/uknews/1581658/cult-of-celebrity-is-harming-children.

[148] In the American context, see JEAN M. TWENGE & W. KEITH CAMPBELL, THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT 92–93 (2009); Yalda T. Uhls & Patricia M. Greenfield, *The Rise of Fame: A Historical Content Analysis*, MASARYK UNIV. (2011), https://cyberpsychology.eu/article/view/4243/3289. In the British context, see Twenge & Campbell, *supra* note 148, at 193; Camilla Turner, *Revealed: Top Career Aspirations For Today's Primary School Children*, THE TELEGRAPH (Jan. 19, 2018), www.telegraph.co.uk/education/2018/01/19/revealed-top-career-aspirations-todays; Jacob Dirnhurber, *VLOG's a Job: Children Turn Backs on Traditional Careers in Favour of Internet Fame, Study Finds*, THE SUN (May 22, 2017), www.thesun.co.uk/news/3617062/children-turn-backs-on-traditional-careers.

[149] *See generally* NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (2005).

[150] *But see* Julia Glum, *53% of Millennials Expect to Become Millionaires One Day, According to New Study*, TIME (June 11, 2018), http://time.com/money/5308043/millennials-millionaires-new-study.

[151] For background, see the evolving generational cohort differences interestingly described in JEAN M. TWENGE, iGEN: WHY TODAY'S SUPER-CONNECTED KIDS ARE GROWING UP LESS REBELLIOUS, MORE TOLERANT, LESS HAPPY—AND COMPLETELY UNPREPARED FOR ADULTHOOD—AND WHAT THAT MEANS FOR THE REST OF US (2017).

[152] One would be hard pressed to argue that the Roman Empire collapsed due, precisely, to the availability of popular circuses. For background see *Panem et Circenses*, CAPITOLIUM (1999), www.capitolum.org/eng/imperatori//circenses.htm.

property claims, is at most only a minor contributor to any such disvalue.[153] The popular attention devoted to celebrities is only minimally focused on non-consensual and legally unprotected uses of celebrity personas. Over the course of their careers, celebrities may "trend" for a variety of reasons, including their direct associations with popular entertainment.[154] But the nature and value of their identity, "brand," and legacy do not significantly hinge specifically on the availability of legal publicity right claims.[155]

In particular, "even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than 'adequate' supply of creative efforts and achievement."[156] In the extreme case, it is difficult to imagine many persons declining their otherwise preferred career as, say, a Paris Hilton[157] or an Olivia de Havilland,[158] because of the unavailability of a right of reputation in particular.[159]

It is fair to conclude that the availability of, specifically, an enforceable legal right of publicity does not harmfully promote, to any meaningful extent, what has been called the celebrification of culture. But this leaves us with a final concern with regard to publicity rights. Is it likely that the damages recoveries and other remedies provided to successful publicity rights claimants, above and beyond merely publicizing their grievances, and the remedies available to such claimants under other causes of action, meaningfully promote the public well-being. We arrive at a generally skeptical answer to this question below.

V. BUT DON'T PUBLICITY RIGHT RECOVERIES INVOLVE APPROPRIATE COMPENSATION AND MEANINGFULLY PROMOTE THE PUBLIC GOOD?

As it turns out, providing for damages and related recoveries for publicity rights plaintiffs does not promote the broader public well-being to any meaningful degree. Any inclination we might have to analogize publicity rights cases to, say, actions for recovery for physical injuries, including medical bills and lost wages, is more misleading than helpful.

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153 *See supra* text accompanying note 148.

154 As of June 13, 2018, the Google query "Paris Hilton" generated about 25,400,000 hits. For what it may be worth, the Google query "Paris Hilton Hallmark" resulted in about 387,000 hits, or approximately 1.52% of the broader total.

155 *See* Cardtoons, L.C. v. Major League Baseball Player's Ass'n, 95 F.3d 959, 973–75(10th Cir. 1996); JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 98–108 (2018).

156 *Cardtoons, L.C.*, 95 F.3d at 974 (quoting Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 210 (1993)).

157 *See supra* text accompanying notes 12–29.

158 *See supra* text accompanying notes 55–80. Note the various roles, acting awards, honorary degrees, and titles of nobility conferred upon de Havilland, as reported at *Olivia de Havilland*, IMDB (2018), www.imdb.com/name/nm0000014/610.

159 We set aside here whether those who seriously consider celebrity-oriented careers may tend to be less, or more, financial risk-averse than average. For a brief background discussion, see *Risk Averse*, INVESTOPEDIA (2018), www.investopedia.com/terms/riskaverse.asp.

One entryway into this remarkably complex area is to divide publicity rights claimants into, however crudely, the famous, and the non-famous or non-celebrity. The initial problem with the latter, non-celebrity plaintiff category is that almost by definition, their own personal financial losses, whatever the scope of the defendant's overall profits, are typically minimal.[160] Nor does their name or identity, as an individual, tend to itself generate substantial profits for the defendant, above and beyond the defendant's most profitable alternative opportunity.

In most such non-celebrity cases, including the team sports video game context, the value of the product to the consumer is largely what we might call irreducibly "emergent"[161] and collective in character. That is, the value to the consumer results largely from the defendant's collecting, aggregating, and usefully processing of individual identities, such that the overall game, or other product, has value well above and beyond what is contributed separately by the individual players, or even by sets of players.[162] By very loose analogy, most of the value of a wide-angle photo of troops storming a beach would not be due to the presence of any single recognized person or group.

Beyond this, there lies severe problems of damages claim valuation. Often, courts have been generous toward publicity rights claimants, especially celebrities, in finding a genuine compensable legal injury.[163] Once a non-consensual commercial use of a plaintiff's image has been shown, some degree of legal injury and corresponding damages is presumed.[164] In such cases, lack of the plaintiff's—or at least a celebrity plaintiff's—consent implies a damages award.[165]

This practice may seem sensible in light of the familiar practice of awarding presumed damages in defamation cases.[166] Meaningful tracing, in defamation cases,

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[160] Consider, merely for example, the distinctive, more or less irreplaceable financial value added to a digital content provider or video game maker by one or more non-celebrity college team athletes. *See, e.g.*, Maloney v. T3Media, Inc., 853 F.3d 1004, 1007 (9th Cir. 2017); *see also* Dobrolowski v. Intellius, Inc., No. 17CV1519, 2017 WL 3720170 (N.D. Ill. Aug. 29, 2017).

[161] *See* Timothy O'Connor & Hong Yu Wong, *Emergent Properties*, STAN. ENCYC. OF PHIL. (June 3, 2015), https://plato.stanford.edu/entries/properties-emergent.

[162] Most sports video games do not feature intra-squad scrimmages of even the most popular established teams.

[163] *See, e.g.*, Solano v. Playgirl, Inc., 292 F.3d 1078, 1090 (9th Cir. 2002); Newcombe v. Adolph Coors Co., 157 F.3d 686, 693 (9th Cir. 1998); Estate of Smith v. Cash Money Records, 14CV2703, 2018 WL 2224993 (S.D.N.Y. May 5, 2018); Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 806–07 (N.D. Cal. 2011).

[164] *See supra* text accompanying note 144.

[165] *Solano*, 292 F.3d at 1090.

[166] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (plurality opinion) (citing WILLIAM PROSSER, THE LAW OF TORTS § 112, at 765 (4th ed. 1971)).

of the injurious effects to one's reputation may often be impractical.[167] The truth never catches up with the lie. The long-term harm of defamation may be as subtle as a phone that does not ring. And the genuine harms of defamation may accrue over time, in ways impossible to calculate. It may thus be more sensible to speculate at a monetary value of such damages, or to set a minimum floor for such damages, than to assume that the value of unprovable damages in such defamation cases is zero.[168]

The problem with presuming damages in publicity rights cases is that such cases do not relevantly resemble the defamation cases in which presumed damages may be appropriate.[169] Defamation, by definition, requires something like a tendency to lower or impair the plaintiff's reputation and perceived character.[170] A typical reaction to credible defamation would thus be hostility, shunning, avoidance, or a sense of the shamefulness of the defamed party's behavior.[171] It is reasonable, in appropriate cases, to thus assume that undermining the victim's reputation will tend to have adverse consequences for that victim.[172]

However, publicity rights cases are typically not like this.[173] At best, there can be no broad presumption that non-consensual users of the plaintiff's identity expect to meaningfully diminish the plaintiff's reputation, or to subject that plaintiff to hostility, shunning, avoidance, or disgrace.[174] In many such cases, it would be clearly contrary to the user's own interest to diminish the reputation of the party they wish to use to promote their product or service. There may be rare cases in which the user wishes to enhance its own already distinctively negative public image[175] by somehow associating itself with the plaintiff. Even in those cases, however, typical consumers may not tend to shun or avoid the plaintiff.

More generally, consumers' reactions to non-consensual invocations of plaintiffs' identities are likely to involve favorable, unfavorable, indifferent, minimal, equivocal, fleeting, ambivalent, or somehow offsetting responses.[176] In any event, and as sympathetic as we might be to the plaintiff in question, it is simply unrealistic and inappropriate to construct a damages presumption in typical publicity rights cases.

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[167] *Id.* at 754.

[168] TURNER, *supra* note 145, at 3–4, 18, 94, 155.

[169] *Greenmoss Builders, Inc.*, 472 U.S. at 754.

[170] *See, e.g.*, Masson v. New Yorker Mag., Inc., 501 U.S. 496, 509–10 (1991) (stating under California law, defamation involves exposing the plaintiff to "hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation").

[171] *See id.*

[172] *Defamation*, BLACK'S LAW DICTIONARY (10th 2014).

[173] We again set aside the distinct set of consumer fraud and false endorsement cases.

[174] *See* White v. Samsung Elec. Am., Inc., 971 F.2d 1395 (9th Cir. 1992); Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867 (C.D.C.A. 1999); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

[175] It seems fair to assume that market forces will in general tend to limit the influence of commercial enterprises with genuinely negative reputations among consumers.

[176] *See supra* text accompanying note 174.

To assume, merely for example, that Paris Hilton suffers a meaningful, if untraceable, financial loss when the Hallmark Card Company utilizes her image, without evidently impairing or demeaning that image,[177] is arbitrary in the extreme. We could just as well, if equally arbitrarily, consider such nonconsensual uses as name recognition-enhancing publicity for the plaintiff. Perhaps the plaintiff's publicized objections to the non-consensual use generate further lucrative, or at least favorable, publicity for the plaintiff.[178]

It is technically possible that the defendant's use of the plaintiff's identity could, by itself, trigger a public sense that the plaintiff has become "over-exposed," to the plaintiff's detriment.[179] It is also possible that a defendant's nonconsensual use of a plaintiff's identity may revive or revitalize the plaintiff's public presence, or even set off a favorable preference cascade,[180] whether out of sympathy, nostalgia, or otherwise. And it is certainly possible that any effects on the plaintiff may be swamped by the collective impact of the many times in the course of the day that the celebrity is in other contexts referred to in social media and elsewhere.[181]

Of course, not all publicity rights cases are brought by major celebrities, whether established, viral, or trending. Consider again the case of Hugo Zacchini, the Human

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[177] *See supra* text accompanying notes 12–29.

[178] *See, e.g.*, *What Is the Streisand Effect?*, THE ECONOMIST (Apr. 16, 2013), www.economist.com/the-economist-explains/2013/04/15/what-is-the-streisand-effect; Stacy Conrad, *How Barbara Streisand Inspired the "Streisand Effect,"* MENTAL FLOSS (Aug. 18, 2015), http://mentalfloss.com/article/67299/how-barbara-streisand-inspired-streisand-effect.

[179] It is certainly possible for a celebrity to be over-exposed in a career-damaging way. But this may be due to excessive voluntary as well as involuntary appearances. We cannot casually apply the theory of public goods, external effects, and uninternalized costs to publicity rights cases. There is only so much unowned grazable land, pollutable water, or sub-surface petroleum. Unspecified property rights in those cases can lead to overgrazing, polluted streams, and premature exhaustion of oil resources. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968); ELINOR OSTROM, GOVERNING THE COMMONS, THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990). But the positive, even monetizable, associations of a particular celebrity's name or image have no similar finitude, bounds, or quantifiablity. Sheep pastures do not typically go viral within hours. And it is even possible for a celebrity's fame to enhance itself, as when being famous for being famous is itself a point of notoriety. Nor do publicity right values correspond to, say, grazing land or oil resource values in how they are dissipated or exhausted. Different sorts of "scarcity" are thus involved.

[180] As more generally described in TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (reprint ed. 1997).

[181] Commercial enterprises may today invoke the identity of Beyonce, without her consent, but also without falsely implying her endorsement. These invocations may even seem to logically "interfere" with one or more of Beyonce's paid endorsement contracts. But these possibilities must be placed in the overwhelming context of Beyonce's 248,000,000 Google hits and 15,200,000 Twitter followers (as of June 18, 2018).

Cannonball.[182] Especially when one considers the complications of celebrity and non-celebrity cases, it should not be surprising that "[t]here is no well-established method for valuing a right of publicity."[183] In Zacchini's case, trying to select and draw upon some other specific prior publicity rights of the plaintiff as a baseline or guide for evaluating the appropriate damages in Zacchini would be not merely unusually speculative, but question-begging or circular.[184] Who, by consensus, has brought a case that is usefully like Zacchini's? Which prior claimant has priorities and circumstances like Zacchini's? And trying to determine the outcome of a hypothetical voluntary negotiation process between Zacchini and the defendant is equally arbitrary and unmanageably complex.[185]

The Zacchini case thus nicely illustrates some of the damages imponderables in publicity rights cases. It is possible, ironically, that Zacchini, at the time or thereafter, may have been best known among the general public precisely for his legal case and its United States Supreme Court determination.[186] Whatever the potential for later or more widespread further abuse, the fifteen second act in question in Zacchini was actually broadcast only once, on a local television station, apparently part way through Zacchini's local engagement at the Geauga County Fair.[187] Thus, to a degree, the broadcast could be said to act as a full or partial substitute for paying to see Zacchini's act in person.[188] On the other hand, it is also possible that for some potential consumers, the broadcast of even the entire act, especially with favorable and directly

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[182] *See supra* text accompanying notes 30–53.

[183] Matthew Savare, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 151 (2004) (quoting *Note, Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 688 (1995)) (describing several dubious alternative methods, including a largely circular, if not arbitrary, consideration of what somehow "comparable" celebrities make). *See also* Cody Reaves, *Show Me the Money: Determining a Celebrity's Fair Market Value in a Right of Publicity Action*, 50 U. MICH. J.L. REFORM 831, 836–37 (2017) (discussing an alternative method involving an attempt to determine the results, if any, of a hypothetical willing and consensual bargaining process between the defendant and the plaintiff). Note as well the possibility that the value of a celebrity name over time may be unusually volatile and unpredictable. *See* Douglass v. Hustler Magazine, 769 F.2d 1128, 1143 (7th Cir. 1985) (Judge Posner's discussion on such topic).

[184] *See* Savare, *supra* note 183, at 151.

[185] *See* Reaves, *supra* note 183, at 836–37.

[186] Katies Thomas, *Image Rights vs. Free Speech in Video Game Suit*, NEW YORK TIMES (Nov. 15, 2010), https://www.nytimes.com/2010/11/16/sports/16videogame.html.

[187] Zacchini's act was videotaped and broadcast on August 31, with Zacchini's local performances being scheduled for at least some dates in August and September. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[188] Bearing in mind that Zacchini's entire act, and not just an excerpt, parody, or sampling thereof, was broadcast, whatever the visual and audio quality of the videotape or film involved. *See id.* at 575–76.

promotive commentary,[189] tended to encourage their later paid attendance at a local performance.[190]

But the fact that no one had paid for direct access solely to Zacchini's act further clouds this speculation.[191] Witnessing the performance live was merely one of the attractions of buying a pass to the fair in general.[192]

In terms of incentives to produce popular entertainment,[193] Zacchini's best alternative option would likely not have been to engage in some other, less readily exploitable activity, but to actively enforce a contractual prohibition against filming without permission.[194] It is possible to imagine Zacchini's act being broadcast nationally, or perhaps during or prior to each of his various local appearances across the country. But this possibility would not assist in clarifying any damages issues. We would instead face additional guesswork in sorting out any possible net favorable or unfavorable effects, for Zacchini, from such widespread broadcast dissemination.

The availability of a damages recovery for Zacchini might have some minimal effect—presumably negative—on whatever free speech values might otherwise be furthered by the more widespread visual distribution of Zacchini's act.[195] And as we have seen, courts have been inclined to constitutionally protect pure popular entertainment, absent any intended message, on a par with other non-commercial speech.[196] But as with most right of publicity cases, the extent to which the public's most convenient access to Zacchini's cannon shot really implicates any of the basic reasons for distinctively protecting free speech[197] seems minimal at best.[198] And again, the real tradeoff in free speech values is not between the minimal such value of uninhibited broadcasting[199] of the act and no such speech at all. Rather, the real free speech tradeoff is between the minimal free speech value of such broadcasts and the

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189 *See id.* at 564, 564 n.1.

190 Amounting thereby to timely, potentially valuable, unsolicited advertising. In this case, such benefit would accrue directly to the fair, and indirectly to Zacchini.

191 *See Zacchini*, 433 U.S. at 563.

192 *See id.*

193 *See id.* at 575–77.

194 *See id.* at 563–64 (denying permission and the defendant's response the following day).

195 *See Zacchini*, 433 U.S. at 581 (Powell, J., dissenting).

196 *See supra* text accompanying notes 50–51.

197 *See supra* text accompanying notes 92–95.

198 *See supra* Section III.

199 Or the continuous universal availability of a high-quality video on popular platforms such as Youtube.

free speech values of the media's next best speech alternative,[200] whether that involves airing a visual excerpt of Zacchini's act or not.[201]

VI. CONCLUSION

As a general matter, right of publicity claims, as defined and described herein, tend neither to significantly enhance nor to significantly detract from the public well-being or from the structure of basic rights worth recognizing. Neither the recognition nor the denial of publicity rights systematically affects the basic reasons for specially protecting freedom of speech. Nor do such publicity rights claims, or their unavailability, materially impact the phenomenon of cultural celebrification. Finally, it is essentially arbitrary to hold that right of publicity judgements typically involve distinctly appropriate compensation or other forms of promoting the common good.

[200] *See supra* text accompanying notes 118–119 on the value of free speech, including from the defendant's perspective, of alternative speech channels and opportunities, which may be superior in terms of everyone's free speech values, to that of the defendant's regulated speech.

[201] Note that when entertainment media decide what to disseminate, they may well to seek to very roughly maximize profit or shareholder wealth, as opposed to any vision of the maximizing of free speech values. For further discussion of complications associated with damage awards in publicity rights cases, see JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 87–114 (2018).