

Busted Mugs and Bad Lighting:  
Balancing First Amendment Interests Against Claims for Control of One's Identity

A THESIS  
SUBMITTED TO THE FACULTY OF  
UNIVERSITY OF MINNESOTA  
BY

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IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF  
MASTER OF ARTS

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MAY 2014

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## **Dedication**

This thesis is dedicated to my family, friends, and the supportive faculty at the University of Minnesota School of Journalism and Mass Communication and the Law School. Without your wisdom, compassion, and brilliant contributions, I could not have completed this dual degree program.

## Abstract

Booking photographs, also known as “mug shots,” have served law enforcement purposes for centuries. Mug shots also dominate media coverage of crime. These images attract readers, as tabloid publications and reputable newspapers alike maintain online databases of mug shots. Observing this popularity, Internet entrepreneurs saw an opportunity to make a profit. Mug shot website proprietors began to “scrape” mug shots from local law enforcement agencies and post the images along with the arrested individual’s name and reason for arrest online. To make a profit, sites began to charge fees to remove individuals’ mug shots from their websites. This practice sparked several reactions. Search engines like Google changed their algorithms to push mug shot websites further back in results pages. Payment service providers began to refuse to do business with the mug shot websites. State legislatures began passing laws to make this business practice illegal, often restricting or placing conditions on access to once-public mug shots in the process. Individuals began to sue these websites, arguing the sites’ use of their mug shots was for a commercial purpose that violated the individuals’ right of publicity. In response, mug shot websites have largely adapted their business practices, now only collecting revenue from displaying mug shots alongside advertising or collecting subscription fees.

The reactions to mug shot websites’ new business practices raise concerns for all content creators. Restricted access to mug shots through a patchwork of state laws about their use and right of publicity lawsuits based on mug shot websites provide a lens through which to view the conflict between individuals’ interest in controlling information about themselves and content creators’ interest in autonomously deciding what to publish pursuant to the First Amendment. This thesis begins by discussing the history of mug shots, the rise of mug shot websites, and the reactions to these websites. The thesis then traces the legal roots of two of these responses: the legislative approaches to mug shots and the development of the right of publicity. Next, this thesis considers a theoretical framework through which to view both sides of this debate—an individual’s autonomy interest in controlling information and a publisher’s interest in making autonomous publishing decisions. Then, this thesis considers how courts have resolved the conflict between these positions.

Finally, this thesis concludes that going forward, a unified approach, rather than a patchwork of state laws addressing harms that arise from uses of information or a tort claim without an underlying theory, should govern conflicts between individuals and publishers. A unified approach that values the autonomy of both parties best balances the two positions. Courts should consider the totality of the circumstances in which the use of information about an individual appears to determine whether the First Amendment interest outweighs the individual’s autonomy interest. Only then will a manageable approach to the use of an individuals’ information emerge—one that protects both First Amendment interests and provides meaningful protection to individuals from future harms stemming from new uses of technology.

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## I. INTRODUCTION

Meagan Simmons, a 28-year-old Florida mother of four, probably never expected to become an Internet meme. Nor did she expect to be featured in an advertisement for a background check website. But her booking photograph, commonly known as a “mug shot,” snapped at the Hillsborough, Florida jail in the wee hours of July 25, 2010, set all of these events into motion.<sup>1</sup> Simmons was arrested for driving under the influence on July 25, 2010.<sup>2</sup> As part of the standard arrest process, a deputy at the Hillsborough, Florida, jail took her photograph.<sup>3</sup> This public record then made its way to a website that compiles mug shots.<sup>4</sup> But Simmons’ mug shot was not like all the others; she is undeniably attractive. Thus, her mug shot caught the attention of users of websites *The Chive* and *Reddit* in late 2012 and early 2013.<sup>5</sup> She became known as the “hot convict” in some Internet circles.<sup>6</sup> Users began to create Internet memes using Simmons’ mug shot,<sup>7</sup> with such commentary as “Miss Demeanor,” “Guilty of taking my breath away,” “This is what a model inmate looks like,” “Appears on Cops, Gets modeling contract,” and “I

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<sup>1</sup> Jon Silman, *Woman behind ‘attractive convict’ mug shot sued for invasion of privacy*, TAMPA BAY TIMES (Feb. 27, 2014), <http://www.tampabay.com/news/courts/civil/zephyrhills-woman-in-attractive-convict-mugshot-files-suit/2167688>.

<sup>2</sup> Id.

<sup>3</sup> Id..

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id. A meme is an “idea . . . or usage that spreads from person to person within a culture,” and in the context of the Internet, memes are recognized as images that individuals superimpose with their own ideas, statements or jokes. Meme, MERRIAM-WEBSTER DICTIONARY (last visited April 1, 2014), <http://www.merriam-webster.com/dictionary/meme>.

guess it's true, looks do kill.”<sup>8</sup> But it was only after a background check website, InstantCheckmate.com, used her mug shot in an advertisement for its services that Simmons filed suit.<sup>9</sup> The ad featured her mug shot with a caption reading, “Sometimes the cute ones aren't that innocent.”<sup>10</sup> Discussing the basis for Simmons' suit, her attorney, Matthew Christ, said, “At the end of the day, this is actually about intellectual property. If someone is going to use your image, they need to pay you for it.”<sup>11</sup> He distinguished it from previous Internet meme uses of Simmons' image because of InstantCheckmates.com's commercial purpose for using the image.<sup>12</sup> “The legal issue is it's your face, and your name. You own it. You can use it, you control it and when someone misappropriates it — that's when you're violating Florida law.”<sup>13</sup> Simmons' lawsuit seeks an injunction to prohibit further use of her mug shot by the website and monetary damages for mental anguish.<sup>14</sup>

Simmons' mug shot's trajectory speaks to the progression of the use of mug shots over time. First used only for law enforcement purposes, mug shots have increasingly become a ubiquitous aspect of American culture, particularly in the context of media

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<sup>8</sup> *Meagan Simmons Sues Websites Over 'Attractive Convict' Mug Shot*, THE HUFFINGTON POST (Feb. 28, 2014 6:59 PM EST), [http://www.huffingtonpost.com/2014/02/28/meagan-simmons-attractive-convict-sues\\_n\\_4875035.html](http://www.huffingtonpost.com/2014/02/28/meagan-simmons-attractive-convict-sues_n_4875035.html).

<sup>9</sup> Silman, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Brett Snider, *'Hot Convict' Sues Website Over Mugshot Ad*, INJURED: THE FINDLAW ACCIDENT, INJURY AND TORT LAW BLOG (Feb. 28, 2014, 10:50 AM), <http://blogs.findlaw.com/injured/2014/02/hot-convict-sues-website-over-mugshot-ad.html>.

coverage of crime. Beginning in 2010, however, several individuals developed a business model utilizing mug shots, which are public records in many jurisdictions. These mug shot websites collected mug shots, posted them online, and then made money by charging those pictured on the websites to take down their mug shots. Not long after these practices were unveiled by several media outlets did the public and press react negatively, likening this business model to extortion. In the face of private business and public pressures, these websites' business models have generally shifted. Like online newspapers, mug shot websites' revenue-generating methods now focus on advertising. This makes distinguishing them from newspapers more difficult. Reactions to these websites potentially raise First Amendment concerns and implicate the rights of content creators to use mug shots.

This thesis proceeds with the history of mug shots and their use by law enforcement and media. Following that, a discussion of the rise of today's mug shot industry, including several permutations of business models, outlines how mug shot websites operate. This section also addresses reactions to this industry, including legislative action, and explains mug shots' status as public records. One of the crucial responses to mug shot websites covered in this section is a lawsuit claiming a violation of the right of publicity. The next part discusses the history of torts tied to the unauthorized use of one's identity, covering in depth the foundation of these torts in privacy law. Next, a discussion of autonomy theory explains how torts tied to use of identity and First Amendment interests in publishing information both implicate theory grounded in autonomy. This section also explores the conflicts between these theories and discusses factors courts consider when weighing an individual's claim for control of information

about him or herself against First Amendment rights of content creators. Keeping this history and development in mind, this thesis next turns to several questions: what are the theoretical underpinnings for the resolution of conflicts between the right to control information and the right to publish? How should courts balance these rights in the digital information age?

This thesis proposes that a unified theory based in autonomy best undergirds claims based on identity while still maintaining First Amendment rights of those who create content. This thesis concludes that an autonomy-based approach accounts for the First Amendment, economic, and privacy interests at stake in identity-based claims. This approach requires a conscientious effort by courts to analyze the context in which mug shots appear, drawing on the “totality of the circumstances” approach courts follow in defamation cases. This approach would ensure coverage of crime continues while respecting the autonomy and privacy interests of those depicted in mug shots.

## **II. THE HISTORY, DEVELOPMENT, AND USE OF MUG SHOTS**

### **A. The History of Mug shots**

Law enforcement officials realized that modern photography, developed in the 1820s and 1830s, could be useful for police purposes later that century.<sup>15</sup> The San Francisco Police Department began to keep records with suspects’ images and biographical details in 1854, and the New York Police Department followed along under the leadership of Chief Detective Thomas F. Byrnes in 1858.<sup>16</sup> Byrnes created a book of

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<sup>15</sup> THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA, VOL. 5, 1143 (Wilbur R. Miller, ed. 2012).

<sup>16</sup> JONATHAN FINN, CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY, 6 (2009).

204 photographs of criminals he called the “Rogue’s Gallery” that the police showed to eyewitnesses to identify suspects.<sup>17</sup> This book proved unwieldy and inefficient, though, forcing eyewitnesses to look over too many images to identify one suspect. French police officer Alphonse Bertillon identified this problem and developed a more systematic way to identify suspects after he began to work for the Parisian police department in 1879.<sup>18</sup> Bertillon organized the images by combining photographs of the individuals’ front and profile, similar to today’s mug shots, with “detailed anthropometric measurements, records of tattoos and scars, and notes of personality characteristics.”<sup>19</sup> Police recorded this information on cards that they filed and indexed for easier access.<sup>20</sup>

Public awareness of crime has increased since those early years. As the mass media developed, law enforcement increasingly turned to outside sources for aid in the search for suspects, and popular interest in crime has led to increased coverage of crime.<sup>21</sup> The spread of printing technology in the 1800s led to greater awareness about crime among the public, as more citizens became literate and read papers that included crime stories.<sup>22</sup> Crime reporting became increasingly sensational during the twentieth

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<sup>17</sup> THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA, vol. 5, *supra* note 15 at 1143; FINN, *supra* note 16, at 7.

<sup>18</sup> FINN, *supra* note 16, at 23.

<sup>19</sup> THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA, vol. 5, *supra* note 15 at 1143.

<sup>20</sup> *Id.*

<sup>21</sup> THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA, vol. 1, 1243 (Wilbur R. Miller, ed. 2012).

<sup>22</sup> THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA, *supra* note 21, at 1243.

century, with images of “fatal bar brawls and car chases through brothel raids to mobster warfare” dominating newspaper coverage.<sup>23</sup>

Police began to turn to the news media to gather information about suspects in the twentieth century.<sup>24</sup> The police began the practice of, in seeking information about a crime suspect, providing the media with images of a suspect, which the news “circulates... in the hope that someone will know the suspect and report him or her to the police.”<sup>25</sup> Television shows entirely dedicated to showing images of wanted suspects to get tips and leads on suspects from the public started in Germany in 1967 and spread to the United States in the 1980s with the program *America’s Most Wanted*.<sup>26</sup> Today, “[m]ug shots permeate our daily lives in newspapers, on television, and in film.”<sup>27</sup>

Traditional newspapers regularly include mug shots in crime coverage.<sup>28</sup> Mug shots often run alongside stories about crime to show the suspect. Beyond use in their coverage of crime, even traditional, “mainstream” newspapers post mug shots in online galleries.<sup>29</sup> *The Chicago Tribune* and *The Washington Post* both include galleries of mug shots. *The Washington Post’s* mug shot gallery, for example, is surrounded by banner

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<sup>23</sup> Id. at 1244.

<sup>24</sup> Id. at 1245.

<sup>25</sup> Id. at 1243.

<sup>26</sup> THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA, vol. 5, *supra* note 15 at 1143.

<sup>27</sup> FINN, *supra* note 16, at 23.

<sup>28</sup> Allen Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. U. L. REV. 1321, 1323 (2013).

<sup>29</sup> Id..

advertising and includes a video advertisement before a reader can view the gallery.<sup>30</sup>

The captions below the mug shots describe the individual's crime and include a link to the *Post's* coverage of the crime.<sup>31</sup> The *Chicago Tribune's* gallery, "Mugs in the news," is also surrounded by advertising.<sup>32</sup> The top of the gallery includes a disclaimer that reads, "Arrest and booking photos are provided by law enforcement officials. Arrest does not imply guilt, and criminal charges are merely accusations. A defendant is presumed innocent unless proven guilty and convicted."<sup>33</sup> The gallery includes the defendant's name, the law enforcement agency from where the image came, and the charge.<sup>34</sup>

Tabloids like the *National Enquirer* have never shied away from publishing mug shots—particularly those in which a celebrity looks unusual or somehow shocking.<sup>35</sup> TMZ.com, a tabloid and gossip website, maintains an online gallery of celebrity mug shots, including advertisements after every fourth mug shot.<sup>36</sup> Print tabloids entirely dedicated to mug shots have been popping up around the country in recent years.<sup>37</sup> These mug shot tabloids, with titles like *Cellmates*, *Jailbirds*, *Just Busted*, *Jail House Rocs* and

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<sup>30</sup> *D.C. region mug shots*, THE WASH. POST (Mar. 1, 2014), [http://www.washingtonpost.com/local/crime/2014/03/01/9869432e-c08e-11e1-95b8-18a2903941ea\\_gallery.html#item0](http://www.washingtonpost.com/local/crime/2014/03/01/9869432e-c08e-11e1-95b8-18a2903941ea_gallery.html#item0).

<sup>31</sup> *Id.*

<sup>32</sup> *Mugs in the news*, THE CHICAGO TRIBUNE (Mar. 14, 2014), <http://www.chicagotribune.com/news/local/chi-mug-photogallery.0.5488047.photogallery>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Rostron, *supra* note 28, at 1323.

<sup>36</sup> *Celebrity Mug Shots*, TMZ (last visited Mar. 19, 2014), <http://www.tMZ.com/photos/2007/05/09/39-celebrity-mug-shots/images/2014/01/23/012314-justin-bieber-mugshot-duc-troubled-jpg>.

<sup>37</sup> Debbie Elliot, *The Newest Magazine Fad: The Mug Shot Tabloid*, NATIONAL PUBLIC RADIO (Nov. 23, 2011), <http://www.npr.org/2011/11/23/142701001/the-newest-magazine-fad-the-mug-shot-tabloid>.

*The Slammer*, have become increasingly ubiquitous in the southern United States.<sup>38</sup> The publisher of one Arkansas-based tabloid, Daniel Schroeder, told NPR he considers the tabloids “[m]odern-day stockades.”<sup>39</sup> On sale at gas stations and convenience stores, the papers include rows of mug shots, often divided into categories based on age, hairstyle, attractiveness, and other notable features of those pictured.<sup>40</sup> Sprinkled throughout the mug shots are short crime stories and advertisements.<sup>41</sup> Schroeder’s *The Slammer* sold 7,000 copies a week at the time of NPR’s 2011 report.<sup>42</sup> *Caught Up*, a weekly based in Tennessee, does even better—distributing more than 25,000 copies each week.<sup>43</sup> The paper, however, is now defunct, and Schroeder has moved on to a new mug shot tabloid.<sup>44</sup> Schroeder explained the medium’s popularity by saying, “Most people look at this because they’re curious and they want to gawk and gossip a little bit . . . But there’s a good side to it to that provides people with an opportunity to see maybe somebody that they know has committed a crime, or somebody — might be a victim of a crime — is able to see the person that committed the crime if they haven’t been caught already.”<sup>45</sup> Schroeder has also said, “It is legal to publish this, you may not like it, but if (an arrest

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<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Emma Lacey-Bordeux and Gavin Godfrey, *Published mug shots: A constant reminder of one man’s past*, CNN (May 29, 2012, 12:10 PM), [http://www.cnn.com/2012/05/29/us/mug-shot-websites/index.html?hpt=ju\\_t3](http://www.cnn.com/2012/05/29/us/mug-shot-websites/index.html?hpt=ju_t3).

<sup>44</sup> *Suspect’s Mugshots Have Long Life In Internet*, ASSOCIATED PRESS (Dec. 15, 2013), <http://www.monroenews.com/news/2013/dec/15/suspects-mugshots-have-long-life-internet/>.

<sup>45</sup> Elliot, *supra* note 37.

happens), it's going to (be published) . . . I'm proud of what we did. It's not the most highbrow of journalism. But we tried to show and handle the subject matter with some respect and dignity.”<sup>46</sup>

### **B. The Rise of Commercial Mug Shot Websites**

Public attention first turned to the publication of mug shots by websites that profit from posting the images online in 2011.<sup>47</sup> At that time, websites like florida.arrests.org and BustedMugshots.com had recently begun to scour databases of booking photos from local law enforcement offices using scraping software, collect the images and biographical information, and post them all in one place.<sup>48</sup> For the individuals pictured in these photographs, what was once buried by the protection of police CGI search scripts suddenly appeared in search engine results.<sup>49</sup>

Controversy has surrounded mug shot websites for several years, and their business models have seemingly shifted with public sentiment. Today, the websites themselves generally explain their purpose and viewpoint in “About Us” sections. Bustedmugshots.com, for example, includes an “About Us” page, which states that its purpose is to “synergize multiple sources of law enforcement data in one convenient

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<sup>46</sup> *Suspect's Mugshots Have Long Life in Internet*, *supra* note 44.

<sup>47</sup> See David Kravets, *Mug-Shot Industry Will Dig Up Your Past, Charge You to Bury It Again*, WIRED (Aug. 2, 2011), <http://www.wired.com/threatlevel/2011/08/mugshots>; Joshua Benton, *Some digging by The New York Times strikes a blow against those skeezy mugshot sites*, NIEMAN JOURNALISM LAB, HARVARD UNIVERSITY (Oct. 7, 2013, 11:28 AM), <http://www.niemanlab.org/2013/10/some-digging-by-the-new-york-times-strikes-a-blow-against-those-skeezy-mugshot-sites> (both tracing the advent of commercial mug shot websites to 2011).

<sup>48</sup> Kravets, *supra* note 47.

<sup>49</sup> *Id.*

location for the education of the public.”<sup>50</sup> The site explains that it seeks to offer recent, accurate information, but clarifies that:

[I]n some cases, we realize for the greater good of providing this information, we receive requests to be removed from our database. We are especially sensitive to cases where records should have been sealed or expunged. Given the very nature of expunction (no official order is made public) it is difficult for us to proactively remove records that have already been released to us by sheriff and police agencies; however, we make every effort to remove that information when it is brought to our attention. On the other hand, we do not allow the removal of serious violent or sex crime arrests that have not been exonerated or found not guilty.<sup>51</sup>

The site also seems to address its controversial nature, suggesting a change in attitude about mug shots:

As we continue to bring you publicly available crime incident, sex offender registry and arrest information, we hope to begin changing attitudes about crime information and personal safety. It’s our mission at Busted! to help make crime awareness part of your everyday life in keeping yourself and family safe – just the same as locking your doors, setting your alarms, protecting your identity, hugging your kids, etc. Crimes are occurring around you and your loved ones every second of every day. What are you doing to stay aware, informed, and safe?<sup>52</sup>

Finally, fine print at the bottom of the site addresses the nature of the information it provides, clarifying the role of mug shots in the criminal justice system:

Disclaimer: BustedMugshots.com reproduces publicly available arrest and booking records obtained from the relevant city, county or state reporting agency. BustedMugshots.com makes every effort to ensure the accuracy of all information on the site, but does not guarantee accuracy of the records. The data may not reflect the status of current charges or convictions and all individuals are presumed innocent until proven guilty in a court of law. Users shall not use the data to determine any individual's criminal or conviction record. Please contact

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<sup>50</sup> *About Us*, BUSTEDMUGSHOTS.COM (lasted visited Mar. 14, 2014), <http://www.bustedmugshots.com/about>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

BustedMugshots.com to report an inaccuracy or call us at 800-849-BUSTED (800-849-2878).<sup>53</sup>

Mug shot websites generally operate under one of three business models: an arrangement with “reputation management” companies for paid removal of mug shots, direct payments to the website for removal by those pictured in mug shots, or profits from advertising or subscriptions. When *Wired* magazine first investigated mug shot websites several years ago, many websites sustained their operations through relationships with “reputation-management companies.”<sup>54</sup> These sites still exist today. Individuals who want their photos erased could pay companies like RemoveSlander.com fees to get the images removed from the mug shot websites.<sup>55</sup> RemoveSlander.com, for example, advertises on its site: “Hire RemoveSlander.com And Get Your Mug Shot Deleted from Google ASAP!!!”<sup>56</sup>

The proprietors of reputation management companies told *Wired* magazine that removing the mug shots from the sites and from search engines’ search indexes was “a trade secret” and required a “tremendous amount of work.”<sup>57</sup> Doing some investigation of its own, *Wired* discovered that in fact, the mug shot websites and reputation management companies were in collusion.<sup>58</sup> The mug shot websites allegedly provided the reputation management companies with the URL for an automated takedown script for the mug shot

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<sup>53</sup> Id.

<sup>54</sup> Kravets, *supra* note 47.

<sup>55</sup> Id.

<sup>56</sup> *I Need Help Removing Negative Pictures*, REMOVESLANDER.COM (last updated Oct. 22, 2013), <http://www.remove slander.com/Florida-Arrest-Mug-Shot-Search.html>.

<sup>57</sup> Kravets, *supra* note 47.

<sup>58</sup> Id.

website—for a fee of about ten dollars.<sup>59</sup> Another script, worth another fee, removed the content from search engines’ indexes.<sup>60</sup> Rob Wiggins, creator of florida.arrests.org, confirmed the existence of these takedown tools, but the representatives of reputation management firms refused to discuss their methods.<sup>61</sup> RemoveSlander.com’s disclaimer states, “We are not affiliated with any mugshot websites - and can only offer a service to bury mugshot links on to lower pages in Google.”<sup>62</sup> Its spokesperson, Philip Lee, said the site should not be associated with mug shot sites.<sup>63</sup> It seems possible, however, that this symbiotic relationship lined the pockets of both reputation management firms and the mug shot websites themselves.<sup>64</sup>

The mug shot industry attracted the attention of *The New York Times* by late 2013, resulting in coverage that some argue may have caused a shift within the industry.<sup>65</sup> David Segal reported that by October 2013, 80 websites made money by demanding payment for removal directly from the individuals pictured.<sup>66</sup> Many of the proprietors professed to offer free removal of mug shots to those whose charges were dropped or

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<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Disclaimer, RemoveSlander.com (last updated Oct. 22, 2013), <http://www.removeslander.com/Florida-Arrest-Mug-Shot-Search.html>.

<sup>63</sup> Lacey-Bordeux and Godfrey, *supra* note 43.

<sup>64</sup> Kravets, *supra* note 47.

<sup>65</sup> Kashmir Hill, *Payment Providers And Google Will Kill The Mug-Shot Extortion Industry Faster Than Lawmakers Can*, FORBES (Oct. 7, 2013), <http://www.forbes.com/sites/kashmirhill/2013/10/07/payment-providers-and-google-will-kill-the-mug-shot-extortion-industry-faster-than-lawmakers> (stating that *Times*’ reporter David Segal’s “investigation may be the fix” for the mug shot industry).

<sup>66</sup> David Segal, *Mugged by a Mug Shot Online*, THE N.Y. TIMES (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all>.

who were found not guilty.<sup>67</sup> Free removal from one site, however, is of little comfort when a multitude of other sites copy the image from the original website and repost the mug shot. For instance, Princess Matthews of Toledo, Ohio, got her mug shot from a dropped charge successfully removed from one site for free, but the mug shot continued to appear on other websites.<sup>68</sup> Removal was not free across the board for Matthews, with some sites asking more than \$300 per image.<sup>69</sup> Other have has similar experiences. Donald Andrew McMahon was actually convicted of his crimes and served time in jail, but was able to pay to have his mug shot removed.<sup>70</sup> Shortly thereafter, it appeared on four other websites.<sup>71</sup>

The payment services used to process removal fees attracted some attention during the course of Segal's investigation. After learning about the websites, MasterCard's general counsel said he found their practices "repugnant" and that he had asked the merchant bank that handled MasterCard's mug shot site accounts to terminate the sites as customers.<sup>72</sup> PayPal also decided to "discontinue support for mug-shot removal payments."<sup>73</sup> American Express and Discover responded in kind, and Visa reported it was investigating the legality of the sites' business practices.<sup>74</sup>

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<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Lacey-Bordeaux and Godfrey, *supra* note 43.

<sup>71</sup> Id.

<sup>72</sup> Segal, *supra* note 66.

<sup>73</sup> Id.

<sup>74</sup> Id.

Beyond changes by payment systems, search engine results for mug shot websites may have also seen a hit in the wake of Segal's reporting. When he originally investigated the industry in late 2013, mug shot websites appeared at the top of results lists when a user ran a Google search query for a person's name whose mug shot appeared on a website.<sup>75</sup> The Google search algorithm's "results are supposed to reflect both relevance and popularity," and the mug shots' appearances at the top suggested the sites were attracting plenty of attention.<sup>76</sup> Indeed, Matt Waite, a journalism professor who created one of the earliest online mug shot galleries for *The Tampa Bay Times*, said that "pageviews remain the coin of the realm, and these mug shot websites are pageview machines at almost no cost."<sup>77</sup> By changing its search algorithm to knock mug shot websites down further on results lists, "Google could do what no legislator could — demote mug-shot sites and thus reduce, if not eliminate, their power to stigmatize."<sup>78</sup> Google spokesman Jason Freidenfelds originally responded to Segal's inquiries about mug shot websites with "a statement that amounted to an empathetic shrug."<sup>79</sup> But Freidenfelds got back to Segal with an update: "Our team has been working for the past few months on an improvement to our algorithms to address this overall issue in a

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<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Tracie Powell, *Some news sites suffer from an online mugshot crackdown*, COLUMBIA JOURNALISM REVIEW (Oct. 14, 2013), [http://www.cjr.org/behind\\_the\\_news/news\\_mugshot\\_sites.php?page=all#sthash.T1SmEEEn.dpuf](http://www.cjr.org/behind_the_news/news_mugshot_sites.php?page=all#sthash.T1SmEEEn.dpuf).

<sup>78</sup> Segal, *supra* note 66.

<sup>79</sup> Id.

consistent way. We hope to have it out in the coming weeks.”<sup>80</sup> After Google adjusted its algorithm in the midst of Segal’s reporting in fall 2013, the owner of JustMugshots.com, one of the mug shot sites, reported that searches that used to show his site on the first page of results now showed his site on the fifth page of results.<sup>81</sup> Whether the change to the algorithm has resulted in meaningful change is debatable.<sup>82</sup> A Google search for Maxwell Birnbaum, the original subject of the *Times* report, still returned a result from Mugshots.com as the first result on March 20, 2014.

Many mug shot websites have now turned to more traditional business methods such as running advertisements alongside mug shots<sup>83</sup> or subscription services.<sup>84</sup> BustedMugshots.com’s subscription service offers unlimited access to its mug shot repository for \$19.95 a month.<sup>85</sup> Subscribers can search the mug shot database by name, set up alerts for particular names, and monitor arrests in their neighborhood.<sup>86</sup> JustMugshots.com relies on advertising on its site for revenue, clarifying that it does “not accept payment for removals, updates, or any other services.”<sup>87</sup> Rather,

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<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Barry Schwartz, *Google Launches Fix To Stop Mugshot Sites From Ranking: Google’s MugShot Algorithm*, SEARCH ENGINE LAND (Oct. 7, 2013, 9:36 AM), <http://searchengineland.com/google-launches-fix-to-stop-mugshot-sites-from-ranking-googles-mugshot-algorithm-173672> (noting mixed results for those who have been featured on mugshot websites).

<sup>83</sup> Benton, *supra* note 47.

<sup>84</sup> About Us, *supra* note 50.

<sup>85</sup> Registration, BUSTEDMUGSHOTS.COM (last visited Apr. 28, 2014), <https://www.bustedmugshots.com/registration>.

<sup>86</sup> Id.

<sup>87</sup> *Knowledgebase & FAQs*, JUSTMUGSHOTS.COM (last visited Mar. 16, 2014), <http://support.justmugshots.com/entries/25294294-Will-you-remove-a-page-if-I-pay-you->

JustMugshots.com features advertising banners beside mug shots online.<sup>88</sup> These advertising and subscription services are more similar to traditional news websites that include mug shots in reporting alongside purchased advertising, sometimes behind a paywall.

### **C. The Status of Mug Shots as Public or Private Records**

Whether a booking photograph constitutes a public record is a matter determined by the jurisdiction. States vary widely as to whether they consider mug shots public or private records.<sup>89</sup> At the federal level, the circuits are split as to whether mug shots are public records pursuant to the Freedom of Information Act. The United States Court of Appeals for the Sixth Circuit held in *Detroit Free Press v. Department of Justice* that disclosure of mug shots does not implicate defendants' privacy rights.<sup>90</sup> The United States Court of Appeals for the Eleventh and Tenth Circuits, however, treats mug shots as private records.<sup>91</sup>

The Freedom of Information Act, passed in 1966, creates a presumption of openness for records held by federal executive branch agencies.<sup>92</sup> Crucial to this openness is citizens' abilities to "draw their own conclusions" about government policies

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<sup>88</sup> Rostron, *supra* note 28, at 1323.

<sup>89</sup> *See id.*

<sup>90</sup> *See Detroit Free Press v. Dep't of Justice*, 73 F.3d 93 (6th Cir.1996).

<sup>91</sup> *See Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 503 (11th Cir. 2011), cert. denied, 132 S.Ct. 1141 (2012).

<sup>92</sup> 5 U.S.C. § 552 (2009).

via the access they receive through FOIA.<sup>93</sup> In passing FOIA, Congress recognized the importance of weighing citizens' needs "to have access to government information in order to participate in self-rule" against "the government's need to keep some information confidential and the individual's need for privacy."<sup>94</sup> FOIA permits citizens to request records from federal agencies.<sup>95</sup> Thus, to balance the presumption that records are public, Congress included Exemption 7(C).<sup>96</sup> Privacy concerns have increased in recent years "as computerized federal agency databases have accumulated tremendous amounts of personally-identifiable information such as names, addresses, and social security numbers."<sup>97</sup> Policy discussions surrounding FOIA focus on the use of the information by the requestors and the potential consequences for those who argue their privacy is invaded by the release of records.<sup>98</sup> Derivative uses—uses of public records for purposes other than why the records were originally compiled—made by FOIA requestors have also drawn criticism from privacy advocates.<sup>99</sup> A request by a journalist to collect records for an investigative story, for example, constitutes a derivative use.<sup>100</sup>

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<sup>93</sup> Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RIGHTS J. 1, 3 (2003).

<sup>94</sup> Hoefges, Halstuk & Chamberlin, *supra* note 93, at 3.

<sup>95</sup> 5 U.S.C. § 552 (2009).

<sup>96</sup> 5 U.S.C. § 552(b)(7)(C) (2009); Hoefges, Halstuk & Chamberlin, *supra* note 93, at 3.

<sup>97</sup> Hoefges, Halstuk & Chamberlin, *supra* note 68, at 4.

<sup>98</sup> *Id.* at 5.

<sup>99</sup> *Id.*

<sup>100</sup> Brooke Barnett, *Use of Public Records Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L.J. 557 (2001).

The Sixth and Eleventh Circuits considered the question of whether disclosing mug shots violates Exemption 7(C) of the federal Freedom of Information Act.<sup>101</sup> Exemption 7(C) exempts from public disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>102</sup> This language was amended in 1986—prior to that year, it read “would constitute,” rather than “could reasonably be expected to constitute.”<sup>103</sup> The Supreme Court interpreted this amendment to mean that Congress wanted to give agencies more flexibility to deny FOIA requests based on privacy concerns.<sup>104</sup> The Court held that an agency need not disclose a record if “(1) the information sought implicates someone’s personal privacy, (2) no legitimate public interest outweighs infringing the individual’s personal privacy interest, and (3) disclosing the information ‘could reasonably be expected to constitute an unwarranted invasion of personal privacy.’”<sup>105</sup>

The Sixth Circuit considered privacy rights in the mug shots of eight defendants who were indicted and awaiting trial in federal court in *Detroit Free Press v. Dep’t of*

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<sup>101</sup> 5 U.S.C. § 552 (2009).

<sup>102</sup> 5 U.S.C. § 552(b)(7)(C) (2009).

<sup>103</sup> Act of Oct. 27, 1986, [Pub.L. No. 99-570](#), tit. I, § 1802, 1803, 100 Stat. 3207-48, 3207-49.

<sup>104</sup> *See* *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989) (quoting 132 Cong.Rec. 31,424 (1986)) (stating that “the move from the ‘would constitute’ standard to the ‘could reasonably be expected to constitute’ standard represents a considered congressional effort ‘to ease considerably a Federal law enforcement agency’s burden in invoking [Exemption 7]’”).

<sup>105</sup> *Reporters Comm. for Freedom of Press*, 489 U.S. at 762.

Justice.<sup>106</sup> To apply the privacy exemption under FOIA, the court wrote that it must balance “the need for protection of private information against the benefit to be obtained by disclosure of information concerning the workings of components of our federal government.”<sup>107</sup> The court noted that, in this balancing, the “ridicule or embarrassment from the disclosure of information in the possession of government agencies” does not establish a privacy invasion.<sup>108</sup> The court focused on the public nature of the proceedings against those indicted and that their names and images were already associated with the indictment.<sup>109</sup> Balancing any privacy claimed by those indicted against the public interest, the court wrote that “[e]ven had an encroachment upon personal privacy been found, however, a significant public interest in the disclosure of the mug shots of the individuals awaiting trial could, nevertheless, justify the release of that information to the public.”<sup>110</sup> The court found that in a given case, a court could find that “[p]ublic disclosure of mug shots in limited circumstances can, however, serve to subject the government to public oversight.”<sup>111</sup> On these grounds, the Sixth Circuit concluded that disclosing mug shots in an instance involving “ongoing criminal proceedings in which the names of the indicted suspects have already been made public and in which the

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<sup>106</sup> Detroit Free Press, 73 F.3d at 95.

<sup>107</sup> Id. at 96.

<sup>108</sup> Id.

<sup>109</sup> Id. at 97.

<sup>110</sup> Id. at 97–98.

<sup>111</sup> Id. at 98.

defendants have already appeared publicly in court” does not implicate defendants’ privacy rights and so does not fall within Exemption 7(C).<sup>112</sup>

The Eleventh Circuit reached the opposite conclusion in *Karantsalis v. U.S. Dep’t of Justice*, in which a freelance journalist, Theodore Karantsalis, sought the mug shot of a man convicted of securities fraud.<sup>113</sup> Karantsalis requested the mug shot from the United States Marshals Service, who denied the request, citing Exemption 7(C), and argued that disclosure of the mug shot would constitute an unwarranted invasion of the convict’s personal privacy.<sup>114</sup> The Marshals Service maintains a policy that it does not release booking photographs unless the release serves a law enforcement goal of “address[ing] an issue involving a fugitive.”<sup>115</sup> This Marshals Service policy, the court noted, differs for FOIA requests from the Sixth Circuit due to the holding in *Detroit Free Press*, and the court applied the Marshals Service’s policy within the Eleventh Circuit.<sup>116</sup> Deciding that the mug shot implicated the convict’s privacy interests, the court wrote:

[A] booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties. Finally . . . booking photographs taken by the Marshals Service are generally not available

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<sup>112</sup> Id. at 95.

<sup>113</sup> *Karantsalis*, 635 F.3d at 503.

<sup>114</sup> Id.

<sup>115</sup> Id. at 501.

<sup>116</sup> Id.

for public dissemination; an attribute which suggests the information implicates a personal privacy interest.<sup>117</sup>

The court next concluded that there was little public interest in the mug shot; Karantsalis asserted that the convict's countenance in the photograph might reveal whether he was receiving preferential treatment.<sup>118</sup> The court was unconvinced of the value of the mug shot in determining a prisoner's treatment, and it said general curiosity about a prisoner's facial expression is not an interest that serves FOIA's public oversight goals.<sup>119</sup> Finally, the court concluded that "the balance weighs heavily against disclosure" because of the convict's "substantial personal privacy interest in preventing public dissemination of his non-public booking photographs," contrasted with the public's lack of a "discernable interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities."<sup>120</sup> The Tenth Circuit joined the Eleventh Circuit's reasoning in 2012 in *World Pub. Co. v. U.S. Dept. of Justice*.<sup>121</sup>

The circuit split, combined with the federal government's preferred policy to not release mug shots, has led to an unusual situation for requests for mug shots nationwide. The Marshals Service will release mug shots to FOIA requesters in the Sixth Circuit and will subsequently release any photos requested in the Sixth Circuit to anyone else who

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<sup>117</sup> Id. at 503.

<sup>118</sup> Id. at 504.

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> 672 F.3d 825 (10th Cir. 2012).

requests them nationwide.<sup>122</sup> Thus, many news organizations employ reporters in Kentucky, Michigan, Ohio and Tennessee to request federal mug shots.<sup>123</sup>

#### **D. Legislative Responses to Commercial Mug Shot Websites**

The outrage surrounding mug shot websites has prompted several state legislatures to pass laws limiting the websites' activities in various ways. The wave of legislation began in 2013, when nine states and the District of Columbia introduced legislation about the use of mug shots online. Georgia, Illinois, Oregon, Texas, and Utah each passed legislation restricting activities by mug shot websites in 2013. So far in 2014, 13 states are considering legislation that would impact mug shot websites, and Wyoming has enacted a law addressing mug shots this year. The legislation passed in 2013 and proposals for 2014 are outlined in the figures below.

Most of 2013's enacted legislation shares a common feature in that it specifically targets websites that remove or alter mug shots on their site for a fee, creating civil penalties for that business practice. The legislation also provides methods for individuals to request free removal of their mug shots from websites that solicit payment for removal.

**Table 1: 2013 Enacted Legislation Related to Mug Shots**<sup>124</sup>

<b>State</b>	<b>Law</b>	<b>Summary</b>
<b>Georgia</b>	H.B. 150, Act No. 188	Prohibits certain persons from collecting a fee for removing certain individuals' arresting

<sup>122</sup> Memorandum to U.S. Marshals, *Booking Photograph Disclosure Policy*, U.S. DEPARTMENT OF JUSTICE OFFICE OF GENERAL COUNSEL, (Dec. 12, 2012), available online at [http://www.usmarshals.gov/foia/policy/booking\\_photos.pdf](http://www.usmarshals.gov/foia/policy/booking_photos.pdf).

<sup>123</sup> Josh Gerstein, *Court Ruling Keeps Federal Mugshots Secret*, POLITICO (Feb. 22, 2012), <http://www.politico.com/blogs/under-the-radar/2012/02/court-ruling-keeps-federal-mugshots-secret-115210.html>.

<sup>124</sup> *Mug Shots and Booking Photo Websites*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 21, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx>.

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		booking photographs from a website.
<b>Illinois</b>	S.B. 115, Public Act 98-0555	Provides that it is an unlawful practice for any person engaged in publishing or otherwise disseminating criminal record information through a print or electronic medium to solicit or accept the payment of a fee or other consideration to remove, correct, or modify said criminal record information.
<b>Oregon</b>	H.B. 3467, June 6, 2013, Chapter No. 330	Requires individual seeking disclosure of photographic records of arrested person from law enforcement agency to submit written request to agency, in person and with payment of fees; limits scope of each request to photographic records of one arrested person; prohibits law enforcement agencies from publishing photographic records of arrested persons on Internet.
<b>Texas</b>	S.B. 1289, July 30, 2013, Chapter 1200	Regulates business entities engaged in the publication or other dissemination of mug shots and other personal identifying information regarding the involvement of an individual in the criminal justice system; provides a civil penalty for violations. Provides an avenue to dispute records.
<b>Utah</b>	H.B. 408, April 26, 2013, Chapter. No. 404	Enacts a provision relating to photographs of criminal suspects; prohibits county sheriffs from providing a copy of a booking photograph to a person if the photograph will be placed in a publication or posted on a website that requires a payment in order to remove the photograph; requires a person requesting a copy of a booking photograph to sign a statement that the photograph will not be placed in a publication or on a website that requires payment in order to remove the photograph; relates to penalties.

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The legislation pending in 2014 also generally provides for free removal of mug shots from commercial websites for those who can prove the charges were dropped or they were acquitted. Several states, however, have gone further: Florida and Georgia are considering bills that would severely restrict or cut off access to mug shots altogether.

Further, two states' bills (e.g. Missouri, Minnesota) do not require that an individual have been acquitted or had the charges dropped to require removal of the mug shot. For example, Minnesota H.B. 1940 provides that "if the individual was convicted of the crime listed, the individual may request that the Web site or publication alter the information posted to include no more than the individual's first name, last initial, and crime of conviction."<sup>125</sup> Additionally, some states are considering making access to mug shots more burdensome; Minnesota legislators are considering requiring requests to be made in person to the agency that has the original photograph and establishing fees of more than \$5 for the photographs.<sup>126</sup>

**Table 2: 2014 Legislation Related to Mug Shots<sup>127</sup>**

State	Bill	Summary
<b>Alabama</b>	H.B. 135	Requires the operator of a website publishing an arrest photograph of an individual to remove, at no charge, the photograph and information within a specified period after notice of acquittal, the charges were dropped, or other resolution of the charges without a conviction. Provides that failure to remove a photograph and information is a deceptive trade practice and provides remedies for violations under the Deceptive Trade Practices Act.
<b>California</b>	S.B. 1027	Prohibits a person who publishes criminal record information via print or electronic means from soliciting or accepting a fee or other consideration to remove, correct, or modify that information. Establishes civil penalties for violations.
<b>Colorado</b>	H.B. 1047	Requires a person who publishes booking photographs or other basic identification information on a publicly available commercial web site, upon request and without compensation, to remove the booking photograph and basic identification information of a person who is not charged, whose charges are

<sup>125</sup> Minn. H.B. 1940 (2014).

<sup>126</sup> Minn. H.B. 1933 (2014).

<sup>127</sup> *Mug Shots and Booking Photo Websites*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 21, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx>.

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		dismissed, or who is acquitted of the charges, or whose case is sealed. Authorizes a person whose booking photo or information is not removed to file a civil action to recover any damages caused by the failure.
<b>Florida</b>	H.B. 265	Prohibits county or municipal detention facilities from electronically publishing arrest booking photographs of certain arrestees.
<b>Florida</b>	H.B. 619	Requires removal of photograph from website without fee or compensation upon request by subject individual; provides requirements for request; provides that violations are subject to remedies under Florida Deceptive & Unfair Trade Practices Act.
<b>Florida</b>	S.B. 298	Prohibits a person who publishes or disseminates an arrest booking photograph through a publicly accessible print or electronic medium from soliciting or accepting payment of a fee or other consideration to remove, correct, or modify such photograph; authorizes an action to enjoin publication or dissemination of an arrest booking photograph if the publisher or disseminator unlawfully solicits or accepts a fee or other consideration to remove, correct, or modify such photograph.
<b>Georgia</b>	H.B. 845	Prohibits the disclosure of arrest booking photographs except under certain circumstances.
<b>Kentucky</b>	H.B. 51	Prohibits a person from using a booking photograph for a commercial purpose if that photograph will be posted in a publication or on a Web site, and the removal of the booking photograph requires the payment of a fee or other consideration.
<b>Kentucky</b>	S.B. 95	Prohibits a person from using criminal records, including booking photographs, for a commercial purpose if that information will be posted in a publication or on a Web site, and the removal of the information requires the payment of a fee or other consideration.
<b>Minnesota</b>	H.B. 1933	Identifying booking photos as public, but requiring requests for photos to be made in person to the agency that has the original photo and establishing a fee of no less than \$5 per photograph requested.
<b>Minnesota</b>	H.B. 1940	Requiring, for receipt of a booking photo, contact information, a statement of purpose for the request, a list of locations and formats where the photograph will be published, and possible supplemental disclosures if the location or format of publication changes. Establishing that booking photos may not be published in media that require payment of a fee or consideration for removal, and creating a process for free removal. Restricting the information that may be listed for those convicted of crimes.

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<b>Minnesota</b>	S.B. 1863	Requiring, for receipt of a booking photo, contact information, a statement of purpose for the request, a list of locations and formats where the photograph will be published, and possible supplemental disclosures if the location or format of publication changes. Establishing that booking photos may not be published in media that require payment of a fee or consideration for removal, and creating a process for free removal. Restricting the information that may be listed for those convicted of crimes.
<b>Missouri</b>	H.B. 1335	Prohibits businesses from requiring payment to remove a booking photograph and includes a petition process for an individual to have his or her booking photograph removed from the website.
<b>Missouri</b>	H.B. 1665	Requires a person publishing an arrest booking photograph on his or her internet website to remove such photograph upon the request of the individual whose photograph was published.
<b>New Jersey</b>	A.B. 2064	Exempts mug shots of arrestees who have not been convicted of the underlying offense from State's open public records law.
<b>New Jersey</b>	A.B. 2177	Provides a uniform policy that all mug shots are to be made available to the public.
<b>New Jersey</b>	S.B. 961	Prohibits a person from charging a fee to stop publishing personal identifying information obtained through the criminal justice system.
<b>New York</b>	A.B. 8731	Relates to when booking photographs taken after arrest of a person or the defendant shall be made publicly available.
<b>South Carolina</b>	S.B. 700	Provides that a person or entity who publishes on the person or entity's publicly available website a mug shot of a person whose charges have been discharged, dismissed, or the person has been found not guilty, shall, without fee or compensation, remove the mug shot from the person or entity's website within thirty days of the person sending a written request to the person or entity.
<b>Virginia</b>	S.B. 137	Makes it a Class 1 misdemeanor for the owner of a website to post both an arrest photo and solicit, request, or accept money for removing the photograph.
<b>Wyoming</b>	S.B. 53, Act 35	Provides for removal of arrest photographs from websites that charge to remove photographs for free within 30 days of a written request accompanied by documentation that charges stemming from the arrest were resolved through acquittal or without conviction, or were expunged.

This wave of legislation suggests the seriousness with which legislators view the issue. Some of the legislation, however, raises significant theoretical and constitutional questions, discussed below. The responses by legislatures, particularly those that change the rules for access to mug shots, draw into question deeper issues about the conflict between privacy rights and First Amendment rights.

### **E. Right of Publicity Lawsuit in Ohio**

Attorney Scott Ciolek from Toledo, Ohio, came up with what some called a novel way to tackle mug shot websites after several of his clients complained about them.<sup>128</sup> Three Ohio residents whose mug shots appeared on variety of sites, Debra Lashaway, Phillip Kaplan, and Otha Randall, filed suit against several commercial mug shot websites on December 3, 2012, in Lucas County Common Pleas Court in Ohio..<sup>129</sup> The defendants in the case originally included Bustedmugshots.com, Justmugshots.com, Mugshotsonline.com, Findmugshots.com and Mugremove.com.<sup>130</sup>

Claiming a violation of Ohio's right of publicity statute,<sup>131</sup> the complaint alleged that the plaintiffs represented a class of Ohio residents whose personas the websites used for commercial gain.<sup>132</sup> The complaint also alleged unjust enrichment because the defendants collected money to have the mug shots removed, and "such sums represents

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<sup>128</sup> Rostron, *supra* note 28, at 1323.

<sup>129</sup> Complaint, *Lashaway et al v. JustMugshots.com et al*, , Ohio Common Please Court, Lucas County, Dec. 12, 2012, CI-0201206547-000.

<sup>130</sup> *Id.*

<sup>131</sup> OHIO REV. CODE §2741.01

<sup>132</sup> Complaint, *Lashaway et al v. JustMugshots.com et al*, , Ohio Common Please Court, Lucas County, Dec. 12, 2012, CI-0201206547-000.

[sic] the proceeds of the illegal and unconsented exploitation of the persona of Plaintiffs.”<sup>133</sup> The issue for the plaintiffs was not the publication of photos, but rather the payment demanded to remove them.<sup>134</sup> He argued that the websites have a First Amendment right to publish the mug shots, but that they forfeited their constitutional protection by demanding payment for removal of the plaintiffs’ mug shots because the plaintiffs still have a property right in their own personas.<sup>135</sup> Of course, the defendants responded that the plaintiffs failed to prove that their images had commercial value.<sup>136</sup>

Some commentators seemed hopeful about the lawsuit’s chances, even saying “Ciolek may have found a crucial gap in the mugshot industry’s defenses.”<sup>137</sup> The lawsuit is “not a trivial legal claim. In other words, it’s novel and it’s untested . . .” Peter Scheer, director of the First Amendment Coalition, said.<sup>138</sup> “[T]he results may differ in each state. I do think it is not a ridiculous stretch to say charging somebody to remove one’s mugshot from an internet site infringes that individuals’ right of publicity.”<sup>139</sup> University of Toledo law school professor Llew Gibbons questioned the news value of

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<sup>133</sup> Id.

<sup>134</sup> Id.; see also Michael McLaughlin, *Mug Shot Websites Face Lawsuit Alleging Violations Of Arrestee Publicity Rights*, HUFFINGTON POST (Jan. 14, 2013), [http://www.huffingtonpost.com/2013/01/14/mug-shot-websites-lawsuit-publicity-rights\\_n\\_2472607.html](http://www.huffingtonpost.com/2013/01/14/mug-shot-websites-lawsuit-publicity-rights_n_2472607.html).

<sup>135</sup> Complaint, *Lashaway et al v. JustMugshots.com et al*, , Ohio Common Pleas Court, Lucas County, Dec. 12, 2012, CI-0201206547-000.; see also McLaughlin, *supra* note 134.

<sup>136</sup> See Defendant’s Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted and Memorandum in Support at 3-4, *Lashaway et al v. JustMugshots.com et al*, No. 3:13-cv-00043-JZ (N.D. Ohio Jan. 11, 2013) (arguing that plaintiffs’ claims fail because their mug shots do not have commercial value).

<sup>137</sup> Rostron, *supra* note 14, at 1328.

<sup>138</sup> David Kravets, *Shamed by Mugshot Sites, Arrestees Try Novel Lawsuit*, WIRED (Dec. 12, 2012), <http://www.wired.com/threatlevel/2012/12/mugshot-industry-legal-attack>.

<sup>139</sup> Kravets, *supra* note 138.

mug shots that are years old and remain online.<sup>140</sup> “The problem is [the websites] have a mixed commercial motive. When they charge this fee for expedited takedown, it becomes another question. It becomes more and more in the commercial realm and out of the world of political speech.”<sup>141</sup> Professor Allen Rostron concluded that “Ciolek can persuasively argue that mug shot companies have improperly wrung commercial value from the use of his clients’ personas. Indeed, the rapid growth of the mug shot industry demonstrates that images of arrestees, famous or not, have substantial commercial value.”<sup>142</sup>

Other experts, however, concluded that the mug shot websites should fall under the umbrella of the First Amendment’s protection. “The websites probably have a First Amendment right to publish the mug shots because this is lawfully obtained public information,” Ohio State University Moritz College of Law professor Daniel Tokaji told *Huffington Post*.<sup>143</sup> “The practice of requiring payment to have them removed is unsavory, but probably not illegal.”<sup>144</sup>

The defendants removed Ciolek’s suit to the U.S. District Court for the Northern District of Ohio on August 9, 2013.<sup>145</sup> Several defendants were dismissed over the

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<sup>140</sup> McLaughlin, *supra* note 134.

<sup>141</sup> *Id.*

<sup>142</sup> Rostron, *supra* note 14, at 1328.

<sup>143</sup> McLaughlin, *supra* note 134.

<sup>144</sup> *Id.*

<sup>145</sup> Dismissal Order, *Lashaway et al. v. Antonio et al.*, Case No. 3:13 CV 1733 (N.D. Ohio, Dec. 27, 2013).

following months because the owners of the sites could not be located.<sup>146</sup> The proprietors of BustedMugshots.com and MugshotsOnline.com were the only remaining defendants by the time the parties reached a settlement on December 27, 2013.<sup>147</sup> The terms of the settlement reportedly included a \$7,500 payment to each of the three plaintiffs.<sup>148</sup> The attorney for BustedMugshots.com and MugshotsOnline.com also said his clients ended their practice of charging fees to remove the mug shots.<sup>149</sup>

### **E. The Harms of Mug Shots**

Many individuals who have been featured on mug shot websites have recounted the harms that came to them as a result of the websites in the popular press. Max Birnbaum, a college student, told the *Times* that he lost out on a job working for a state representative because Google searches for his name turned up a mug shot from a drug arrest that will be off his record when he finishes a diversion program.<sup>150</sup> “I know what I did was wrong, and I understand the punishment,” Birnbaum said.<sup>151</sup> “But these Web sites are punishing me, and because I don’t have the money it would take to get my photo off them all, there is nothing I can do about it.”<sup>152</sup> Harm to job prospects is a common

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<sup>146</sup> Id.

<sup>147</sup> Id..

<sup>148</sup> *Plaintiffs win settlement over online mugshot sites*, UPI (Jan. 7, 2014), [http://www.upi.com/Top\\_News/US/2014/01/07/Plaintiffs-win-settlement-over-online-mugshot-sites/UPI-85291389134529](http://www.upi.com/Top_News/US/2014/01/07/Plaintiffs-win-settlement-over-online-mugshot-sites/UPI-85291389134529).

<sup>149</sup> Id.

<sup>150</sup> Segal, *supra* note 66.

<sup>151</sup> Id.

<sup>152</sup> Id.

refrain among those who are pictured on mug shot websites.<sup>153</sup> Janese Trimaldi, pictured in two mug shots on several websites, was daunted by the prospect of several mug shots from dropped charges being online.<sup>154</sup> Trimaldi had just finished medical school and was working toward her residency placement.<sup>155</sup> “If I wasn’t a level-headed, positive person, I would have seriously considered ending my own life,” she wrote in a letter to an attorney filing suit against mug shot websites.<sup>156</sup>

The release of a mug shot may also implicate constitutional fair trial rights.<sup>157</sup> If a mug shot is released prior to a conviction, the image itself may tend to show the suspect in an unfair light. The ubiquity and cultural meaning of mug shots is crucial to this analysis; the link between mug shots and criminal misconduct, many argue, is clear: “The police mug shot has become an icon in contemporary visual culture. The pose, framing, and formal conventions of the image are easily recognized throughout the general public. It is an image that is taken to indicate criminality.”<sup>158</sup> Courts have offered critical words about how the public interprets mug shots, arguing that they invade a person’s privacy at a crucial moment. “. . . [A] mug shot conveys much more than the appearance of the

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<sup>153</sup> See, e.g., Mike Riggs, *Mugshots Shouldn’t Be in the Public Record. Here’s Why.*, THE ATLANTIC, (Oct. 8, 2013), <http://www.theatlanticcities.com/technology/2013/10/case-making-mugshots-private/7159>.

<sup>154</sup> Segal, *supra* note 66.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> See U.S. CONST., amend. XI. The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. *Id.*

<sup>158</sup> FINN, *supra* note 16, at 23.

pictured individual. Unlike a photograph taken under normal circumstances, it relates a number of facts about a person, including his expression at a humiliating moment and the fact that he has been booked on criminal charges.”<sup>159</sup> The Sixth Circuit has described mug shots as conveying an “unmistakable badge of criminality.”<sup>160</sup> Indeed, for decades, the mug shot format has been “so familiar, from ‘wanted’ posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is natural, perhaps automatic.”<sup>161</sup> The *Barnes* court ordered a new trial after the introduction of a defendant’s mug shots from a prior arrest.<sup>162</sup> The government argued it sought to use the images for identification purposes only, but the court concluded that the mug shots too closely and improperly associated the defendant with past criminal conduct.<sup>163</sup>

#### **F. Journalists’ Interests in Mug Shots**

From the perspective of a content creator, recent responses to mug shot websites, including legislative responses and potential lawsuits related to the publication of mug shots, are concerning. The general tenor of the conversation surrounding these records has implications for those who publish content. Journalists see value for crime coverage in the ability to use mug shots. More broadly, a precedent that American policymakers and courts are willing to pull a previously-available type of record out of the public domain is troubling. Press autonomy and editorial discretion are arguably longstanding

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<sup>159</sup> Detroit Free Press, 73 F.3d at 99 (Norris, dissenting).

<sup>160</sup> Eberhardt v. Bordenkircher, 605 F.2d 275, 280 (6th Cir.1979).

<sup>161</sup> Barnes v. U.S., 365 F.2d 509, 510–11 (D.C. Cir. 1966).

<sup>162</sup> Id. at 511.

<sup>163</sup> Id.

First Amendment values that would be implicated by changes to public record policies.

The recent shift in sentiment toward mug shots confronts head on what happens when the autonomy of the press and individual privacy and autonomy rights clash.

Mug shots, journalists argue, offer value beyond the identification of suspects for law enforcement purposes. For the press, mug shots are a way to illustrate a story, offer context for a story, serve a community purpose, and can even be central to the story themselves. They can serve informational and entertainment purposes, as “[m]ug shots of famous individuals have been printed in tabloid newspapers . . .”<sup>164</sup> Mug shots have also been used for educational purposes, “for instance, to demonstrate the toll of drug use to audiences of students.”<sup>165</sup>

From a journalist’s perspective, the choice to publish mug shots serves a valuable goal. The practice of using identifying information in service of the public goals of knowing who is accused of committing crimes and oversight of the criminal justice system dates back to the American Revolution when “[t]he British used to arrest people in secret, and the public would never know who was arrested or why. Rebel colonists changed that by publishing the names of those who were wanted or were arrested.”<sup>166</sup>

The commission of crime and the identities of those arrested are public information that informs readers and viewers about their communities, serving a public safety purpose and informing citizens about who commits crime around them. “Arrests

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<sup>164</sup> THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA, vol. 5, *supra* note 15 at 1144.

<sup>165</sup> *Id.*

<sup>166</sup> Tracie Powell, *Some news sites suffer from an online mugshot crackdown*, COLUMBIA JOURNALISM REVIEW (Oct. 14, 2013), [http://www.cjr.org/behind\\_the\\_news/news\\_mugshot\\_sites.php?page=all#sthash.T1SmEEnn.dpuf](http://www.cjr.org/behind_the_news/news_mugshot_sites.php?page=all#sthash.T1SmEEnn.dpuf).

are news – and also public records – and identifying those in custody is important to society. It’s one role of an independent free press.”<sup>167</sup>

Further, mug shots themselves shed light on the inner workings of the criminal justice system. “[T]ransparency in the criminal justice system is for the protection of the arrested. Secrecy imperils those in custody.”<sup>168</sup> This transparency, journalists argue, allows media outlets to inform the public about the conditions inside the criminal justice system.

The fact that somebody has been arrested is public information. Booking photos help us identify suspects but also people that have been wrongly arrested. . . It also tells us what happened to them when they were arrested. If they’ve been roughed up, those scars show up, and that’s a very important part of public oversight of what law enforcement is doing.<sup>169</sup>

The Sixth Circuit wrote favorably about this public oversight function in finding that mug shots are public records, providing several examples of useful oversight functions.

[R]elease of a photograph of a defendant can more clearly reveal the government’s glaring error in detaining the wrong person for an offense than can any reprint of only the name of an arrestee. Furthermore, mug shots can startlingly reveal the circumstances surrounding an arrest and initial incarceration of an individual in a way that written information cannot.<sup>170</sup>

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<sup>167</sup> Gene Policinski, ‘Mug shot’ sites post First Amendment dilemma, Commentary, FIRST AMENDMENT CENTER (Oct. 26, 2012), <http://www.firstamendmentcenter.org/mug-shot-sites-pose-first-amendment-dilemma>.

<sup>168</sup> Stephanie Fox, “Busted Paper” and other mugshot magazines: Why they are—and will likely remain—legal, TWIN CITIES DAILY PLANET (April 6, 2013), <http://www.tcdailyplanet.net/news/2013/04/06/busted-paper-and-other-mugshot-magazines-why-they-are-and-will-likely-remain-legal>.

<sup>169</sup> Aaron Rugar, *MNGOPer’s bill to restrict access to mugshots criticized as “poor policy” by journalism prof*, MINNEAPOLIS CITY PAGES (Jan. 21, 2014), [http://blogs.citypages.com/blotter/2014/01/mngopers\\_bill\\_to\\_restrict\\_access\\_to\\_mugshots\\_criticized\\_as\\_poor\\_policy\\_by\\_journalism\\_prof.php?page=2](http://blogs.citypages.com/blotter/2014/01/mngopers_bill_to_restrict_access_to_mugshots_criticized_as_poor_policy_by_journalism_prof.php?page=2).

<sup>170</sup> Detroit Free Press, 73 F.3d at 98.

The Sixth Circuit cited the example of the Rodney King beating, noting that, had the infamous video of police officers beating King never come to light, a mug shot depicting King's injuries would have "alerted the world" that the officers had acted outside the bounds of the law.<sup>171</sup>

Mug shots themselves often become part of the story, or trigger a story on their own. The January 2014 drunk driving and drag racing arrest of pop star Justin Bieber in Miami made headlines because Bieber, "[a]lways one to flash his pearly whites," smiled broadly in his mug shot.<sup>172</sup> Coverage by the press questioned Bieber's state of mind, especially given that he had been driving, and his judgment. The story of his image in his mug shot, of course, could not be told without showing the mug shot itself. The mug shot of O.J. Simpson, displayed on the covers of *Time* and *Newsweek* magazines, sparked a national discussion about race after *Time* darkened the image, changing Simpson's appearance dramatically.<sup>173</sup> Of course, the media coverage itself became the story due to *Time*'s portrayal of Simpson. Nonetheless, other media could not cover the story without showing the two versions of the mug shot. The mug shot thus became the story's centerpiece.

Proprietors of mug shot websites defend the value of their work along similar lines. "No one should have to go to the courthouse to find out if their kid's baseball coach has been arrested, or if the person they're going on a date with tonight has been arrested,"

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<sup>171</sup> Id.

<sup>172</sup> Erika Watts, *Justin Bieber Smiles in Mugshot After DUI Arrest*, WEBPRONews (Jan. 23, 2014), <http://www.webpronews.com/justin-bieber-smiles-in-mugshot-after-dui-arrest-2014-01>.

<sup>173</sup> See Christo Lassitter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69, 71 (1996) (discussing *Time* magazine's use of the darkened mug shot and the subsequent national debate surrounding racial issues); TIME, June 27, 1994 (cover).

Arthur D'Antonio III, founder of JustMugshots.com, told *The New York Times*.<sup>174</sup> “Our goal is to make that information available online, without having to jump through any hoops.”<sup>175</sup>

### III. THE GROWTH OF TORTS TIED TO UNAUTHORIZED USES OF IDENTITY

The plaintiffs in *Lashaway et al v. JustMugshots.com et al*, sued under Ohio’s right of publicity statute to vindicate their rights after being pictured on mug shot websites. Claims for the right of publicity, which has developed to protect a commercial interest in one’s identity, and the tort claim for misappropriation of one’s identity, premised on an invasion of privacy, evolved from the early recognition of the misappropriation of identity. Both focus on uses of individuals’ identities without their authorization. This species of claim has seen significant evolution during the last century. This section outlines the development of claims based on one’s identity.

#### A. Elements of the Identity-Based Claims: The Right of Publicity and Misappropriation of Name or Likeness

To begin, outlining the elements of the claims will assist in understanding their development. Appropriation of name or likeness and the right of publicity are similar in most ways. The torts have one significant difference noted by commentators.

Many states have adopted the *Restatements (Second) of Torts* model for appropriation of name or likeness as a subset of privacy protections. Under this approach, “one who appropriates to his own use or benefit the name or likeness of another is subject

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<sup>174</sup> Segal, *supra* note 66.

<sup>175</sup> *Id.*

to liability to the other for invasion of his privacy.”<sup>176</sup> If mental harms tied to privacy rights are part of the damages alleged, the claim likely falls under this rubric.<sup>177</sup>

The right of publicity has generally developed to focus more on protection of the commercial value of an individual’s image. The elements of infringement of this right are that the defendant “without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use” and “defendant’s use is likely to cause damage to the commercial value of that persona.”<sup>178</sup> As the following section demonstrates:

While the right of publicity evolved historically from ‘appropriation privacy,’ the right of publicity is now a separate and distinct legal concept which recognizes the proprietary and commercial value of a person’s identity and persona. Simply put, an infringement of the right of publicity focuses upon injury to the pocketbook, while an invasion of ‘appropriation privacy’ focuses upon injury to the psyche.<sup>179</sup>

Some courts have concluded that the right of publicity only protects economic harm, differing from the tort of misappropriation’s protection of privacy.<sup>180</sup> State statutes do not all follow this template, however—some recognize a unified right to control one’s identity, not distinguishing between the right of publicity and the tort of

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<sup>176</sup> RESTATEMENT (SECOND) OF TORTS § 652C (1977).

<sup>177</sup> I J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 11:30 (2d ed 2013).

<sup>178</sup> MCCARTHY, *supra* note 177, at § 3:2.

<sup>179</sup> MCCARTHY, *supra* note 177, at § 5:63.

<sup>180</sup> *See, e.g.,* *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996) (concluding that “[p]ublicity rights . . . are meant to protect against the loss of financial gain, not mental anguish.”); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (observing that “[t]he right of publicity has developed to protect the commercial interest of celebrities in their identities.”).

misappropriation.<sup>181</sup> These differing approaches raise questions about what type of claim a plaintiff may assert for an unauthorized use of his or her identity. The next section outlines the history of these torts

### **B. The Beginning: Privacy Rights Develop**

Claims related to the unauthorized use of identity are generally traced to Samuel Warren and Louis Brandeis' "The Right to Privacy."<sup>182</sup> This work sparked much of the body of privacy law in the United States,<sup>183</sup> although Professor Amy Gajda offers a compelling argument that courts were willing to acknowledge privacy interests prior to the publication of that seminal article.<sup>184</sup> "The Right to Privacy" did, either way, serve as a catalyst for courts to more directly recognize a right to privacy in the common law and for states to consider statutory protections.<sup>185</sup> Authors Samuel Warren and Louis Brandeis, bothered by the aggressive press of the late nineteenth century and its practice of publishing personal information and photographs, complained that the press was "overstepping in every direction the obvious bounds of propriety and of decency" and had built a "trade" around "gossip."<sup>186</sup>

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<sup>181</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 cmt. b (1995) (noting that "in some jurisdictions separate causes of action now redress the commercial and personal injuries resulting from an unauthorized commercial exploitation of a person's identity . . . In other jurisdictions, relief for both personal and commercial harm is available through a single common law or statutory cause of action").

<sup>182</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>183</sup> *Id.*

<sup>184</sup> See Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1045-46 (2009) (offering a discussion of case law prior to 1890 that implicated privacy interests).

<sup>185</sup> *Id.*

<sup>186</sup> Warren & Brandeis, *supra* note 183, at 196.

One catalyst for what they saw as an increase in privacy invasions was changing technology. The authors expressed concern that “[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”<sup>187</sup> Also crucial to Warren and Brandeis’ analysis was the common law’s increasing recognition of harms beyond those to the physical self or tangible property—emotional and mental harms, too, began to warrant protection.<sup>188</sup> “The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition . . .”<sup>189</sup>

Following Warren and Brandeis’ call for a right to privacy, courts had mixed reactions to embracing the protections for which they advocated. The New York Court of Appeals declined to recognize a common law claim for misappropriation of identity in 1902.<sup>190</sup> A flour company had printed lithographs depicting Abigail Roberson, a young woman, on its packaging and advertising.<sup>191</sup> Roberson claimed she was “greatly humiliated” by having her “face and picture on this advertisement” and alleged that “her good name [was] attacked, causing her great distress and suffering, both in body and

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<sup>187</sup> *Id.* at 195.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

<sup>191</sup> *Id.*

mind . . . .”<sup>192</sup> The image of her was flattering, but people recognized her and “jeered,” she said, and she was “bedridden.”<sup>193</sup> The appellate court in the case had concluded that the claim was new and few precedents would support it, but nonetheless held that the flour company “had invaded what is called a ‘right of privacy,’ in other words, the right to be let alone.”<sup>194</sup> The Court of Appeals, however, was concerned that a right to privacy, if recognized at common, would become a tort without limits or bounds, inviting too much litigation.<sup>195</sup> On this logic, the court refused to create a right to privacy at common law in New York, and instead invited the legislature to craft a statute to recognize such rights if it deemed such rights valuable.<sup>196</sup> The New York legislature did just that in 1903, passing the first privacy statute<sup>197</sup> in the United States, which forbade the “unpermitted use of name or likeness for advertising or trade purposes.”<sup>198</sup>

Of the cases that attempted to claim a right of privacy, “the tort of appropriation of identity was the favorite of all in privacy’s early successes in litigation.”<sup>199</sup> A court

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 443.

<sup>195</sup> *See id.* The court stated:

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one’s looks, conduct, domestic relations or habits. *Id.*

<sup>196</sup> *Id.* at 444.

<sup>197</sup> New York Session Laws 1903, ch. 132, §§ 1 to 2.

<sup>198</sup> MCCARTHY, *supra* note 177, at § 1:7.

<sup>199</sup> Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L.L. REV. 233, 247–48 (1977).

first recognized this right in *Roberson* in 1905.<sup>200</sup> The Georgia Supreme Court adopted the right in *Pavesich*, in which the plaintiff's image was used in an advertisement for insurance and falsely suggested he had purchased insurance with the company.<sup>201</sup>

Establishing the right to privacy, the court approvingly cited the dissenting opinion from *Roberson*, in which Judge Gray wrote that the right of privacy already existed in the law as "the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own."<sup>202</sup> The court acknowledged that conflicts may arise between privacy rights and other rights, but that commercial uses of one's likeness simply crossed the line too clearly into an invasion of rights.<sup>203</sup> The court concluded by saying:

So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . . ."<sup>204</sup>

Thus, the tort of misappropriation of identity had entered the lexicon of American legislatures and courts.

### **C. An Economic Rationale Emerges**

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<sup>200</sup> *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 79 (Ga. 1905).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 78 (citing *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (Gray, J., dissenting)).

<sup>203</sup> *Pavesich* 50 S.E. at 80.

<sup>204</sup> *Id.* at 80–81.

As the twentieth century progressed and public figures increasingly began to sue for uses of their image, courts began to struggle with the privacy label originally attached to claims for the misappropriation of the plaintiff's identity. Harold R. Gordon asserted that the confusion arose because litigants who were public figures focused on the privacy aspects of their claims.<sup>205</sup> A stark privacy label on claims by celebrities seemed disingenuous to courts, since these individuals held themselves out as public figures and promoted their images in other ways that, to these celebrities, were apparently not objectionable.<sup>206</sup> An illustrative case is *O'Brien v. Pabst Sales Co.*,<sup>207</sup> in which football star Davey O'Brien sued for the unauthorized use of his image in a calendar promoting Pabst Blue Ribbon beer. O'Brien had turned down alcohol endorsements and was an advocate for temperance—and was thus quite offended to be associated with Pabst's product.<sup>208</sup> The Fifth Circuit Court of Appeals affirmed the dismissal of his claims for an invasion of his privacy, concluding that he did not have a privacy interest in avoiding having his image used for promotional purposes because he had sought to have his image used in promotion before.<sup>209</sup> The court seemed to conclude that because O'Brien was not willing to allow the use of his image for the promotion of beer, he could not recover the value of the unauthorized endorsement—it would seem hypocritical to collect damages for a use one found disagreeable. The court did not, in the context of O'Brien's claim,

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<sup>205</sup> Harold R. Gordon, *Rights of Property in Name, Likeness, Personality and History*, 55 N. U.L. REV. 553, 554 (1960).

<sup>206</sup> MCCARTHY, *supra* note 177, at § 1:7.

<sup>207</sup> 124 F.2d 167 (5th Cir. 1941).

<sup>208</sup> *Id.* at 168.

<sup>209</sup> *Id.* at 170.

consider that O'Brien should be able to assert a right to entirely prevent the use of his image simply because he did not want it used in connection with Pabst's product.

Thus, courts began to turn to economic rationales for the right to one's identity. Judge Jerome Frank, writing for the Second Circuit Court of Appeals, coined the phrase "right of publicity" in *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>210</sup> a foundational case emphasizing the economic rationale for the right to control uses of one's identity by recognizing it as an assignable property right. A baseball player had signed a contract giving the plaintiff the exclusive rights to print baseball cards using his name, likeness, and personal information.<sup>211</sup> Topps Chewing Gum then printed its own cards using the same player's name, likeness, and personal information.<sup>212</sup> Haelen sued under New York's privacy statute, arguing that the player had assigned his right of privacy, which included his commercially valuable image, to it, and so Topps was liable for using the image since the player had exclusively assigned the right to Haelen.<sup>213</sup> The court concluded 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."<sup>214</sup> The court argued that famous people do not have their "feelings bruised through public exposure of their likenesses," but they "would feel sorely deprived" if they could not

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<sup>210</sup> 202 F.2d 866 (2d Cir. 1953).

<sup>211</sup> *Id.* at 867–68.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 868.

<sup>214</sup> *Id.*

control the commercial value of their images.<sup>215</sup> The court concluded that without a right of publicity that they could exclusively assign, celebrities could not reap the profits of their fame.<sup>216</sup>

Following the Second Circuit's opinion, Professor Melville Nimmer published an influential article articulating the right of publicity's foundations.<sup>217</sup> The article outlines the various bodies of law that he felt were inadequate to explain the right of publicity, including privacy.<sup>218</sup> Nimmer argued privacy was insufficient to ensure one could control her image because a celebrity waived her privacy interests by putting her persona in the public eye, although Nimmer acknowledged that a celebrity would still had a right to privacy in those parts of her life she kept private.<sup>219</sup> He concluded that trademark and unfair competition law, too, were inadequate to explain the right of publicity because they require some type of confusion by consumers, and not all unauthorized uses of a person's image mislead consumers into believing the person whose image is used endorses the message construed.<sup>220</sup>

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<sup>215</sup> Haelen, 202 F.2d at 868.

<sup>216</sup> *See id.* (stating that “[t]his right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures”).

<sup>217</sup> Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS 203 (1954); *see also* MCCARTHY, *supra* note 198, at §1:27 (stating that “Professor Nimmer built the intellectual foundation for the right of publicity. All subsequent case law and commentary has built upon the foundation that Nimmer laid down.”)

<sup>218</sup> Nimmer, *supra* note 217, at 204.

<sup>219</sup> *See id.* at 204–05.

<sup>220</sup> *See id.* at 212 (noting that “[p]ublicity values of a person or firm may be profitably appropriated and exploited without the necessity of any implication that such person or firm is connected with the exploitation undertaken by the appropriator”).

This language emphasizing the economic value of the right of publicity carried through when Prosser divided the general claim of “invasion of privacy” into four distinct torts in 1960.<sup>221</sup> The fourth tort, “appropriation,” covered the “right of publicity” claims that had come before American courts in the previous half-century.<sup>222</sup> This tort required first, that some part of the plaintiff’s identifiable identity was appropriated.<sup>223</sup> Next, the question under Prosser’s conception was whether the defendant appropriated the identity “for his own advantage.”<sup>224</sup> Prosser noted that statutory appropriation of image claims require pecuniary gain by the defendant, whereas the common law was likely less stringent as to the type of damage required.<sup>225</sup> He also commented that courts faced a conflict between press rights and the right of publicity because the press operates for profit.<sup>226</sup> To protect First Amendment rights, early courts “were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper is sold; and that the presence of advertising matter in adjacent columns does not make any difference.”<sup>227</sup> Relying on the language of *Haelen Laboratories*, Prosser asserted that it was “sufficiently evident” that his fourth tort differed from the other privacy torts because the plaintiff’s interest was “not so much a mental as a proprietary”

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<sup>221</sup> William Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

<sup>222</sup> *Id.* at 401.

<sup>223</sup> *Id.* at 403.

<sup>224</sup> *Id.* at 405.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

interest in the use of his identity.<sup>228</sup> To Prosser, this meant that a right to control one's identity was rooted in property.<sup>229</sup>

#### **D. Protection for Identity Grows**

Through the next several decades, states began to codify the right of publicity. States also chose to recognize rights based on misappropriation of name or likeness. Today, 21 states recognize the right of publicity by statute.<sup>230</sup> Others recognize identity rights through common law.<sup>231</sup> Appendix 1 outlines, state-by-state, the extent of the adoption of claims based on one's identity.

The Supreme Court has decided just a single case involving the right of publicity, in 1977.<sup>232</sup> Under Ohio's right of publicity statute, "human cannonball" performer Hugo Zacchini sued when a television station broadcast his entire act during a nightly newscast.<sup>233</sup> The Court narrowly held that a First Amendment defense did not shield the television station from liability because it had broadcast his "entire act."<sup>234</sup> This display, the Court argued, "pose[d] a substantial threat to the economic value of that

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<sup>228</sup> *Id.* at 406.

<sup>229</sup> *Id.*

"It seems quite pointless to dispute over whether such a right is to be classified as 'property.' If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses. Its proprietary nature is clearly indicated by a decision of the Second Circuit that a 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 this decision has not yet been followed, it would seem clearly to be justified." *Id.* at 406–07 (citing *Haelen*, 202 F.2d at 866).

<sup>230</sup> *See, infra*, Appendix 1.

<sup>231</sup> *See, infra*, Appendix 1.

<sup>232</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>233</sup> *Id.* at 573.

<sup>234</sup> *Id.* at 575.

performance” and was akin to preventing Zacchini from “charging an admission fee” because viewers would not pay to see a performance that they could see in its entirety from the comfort of their living rooms.<sup>235</sup> The Court saw the claim as related to an economic interest, not a privacy one—it was “the right of the individual to reap the reward of his endeavors” at stake, and this had “little to do with protecting feelings or reputation.”<sup>236</sup> *Zacchini*’s dissenters addressed the privacy and First Amendment concerns involved in the case, calling for greater deference to the press.<sup>237</sup> Justice Powell advocated for a First Amendment defense unless the plaintiff could show “that the news broadcast was a subterfuge or cover for private or commercial exploitation.”<sup>238</sup> He would begin not from the performer’s interest in his work, but rather from the press’ motivation for and use of the work—a news use would be protected from a right of publicity claim.<sup>239</sup>

Given the development of the concept of misappropriation of identity and the dual privacy and property concerns, great debate has arisen in recent years as to whether non-celebrities can make claims under the right of publicity rubric. Based on labor theory, some contend that only celebrities have a right of publicity because of the labor that they put into crafting their image, finding support from the Court’s opinion in *Zacchini*.<sup>240</sup>

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<sup>235</sup> Id. at 575–76.

<sup>236</sup> Id. at 573.

<sup>237</sup> Id. at 579–80 (Powell, J., dissenting); id. at 583 (Stevens, J., dissenting).

<sup>238</sup> Id. at 581.

<sup>239</sup> Id.

<sup>240</sup> See, e.g., Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 674-79 (1991).

Those who argue the right extends to celebrities and non-celebrities alike argue that “the fact that most reported right of publicity decisions involve ‘celebrity’ plaintiffs is a product of the economics of litigation, not of inherent legal rights. . . [T]he law should not draw a critical legal line between ‘celebrities’ and ‘non-celebrities’ for purposes of the right of publicity.”<sup>241</sup> Indeed, the trend has been to recognize a commercial value under the right of publicity for all individuals, regardless of their status.<sup>242</sup>

With this history and development in mind, a question naturally arises: if anyone, regardless of how much work he puts into cultivating a public image, can assert a right of publicity to control the use of his or her image, what are the theoretical underpinnings for such a right? Does any single, unifying theory explain the protection of individuals’ identities? And how should legislatures and courts protect these rights in an era of digital information and instant celebrity? The next section seeks to examine the theory surrounding this right to one’s identity and explores how it conflicts with First Amendment rights to publish.

#### **IV. TWO APPROACHES TO AUTONOMY THEORY: CONTROL OF INFORMATION AND AUTONOMOUS PUBLISHING DECISIONS**

The concept of autonomy as a rationale for the conferral of rights has proved compelling to many theorists. At the same time, the principles underlying the idea of autonomy highlight many of the tensions between the First Amendment and the arguments surrounding the use of mug shots. The two overlap in a number of ways. On one hand, private citizens, some argue, can achieve autonomy if the law advances their control over information about them. On the other hand, journalists argue that the press

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<sup>241</sup> MCCARTHY, *supra* note 177, at § 4:1.

<sup>242</sup> *Id.*

can only function if journalists are given editorial discretion – the autonomy to determine what to publish. This thesis relies on the conflicts between these conceptions of autonomy for both journalists and those pictured in mug shots to emphasize the complexity of the two positions, as well as offering a possible solution to these conflicts as viewed through the lens of the use of mug shots.

Some theorists argue that the idea of autonomy best justifies the bestowal of rights and that “other values possess their worth only because rational, autonomous agents find them worth pursuing,” a perspective that traces back to the work of Immanuel Kant.<sup>243</sup> Kant contended that morality itself is rooted in autonomy, as autonomous beings are able to reflect on their choices and decide how to act.<sup>244</sup> In this sense, a choice to obey moral laws is still autonomous if made after a process of deliberation.<sup>245</sup> A government’s recognition of its citizens’ autonomy is crucial, as “a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents.”<sup>246</sup> For many theorists who adopt an autonomy model, “the spirit of Kant suffuses ascriptions of autonomy, and freedom of the will undergirds the sovereign prerogative to make decisions for oneself and to act accordingly.”<sup>247</sup>

A wide variety of definitions and interpretations of this autonomy principle exist, and the term “autonomy” is itself loaded with meaning:

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<sup>243</sup> Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994).

<sup>244</sup> IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSIC OF MORALS* (1785).

<sup>245</sup> Id.

<sup>246</sup> Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 214 (1972).

<sup>247</sup> Fallon, *supra* note 243, at 878.

[Autonomy] is used sometimes as an equivalent of liberty . . . , sometimes as equivalent to self-rule or sovereignty, sometimes as identical with freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical reflection, with freedom from obligation, with absence of external causation, with knowledge of one's own interests.<sup>248</sup>

A commonly accepted view of autonomy concludes that “[i]n the cacophony of pluralist culture, the ‘idea has entered very deep’ that every person possesses her own originality, and that it is of ‘crucial moral importance’ for each to lead a life that is distinctively self-made. Autonomy both expresses this idea and promotes its realization.”<sup>249</sup> This model calls back to Professor Thomas Scanlon’s approach, in which “a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action.”<sup>250</sup> This understanding, complemented by similar ideas from many theorists and courts, arises both in the context of press autonomy and the autonomy of those pictured in mug shots.

### **A. Autonomy Interests Surrounding the Control of Identity**

As the law surrounding the use, or misuse, of identity has developed in the United States, arguments bolstering these rights by reference to autonomy values have followed. The right, as discussed above, originated in privacy law. Beginning with Warren and

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<sup>248</sup> GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 6 (1988). See also, SUSAN H WILLIAMS, *TRUTH, AUTONOMY, AND SPEECH: FEMINIST THEORY AND THE FIRST AMENDMENT* 41 (2004). Williams notes that, in philosophical literature, “autonomy” can “refer either to the capacity to govern oneself . . . ; or to the actual condition of self-government and its associated virtues; or to an ideal of character derived from that conception; or to an ideal of character derived from that conception; or . . . to the sovereign authority to govern oneself . . .”

<sup>249</sup> Fallon, *supra* note 243, at 902–03 (citing CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 28–29 (1992)).

<sup>250</sup> Scanlon, *supra* note 246 at 215.

Brandeis, several values akin to autonomy emerged.<sup>251</sup> The framework for privacy Warren and Brandeis had in mind was “the right to be let alone.”<sup>252</sup> They rooted an individual’s right to control his own papers in “the more general right to the immunity of the person, — the right to one’s personality.”<sup>253</sup> They concluded by advocating for the privacy torts recognized by states today either through common law or by statute, as adopted by state legislatures.

Theorists have defined privacy itself “as an autonomy or control over the intimacies of personal identity.”<sup>254</sup> Based on Warren and Brandeis’ defense of “a civil right to control information about oneself,” a concern for “the principle of inviolate personality” grew in American jurisprudence.<sup>255</sup> Autonomy in the privacy context derives from Kantian theory, viewing citizens as ends, rather than means to an end.<sup>256</sup> Privacy invasions interfere with an individual’s autonomy, and so privacy protections can be seen as a means to protecting that autonomy.<sup>257</sup> Laws based in privacy serve both individual and societal interests in autonomy. Professor Rodney Smolla noted the internal and external nature of these protections.<sup>258</sup> “Laws protecting privacy are the means through

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<sup>251</sup> Warren & Brandeis, *supra* note 183, at 195.

<sup>252</sup> *Id.* at 195 (citing THOMAS M. COOLEY, COOLEY ON TORTS 29 (1879)).

<sup>253</sup> Warren & Brandeis, *supra* note 183, at 207.

<sup>254</sup> Gerety, *supra* note 199, at 236.

<sup>255</sup> Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 189 (1982).

<sup>256</sup> Charles Fried, *Privacy*, 77 YALE L.J. 475, 478 (1968).

<sup>257</sup> Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980).

<sup>258</sup> RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY, 199 (1992).

which the collective acknowledges rules of civility that are designed to affirm human autonomy and dignity.”<sup>259</sup>

Early courts identified an autonomy interest in controlling information about one’s identity. The *Pavesich* case nicely outlines autonomy concerns.<sup>260</sup> The court opined that the right to enjoyment of life embodies more than just the “right to breathe and exist”—it means “[a]n individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy.”<sup>261</sup> The *Pavesich* court concluded that the advertisement violated a right to privacy because Pavesich’s “form and features . . . are his own,” and the insurance company did not have a right to decide for Pavesich how his image would be used.<sup>262</sup> Pavesich deserved the control his image and the extent to which he was a private citizen.<sup>263</sup> “One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze.”<sup>264</sup>

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<sup>259</sup> SMOLLA, *supra* note 258.

<sup>260</sup> *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>261</sup> *Id.* at 70.

<sup>262</sup> *Id.* at 79.

<sup>263</sup> *Id.* at 70.

<sup>264</sup> *Id.*

The concept of privacy dominates much Western thinking about self-realization and control over one's own development,<sup>265</sup> and it has countless definitions.<sup>266</sup> The concept of "control," however, is central to many of these definitions:

[P]rivacy has been defined as control over: 'knowledge about oneself,' 'the intimacies of personal identity,' 'acquaintance with one's personal affairs,' 'disclosures of confidential information by others when disclosures do not, or no longer, serve associational interests,' 'decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking,' and finally 'control over who can sense us.'<sup>267</sup>

In Professor Jonathan Kahn's view, "privacy recognizes and protects the conditions necessary for proper individuation and realization of the self over time," a central tenet of the concept of autonomy.<sup>268</sup> This control over one's identity, according to Kahn, is the most important value served by privacy.<sup>269</sup> This autonomy-as-control model reflects the Supreme Court's conception of privacy, as well. The Court has commented that "both the

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<sup>265</sup> Jonathan Kahn, *Privacy As A Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371 (2003) (stating that privacy "occupies a central place in the western liberal tradition as an essential component of self-definition and individual development").

<sup>266</sup> *See id.* Kahn notes:

Legal scholars and philosophers have variously characterized privacy as a social situation of autonomy, a claim, a psychological state, a physical area, or a form of control. More specific definitions include: privacy as a psychological condition of 'being apart from others,' 'freedom not to participate in the activities of others,' 'a social ritual by means of which an individual's moral title to his existence is conferred,' 'a boundary through which information does not flow from the persons who possess it to others,' "the state of limited access by others . . . to certain modes of being in a person's life,' 'the exclusive right to dispose of access to one's property (private) domain,' 'intermediate goods' involving the 'concealment of information about themselves that others might use to their disadvantage,' and as 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.' Kahn, *supra* note 265 at 371–72 (citations omitted).

<sup>267</sup> *Id.* at 372.

<sup>268</sup> *Id.* at 373.

<sup>269</sup> *Id.*

common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."<sup>270</sup>

Legal protections for privacy hinge on "a concern to protect the basic dignity" involved in allowing a person to define himself and make his own choices "with a measure of autonomy and control over the process of developing an individuated self, capable of human flourishing."<sup>271</sup> Professor Ruth Gavison adopts a similar control-focused conception of privacy as a "concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention."<sup>272</sup> In this sense, Gavison and Kahn's approaches both embrace autonomy as the ability of one to define his identity and control its accessibility. Gavison, however, outlines a wide variety of values served by privacy, autonomy not the least among them.<sup>273</sup> Professor Charles Fried, too, agrees that privacy is best conceived as "the *control* we have over information about ourselves."<sup>274</sup> Fried would entirely justify laws aimed at protecting privacy on the grounds that individuals should be able to control their identities.<sup>275</sup>

Professor Randall Bezanson similarly rests his conception of privacy on the idea of giving individuals a form of autonomy by allowing them to define their personalities

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<sup>270</sup> U.S. Dept. of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749, (1989).

<sup>271</sup> Kahn, *supra* note 265, at 373–74.

<sup>272</sup> Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980).

<sup>273</sup> *Id.* at 449–50 (stating that "[a]utonomy is another value that is linked to the function of privacy in promoting liberty . . . Privacy is needed to enable the individual to deliberate and establish his opinions").

<sup>274</sup> Charles Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968) (emphasis in original).

<sup>275</sup> *Id.* at 493.

by controlling information about them.<sup>276</sup> Under this view, “the object of privacy should be to give the individual control over the disclosure of confidential personal information in a more complex milieu of personal and social relationships.”<sup>277</sup> He argues that Warren and Brandeis’ century-old view was not up-to-date with a 1990 world and has failed to remain relevant across differences between the social and economic conditions between the two periods.<sup>278</sup> Warren and Brandeis, Bezanson contends, fell a bit short in offering a theory of privacy that could withstand the test of time.<sup>279</sup> He submits a more timeless approach that would grant individuals more control over personal information itself, rather than focusing on “social controls of information” like the institutional press.<sup>280</sup> This approach aligns nicely with the concept of autonomy in the privacy context, giving individuals control over their information and ultimately, their image.

Justifications for rights in one’s identity have expanded, just as the law has, beyond autonomy theory based in privacy considerations, however. The right of publicity and all its economic and property trappings may be best conceived as protecting individuals’ rights to “autonomous self-definition.”<sup>281</sup> The right of publicity uniquely implicates autonomy concerns because “the things and people with which individuals choose to associate reflect their character and values. An individual's choices therefore

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<sup>276</sup> Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133 (1992) [hereinafter *Privacy Revisited*].

<sup>277</sup> *Id.* at 1135.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

can be viewed as the text of her identity, and unauthorized uses of a person's identity in connection with products or services threaten to recreate that text and affect the way the individual is perceived by others.<sup>282</sup> Professor Mark McKenna would distinguish the autonomy interest inherent in a right of publicity claim from other privacy interests because with publicity rights, an individual's concern is not in maintaining anonymity or avoiding commercial exploitation.<sup>283</sup> Instead, outrage at violations in publicity rights is based in the unease that the “choices we make with respect to the cultural objects and images we incorporate into our lives play an important role in reflecting our personalities.”<sup>284</sup> In this sense, violations of the right of publicity directly impact an individual's ability to shape his identity and determine his own associations—regardless of the economic value of that identity.<sup>285</sup> McKenna notes a number of examples of celebrities' choices not to identify with certain brands because of the implications of being associated, arguing that these choices demonstrate that “avoiding particular

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<sup>282</sup> *Id.* at 229.

<sup>283</sup> *See id.* at 280 (recounting the story of “Joe,” who was embarrassed and ashamed after his image was used in connection with a commercial for an erectile dysfunction treatment, and asserting that “Joe was not concerned because the advertisement made him known or recognizable, nor was he particularly upset about the fact that the couple's images were being used commercially”).

<sup>284</sup> McKenna, *supra* note 281, at 281.

<sup>285</sup> Alisa M. Weisman, Note, *Publicly [sic] as an Aspect of Privacy and Personal Autonomy*, 55 S. CAL. L. REV. 727, 729–30 (1982).

Unauthorized publicity . . . affects the individual's identity by associating him with a concept. Thus, the harm in unauthorized publicity is that an individual is not given the opportunity to consider whether to approve the proposed association in light of his own self-concept. An individual should not be denied the right to shape his personality and to decide matters affecting that crucial right. *Id.*

associations was important to the integrity of their identities.”<sup>286</sup> Autonomy is critical in this analysis because “[i]f the overall picture of an individual's character is made up of the messages conveyed by her associational decisions, then unauthorized use of her identity interferes with her autonomy because the third party takes at least partial control over the meaning associated with her.”<sup>287</sup> This conception calls back to Kahn and Gavison’s models that emphasize control over information about oneself as crucial to autonomy.

An individual, celebrity or not, may have “both emotional and economic” interests in uses of her identity.<sup>288</sup> “[W]hile the autonomy interest implicated by commercial use of one's identity is shared by all, the damages that flow from those violations may vary widely.”<sup>289</sup> From McKenna’s perspective, this means the commercial value of a person’s identity is less important to the claim than the intrusion on the person’s ability to define him or herself.<sup>290</sup> He notes that “all individuals share the interest in autonomous self-definition,” which means that regardless of level of fame, “every individual should be able to control uses of her identity that interfere with her ability to define her own public character.”<sup>291</sup> False endorsement claims clearly implicate this interest, but so do other claims in which the meaning an individual has crafted for

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<sup>286</sup> McKenna, *supra* note 281, at 281 (citing examples including basketball player Chris Webber ending his association with Nike because the company’s products were too expensive for underprivileged children, radio personality Casey Kasem’s choice to disaffiliate with Dairy Queen after becoming a vegetarian.)

<sup>287</sup> McKenna, *supra* note 281, at 282.

<sup>288</sup> *Id.* at 229.

<sup>289</sup> *Id.* at 290.

<sup>290</sup> *Id.* at 285.

<sup>291</sup> *Id.* at 285–86.

himself is “destabilized.”<sup>292</sup> For private citizens in particular, “uses that violate anonymity, secrecy, or solitude” infringe on autonomy.<sup>293</sup>

Autonomy in the context of a right of publicity action, conceived as an individual’s right to control information about herself, bridges the gap between the right of publicity and its original roots as a privacy concern under misappropriation of identity. Although celebrities have often used the right of publicity to vindicate unauthorized uses of their images, autonomy concerns animate the harm inherent in violations of the right of publicity for celebrities and ordinary citizens alike. Either way, an unauthorized use of one’s name, image or likeness interferes with one’s ability to define his character. The foregoing suggests that, for either tort related to one’s identity, autonomy can be conceived as one’s interest in controlling information about himself, whether the interest leans more toward a privacy concern or an economic one. This desire to act autonomously by controlling information about oneself, however, comes into tension with press autonomy when the press and other publishers of information choose to publish information individuals, public figures or not, would rather keep private. The next section addresses the theoretical underpinnings of this press autonomy.

### **B. Autonomy Interests Surrounding the Right to Publish**

The First Amendment declares, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”<sup>294</sup> Discussions of autonomy have “dominated the

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<sup>292</sup> Id. at 286–89.

<sup>293</sup> Id. at 286.

<sup>294</sup> U.S. CONST., amend. I.

Supreme Court’s First Amendment jurisprudence” related to this right.<sup>295</sup> The autonomy value, as applied to the press, appears throughout First Amendment theory, dating back to John Milton and John Stuart Mill. In *Areopagatica*, Milton emphasized liberty and criticized the practice of censorship as infringing on that liberty.<sup>296</sup> Mill further argued that government suppression of opinions withdraws valuable discourse from the public sphere, thwarting opportunities for the society to discern truth and harming individuals’ liberty.<sup>297</sup> These early works served as the foundation for many later doctrines, including autonomy-based theories of the First Amendment.

Theorists who ascribe to an autonomy model of free speech generally conclude that “respect for autonomy requires very broad freedoms of speech. . . [O]nly coercive speech or speech that is used to invade the private rights of others can justifiably be prohibited under autonomy-based principles.”<sup>298</sup> Government restrictions on speech should be viewed with great suspicion, and “[g]overnment behaves manipulatively, and thereby infringes on autonomy, whenever it prohibits speech based on fears that people might be persuaded by the speech’s message.”<sup>299</sup>

The autonomy value can serve both the individual and society at large. Professor Thomas Emerson articulated a view of the First Amendment that justifies its existence for

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<sup>295</sup> Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171 (1993).

<sup>296</sup> JOHN MILTON, *AEROPAGATICA* (1644).

<sup>297</sup> JOHN STUART MILL, *ON LIBERTY* (1859).

<sup>298</sup> Fallon, *supra* note 243, at 881. *See also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1977) (concluding that only manipulative speech can be restricted under his liberty model, one approach to the First Amendment based in autonomy-like values).

<sup>299</sup> Fallon, *supra* note 243, at 881.

the protection of both individual self-fulfillment interests in autonomy and societal interests in autonomy.<sup>300</sup> In Emerson's view, free speech allows individuals to reach self-realization by making their own choices.<sup>301</sup> Free speech, through this autonomous activity by individuals, also serves society by allowing citizens to discuss and debate issues to reach the truth, harkening back to Mill's early concerns about restrictions on speech that would remove important discussion from public discourse.<sup>302</sup>

Other free speech theories based in autonomy principles focus more on the individual's own development and less on what autonomy contributes to society. Professor Martin Redish concluded that only "individual self-realization" fully justifies free speech, as the United States adopted a democratic model of government to allow for this self-realization.<sup>303</sup> For Redish, this individual self-realization encompasses both one's ability to develop his own "powers and abilities" as an individual and "the individual's control of his or her own destiny through making life-affecting decisions."<sup>304</sup> This decision-making element is also critical to Susan H. Williams' view of autonomy.<sup>305</sup> Williams promotes a "conception of autonomy [that] focuses on choice: self-determination is understood as exercised through the process of choosing."<sup>306</sup> Thus, under Williams' approach, the key is whether the person's choices for his life originate

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<sup>300</sup> THOMAS I. EMERSON, SYSTEMS OF FREEDOM OF EXPRESSION (1969).

<sup>301</sup> EMERSON, SYSTEMS, *supra* note 300, at 6–9.

<sup>302</sup> *Id.* at 7.

<sup>303</sup> Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591

<sup>304</sup> *Id.*

<sup>305</sup> WILLIAMS, *supra* note 248 at 41.

<sup>306</sup> *Id.*

within himself—truly autonomous choices—or whether the choices originate outside the agent.<sup>307</sup>

Professor C. Edwin Baker’s liberty model similarly focuses on the protection of free speech against restrictions by government or society that impinge on autonomy of the individual.<sup>308</sup> Baker’s theory is rooted in the autonomy underlying social contract doctrine—citizens respect and buy into a society and government that, in turn, respect their own autonomy.<sup>309</sup> “The legitimacy of the legal order depends, in part, on it respecting the autonomy that it must attribute to the people whom it asks to obey its laws. Despite the plethora of values served by speech, the need for this respect . . . provides the proper basis for giving free speech constitutional status.”<sup>310</sup>

In his model, however, Baker argued for a distinction between the Speech and Press Clauses of the First Amendment, arguing that the press only deserves First Amendment protection for its institutional value in serving democracy.<sup>311</sup> Supreme Court Justice Potter Stewart first reached the conclusion that the Press Clause was a structural provision in a well-known 1975 article.<sup>312</sup> Stewart argued that “the Free Press Clause extends protection to an institution. The publishing business is, in short, the only

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<sup>307</sup> WILLIAMS, *supra* note 248 at 41–42.

<sup>308</sup> C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1977).

<sup>309</sup> *Id.*

<sup>310</sup> C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENTARY 251 (2011).

<sup>311</sup> *See, e.g.*, C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 959–60 (2007) (stating that “individual speech rights are based on respect for the individual’s autonomy or liberty as an actor. In contrast, the press’s rights are related to its instrumental role as a fundamental institution of a free and democratic society”).

<sup>312</sup> Potter Stewart, *Or Of The Press*, 26 HASTINGS L. J. 631 (1975).

organized private business that is given explicit constitutional protection.”<sup>313</sup> Stewart viewed the goal of the Press Clause as “creat[ing] a fourth institution outside the Government as an additional check on the three official branches.”<sup>314</sup> Empirical studies of the Supreme Court’s free speech and press decisions, however, counsel against this distinction.<sup>315</sup> In reality, the Court has not “declared that the Press Clause has any meaning apart from the Speech Clause.”<sup>316</sup> Indeed, in his concurrence in *First National Bank of Boston v. Bellotti*, Chief Justice Burger examined the Press Clause’s history and proclaimed that “it was not meant to be a source of unique protections for the institutional press but was meant merely as an extension of the Speech Clause, guaranteeing all people the ability to express ideas through ‘every sort of publication which affords a vehicle of information and opinion.’”<sup>317</sup>

Prior to the second half of the twentieth century, “[w]ithout case law recognizing robust First Amendment protection for the press, courts often felt free to chastise reporters or editors who crossed the line of fair play in their news judgment.”<sup>318</sup> Indeed, “the press” had an entirely different meaning—in the eighteenth century, the concept of

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<sup>313</sup> Id.

<sup>314</sup> Id.

<sup>315</sup> See, e.g., Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 392–94 (2009) (in an empirical study of the Court’s free speech and free press decisions, concluding that the Court’s jurisprudence has not distinguished between the two, and that its decisions related to both the speech and press “fit comfortably under the rubric of the autonomy-model”).

<sup>316</sup> Id. at 393.

<sup>317</sup> Id. (citing 435 U.S. 765, 800 (1978) (Burger, C.J., concurring)).

<sup>318</sup> Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1044 (2009).

the press “referred less to a journalistic enterprise than to the technology of printing and the opportunities for communication that the technology created,” and the Press Clause gave people the right “to publish their views,” rather than specific freedom for “journalists to pursue their craft.”<sup>319</sup> Technological developments toward the end of the nineteenth century resulted in newspapers becoming “large and profitable enterprises” with employees who gathered and reported the news and commentary, eventually growing into the mass media we recognize today.<sup>320</sup> This further suggests that the idea of autonomy applicable to free speech also ought to apply to the press.

Bezanson notes that while an individual’s personal speech is not disseminated by the press, “in separately recognizing freedom of the press, the framers do not appear to have held a radically different view of the press’s speech (as opposed to its identity as a speaker) from that held for individual speech.”<sup>321</sup> Most importantly, for the purpose of autonomy theory, the functions of the institutional press and individual free speech do not suggest that a different theoretical framework should apply to the two clauses.

[T]he same process of intentional, independent, and free-willed judgment leading to the formation and expression of one's own beliefs, values, and ideas that is protected for individual speech under the free speech guarantee, is one that, by analogy, seems also to fit the independent, non-self-regarding, reasoned process of judgment that best describes the press in the performance of its classic checking and informing functions. The institutional analogue to the exercise of communicative free will by individuals under the speech guarantee is the exercise of editorial judgment by the press.<sup>322</sup>

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<sup>319</sup> David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446 (2002).

<sup>320</sup> *Id.* at 447.

<sup>321</sup> Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 758 (1999).

<sup>322</sup> *Id.* at 758–59.

Other theorists have followed this framework, concluding that justifications for free speech similarly apply to a free press, and autonomy is crucial for both individual speakers and the press. “[F]reedom of the press means independence from government in decisions about whether and what to publish.”<sup>323</sup> Bezanson wrote that independence for the press occurs when it is “free of forces from government or from outside of government that compromise the free independent judgment of those assigned the task of writing and composing the publication.”<sup>324</sup>

The Supreme Court has embraced an approach to the First Amendment that recognizes the autonomy of the press. The Court has announced that it will not interfere with “the day-to-day editorial decisions of broadcast licensees,” concluding that “[j]ournalistic discretion would in many ways be lost” with governmental regulation of journalists’ speech.<sup>325</sup> In *Miami Herald Pub. Co. v. Tornillo*, a case striking down a Florida statute that gave political candidates a right to reply to criticism by newspapers, the court recognized the importance of an autonomous press.<sup>326</sup> Writing for the Court, Chief Justice Burger concluded

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”<sup>327</sup>

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<sup>323</sup> Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 896 (1998).

<sup>324</sup> Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 760 (1999).

<sup>325</sup> *Columbia Broad. System, Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 120–21 (1973).

<sup>326</sup> 418 U.S. 241 (1974).

<sup>327</sup> *Id.* at 258.

More recently, the Court emphasized the vast number of entities that autonomously publish information, particularly in the context of “the vast democratic forums of the Internet.”<sup>328</sup> In *Reno v. American Civil Liberties Union*, Justice Stevens wrote that “[a]ny person or organization with a computer connected to the Internet can ‘publish’ information.”<sup>329</sup> The opinion highlighted the control individual publishers have over their contents, noting that “government agencies, educational institutions, commercial entities, advocacy groups, and individuals . . . may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege.”<sup>330</sup> This framework that revolves around autonomous speakers has worked its way into both First Amendment theory and the Supreme Court’s First Amendment jurisprudence. Autonomy derived for speakers from the First Amendment, however, conflicts with the autonomy inherent in laws that give individuals control over information about themselves. The next section examines how courts have solved this conflict.

### **C. The Stage is Set: Autonomy Interests Clash**

Individuals’ autonomy interest in controlling information about themselves naturally runs into trouble when others want to publish information about them. The clash of these interests is an issue courts have often addressed by providing speakers with a defense. Courts have developed several tests for resolving the conflict between First Amendment interests and the right of publicity. Three tests dominate the discussion of the

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<sup>328</sup> *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 868 (1997).

<sup>329</sup> *Id.* at 853.

<sup>330</sup> *Id.*

specific clash between the First Amendment and the right of publicity. In recent years, the courts have often relied on the transformative use test, derived from copyright law's fair use doctrine. The *Rogers* test, also popular with courts, originates in trademark law. Finally, the predominant use test focuses on the extent of the commercial nature of the defendant's use. Beyond these formal tests, courts also balance whether information is newsworthy against claims that the use infringes on its subject's autonomy. Courts have articulated several factors that contribute to a decision that a use of information is newsworthy, including whether the information was already in the public domain, the subject of the information's societal status, the context in which the information appears, and whether the information was used for commercial purposes.

## **1. Tests for the right of publicity**

### **i. Transformative use test**

Copyright law's fair use test<sup>331</sup> emerged as a way to balance First Amendment interests against right of publicity claims in *Comedy III Products, Inc. v. Saderup*.<sup>332</sup> The case involved T-shirts depicting the Three Stooges; the defendant was an artist who drew portraits and imposed them on T-shirts. The court acknowledged the difficulty of weighing the two values, noting that "any such test must incorporate the principle that the right of publicity cannot, consistent with the First Amendment, be a right to control the

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<sup>331</sup> The Copyright Act directs courts to consider four factors in weighing whether the use of copyrighted material is fair: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

<sup>332</sup> 21 P.3d 797 (Cal. 2001).

celebrity's image by censoring disagreeable portrayals."<sup>333</sup> The court emphasized that this principle holds especially true for celebrities who have sought fame because "the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope." In the case, however, the California Supreme Court concluded that "depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment."<sup>334</sup> The court adopted copyright fair use's "purpose and character of the use" factor,<sup>335</sup> asking "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."<sup>336</sup> The test does not judge the quality of the expression, but instead focuses on "whether the literal and imitative or the creative elements predominate in the work."<sup>337</sup> Important to the court's analysis is an analysis of whether the "marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted."<sup>338</sup> Thus, as a whole, a defendant in a right of publicity case may argue as a defense that his work "is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame."<sup>339</sup>

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<sup>333</sup> Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 807 (Cal. 2001).

<sup>334</sup> Id. at 805.

<sup>335</sup> 17 U.S.C. §107(1).

<sup>336</sup> Id. at 809.

<sup>337</sup> Id.

<sup>338</sup> Id. at 810.

<sup>339</sup> Id.

The defendant's T-shirts of the Three Stooges, the court decided, were not sufficiently transformative of the performers' likenesses to warrant the First Amendment defense.<sup>340</sup> The "artist's skill and talent [was] manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame."<sup>341</sup> The T-shirts were marketable not because of Saderup's skills, the court said, but because of the fame of the Three Stooges—consumers would buy the shirts not because they appreciated Saderup's skill as an artist but because they were fans of the Three Stooges.<sup>342</sup> The court could "perceive no transformative elements in Saderup's works that would require" First Amendment protection.<sup>343</sup>

The transformative use test proves to be especially protection of a plaintiff's right of publicity, and in the minds of some scholars, is not protective enough of the First Amendment rights at issue.<sup>344</sup> Professor Matthew Bunker notes that "transformative use places the burden of proof on the user, which is not consistent with standard First Amendment practice with regard to protected speech . . . The transformative use doctrine, on the other hand, places the burden squarely on the speaker to justify his or her speech."<sup>345</sup> He argues that the test does not adequately balance First Amendment values

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<sup>340</sup> Id.

<sup>341</sup> Id.

<sup>342</sup> Id. at 811.

<sup>343</sup> Id.

<sup>344</sup> Matthew D. Bunker, *Free Speech Meets the Publicity Tort: Transformative Use Analysis in Right of Publicity Law*, 13 COMM. L. & POLICY 301, 311 (2008) (arguing that there are "significant difficulties with the concept of transformative use as the key First Amendment protection in publicity cases").

<sup>345</sup> Id. at 317.

because copyrighted works deserve more deference than uses of one's name or likeness.<sup>346</sup> Professor Eugene Volokh, too, notes that copyright law has a constitutional mandate and the right of publicity does not, which he argues means the First Amendment should loom more largely in right of publicity cases than in the traditional copyright fair use analysis.<sup>347</sup> Volokh asks, "Even if state law says that the right of publicity is a sort of property, why should First Amendment law tolerate a state law that uses the term 'property' to bar people from expressing themselves in certain ways?"<sup>348</sup> Thus, the transformative use test is protective of an individual's right to publicity.

## ii. Rogers test

The test from *Rogers v. Grimaldi*<sup>349</sup> came about after a film about dancers was titled "Ginger and Fred," but was not about the eponymous, famous dancers Ginger Rogers and Fred Astaire. Instead, the fictional film by Federico Fellini told the story of two Italian cabaret performers who imitated Rogers and Astaire.<sup>350</sup> The Third Circuit concluded that the right of publicity would not "bar the use of a celebrity's name in a movie title unless the title was 'wholly unrelated' to the movie or was 'simply a disguised commercial advertisement for the sale of goods or services.'"<sup>351</sup> The film was related to Rogers and Astaire in that it was about the dancing careers of two performers. Further, it

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<sup>346</sup> Id.

<sup>347</sup> Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 908–10 (2003).

<sup>348</sup> Id. at 913.

<sup>349</sup> 875 F.2d 994 (2d Cir. 1989).

<sup>350</sup> Id. at 996.

<sup>351</sup> Id. at 1004 (citations omitted).

was not an advertisement, so the First Amendment trumped Ginger Rogers' rights of publicity in that case. The *Rogers* test also has roots in the *Restatement (Third) of Unfair Competition*, which states that "if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising."<sup>352</sup>

Courts apply the *Rogers* test less frequently than the transformative use test.<sup>353</sup> The *Rogers* test tends to be more protective of First Amendment interests than the transformative use test because it only applies to uses of information in expressive works, not in commercials.<sup>354</sup> The *Rogers* test requires some suggestion of falsity due to its similarity to false endorsement claims, but the right of publicity does not require falsity.<sup>355</sup> For this reason, some courts have held it inapplicable to right of publicity claims.<sup>356</sup>

### iii. Predominant use test

The Missouri Supreme Court articulated the predominant use test in *Doe v. TCI Cablevision*.<sup>357</sup> In the case, a hockey player named Tony Twist sued the creators of a comic book after they developed a villain named Anthony "Tony Twist" Twistelli.<sup>358</sup> The

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<sup>352</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. C (1995).

<sup>353</sup> MCCARTHY, *supra* note 177, at § 8.71.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *See, e.g.*, Hart v. Electronic Arts, Inc., 717 F.3d 141, 158 (3d Cir. 2013) (rejecting the *Rogers* test because it requires an element of falsity not present in right of publicity cases.),

<sup>357</sup> 110 S.W.3d 363 (Mo.2003).

<sup>358</sup> *Id.*

court rejected the transformative use and *Rogers* tests as “preclud[ing] a cause of action whenever the use of the name and identity is in any way expressive, regardless of its commercial exploitation.”<sup>359</sup> The court was concerned that these tests deferred too much to any expression. Thus, it expressed its new balancing test:

If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some ‘expressive’ content in it that might qualify as ‘speech’ in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.<sup>360</sup>

The court in *TCI* held, under this test, that the use by the comic book creators was a “literary device,” but concluded that the comic’s use of Twist’s persona “ha[d] very little literary value compared to its commercial value” and found a violation of Twist’s right of publicity.<sup>361</sup> Other courts, however, have rejected the predominant use test as “subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics.”<sup>362</sup> The test allows courts to “select elements of a work to determine how much they contribute to the entire work’s expressiveness.”<sup>363</sup> Weighing in on the expressive value of speech is a role the Supreme Court has discouraged courts to take. For example, in both *Brown v. Entertainment Merchants Association*<sup>364</sup> and *United States v. Stevens*,<sup>365</sup> the Court refused to weigh the First

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<sup>359</sup> Id.

<sup>360</sup> Id.

<sup>361</sup> Id.

<sup>362</sup> *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 154 (3d Cir. 2013).

<sup>363</sup> Id.

<sup>364</sup> 131 S.Ct. 2729 (2011).

Amendment value of expressive speech, even in potentially morally objectionable situations—violent video games in *Brown* and “snuff films” that depict women crushing animals with stiletto heels in *Stevens*. The Court would only find that certain specific categories of speech lack First Amendment protection—obscenity, fighting words, incitement.<sup>366</sup> Thus, this test has generally fallen out of favor.

### **B. The Newsworthiness Defense: A Shrinking Paradigm**

The “newsworthiness” defense is the primary way the press has, more generally than the right of publicity tests, exercised its autonomy throughout the last century. It is also the way courts have resolved conflicts between speakers’ autonomy in determining what to publish and individuals’ desires to control information.<sup>367</sup> “Partly out of First Amendment concerns and partly out of a sense of their own limited competence, judges have regularly declined to second-guess journalists’ editorial decisions.”<sup>368</sup> The *Restatement (Second) of Torts* does discuss what newsworthiness is—and the language is notably deferential to the press:

Included within the scope of legitimate public concern are matters of the kind customarily regarded as “news.” To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm.<sup>369</sup>

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<sup>365</sup> 559 U.S. 460 (2010).

<sup>366</sup> 131 S.Ct. 2729, 2773 (2011).

<sup>367</sup> Gajda, *supra* note 184, at 1041.

<sup>368</sup> *Id.*

<sup>369</sup> RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

The *Restatement* declines to define what, precisely, is newsworthy, and rather outlines what is beyond the bounds of news value: that which “becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern” is beyond the scope of the newsworthiness defense under the *Restatement* approach.<sup>370</sup>

Recognizing the early tort of misappropriation, the *Pavesich* court identified this conflict between publication and private individuals’ interests as a major reason for the hesitation by some courts to adopt rights of privacy:

The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other...One may be used as a check upon the other, but neither can be lawfully used for the other's destruction.<sup>371</sup>

*Time v. Hill* marked the first time the Supreme Court directly confronted the tension between individuals seeking to control information about themselves and publication by the press, in the context of New York’s privacy statute.<sup>372</sup> The Hill family had been held captive by escaped convicts in their home, inspiring a fictional novel and then a play, which *Life* magazine covered.<sup>373</sup> The novel and play took creative license with the Hill family’s story, adding several more dramatic elements.<sup>374</sup> The family sued

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<sup>370</sup> Id. § 652D cmt. h.

<sup>371</sup> 50 S.E. at 73–74.

<sup>372</sup> 385 U.S. 374 (1967).

<sup>373</sup> Id. at 377.

<sup>374</sup> Id. at 378.

under the privacy statute, arguing that *Life*'s article intended to, and did, give the impression that the novel and play were accurate depictions.<sup>375</sup> *Life* asserted the defense that the story about the play and the Hill family's brush with crime had news value.<sup>376</sup> The Court agreed, stating that "guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . . One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials."<sup>377</sup> The Court concluded that the story addressed a matter of public concern, and thus the story's news value served a defense to the Hill family's claim.<sup>378</sup>

For years after these pronouncements, courts were deferential when journalists decided information was worth publishing. Coverage of crime, in particular, warranted deference, as Gajda illustrates with several examples of early cases allowing for press coverage of crime even when the perpetrators objected.<sup>379</sup> For example, the Circuit Court of Appeals for the District of Columbia found that a bartender who worked in a hotel patronized by government officials did not have a claim for invasion of his privacy after a newspaper reported on his trial for sedition.<sup>380</sup> Indeed, crime coverage was of particular news value according to courts in the mid-twentieth century, and courts chose to defer to

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<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 379.

<sup>377</sup> *Id.* at 388.

<sup>378</sup> *Id.* at 391.

<sup>379</sup> Gajda, *supra* note 184, at 1059.

<sup>380</sup> *Elmhurst v. Pearson*, 153 F.2d 467 (D.C. Cir. 1946).

the press’ decision to publish.<sup>381</sup> Indeed, the Supreme Court considered the constitutionality of a New York statute that criminalized some crime-focused publications, including magazines comprising stories based on police reports and other accounts of criminal deeds.<sup>382</sup> “‘Though we can see nothing of any possible value to society in these magazines,’ the Court wrote, ‘they are as much entitled to the protection of free speech as the best of literature.’”<sup>383</sup> During this era, some courts even went so far as to say that the press was free to publish not just what journalists thought the public needed to know, but also what the public wanted to know—opening the door to more sensational stories being deemed newsworthy.<sup>384</sup>

The dissenting opinion in *Zacchini* considered what might happen when the press’ interests come into conflict with an individual’s interest in controlling information about himself that has commercial value.<sup>385</sup> Judge Powell wrote that in the case, the news broadcast “simply reported on what petitioner concede[d] to be a newsworthy event” by means of its nightly news coverage.<sup>386</sup> He expressed concern that the holding of *Zacchini* would have “disturbing implications” by “lead[ing] to degree of media self-censorship”

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<sup>381</sup> Gajda, *supra* note 184, at 1053.

<sup>382</sup> *Winters v. New York*, 333 U.S. 507 (1948).

<sup>383</sup> Gajda, *supra* note 184, at 1057 (citing *Winters*, 333 U.S. at 510).

<sup>384</sup> Gajda, *supra* note 184, at 1055 (citing *Sidis v. F-R Publishing Corp.* 113 F.2d 806, 807 (2d Cir. 1940)). The Second Circuit in *Sidis* considered claims by a former child prodigy who had left the public eye and objected to a story in *The New Yorker* later in his life that shared intimate personal details. The court wrote:

Regrettably or not, the misfortunes and frailties of neighbors and “public figures” are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day. *Id.* at 809.

<sup>385</sup> 433 U.S. at 579–80 (Powell, J., dissenting).

<sup>386</sup> *Id.* at 580 (Powell, J., dissenting).

in reporting on “clearly newsworthy events.”<sup>387</sup> In the context of a right of publicity claim, Justice Powell opined that Zacchini’s public performance was newsworthy and thus he could not, “consistent with the First Amendment, complain of routine news reportage.”<sup>388</sup> However, the dissent did not offer an opinion as to what constitutes a newsworthy event beyond the performance’s public nature because both parties agreed the “human cannonball” act had news value.<sup>389</sup>

Gajda argues that courts in recent years have shifted from complete deference to journalists to more significant inquiries into what constitutes newsworthy information.<sup>390</sup> She rests this argument on increased societal concern about diminished privacy and a downturn in the public’s respect for journalism.<sup>391</sup> She cites a number of recent federal district court cases chastising publication by media outlets for this proposition, and also points to the Supreme Court’s narrow holding in *Bartnicki v. Vopper*.<sup>392</sup> In the case, the Court declined to broadly hold that the press could never be held liable for publication of truthful information, and instead narrowly held that on the facts of that case, the information about a union official making threats was of such obvious news value as to

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<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 582 (Powell, J., dissenting).

<sup>389</sup> *Id.* at 580 (Powell, J., dissenting).

<sup>390</sup> Gajda, *supra* note 184, at 1041–42.

<sup>391</sup> *Id.* at 1041–42, 1068. Gajda cites several factors that contribute to the lowered estimation of the media:

(1) The expanding demand for content fueled by the spread of cable news channels and the twenty-four-hour news cycle; (2) the obsession with celebrities and the proliferation of print, broadcast, and Web-based tabloids; (3) the melding of news and entertainment programming through reality TV; and (4) deepening ambiguity over the identity and role of journalists with the advent of the Internet, blogging, and podcasting. *Id.* at 1068.

<sup>392</sup> 532 U.S. 514 (2001).

warrant the newsworthiness defense.<sup>393</sup> Gajda concludes that “[t]he Court’s evident comfort in balancing the privacy interests of particular claimants against what it judged to be the public value of a disputed news story may well encourage lower courts to go even further in this regard.”<sup>394</sup>

If, indeed, courts are becoming increasingly stringent in their determinations of whether a publication is newsworthy, then they must have some standards by which to judge whether information possesses news value. The next sections outline factors that courts consider in striking a balance between an individual’s interest in maintaining autonomy by controlling information about herself and speakers’ interests in autonomous publishing decisions.

#### **i. Deference for Information in the Public Domain**

When truthful information has entered the public domain, the Court has narrowly held in several cases that content creators could not be punished for publishing this information. The Court balanced the individual and First Amendment interests at stake in both cases. Such a determination suggests that, once information is public, courts should proceed cautiously and perhaps conclude that the press is free to deem this public information newsworthy.

The Court first addressed this issue in *Cox Broadcasting Corp. v. Cohn*,<sup>395</sup> in which a newspaper published the name of a deceased rape victim, violating a Georgia statute prohibiting publication of this information, and her father sued for invasion of his

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<sup>393</sup> Gajda, *supra* note 184, at 1079 (citing Bartnicki, 532 U.S. at 529).

<sup>394</sup> Gajda, *supra* note 184, at 1080.

<sup>395</sup> 420 U.S. 469 (1975).

privacy. The Court held that imposing sanctions on this information, obtained from public judicial records and a public trial, infringed the publisher's First Amendment rights.<sup>396</sup> This holding was narrow, however—the Court said it would not “address the broader question whether truthful publications may ever be subjected to civil or criminal liability” and would instead “focus on the narrower interface between press and privacy” involved in the facts of the specific case.<sup>397</sup> The Court emphasized the public nature of the proceedings and citizens' reliance on the press to track the activity of government.<sup>398</sup> It concluded that when the information involved was already in the public record, an individual has a diminished interest in controlling that information, and “the interests in privacy fade.”<sup>399</sup> Concerned about the possible resulting chilling effect that sanctions for publication of information contained in public records could create, the Court concluded:

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose

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<sup>396</sup> Cox Broadcasting Corp., 420 U.S. at 496.

<sup>397</sup> Id. at 491.

<sup>398</sup> Id. at 491–92. The Court observed:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

<sup>399</sup> Id. at 494–95.

sanctions on the publication of truthful information contained in official court records open to public inspection.<sup>400</sup>

Similarly, *Florida Star v. B.J.F.* involved the publication of a rape victim's name which a newspaper had gathered from a public report.<sup>401</sup> The police report had been made public in error, and the newspaper in fact published the name accidentally, as it had an internal policy of declining to publish the names of rape victims.<sup>402</sup> The Court again declined to decide whether truthful publication can be punished in keeping with the First Amendment.<sup>403</sup> Again, the Court held that on this set of facts, the newspaper could not be punished because it lawfully obtained this truthful information from public records; in this case, the government could have kept the police report private, but it failed to do so and the newspaper could not be subject to liability for this error.<sup>404</sup>

These cases suggest that government is free to make certain records private. However, where they have been made public, a content creator cannot be held liable for their truthful publication. This suggests public records themselves are within an autonomous press' right to deem newsworthy by virtue of their nature as public records.

## **ii. Newsworthiness Based on the Subject's Stature in Society**

One consideration in the analysis of whether a piece of information about an individual is newsworthy is that individual's stature in the community. In Supreme Court parlance, whether that individual is a "public figure" has bearing on the newsworthiness

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<sup>400</sup> Id. at 495.

<sup>401</sup> *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>402</sup> Id. at 527–28.

<sup>403</sup> Id. at 532.

<sup>404</sup> Id. at 534–5.

of information about him or her. In a line of important cases, the Court concluded that the more public an individual's persona, the more likely information about him or her is newsworthy.<sup>405</sup>

In *New York Times v. Sullivan*, the Court drew a line between public officials and private citizens, giving speakers breathing space to publish information about the former to avoid chilling speech on matters of public concern.<sup>406</sup> The Court held that a higher standard of proof, actual malice, applied to public officials who sued for defamation.<sup>407</sup> This holding provided greater protection for speech on newsworthy matters. The Court extended this actual malice standard beyond public officials to public figures several years later.<sup>408</sup> The plaintiffs in *Curtis Pub. Co. v. Butts* were not elected officials, so the Court decided that the *Sullivan* standard was inapplicable; nonetheless, the Court concluded that there was public interest in the information involved.<sup>409</sup> Butts was the athletic director for the University of Georgia and was well-known in the college football community.<sup>410</sup> The publication alleged he was involved in "fixing" a football game.<sup>411</sup> The Court chose to "investigate[] the plaintiff's position to determine whether he ha[d] a legitimate call upon the court for protection in light of his prior activities and means of

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<sup>405</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>406</sup> *New York Times Co.*, 376 U.S. at 279–80.

<sup>407</sup> *Id.* at 279.

<sup>408</sup> *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

<sup>409</sup> 388 U.S. at 154.

<sup>410</sup> 388 U.S. at 136.

<sup>411</sup> 388 U.S. at 136.

self-defense.”<sup>412</sup> The Court held that the actual malice standard also applied to a person who was a public figure.<sup>413</sup> A public figure under this standard is not a public official but is “nevertheless intimately involved in the resolution of important public questions or, by reason of [his] fame, shape[s] events in areas of concern to society at large.”<sup>414</sup> The importance of an individual’s standing in society in determinations about his ability to control information about himself came full circle in *Gertz v. Robert Welch, Inc.*<sup>415</sup> The case arose when a magazine article incorrectly described Gertz, a lawyer who was representing a family in civil litigation after a police officer killed their child, as a “Leninist” and a “Communist-frontier.”<sup>416</sup> Gertz sued for defamation, and the Court analyzed Gertz’s standing in the community to determine what burden of proof he carried.<sup>417</sup> A person may become a public figure if he has “achieve[d] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts” or if he “injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”<sup>418</sup> With these standards in mind, the Court concluded Gertz was not a public figure because Gertz “did not thrust himself

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<sup>412</sup> 388 U.S. at 154.

<sup>413</sup> *Id.*

<sup>414</sup> 388 U.S. at 164.

<sup>415</sup> 418 U.S. 323 (1974).

<sup>416</sup> 418 U.S. at 325–26.

<sup>417</sup> 418 U.S. at 352.

<sup>418</sup> 418 U.S. at 351.

into the vortex of this public issue.”<sup>419</sup> The Court left it to states to determine the burden of proof for private plaintiffs, so long as some level of fault was shown.<sup>420</sup>

Although overruled by *Gertz*, a plurality of the Court in *Rosenbloom v. Metromedia, Inc.* focused on the nature of information published and society’s interest in it.<sup>421</sup> Justice Brennan wrote that “[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”<sup>422</sup> On these grounds, private citizens involved in matters of general interest must also satisfy the actual malice standard.<sup>423</sup>

These standards suggest that an individual who exists in the public eye, or who is involved in some matter of public interest, has less control of information about himself. The Court seems to have decided that, in exchange for this position, he must sacrifice some of this autonomy. Social stature is not the only factor significant in decisions about what is worth sharing publicly.

### **iii. Newsworthiness Based on Context**

Courts willing to take a deeper look at a piece of information’s newsworthiness have also considered the context in which the information appears. Indeed, especially in a tort claim based on unauthorized use of an individual’s identity, the context is crucial in

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<sup>419</sup> 418 U.S. at 352.

<sup>420</sup> 418 U.S. at 347.

<sup>421</sup> 403 U.S. 29 (1971).

<sup>422</sup> 403 U.S. at 43.

<sup>423</sup> 403 U.S. at 43.

light of the element requiring commercial use by the defendant. A simple search for cases containing the words “newsworthiness” and “right of publicity” yields a number of federal appellate court decisions that detail the context in which the use of information is judged for its news value.

The Eleventh Circuit recently evaluated the context in which a piece of information appeared to decide whether the use warranted the newsworthiness defense in *Toffoloni v. LFP Publishing Co.*<sup>424</sup> Professor Clay Calvert argued the case “represents a prime and dangerous example of Gajda’s hypothesis about the increased willingness of courts to intrude on the realm of journalists in privacy cases.”<sup>425</sup> Nancy Benoit was a well-known model and professional wrestler who was famously murdered by her husband, also a wrestler, in 2007.<sup>426</sup> After her death, a photographer in possession of 20-year-old nude photographs of Nancy Benoit sold them to *Hustler* magazine.<sup>427</sup> *Hustler* published the photographs 9 months later.<sup>428</sup> Benoit’s mother sued under Georgia’s right of publicity statute to enjoin the publication a month before the photos appeared, but the district court held that Nancy Benoit’s death was a “legitimate matter of public interest

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<sup>424</sup> 572 F.3d 1201 (11th Cir. 2009).

<sup>425</sup> Clay Calvert, *Every Picture Tells A Story, Don't It? Wrestling with the Complex Relationship Among Photographs, Words and Newsworthiness in Journalistic Storytelling*, 33 COLUM. J.L. & ARTS 349, 358 (2010).

<sup>426</sup> Toffoloni, 572 F.3d at 1204.

<sup>427</sup> *Id.* at 1204.

<sup>428</sup> *Id.*

and concern” and so *Hustler* was not publishing them merely for its commercial gain, although one of its goal as a for-profit publication was, of course, to make a profit.<sup>429</sup>

The court outlined the historical development of the right of publicity, noting its roots in privacy law and its increasingly pervasive recognition of economic harms.<sup>430</sup> Next, turning to the newsworthiness exception to a right of publicity claim, the court proclaimed that “[t]he right to privacy and corresponding right of publicity are necessarily in tension with the First Amendment’s protection of freedom of speech and of the press.”<sup>431</sup> A right of publicity results in liability, the court said, when a publisher publishes “one’s image for pure financial gain, as in an advertisement . . . .”<sup>432</sup>

Finally, the court turned to *Hustler*’s use of the nude photographs. Far from being deferential to *Hustler*’s decision to publish the images, the court engaged in what it called an “intensive review of both the relationship between the published photographs and the corresponding article, as well as the relationship between the published photographs and the incident of public concern—Benoit’s murder.”<sup>433</sup> The court quickly concluded that the nude pictures standing alone without a news article would not be newsworthy.<sup>434</sup>

*Hustler*’s publication included a biographical article about Benoit’s career, which the

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<sup>429</sup> Toffoloni, 572 F.3d at 1204–05 (citing *Toffoloni v. LFP Publ'g Grp.*, No. 1:08–CV–421–TWT, 2008 WL 4559866, at \*2, 2008 U.S. Dist. LEXIS 82287, at \*6 (N.D.Ga.2008)).

<sup>430</sup> Toffoloni, 572 F.3d at 1205–07 (stating that “[t]he right of publicity grew out of a long-standing recognition of the right to privacy under Georgia law”).

<sup>431</sup> Toffoloni, 572 F.3d at 1207.

<sup>432</sup> Toffoloni, 572 F.3d at 1208.

<sup>433</sup> Toffoloni, 572 F.3d at 1208–09.

<sup>434</sup> Toffoloni, 572 F.3d at 1209 (commenting that “people are nude every day, and the news media does not typically find the occurrence worth reporting”).

court said was newsworthy on its own.<sup>435</sup> Nonetheless, the court concluded that the photographs did not adequately illustrate the news story.<sup>436</sup> “These photographs were not incidental to the article. Rather, the article was incidental to the photographs.”<sup>437</sup> The court then engaged in a detailed analysis of the article and photo spread, noting that the magazine’s cover and table of contents referred only to the nude pictures and not the biographical piece accompanying them.<sup>438</sup> A discussion of the contents of the article followed,<sup>439</sup> with the court concluding that “[t]he heart of this article was the publication of nude photographs—not the corresponding biography.”<sup>440</sup> Further, the court determined that the nude photographs “were in no way related to the ‘incident of public concern’ or ‘current drama’” surrounding Benoit’s death.<sup>441</sup> *Hustler*’s use was not newsworthy and so the publisher was liable to Benoit’s estate for damages.<sup>442</sup>

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<sup>435</sup> Toffoloni, 572 F.3d at 1209.

<sup>436</sup> Id. (stating that “[a]lthough LFP argues that the photographs were illustrative of the substantive, biographical article included in *Hustler*, our review of the publication demonstrates that such is not the case”).

<sup>437</sup> Id.

<sup>438</sup> Id.

<sup>439</sup> Id. The court observed:

The article is entitled “NANCY BENOIT Au Naturel: The long-lost images of wrestler Chris Benoit's doomed wife.” The title and page frame, which reads “EXCLUSIVE PICS! EXCLUSIVE PICS!,” comprise about one-third of the first page. A second third of the page is devoted to two nude photographs of Benoit. The final third of the page discusses Benoit's murder and her nude photo shoot, twice referencing her brief desire to be a model. The second page of the article is entirely devoted to photographs, displaying eight additional photographs of Benoit. *Id.*

<sup>440</sup> Id. at 1209.

<sup>441</sup> Id. at 1212.

<sup>442</sup> Id. at 1213.

The Ninth Circuit, however, took a starkly different approach than the *Toffoloni* court in its consideration of a right of publicity claim based on a fashion spread, including photos and accompanying text, in *Hoffman v. Capital Cities/ABC, Inc.*<sup>443</sup> The Ninth Circuit drew from defamation law in creating a test to balance First Amendment interests against the right of publicity. In the case, *L.A. Magazine* created a fashion spread that altered a picture of actor Dustin Hoffman from his performance in the film “Tootsie” to put a designer’s clothing on the character.<sup>444</sup> Hoffman argued the piece was commercial speech and so warranted lesser First Amendment protection. The Ninth Circuit disagreed, concluding that the article was not a “traditional advertisement” after analyzing the entire context in which the piece appeared:

[The magazine] did not receive any consideration from the designers for featuring their clothing in the fashion article containing the altered movie stills. Nor did the article simply advance a commercial message. [The article] appears as a feature article on the cover of the magazine and in the table of contents. It is a complement to and a part of the issue’s focus on Hollywood past and present. Viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are ‘inextricably entwined’ with expressive elements, and so they cannot be separated out ‘from the fully protected whole.’<sup>445</sup>

The court next concluded that because Hoffman was a public figure, to assert his right of publicity claim he must overcome the magazine’s First Amendment rights with a showing that the magazine acted with actual malice—knowledge that the photograph was false, or with reckless disregard for its falsity.<sup>446</sup> “Oddly, the court never explained why

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<sup>443</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

<sup>444</sup> *Id.*

<sup>445</sup> *Id.* at 1185 (citations omitted).

<sup>446</sup> *Id.* at 1184.

Hoffman would have to show falsity (or reckless disregard) with respect to a cause of action for which falsity is not an element. Perhaps, though, the case can be read as standing for the proposition that in other cases involving noncommercial speech, some degree of heightened First Amendment scrutiny necessarily applies.”<sup>447</sup>

The district court had concluded that the magazine acted with actual malice because it gave the false impression that Hoffman had worn the outfit he was pictured in. The standard the Ninth Circuit applied was that “[t]o show actual malice, Hoffman must demonstrate by clear and convincing evidence that [the magazine] intended to create the false impression in the minds of its readers that when they saw the altered ‘Tootsie’ photograph they were seeing Hoffman's body.”<sup>448</sup> The court refused to examine just the altered photograph and said it had to examine the “‘totality of [LAM's] presentation,’ to determine whether it ‘would inform the average reader (or the average browser)’ that the altered ‘Tootsie’ photograph was not a photograph of Hoffman's body.”<sup>449</sup> The entire magazine made clear, the court concluded, that the piece was not intended to suggest Hoffman actually wore the clothing in which he was portrayed. “All but one of the references to the article in the magazine make it clear that digital techniques were used to substitute current fashions for the clothes worn in the original stills.”<sup>450</sup> In the magazine’s entire context, the court decided that because the magazine did not, with knowledge that the photograph was false or with reckless disregard for its falsity, mislead readers into

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<sup>447</sup> Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 178 (2010).

<sup>448</sup> Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1187 (9th Cir. 2001).

<sup>449</sup> Id.

<sup>450</sup> Id. at 1188.

believing that Hoffman actually wore the outfit in which he was depicted, Hoffman could not sustain a claim for a violation of his right of publicity.<sup>451</sup> This approach, which Calvert described as “holistic,”<sup>452</sup> resulted in a conclusion that the spread warranted the newsworthiness exemption because “[v]iewed in context, the article as a whole [wa]s a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are ‘inextricably entwined’ with expressive elements, and so they cannot be separated out ‘from the fully protected whole.’”<sup>453</sup>

Finally, context can be critical in ensuring protection for creative expression that requires the use of information about individuals. A parody mocking baseball players was at issue in *Cardtoons, L.C. v. Major League Baseball Players Association*.<sup>454</sup> Cardtoons sold parody trading cards that used components of baseball players’ identities to poke fun at them.<sup>455</sup> “Egotisticky Henderson” of the “Pathetics” was the fake player featured on a card parodying Oakland A’s player Ricky Henderson, known for his ego:

The card features a caricature of Henderson raising his finger in a “number one” sign while patting himself on the back, with the following text: Egotisticky Henderson, accepting the “Me–Me Award” from himself at the annual “Egotisticky Henderson Fan Club” banquet, sponsored by Egotisticky Henderson: “I would just like to thank myself for all I have done. (Pause for cheers.) I am the greatest of all time. (Raise arms triumphantly.) I love myself. (Pause for more cheers.)

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<sup>451</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1188 (9th Cir. 2001).

<sup>452</sup> Calvert, *supra* note 425, at 359.

<sup>453</sup> *Hoffman*, 255 F.3d at 1183.

<sup>454</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 963 (10th Cir. 1996).

<sup>455</sup> *Id.*

The court wrote that the cards required the “use of player identities because, in addition to parodying the institution of baseball, the cards also lampoon individual players.”<sup>456</sup> In the context of a right of publicity claim, the court considered the players’ identifying information the “raw materials” necessary to complete the parodies successfully.<sup>457</sup> The court thus concluded that the First Amendment provided a defense for usurping some of the players’ control of their identities.<sup>458</sup>

#### **iv. Less Deference for Commercial Speech**

The Supreme Court has held that commercial speech holds a unique position in First Amendment jurisprudence. The U.S. Supreme Court defines it as “speech which does ‘no more than propose a commercial transaction.’”<sup>459</sup> Courts consider several factors, including whether the speech is conceded to be advertising, whether it refers to a specific product, and whether the speaker has an economic motivation for making the speech.<sup>460</sup> Commercial speech does receive limited constitutional protection, as the Supreme Court has announced that the “relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.”<sup>461</sup> However, it receives less First and Fourteenth Amendment protection than does other

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<sup>456</sup> *Cardtoons, L.C.*, 95 F.3d at 971.

<sup>457</sup> *Id.* at 976.

<sup>458</sup> *Id.*

<sup>459</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

<sup>460</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983).

<sup>461</sup> *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

constitutionally protected “pure” speech.<sup>462</sup> Because commercial speech receives less constitutional protection, the government may be justified in regulating it, if the government can show the speech falls within the framework provided by *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Commn. of New York*.<sup>463</sup> Under *Central Hudson*, the court must first determine whether the expression is protected by the First Amendment by being lawful and not misleading and then whether the government’s interest in regulating it is substantial; if the answer to these inquiries is yes, the court must next decide whether the regulation directly advances the government interest and whether it is more extensive than is necessary to serve that interest.<sup>464</sup>

Thus, if the defendant’s use of the plaintiff’s identity occurs in the context of commercial speech, the use warrants less First Amendment deference. Further, the commercial speech context is often more likely to be “for the purposes of trade,” making it easier to prove one of the elements of the tort. Context was similarly crucial to the Ninth Circuit when it weighed Kareem Abdul-Jabbar’s claim to his right of publicity against General Motors’ use of Abdul-Jabbar’s former name and basketball record in a commercial.<sup>465</sup> General Motors asserted that Abdul-Jabbar’s basketball record was newsworthy and thus it was immune from liability for a violation of his right of publicity under California’s right of privacy statute. The Ninth Circuit held that while the record itself may have been newsworthy, General Motors’ use was commercial—it occurred “in

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<sup>462</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64 (1983).

<sup>463</sup> *Cent Hudson Gas & Elec. Corp. v. Pub. Serv. Commn. of New York*, 447 U.S. 557, 566 (1980).

<sup>464</sup> *Id.*

<sup>465</sup> *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 415–16 (9th Cir. 1996).

the context of an automobile advertisement, not in a news or sports account.”<sup>466</sup> Thus, the use of information Abdul-Jabbar wanted to control about himself was not newsworthy in the context of an advertisement.

The right of publicity tests apply in situations when the newsworthiness defense is not readily apparent or applicable. The numerous factors that can contribute to a publication’s newsworthiness demonstrate the complexity of this determination. The new uses of mug shots highlight the increasing difficulty of drawing lines between when these differences infringe on individuals’ rights or when they are protected by the First Amendment. The next section discusses the challenges surrounding the application of current conceptions of the right of publicity in the context of mug shot websites. As technology progresses and uses for individuals’ information have increasing economic and social value, deciding when a use is protected and when it is not becomes harder. When new uses of information, like mug shot websites, arguably infringe individuals’ rights to control information while at the same time may embody First Amendment values, how should courts resolve this tension?

#### **V. RECONCEIVING IDENTITY TORTS: REFLECTING HISTORY AND MODERN DEVELOPMENTS WITH A UNIFIED APPROACH TO IDENTITY CLAIMS**

The recent use, or alleged misuse, of mug shots by websites seeking to profit from the use of this information about others provides a valuable lens through which to consider tensions between claims for rights to one’s identity and the First Amendment. While legislative, public, and corporate reactions may have hindered the original business model that essentially extorted money from individuals, the reaction may also infringe on

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<sup>466</sup> 85 F.3d at 416.

First Amendment rights. As technology has developed to allow for the collection of these mug shots by scraping other websites, questions have arisen about the use of these images in this manner—and who should be allowed to use them. Responses to these websites—both lawsuits claiming a right of publicity in the images and legislation aiming to control the use of mug shots—demonstrate a fundamental flaw with the current American approach to how the balance of who controls information is struck. Rather than relying on piecemeal legislation that does not take into account technological changes, jurisdictional issues, or harms both to individuals and content creators, this thesis proposes that a unified approach is necessary to explain how to balance First Amendment interests in information against individual interests in controlling that information. Defining the right of publicity not as a privacy- or property-based tort, but rather one that allows for autonomous control over information related to one's identity provides more stable ground for resolving conflicts between individuals and publishers. This autonomy-focused approach means that courts considering right of publicity claims must consider the entire context in which information appears, resisting the temptation to fall back on arguments about cluttered media environments and information overload. Only from that position can a holistic, contextual approach to right of publicity claims yield results that are sensitive to the autonomy of both parties.

#### **A. Patchwork Approaches to Identity Claims Fail to Protect Either Party's Autonomy Interests**

In states where mug shots are public records, perhaps the newsworthiness issue has been decided. Following the holdings in *Cox Broadcasting Corp.* and *Florida Star*, public-record mug shots truthfully depict that a person was arrested. In that sense, a

publisher should not be punished for publishing these public records—to do so would contravene First Amendment rights. “If the First Amendment protects republication of information about crime victims obtained from publicly-accessible sources, it surely gives companies a right to print tabloids or create websites featuring mug shots and arrest information made available to the public by police or sheriff’s departments.”<sup>467</sup>

This does not resolve the matter, however. As tables 1 and 2 demonstrate, some legislation in reaction to mug shot websites has resulted in removing mug shots from the public domain or putting restrictions on their use. As a matter of policy, journalists object to these changes. The problem is that these records are being taken out of the public domain after years of availability. Steven Aftergood, a privacy and surveillance expert, predicts that this trend of shifting mug shots from being public to being private records is likely to continue, and he sees this as an overreaction to the problems associated with mug shot websites. “From an information policy point of view, [mug shot websites are] likely to have adverse consequences. People are more likely to say, ‘Who needs it, let’s seal all of these records.’ That would be an unfortunate consequence.”<sup>468</sup> For example, Georgia is considering a bill that would make mug shots private records.

Governments are, of course, free to decide how to classify their records—public or private. But this thesis has shown that some of these bills place restrictions on how this publicly accessible information can be used after it has already been made public. For example, Minnesota H.B. 1940 applies to all websites and publications, and requires sites to remove the mug shots of individuals who were not convicted of a crime in connection

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<sup>467</sup> Rostron, *supra* note 14, at 1326–27 (2013).

<sup>468</sup> Kravets, *supra* note 47.

with their arrest immediately upon learning of the end of the case.<sup>469</sup> Further, even those who are convicted of their crimes would be able to request that the site or publication change what they have published to publish only the individual's first name, last initial, and crime.<sup>470</sup> This forced editing or "unpublishing" infringes on content creators' autonomy by directly overruling editorial judgment as to the publication of truthful information. The mug shot tells the world that a person was arrested. It is not a report of a conviction; it is a record of arrest. Additionally, journalists have legitimate arguments about the newsworthiness of these records. This legislation is symptomatic of the problem with a patchwork approach to information about individuals. Without an underlying theory that properly balances these individual concerns against First Amendment rights, both interests may suffer.

A better approach to issues about control of information like mug shots is a unified theory that works across platforms, technologies, and jurisdictions. A piecemeal approach to personal information runs into trouble when one considers the context of the Internet. Under the current approach, whether one's mug shot becomes public depends on where that person engages in the act resulting in the mug shot. Max Birnbaum, the young man featured in *The New York Times* piece, was unlucky enough to get caught with ecstasy in a state where mug shots are public records, and from there it spread across the Internet.<sup>471</sup> Had Birnbaum been enjoying Spring Break in a state where mug shots are not public records, his mug shot would not be the first result when one performs a Google

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<sup>469</sup> Minn. H.B. 1940 (2014).

<sup>470</sup> Minn. H.B. 1940 (2014).

<sup>471</sup> Segal, *supra* note 66.

search for his name. This state-by-state approach makes little sense in an era where the Internet does not stop at the state line. Laws should not react to technology in a way that allows jurisdictions to individually craft their rules. If the legal system takes seriously both an individual's right to control information about himself and a content creator's right to make editorial decisions autonomously, those rights should not end at jurisdictional boundaries. Rights, not technology, must drive law.

Until a unified approach emerges, both sides of this balancing act suffer. On one hand, this piecemeal approach does not protect individuals from harm as new technology undermines their control of information about themselves. Whereas individuals used to believe that their mug shots were in the possession of the police and might be used by media outlets if the crime was notorious or newsworthy enough, individuals who are arrested now see many more uses for their mug shots, and they may complain about harms stemming from the mug shot industry. Until a state responds to the harm, likely years after the original use of the information, individuals suffer harm. On the other hand, incremental responses continually result in overreaction and in the chipping away of content that publishers previously could access, as this thesis' survey of current pending legislative responses to the mug shot industry in tables 1 and 2 demonstrates. Warren and Brandeis essentially predicted this problem 124 years ago. Much harm can potentially flow from new technology. Some theory must undergird the entire concept of control of one's name and likeness to offer a single, coherent approach that is applicable even in the face of unpredictable new technology and uses of that technology.

**B. An Autonomy-Based Approach Adequately Recognizes the Interests of Individuals and Publishers**

This thesis proposes that autonomy theory should animate claims for violations of one's control of his or her identity, both in terms of the interest claimed by the plaintiff and in defenses that content creators can assert. The interest in controlling one's identity can be viewed as comprising both privacy interests and economic interests, as discussed above. Autonomy, conceived as control over information about oneself, is a better approach to the overarching interests asserted by plaintiffs in both misappropriation and right of publicity claims than either privacy or property because it encompasses the root of plaintiffs' concerns in both—individuals want to control the narrative surrounding their image because they desire autonomous self-definition. They want to be the ones who benefit from these uses.

This is particularly true in an era of YouTube fame and instant, if fleeting, celebrity. Individuals who are perhaps not famous in the traditional sense and whose brand of fame is unlikely to invite privacy invasions the way Davey O'Brien's did may nonetheless have a commercial interest in their image. The rise of user-generated content in advertising suggests that firms believe in the commercial value of information about everyday people. For example, Doritos' "Crash the Super Bowl" campaign invited anyone to star in, create and submit commercials for Doritos chips.<sup>472</sup> The campaign has been hailed as an advertising success because of its involvement of even those without what would be seen as traditionally commercially valuable personas.<sup>473</sup> The predicament of "hot convict" Meagan Simmons illustrates the point perfectly. Simmons is by no

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<sup>472</sup> *Crash the Super Bowl*, DORITOS (last visited April 1, 2014), <https://www.youtube.com/user/CrashtheSuperBowl/featured>.

<sup>473</sup> Carol Baumgarten, *3 User-Generated Campaigns That Got it Right*, MASHABLE (June 26, 2012), <http://mashable.com/2012/06/26/user-generated-content-campaign> (discussing the cost-effectiveness, novelty, and user-engagement benefits of user-generated advertising).

means a celebrity. But the publication of her mug shot has given her some, likely fleeting, unwanted media attention, sparked by online communities of other “everyday people.” There is clearly a commercial value to her image, however, as at least one company’s advertising department felt it would attract customers to its business. An approach that focuses on balancing Simmons’ autonomy interests against publishers’ autonomy interests, rather than drawing bright lines along privacy or property regimes, better accounts for how all individuals view their right to control uses of their name or likeness today.

### **C. A Totality of the Circumstances Test Could Resolve Tensions Between Publishers and Individuals**

Mug shot websites’ new business model—using individuals’ personal information, accompanied by advertising—presents a question about how courts should weigh claims governed by this autonomy-based identity tort. This example of a new use for technology illustrates another way a content creator’s interest in autonomous publishing decisions can increasingly infringe on individuals’ interest in controlling information and thus asserting their own autonomy. Courts should look to the totality of the circumstances surrounding a publisher’s use to determine whether the use constitutes an infringement of an individual’s right to control commercial uses of his or her identity. The rise of mug shot websites demonstrates that new uses for technology may represent borderline uses—uses that may have news value, but also serve the commercial interests of the publisher. This thesis shows that, traditionally, courts and scholars recognize that traditional news media profit from their work but that work still has news value.

*Toffoloni*, however, suggests a shift in this thinking, as *Hustler*'s work was deemed to infringe the plaintiff's right of publicity

Looking at traditional factors for newsworthiness, it is increasingly difficult to identify who is a public figure with a commercially valuable image and who is a private figure with an interest in avoiding an invasion of privacy.. As discussed above, even everyday, "average Joe" plaintiffs may have commercial value in their image, and everyone has an interest in autonomy. Thus, the individual's stature alone cannot answer the newsworthiness question.

Going forward, this right of identity claim should account for First Amendment concerns by respecting context, explicitly drawing from the defamation tort and considering the holistic use of information. The test must focus on the totality of the circumstances to weigh the plaintiff's autonomy interest in controlling information with the content creator's interest in autonomously choosing what to publish. The Ninth Circuit's approach to the right of publicity claim in *Hoffman*, rather than the Eleventh Circuit's approach in *Toffoloni*, should be the standard for evaluating whether a content creator used the information in a way that impermissibly infringes on the subject's autonomy.

In defamation law, courts apply a "totality of the circumstances" test that, rather than isolating a single image or object from its surrounding context, considers the language as it appears to the reader to discern whether defamatory meaning exists, considering "all parts of the communication which are ordinarily heard or read with it."<sup>474</sup>

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<sup>474</sup> *Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005) (citing RESTATEMENT (SECOND) OF TORTS § 563 cmt. d (1977)).

The Supreme Court recently affirmed the importance of context in evaluating speech, holding that the “identity of the relevant reader or listener varies according to the context.”<sup>475</sup> In a claim for a right to identity, courts should examine this context to make the newsworthiness determination. In the right to identity context, this holistic view is essential; one aspect of an individual’s identity may be used and suggest that a finding for the plaintiff is warranted, but the entire context of the creator’s content may suggest that the identity is newsworthy in context. The existing tests, particularly the transformative use test and the predominant use test, focus too narrowly on the use of a single aspect of the plaintiff’s identity, rather than considering the entire context in which the use appears. Use of identity should not decide for a plaintiff if an aspect of his or her identity appears in a publication and if that publication has a commercial motive. Rather, courts must look to every aspect of the publication as a whole to determine newsworthiness. Singling out a photograph, a name, or other indicia of identity out of an entire work will not adequately accommodate the First Amendment interests at play. This totality of the circumstances test must replace the existing right of publicity tests.

In the context of uses of mug shots, this test would have several implications. A number of content creators, as discussed in the first part, use mug shots in varying ways. Future cases will require courts to evaluate the entire context and consider value beyond simply exploitation of mug shots for their commercial value. In some cases, a clear commercial interest accompanies some other valuable public interest. For example, Meagan Simmons may have a viable claim against InstantCheckmate.com, but not against the meme creators who add other value to her mug shot. Similarly, going forward,

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<sup>475</sup> *Air Wisconsin Airlines Corp. v. Hooper*, 134 S. Ct. 852, 863 (2014) reh’g denied, 82 USLW 3551 (U.S. 2014).

websites who formerly charged for removal of mug shots and now profit from advertising will have to provide a holistic context for the use of the mug shots that suggests that use is newsworthy.

## **VI. CONCLUSION**

Mug shot websites, once despicable in the minds of some, have adapted their business practices. In the meantime, this thesis shows that two responses, claims under the right of publicity and legislative responses that limit or place conditions on the use of mug shots, have proliferated. The legislative responses, however, demonstrate a fundamentally flawed view of how law should adapt to tensions between First Amendment autonomy and individual autonomy interests. Rather than a piecemeal response that allows harm to accrue to individuals and provides little predictability for content creators, one theory should undergird a tort that would vindicate rights for all individuals who might be impacted by new uses of technology going forward. An autonomy interest, rather than a property or privacy interest, best supports these claims in today's media environment. To ensure that this claim to a right to identity does not subsume First Amendment rights, courts must holistically evaluate right of identity claims in the context in which the claimed information appears.

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## Appendix

*State Right of Publicity & Appropriation Law: Statutory & Common Law*

<i>State</i>	<i>Citation to Applicable Law</i>	<i>Summary of Law</i>
<b>Alabama</b> <i>Right of publicity</i>	No statute.	N/A.
	No recognition of right of publicity at common law.	N/A.
<b>Alabama</b> <i>Appropriation</i>	<i>Birmingham Broad. Co. v. Bell</i> , 68 So. 2d 314, (Ala. 1953).	Recognizes common law appropriation as a privacy interest.
<b>Alaska</b> <i>Right of publicity</i>	No statute.	N/A.
	No recognition of right of publicity at common law.	N/A.
<b>Alaska</b> <i>Appropriation</i>	<i>Smith v. Suratt</i> , 7 Ak. 416 (D. Alaska 1926).	No express recognition, but allowed for a “hot news” defense.
<b>Arizona</b> <i>Right of publicity</i>	ARIZ. REV. STAT. §§ 12-761 and 13-3726	Recognizes a statutory right of publicity for active and former members of the US Armed Forces.
	<i>Pooley v. Nat'l Hole-In-One Ass'n</i> , 89 F. Supp. 2d 1108 (D. Ariz. 2000).	Federal court interpreting state law stated the right of publicity exists under state law.
<b>Arizona</b> <i>Appropriation</i>	<i>Reed v. Real Detective Publ'g Co.</i> , 162 P.2d 133, 138 (Ariz. 1945).	Recognizes common law appropriation as a privacy interest.
<b>Arkansas</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>Arkansas</b> <i>Appropriation</i>	<i>Dodrill v. Arkansas Democrat Co.</i> , 590 S.W.2d 840 (Ark. 1979)	Recognizes common law appropriation as a privacy interest.
<b>California</b> <i>Right of publicity</i>	CAL. CIV. CODE § 3344(a)	Recognizes a statutory right of publicity for living and deceased persons.
	<i>Montana v. San Jose Mercury News, Inc.</i> , 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995)	Recognizes a common law right of publicity for living persons.
<b>California</b> <i>Appropriation</i>	<i>Montana v. San Jose Mercury News, Inc.</i> , 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995)	Recognizes a common law appropriation claim based on injury to dignity and self-esteem.
<b>Colorado</b> <i>Right of publicity</i>	No statute.	N/A.
	<i>Donchez v. Coors Brewing Co.</i> , 392 F.3d 1211 (10th Cir. 2004).	Federal court interpreting state law stated the right of publicity exists under state law.
<b>Colorado</b> <i>Appropriation</i>	<i>Dickerson &amp; Assocs. v. Dittmar</i> , 34 P.3d 995 (Colo. 2001).	Recognizes common law appropriation as a privacy interest.
<b>Connecticut</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>Connecticut</b> <i>Appropriation</i>	<i>Goodrich v. Waterbury Republican-Am., Inc.</i> , 448 A.2d 1317 (Conn. 1982).	Recognizes common law appropriation as a privacy interest.
<b>Delaware</b>	No statute.	N/A.

<i>Right of publicity</i>	Not recognized at common law.	N/A.
<b>Delaware</b> <i>Appropriation</i>	<i>Barbieri v. News-Journal Co.</i> , 189 A.2d 773, 774 (Del. 1963)	Recognizes common law appropriation as a privacy interest.
<b>Florida</b> <i>Right of publicity</i>	FLA. STAT. § 540.08	Recognizes a statutory right of publicity not limited to privacy interests.
	Not recognized at common law.	N/A.
<b>Florida</b> <i>Appropriation</i>	<i>Fuentes v. Mega Media Holdings, Inc.</i> , 721 F. Supp. 2d 1255 (S.D. Fla. 2010).	Recognizes common law appropriation as a privacy interest.
<b>Georgia</b> <i>Right of publicity</i>	No statute.	N/A.
	<i>Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.</i> , 296 S.E.2d 697 (Ga. 1982).	Recognizes common law right of publicity as distinct from a right to privacy.
<b>Georgia</b> <i>Appropriation</i>	<i>Pavesich v. New England Life Ins. Co.</i> , 50 S.E. 68, (Ga. 1905).	Recognizes common law appropriation as a privacy interest.
<b>Hawaii</b> <i>Right of publicity</i>	HAW. REV. STAT. §§ 482P-1 to 482P-8	Recognizes the right of publicity as a property interest.
	Not recognized at common law.	N/A.
<b>Hawaii</b> <i>Appropriation</i>	<i>Fergerstrom v. Hawaiian Ocean View Estates</i> , 441 P.2d 141 (Haw. 1968).	Recognizes common law appropriation as a privacy interest.
<b>Idaho</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>Idaho</b> <i>Appropriation</i>	<i>Peterson v. Idaho First Nat'l Bank</i> , 367 P.2d 284 (Idaho 1961)	Recognizes common law appropriation as a privacy interest.
<b>Illinois</b> <i>Right of publicity</i>	765 ILL. COMP. STAT. 1075/1-1075/60.	Recognizes statutory right of publicity that controls use of image for commercial purposes.
	Not recognized at common law.	Statute replaced common law as of 1/1/99.
<b>Illinois</b> <i>Appropriation</i>	Not recognized at common law.	Statute replaced common law appropriation as of 1/1/99.
<b>Indiana</b> <i>Right of publicity</i>	IND. CODE §§ 32-36-1-0.2 to 32-36-1-20	Recognizes statutory right of publicity as a property interest.
	<i>Cont'l Optical Co. v. Reed</i> , 86 N.E.2d 306 (Ind. Ct. App. 1949)	Recognizes common law right of publicity as a privacy interest..
<b>Indiana</b> <i>Appropriation</i>	<i>Cont'l Optical Co. v. Reed</i> , 86 N.E.2d 306 (Ind. Ct. App. 1949)	No distinction between common law right of publicity and appropriation torts.
<b>Iowa</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>Iowa</b> <i>Appropriation</i>	<i>Howard v. Des Moines Register &amp; Tribune Co.</i> , 283 N.W.2d 289 (Iowa 1979)	Recognizes the invasion of privacy by appropriation, but no court has heard a claim for appropriation of name or likeness.
<b>Kansas</b> <i>Right of publicity</i>	No statute.	N/A.
	No recognition of right of	N/A.

	publicity at common law.	
<b>Kansas</b> <i>Appropriation</i>	<i>Johnson v. Boeing Airplane Co.</i> , 262 P.2d 808 (1953).	Recognizes common law appropriation as a privacy interest.
<b>Kentucky</b> <i>Right of publicity</i>	KY. REV. STAT. § 391.170	Recognizes a statutory right of publicity.
	Not recognized at common law.	N/A.
<b>Kentucky</b> <i>Appropriation</i>	<i>McCall v. Courier-Journal &amp; Louisville Times Co.</i> , 623 S.W.2d 882 (Ky. 1981).	Recognizes common law appropriation as a privacy interest.
<b>Louisiana</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>Louisiana</b> <i>Appropriation</i>	<i>Jaubert v. Crowley Post-Signal, Inc.</i> , 375 So. 2d 1386 (La. 1979)	Recognizes common law appropriation as a privacy interest.
<b>Maine</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>Maine</b> <i>Appropriation</i>	<i>Estate of Berthiaume v. Pratt</i> , 365 A.2d 792 (Me. 1976).	Recognizes common law appropriation as a privacy interest.
<b>Maryland</b> <i>Right of publicity</i>	MD. CODE ANN., BUS. REG. § 19-503)	Recognizes only a right of publicity that criminalizes the use of the name or likeness of a soldier killed in the line of duty for commercial advantage.
	Not recognized at common law.	N/A.
<b>Maryland</b> <i>Appropriation</i>	<i>Lawrence v. A.S. Abell Co.</i> , 299 Md. 697 (1984).	Recognizes common law appropriation as a privacy interest.
<b>Massachusetts</b> <i>Right of publicity</i>	MASS. GEN. LAWS ch. 214 § 3A.	Recognizes the right of publicity as a property interest.
	Not recognized at common law.	N/A.
<b>Massachusetts</b> <i>Appropriation</i>	MASS. GEN. LAWS ch. 214 § 1B	Recognizes appropriation as a privacy interest.
<b>Michigan</b> <i>Right of publicity</i>	No statute.	N/A.
	<i>Pallas v. Crowley, Milner &amp; Co.</i> , 322 Mich. 411, 416-17 (1948).	Recognizes a common law right of publicity.
<b>Michigan</b> <i>Appropriation</i>	<i>Armstrong v. Eagle Rock Entm't, Inc.</i> , 655 F. Supp. 2d 779, 784 n. 2 (E.D. Mich. 2009).	Recognizes common law appropriation. Courts do not distinguish between the right of publicity and appropriation.
<b>Minnesota</b> <i>Right of publicity</i>	No statute.	N/A.
	<i>Ventura v. Titan Sports, Inc.</i> , 65 F.3d 725, 730 (8th Cir. 1995)	Federal court interpreting state law stated the right of publicity exists under state law.
<b>Minnesota</b> <i>Appropriation</i>	<i>Lake v. Wal-Mart Stores, Inc.</i> , 582 N.W.2d 231 (Minn. 1998).	Recognizes common law appropriation as a privacy interest.
<b>Mississippi</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>Mississippi</b>	<i>Deaton v. Delta Democrat</i>	Recognizes common law appropriation as a

<i>Appropriation</i>	<i>Publ'g Co.</i> , 326 So. 2d 471 (Miss. 1976).	privacy interest.
<b>Missouri</b> <i>Right of publicity</i>	No statute. <i>Bear Foot, Inc. v. Chandler</i> , 965 S.W.2d 386 (Mo. Ct. App. 1998).	N/A. Recognizes a common law right of publicity as a property interest.
<b>Missouri</b> <i>Appropriation</i>	<i>Sullivan v. Pulitzer Broad.</i> , 709 S.W.2d 475 (Mo. Ct. App. 1986).	Recognizes common law appropriation as a privacy interest.
<b>Montana</b> <i>Right of publicity</i>	No statute. No recognition of right of publicity at common law.	N/A. N/A.
<b>Montana</b> <i>Appropriation</i>	<i>Gilham v. Burlington Northern</i> , 514 F.2d 660 (9th Cir. 1975).	Court suggested it might adopt appropriation tort but stopped short of doing so.
<b>Nebraska</b> <i>Right of publicity</i>	NEB. REV. STAT. §§ 20-201-20-211 and 25-840.01. Not recognized at common law.	Privacy statutes include a right of publicity. N/A.
<b>Nebraska</b> <i>Appropriation</i>	NEB. REV. STAT. §§ 20-201-20-211 and 25-840.01.	Recognizes a statutory right to privacy that includes the right of publicity and does not distinguish between the two.
<b>Nevada</b> <i>Right of publicity</i>	NEV. REV. STAT. §§ 597.770 to 597.810 Not recognized at common law.	Recognizes a statutory right of publicity as a property interest. N/A.
<b>Nevada</b> <i>Appropriation</i>	<i>Kuhn v. Account Control Technology, Inc.</i> , 865 F. Supp. 1443 (D. Nev. 1994).	Recognizes common law appropriation as a privacy interest.
<b>New Hampshire</b> <i>Right of publicity</i>	No statute. <i>Matthews v. Wozencraft</i> , 15 F.3d 432 (5th Cir. 1994).	N/A. Recognizes the right of publicity as part of the appropriation tort.
<b>New Hampshire</b> <i>Appropriation</i>	<i>Matthews v. Wozencraft</i> , 15 F.3d 432 (5th Cir. 1994).	Recognizes the appropriation tort and does not distinguish between this and the right of publicity.
<b>New Jersey</b> <i>Right of publicity</i>	No statute. <i>McFarland v. Miller</i> , 14 F.3d 912 (3d Cir. 1994).	N/A. Recognizes the right of publicity as a property interest.
<b>New Jersey</b> <i>Appropriation</i>	<i>Edison v. Edison Polyform Manufacturing Co.</i> , 67 A. 392 (N.J. Ch. 1907).	Recognizes appropriation as a common law right but uses it interchangeably with the right of publicity and roots it in property interests.
<b>New Mexico</b> <i>Right of publicity</i>	No statute. No recognition of right of publicity at common law.	N/A. N/A.
<b>New Mexico</b> <i>Appropriation</i>	<i>Andrews v. Stallings</i> , 892 P.2d 611 (N.M. Ct. App. 1995).	Recognizes common law appropriation as a privacy interest.
<b>New York</b> <i>Right of publicity</i>	N.Y. CIV. RIGHTS LAW §§ 50 and 51 Not recognized at common law.	Recognizes the right of publicity. Courts have differed as to whether the statute protects property or privacy interests. N/A.
<b>New York</b> <i>Appropriation</i>	N.Y. CIV. RIGHTS LAW §§ 50 and 51	Recognizes appropriation. Courts have differed as to whether the statute protects property or privacy interests.

<b>North Carolina</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>North Carolina</b> <i>Appropriation</i>	<i>Flake v. Greensboro News Co.</i> , 195 S.E. 55 (N.C. 1938)	Recognizes common law appropriation as a privacy interest.
<b>North Dakota</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>North Dakota</b> <i>Appropriation</i>	Not recognized at common law.	N/A.
<b>Ohio</b> <i>Right of publicity</i>	OHIO REV. CODE ANN. § 2741.02	Recognizes a statutory right of publicity that is in addition to the common law right of publicity.
	<i>Zacchini v. Scripps-Howard Broad. Co.</i> , 351 N.E.2d 454 (Ohio 1976).	Recognizes a common law right of publicity.
<b>Ohio</b> <i>Appropriation</i>	<i>Housh v. Peth</i> , 133 N.E.2d 340, 343 (Ohio 1956).	Recognizes appropriation as common law right. Differs from statute in that remedies vary and common law rights terminate at death.
<b>Oklahoma</b> <i>Right of publicity</i>	OKLA. STAT.. TIT. 12, §§ 1448 and 1449	Recognizes rights of publicity for living and deceased persons as property rights.
<b>Oklahoma</b> <i>Appropriation</i>	OKLA. STAT. TIT. 21, § 839.1, <i>McCormack v. Oklahoma Publ'g Co.</i> , 613 P.2d 737 (Okla. 1980),	Recognizes appropriation as a statutory and common law right to privacy.
<b>Oregon</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.
<b>Oregon</b> <i>Appropriation</i>	No recognition of right of publicity at common law.	N/A.
<b>Pennsylvania</b> <i>Right of publicity</i>	42 PA. CONS. STAT. ANN. § 8316(a)	Recognizes a statutory right of publicity that is in addition to the common law right of publicity.
	<i>Philadelphia Orchestra Assoc. v. Walt Disney Co.</i> , 821 F. Supp. 341 (E.D. Pa. 1993)	Recognizes a common law right of publicity as a property right.
<b>Pennsylvania</b> <i>Appropriation</i>	<i>Lewis v. Marriott Intern., Inc.</i> , 527 F. Supp. 2d 422 (E.D. Pa. 2007).	Recognizes appropriation as a common law right. Courts have discussed, but not ruled, whether the right of publicity statute subsumes appropriation at common law.
<b>Rhode Island</b> <i>Right of publicity</i>	R.I. GEN. LAWS § 9-1-28.	Recognizes a statutory right of publicity, used interchangeably with appropriation.
	Not recognized at common law.	N/A.
<b>Rhode Island</b> <i>Appropriation</i>	R.I. GEN. LAWS § 9-1-28.	Recognizes statutory appropriation, used interchangeably with the right of publicity.
<b>South Carolina</b> <i>Right of publicity</i>	No statute.	N/A.
	<i>Gignillat v. Gignillat, Savitz and Bettis, LLP</i> , 385 S.C. 452 (2009).	Recognizes a common law right of publicity as a property interest.
<b>South Carolina</b> <i>Appropriation</i>	<i>Gignillat v. Gignillat, Savitz and Bettis, LLP</i> , 385 S.C. 452 (2009).	Recognizes appropriation at common law as protecting the same interests as the right of publicity.
<b>South Dakota</b> <i>Right of publicity</i>	No statute.	N/A.
	Not recognized at common law.	N/A.

<b>South Dakota</b> <i>Appropriation</i>	Not recognized at common law.	N/A.
<b>Tennessee</b> <i>Right of publicity</i>	TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108	Recognizes a statutory right of publicity as a property right.
	<i>State ex rel. Elvis Presley Intern. Meml. Found. v. Crowell</i> , 733 S.W.2d 89 (Tenn. App. 1987).	Recognizes a common law right of publicity that is coextensive with the statutory right.
<b>Tennessee</b> <i>Appropriation</i>	<i>Langford v. Vanderbilt Univ.</i> , 287 S.W.2d 32 (Tenn. 1956).	Courts recognize the general right to privacy, but courts have not distinguished between the four privacy torts.
<b>Texas</b> <i>Right of publicity</i>	TEX. PROP. CODE §§ 26.001 to 26.015	Recognizes a right of publicity for deceased persons as a property right.
	<i>Henley v. Dillard Dep't Stores</i> , 46 F. Supp. 2d 587 (N.D. Tex. 1999).	Recognizes a right of publicity as the same as appropriation, based in a privacy interest.
<b>Texas</b> <i>Appropriation</i>	<i>Henley v. Dillard Dep't Stores</i> , 46 F. Supp. 2d 587 (N.D. Tex. 1999).	Recognizes appropriation as the same as the right of publicity, based in a privacy interest.
<b>Utah</b> <i>Right of publicity</i>	U.C.A. 1953 § 45-3-1.	Recognizes a statutory right of publicity as a property right.
	<i>Nat.'s Way Products, Inc. v. Nat.-Pharma, Inc.</i> , 736 F. Supp. 245 (D. Utah 1990).	Recognizes a common law right of publicity based on a property interest.
<b>Utah</b> <i>Appropriation</i>	<i>Cox v. Hatch</i> , 761 P.2d 556 (Utah 1988).	Recognizes common law appropriation as a privacy interest.
<b>Vermont</b> <i>Right of publicity</i>	No statute.	N/A.
	No recognition of right of publicity at common law.	N/A.
<b>Vermont</b> <i>Appropriation</i>	<i>Staruski v. Continental Telephone Co.</i> , 581 A.2d 266 (Vt. 1990).	Recognizes common law appropriation as a privacy interest.
<b>Virginia</b> <i>Right of publicity</i>	VA. CODE ANN. § 8.01-40	Recognizes a statutory right of publicity as a property right.
	Not recognized at common law.	N/A.
<b>Virginia</b> <i>Appropriation</i>	Not recognized at common law.	N/A.
<b>Washington</b> <i>Right of publicity</i>	WASH. REV. CODE ANN. §§ 63.60.010 to 63.60.080	Recognizes a statutory right of publicity as a property interest.
	Not recognized at common law.	N/A.
<b>Washington</b> <i>Appropriation</i>	<i>Mark v. Seattle Times</i> , 635 P.2d 1081 (Wash. 1981).	Recognizes common law appropriation as a privacy interest.
<b>West Virginia</b> <i>Right of publicity</i>	No statute.	N/A.
	<i>Crump v. Beckley Newspapers, Inc.</i> , 320 S.E.2d 70, (W. Va. 1983).	Recognizes a common law right of publicity as a property interest.
<b>West Virginia</b> <i>Appropriation</i>	<i>Crump v. Beckley Newspapers, Inc.</i> , 320 S.E.2d 70, (W. Va. 1983).	Recognizes common law appropriation as a privacy interest.
<b>Wisconsin</b> <i>Right of publicity</i>	WIS. STAT. ANN. § 995.50	Recognizes a statutory right of publicity.

	<i>Hirsch v. S. C. Johnson &amp; Son, Inc.</i> , 280 N.W.2d 129 (Wis. 1979).	Recognizes a common law right of publicity that courts do not distinguish from appropriation.
<b>Wisconsin</b> <i>Appropriation</i>	<i>Hirsch v. S. C. Johnson &amp; Son, Inc.</i> , 280 N.W.2d 129 (Wis. 1979).	Recognizes common law appropriation that courts do not distinguish from right of publicity.
<b>Wyoming</b> <i>Right of publicity</i>	No statute.	N/A.
	No recognition of right of publicity at common law.	N/A.
<b>Wyoming</b> <i>Appropriation</i>	Not recognized at common law.	N/A.