

2-2020

Unmasking the Right of Publicity

Dustin Marlan

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Dustin Marlan, *Unmasking the Right of Publicity*, 71 HASTINGS L.J. 419 (2020).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol71/iss2/5

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Unmasking the Right of Publicity

DUSTIN MARLAN[†]

In the landmark 1953 case of Haelan Laboratories v. Topps Chewing Gum, Judge Jerome Frank first articulated the modern right of publicity as a transferable intellectual property right. The right of publicity has since been seen to protect the strictly commercial value of one's "persona"—the Latin-derived word meaning the mask of an actor. Why might Judge Frank have been motivated to fashion a transferable right in the monetary value of one's public persona distinct from the psychic harm to feelings, emotions, and dignity rooted in the individual and protected under the rubric of privacy?

Judge Frank was a leading figure in the American legal realist movement known for his unique and controversial "psychoanalysis of certain legal traditions" through influential books including Law and the Modern Mind. His work drew heavily on the ideas of psychoanalytic thinkers, like Sigmund Freud and Carl Jung, to describe the distorting effects of unconscious wishes and fantasies on the decision-making process of legal actors and judges. For Judge Frank, the psychoanalytic interplay between public and private aspects of the personality supported his realist interpretation of lawmaking as a subjective and indeterminate activity. Indeed, though Judge Frank provided little rationale for articulating a personality right separate from privacy in Haelan, he had given a tremendous amount of attention to the personality in his scholarly works.

In considering Judge Frank's psychoanalytic jurisprudence, this Article suggests that the modern right of publicity's aim, apart from privacy law, may be usefully understood through the psychoanalytic conception of the personality—one divided into public and private subparts. In the psychoanalytic sense, the term persona, or "false self," is used to indicate the public face of an individual—the image one presents to others for social or economic advantage—as contrasted with their feelings, emotions and subjective interpretations of reality anchored in their private shadow, or "true self." Yet, the law's continued reliance on this dualistic metaphor of the personality appears misguided, particularly as technology, internet, and social media increasingly blur the traditional distinctions between public and private.

[†] Assistant Professor of Law, University of Massachusetts School of Law. Many thanks to Shyam Balganesh, Ralph Clifford, Robert Chang, Jasmin Cohen, Kelsey Constantin, Rebecca Curtin, Greg Day, Margaret Drew, John Duffy, Justine Dunlap, Rebecca Eisenberg, Brian Frye, Charlotte Garden, Andrew Gilden, Gautam Hans, Jeremiah Ho, Anne Klinefelter, Lydia Loren, Lisa Larrimore Ouellette, Stephen McJohn, Mark McKenna, Michael Murray, Sean Pager, Greg Reilly, Jennifer Rothman, Irene SanPietro, and Jason Zhu, as well as to participants at the 2018 Works-in-Progress Intellectual Property Colloquium at Case Western Reserve University, the 18th Annual Intellectual Property Scholars Conference (IPSC) at the University of California, Berkeley, the Eleventh Annual Junior Scholars in Intellectual Property (JSIP) Workshop, and workshops at the University of Kentucky College of Law and Suffolk University Law School for helpful comments and suggestions. Raven Lanier, Irene SanPietro, and Jason Zhu provided outstanding research assistance. All remaining errors—conscious or unconscious—are mine alone.

TABLE OF CONTENTS

INTRODUCTION	421
I. THE RIGHT OF PUBLICITY'S IDENTITY CRISIS	425
A. THE COMMERCIAL PERSONA	426
B. THE PUBLIC-PRIVATE DICHOTOMY	429
II. JUDGE JEROME FRANK'S PSYCHOANALYTIC JURISPRUDENCE.....	437
III. THE PSYCHOANALYTIC MODEL OF THE DIVIDED SELF	443
A. FREUD'S EGO AND ID.....	443
B. JUNG'S PERSONA AND SHADOW	445
IV. PUBLICITY AND THE FALSE SELF.....	448
A. THE ACTOR'S MASK METAPHOR.....	448
B. OBJECTIVE PUBLICITY JUSTIFICATIONS.....	451
C. SUBJECTIVE PUBLICITY JUSTIFICATIONS	456
V. PUBLICITY AND THE INTERSUBJECTIVE SELF	458
A. INTERSUBJECTIVITY THEORY.....	459
B. PRIVACY AND INTERSUBJECTIVITY.....	461
C. PUBLICITY AND INTERSUBJECTIVITY	463
1. <i>A Data Protection Right</i>	463
2. <i>A Flexible Theory of Harm</i>	468
3. <i>A Heightened Standard of Consent</i>	470
CONCLUSION.....	473

INTRODUCTION

The conventional image of the law is, of course, a mask, a false-face, made to suit unconscious childish desires. But that false-face terrifies even the persons who have made it.

Jerome N. Frank¹

In the landmark 1953 case of *Haelan Laboratories v. Topps Chewing Gum*, Judge Jerome Frank first articulated the right of publicity as a transferable intellectual property right.² However, that influential decision shed little light on the right's conceptual boundaries or its proper justification.³ The right of publicity has since typically been seen to protect the *commercial* value of one's "persona"⁴—the Latin-derived word originally meaning the mask of an actor.⁵ In part because the persona is an ethereal concept lacking an accepted meaning under the law,⁶ the right of publicity's doctrinal scope has

1. JEROME FRANK, *LAW AND THE MODERN MIND* 175 (1930) [hereinafter FRANK, *LAW AND THE MODERN MIND*].

2. 202 F.2d 866, 868 (2d Cir. 1953) ("This right might be called a 'right of publicity.'"); *see also* Fler Corp. v. Topps Chewing Gum, 658 F.2d 139, 148 (3d Cir. 1981); J. THOMAS MCCARTHY & ROGER E. SCHECHTER, 1 *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1.27, at 58 (2019) (referring to Judge Frank as "architect" of the right of publicity); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 *STAN. L. REV.* 1161, 1172–73 (2006); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 *VAND. L. REV.* 1199, 1201 (1986); Melville B. Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203, 204, 218–23 (1954); *cf.* JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 67 (2018) ("A careful reading of *Haelan Laboratories v. Topps Chewing Gum* indicates that it did not create anything new, but as more and more commentators claimed that the decision did, it was hard to put the genie back in the bottle.").

3. *See, e.g.*, Stacey L. Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* 17, 17–18 (2014) ("Given the magnitude of its impact, *Haelan* was a remarkably terse decision—skimpy in its discussion of precedent, short on normative rationale, and utterly lacking in an examination of potential consequences.").

4. *See, e.g.*, MCCARTHY & SCHECHTER, *supra* note 2, at § 4:46, at 262; Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 *COLUM. J.L. & ARTS* 123, 125–26 (1996); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *IND. L.J.* 47, 47 (1994) ("The right of publicity is a legal theory which enables individuals to protect themselves from unauthorized, commercial appropriations of their personas."); *see also* cases cited *infra* note 46.

5. *See, e.g.*, ROBERT C. ELLIOT, *THE LITERARY PERSONA* 20–21 (1982) ("Whatever the uncertainties about derivation, there is no question that, in Latin, *persona* refers originally to a device of transformation and concealment on the theatrical stage."); *see also* Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 962 (1982) (noting that "'person' stems from the Latin *persona*, meaning, among other things, a theatrical role").

6. *See, e.g.*, Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 *TEX. L. REV.* 779, 829–35 (1997) (discussing the ambiguous nature of the term persona under right of publicity law); *see also* Rosina Zapparoni, *Propertising Identity: Understanding the United States Right of Publicity and Its Implications—Some Lessons for Australia*, 28 *MELBOURNE U. L. REV.* 690, 710 (2004) (describing the persona as an "ephemeral" concept lacking a clear meaning under the law).

not been clearly articulated,⁷ and its theoretical grounding remains shaky.⁸ Among other criticisms, the right of publicity is frequently accused of lacking a coherent justification, permitting only for economic redress against harms to the public persona, and stripping away individual identities by allowing for an alienable, proprietary right in one's personality.⁹ Why might Judge Frank have been motivated to fashion a transferable intellectual property right in the *monetary* value of one's objectified persona, or external image, distinct from the inner *psychic* or *spiritual* harm to feelings and dignity rooted in the individual and protected under the rubric of privacy?¹⁰

Judge Frank was a leading figure in the American legal realist movement known for his unique and controversial "jurisprudence of therapy," or "psychoanalysis of certain legal traditions,"¹¹ through seminal works including *Law and the Modern Mind*,¹² *Why Not a Clinical Lawyer-School?*,¹³ *Courts on Trial: Myth and Reality in American Justice*,¹⁴ and *Fate and Freedom: A Philosophy for Free Americans*.¹⁵ His judicial philosophy drew heavily on the ideas of then-cutting edge psychoanalytic thinkers, like Sigmund Freud,¹⁶ Jean Piaget,¹⁷ and Carl Jung,¹⁸ to describe the distorting effects of unconscious wishes and fantasies on the decision-making process of legal actors and

7. See, e.g., Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 892 (2017); Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 158–59 (2015) [hereinafter Tushnet, *A Mask that Eats*]; Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 1539, 1541 (2017).

8. See, e.g., Alice Hammerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 173–74 (1993); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 230 (2005).

9. See, e.g., Hammerli, *supra* note 8, at 388; Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 186–91 (2012).

10. See, e.g., 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (2017) (explaining that misappropriation "centers on damage to human dignity" while "the right of publicity relates to commercial damage to the business value of human identity"); Danielle Keats Citron, *The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life*, 42 COLUM. J.L. & ARTS. 383, 384–87 (2019) ("As Warren and Brandeis explained, privacy involved the spiritual. It was not about material economic or physical harm. . . [h]ence the difference in the right to publicity, which concerns financial harm and the market value of one's identity." (footnote omitted)).

11. Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175, 180 (1991); cf. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997).

12. FRANK, *LAW AND THE MODERN MIND* *supra* note 1.

13. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

14. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949) [hereinafter FRANK, *COURTS ON TRIAL*].

15. JEROME FRANK, *FATE AND FREEDOM: A PHILOSOPHY FOR FREE AMERICANS* (1945) [hereinafter FRANK, *FATE AND FREEDOM*].

16. See *id.* at 64; FRANK, *LAW AND THE MODERN MIND*, *supra* note 1, at 359; see also *infra* Part II.

17. See FRANK, *FATE AND FREEDOM*, *supra* note 15, at 164; FRANK, *LAW AND THE MODERN MIND*, *supra* note 1, at 117, 164, 201.

18. See FRANK, *COURTS ON TRIAL*, *supra* note 14, at 395–96.

judges.¹⁹ For Judge Frank, the psychoanalytic interplay between disparate parts of the personality supported the realist interpretation of judging as a highly subjective and indeterminate activity.²⁰

To this end, Judge Frank believed the “basic legal myth” is that the “Father-as-Infallible-Judge” simply deduces objective legal conclusions from rules.²¹ He argued, rather, that judges arrive at decisions based largely on the subjective influences of their individual personalities.²² For Judge Frank, “[t]he conventional image of the law,”—that law is objective and precise—is “a mask, a false-face, made to suit unconscious childish desires.”²³ And Judge Frank’s judicial philosophy was concerned with distinguishing between what he labeled the public-private dichotomy, in effect the “internal and external, psychical and physical, mind and body, subjective and objective.”²⁴ Indeed, though Judge Frank provided little rationale for articulating a personality right apart from privacy in *Haelan*, he had given a tremendous amount of attention to the personality in his scholarly works.

In considering Judge Frank’s psychoanalytic jurisprudence, this Article suggests that the modern right of publicity’s aim, apart from privacy law, may be usefully understood through the psychoanalytic conception of the personality—one divided into public and private subparts. In this sense, the term *persona*, or “false self,” refers to an individual’s social façade or front that reflects the role in life the individual is playing.²⁵ Distinct from an inner *shadow*, or “true self,” the psychoanalytic *persona* designates only the aspect of the personality that one presents to the world in public to gain social approval or economic advantage: “a kind of mask, designed on one hand to make a definite impression upon others, and on the other to conceal the true nature of the individual.”²⁶ Indeed, as a “metaphor of the actor and his mask,” the psychoanalytic *persona* is used “to indicate the public self of the individual, the image he presents to others, as contrasted with his feelings, cognition, and

19. See, e.g., Archie Zariski, *Sympathy and Empathy in Therapeutic Jurisprudence from a Psychoanalytic Perspective: From Freud to Posner and Beyond*, 1 INT’L J. THERAPEUTIC JURIS. 291, 300 (2016).

20. Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 180 (2010).

21. FRANK, LAW AND THE MODERN MIND *supra* note 1, at 18, 20; see also, e.g., Julius Paul, *Jerome Frank’s Attack on the “Myth” of Legal Certainty*, 36 NEB. L. REV. 547, 548, 554 (1957).

22. FRANK, LAW AND THE MODERN MIND *supra* note 1, at 111.

23. *Id.* at 175.

24. *Id.* at 77.

25. C. G. JUNG, PSYCHOLOGICAL TYPES OR THE PSYCHOLOGY OF INDIVIDUATION 268 (1923).

26. C. G. Jung, *The Persona and the Collective Unconscious*, in 7 THE COLLECTED WORKS OF C. G. JUNG: TWO ESSAYS IN ANALYTICAL PSYCHOLOGY 127, 192 (R. F.C. Hull trans., Herbert Read, et al. eds., 2d ed. 1966); cf. ERIC BERNE, TRANSACTIONAL ANALYSIS IN PSYCHOTHERAPY: A SYSTEMATIC INDIVIDUAL AND SOCIAL PSYCHIATRY 79 (1961); D. W. Winnicott, *Ego Distortion in Terms of True and False Self*, in THE MATURATIONAL PROCESS AND THE FACILITATING ENVIRONMENT: STUDIES IN THE THEORY OF EMOTIONAL DEVELOPMENT 140, 140–57 (1965).

interpretations of reality anchored in his private self.”²⁷ This parallels the legal divide between the right of publicity and the right of privacy.

However, the conceptual usefulness of such a dualistic metaphor of the self²⁸—one sharply divided into internal (private) and external (public) spheres—is being called into question amidst a growing technology, internet, and social media-driven need for interwoven rights of privacy and publicity.²⁹ In Jennifer Rothman’s recent book, *The Right of Publicity: Privacy Reimagined for a Public World*, she imagines privacy and publicity as intertwined rights, “protecting individuals’ identities rather than protecting a separable, purely economic interest.”³⁰ As Rothman puts it, the “[d]istinctions between public and private figures make little sense today as so-called private figures increasingly live public or quasi-public lives on Instagram, Twitter, Facebook, Pinterest, Periscope, and other online fora.”³¹

Given this heightened need for intertwined rights of privacy and publicity, this Article suggests that the law’s continued theoretical reliance on a dualistic metaphor of the personality is misguided, and instead, looks to intersubjective personality theory. Intersubjectivity provides publicity law with a useful conceptual update given its view of the personality as a relational, contextual, and social construct, rather than a public-private dichotomy. An intersubjective conception of the self is consistent with theoretical accounts of the self put forth by leading privacy theorists.³² Intersubjectivity emphasizes embodied experiences and social relations between individuals as integral to the development of the genuine personality, not as a public façade distinct from an underlying private self.³³

Unlike in traditional psychoanalytic thought (and current personality rights jurisprudence), intersubjectivity does not view individuals “as trying to hide or dress themselves up.”³⁴ “Public” and “private” are rather regarded as metaphors that may be helpful in understanding some individuals in some situations, some of the time.³⁵ Recasting the right of publicity through an intersubjective lens highlights the right’s role in protecting the personas of everyday citizens—not just celebrities—especially in the digital and social media context where users’ personas have value in the data economy.

This Article proceeds as follows. Part I provides an overview of the right of publicity as a right protecting the commercial and economic value of an

27. CHRISTOPHER F. MONTE, *BENEATH THE MASK: AN INTRODUCTION TO THEORIES OF PERSONALITY* 20 (2d ed. 1980).

28. For purposes of this discussion, this Article treats the terms “self” and “personality” as equivalents.

29. See JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 107–52 (2012). See generally ROTHMAN, *supra* note 2.

30. ROTHMAN, *supra* note 2, at 183.

31. ROTHMAN, *supra* note 2, at 183.

32. See *infra* Subpart V.B.

33. See *infra* Part V.

34. See PETER BUIRSKI & PAMELA HAGLUND, *MAKING SENSE TOGETHER: THE INTERSUBJECTIVE APPROACH TO PSYCHOTHERAPY* 4 (2001).

35. *Id.* at 14.

individual's "persona" as distinct from privacy's focus on personal harms to feelings, emotion, and dignity. This bifurcation between privacy and publicity was first articulated in Judge Frank's *Haelan* decision. Part II attempts to weave a plausible psychological origin story of the right of publicity by looking to Judge Frank's psychoanalytic jurisprudence. It suggests that Judge Frank—consciously or unconsciously—might have influenced the right of publicity's proprietary turn based on his own psychoanalytic understanding of a fragmented personality divided into internal and external spheres. Part III, in turn, examines the divided model of the personality common to traditional psychoanalysis through both Freudian and Jungian lenses. Part IV explores the practical and theoretical consequences of the right of publicity's current external, objective, and commercial focus, as exemplified by the actor's mask metaphor. Part V discusses intersubjective personality theory, explores theoretical accounts of intersubjectivity among privacy law scholars, and, before concluding, examines one potential application of intersubjectivity for publicity in the realm of personal public spaces such as social media.

I. THE RIGHT OF PUBLICITY'S IDENTITY CRISIS

The right of publicity is often considered in connection with the typically superficial nature of its landmark cases. From chewing gum,³⁶ to parody trading cards,³⁷ to human cannonballs,³⁸ to Dracula,³⁹ to video games featuring professional athletes,⁴⁰ to Eagles band member Don Henley-branded Henley shirts,⁴¹ to Johnny Carson-themed portable toilets,⁴² to a robot version of Vanna White,⁴³ and the list goes on and on.⁴⁴ However, as a right governing

36. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953) (involving rival chewing gum manufacturers).

37. *Cardtoons, Ltd. Co. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996) (involving parody trading cards featuring active major league baseball players).

38. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563–64 (1977) (involving a human cannonball performance that was broadcasted in its entirety on the news).

39. *Lugosi v. Universal Pictures*, 603 P.2d 425, 427–28 (Cal. 1979) (involving the rights of an actor who had played Count Dracula in the 1927 Deane-Balderston Broadway play).

40. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145–46 (3d Cir. 2013) (involving the former quarterback of Rutgers and the NCAA Football videogame); *Keller v. Elec. Arts, Inc.* 724 F.3d 1268, 1271 (9th Cir. 2013) (involving the former quarterback of Arizona State University and the NCAA Football videogame).

41. *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 589 (N.D. Tex. 1999) ("Sometimes Don tucks it in; other times he wears it loose—it looks great either way. Don loves his Henley; you will too." (internal quotation marks omitted)).

42. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 832–33 (6th Cir. 1983) (involving the use of a former late-night television host's name and persona as a pun on portable toilets).

43. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (involving the use of an ad using a robot dressed in a wig, gown, and jewelry that resembled White's hair and dress).

44. Other prominent right of publicity cases include *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988) (focusing on the "protectability of the voice" of Bette Midler used in a Ford commercial without her consent); *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003) (involving well-known performers, Johnny and Edgar Winter, suing DC Comics for using aspects of their likenesses in "Autumn Brothers" comic book characters); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800–01 (Cal. 2001) (involving lithographs and t-shirts bearing the likeness of The Three Stooges); *No Doubt v. Activision Publ'g, Inc.*, 122

the personality, it takes on a hidden depth and complexity when closely scrutinized. This Part first examines the right of publicity as a right governing the value of one's commercial "persona." It then examines the influence of Judge Frank's *Haelan* decision on the conceptualization of the right of publicity as an alienable intellectual property right to control the commercial value of one's "persona," distinct from the right to privacy's focus on protecting dignity, emotions, and feelings.

A. THE COMMERCIAL PERSONA

There exists no federally legislated right of publicity. Rather, the right has been adopted by either judicial decision or by statute in the majority of states.⁴⁵ While varying state to state, the common law right of publicity is now widely seen as the right to control the *commercial* use and value of one's persona.⁴⁶ The right of publicity generally requires three elements to be actionable: (1) use of an individual's *persona*; (2) for commercial purposes; and (3) without plaintiff's consent. However, the proper definition of "persona" is unclear and typically considered some combination of the economic value in not just one's name or likeness, but also one's image—and "image" is not just what a person looks like, but also includes audiences' beliefs about that person.⁴⁷

While the persona has been described in the case law as "the essence of the person,"⁴⁸ it is usually regarded for right of publicity purposes as the strictly public image of the person. One judge's view is that the right of publicity "protects the persona—the public image that makes people want to identify with the object person, and thereby imbues his name or likeness with commercial value marketable to those that seek such identification."⁴⁹ The right of publicity, according to one appellate court, "protects against the unauthorized appropriation of an individual's very persona which would result

Cal. Rptr. 3d 397, 401–03 (2011) (involving rock band, No Doubt, suing video game publisher, Activision, for featuring computer-generated images of band members in video game, Band Hero).

45. As of 2019, thirty-eight states have some form of common law precedent, while twenty-four states have a right of publicity statute. See *Statutes and Interactive Map*, RIGHT OF PUBLICITY, <https://righttopublicity.com/statutes> (last visited Jan. 24, 2020).

46. See, e.g., *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) ("[T]he tort of misappropriation of name or likeness protects a person's *persona*. A *persona* does not fall within the subject matter of copyright."); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 289 (2d Cir. 1981) (Mansfield, J., dissenting) ("The right of publicity . . . protects against the unauthorized appropriation of an individual's very persona which would result in unearned commercial gain to another."); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978) ("The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona.'"); *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 260 (N.Y. Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (N.Y. App. Div. 1985) (The New York statute "is intended to protect the essence of the person, his or her identity or *persona* from being unwillingly or unknowingly misappropriated for the profit of another.").

47. Rebecca Tushnet, *A Mask that Eats*, *supra* note 7, at 158.

48. *Onassis*, 472 N.Y.S.2d at 260.

49. *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983), *opinion supplemented*, 578 F. Supp. 59 (S.D.N.Y. 1983).

in unearned commercial gain to another.”⁵⁰ Another court defines it as “public reputation.”⁵¹

Adding to the confusion is the rhetoric of the term “persona” itself. Author of the leading treatise on publicity law, J. Thomas McCarthy, explains that the word persona has a semantic problem in the right of publicity context given that it presents two distinct meanings—(1) the commercial persona and (2) the human persona. McCarthy writes:

(1) “Persona” describes that bundle of commercial values embodied in the “identity” of a person. A “persona” has commercial value in that it can attract consumers’ attention to an advertisement or product. In creating a right of publicity, the law recognizes the existence of this economic reality; and

(2) “Persona” describes in a single word the various ways by which a human being can be identified. . . . “The right of publicity comprises a person’s right to own, protect and commercially exploit his own name, likeness and persona.” A more terse definition would be that the right of publicity protects a human persona—period.⁵²

And the Merriam-Webster dictionary, for instance, defines persona in multiple ways, each potentially relevant in the context of a personality right: (1) “a character assumed by an author in a written work”; (2) “from Latin,” either (a) “an individual’s social facade or front that especially in the analytic psychology of C. G. Jung reflects the role in life the individual is playing” or (b) “the personality that a person (such as an actor or politician) projects in public: image”; or (3) “a character in a fictional presentation (such as a novel or play).”⁵³

Confusion over what the persona means tends to manifest in both common law decisions and states’ legislative drafting of the right. Some states interpret persona narrowly and others more expansively. For example, Indiana’s statute refers to the property interest in a personality’s “(1) name, (2) voice, (3) signature, (4) photograph, (5) image, (6) likeness, (7) distinctive appearance, (8) gestures, or (9) mannerisms.”⁵⁴ Virginia, in contrast, limits the right of publicity to name or picture.⁵⁵ While publicity was initially limited to protecting one’s name and likeness, “a broader concept arose” following Judge Frank’s *Haelan* decision, “one often referred to as a ‘persona.’”⁵⁶ And such use of one’s persona leads to greater liability than for using their name or likeness

50. *Factors Etc.*, 652 F.2d at 289 (Mansfield, J., dissenting).

51. *Ali*, 447 F. Supp. at 728 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977)).

52. MCCARTHY & SCHECHTER, *supra* note 2, at § 4:46 (footnotes omitted).

53. See *Persona*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/persona> (last visited Jan. 24, 2020). The Jungian definition, 2(a), will be explored further in Part III, as especially relevant given Judge Frank’s psychoanalytic approach to understanding the law. See *infra* Part II.

54. IND. CODE § 32-36-1-6 (2019).

55. See, e.g., *WJLA-TV v. Levin*, 564 S.E.2d 383, 395 (Va. 2002).

56. ROTHMAN, *supra* note 2, at 89.

given that it encompasses any and all use or evocation of a person's outward identity.⁵⁷

To illustrate the breadth of the right of publicity's protection of the commercial persona—as distinct from a narrower focus on name, picture, or likeness—consider three seminal examples from the case law.

Midler v. Ford Motor Company involved the protectability of famed actress and singer Bette Midler's unique voice. Here, Ford Motor Company and its advertising agency used a sound alike of Midler on a television commercial, and Midler sued for a violation of her right of publicity.⁵⁸ Notably, neither Midler's name nor picture was used in the commercials. While Midler's song, "Do You Want To Dance," was used, Ford's advertising agency had properly licensed the copyright for it.⁵⁹ At issue was only the nature of Midler's voice in that the sound-alike, who was hired after Midler refused to participate, "sounded exactly" like Midler's recorded version of the song.⁶⁰ In siding with Midler, the Ninth Circuit held that:

[W]hen a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California. Midler has made a showing, sufficient to defeat summary judgment, that the defendants here for their own profit in selling their product did appropriate part of her identity.⁶¹

Therefore, Midler's commercial persona was protected, even despite her own individual lack of participation in the advertisement.

Carson v. Here's Johnny Portable Toilets involved a lawsuit by Johnny Carson, former host and star of "The Tonight Show."⁶² Throughout Carson's decades-long tenure on The Tonight Show, he was introduced each night with the phrase "Here's Johnny," for which he became widely known.⁶³ The defendant, Here's Johnny Portable Toilets, Inc. rented and sold "Here's Johnny" portable toilets, and, clearly aware of Carson's use of the phrase, coupled this with the phrase "The World's Foremost Comedian."⁶⁴ In holding for Carson, the Sixth Circuit stated:

The right of publicity . . . is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used. Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used.⁶⁵

57. *Id.*

58. *Midler v. Ford Motor Company*, 849 F.2d 460, 461–62 (9th Cir. 1988). The soundalike was Ula Hedwig, who was a longtime backup singer for Midler. *Id.*

59. *Id.* at 460.

60. *Id.* at 462.

61. *Id.* at 463–64.

62. 698 F.2d 831, 832–33 (6th Cir. 1983).

63. *Id.*

64. *Id.*

65. *Id.* at 835.

Thus, Johnny Carson's phrase "Here's Johnny" was protected based on its mere association with his commercial persona.

White v. Samsung Electronics America, Inc. involved a dispute over an advertisement by Samsung for video cassette recorders that depicted a robot dressed in a gown, wig, and jewelry.⁶⁶ The robot was designed to resemble current "Wheel of Fortune" host Vanna White, and the "caption of the ad read: 'Longest-running game show. 2012 A.D.'"⁶⁷ White sued Samsung, and the Ninth Circuit held in her favor:

The robot is standing on what looks to be the Wheel of Fortune game show set. Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one. Indeed, defendants themselves referred to their ad as the "Vanna White" ad. We are not surprised.

Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.⁶⁸

As such, White prevailed despite the robotic depiction of her commercial persona.

These cases illustrate that the right of publicity is a broad right capable of encompassing not just one's name and likeness, but also the commercial persona—one's objectified image as a commodity distinct from any emphasis on inner and subjective feelings and emotions. The next Subpart focuses on how such a personality right arose at common law.

B. THE PUBLIC-PRIVATE DICHOTOMY

Today, the right of publicity and the right of privacy are considered opposites; publicity is thought to be "the reverse side of the coin of privacy."⁶⁹ However, the rights were originally intertwined.⁷⁰ Privacy, especially the tort of commercial appropriation of identity, has long focused not just on *privacy in solitude*, but also *privacy in public*.⁷¹ That is, even before a formal right of

66. 971 F.2d 1395, 1396 (9th Cir. 1992).

67. *Id.* It is now 2020 A.D. and the real Vanna White is still hosting the original human version of Wheel of Fortune. Her contract has been extended until 2022. Lesley Golberg, *Alex Trebek, Pat Sajak, Vanna White Renew Contracts Through 2022*, HOLLYWOOD REP. (Oct. 31, 2018, 12:05 PM), <https://www.hollywoodreporter.com/live-feed/alex-trebek-pat-sajak-vanna-white-renew-contracts-2022-1156793>.

68. *White*, 971 F.2d at 1399.

69. Nimmer, *supra* note 2, at 204; see also Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 COLUM. J.L. & ARTS 277, 287 (2019).

70. Rothman, *supra* note 69, at 287.

71. While *Haelan* popularized the concept of the right of publicity, it was not the first court to coin the term "right of publicity," despite often being credited as doing so. The term was used, rather, at least as early as 1905, although to describe the public aspect of privacy rather than any formal publicity right under the common law. See *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) ("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." (emphasis added)).

publicity developed at common law, privacy was focused on the right to control one's "publicity," or how and when one's name or picture could be used by others in public.⁷² Privacy law was developed, at least in part, to ward off "unwarranted publicity" in response to the advent of the portable camera, which enabled widespread commercial exploitation.⁷³ Several cases, beginning as early as the late 1800s, involved the nonconsensual use of names and photos of random individuals, typically on products and in advertisements.⁷⁴ Performers objected to the taking of their names, images, and photographs without permission in newspapers and promotions,⁷⁵ typically recovering damages for dignitary and emotional—but sometimes also economic—harms.⁷⁶

Common law privacy can be traced back at least as far as Samuel Warren and Louis Brandeis's seminal 1890 *Harvard Law Review* article, *The Right to Privacy*.⁷⁷ There, consistent with the challenges faced in that era, Warren and Brandeis articulated the normative bases for a right intended to protect the press from *publishing* private facts and photographs.⁷⁸ They wrote:

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. . . . The existence of this right does not depend on the particular method of expression adopted. . . . The right is lost only when the author himself communicates his production to the public—in other words, publishes it.⁷⁹

It was not until 1960, however, that William Prosser's seminal article, simply titled *Privacy*, carved four distinct causes of action out of the still-developing doctrine.⁸⁰ As Prosser summarizes:

72. See Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1119, 1120 (2013).

73. ROTHMAN, *supra* note 2, at 12–13, 27.

74. See, e.g., *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 168 (5th Cir. 1942) (involving the use of a famous football player's photograph on advertisement for beer); *Pavesich*, 50 S.E. at 70 (involving plaintiff's picture on advertisement for insurance); *Loftus v. Greenwich Lithographing Co.*, 182 N.Y.S. 428, 429–30 (N.Y. App. Div. 1920) (involving plaintiff's picture being used without her consent for an advertisement for a film in New York City); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 442 (N.Y. 1902) (involving plaintiff finding her picture on an ad for Franklin Mills flour); *Edison v. Edison Polyform Mfg., Co.*, 67 A. 392, 392 (N.J. Ch. 1907) (involving appropriation of Thomas A. Edison's name and likeness for use in labeling of pharmaceuticals).

75. See, e.g., cases cited *supra* note 74; cf. Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1328 (2002) ("The right of publicity had its origins in a body of tort law that was designed to protect personal privacy.").

76. See generally Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 229 (1999).

77. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

78. Cf. Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128, 133 (2016) (exploring the possibility that Warren's motivation for writing *The Right to Privacy* may have been about his drive to protect his younger siblings, especially his gay brother Ned).

79. Warren & Brandeis, *supra* note 77, at 198–200 (emphasis added) (footnotes omitted).

80. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); see also Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1890 (2010) (noting that, beyond

What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, “to be let alone.”⁸¹

To this end, Prosser described four separate torts: (1) intrusion upon the plaintiff’s seclusion or solitude, or into his or her private affairs;⁸² (2) public disclosure of embarrassing private facts about the plaintiff;⁸³ (3) false light in the public eye;⁸⁴ and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.⁸⁵ While the first three torts focus on emotional harm to the subject, the fourth alludes to Judge Frank’s articulation of a “right of publicity” seven years prior in the 1953 Second Circuit Court of Appeals decision.⁸⁶

In *Haelan Laboratories v. Topps Chewing Gum*, Judge Frank recognized for the first time an *alienable* licensing right in the commercial value of an objectified image—or in other words, a persona—as distinct from the non-assignable right to privacy.⁸⁷ In what was really a breach of contract case, *Haelan* held that a professional baseball player could sell to a third party the exclusive right to use his image on baseball cards.⁸⁸ In effect, *Haelan* was the first case to recognize a licensable right in the personality.

The facts involved the plaintiff (Haelan), a chewing gum manufacturer, entering into a contract with a baseball player providing Haelan with the exclusive right to use the player’s photographs to be sold in connection with Haelan’s chewing gum during the term of the contract.⁸⁹ Defendant (Topps), a rival chewing gum manufacturer who knew of the contract between Haelan and the baseball player, deliberately induced the baseball player to contract with Topps to use the player’s same photograph during the term of Haelan’s

Prosser’s 1960 *California Law Review* article, Prosser was engaged with tort privacy scholarship from the 1940s until his death in 1972; and providing a critical assessment of Prosser’s legacy in that regard).

81. Prosser, *supra* note 80, at 389 (footnotes omitted).

82. *Id.* at 389–92.

83. *Id.* at 392–98.

84. *Id.* at 398–401.

85. *Id.* at 401–06.

86. *Id.* at 406–07 (“[Appropriation’s] proprietary nature is clearly indicated by a decision of the Second Circuit that an exclusive license has what has been called a ‘right of publicity,’ which entitles him to enjoin the use of the name or likeness by a third person. Although [*Haelan*] has not yet been followed, it would seem clearly to be justified.” (footnotes omitted)).

87. 202 F.2d 866 (2d Cir. 1953). *See, e.g.*, Brian L. Frye, *Incidental Intellectual Property*, 33 ENT. & SPORTS LAW. 24, 27 (2017) (“[T]he Second Circuit effectively created a new kind of intellectual property, the ‘right of publicity,’ which gives people an alienable right in the commercial use of their name and likeness. After *Haelan*, not only could people prevent the commercial use of their name and likeness without their permission, but also they could transfer the right to control the commercial use of their name and likeness to someone else.”).

88. 202 F.2d at 869.

89. *Id.* at 867.

contract.⁹⁰ The baseball player then contracted with Topps for the photograph during the designated term of Haelan's exclusive contract.⁹¹

When Haelan sued, Topps countered that "the contract with plaintiff was no more than a release by the ball-player to plaintiff of the liability which, absent the release, plaintiff would have incurred in using the ball-player's photograph, because such a use, without his consent, would be an invasion of his right of privacy."⁹² And, under New York law, "this statutory right of privacy is personal, not assignable; therefore, plaintiff's contract vested in plaintiff no 'property' right or other legal interest which defendant's conduct invaded."⁹³

Judge Frank, along with Judge Clark and Chief Judge Swan (concurring),⁹⁴ held that the privacy statute did not limit Haelan's rights.⁹⁵ Rather, the Second Circuit found that New York recognized an independent common law right protecting commercial interests in contrast to the personal and emotional ones protected under privacy.⁹⁶ Moreover, such a right was assignable, thus granting Haelan—who did not hold the baseball player's non-transferable right of privacy—a cause of action.⁹⁷

Indeed, Judge Frank considered publicity and privacy as separate interests. According to Judge Frank:

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, and that such a grant may be validly made "in gross" i.e., without any accompanying transfer of a business or of anything else. . . . 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 likenesses, would *feel sorely deprived* if they *no longer received money* for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.⁹⁸

To be sure, Judge Frank had a practical reason for articulating a publicity right in this circumstance. Privacy rights, as non-severable from the right-holder, could not accommodate a transferable cause of action for the plaintiff

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. In looking at the letters and internal memoranda exchanged in the case, it seems that Judge Clark contributed only rather minor edits and suggestions to Judge Frank's written opinion, though documents alluded to the fact that they had discussed the matter in some detail orally. Special thanks to the Lillian Goldman Law Library at Yale Law School where the Jerome Frank papers are archived. Jennifer Rothman has drawn some additional conclusions from the *Haelan* case record, pertaining especially to Judge Clark's potential motive for fashioning a right of publicity separate from privacy. See ROTHMAN, *supra* note 2, at 59–62; Rothman, *supra* note 69, at 286–88.

95. *Haelan*, 202 F.2d at 868–89.

96. *Id.*

97. *Id.*

98. *Id.* at 868 (emphasis added).

based on the plaintiff's contract to use celebrity baseball players' likenesses in connection with the sale of chewing gum. Yet Judge Frank need not have created a new intellectual property right to hold Topps liable. Judge Swan had concurred in the judgment insofar as the opinion "deals with the defendant's liability for intentionally inducing a ball-player to breach a contract which gave plaintiff the exclusive privilege of using his picture."⁹⁹ Thus, the Second Circuit's analysis could have sounded entirely in tort or contract law and achieved a similar result. But it went much further.

Judge Frank's opinion also gives little useful insight as to his rationale for articulating a licensable "right of publicity" beyond the following cursory description:

[A] man has no legal interest in the publication of his picture other than his right of privacy, i.e., a *personal and non-assignable* right not to have his *feelings hurt* by such a publication. . . . 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, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.¹⁰⁰

Judge Frank's analysis has been much maligned by commentators. Stacey Dogan has written that "[g]iven the magnitude of its impact, *Haelan* was a remarkably terse decision—skimpy in its discussion of precedent, short on normative rationale, and utterly lacking in an examination of potential consequences."¹⁰¹ *Haelan*, in effect, "created a sort of rogue intellectual property right, lacking internal limits and disciplined only by the intervention of the First Amendment."¹⁰² Michael Madow notes that Judge Frank offered no rationale for the right of publicity beyond that celebrities who were denied image revenues would "feel sorely deprived," failed to evaluate the potential costs of such a right, and that his opinion "contained not a trace of moral or conceptual uneasiness about the commodification of personality."¹⁰³ And, as Sheldon Halpern puts it, it was "natural and obvious to the court that celebrity personas should be treated as garden variety commodities, to be bought and sold in the market like any other."¹⁰⁴

While the Second Circuit, as a federal court, did not actually have the power to change New York law,¹⁰⁵ its description of the right of publicity as independent of privacy has proven extremely influential. In fact, despite its

99. *Id.* at 869 (Swan, J., concurring).

100. *Id.* at 868 (emphasis added).

101. DOGAN, *supra* note 3, at 17–18.

102. *Id.* at 18.

103. Madow, *supra* note 8, at 173.

104. *Id.* at 174.

105. *See, e.g.*, Rothman, *supra* note 69, at 287.

flaws, the *Haelan* formulation caught on as “the principal support for the doctrine that the right of publicity protects a distinct economic interest in personality.”¹⁰⁶ After Judge Frank’s articulation, Melville Nimmer’s 1954 law review article, called *The Right of Publicity*, theorized a dichotomy between privacy and publicity.¹⁰⁷ He called the right of publicity the “reverse side” of privacy, conceptualizing a public right in excess of privacy and unfair competition.¹⁰⁸ Nimmer argued that privacy law:

[I]s not adequate to meet the demands of the second half of the twentieth century With the tremendous strides in communications, advertising, and entertainment techniques, the *public personality* has found that the use of his name, photograph, and likeness has taken on a *pecuniary* value undreamed of at the turn of the century.¹⁰⁹

And courts began to take to this “Cartesian dualism” between privacy and publicity. In 1956, for instance, the Third Circuit remarked:

[W]e think the reader will conclude, as do we, that the word of *power* most frequently employed by the courts is either “privacy” or “property,” the latter usage being not infrequently colored by the contract rights of a performer or of an entrepreneur.

There are, speaking very generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him, arguably, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur.¹¹⁰

And the Second Circuit, for example, noted that:

It is evident that courts address intrusions on feelings, reputation and privacy only when an individual has elected not to engage in personal commercialization. By contrast, when a ‘persona’ is in effect a product, and when that product has already been marketed to good advantage, the appropriation by another of that valuable property has more to do with unfair competition than it does with the right to be left alone.¹¹¹

Indeed, privacy rights came to serve as a “vehicle for the protection of an internal interest, the feelings of one who involuntarily has been publicly ‘used.’”¹¹² Put differently, a “subjective, emotional harm flowing from exposure.”¹¹³ As one court described it, “[r]elief is available under the applicable privacy law only for acts that invade plaintiffs’ privacy and consequently bruise their feelings [I]ts primary purpose . . . is to protect

106. Halpern, *supra* note 2, at 1202.

107. *See generally* Nimmer, *supra* note 2.

108. *Id.* at 204.

109. *Id.* at 203–04 (emphasis added).

110. *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 486 (3d Cir. 1956) (footnotes omitted).

111. *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 283 (S.D.N.Y. 1977), *aff’d.*, *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978).

112. Halpern, *supra* note 2, at 1204 (emphasis added).

113. *Id.* at 1205.

the feelings and privacy of the ‘little man.’”¹¹⁴ As Jennifer Rothman, who takes issue with the consensus view that *Haelan* coined or created the right of publicity, puts it:

A careful reading of *Haelan Laboratories v. Topps Chewing Gum* indicates that it did not create anything new, but as more and more commentators claimed that the decision did, it was hard to put the genie back in the bottle. . . . [O]ver the decades that followed *Haelan*, parties advocating for an expansive, transferable property-like right, distinct from the right of privacy, began to prevail in many states, particularly in federal courts applying their best guess about what state courts might decide about their own states’ laws. The right of publicity then exploded across the country and expanded in scope far beyond what even its initial proponents had advocated.¹¹⁵

Thus, though the right of publicity developed in “a kind of analytical fog,”¹¹⁶ it has come to be widely interpreted as a property right protecting strictly commercial interests rather than rights personal to an individual. As Alice Haemmerli explains, the doctrines of privacy and publicity following *Haelan* “developed in a schizoid manner: publicity rights were purely economic property rights, as distinct from ‘personal’ privacy rights.”¹¹⁷ On the other hand, the cause of action in a privacy case, also following *Haelan*, came to be regarded entirely as internal, concerning only mental harm, or “one’s own peace of mind.”¹¹⁸ Even injury to one’s “character or reputation,” which had previously been allowed, would not suffice.¹¹⁹ Rather, only a “direct wrong of a *personal* character resulting in injury to the feelings *without regard to any effect* which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community.”¹²⁰

And in 1977, the Supreme Court affirmed the *Haelan* interpretation of the right of publicity as an intellectual property right in *Zacchini v. Scripps-Howard Broadcasting Co.* In *Zacchini*, the Court held that the press has no constitutional right to broadcast a performer’s entire fifteen second “human cannonball” act without consent or compensation.¹²¹ The Court remarked that publicity rights, like patent and copyright law, have “little to do

114. *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (quoting *Lugosi v. Universal Pictures*, 603 P.2d 425, 443 n.23 (Cal. 1979)).

115. ROTHMAN, *supra* note 2, at 67. Rothman distinguishes between “privacy in public,” privacy in private, and the “right of publicity.” *Id.* at 11–12.

116. Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1, 2 (1985).

117. Haemmerli, *supra* note 8, at 407.

118. *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 197 (Cal. Ct. App. 1955).

119. *Id.*

120. *Id.* (emphasis added).

121. *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563–64, 572 (1977) (holding that the news broadcasting of petitioner’s “human cannonball” performer’s entire fifteen-second long act, while in the public interest, did not immunize defendant, news media, from civil liability concerning violation of petitioner’s right of publicity); *see also* Douglas G. Baird, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1192–94 (1978) (noting that the *Zacchini* decision was based on the justification of promoting economic incentives, like copyright law).

with . . . feelings or reputation.”¹²² Instead, broadcasting “a film of petitioner’s entire act poses a substantial threat to the economic value of that performance.”¹²³ Thus, following *Zacchini*, a “harm to feelings” publicity claim would be inconsistent with the Supreme Court’s articulation of the right of publicity as a freestanding intellectual property right built upon an economic incentives-based rationale.¹²⁴ Rothman writes regarding this point:

The Second Circuit, in *Haelan*, suggested (even if unintentionally) the possibility of a transferable right, and the U.S. Supreme Court endorsed and expanded this right to encompass performance rights, and to stand up against the First Amendment rights even in a news broadcast. By the end of the 1970s, the right of publicity was well established as an independent right—primarily framed as an exclusionary property right similar to longstanding IP rights, like patent and copyright laws. As this shift took place, a cramped understanding of [tort-based] privacy law—one focused more on private figures, seclusion, secrecy—overtook the broader notions of autonomy and dignity that had reigned over the first seven to eight decades of [tort-based] privacy law.¹²⁵

In sum, the right of publicity has come to protect the persona as a freestanding intellectual property right apart from the human person. Conceptualizing the right of publicity as a property right in the persona allows a level of comfort with the right being assignable, descendible, survivable, taxable, and capable of division in the case of divorce.¹²⁶ As J. Thomas McCarthy, author of the leading publicity treatise, has observed, “infringement of the right of publicity focuses upon injury to the *pocketbook* while an invasion of ‘appropriation privacy’ focuses upon injury to the *psyche*.”¹²⁷

Thus, the right of publicity is now typically considered transferable, and is structured so as to protect the economic interests of those who commodify their personas for a living. Rarely, if ever, do subjective emotional, dignitary, or reputational harms provide an apt basis for recovery.¹²⁸ Indeed, the right of publicity as predicated on Judge Frank’s interpretation of New York law in *Haelan* has been accepted, and its doctrine has grown more sophisticated in the

122. See *Zacchini*, 433 U.S. at 573.

123. *Id.* at 575.

124. According to Rothman, given the Supreme Court’s binding precedential effect, “[i]t was *Zacchini*, not *Haelan*, that created what we understand today as the right of publicity.” Rothman, *supra* note 69, at 302. Perhaps so, though now with over 1000 citations, Judge Frank’s analysis in *Haelan* has proven extremely influential in terms of establishing publicity as a freestanding, transferable right in the persona.

125. See ROTHMAN, *supra* note 2, at 86.

126. See *infra* Part IV.

127. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:60 (1987). In addition, according to the Nevada Supreme Court:

The distinction between these two torts is the interest each seeks to protect. The appropriation tort seeks to protect an individual’s personal interest in privacy; the personal injury is measured in terms of the mental anguish that results from the appropriation of an ordinary individual’s identity. The right of publicity seeks to protect the property interest that a celebrity has in his or her name.

People for the Ethical Treatment of Animals v. Berosini, 895 P.2d 1269, 1283 (Nev. 1995).

128. Barbas, *supra* note 72, at 1187.

nearly seventy years since it was decided.¹²⁹ The next Part theorizes that Judge Frank—consciously or unconsciously—may have influenced this commercial and proprietary shift in right of publicity jurisprudence based on a psychoanalytic understanding of the personality as fractured into distinctly public and private aspects.

II. JUDGE JEROME FRANK’S PSYCHOANALYTIC JURISPRUDENCE

In attempting to better understand the conceptual division between privacy and publicity, this Part looks to the judicial philosophy of the right of publicity’s founder, Judge Jerome Frank. While Judge Frank gave few clues as to his motives in the *Haelan* decision, his controversial and aggressive form of legal realism was in fact largely built around a psychoanalytic model of the personality, stressing external and internal divisions. Judge Frank’s dualistic understanding of the personality could plausibly have motivated or influenced his drawing of a sharp divide in *Haelan* between the objective, commercial persona (publicity rights) and subjective harm to the inner person’s dignity and feelings (privacy rights). Perhaps that is why, as Halpern noted, it was “*natural and obvious* to [Judge Frank] . . . that celebrity personas should be treated as garden variety commodities.”¹³⁰ And regardless of Judge Frank’s conscious intent, the psychoanalytic division of the self—into internal and external spheres—might provide a useful psychological metaphor for understanding the right of publicity’s protection of the public persona as distinct from the private psyche.¹³¹

129. Halpern, *supra* note 2. This doctrinal sophistication has yielded a hydra-like triad of sub-rights, which can usefully be described as the mirror image of the privacy torts. As Eric Johnson writes in his recent article, *Disentangling the Right of Publicity*, even all these years later, “courts have yet to clearly articulate what the right of publicity is.” Johnson, *supra* note 7, at 893. In an attempt to remedy this misunderstanding, Johnson commendably unearths three separate rights under the umbrella of a “right of publicity”: (1) an endorsement right, (2) a merchandising entitlement, and (3) the right against virtual impressment. *Id.* at 891. This triad mirrors public versions of the privacy torts: (1) intrusion upon seclusion, (2) public disclosure, (3) false light, and (4) appropriation of name or likeness. *Id.* at 896. In fact, Johnson’s article carves out right of publicity doctrine in much the same way as Prosser’s classic *Privacy* did for its namesake.

130. Madow, *supra* note 8, at 174 (emphasis added). Moreover, the rise of psychoanalysis as an important influence on legal doctrine and theory coincided with the development of the right of publicity as a strictly economic right. As Anne Dailey notes:

In 1930, Jerome Frank published his seminal book, *Law and the Modern Mind*, which drew on psychoanalytic ideas to describe the distorting effects of infantile wishes and fantasies on the decision making of legal actors and judges. Over the following decades, the ascendancy of psychoanalysis was reflected in legal scholarship on the insanity defense, child custody, and jurisprudence. Indeed, by the 1970s, psychoanalysts had even joined the Harvard and Yale law school faculties.

Dailey, *supra* note 20, at 180 (footnote omitted) (citation omitted).

131. See, e.g., Lewis A. Kirshner, *The Concept of the Self in Psychoanalytic Theory and its Philosophical Foundations*, 39 J. AM. PSYCHOANALYTIC ASS’N. 157, 157 (1991) (noting that, at least historically, “[p]sychoanalysis has not utilized Hegel’s conception of the intersubjective origins of the self, in which the self emerges only in an encounter with another subject,” but instead reflects “a homuncular self internal to consciousness and the isolation of the subject from other selves”).

Even before his appointment to the Second Circuit Court of Appeals in 1941,¹³² Judge Frank was a leading, though polarizing, figure in the American legal realist movement.¹³³ He was known for his unique “psychological realism” exemplified in many scholarly works. These include his most influential work, the seminal 1930 book *Law and the Modern Mind*,¹³⁴ as well as several other books and articles such as *Courts on Trial: Myth and Reality in American Justice*,¹³⁵ *Fate and Freedom: A Philosophy for Free Americans*,¹³⁶ *Are Judges Human?*,¹³⁷ *Judicial Fact-Finding and Psychology*¹³⁸ and *Why Not a Clinical Lawyer-School?*¹³⁹

Judge Frank’s jurisprudence has come to be regarded as a “jurisprudence of therapy”¹⁴⁰ or a “psychoanalysis of certain legal traditions”¹⁴¹ because of its reliance on the ideas of then cutting-edge thinkers like Sigmund Freud,¹⁴² Jean Piaget,¹⁴³ and Carl Jung.¹⁴⁴ In relying on their work and ideas, Frank created an “elaborate psychoanalytical apparatus” as an explanation of the “persistent longing of lawyers and non-lawyers for a patently unachievable legal

132. The son of a lawyer, Judge Frank was born in 1889. He received a Ph.D. from the University of Chicago in 1909 after studying under Charles Merriam who was developing a psychological approach to political science. He soon went on to enroll at the University of Chicago Law School and graduated in 1912 with the highest grades in the school’s history. Upon graduation, he worked at a large corporate law firm in Chicago and then left to practice law at another corporate firm in New York City. Judge Frank underwent psychoanalysis while in New York and soon after, in 1930, wrote *Law and the Modern Mind*. Between 1933 and 1941, he bounced back and forth between private practice and Franklin D. Roosevelt’s “New Deal” administration. Judge Frank was then appointed to the United States Court of Appeals for the Second Circuit, despite experiencing anti-Semitism during the appointment process. Duxbury, *supra* note 11, at 176.

133. See, e.g., Shyamkrishna Balganes, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 800 (2016) (noting that much of Judge Frank’s legal philosophy “has since been soundly repudiated in American legal thinking”); Leiter, *supra* note 11, at 269 (“Even among Realists, of course, Frank’s view represented a particular sort of extreme—as Frank himself recognized.”) (citing Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 22–23, 30 n.31 (1931) [hereinafter Frank, *Are Judges Human? Part One*]).

134. See, e.g., Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 BUFF. L. REV. 1127, 1128 (2010) (noting that *Law and the Modern Mind* is still regarded as a “legal classic” and Frank’s “most famous contribution to legal theory”); Charles E. Clark, *Jerome N. Frank*, 66 YALE L.J. 817, 817 (1957) (noting that “*Law and the Modern Mind* fell like a bomb on the legal world”); Walter Wheeler Cook, *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 82 (1931) (describing the book as “excit[ing][.]” “keen, cogent,” and “unique”).

135. See FRANK, COURTS ON TRIAL, *supra* note 14.

136. See FRANK, FATE AND FREEDOM, *supra* note 15.

137. See Frank, *Are Judges Human? Part One*, *supra* note 133; Jerome Frank, *Are Judges Human? Part Two: As Through a Glass Darkly*, 80 U. PA. L. REV. 233 (1931).

138. See Jerome N. Frank, *Judicial Fact-Finding and Psychology*, 14 OHIO ST. L.J. 183 (1953).

139. See Frank, *supra* note 13 (establishing what might be the first formal call for clinical legal education).

140. Thurman Arnold, *Judge Jerome Frank*, U. CHI. L. REV. 633, 635 (1957).

141. Duxbury, *supra* note 11, at 180.

142. See FRANK, LAW AND THE MODERN MIND, *supra* note 1, at 359; FRANK, FATE AND FREEDOM, *supra* note 15, at 64.

143. See FRANK, LAW AND THE MODERN MIND, *supra* note 1, at 164.

144. See FRANK, COURTS ON TRIAL, *supra* note 14, at 366.

stability.”¹⁴⁵ Judge Frank published the bulk of his work between 1930 and 1953,¹⁴⁶ the year he wrote the *Haelan* decision.

Judge Frank underwent six months of intensive psychoanalysis in 1930, after which he published *Law and the Modern Mind*.¹⁴⁷ The book, considered the foremost realist discussion of law and psychoanalysis,¹⁴⁸ identifies his theory of a “basic legal myth,” unconsciously reinforced by lawyers, judges, and the public, that the law is objective and certain, and that applying legal rules to specific cases is a mechanical task performed by judges. For Judge Frank, rather, the “personality of the judge is the pivotal factor in law administration, then law may vary with the personality of the judge who happens to pass upon any given case.”¹⁴⁹ As Judge Frank puts it:

[Most people] retain a yearning for Someone or Something, qualitatively resembling father, to aid them in dissipating the fear of chance and change. . . . To the child the father is the Infallible Judge, the Maker of the definite rules of conduct. He knows precisely what is right and what is wrong and, as head of the family, sits in judgment and punishes misdeeds. The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible-Judge. That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child’s Father-Judge. That childish longing is an important element in the explanation of the absurdly unrealistic notion that law is, or can be made, entirely certain and definitely predictable.¹⁵⁰

While Judge Frank maintained and refined his psychoanalytic approach to understanding the law throughout his career, as a lawyer, scholar, and later a judge,¹⁵¹ he first became interested in the works of Freud while a student at the

145. Edward F. Barrett, *Confessions and Avoidance—Reflections on Rereading Judge Frank’s Law and the Modern Mind*, 24 NOTRE DAME L. REV. 447, 449 (1949).

146. See Balganes, *supra* note 133, at 814.

147. Duxbury, *supra* note 11, at 176.

148. Peter Goodrich, *Habermas and the Postal Rule*, 17 CARDOZO L. REV. 1457, 1465 n.30 (1996); see also Dailey, *supra* note 20, at 180.

149. FRANK, *LAW AND THE MODERN MIND*, *supra* note 1, at 119-20.

150. *Id.* at 18.

151. Duxbury, *supra* note 11, at 177. For examples of this continual reliance on psychoanalytic thinking in Judge Frank’s later works in the 1950s, see FRANK, *FATE AND FREEDOM* *supra* note 15, at 65 (“Our justification lies in the fact that psychoanalytic research has taught us that all these tendencies [described by Freud and Marx] are an expression of the same instinctive activities; in relations between the sexes these instincts force their way toward sexual union, but, in other circumstances, they are diverted from this aim or prevented from reaching it, though always preserving enough of their original nature to keep their identity recognizable.”); see also FRANK, *COURTS ON TRIAL*, *supra* note 14, at 395–96 (“Excessive classicism, with its excessive worship of abstractions, has its psychological roots in a morbid fear of particulars, of uniques. To ‘the man with the abstracting attitude,’ says Jung, ‘the world is filled with powerfully operating and therefore dangerous objects; these inspire him with fear, and with a consciousness of his own impotence: he withdraws himself from a too close contact with the world, thus to create those . . . formulae with which he hopes to gain the upper hand.’ Craving ‘fixed bounds,’ seeking a negation . . . of irreconcilable diversities,’ by abstractions

University of Chicago before undergoing psychoanalysis himself.¹⁵² As Neil Duxbury writes in *Jerome Frank and the Legacy of Legal Realism*:

Frank clearly found in psychoanalysis his panacea: just as psychoanalysis had purged him of his inner conflicts so too, with comparable results, he believed it might be applied to the judicial system. Without pausing to consider whether or not psychoanalysis—concerned at core with human individuals—might plausibly be re-cast as an institutional theory, Frank appeared basically to resolve that it could provide an all-encompassing framework for judicial critique and reform.¹⁵³

Indeed, for Judge Frank, “Freud’s conception of the psyche as a dynamic interplay between id, ego, and superego appeared to support the American Legal Realist interpretation of judging as a highly subjective and indeterminate activity.”¹⁵⁴ As Joseph Goldstein writes regarding psychoanalysis as an institutional theory of law:

Though law is stereotypically perceived as being concerned with an external image of man, and psychoanalysis with his internal image, each discipline is in fact concerned with both faces of man. While legal training, practice, and research concentrate primarily on man’s external world, the substance and process of law depend heavily on assumptions about man’s internal world.¹⁵⁵

Under this dualistic viewpoint, Judge Frank thought “[t]he key to reform was thus not *observation* of judicial behavior, but rather for judges themselves to engage in individual *introspection* as to their own thoughts, feelings, beliefs, purposes, goals, and assumptions.”¹⁵⁶ Under the umbrella of the “basic legal myth,” as Shyamkrishna Balganesh has explained, Judge Frank sought to bring into focus three subjective ideas about the law: (1) indeterminacy, (2) hunches, and (3) fact skepticism—in contrast to the formalist view of the law as an objective science.¹⁵⁷ This “conventional image of the law,” was, for Judge Frank, “a mask, a false-face, made to suit unconscious childish desires,”¹⁵⁸ that hides the reality that the law is never capable of providing exact and discernible answers.¹⁵⁹

he ‘conjures impressions into a law-abiding form,’ and thereby ‘depotentiates’ particulars, puts an end to their ‘tyrannical hold,’ there ‘threatening quality.’ Thus he strives to rob life of what are to him its dangerous spontaneities. His attempted use of abstractions wholly to ‘confine the changing and irregular within law abiding limits’ is ‘at bottom a magical procedure.’ (citing Carl Jung, *The Type Problems in Aesthetics*, in 6 THE COLLECTED WORKS: PSYCHOLOGICAL TYPES, 289, 296 (Gerhard Adler & R. F.C. Hull, eds. and trans., 1971)).

152. Duxbury, *supra* note 11, at 176.

153. *Id.* at 181.

154. Zariski, *supra* note 19, at 300; *see also* Dailey, *supra* note 20, at 180.

155. Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1054 (1968).

156. Barzun, *supra* note 134, at 1162 (emphasis added).

157. *See, e.g.*, Balganesh, *supra* note 133, at 815–821.

158. FRANK, LAW AND THE MODERN MIND, *supra* note 1, at 175.

159. *See e.g.*, BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 10–11 (2007). Leiter also referred to Judge Frank’s belief system as “Global Rational Indeterminacy.” *Id.* at 11. For additional information on this theory, *see* Balganesh, *supra* note 133, at 816.

First, Judge Frank believed that legal and judicial thinking is inherently imprecise and indeterminate. “The trouble with legal thinking,” said Judge Frank, “is not the mental inadequacies of the lawyers. It is the very nature of law, its role as a father substitute, that stirs up unconscious attitudes, concealed desires, illusory ideals, which gets in the way of realistic observation of the workings and significance of law.”¹⁶⁰ Lawyers and judges “like the laymen, fail to recognize fully the essentially plastic and mutable character of law” and erroneously believe that “rules either are or can be made essentially immutable.”¹⁶¹ In effect, lawyers are not being “consciously deceptive” in perpetuating the myth; the myth—that the law is a science—is unconscious. Judge Frank even writes regarding what he refers to as the “public-private dichotomy:”

It is the child’s naïve egocentricity, his unconsciousness of self, which leads him to regard his own perspective as immediately objective and absolute; to assimilate *external processes* to schemas arising from his own *internal* experiences, attributing to the *outer world* characteristics which properly belong to his *mind* . . . and, generally speaking, to fail to differentiate between *internal* and *external, psychical* and *physical, mind* and *body, subjective* and *objective*.¹⁶²

The consequence of this legal myth is that “demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary.”¹⁶³ To this end, Judge Frank sought to show that “judging” does not involve the mechanical application of legal rules to facts, but also involves actual lawmaking. Legal rules and principles, for Judge Frank, are merely “psychological pulleys, psychical levers, mental bridges or ladders, means of orientation, [or] modes of reflection” rather than a hard constraint on legal and judicial thinking.¹⁶⁴

Second, given that legal rules are not the primary determinates of judicial reasoning, but rather these “psychological pulleys,” Judge Frank’s account of how judges decide individual cases was based on subjective hunches.¹⁶⁵ For Judge Frank, the hunch represents the judge’s subjective reactions to the facts and circumstances—“that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.”¹⁶⁶ The

160. FRANK, LAW AND THE MODERN MIND, *supra* note 1, at 91.

161. *Id.* at 9.

162. *Id.* at 77 (emphasis added).

163. *Id.* at 11.

164. *Id.* at 167.

165. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L. REV. 274, 279 (1929).

166. *Id.* at 278.

facts generate the hunch, Judge Frank believed, which is then filtered through the judge's impulses and unconscious biases.¹⁶⁷

Third, distinct from other legal realists, Judge Frank believed in “fact skepticism,” that is, that uncertainty in legal decision-making resulted not just from uncertainty in the law (rule skepticism), but from biased interpretations of the facts of a case as well. In several of his later works, Judge Frank claimed that every federal judge should undergo compulsory psychoanalysis so as to clear their minds of subjective biases, unconscious prejudices, and peculiar thought processes.¹⁶⁸ Judges, as human beings, cannot “prevent their personal preferences from governing their decisions” unless “each judge, with the assistance of a psychiatrist, engage[s] in a voyage of self-exploration and so become conscious of those sub-threshold biases.”¹⁶⁹

In sum, Judge Frank believed that the law, as an objective science, was a mask that hid its inner subjectivity. As he described the legal persona:

The conventional image of the law is, of course, *a mask, a false-face*, made to suit unconscious childish desires. But that *false-face* terrifies even the persons who have made it. The law, as they picture it, will not allow the judges to indulge their feelings, their sympathies, for the persons appearing as suitors in the courtroom; the law, they believe, when properly administered, creates impersonal and artificial rules, which command respect because they guard against any human “weakness” in the judge The judge, *wearing a false-face*, which makes him seem like the child's stern father, gravely recites the *impersonal and artificial* rules which command respect.¹⁷⁰

Interestingly, Judge Frank's description of the legal personality is very similar to what Carl Jung writes regarding the psychoanalytic persona, which will be explored in the next Part:

[W]hoever looks into the mirror of the water will see first of all his own face. Whoever goes to himself risks a confrontation with himself. The mirror does not flatter, it faithfully shows whatever looks into it; namely, the face we never show to the world because we cover it with the *persona*,

167. *Id.* at 116 (“The judge, in arriving at his hunch, does not nicely separate his belief as to the ‘facts’ from his conclusion as to the ‘law’; his general hunch is more integral and composite, and affects his report—both to himself and the public—concerning the facts. . . . The judge's decision is determined by a hunch arrived at long after the event on the basis of his reaction to fallible testimony.”).

168. See FRANK, FATE AND FREEDOM, *supra* note 15, at 226–27; Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 678 (1957) [hereinafter Frank, *Some Reflections*]; Jerome Frank, *Say It with Music*, 61 HARV. L. REV. 921, 955 (1948) [hereinafter Frank, *Say It with Music*]; see also Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1066 (2006) (“Jerome Frank thought judges should undergo psychoanalysis, as he had done; this is a ridiculous suggestion.”); Fred Rodell, *Courts on Trial: Myth and Reality in American Justice*, by Jerome Frank, 25 IND. L.J. 114, 119 (1949) (book review) (suggesting “that the compulsory psychoanalysis of every prospective judge, which Judge Frank does propose, is no more utopian or radical”); Brendan F. Brown, *Jerome Frank and the Natural Law*, 5 CATH. LAW. 133, 141 (1959).

169. Frank, *Some Reflections*, *supra* note 168, at 678.

170. FRANK, LAW AND THE MODERN MIND, *supra* note 1, at 175 (emphasis added).

the *mask of the actor*. But the mirror lies behind the *mask* and shows the *true face*.¹⁷¹

Might Judge Frank's belief in an actor's mask (a false face or objective image) as distinct from the "true" self (the subjective, inner, private life of the individual) have influenced his decision to theorize a personality right over that very mask?

III. THE PSYCHOANALYTIC MODEL OF THE DIVIDED SELF

This Part examines the psychoanalytic concept of the self. It especially focuses on the Jungian "persona," the psychological corollary to the aspect of the personality, which the right of publicity protects. In the spirit of Judge Frank's psychoanalytic approach to the law, support for a hard separation between privacy and publicity can be found in this psychoanalytic view of the fragmented self.¹⁷² This traditional psychoanalytic view of the self retained a "Cartesian dualism" between mind and body, hence its emphasis on inner and outer dimensions of the personality.¹⁷³

A. FREUD'S EGO AND ID

At least in a mainstream Western sense, Sigmund Freud introduced the theory of a fragmented or layered personality—one divided into subparts: the id, the ego, and the super-ego.¹⁷⁴ In Freud's 1919 work, *The Interpretation of Dreams*, he sought to demonstrate that a person's outer behavior and appearance were not necessarily the same as their inner needs and longings.¹⁷⁵ As an example, Freud claims that dreaming cannot be explained if we conceptualize ourselves as a unity.¹⁷⁶ In other words, Freud asks "who is the dreamer?," as distinct from the waking person, to illustrate that the self is not a unity, but rather an "amalgamation of two separate people."¹⁷⁷

As Freud claimed in *The Pleasure Principle*, the experience of psychic pain is also evidence of a divided self.¹⁷⁸ In this early formulation of Freud's

171. C. G. Jung, *Archetypes of the Collective Unconscious*, in 9 THE COLLECTED WORKS OF C. G. JUNG, PART I: ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS 3, 20 (Gerhard Adler & R. F.C. Hull, eds. and trans., 2d ed. 1969) (second, third, fourth, and fifth emphasis added).

172. See, e.g., Alex Watson, *Who Am I? The Self/Subject According to Psychoanalytic Theory*, 4 SAGE OPEN, no. 3, 2014, at 1, 2, <http://nrs.harvard.edu/urn-3:HUL.InstRepos:12328212>.

173. Robert D. Stolorow, *Post-Cartesian Psychoanalysis as Phenomenological Contextualism*, in WORLD, AFFECTIVITY, TRAUMA: HEIDEGGER AND POST-CARTESIAN PSYCHOANALYSIS 19, 20 (2011) ("Freud's psychoanalysis expanded the Cartesian mind, Descartes's 'thinking thing,' to include a vast unconscious realm. . . . [Yet] . . . the Freudian mind remained a Cartesian mind, a self-enclosed worldless subject or mental apparatus containing and working over mental contents and radically separated from its surround.")

174. See, e.g., SIGMUND FREUD, THE EGO AND THE ID 18 (1923) [hereinafter FREUD, THE EGO].

175. See SEARS A. ELDRIDGE, MASK IMPROVISATION FOR ACTOR TRAINING AND PERFORMANCE: THE COMPELLING IMAGE 13 (1996).

176. SIGMUND FREUD, THE INTERPRETATION OF DREAMS 5 (A.A. Brill trans., MacMillan Company 2d ed. 1919) (emphasis added).

177. *Id.*

178. *Id.*

theory, he outlines a conflict between a primitive and instinctual layer of the psyche in contrast to the ego, which rests uneasily atop the psychic appetite, and effects a kind of compromise between base instinct and social necessity. To the extent that the conscious self (the ego) can provide gratification to its unconscious component (instinct), the self, as a whole, experiences gratification. Yet, to the extent that the ego fails to do so, the conscious self experiences pain.¹⁷⁹

The nature of Freud's two parts of the self (which he later modified in his 1923 work, *The Ego and the Id*), is less important than the dualism he articulated, which provides the beginnings of a psychoanalytic rhetoric that includes a dichotomy between an extroverted ego and an introverted id.¹⁸⁰ For Freud, the personality that is outwardly expressed is a compromise between these competing impulses.

According to Freud's mature theory, the ego is the public-facing portion of the self that interfaces with the outside world and makes the calculations and compromises necessary for socialization,¹⁸¹ which tends to align with the concerns implicated by the right of publicity. As Freud puts it, the ego is "that part of the id which has been modified by the direct influence of the external world."¹⁸² The ego, which is most in touch with external reality, stands in sharp contrast with the unconscious and introverted id—the libido or sex impulse,¹⁸³ which aligns with the kinds of shame that Warren and Brandeis were seeking to keep hidden in *The Right to Privacy*. The super-ego is not so much a third part of the self as it is the apex of the ego, a standard to which the ego strives based on ideals provided externally.¹⁸⁴

In sum, for Freud, the self is appropriately represented as a plurality of id, ego and superego, with the id comprising the internal psychic structure as compared to the externally motivated ego and superego.¹⁸⁵ Building off of Freud's theory of the person, continued psychological research, such as by Jung, expanded on his partition of the person into an "outer persona" as contrasted with an "inner figure."¹⁸⁶

179. Though Freud uses the language of consciousness to distinguish parts of the self, he cautions that his more particular distinction is functional; or in other words, between coherence and repression: "We escape ambiguity if we contrast not the conscious and the unconscious, but the coherent ego and the repressed. Much in the ego is certainly unconscious itself, just what may be called the kernel of the ego; only a part of it comes under the category of preconscious." SIGMUND FREUD, *BEYOND THE PLEASURE PRINCIPLE* 19 (1922) [hereinafter FREUD, *BEYOND THE PLEASURE*].

180. See, e.g., 4 STEVEN COOPER, ID., *ENCYCLOPEDIA OF PSYCHOLOGY* 221–22 (Alan E. Kazdin ed., 2000) ("In Freudian theory, the id is the division of the psyche that is totally unconscious and serves as the source of instinctual impulses and demands for immediate satisfaction of primitive needs. The ego is that which is conscious in a person, most immediately controls thought and behavior, and is most in touch with external reality.")

181. FREUD, *BEYOND THE PLEASURE*, *supra* note 179, at 13.

182. FREUD, *THE EGO*, *supra* note 174, at 25.

183. *Id.*

184. *Id.* at 18.

185. See Watson, *supra* note 172, at 4.

186. ROBERT H. HOPCKE, *PERSONA: WHERE SACRED MEETS PROFANE* 35 (1958).

B. JUNG'S PERSONA AND SHADOW

Freud's contemporary, Carl Jung, provides the closest descriptive corollary to the divide between privacy and publicity, labeling the "persona" as the outward and external face of the psyche, or "the mask of the actor."¹⁸⁷ As described in *Beneath the Mask*, a text on theories of personality, "[t]he metaphor of the actor and his mask was used by Carl Jung . . . to indicate the public self of the individual, the image he presents to others, as contrasted with his feelings, cognition, and interpretations of reality anchored in his private self."¹⁸⁸

Jung contrasted the "arbitrary segment of the collective psyche,"¹⁸⁹—the persona, with the inner attitude of the person, which he refers to as the "shadow"—that part of the self which an individual represses or keeps hidden.¹⁹⁰ The persona is one of the most widely adopted aspects of Jungian psychology, and, like Jung's concepts of introversion and extraversion as personality types, has attained common and colloquial usage.¹⁹¹

In his seminal work, *Psychological Types*, Jung describes the persona as the outer, extraverted workings of a person, or "how one *appears* to oneself and the world, but not what one is."¹⁹² Distinct from the "true self," the psychological persona designates only the aspect of the personality that one presents to the world in public to gain social approval or economic advantage: "a kind of mask, designed on one hand to make a definite impression upon others, and on the other to conceal the true nature of the individual."¹⁹³ Similar to Judge Frank's depiction of the legal persona, Jung notes that

Every calling or profession, for example, has its own characteristic persona. It is easy to study these things nowadays, when the photographs of public personalities so frequently appear in the press. A certain kind of behaviour is forced on them by the world, and professional people endeavor to come up with these expectations.¹⁹⁴

The persona, as an ideal, external image, is "exclusively concerned with the relation to objects," or, in other words, people and things in the material world.¹⁹⁵ Jung typically spoke disparagingly of the persona as "nothing real; it is a compromise between the individual and society as to what a man should

187. Jung, *supra* note 171, at 20.

188. MONTE, *supra* note 27, at 20.

189. Jung, *supra* note 26, at 281.

190. Compare HOPCKE, *supra* note 186, at 35, with ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE 9–10 (2011).

191. See, e.g., ERIC BERNE, SEX IN HUMAN LOVING 98 (1973).

192. C. G. JUNG, *The Type Problem in Poetry*, in 6 THE COLLECTED WORKS, *supra* note 151, at 166, 218.

193. Jung, *supra* note 26, at 192; see also BERNE, *supra* note 26, at 79; cf. WINNICOTT, *supra* note 26, at 148.

194. C. G. Jung, *Concerning Rebirth*, in 9 THE COLLECTED WORKS, *supra* note 171, at 112, 122–23; see also DARYL SHARP, DIGESTING JUNG: FOOD FOR THE JOURNEY 22 (2001) ("[B]y handsomely rewarding the persona, the outside world invites us to identify with it. Money, respect, and power come to those who can perform single-mindedly and well in a social role.").

195. HOPCKE, *supra* note 186, at 11.

appear to be.”¹⁹⁶ Jung also explained the persona’s deceptive nature as the surface-level part of the whole person:

The term *persona* is really a very appropriate expression for this, for originally it meant the mask once worn by actors to indicate the role they played. . . . It is, as its name implies, only a mask of the collective psyche, a mask that *feigns individuality*, making others and oneself believe that one is individual, whereas one is simply acting a role through which the collective psyche speaks.¹⁹⁷

According to Jung, analysis of the persona involves “strip[ping] off the mask, and discover[ing] that what seemed to be individual is at bottom collective; in other words, that the persona was only a mask of the collective psyche.”¹⁹⁸ An individual “takes a name, earns a title, exercises a function, he is this or that,” but as compared to “the essential individuality of the person concerned,” these objective aspects are “only a secondary reality, a compromise formation.”¹⁹⁹ The persona is thus “a semblance, a two-dimensional reality” of an individual’s true nature,²⁰⁰ as distinct from the inner “true self.”²⁰¹ Jungian analyst Murray Stein writes:

Persona is a type of mask. It hides parts of the self that you do not want to be seen by others, and it also express[es] who you feel you are at the present time. Personas are created by choosing a particular life style, by clothes, by hairstyle and adornments like jewelry or tattoos or piercings, by cosmetic make up and scent, and by association with friends, a chosen profession or fan club or political party. The persona also includes behavior and plays itself out in roles that say who you are for and with others. But it does not say who you are when you are alone.²⁰²

And Jung also spoke of the etymology of the term *persona*, from *per sonare*, meaning “to sound through, derived from the way in which ancient masks were fitted with tubes, not unlike megaphones, which the actors behind the mask used to project their voices toward the audience.”²⁰³ In effect, “[o]ne could say, with a little exaggeration, that the persona is that which in reality one is not, but which oneself as well as others think one is.”²⁰⁴ As Jung puts it:

It would be wrong to leave the matter as it stands without at the same time recognizing that there is, after all, something individual in the peculiar choice and delineation of the persona, and that despite the exclusive identity of the ego-consciousness with the persona the unconscious self,

196. C. G. Jung, *The Persona as a Segment of the Collective Psyche*, in 7 THE COLLECTED WORKS, *supra* note 26, 156, 158.

197. *Id.* at 157.

198. *Id.* at 158.

199. *Id.*

200. *Id.*

201. Jung, *supra* note 192, at 218.

202. MURRAY STEIN, MAP OF THE SOUL – PERSONA: OUR MANY FACES 9 (2019).

203. HOPCKE, *supra* note 186, at 13 (citing *Comments on a Doctoral Thesis*, in C. G. JUNG, SPEAKING: INTERVIEWS AND ENCOUNTERS 210 (William McGuire & R. F.C. Hull eds., 1977)).

204. Jung, *supra* note 194, at 123; *see also* ANTHONY STEVENS, ON JUNG 42–43 (1990) (referring to the persona as “the social archetype” or the “conformity archetype”).

one's real individuality, is always present and makes itself felt indirectly if not directly. Although the ego-consciousness is at first identical with the persona—that compromise role in which we parade before the community—yet the unconscious self can never be repressed to the point of extinction.²⁰⁵

In contrast to the persona, Jung called the inner and unconscious aspect of the personality the “shadow,” or “what was hidden under the mask of conventional adaptation.”²⁰⁶ The shadow in the Jungian model encompasses the unknown dark side, which are the least desirable aspects, of one’s personality.²⁰⁷ Similar to Freud’s id, the shadow is irrational and instinctive, comprising the unconscious part of the psyche.²⁰⁸

In opposition to the social, collective, and public persona, the shadow is “fed by the neglected and repressed collective values,”²⁰⁹ and “personifies everything that the subject refuses to acknowledge about himself.”²¹⁰ This may include “such things as egotism, mental laziness, and sloppiness; unreal fantasies, schemes and plots; carelessness and cowardice; inordinate love of money and possessions.”²¹¹ The shadow aspect of the personality is dark “because it predominantly consists of the primitive, negative, socially or religiously depreciated human emotions and impulses such as hunger for power, selfishness, greed, envy, anger or rage.”²¹² Like the Freudian id, the Jungian shadow can thus be seen to align with the personal shame that Warren and Brandeis wanted to protect in *The Right to Privacy*,²¹³ in contrast to the persona’s public and communicatory role, as articulated in *Haelan*.²¹⁴

As Jung writes with respect to the contrast between privacy and publicity:

The demands of propriety and good manners are an added inducement to assume a becoming mask. What goes on behind the mask is then called “private life.” This painfully familiar division of consciousness into two figures, often preposterously different, is an incisive psychological operation that is bound to have repercussions on the unconscious.²¹⁵

205. Jung, *supra* note 196, at 158 (emphases added).

206. C. G. Jung, *The Psychology of the Transference*, in 16 THE COLLECTED WORKS OF C. G. JUNG 164, 239 (Gerhard Adler & R. F.C. Hull eds., 1982).

207. See, e.g., C. G. Jung, *The Shadow*, in 9 THE COLLECTED WORKS OF C. G. JUNG: PART II: AION RESEARCHES INTO THE PHENOMENOLOGY OF THE SELF 8, 8 (Gerhard Adler & R. F.C. Hull eds., 1959) (“The shadow is a moral problem that challenges the whole ego-personality, for no one can become conscious of the shadow without considerable moral effort. To become conscious of it involves recognizing the dark aspects of the personality as present and real.”).

208. STEVENS, *supra* note 203, at 43.

209. MICHAEL FORDHAM, JUNGIAN PSYCHOTHERAPY: A STUDY IN ANALYTICAL PSYCHOLOGY 5 (1905).

210. C. G. Jung, , *Archetypes of the Collective Unconscious*, in 9 THE COLLECTED WORKS OF C. G. JUNG, PART VI: CONSCIOUS, UNCONSCIOUS, AND INDIVIDUATION 284, 20 (Gerhard Adler & R. F.C. Hull eds., 1982).

211. M. L. von Franz, *The Process of Individuation*, in MAN AND HIS SYMBOLS 158, 174 (Carl G. Jung et al. eds., 1964).

212. GWILYM WYN ROBERTS & ANDREW MACHON, APPRECIATIVE HEALTHCARE PRACTICE: A GUIDE TO COMPASSIONATE, PERSON-CENTERED CARE 71 (2015).

213. Warren & Brandeis, *supra* note 79.

214. *Haelan Labs. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

215. C. G. Jung, *Anima and Animus*, in 7 THE COLLECTED WORKS, *supra* note 26, at 188, 193.

In sum, Jung treats the outer “persona” as merely a “shallow, brittle, conformist kind of personality,”²¹⁶ perhaps undeserving of dignitary, emotional, and non-commercial considerations. And, in its collective rather than individual aspect, it is easily severable from the identity-holder. Indeed, to the extent that, in adopting a psychoanalytic view of the self, Judge Frank thought of the outer personality as a sort of *false self* or *actor’s mask*, it made perfect sense for him to treat it like a garden variety commodity—a transferable form of intellectual property.

IV. PUBLICITY AND THE FALSE SELF

This Part examines the consequences of a right protecting the mask of the actor, in the metaphorical sense, apart from the actor herself. Under the psychoanalytic view, we see a theoretical split between the false façade, or persona, and the inner self, or shadow. This is consistent with the right of privacy’s protection of seclusion, secrecy, and hurt feelings, in contrast to Judge Frank’s articulation of the right of publicity as concerning public figures and their commercial interests. Judge Frank did not specifically mention psychoanalytic influences in *Haelan*. However, it would make sense that, in ascribing to a psychoanalytic viewpoint, it was “natural and obvious”²¹⁷ for Judge Frank to bifurcate personality rights into inner private and outer public dimensions, as his psychoanalytic influencers around that time period were apt to do.²¹⁸ This theoretical account is consistent with the right of publicity as the “reverse side of the coin of privacy.”²¹⁹

A. THE ACTOR’S MASK METAPHOR

Privacy law scholars frequently use visual metaphors to describe privacy-related problems.²²⁰ Examples of such metaphors include the anthropomorphic

216. See STEVENS, *supra* note 203, at 43. Psychoanalyst D.E. Winnicott later elaborated on this psychoanalytic dichotomy between the private self and the public self. Winnicott drew a distinction between a “false self” that is both the natural product of socialization and a potentially corrupt artifact of social pressures, and an introverted, authentic, and spontaneous true self, which he linked to Freud’s concept of the id. Thus, the exterior false self serves a defensive function for the interior “true self,” which it masks. D. W. WINNICOTT, *Clinical Varieties of Transference*, in 5 THE COLLECTED WORKS OF D.W. WINNICOTT 61, 62 (Lesley Caldwell et al. eds., 2017) (“In the cases on which my work is based there has been what I call a true self hidden, protected by a false self. This false self is no doubt an aspect of the true self. It hides and protects it, and it reacts to the adaptation failures and develops a pattern corresponding to the pattern of environmental failure.”). This psychological emphasis on the true self and the false self somewhat mirrors sociologist Erving Goffman’s model of the front stage and the backstage prevalent in privacy law scholarship, except with emphasis in publicity law on the front stage instead of the backstage. Under Goffman’s theory, in the “presentation of self in everyday life,” we do not see the self, but rather, only a reflection or image of the self. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (Anchor Books ed. 1959).

217. Madow, *supra* note 8, at 174.

218. Goldstein, *supra* note 155, at 1054.

219. Nimmer, *supra* note 2, at 204.

220. See, e.g., COHEN, *supra* note 29, at 109 (discussing the use of visual metaphors and spatial metaphors in privacy law commentary); Orin S. Kerr, *Internet Surveillance Law After the U.S.A. Patriot Act: The Big Brother That Isn’t*, 97 NW. U. L. REV. 607, 673 (2003) (using the “Big Brother” metaphor); Jeffrey H. Reiman,

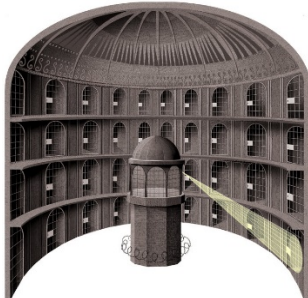
figure of Big Brother from George Orwell's *Nineteen Eighty-Four*,²²¹ or Jeremy Bentham's image of the Panopticon prison,²²² to describe privacy problems. Along these lines, Jung's persona as actor's mask perhaps serves as

Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 27, 28 (1995) (explaining Michel Foucault and Jeremy Bentham's Panopticon metaphor to describe social control); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1413–23 (2001) (arguing that the privacy problem created through computer databases and the Internet is better captured by Franz Kafka's *The Trial* rather than by George Orwell's Big Brother).

221. Illustration by Frederic Guimont from GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).



222. Adam Simpson, *The Panopticon*, ADAM SIMPSON <https://www.adsimpson.com/The-Panopticon-The-New-York-Times> (last visited Jan. 24, 2020).



an accurate metaphor for what the right of publicity currently aims to protect.²²³

The actor's mask is descriptive of the right of publicity's transformation from a personal right under the rubric of privacy, rooted in the individual, to a property-like right external to the person, an object that can be bought and sold like a commodity.²²⁴ The actor's mask conception of publicity is consistent with its transferability and strictly commercial nature, and thus its status as an intellectual property right.²²⁵ An actor can take off their mask and do with it what they wish, hence the right of publicity's alienability. And when the actor dies, her mask survives her, hence its descendibility under certain state laws.²²⁶ The actor likely will not have an emotional attachment to that mask as an object distinct from its subject, hence the right of publicity's economic focus.

Despite its descriptive accuracy, though, the actor's mask metaphor is problematic from a normative perspective. For what reason should we justify protecting only the public aspect, or external image, of an individual? As Alice Haemmerli writes, "as nothing more than a claim to an objectified commodity, [the right of publicity] cannot be theoretically reconciled with non-economic personal interests such as those protected by privacy."²²⁷ Indeed, the common justifications for a property right in an outer self are not wholly persuasive.²²⁸

223. *Theater Masks—Different Types of Theatrical Masks*, HISTORY OF MASKS, <http://www.historyofmasks.net/famous-masks/theater-masks/> (last visited Jan. 24, 2020).



224. See ROTHMAN, *supra* note 2, at 7.

225. Cf. Brian L. Frye, *The Athlete's Two Bodies: Reflections on the Ontology of Celebrity*, INCITE J. EXPERIMENTAL MEDIA: SPORTS, 2016–17, <http://www.incite-online.net/frye7-8.html> ("Warren and Brandeis unwittingly enabled the creation of the modern concept of celebrity by creating the right to privacy, which implicitly recognized the existence of an intangible identity in every tangible person. And the creation of the right of publicity in *Haelan* realized that concept by implicitly defining a celebrity as the union of two bodies: a tangible and mortal person, and an intangible and immortal celebrity identity.").

226. See, e.g., *King v. Jowers*, 12 S.W.3d 410 (Tenn. 1999) (alluding to Dr. Martin Luther King's ongoing celebrity, even post-mortem); Rothman, *supra* note 9, at 203 ("Several states have outright rejected a postmortem right of publicity. Some have done so on the basis that a violation of the right of publicity remains a privacy-based tort and *ipso facto* is not devisable. States that have descendible publicity rights have often established them by statute after courts in those states rejected their descendibility at common law." (footnotes omitted)).

227. Haemmerli, *supra* note 8, at 388.

228. See, e.g., Marshall Leaffer, *Sheldon Halpern and the Right of Publicity*, 78 OHIO ST. L.J. 273, 277 (2017) ("The literature is voluminous, and I have yet to encounter totally persuasive justification for this all-inclusive right for the misappropriation of persona.").

Because of the strictly commercial nature of the right, the primary justifications for it focus on the intellectual property-oriented justifications of Lockean labor theory, economic incentives, unjust enrichment, and consumer protection, to the relative exclusion of personhood, dignity, and autonomy. The following Subpart will now briefly touch on these justifications and their criticisms.²²⁹

B. OBJECTIVE PUBLICITY JUSTIFICATIONS

A popular justification for the right of publicity is built on John Locke's labor theory of property. That is, "every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."²³⁰ According to Locke, a system of private property was needed to determine how to allocate rivalrous objects in the case of conflicting claims.²³¹ Labor, as a morally significant act, was Locke's solution. The person who labored for the property is the one who should prevail in the case of opposing claims. And labor makes exclusive ownership acceptable.²³² By this logic, the celebrity status that is associated with the right of publicity is one that comes from hard work and determination.²³³

But this justification is suspect in the case of the right of publicity. As Mark McKenna argues, identity, as an intangible, is nonrivalrous and thus, not scarce. Because it need not be appropriated exclusively, Lockean property theory's applicability to a property right over the persona is suspect.²³⁴ It might also be that adherence to Locke is misplaced because of its reliance on a sort of libertarian free will that does not exist.²³⁵ Not all personalities "work hard" for their fame. Many were in the right place at the right time. For others, talent comes very naturally.²³⁶

Further, it is unclear if the issue of "fame" is what is valuable and being exploited by advertisers. Advertisers choose personas to place in advertisements because of the meaning that they hold in our collective society. If such meaning is developed by the public in its collective aspect, it seems like a stretch for the celebrity to claim that her labor is entirely responsible for its value; fame and meaning are conferred onto celebrities by the public and not built up by a celebrity in the same way that a carpenter builds a chair from

229. Several other scholars provide more detailed explanations of the normative issues faced by the right of publicity's economic, commercial, and external focuses. *See, e.g.*, Dogan & Lemley, *supra* note 2; Madow, *supra* note 8, at 173–74; McKenna, *supra* note 8.

230. *See, e.g.*, Nimmer, *supra* note 2, at 216.

231. JOHN LOCKE, TWO TREATIES OF GOVERNMENT § 27, at 305–06 (Peter Laslett ed., 2d ed. 1967).

232. *Id.*

233. *See, e.g.*, Nimmer, *supra* note 2, at 216.

234. McKenna, *supra* note 8, at 256.

235. *See, e.g.*, SAM HARRIS, FREE WILL (2012) (advocating for a hard deterministic view of the universe incompatible with free will).

236. Madow, *supra* note 8, at 189.

wood.²³⁷ Therefore, because celebrities do not exclusively construct their personas, it is not altogether convincing that labor should provide a principle justification for a personality right.

Unjust enrichment provides another possible justification for protecting the public persona. Because public personalities do at least *something* to bring about their fame, allowing others to exploit it might be seen to unjustly enrich them at the expense of the persona-holder.²³⁸ Our society dislikes free riding—allowing others to reap where they have not sown.²³⁹ No matter how or who actually created the value, a new valuable asset has been created and allowing others to profit from it might simply be unfair. The right of publicity might correct this unfairness. That is, it gives public figures the legal means to control their marketable fame and keep others from appropriating that fame for their own benefit.²⁴⁰ One issue with the unjust enrichment justification, though, is that it assumes that personas are original; rather, public personalities typically build their images and personalities by appropriating things from society and culture.²⁴¹ Madonna, for example, built her persona on an “ironic reworking of the Hollywood myth of ‘the blonde.’”²⁴² Additionally, a focus on unjust enrichment tends to concentrate, perhaps erroneously, on the profits of the infringer, rather than the harm to the publicity-holder, in evaluating harm.²⁴³

Much like in copyright law, the right of publicity is sometimes rationalized, including by the Supreme Court, as promoting an economic incentives structure.²⁴⁴ Giving people control over their masks “induces people to expend the time, effort, and resources necessary to develop talents and produce works that ultimately benefit society as a whole.”²⁴⁵ Control of persona encourages activities that are socially valuable by making up for the

237. *Id.* at 196.

238. MCCARTHY & SCHECHTER, *supra* note 2, § 2:2.

239. *Id.* § 2:6.

240. Madow, *supra* note 8, at 196.

241. *Id.* at 196–97.

242. *Id.* at 197 (“How much does she owe to Marilyn Monroe? To the directors . . . who made the films in which Monroe appeared? To Andy Warhol and the Kennedy brothers, who helped elevate her to iconic status?” (footnote omitted)).

243. See Jesse Koehler, Fraley v. Facebook: *The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963, 996 (2013).

244. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (“Ohio’s decision to protect petitioner’s right of publicity . . . provides an economic incentive for him to make the investment required to produce a performance of interest to the public.”); Madow, *supra* note 8, at 206 (“It is frequently asserted that the purpose of the right of publicity, like that of copyright, is to provide an economic incentive for enterprise, creativity, and achievement.” (footnote omitted)); Dogan & Lemley, *supra* note 2, at 1186 (“A final justification offered for the right of publicity is that the grant of such control is needed to encourage investment in the development of a public persona.”); Vincent M. de Grandpré, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 76 (2002) (“Economics can go a long way towards making sense of the right of publicity because the rationale for the right of publicity is to offer incentives to celebrities and others to market their identity.”).

245. Madow, *supra* note 8, at 206.

downsides of being in the spotlight, which is important in a world where fame is fickle. If this protection was not available, the idea goes, less people would be willing to venture out onto the stage of publication.

However, the financial rewards for achieving fame are often great without the needed control incentive.²⁴⁶ Moreover, incentives for achieving success in a given (public) field and incentives to develop a public persona, while sometimes overlapping, are typically distinct.²⁴⁷ And if the right of publicity incentivizes anything, it is not clear that it is incentivizing anything productive, perhaps leading to overinvestment in celebrity and producing more people who are “famous for being famous” (like the Kardashians, for instance).²⁴⁸ Moreover, a right seeking to incentivize investment in celebrity personas will tend to afford protection only to those personas which are commercially valuable, leaving others whose images have entered the public arena without recourse.²⁴⁹

A consumer protection justification is also sometimes invoked, analogous to trademark law.²⁵⁰ That is, the right of publicity might be needed to protect consumers from being confused or misled about product endorsements.²⁵¹ The right of publicity, under this justification, seeks to protect consumers from wrongly thinking that a celebrity endorsed or sponsored a product when he or she has not. It is unclear, though, that consumers are typically damaged by confusion as to the source of one’s identity. Regardless, the right of publicity

246. A lesser-used, alternative economic justification for the right of publicity is allocative efficiency, a variation on the “tragedy of the commons” argument for private property. *See, e.g.*, Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 *UCLA ENT. L. REV.* 97, 99 (1994). It assumes that the persona is a scarce resource that, absent allocation through a property regime, would be ruined by overuse. *See* McKenna, *supra* note 8, at 268. Landes and Posner argue that “[t]he motive [in providing stronger publicity rights] is not to encourage greater investment in becoming a celebrity (the incremental encouragement would doubtless be minimal), but to prevent the premature exhaustion of the commercial value of the celebrity’s name or likeness.” WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 223 (2003) (footnotes omitted). Thus, under this theory, the law should grant an individual rights in their persona so that they may control its uses and maximize its advertising value. Yet, McKenna points out that the theory is an odd fit for publicity, among other reasons, in that the persona is subject to depletion only in an abstract sense, and is at odds with the well-known maxim that “all publicity is good publicity”—that is, publicity “tends to feed off of itself and, as a result, many uses actually increase the value of a celebrity’s identity, whatever the character of those uses.” McKenna, *supra* note 8, at 270.

247. McKenna, *supra* note 8, at 259. As Mark McKenna puts it:

It is possible that someone would work extremely hard to become the world’s best golfer, thereby creating demand to see that individual golf, but still fail to create a public persona that draws people to purchase products. The inverse is also true: While many of the most marketable athletes are at the top of their sports, some commercially marketable people are decidedly not. For example, despite her lack of athletic success, tennis player Anna Kournikova has been among the most well-known and marketable female athletes. Evidently it is not necessarily the same characteristics that lead to success both within one’s native field and within the market for commercial endorsements.

Id. (footnote omitted).

248. ROTHMAN, *supra* note 2, at 101; Dogan & Lemley, *supra* note 2, at 1187–88.

249. Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, 10 *LANDSLIDE* 37, 38 (2018).

250. *See, e.g.*, Dogan & Lemley, *supra* note 2, at 1190.

251. Madow, *supra* note 8, at 228.

gives the celebrity a cause of action for claims even in cases where it is clear that consumers would not believe the advertisements are endorsements.

One could also argue that such a consumer confusion-oriented justification makes the right of publicity redundant to the Lanham Act—the federal trademark statute.²⁵² That is, if the true concern of the right of publicity is consumer protection, then perhaps amendments should be made to expand the Lanham Act, rather than having the right of publicity constitute a separate cause of action.²⁵³ Though as Stacey Dogan and Mark Lemley have convincingly pointed out, limiting applicability of the right of publicity to cases involving confusion of some kind or another might be a helpful mechanism in cabining the right, which is widely seen as lacking conceptual boundaries, to certain situations.²⁵⁴

Thus, the conceptualization of the right of publicity as protecting the external self leaves us with justifications imported from other intellectual property regimes, which, while facially promising, are ultimately unconvincing. Further, these justifications support the right of publicity as a freely transferable intellectual property right,²⁵⁵ which, as Jennifer Rothman has explored, has several negative practical consequences.

First, aspiring actors, musicians, and models, who, unlike celebrities, have little leverage in contract negotiation, may lose control of their names, images, or personas by long-term license or assignment.²⁵⁶ For example, reality television contestants must sometimes sign over their rights to their personas to producers or production companies as a prerequisite to appearing on the show. Consider the predatory nature of the following redacted representation of language in a Publishing Agreement between a television film studio and prospective reality television contestant (who is not otherwise famous):

Participant hereby grants to Producer . . . the perpetual, exclusive right, but not the obligation to use and authorize others to use Participant's name(s), voice, image, photograph, personal characteristics, persona, life-story, signature, actual or simulated likeness, expressions, performance, attributes, personal experiences and biographical information (collectively, "Name and Likeness") in and in connection with the production, distribution, advertising, publicity, promotion, merchandising, exhibition and other exploitation of all versions and formats of the Program (including its title) and the businesses, services, programs and/or products of . . . Producer and its licenses, sub-licensees and assigns (including all advertising, publicity and promotion and materials associated therewith) and in or in connection with any episode of the Program in which Participant does not appear,

252. 15 U.S.C. § 1125(a) (2018).

253. Madow, *supra* note 8, at 233–34.

254. Dogan & Lemley, *supra* note 2, at 1166; Mark A. Lemley, *Privacy, Property and Publicity*, 117 MICH. L. REV. 1153, 1173 (2019); cf. Barton Beebe, *What Trademark Law Is Learning from the Right of Publicity*, 42 COLUM. J.L. & ARTS 389, 389 (2019) (arguing that trademark law and right of publicity now mimic one another, and any further effort to merge the doctrines will result in one, "mutant" version).

255. *But see generally* Rothman, *supra* note 9, at 186 (arguing that the right of publicity is less alienable than most commentators believe it to be).

256. *Id.* at 188.

including without limitation in billing, cast credits, advertising, promoting or publicizing any such episode, in any manner, in any and all media and by any means now known or hereafter devised Producer . . . may include photographs or other images or depictions of the likeness of Participant in or in relation to any exploitation of the Program and all documentaries, “behind-the-scenes,” “the making of” featurettes, promotional films and videos of the Program in any manner and by any means throughout the universe.²⁵⁷

Second, social media companies, like Facebook and Twitter, have claimed the ability to use the names and images of their users for advertising and endorsement purposes.²⁵⁸ Consider the following abridged representation from Facebook’s terms of service agreement:

Permission to use your name, profile picture, and information about your actions with ads and sponsored content: You give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you.²⁵⁹

This is often against the will of social media users.²⁶⁰ And conceivably, these social media companies could change their terms of service or privacy policies to allow broader rights in their users’ personas, using their names, images, or likeness for other purposes as well.²⁶¹

Third, parents have transferred rights in the identities of their underage children, who have struggled to get them back upon reaching the age of legal maturity.²⁶² Fourth, those with lucrative public personas, creditors, employers, or ex-spouses might be able to take ownership of their identities during cases of monetary or familial disputes.²⁶³ Finally, student athletes have been made to sign broad publicity releases to the NCAA as a condition for playing sports at the collegiate level, giving the NCAA the right to license (and potentially even assign) players’ personas indefinitely.²⁶⁴ In these ways, the alienable right of publicity can be thought of as stripping away the identity of individuals.²⁶⁵

257. October Films, Participant Agreement 6 (Aug. 31, 2016) (unpublished agreement) (on file with author).

258. *Id.* at 10; *see also infra* Part V.

259. *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last updated July 31, 2019).

260. *See infra* Subpart V.C.

261. *See* Rothman, *supra* note 9, at 187.

262. *Id.* at 188 (citing *Shields v. Gross*, 448 N.E.2d 108 (N.Y. 1983) (involving the child actress Brooke Shields’s mother having assigned her right of publicity to photographers and Shields attempting to regain it without success)).

263. Rothman, *supra* note 9, at 189.

264. *Id.* at 188. *But see* Dan Wolken & Steve Berkowitz, *NCAA Removes Name-Likeness Release from Student-Athlete Forms*, USA TODAY (July 18, 2014, 5:10 PM), <https://www.usatoday.com/story/sports/college/2014/07/18/ncaa-name-and-likeness-release-student-athlete-statement-form/12840997/>.

265. Rothman, *supra* note 9, at 189.

C. SUBJECTIVE PUBLICITY JUSTIFICATIONS

In attempting to bring the focus from the actor's mask back to the actor, several commentators have proposed dignity and autonomy-based justifications for the right of publicity. Rothman believes that "the best justifications, perhaps the only legitimate ones, for the right of publicity are not those rooted in analogies to IP but those focused on protecting a person's identity, particularly the person's name or likeness, when the uses are likely to cause dignitary, emotional, or economic harms."²⁶⁶ Along these lines, Alice Haemmerli and Mark McKenna have offered two significant examples of theories that involve the right of publicity as protecting an autonomous self.

Haemmerli proposes a Kantian view of the right of publicity. In contrast to the Lockean conception, which focuses on the right of publicity as a property right *external* to the individual, Haemmerli's focus is on the *internal* autonomous self. For Haemmerli, a normative underpinning based on Immanuel Kant's idealist philosophy shifts the focus of the right of publicity from a strictly economic right to one also focused on morality and personhood. One that considers "the individual as an autonomous being preceding the creation of property."²⁶⁷

Kant viewed the individual as an autonomous and moral being. Freedom, for Kant, is an innate right: the "sole and original right that belongs to every human being by virtue of his humanity," and, in invoking a notion of control and self-determination, "the attribute of a human being's being his own master."²⁶⁸ This central concept of autonomy in Kantian philosophy, Haemmerli believed, lent itself to a philosophical justification for the right of publicity: "Autonomy implies the individual's right to control the use of her own person, since interference with one's person is a direct infringement of the innate right of freedom (which takes concrete form in social life as liberty or freedom from compulsion by others)."²⁶⁹

Haemmerli then attempts to link this concept of personal autonomy with Kant's theory of property, which, together, might be seen to establish a link in objectified identity. Under the Kantian framework, property stems from human freedom: "it is an a priori assumption of practical reason that any and every object of my will be viewed and treated as something that has the objective possibility of being yours or mine."²⁷⁰ Thus, in the Kantian system, property is inseparable from one's personhood because property grows from freedom and freedom is essential to personhood.²⁷¹ If one's own external image is treated as

266. ROTHMAN, *supra* note 2, at 155.

267. Haemmerli, *supra* note 8, at 413.

268. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 44 (John Ladd trans., 1797).

269. Haemmerli, *supra* note 8, at 416 (citing KANT, *supra* note 268, at 44).

270. KANT, *supra* note 268, at 53.

271. Haemmerli, *supra* note 8, at 418.

an object capable of “being yours or mine,” then perhaps it is best claimed by the person who serves as its natural source.²⁷² As Haemmerli puts it:

[A]n innate right to one’s persona, and an accompanying property right in the uses and control of the objectification of that persona, can be grounded in idealist philosophy (keeping in mind that image-as-object may also be qualified as having a [sic] subjective, personal, inward aspect and that it is not a “thing” like any other). Like intellectual property, image can be viewed as unique, a product of the peculiar mix of mental, psychological, and physical attributes that make the progenitor the individual she is. . . . Even more broadly, this philosophical orientation permits us to reconceive the right of publicity as a freedom-based property right with both moral and economic characteristics, rather than being forced to make a dichotomous choice between a privacy right concerned with moral injury on the one hand, or a purely pecuniary publicity right on the other.²⁷³

Similarly, Mark McKenna has proposed an alternative justification for the right of publicity based on individual autonomous self-definition, which like Haemmerli’s theory, would support an emphasis on the emotional harms caused by the commercial use of one’s identity.²⁷⁴ McKenna argues that the appropriation of identity implicates an individual’s ability to “autonomously define” themselves, thus inflicting harm.²⁷⁵ According to McKenna, while the “unauthorized commercial use of a private citizen’s identity, like publication of private facts, threatens the private citizen’s anonymity, it also implicates a very different interest in autonomous self-definition.”²⁷⁶ That is, “because an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning.”²⁷⁷

This interest, while important in the privacy context, appears to be equally relevant for individuals with public personas.²⁷⁸ In this way, McKenna would seek to distinguish between identity appropriation claims on one hand, and traditional privacy claims on the other—rather than claims between public figures and private citizens.²⁷⁹ As McKenna articulates it, “[b]ecause the things with which individuals choose to associate reflect the way they wish to be perceived, unauthorized use of one’s identity in connection with products or services threatens to define that individual to the world.”²⁸⁰

Rather than protecting the actor’s mask in the vein of the psychoanalytic theory of persona, these personhood theories seek to extend the right of publicity to the inner, autonomous self—the actor—rather than the mask. Yet,

272. *Id.*

273. *Id.* at 421–22 (footnotes omitted).

274. McKenna, *supra* note 8, at 279.

275. *See id.* at 264 n.169.

276. *Id.* at 279.

277. *Id.*

278. *Id.* at 279–80.

279. *Id.* at 280.

280. *Id.* at 294.

in focusing on an inner, “true self,” these justifications presuppose that the self has an autonomous core—an “essential underlying identity”—rather than seeing the public image itself as a principle aspect of that identity.²⁸¹ In this way, these theories retreat from viewing publicity as strictly outer, objective, and economic, to the other extreme in referring to it in relation to an isolated, subjective, and solitary inner self.²⁸² But the existence of such a static core self may ultimately be an illusion.²⁸³

The next Part suggests that right of publicity law pivot from the public-private dualism that has plagued personality rights jurisprudence since Judge Frank decided *Haelan*. In place of that dualism, it urges a push toward intersubjectivity—a focus on the psychological relation between individuals as integral to the development of the self and personality.

V. PUBLICITY AND THE INTERSUBJECTIVE SELF

In its focus on the image-as-object capable of being owned and transferred, post-*Haelan* publicity law views the personality from an objective third-person perspective—the perception of reality from outside the person. In contrast, given its focus on inner feelings, emotions, and dignity, privacy law tends to view the personality from a subjective, first-person perspective—the perception of reality from one’s own vantage point.²⁸⁴ While this dichotomy may be a convenient metaphor given its simplicity, it fails to accurately account for the dynamic and relational nature of the personality.

To this end, this Part proposes that publicity law consider an alternate conception of the self that emphasizes *intersubjectivity*—that the personality develops by, and is dependent on, relationships between people.²⁸⁵ In effect, intersubjectivity shifts the concept of the self from noun to verb—from an isolated mind to an expressive communicative act.²⁸⁶ While the concept of intersubjectivity is not unique to psychoanalysis,²⁸⁷ given its focus on the

281. Haemmerli, *supra* note 8, at 425–26.

282. See, e.g., McKenna, *supra* note 8, at 279 (claiming that “Haemmerli’s analysis,” while flawed in certain respects, “offers an opportunity to re-examine the harm of identity appropriation with a renewed emphasis on individual autonomy and the emotional harms caused by the commercial use of one’s identity.”).

283. See, e.g., DANIEL C. DENNETT, *CONSCIOUSNESS EXPLAINED* (1991); BRUCE HOOD, *THE SELF ILLUSION: HOW THE SOCIAL BRAIN CREATES IDENTITY* (2012); see *infra* Subpart V.A.

284. See, e.g., GEORGE E. ATWOOD & ROBERT D. STOLOROW, *FACES IN A CLOUD: INTERSUBJECTIVITY IN PERSONALITY THEORY* (1999); ROBERT D. STOLOROW & GEORGE E. ATWOOD, *CONTEXTS OF BEING: THE INTERSUBJECTIVE FOUNDATIONS OF PSYCHOLOGICAL LIFE* (1992) [hereinafter ATWOOD & STOLOROW, *CONTEXTS OF BEING*]; *THE INTERSUBJECTIVE PERSPECTIVE* (Robert D. Stolorow ed., 1994) [hereinafter *THE INTERSUBJECTIVE PERSPECTIVE*]; Werner Bohleber, *The Concept of Intersubjectivity in Psychoanalysis: Taking Critical Stock*, 94 *INT. J. PSYCHOANALYSIS* 799 (2013) (describing this principle throughout the article in great depth); Stolorow, *supra* note 173, at 20.

285. See *infra* Part V.

286. See Christian de Quincey, *Intersubjectivity: Exploring Consciousness from the Second-Person Perspective*, 32 *J. TRANSPERS. PSYCHOL.* 135, 139 (2000).

287. Perhaps the first formulation of an intersubjective viewpoint was put forth by the philosopher Edmund Husserl, the founder of phenomenology, in the early twentieth century; see, e.g., EDMUND HUSSERL, *CARTESIAN MEDITATIONS* 136–39 (1931) (claiming that intersubjective experience plays a fundamental role in

contextual nature of interactions between people, intersubjectivity has been proposed as an update to the classical psychoanalytic dualistic view of the self previously examined in Part III.²⁸⁸

A. INTERSUBJECTIVITY THEORY

As mentioned earlier, traditional psychoanalysis was pervaded by the Cartesian “Myth of the Isolated Individual Mind.”²⁸⁹ The philosophy of Rene Descartes severed mind from body, conceiving of the mind as a “thinking thing” with “an inside” that “looks out on an external world” from which it is essentially estranged.²⁹⁰ This metaphysical dualism “concretized the idea of a complete separation between mind and world, between subject and object.”²⁹¹ Inner reality—the private—is considered to be subjective and psychic. In contrast, outer reality—the public—is objective, material, and “extended in space.”²⁹² The mind is seen as a container, with fantasies, ideas, emotions, drives, and instincts, separate from external, material reality.²⁹³

Judge Frank’s judicial philosophy and psychoanalytic jurisprudence was consistent with the myth of the isolated mind. Consider, for example, Judge Frank’s statement that legal rules are just “psychology pulleys” or “psychical levers,”²⁹⁴ and his emphasis on separating “internal and external, psychical and physical, mind and body, subjective and objective.”²⁹⁵ “In psychoanalysis, this split appears in the contrast between psychic reality and external reality.”²⁹⁶ In terms of personality rights jurisprudence, we see the consequences of this dualism in the split between privacy—focused on inner reality and psychic harm—and publicity—focused on the material image and economic gain.

This subject-object split between privacy and publicity mirrors the psychoanalytic dichotomy of false self (the public) and true self (the private) previously described. Yet this dichotomy has since been shown to be unrealistic.²⁹⁷ Rather, the self has more recently been found to be contextual in

our conception of ourselves as objectively existing subjects, our relations with other subjects, and our interpretation of space and time).

288. See, e.g., Bohleber, *supra* note 284, at 799 (“The past two or three decades have seen nearly all psychoanalytical schools of thought undergo a change towards a stronger intersubjective orientation.”).

289. ATWOOD & STOLOROW, *CONTEXTS OF BEING*, *supra* note 284, at 7; cf. Kirshner, *supra* note 131, at 157 (“Psychoanalysis is a heritor of this empiricist view of a self isolated from experience, ‘a central core of self inside the mind which views the mind and ideas passing before it.’”).

290. Stolorow, *supra* note 173, at 9.

291. *Id.*

292. Donna M. Orange, *From Cartesian Minds to Experiential Worlds in Psychoanalysis* 6 (Mar. 26, 1999) (unpublished manuscript), <https://pdfs.semanticscholar.org/4e8f/c97e4e248c28715d8e1a79ad1e7787c4182f.pdf>.

293. *Id.*

294. See FRANK, *LAW AND THE MODERN MIND*, *supra* note 1, at 167.

295. See *id.* at 77.

296. Orange, *supra* note 292, at 5.

297. See e.g., GEORGE E. ATWOOD & ROBERT D. STOLOROW, *STRUCTURES OF SUBJECTIVITY: EXPLORATIONS IN PSYCHOANALYTIC PHENOMENOLOGY* (1984); BUIRSKI & HAGLUND, *supra* note 34, at 15; THE INTERSUBJECTIVE PERSPECTIVE, *supra* note 284.

nature. In *Post-Cartesian Psychoanalysis as Phenomenological Contextualism*, Robert Stolorow explains that what we consider “the self” is the result of “emergent properties of ongoing dynamic intersubjective systems.”²⁹⁸ This intersubjectivity theory reformulates selfhood and personality in terms that more directly capture relational experience. That is, intersubjective psychoanalysis suggests that interactions should be considered contextually. For example, interactions between a patient and therapist, child and a parent, or other relationships are better analyzed as mutually influencing each other as opposed to in isolation.²⁹⁹ One’s “subjective emotional experience—is something that from birth onward is regulated, or mis-regulated, within ongoing relational systems.”³⁰⁰ An individual’s subjective experience of self is not autonomous or static, but instead is continually being constructed in the present out of past experiences and the current context in which the individual finds themselves.

Unlike in the traditional psychoanalytic framework, intersubjectivity does not try to fit a person’s subjective experience into preexisting theoretical frameworks like id and ego, persona and shadow, true self and false self, or public and private.³⁰¹ These categories are regarded in the intersubjective sense as metaphors, which may be helpful in understanding some people, in some situations, some of the time.³⁰² Individuals “are not viewed as trying to hide or dress themselves up.”³⁰³ Their presentations are instead seen as “dynamic solutions” in navigating identity, relationships, and communities.³⁰⁴ Through these sorts of interpersonal experiences, the self develops. Thus, one’s personality “is *always* codetermined by features of the surround and the unique meanings into which these are assimilated.”³⁰⁵

298. Stolorow, *supra* note 173, at 30.

299. See, e.g., DONNA M. ORANGE ET AL., *WORKING INTERSUBJECTIVELY* (1997).

300. ROBERT D. STOLOROW, *TRAUMA AND HUMAN EXISTENCE* 1 (2007).

301. See BUIRSKI & HAGLUND, *supra* note 34, at 14.

302. *Id.*

303. *Id.* at 4.

304. *Id.*

305. STOLOROW & ATWOOD, *CONTEXTS OF BEING*, *supra* note 284, at 21. Along the lines of this intersubjective self is the conception by prominent Japanese philosopher, Nishida Kitaro, of the Kyoto School. Kitaro sought to integrate Zen and Western philosophy in his novel approach to understanding the self and world. NISHIDA KITARŌ, *LAST WRITINGS: NOTHINGNESS AND THE RELIGIOUS WORLDVIEW* 64 (David A. Dilworth trans., 1993). Kitaro rejects the notion of the self as existing within a stable external reality, instead seeing the self as an expression constituted within and by relation with other selves. *Id.* Where Cohen criticizes the “traditional liberal self,” Kitaro similarly notes that the Kantian moral, autonomous self can live only in what he refers to as a “Kingdom of Ends,” that is, an external order of things. *Id.* at 61. Thus, morality and identity, for Kitaro, unlike Kant, does not dictate the definition of the self with which we must work, but itself emerges out of, and as the product of, relationships with others. Indeed, Kitaro notes that “the world becomes a synthetic unity, a ‘consciousness in general,’ through the negation of the individual and the affirmation of the universal.” *Id.* at 63. Kitaro’s takeaway from this point is that we create a community—or public world—not just by our internal self, but via a community of minds such that our self-display—our external image, in other words—is a creation of the public at large. *Id.* at 63–64. Kitaro’s conceptualization of a self, in its focus on the integration of internal and external dimensions, sounds more in tune with the needs of modern personality rights jurisprudence than Kant’s subjective idealism or Locke’s objective empiricism.

B. PRIVACY AND INTERSUBJECTIVITY

The adoption of an intersubjective concept of the self has not yet been suggested in the context of the right of publicity. However, intersubjectivity is consistent with formulations of the self, already discussed by several prominent privacy theorists, to account for privacy norms as being applicable in private and public contexts alike.

Invoking the concept of intersubjectivity specifically, Valerie Steeves has attempted to reconceptualize privacy “as a dynamic process of negotiating personal boundaries in intersubjective relations.”³⁰⁶ “[B]y placing privacy in the social context of intersubjectivity,” Steeves believes “privacy can be more fully understood . . . as we negotiate our relationships with others on a daily basis.”³⁰⁷ In drawing the boundaries between the self and others, privacy is “intersubjectively constituted through communication.”³⁰⁸ Privacy is thus applicable across both public and private spheres given that “privacy is what enables the self to see itself as a social object and to negotiate appropriate levels of openness and closedness to others.”³⁰⁹ Put differently, privacy can be considered intersubjectively as a “dynamic process” negotiated by social actors as they either withdraw into solitude, engage in intimate relations, or participate in broader social interactions.³¹⁰

While not dubbing their contextual approaches to understanding the self “intersubjectivity” explicitly, other leading privacy scholars’ theoretical accounts are consistent with its view of the self as a social and relational construct. For example, in his seminal article, *Privacy, Intimacy, and Personhood*, Jeffrey Reiman argues that the self is not innate, but instead “created in social interaction.”³¹¹ Put another way, the creation of identity is a social process that is ongoing rather than occurring only in childhood. According to Reimann, the existence of the self is dependent on the “social rituals” of privacy.³¹² He continues:

The right to privacy is the right to the existence of a social practice which makes it possible for me to think of this existence as mine. This means that it is the right to conditions necessary for me to think of myself as the kind of entity for whom it would be meaningful and important to claim personal and property rights.³¹³

Julie Cohen, similarly, writes about a “postliberal,” socially constructed conception of the self as supportive of a dynamic right of privacy.³¹⁴ Cohen’s

306. Valerie Steeves, *Reclaiming the Social Value of Privacy*, in *LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY* 191, 193 (Ian Kerr et al. eds., 2009).

307. *Id.*

308. *Id.* at 205.

309. *Id.*

310. *Id.*

311. Jeffrey H. Reimann, *Privacy, Intimacy, and Personhood*, 6 *PHIL. & PUB. AFF.* 26, 39 (1976).

312. *Id.* at 39–40.

313. *Id.* at 43.

314. Julie E. Cohen, *What Privacy Is For*, 126 *HARV. L. REV.* 1904, 1909 (2013).

view of the self is in sharp contrast with the metaphorical division between public and private inherent in the psychoanalytic model. Privacy law (like publicity law) has long assumed that the self has “an autonomous core—an essential self identifiable after the residue of influence has been subtracted.”³¹⁵ Cohen believes, though, that “[t]he idea of privacy as a defense bulwark for the autonomous self is an artifact of a preexisting cultural construction.”³¹⁶

Rather, because “we are born and remain situated within social and cultural contexts,” the self who is the real subject of privacy law is a social construction which gradually emerges from a “preexisting cultural and relational substrate.”³¹⁷ Cohen explains further: “Selfhood is a product of both social shaping and embodied experience. People are born into networks of relationships, practices, and beliefs, and those networks profoundly shape the processes of self-articulation.”³¹⁸

Helen Nissenbaum, through her theory of “contextual integrity,” also invokes an approach akin to intersubjectivity in its focus on transactions and relations.³¹⁹ Nissenbaum explains that while “public and private define a dichotomy of spheres that have proven useful in legal and political inquiry,” privacy norms are rather “rooted in the details of rather more limited contexts, spheres, or stereotypic situations.”³²⁰ These transactional “contexts” or “spheres” include norms of informational (1) appropriateness—what information about individuals is appropriate to reveal in a certain context, and (2) distribution—the transfer or movement between individuals or parties.³²¹ According to Nissenbaum:

[W]hether a particular action is determined a violation of privacy is a function of several variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationship to information subjects; on what terms the information is shared by the subject; and the terms of further dissemination.³²²

To the extent that privacy and publicity are acknowledged to once again be intertwined rights, the theoretical accounts of the intersubjective self in privacy also appear relevant to publicity law. Their applications to publicity might thus be explored in future scholarly works on the right of publicity. One

315. JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 113 (2012).

316. Cohen, *supra* note 314, at 1908.

317. *Id.* at 1908, 1905.

318. Julie E. Cohen, *Turning Privacy Inside Out*, 20 THEORETICAL INQUIRIES LAW 1, 12 (2019); *see also* Cohen, *supra* note 314, at 1907.

319. HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2010); Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004).

320. Nissenbaum, *Privacy as Contextual Integrity*, *supra* note 319, at 137.

321. *Id.* at 138–43.

322. *Id.* at 155.

particular application is discussed in the final subpart below—the right of publicity as applied to “personal-public”³²³ spaces like social media.

C. PUBLICITY AND INTERSUBJECTIVITY

Through analogy to intersubjectivity, this final subpart proposes a reframing of the right of publicity as a “data protection right.” That is, common law and statutory right of publicity laws could provide a tool for identity-holders to be able to retain (but not necessarily own) certain control of their digital information as they navigate online relationships and communities.³²⁴

Under an intersubjective approach, the self is constructed through social relationships. It follows, then, that the right of publicity should not be diametrically opposed to privacy. Intersubjectivity shifts the concept of selfhood from a noun to verb; from an isolated mind to an expressive communicative act.³²⁵ Thus, the extent to which the self is revealed or concealed, embedded or withdrawn, from social relations is part of the same act or phenomenon under both privacy and publicity.³²⁶ In this way, publicity, like privacy, may be conceptualized not just as protecting static objective or subjective identity, but as a dynamic social construction used in negotiating a broad range of social relations with others, both in the physical world, as well as in the digital and social media context.³²⁷

1. *A Data Protection Right*

In Jennifer Rothman’s recent book, *The Right of Publicity: Privacy Reimagined for a Public World*, she imagines privacy and publicity as intertwined rights, “protecting individuals’ identities rather than protecting a separable, purely economic interest.”³²⁸ To this end, Rothman believes that public and private figures should be able to recover for both financial and personal injuries, and that the right of publicity should have reasonable limits to its alienability.³²⁹ Rothman argues that it has “done a disservice to public figures to deny the possibility that they too suffer dignitary and emotional harms from nonconsensual uses of their identities.”³³⁰ In spite of claims to the contrary, the objections of public figures are not solely pecuniary in nature, nor

323. Jan-Hinrik Schmidt, *Twitter and the Rise of Personal Publics*, in *TWITTER AND SOCIETY* 3, 4 (Katrin Weller ed., 2014) (arguing that social websites, such as Twitter, are contributing to the emergence of a new type of publicness: the “personal public”).

324. For examples of the debate over whether data can or should constitute property, see for example, Lothar Determann, *No One Owns Data*, 70 *HASTINGS L.J.* 1 (2018); Jeffrey Ritter & Anna Mayer, *Regulating Data as Property: A New Construct for Moving Forward*, 16 *DUKE L. & TECH. REV.* 220 (2018).

325. See de Quincey, *supra* note 286, at 141–42.

326. Special thanks to Irene SanPietro for suggesting this articulation.

327. Steeves, *supra* note 306, at 206.

328. ROTHMAN, *supra* note 2, at 183.

329. *Id.*

330. *Id.*

should they be made to pretend as if they are.³³¹ Such an economic requirement minimizes injuries to public figures and dehumanizes them.³³² On the other hand, private figures should not be barred from bringing right of publicity claims simply because their personas lack commercial value, while they are simultaneously prohibited from bringing claims based on privacy because they let their personas enter the public sphere.³³³

To this end, Rothman proposes that right of publicity laws should provide minimum statutory damages to protect private figures without commercially valuable identities, when economic damages would be small, nonexistent, or difficult to prove.³³⁴ A reimagined right of publicity could address problems such as revenge porn, mugshot websites charging fees for the removal of photos and, as will be the focus of the remainder of this Article, social media providers' use of its users' personas for advertising, endorsement, and data harvesting purposes.³³⁵ As Rothman puts it, the “[d]istinctions between public and private figures make little sense today as so-called private figures increasingly live public or quasi-public lives on Instagram, Twitter, Facebook, Pinterest, Periscope, and other online fora.”³³⁶

This proposed integration of privacy and publicity rights is increasingly important as the distance between private and public spaces dwindle and modern media blurs the boundaries between the two.³³⁷ To this end, the rise of personal-public networked spaces, most notably social media, allow individuals to connect on social planes that challenge the conventional divide between public and private.³³⁸ While in Judge Frank's time, it was logical to separate public figures from private individuals, that distinction is less obvious in networked spaces where individuals display, record, and archive their performances of self and personality. For example, consider the phenomenon of social media “influencers”—users of social media who are not necessarily celebrities per se, but have established social influence in a given industry or social sphere and are paid to market and endorse products or services.³³⁹

In terms of intersubjectivity, social networks allow individuals to construct and reconstruct their identities into “fluid and situational-based identities” depending on the social network they are using and the audience

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York?* 36 *CARDOZO ARTS & ENT. L.J.*, 573, 588–92 (2018).

336. ROTHMAN, *supra* note 2, at 183.

337. See, e.g., Zizi Papacharissi & Paige L. Gibson, *Fifteen Minutes of Privacy: Privacy, Sociality, and Publicity on Social Network Sites*, in *PRIVACY ONLINE: PERSPECTIVES ON PRIVACY AND SELF-DISCLOSURE IN THE SOCIAL WEB 75* (Sabine Trepte & Leonard Reinecke eds., 2011).

338. *Id.*

339. See, e.g., Kevin Roose, *Don't Scoff at Influencers. They're Taking Over the World.*, *N.Y. TIMES* (July 16, 2019), <https://www.nytimes.com/2019/07/16/technology/vidcon-social-media-influencers.html>.

they are targeting.³⁴⁰ In this manner, new media enables “[t]he self to traverse[] from privacy and publicity and back by cultivating a variety of social behaviors or performances.”³⁴¹ Some of these performances, even among otherwise private figures, are widely seen—perhaps even “going viral.” These individuals, who are not typically wealthy or otherwise famous, might have emotional, reputational, and/or economic attachments to these identities. Julie Cohen describes the conceptualization of an individual’s identity within a networked space as “a nexus of social practice by embodied human beings.”³⁴²

Yet, social networks have been called a “science fiction nightmare” given their ability to gather, misuse, and abuse user data.³⁴³ Perhaps the right of publicity could be used as a legal mechanism for preventing the misuse and abuse of such data. It might also be justified in encouraging identity formation across social media and other digital technologies and new media such as virtual worlds and communities, websites (especially regarding user-generated content), blogs, podcasts, and online videos.

In attempting a reworked justification for the right of publicity, we might then consider the social dynamics of new media. To this end, James Grimmelmann has examined three factors of social networking consistent with intersubjectivity: (1) identity, (2) relationship, and (3) community.³⁴⁴

As to the first goal, “identity,” social network users’ online profiles allow them to cultivate a persona that influences how others think of them.³⁴⁵ Online interactions allow new media users to use their posted name or nickname, home or profile page, photos, and written postings to this effect. Social media profiles allow users to communicate “prestige, differentiation, authenticity, and theatrical persona” through use of a common cultural language.³⁴⁶ In this way, “social-network-site profiles are wholly social artifacts: controlled impressions for a specific audience, as much performative as informative.”³⁴⁷

The second goal, “relationship,” refers to the capacity of social networks to allow users to deepen their connections to their current friends and make new ones.³⁴⁸ Social networks can provide contexts for interaction as well as help to transmit social cues that facilitate offline interactions. To this end, social networks “work for relationship building because they also provide semi-public, explicit ways to enact relationships.”³⁴⁹ Sharing personal

340. STELLA TING-TOOMEY & TENZIN DORJEE, *COMMUNICATING ACROSS CULTURES* 8 (2d ed. 2019).

341. Papacharissi & Gibson, *supra* note 337, at 76.

342. Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 236 (2007).

343. See Margaret Ryznar, *I Quit Facebook, but What About Those Who Remain?*, PRAWFSBLAWG (Sept. 26, 2018, 2:16 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2018/09/i-quit-facebook-but-what-about-those-who-remain-.html>.

344. James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149–57 (2009).

345. *Id.* at 1152.

346. *Id.* (quoting Hugo Liu, *Social Network Profiles as Taste Performances*, J. COMPUTER-MEDIATED COMM. 252, 252 (2007)).

347. *Id.* at 1153.

348. *Id.* at 1154.

349. *Id.*

information is a central component of intimacy, for example, adding contacts gives someone access to your profile information, a minor form of intimacy which signals trust.³⁵⁰

The third goal, “community,” allows individuals to establish a social position and to be recognized as a valued member of various digital communities.³⁵¹ Social media allows individuals to visualize digital communities. By representing relationships as hyperlinks, websites “spatialize social networks, mapping the connections within them.”³⁵² It therefore becomes possible to conceptualize an individual’s identity within a networked space, such as a digital community.

In considering these idealized goals of social networking, the right of publicity might be justified as a vehicle for regulating and promoting not only user identity, but also digital relationships and communities. As examples of the intersubjective self at work in the right of publicity context, consider the *Fraley v. Facebook* and *Perkins v. LinkedIn* litigations.³⁵³ Both cases illustrate the recent trend toward right of publicity litigation in the context of social media,³⁵⁴ which has had the effect of bringing the “right of publicity to the masses.”³⁵⁵ *Fraley* and *Perkins* involved issues such as whether the right of publicity should (1) allow for recovery for personal and reputational as well as financial injuries, (2) apply to both public and private figures, and (3) what constitutes appropriate legal consent as to the transfer of one’s identity to third parties.

Fraley and *Perkins* highlight the need for a recasting of the right of publicity’s focus from commodity to intersubjectivity. In other words, a focus not merely on the economic harm to the identity-holder, but also in terms of facilitating the quality of social interactions and relationship dynamics between the identity-holder and the (digital) community as a whole. In this way, the right would not only be viewed as protecting the personas of celebrities, as in the *Carson*, *White*, and *Midler* cases discussed in Part I,³⁵⁶ but can also serve to effectively regulate the social dynamics associated with digital technologies and new media. The right could then allow for a certain amount of user online identity control absent the creation of a separate property right in data, which

350. *Id.* at 1155.

351. *Id.* at 1157.

352. *Id.*

353. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222 (N.D. Cal. 2014).

354. Other cases include *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011) (recognizing that mental harm could conceivably constitute injury for purposes of California’s right of publicity, though dismissing the action against Facebook based on the facts alleged); *Cohen v. Facebook, Inc.*, No. C 10-5282 RS, 2011 WL 5117164, at *1 (N.D. Cal. Oct. 27, 2011); *C.M.D. v. Facebook, Inc.*, No. C 12-1216 RS, 2014 WL 1266291, at *1 (N.D. Cal. Mar. 26, 2014).

355. Lori Levine et al., *Social Media Brings the Right of Publicity to the Masses*, LEXOLOGY: INTERNET & SOC. MEDIA L. BLOG (Oct. 7, 2015), <https://www.lexology.com/library/detail.aspx?g=c4439120-2339-4253-8fe3-247ab285098b>.

356. See *supra* notes 42–44 and accompanying discussion.

would vest intellectual property rights in users' information about themselves.³⁵⁷

Both *Fraleley* and *Perkins* involved class actions lawsuits brought under California's right of publicity statute, California Civil Code section 3344, which reads, in part:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.³⁵⁸

In *Fraleley*, the plaintiffs—Facebook users—brought a putative class action lawsuit under California's right of publicity statute against Facebook, Inc. The claim involved the use of plaintiffs' names and likenesses in Facebook's "Sponsored Stories" feature.³⁵⁹ As part of Sponsored Stories, Facebook used its users' names and images in paid advertisements broadcasting to the users' friends that the user had "liked" certain companies or brands, for example, "Angel Frolicker likes Rosetta Stone."³⁶⁰ According to plaintiffs, these misleading endorsements conflicted with how users wanted to present themselves online. Plaintiffs alleged that they did not know that the use of the "Like" button would be "interpreted and publicized by Facebook as an endorsement of those advertisers, products, services, or brands."³⁶¹

In *Perkins*, similarly, a class of plaintiffs alleged that LinkedIn Corporation—creators of the popular professional networking platform—violated their right of publicity by harvesting email addresses from the contact lists of email accounts associated with plaintiffs' LinkedIn accounts, as well as by sending repeated invitations to join LinkedIn to the harvested email addresses.³⁶² Specifically, *Perkins* involved a challenge to LinkedIn's use of a service called "Add Connections," which allows LinkedIn users to import contacts from their external email accounts and email connection invitations to their contacts inviting them to connect on LinkedIn, using Plaintiffs' names and likenesses in the endorsement emails (for example, "I'd like to add you to my professional network—Paul Perkins").³⁶³ Upon receiving a member's authorization, LinkedIn would send an invitation email to the member's email contacts who were not already LinkedIn members. If that connection invitation

357. See generally Mark A. Lemley, *Private Property*, 52 STAN. L. REV. 1545 (2000) (describing the dichotomy between self-regulation and government-regulation of personal data); Michael C. Pollack, *Taking Data*, 86 U. CHI. L. REV. 77 (2019) (suggesting regulating governmental collection of personal data via the Takings Clause of the U.S. Constitution).

358. CAL. CIV. CODE § 3344(a) (West 2019).

359. *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 790–92 (N.D. Cal. 2011) (citation omitted).

360. *Id.* at 791.

361. *Id.* at 792.

362. *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1225 (N.D. Cal. 2014).

363. *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1200 (N.D. Cal. 2014).

was not accepted within a certain amount of time, up to two additional emails are sent reminding the recipient that the connection invite is pending.³⁶⁴

Based on the right of publicity's commercial focus, plaintiffs in both cases had difficulties recovering because (1) as private figures, their personas had little financial value for assessing injury, and (2) they had assigned their rights of publicity—their personas—to Facebook and LinkedIn, for advertising and endorsement purposes based on a click-through consent to each platform's respective terms of service. Each set of terms contained a broad publicity license in exchange for each user's use of the platforms.

2. *A Flexible Theory of Harm*

As to the injury alleged, the *Fraleley* court explained that California's right of publicity—despite being one of a minority of jurisdictions to actually incorporate statutory damages for non-economic injuries—was primarily a vehicle to prevent the commercial use and protect the economic value of the persona.³⁶⁵ Plaintiffs were thus limited to alleging economic rather than emotional harm.³⁶⁶ According to the district court:

Plaintiffs here do not allege that their personal browsing histories have economic value to advertisers wishing to target advertisements at Plaintiffs themselves, nor that their demographic information has economic value for general marketing and analytics purposes. Rather, they allege that their individual, personalized endorsements of products, services, and brands *to their friends and acquaintances* has *concrete, provable value in the economy at large*, which can be measured by the additional profit Facebook earns from selling Sponsored Stories compared to its sale of regular advertisements. . . . Based on these *concrete* allegations, Plaintiffs assert that they have a *tangible* property interest in their personal endorsement of Facebook advertisers' products to their Facebook Friends, and that Facebook has been unlawfully profiting from the nonconsensual exploitation of Plaintiffs' statutory right of publicity.³⁶⁷

Yet, had plaintiffs also been allowed to plead mental or reputational harm, they would have had a stronger case. Consider that the motivation of plaintiffs, social media users, was primarily for intersubjective—social identity, relationship, and community—benefit, not economic gain.³⁶⁸ In this light, the right of publicity as an economic creature seems to be a “clumsy tool” to redress plaintiffs' injuries.³⁶⁹ If right of publicity law was receptive to it, plaintiffs could have argued, beyond unjust enrichment, that the misleading

364. *Id.*

365. *Fraleley*, 830 F. Supp. 2d at 806.

366. *Id.*

367. *Id.* at 799 (emphasis added). The Court in *Fraleley* found particularly persuasive Facebook CEO Mark Zuckerberg's quote: “A trusted referral influences people more than the best broadcast message. A trusted referral is the Holy Grail of advertising.” *Id.*

368. Alison C. Storella, *It's Selfie-Evident: Spectrums of Alienability and Copyrighted Content on Social Media*, 94 B.U.L. REV. 2045, 2071 (2014).

369. *Id.*

endorsements simply conflicted with how Facebook or LinkedIn users wanted to present themselves online in terms of their relationships with others and their resulting status in the digital community.

For example, the facts in *Fraleley* indicated that plaintiffs routinely clicked “Like” on the Facebook pages of brands and companies for purposes other than to express support for them. When Facebook and LinkedIn broadcasted misleading endorsements in Sponsored Stories and Add Connections, it conflicted with users’ values (identity), their ability to build digital connections (relationship), and their corresponding social positions on the network (community). As one commentator points out as to the plaintiffs in *Fraleley*:

Such messages [by Facebook] could have caused users non-economic harm in the form of humiliation and impairment of reputation by presenting them to their “friends” as proponents of brands and companies that they did not in fact endorse. Moreover, if users had restricted the visibility of the “Likes” section of their profile to only certain “friends” or to no one but themselves, the broadcasting of these “Likes” through “Sponsored Stories” would certainly have caused them embarrassment and feelings of powerlessness as their selected privacy settings led to a greater expectation of privacy. The unavailability of an option to opt-out of social marketing paired with the lack of transparency about what happens when a user clicks the “Like” button strengthens the support for a finding of non-economic harm.³⁷⁰

In *Perkins*, Plaintiffs similarly alleged that LinkedIn had used their names and likenesses to personally endorse LinkedIn’s services for its commercial benefit and to the detriment of plaintiffs.³⁷¹ Unlike in *Fraleley*, plaintiffs here attempted to plead reputational harm in addition to economic harm. As evidence for harm to users’ reputations, in a message thread on LinkedIn’s Help Center, one user described LinkedIn’s Add Connections process as “deceptive, misleading and purposely vague.”³⁷² Other users stated that they were “‘extremely upset at the repercussions’ of LinkedIn’s ‘hacking,’” and that “LinkedIn should stop the spammy practices of sending out invitations to people’s address book without their explicit request to do so.”³⁷³ Another user wrote: “There is a specific group of people whom I absolutely must avoid for ethical reasons. This feature has sent out invitations on its own initiative twice, and my first notice each time was that one of these people ‘accepted’ my invitations. Terrible.”³⁷⁴ Yet, another user wrote: “[A]t this point I’m finding LinkedIn more of a problem in terms of hurting my reputation than helping it. What’s more the invitations are NOT people in my address book. They are people I don’t know. I find this entire issue extremely unprofessional on

370. Koehler, *supra* note 243, at 989.

371. *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1200 (N.D. Cal. 2014).

372. *Id.* at 1201.

373. *Id.* (second internal quotation marks omitted) (quoting Third Amended Class Action Complaint at 30, 45, *Perkins*, 53 F. Supp 3d 1190 (N.D. Cal. 2014)).

374. *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1237 (N.D. Cal. 2014) (internal quotation marks omitted) (quoting Third Amended Class Action Complaint, *supra* note 377, at 37).

[LinkedIn's] part. You would think with all these members with the same problem [that LinkedIn] would respond with a fix."³⁷⁵

But despite this evidence, Plaintiffs ran into difficulties in pleading reputational injury. Consistent with the subject-object split between private and public personality rights, the court cited precedent distinguishing "injury to the character or reputation" from "injury to the feelings" resulting from harm to one's reputation."³⁷⁶ While California's right of publicity statute is one of the few that allows minimum statutory damages for mental harm, the district court held that it could not compensate for reputational harm.³⁷⁷ Rather, plaintiffs could only be compensated for the "effect any such reputational harm might have on one's feelings" and emotions.³⁷⁸ Thus, the non-economic injury in this case could not comprise the actual injury to plaintiffs' reputations, but rather only the uncertainty and worry regarding these reputations.³⁷⁹

In other words, the court fell for the Cartesian "myth of the isolated mind."³⁸⁰ The harm alleged had to relate solely to the plaintiffs' inner mental state alone, instead of more accurately being conceptualized as the intersubjective harm to the identities, relationships, and community between and among users of the social network. The right of publicity's economic focus, and its difficulty in weighing non-market considerations such as reputation, seriously limits the remedies available to new media users and other private figures whose identities do not have readily measurable commercial value but who attempt to seek recourse for the unauthorized use of their personas.³⁸¹ An approach that focuses not just on the profit or benefit the misappropriating party received, but *also* on the harm—economic, reputational, and mental—incurred by the violated party would better conceptualize the wrongdoing done to plaintiffs.³⁸²

3. *A Heightened Standard of Consent*

Beyond harm, another aspect of the intersubjective approach to the right of publicity involves the element of consent. Of the right of publicity's three major elements—(1) use of an individual's persona; (2) for commercial purposes; (3) without plaintiffs consent—the latter has so far been

375. *Id.* (internal quotation marks omitted) (quoting Third Amended Class Action Complaint, *supra* note 377, at 45).

376. *Id.* at 1243 (citing *Miller v. Collectors Universe, Inc.*, 72 Cal. Rptr. 3d 194 (2008) ("Minimum statutory [right of publicity] damages, thus, do not recompense mere reputational harm; rather, this remedy compensates for the effect any such reputational harm might have on one's feelings or peace of mind.")).

377. *Id.*

378. *Id.* (emphasis added).

379. *Id.*

380. *See supra* note 289, and accompanying discussion.

381. Storella, *supra* note 368, at 2072.

382. *See Koehler, supra* note 243, at 996 ("If future plaintiffs and courts instead adopt the holistic approach focusing on the *harm incurred on plaintiffs* rather than the *profits of the infringer*, plaintiffs will be more likely to recover.").

undertheorized.³⁸³ Facebook and LinkedIn had argued that Plaintiffs had consented to use of their names and likenesses in advertising by agreeing to its Terms of Service.³⁸⁴ According to the *Fraley* court, for example, Plaintiffs “faced a substantial hurdle in proving a lack of consent, either express or implied. While those issues could not be adjudicated in Facebook’s favor at the pleading stage, there was a significant risk that at some later juncture, plaintiffs would be found to have consented.”³⁸⁵

As a result of the settlement in *Fraley* and *Perkins*, which otherwise involved a modest payout to class members,³⁸⁶ Facebook and LinkedIn simply amended their terms of service to explicitly include consent for use of users’ personas for advertising or endorsement purposes. For example, a recent version of Facebook’s Terms of Service reads:

You give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you. For example, we may show your friends that you are interested in an advertised event or have liked a Page created by a brand that has paid us to display its ads on Facebook.³⁸⁷

Courts have since found this boilerplate consent provision enforceable, even in the context of minors who use the platform.³⁸⁸ Thus, while the plaintiffs in *Fraley* and *Perkins* scored a small moral victory by demonstrating that private figures can successfully assert right of publicity claims, social media platforms were able to draft their way out of liability for right of publicity violations via disclosures in their terms of service.³⁸⁹ As a result, right of publicity claims have since dried up in the context of social media. The

383. For examples of discussions as to consent in the right of publicity context, see William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105; Paul Ohm, *Branding Privacy*, 97 MINN. L. REV. 907 (2013). The issue, though, has been heavily theorized in terms of contract law generally. See, e.g., Brian Bix, *Consent and Contracts*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT 222 (Andreas Müller & Peter Schaber eds., 2018); Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57 (2012).

384. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 805 (N.D. Cal. 2011); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1213, 1215 (N.D. Cal. 2014).

385. *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 942 (N.D. Cal. 2013).

386. See, e.g., Eric Goldman, *The Perkins v. LinkedIn Class Action Was Badly Bungled*, FORBES (Oct. 3, 2015, 10:38 AM), <https://www.forbes.com/sites/ericgoldman/2015/10/03/the-perkins-v-linkedin-class-action-settlement-notification-was-badly-bungled/#5190d7844e0c>.

387. *Terms of Service*, *supra* note 259 (As compared to the previous vaguer language, which provided that users’ “grant [Facebook] a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content.”).

388. See *C.M.D. v. Facebook, Inc.*, No. C 12-1216 RS, 2014 WL 1266291 at *2 (N.D. Cal. Mar. 26, 2014). Here, a group of minors who had opted out of the *Fraley* settlement argued that Facebook’s terms are not legally enforceable as to the class. *Id.* at *1. Specifically, that the contract represents a type of contract into which a minor cannot legally enter under California law; or alternatively, that the contract was voidable when entered into with minors. *Id.* at 3–5. The district court rejected these arguments and granted Facebook’s motion to dismiss. *Id.* at *5.

389. See, e.g., Levine et al., *supra* note 355.

right of publicity is thus able to do little to lessen the unequal power dynamics between the users of new media and social networking platforms.

Had plaintiffs been able to demonstrate stronger showings of harm and lack of consent, though, the settlement might have resulted in Facebook or LinkedIn providing a proper opt-out, or preferably opt-in, regime. Users would then be able to opt-out or opt-in to “Add Connections” or “Sponsored Stories” on a notification-by-notification basis. This is the sort of meaningful control that would foster intersubjective relations—stronger control of identity formation and the strengthening of digital relationships and communities. On the other hand, blanket consent to advertising and endorsement programs generally is meaningless, as users will not be able to predict what brand, company, or user of whom they might be forced to broadcast an endorsement.³⁹⁰

Future commentary might then focus on what constitutes adequate consent for purposes of the transfer of one’s personality. While imposing outright limits on the right of publicity’s free transferability is one option, e.g., preventing the transferability of the right of publicity via total assignment,³⁹¹ courts or (especially) legislators could alternatively consider a heightened standard of consent in this regard.³⁹² Commentators, such as Margaret Jane Radin, in her groundbreaking work *Boilerplate*, have put forth significant arguments that language in terms of service, which many website users will never read, should not be enough to constitute consent to a license of something as integral as publication of one’s identity for blanket use in advertising.³⁹³

Perhaps social networks and other new media should be required under the law to obtain the *knowing* consent of its users on a notification-by-notification basis before it can use their personas for capitalistic purposes. Just as it is in privacy law,³⁹⁴ the appropriate standard of consent should be a subject of controversy as to the right of publicity. We might therefore look, for example, to principles of informed consent in the medical context or

390. See Grimmelmann, *supra* note 344, at 1198.

391. See e.g., Rothman, *supra* note 335, at 588–92.

392. See, e.g., Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1408 (2009) (noting that alienability encompasses a broad spectrum); Jennifer Rothman, *supra* note 9, at 186 (proposing that the right of publicity operate on such a spectrum).

393. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2012) (providing a comprehensive treatment of the problems posed by the increasing use of terms and conditions, demonstrating how their use has degraded traditional notions of consent, and thus sacrificed our core rights and liberties); see also Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 92 (2011) (arguing “that the binary choice between alienability and inalienability is over-simplistic, if not outright arbitrary.”).

394. See, e.g., Daniel Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880 (2013).

affirmative consent in feminist legal theory,³⁹⁵ in fashioning publicity consent laws.

In these and other ways, recasting the right of publicity through an intersubjective lens might allow the right to contribute to the development of not just the self, but of digital data-based relationships and community. A far cry from publicity's commonly held stereotype as a hedonic vehicle bolstering the rights of already wealthy celebrities and trampling over the First Amendment.³⁹⁶

CONCLUSION

No one can literally answer the metaphysical question of what the self is. However, we can come up with a better metaphor of the personality for purposes of the law which is more effective than what we currently have. The extent to which the right of publicity should be alienable, whether it should allow claims for emotional and reputational harms as well as economic ones, and what constitutes adequate consent for its transfer, are a few important issues that depend on what our view of the self and personality are. To this end, the subject-object split common to traditional psychoanalytic thought is insufficient in considering the modern intertwined need for privacy and publicity. Intersubjective personality theory, in viewing the self as contextual, relational, and dependent on social interaction, provides a useful conceptual update, including in the context of navigating identity, relationships, and community on new media. Whether he did so consciously or unconsciously, Judge Frank's metaphorical separation of publicity from privacy need no longer haunt personality rights jurisprudence.

395. See, e.g., Robert H. Sloan and Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 J. HIGH TECH. L. 370 (2013); see also Robin West, *Sex Law and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE (Franklin G. Miller & Alan Wertheimer eds., 2010).

396. Tushnet, *A Mask that Eats*, *supra* note 7, at 1558–59. But see Reid Kress Weisbord, *A Copyright Right of Publicity*, 84 FORDHAM L. REV. 2803, 2812 (2016) (“In striking a balance between these oft-competing interests, the law generally favors speech over publicity rights.”).
