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Frederick R. Kessler

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# A COMMON LAW FOR THE STATUTORY ERA: THE RIGHT OF PUBLICITY AND NEW YORK'S RIGHT OF PRIVACY STATUTE

## I. Introduction

In *Price v. Hal Roach Studios, Inc.*,<sup>1</sup> the widows of Stanley Laurel and Oliver Hardy sued the copyright owners of certain Laurel and Hardy motion pictures because of their merchandizing of the actors' names and likenesses.<sup>2</sup> Acknowledging the defendants' copyrights,<sup>3</sup> the complaint conceded use of film "stills" to the defendants.<sup>4</sup> Nonetheless, the complaint asserted that the actors had valid property rights in their names and likenesses, independent of the copyrights, that descended to their heirs.<sup>5</sup> The court agreed,<sup>6</sup> distinguishing the instant case, in which the actors portrayed themselves, from other situations, in which actors develop fictional characters that are copy-rightable in their own right.<sup>7</sup> Therefore, the court entered an injunction against the defendant and awarded damages to the plaintiffs.<sup>8</sup>

The *Price* decision is predicated on the common law right of publicity.<sup>9</sup> The doctrine, which recently has gained wide recognition from judges,<sup>10</sup> legislators<sup>11</sup> and scholars,<sup>12</sup> affords an individual the

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1. 400 F. Supp. 836 (S.D.N.Y. 1975).

2. *Id.* at 838.

3. *Id.* at 840.

4. *Id.* at 842.

5. *Id.* at 839.

6. *Id.* at 846.

7. *Id.* at 845.

8. *Id.* at 847.

9. See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

10. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (state has an "interest in permitting a 'right of publicity'"); *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 680 (11th Cir. 1983) ("public figures have a . . . right of publicity"); *Haelan Laboratories*, 202 F.2d at 868 (independent of right of privacy, "a man has a right in the publicity value of his photograph"); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1281 (D. Minn. 1970).

11. See CAL. CIV. CODE §§ 990, 3344 (West Supp. 1987); KY. REV. STAT. ANN. § 391.170 (Michie/Bobbs-Merrill 1984); TENN. CODE ANN. §§ 47-25-1101 to -1108 (1984). Other state legislatures, under the aegis of the right of privacy, have also created publicity rights. See FLA. STAT. ANN. § 540.08 (West 1972); NEB. REV. STAT. §§ 20-202, 20-208 (1983); OKLA. STAT. ANN. tit. 21, §§ 839.2, 839.3 (West 1986); VA. CODE ANN. § 8.01-40 (1984). Other statutes prohibit the misappropriation of another's name, photograph or likeness, but these either deny descendibility or fail to address the issue. See MASS. ANN. LAWS ch. 214, § 3A (Law. Co-op. 1986);

right to control and profit from the exploitation of his<sup>13</sup> persona,<sup>14</sup> *i.e.*, "the public image that makes people want to identify with the object person, and thereby imbues his name or likeness with commercial value marketable to those that seek such identification."<sup>15</sup> The scope of the right of publicity includes aspects of an individual, such as name or likeness, that attain value from his persona.<sup>16</sup>

The right of publicity emanated from recognition that the right of privacy,<sup>17</sup> which protects an individual's feelings, did not sufficiently protect against the commercial misappropriation of a persona.<sup>18</sup> Indeed, New York's right of privacy statute provides individuals with protection that is in part identical to that safeguarded by the right of publicity.<sup>19</sup> The privacy statute proscribes the use of a living person's "name, portrait or picture" for "advertising purposes, or for the purposes of trade" without his written consent.<sup>20</sup>

R.I. GEN. LAWS § 9-1-28 (1985); UTAH CODE ANN. § 45-3-1 to -6 (1981); Wis. STAT. ANN. § 895.50 (West 1983).

12. *See, e.g.*, Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553, 613 (1960) (approving recognition of causes of action involving appropriation of proprietary rights in name, likeness, personality and history) [hereinafter Gordon]; Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) (protection of "persons who have . . . nurtured the fruit of publicity values" necessitates judicial recognition of the right of publicity) [hereinafter Nimmer]; Simon, *Right of Publicity Reified: Fame as Business Asset*, 30 N.Y.L. SCH. L. REV. 699, 699 (1985) ("the famous have an interest in the fruits of fame") [hereinafter Simon]; Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 455-56 (1981) (accepting right of publicity as general matter and recommending its survivability) [hereinafter Sims]; Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 643 (1973) ("[a]n individual, particularly a celebrity, . . . has an economic interest in his personality") [hereinafter Treece].

13. Throughout this Note, the pronouns "he," "his" and "him" include references to "she," "her's" or "her," unless the context suggests otherwise, to avoid awkward grammatical constructions that would likely occur because of the limitations of the English language.

14. *See* Bi-Rite Enters., Inc. v. Bruce Miner Co., 757 F.2d 440, 442 (1st Cir. 1985); Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 957 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Lind, *The Right of Publicity in New York: A Practical Analysis*, 7 ART & THE LAW 355, 355 (1983).

15. Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983) (citing Winner, *Right of Identity: Right of Publicity and Protection of a Trademark's "Persona"*, 71 TRADEMARK REP. 193, 193 (1981)).

16. "Persona" denotes not only name, picture and likeness but also voice, style and attributes, such as a baseball player's fielding and batting statistics or Charlie Chaplin's cigar, glasses and bushy eyebrows. *See* Onassis v. Christian Dior-New York, Inc., 122 Misc. 2d 603, 612, 472 N.Y.S.2d 254, 261 (Sup. Ct. N.Y. County 1984).

17. *See infra* notes 107-13 and accompanying text.

18. *See infra* notes 37, 55-63 and accompanying text.

19. *See infra* notes 134-96 and accompanying text.

20. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987).

In a landmark decision implicating New York's right of privacy statute, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>21</sup> the Second Circuit held that "in addition to and independent of [the] right of privacy . . . a man has a right in the publicity value of his photograph."<sup>22</sup> This case, precedent for the proposition that the right of publicity exceeds the scope of the privacy statute, has led the federal courts of the Second Circuit to develop a common law right of publicity under New York law.<sup>23</sup>

Unlike these federal courts, however, the New York Court of Appeals has never expressly recognized a common law right of publicity in the state.<sup>24</sup> Indeed, writing for New York's highest court in December of 1984, Chief Judge Wachtler stated: "Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, . . . [a] plaintiff cannot claim an independent common-law right of publicity."<sup>25</sup> Less than one year later, however, following a contrary determination by the appellate division,<sup>26</sup> the court of appeals equivocated: "[W]e do not pass upon the question of whether a common-law descendible right of publicity exists in this [s]tate."<sup>27</sup> Thus, the existence of an independent common law right of publicity remains at issue in New York.<sup>28</sup>

This Note compares New York's right of privacy statute with the right of publicity and considers whether New York courts, in accordance with the judiciary's traditional lawmaking role, should recognize a common law right of publicity.<sup>29</sup> Initially, it reviews the

21. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

22. 202 F.2d at 868.

23. *See, e.g.*, *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978) (right of publicity descends only if decedent exploited it during his lifetime, that is, "acted in such a way as to evidence his . . . recognition of the extrinsic commercial value of his . . . name or likeness, and manifested that recognition in some overt manner"); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975) (right of publicity "does not terminate upon death"); *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 879 (S.D.N.Y. 1973) ("[t]he 'right of publicity' is somewhat akin to the exclusive right of a commercial enterprise to the benefits to be derived from the goodwill and secondary meaning that it has managed to build up in its name").

24. *See Brinkley v. Casablancas*, 80 A.D.2d 428, 435, 438 N.Y.S.2d 1004, 1009 (1st Dep't 1981). *But see infra* notes 241-47 and accompanying text.

25. *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 183, 474 N.E.2d 580, 584, 485 N.Y.S.2d 220, 224 (1984).

26. *See Southeast Bank, N.A. v. Lawrence*, 104 A.D.2d 213, 219, 483 N.Y.S.2d 218, 223 (1st Dep't 1984), *rev'd on other grounds*, 66 N.Y.2d 910, 912, 489 N.E.2d 744, 745, 498 N.Y.S.2d 775, 776 (1985).

27. *Lawrence*, 66 N.Y.2d at 912, 489 N.E.2d at 745, 498 N.Y.S.2d at 776.

28. *See, e.g.*, *Barry, The Recent Developments in the Right of Publicity*, N.Y.L.J., Feb. 22, 1985, at 5, col. 1.

29. *See infra* notes 70-196, 220-348 and accompanying text.

historical development of the rights of privacy and publicity in the United States and their current articulation in New York.<sup>30</sup> The Note then asserts that the unauthorized exploitation of a persona, such as the marketing of a model's posters without her consent<sup>31</sup> or the use of a celebrity's look-alike to imply his endorsement of a product without his consent,<sup>32</sup> merits judicial recognition of a common law right of publicity in New York.<sup>33</sup> Finally, in response to the argument that a judge-made right of publicity—regardless of its value—would impermissibly encroach on the legislature's prerogative, the Note addresses the propriety of court-initiated change today and concludes that some traditional justifications for judge-made law remain persuasive.<sup>34</sup>

## II. History of the Rights of Privacy and Publicity: Protection of a Persona From Unauthorized Exploitation

The rights of privacy and publicity both protect an individual's persona from unauthorized exploitation.<sup>35</sup> The rights, however, protect against different kinds of injury.<sup>36</sup> This Part briefly presents the historical development and current understanding of these rights, and concludes by contrasting them.

### A. The Right of Privacy

Commentators first noted the right of privacy, which secures an individual's right "to be let alone," almost a century ago.<sup>37</sup> In their seminal article, *The Right of Privacy*,<sup>38</sup> Samuel D. Warren and Louis

30. See *infra* notes 35-196 and accompanying text.

31. See *Brinkley v. Casablancas*, 80 A.D.2d 428, 430, 438 N.Y.S.2d 1004, 1006 (1st Dep't 1981) (court resolved Christie Brinkley's identical complaint under New York's right of privacy statute while stating in dictum that the state's common law fails to recognize the right of publicity).

32. See *Allen v. National Video, Inc.*, 610 F. Supp. 612, 617 (S.D.N.Y. 1985) (court resolved Woody Allen's identical complaint under New York's right of privacy statute, finding it unnecessary to rule on the right of publicity cause of action).

33. See *infra* notes 220-85 and accompanying text.

34. See *infra* notes 286-348 and accompanying text.

35. See *infra* notes 55-63, 93-106, 144-60 and accompanying text.

36. See *infra* notes 37-45, 88-92, 114-19, 136-43 and accompanying text.

37. See T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 849 & n.3 (5th ed. 1984) [hereinafter PROSSER & KEETON]; Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) [hereinafter Warren & Brandeis].

38. See Warren & Brandeis, *supra* note 37, at 193.

D. Brandeis asserted that the right must be recognized lest trade in gossip diminish social standards.<sup>39</sup> Warren and Brandeis proceeded from the general proposition that an "individual shall have full protection in [his] person and . . . property."<sup>40</sup> To reinforce their justification of a remedy for "mere injury to the feelings,"<sup>41</sup> which had previously been uncompensable, Warren and Brandeis illustrated that the right of privacy was already being protected.<sup>42</sup> The law, they asserted, protected the right of privacy not on "the principle of private property, but that of an inviolate personality."<sup>43</sup> Specifically, the authors demonstrated that common law protection against unauthorized publication of an owner's intellectual property rested "not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all."<sup>44</sup> In their conclusion, the authors argued that privacy rights, unlike those arising from contractual or fiduciary relationships, are "rights as against the world."<sup>45</sup>

### 1. *The Right of Privacy at Common Law*

In the decade following the release of the Warren and Brandeis article, professional debate raged over the existence of the right of privacy.<sup>46</sup> It was not until 1905, however, that a landmark decision

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39. See *id.* Warren and Brandeis found other reasons to protect the right to be left alone:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

*Id.* at 196.

40. *Id.*

41. *Id.* at 197.

42. See *id.* at 193, 197.

43. *Id.* at 205.

44. *Id.* at 200.

45. *Id.* at 213. The remainder of the article explains limitations on the right of privacy, and remedies available for its infringement.

46. Savell, *Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 ALB. L. REV. 1, 5 nn.19-20 (1983) [hereinafter Savell]. Some commentators favored recognition of the right of privacy. See, e.g., Note, *Injunctions Against Publications Intruding Upon Privacy*, 43 U. PA. L. REV. 134, 135 (1895); Comment, *The Right To Privacy*, 11 YALE L.J. 53, 54 (1901); cf. *Corliss v. Walker*, 64 F. 280, 282-83 (D. Mass. 1894) (if right of privacy exists, publicity waives it and death extinguishes it). Other authority opposed recognition.

recognized such a right at common law.<sup>47</sup> In *Pavesich v. New England Life Insurance Co.*,<sup>48</sup> the Supreme Court of Georgia held that the unauthorized publication of a person's picture in an advertisement to promote the publisher's business violated the person's right of privacy.<sup>49</sup> Although *Pavesich* became the leading case in the area, courts issued divergent opinions for the next thirty years.<sup>50</sup> As the *Restatement of Torts*<sup>51</sup> gained acceptance, however, "the tide set in strongly in favor of recognition."<sup>52</sup>

Early cases recognizing a common law right of privacy, concerned with the threshold question of existence, gave little consideration to its parameters.<sup>53</sup> Commentators, rather than the judiciary, took the lead in defining the extent of the right.<sup>54</sup> Today, however, it is generally agreed that "[t]he law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'"<sup>55</sup>

One text writer has described these four torts in the following manner:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.

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See *Atkinson v. Doherty & Co.*, 121 Mich. 372, 384, 80 N.W. 285, 289 (1899); *Hadley, The Right to Privacy*, 3 NW. U.L. REV. 1, 3 (1894).

47. See *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

48. *Id.*

49. See *id.* at 220, 50 S.E. at 81.

50. Prosser, *The Right of Privacy*, 48 CALIF. L. REV. 383, 386 (1960) [hereinafter Prosser]. Compare *Henry v. Cherry & Webb*, 30 R.I. 13, 73 A. 97 (1909) (rejecting recognition of right of privacy) and *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 P. 594 (1911) (same) with *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918) (recognizing right of privacy) and *Schwartz v. Edrington*, 133 La. 235, 62 So. 660 (1913) (same).

51. RESTATEMENT OF TORTS § 867 (1939). Section 867 provides: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." *Id.*

52. Prosser, *supra* note 50, at 386 & nn.17-43.

53. *Id.* at 388.

54. See, e.g., Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915); Prosser, *supra* note 50, at 389; Warren & Brandeis, *supra* note 37, at 200.

55. Prosser, *supra* note 50, at 389.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>56</sup>

An example of the "intrusion" cause of action is a case in which a landlord physically moves in on a tenant,<sup>57</sup> or technologically enters a tenant's bedroom through wiretaps.<sup>58</sup> The classic "publication of private facts" case involved a prostitute, tried for murder but acquitted, who subsequently married and led an "exemplary" life in another state.<sup>59</sup> Release of a film portraying her experiences, which used her true maiden name and was advertised as a factual account, led to plaintiff's suit.<sup>60</sup> In a recent "false light" case,<sup>61</sup> the Supreme Court held that a journalist, who had implied that the widow of a disaster victim had been present but almost catatonic during the journalist's visit five months later to record its repercussions, violated the widow's right of privacy.<sup>62</sup> Finally, plaintiffs have used the "appropriation" tort to prohibit the unauthorized publication of their photograph or likeness in newspaper advertisements.<sup>63</sup>

Different as the torts are, they share several important features: they are personal<sup>64</sup> and non-assignable.<sup>65</sup> Moreover, limited waiver of the rights against invasion of privacy may be implied against those in the public eye because of first amendment concerns.<sup>66</sup> A worthy plaintiff may seek injunction and damages to remedy his injury.<sup>67</sup> New York's right of privacy is among the most circumscribed in the United States.<sup>68</sup> The limitation stems from the peculiar history

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56. *Id.*

57. *See* *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952).

58. *See* *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964).

59. *See* *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

60. *See id.*

61. *See* *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

62. *See id.*

63. *See, e.g.*, *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

64. Prosser, *supra* note 50, at 408 & n.200.

65. *Id.* at 408 & n.202; *see, e.g.*, *Rosemont Enters., Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 7, 294 N.Y.S.2d 122, 129 (Sup. Ct. N.Y. County 1968), *aff'd*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1st Dep't 1969).

66. *See* *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); Prosser, *supra* note 50, at 410-15.

67. *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971) (permitting damages for invasion of privacy); *Leverton v. Curtis Publishing Co.*, 192 F.2d 974, 978 (3d Cir. 1951) (same); *Brinkley v. Casablancas*, 80 A.D.2d 428, 444, 438 N.Y.S.2d 1004, 1014 (1st Dep't 1981) (granting damages and injunction for invasion of privacy).

68. *See* *Manger v. Kree Inst. of Electrolysis*, 233 F.2d 5, 8 n.3a (2d Cir. 1956); Prosser, *supra* note 50, at 402-403.



of the right of privacy in the state.<sup>69</sup>

## 2. New York's Right of Privacy Statute

Unlike most states,<sup>70</sup> New York has no common law right of privacy.<sup>71</sup> Although lower New York courts discussed the right several times in the years immediately succeeding publication of the Warren and Brandeis article,<sup>72</sup> the state's highest court avoided the issue until 1902.<sup>73</sup> In that year, the court decided *Roberson v. Rochester Folding Box Co.*,<sup>74</sup> which presented facts almost identical to those appearing three years later in the *Pavesich* case discussed above.<sup>75</sup>

69. Prosser, *supra* note 50, at 402-403; see also *infra* notes 70-99 and accompanying text.

70. See W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 804 (4th ed. 1971) ("[i]n one form or another, the right of privacy is by this time recognized and accepted in all but a very few jurisdictions"), quoted in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488 (1975).

71. See *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 182-83, 474 N.E.2d 580, 583-84, 485 N.Y.S.2d 220, 223-24 (1984); *Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858, 860, 374 N.E.2d 129, 130, 403 N.Y.S.2d 218, 219 (1978); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 358, 107 N.E.2d 485, 487 (1952).

72. See *Marks v. Jaffa*, 6 Misc. 290, 292, 26 N.Y.S. 908, 909 (N.Y.C. Super. Ct. N.Y. County 1893) (court enjoined defendant, editor of newspaper, from publishing picture of plaintiff actor, holding that no institution "has the right to use the name or picture of anyone for [a trade] without his consent"); *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240, 249 (Sup. Ct. N.Y. County 1891) (physician obtained injunction against unauthorized use of his name to advertise a medicine on ground of injury to reputation); *Schuyler v. Curtis*, 15 N.Y.S. 787, 789 (Sup. Ct. N.Y. County 1891) (motion by nephew to continue preliminary injunction restraining defendants from exhibiting statue of Mary M. Schuyler, decedent, upheld under right of privacy), *aff'd*, 19 N.Y.S. 264 (1st Dep't 1892), *rev'd subsequently*, 147 N.Y. 434, 451, 42 N.E. 22, 27 (1895) (though "[n]ot assuming to decide what this right of privacy is, in all cases," court rejected claim because nephew did not represent any right of privacy surviving Mrs. Schuyler's death); *Manola v. Stevens*, N.Y. Times, June 15, 1890, at 2, col. 3; N.Y. Times, June 18, 1890, § 1, at 3, col. 2; N.Y. Times, June 21, 1890, at 2, col. 2 (Sup. Ct. N.Y. County 1890) (plaintiff, photographed without her consent by defendants while appearing in tights on stage at Broadway theater, won permanent injunction against publication by defendant).

73. See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

74. *Id.*

75. See *supra* notes 47-49 and accompanying text. In *Roberson*, the defendants made unauthorized prints of the plaintiff, Abigail M. Roberson, and used them to advertise flour they manufactured and sold. *Roberson*, 171 N.Y. at 542-43, 64 N.E. at 442-43. The plaintiff alleged without contradiction that the "scoffs and jeers" of persons who recognized her had greatly humiliated her so that "she was made sick . . . and compelled to employ a physician." *Id.* at 542-43, 64 N.E. at 442. As a result, in what appeared to be an invasion of privacy claim, Roberson sought an injunction and \$15,000 "to reimburse her for the damages to her feelings." *Id.* at 543, 64 N.E. at 443.

In a four to three decision, the court of appeals refused to recognize the existence of a right of privacy under the common law of New York.<sup>76</sup> The court relied on several factors to reach its determination: the complete lack of precedent;<sup>77</sup> the "vast amount of litigation" that would result;<sup>78</sup> the arbitrary limitation on scope;<sup>79</sup> and the inevitable problem of line-drawing<sup>80</sup> that would be associated with judicial recognition of the right. It should be noted, however, that Judge Parker, wary of acting beyond the judiciary's mandate,<sup>81</sup> suggested legislation on the subject in his opinion for the court.<sup>82</sup>

The disposition of *Roberson* incited a storm of controversy.<sup>83</sup> Publication of a *New York Times*' editorial<sup>84</sup> spurred a judge who had joined the court's opinion to take "the unprecedented step"<sup>85</sup> of publishing a law review article defending the decision.<sup>86</sup> In 1903, however, the controversy subsided when New York became the first state to adopt a statute creating a right of privacy.<sup>87</sup>

New York's right of privacy statute "was enacted as a direct response to *Roberson*."<sup>88</sup> Indeed, according to a case brought shortly

76. *Id.* at 556, 64 N.E. at 447.

77. *Id.* at 543, 64 N.E. at 443.

78. *Id.* at 545, 64 N.E. at 443.

79. *See id.*

80. *Id.* at 555, 64 N.E. at 447.

81. *See id.* at 545, 555, 64 N.E. at 443, 447.

82. *See id.* at 545, 64 N.E. at 443.

83. Most commentators favored recognition of the right of privacy by this time. *See, e.g.*, Note, *Publication of Photograph as an Advertisement*, 2 COLUM. L. REV. 486, 487 (1902); Note, *Injunction—Rights of Privacy—Enforcement in Equity*, 50 U. PA. L. REV. 669, 675 (1902); *Right of Privacy* (Book Review), 16 HARV. L. REV. 72, 72 (1902).

84. N.Y. Times, Aug. 23, 1902, § 1, at 8, col. 3. In describing the unwillingness of the New York Court of Appeals to prohibit the unauthorized photographing of Ms. Roberson and the subsequent publication of her pictures, as well as similar occurrences, the article stated:

If there be, as Judge Parker says there is, no law now to cover these savage and horrible practices, practices incompatible with the claims of the community in which they are allowed to be committed with impunity to be called a civilized community, then the decent people will say that it is high time that there were such a law.

*Id.* The article concluded with a call for legislation creating a right of privacy. *Id.*

85. PROSSER & KEETON, *supra* note 37, § 117, at 850; *see also* S. HOFSTADTER & G. HOROWITZ, *THE RIGHT OF PRIVACY* 28 (1964) [hereinafter HOFSTADTER & HOROWITZ].

86. *See* O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).

87. 1903 N.Y. Laws ch. 132, §§ 1-2 (current amended version at N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987)); *see also* PROSSER & KEETON, *supra* note 37, § 117, at 850-51.

88. *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 439, 434 N.E.2d 1319, 1321, 449 N.Y.S.2d 941, 943 (1982), *cert. denied*, 459 U.S. 1146 (1983); *see also* HOFSTADTER & HOROWITZ, *supra* note 85, at 28.

after passage of the statute, "there can be little doubt that its enactment was *prompted* by the suggestion" of Judge Parker in his *Roberson* opinion.<sup>89</sup> Addressing the *Roberson*-type situation, in which a plaintiff suffers "damages to [his] feelings,"<sup>90</sup> the legislature designed the statute "to protect the sentiments, thoughts and feelings of an individual"<sup>91</sup> from injury by the commercial misappropriation

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89. *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 227, 85 N.E. 1097, 1098 (1908) (emphasis added), *aff'd*, 220 U.S. 502 (1911). This case appears to be the first to construe the New York statute. See *supra* notes 81-82 and accompanying text.

90. *Roberson*, 171 N.Y. at 543, 64 N.E. at 443; see also *supra* note 75.

91. *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 280, 164 N.E.2d 853, 855, 196 N.Y.S.2d 975, 978 (1959) (citation omitted); see also *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) ("[s]ection 51 protects a person's feelings and right to be let alone"); *Meeropol v. Nizer*, 381 F. Supp. 29, 36 n.6 (S.D.N.Y. 1974) ("right of privacy has developed to compensate an individual for the injury to his feelings, to prevent inaccurate portrayal of private life, and, in some instances, to prevent one's private life from being depicted at all"), *aff'd in part, rev'd in part on other grounds*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Cohen v. Herbal Concepts, Inc.*, 100 A.D.2d 175, 178, 473 N.Y.S.2d 426, 428 (1st Dep't) ("statute affords protection against the commercial exploitation of one's 'name, portrait or picture' and furnishes a remedy for the injury to a person's feelings and sentiments"), *aff'd*, 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 621, 396 N.Y.S.2d 661, 664 (2d Dep't 1977) ("[t]he statutory right is deemed a 'right of privacy' and is based upon the classic right of privacy's theoretical basis, which is to prevent injury to feelings"); *Wojtowicz v. Delacorte Press*, 58 A.D.2d 45, 47, 395 N.Y.S.2d 205, 206 (1st Dep't 1977) ("right of privacy or the right of a person to live his life quietly and to be left alone rests solely in and is limited by statute") (quoting *Flores*, 7 N.Y.2d at 280, 164 N.E.2d at 854, 196 N.Y.S.2d at 977), *aff'd*, 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978); *Wilson v. Brown*, 189 Misc. 79, 80, 73 N.Y.S.2d 587, 588 (Sup. Ct. Kings County 1947) (statute "was meant to protect *private* rights and to prevent invasion of the *individual* and *personal* right to privacy") (emphasis in original).

Another line of cases, however, implies that the purpose of the New York statute was to prevent the unjust enrichment of a person by prohibiting unauthorized commercial exploitation of his name or photograph. See, e.g., *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 439, 434 N.E.2d 1319, 1321, 449 N.Y.S.2d 941, 943 (1982) (in order to address specific circumstances presented in *Roberson*, legislature drafted statute "narrowly to encompass only the commercial use of an individual's name or likeness and no more"), *cert. denied*, 459 U.S. 1146 (1983); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 358, 107 N.E.2d 485, 487 (1952) (policy underlying statute is to protect individual against "selfish, commercial exploitation"), *aff'd*, 26 N.Y.2d 806, 257 N.E.2d 895, 309 N.Y.S.2d 348 (1970); *Davis v. High Soc'y Magazine, Inc.*, 90 A.D.2d 374, 381, 457 N.Y.S.2d 308, 314 (2d Dep't 1982) ("purpose of sections 50 and 51 is to prohibit commercial misappropriation of a person's name or picture"); *Cardy v. Maxwell*, 9 Misc. 2d 329, 331, 169 N.Y.S.2d 547, 550 (Sup. Ct. N.Y. County 1957) (sections were intended "to prevent *commercial* exploitation of a person's name, portrait or picture") (emphasis in original);

of his name or likeness.<sup>92</sup>

Today, the statute is codified in the New York Civil Rights Law.<sup>93</sup>

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Kline v. Robert M. McBride & Co., 170 Misc. 974, 982, 11 N.Y.S.2d 674, 682 (Sup. Ct. N.Y. County 1939) (sections were "designed to stop the merchandising in the channels of normal trade of a portrait of a person who occupies a position in which there is monetary value by publicizing same"). Judges have imputed this economic purpose not only from the language of the statute, under which commercial uses alone are proscribed, *see* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987), but also from the nature of the violation, which incorporates both privacy and pecuniary interests. *See* Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 563, 64 N.E. 442, 450 (Gray, J., dissenting) ("for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, *but against the display and use thereof for another's commercial purposes or gain*") (emphasis added). The language, however, reflects the legislature's attempt to provide a remedy for the type of injury suffered by Ms. Roberson, who was humiliated as a result of the defendant's publication of her picture to advertise its product. *See id.* at 542-43, 64 N.E. at 442. The statute remedies the injury, invasion of privacy, of which Ms. Roberson had complained, not infringement of the purely commercial right of publicity which may occur concomitantly.

92. The legislature appears to have relied on Judge Gray in drafting the statute. Although he drew significantly from the Warren and Brandeis article, *see Roberson*, 171 N.Y. at 563, 64 N.E. at 450 (Gray, J., dissenting), the statute fails to mention the publication of private facts. *See* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987). Rather, "cast in terms of the use of someone's name, portrait or picture, [the statute] most closely fits the appropriation branch of the common law right of privacy." Greenawalt, *New York's Right of Privacy—The Need For Change*, 42 BROOKLYN L. REV. 159, 176 (1975).

While some authority equates the appropriation branch of the privacy tort with the right of publicity and by analogy extends New York's right of privacy statute to the vindication of economic interests, *see Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985) (quoting Prosser, *supra* note 50, at 854), such authority is doctrinally suspect because the right of privacy is a personal right ensuring an individual's right to be let alone while the right of publicity is a proprietary right protecting a person's right to control the commercial exploitation of his persona. *See infra* note 112.

Furthermore, in its concern over an individual's control of his name or likeness, the legislature appears to have intended to fashion a personal right, based on the protection of a person's privacy interest, rather than any pecuniary interest. This inference follows from the legislature's apparent reliance on Judge Gray, *see supra*, who in turn used the Warren and Brandeis article. *See Roberson*, 171 N.Y. at 563, 64 N.E. at 450 (Gray, J., dissenting). *But see* Kamakazi Music Corp. v. Robbins Music Corp., 534 F. Supp. 69, 77 (S.D.N.Y. 1982) (privacy rights vindicate commercial value of person's name or likeness as well as "mental strain, humiliation, [and] distress associated with the traditional notion of privacy"). It should be noted that there is "little indication that Warren and Brandeis intended to direct their article at . . . the exploitation of attributes of the plaintiff's identity." Prosser, *supra* note 50, at 401; *see also* Nimmer, *supra* note 12, at 203 (statute extended scope of privacy actions "beyond that envisaged by Brandeis and Warren").

93. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987). Although

Section 50 of the Civil Rights Law<sup>94</sup> makes it a misdemeanor to use a living person's "name, portrait or picture" for advertising or other trade purposes without that person's written consent.<sup>95</sup> This narrow statute, unlike the common law of other states, provides no recovery for appropriations of the plaintiff's name for non-commercial purposes.<sup>96</sup> Section 51<sup>97</sup> creates a private right to sue for an injunction and damages.<sup>98</sup> In addition, section 51 contains a number

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the legislature has limited its scope through amendment, the statute retains the critical language it possessed when first passed in 1903. See 1903 N.Y. Laws ch. 132, §§ 1-2.

94. Section 50, entitled "Right of privacy," provides:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976).

95. *Id.*

96. See *id.*; *infra* notes 167-71 and accompanying text.

97. Section 51, labelled "Action for injunction and for damages," provides:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait or picture in whatever medium to any user of such name, portrait or picture, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

N.Y. CIV. RIGHTS LAW § 51 (Supp. 1987).

98. *Id.*

of limitations on the right.<sup>99</sup> Together, these sections comprise New York's privacy statute.

## B. The Right of Publicity

The common law right of publicity affords an individual the right to control and profit from the exploitation of his persona,<sup>100</sup> *i.e.*, the image of him with which people want to identify.<sup>101</sup> In practice, the right protects the aspects of an individual that have been imbued with value by his persona.<sup>102</sup> These aspects include name,<sup>103</sup> picture<sup>104</sup> and likeness.<sup>105</sup> Thus, if a person photographs Christie Brinkley and distributes posters of the model without her consent, the photographer-distributor has "exploited" Brinkley's persona by misap-

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99. *Id.*

100. See *supra* note 14.

101. See *supra* note 15 and accompanying text.

102. The courts have found actionable exploitation in several situations. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 579 (1977) (televised broadcast of human cannonball's entire act); *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 446 (1st Cir. 1985) (distribution of posters depicting plaintiff musicians made from photographs legally obtained by defendants); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978) (publication in magazine of portrait of nude black man seated in corner of boxing ring); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970) (use of baseball players' names and statistics in manufacturer's board game).

Some authority supports the view that only *commercial* exploitation is actionable. See *Bi-Rite Enters.*, 757 F.2d at 442; *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 957 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975); see also PROSSER & KEETON, *supra* note 37, § 117, at 851-54; Hoffman, *The Right of Publicity: An Analytical Update*, 14 INTELL. PROP. L. REV. 1, 14 (1982); Simon, *supra* note 12, at 709. The better view, however, maintains that the right of publicity protects against non-commercial exploitation as well because such use may diminish the subsequent value of the right. See *Zacchini*, 433 U.S. at 575; Nimmer, *supra* note 12, at 217; see also *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (when person misappropriates a right of publicity never before exercised, "[t]here may well be a recognized first-time value (which diminishes with use)"). Copyright law supports this view by its approach to an analogous situation, prohibiting non-profit public performances because they reduce demand as much as for-profit public performances. See Copyright Act of 1976, 17 U.S.C. § 106(4) (1982). Because the rule of damages will limit recovery for non-commercial exploitation, however, plaintiffs will rarely bring such cases. See Nimmer, *supra* note 12, at 217.

103. *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969); *Uhlaender*, 316 F. Supp. at 1281.

104. *Haelan Laboratories*, 202 F.2d at 868; *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 282-84 (S.D.N.Y. 1977).

105. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 680 (11th Cir. 1983); *Memphis Dev. Found.*, 616 F.2d at 957-58; *Ali*, 447 F. Supp. at 728; *Grant*, 367 F. Supp. at 880.

propriation of her photograph, which gives her a cause of action under the right of publicity for injunction and damages against the exploiter.<sup>106</sup>

Although based on different policies<sup>107</sup> and bounded by different parameters,<sup>108</sup> the right of publicity has its origins in a case involving New York's right of privacy.<sup>109</sup> In fact, the first express reference to the right of publicity occurred in a case involving New York's right of privacy statute.<sup>110</sup> In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>111</sup> the Court of Appeals for the Second Circuit recognized that, independent of the right of privacy,<sup>112</sup> an individual

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106. In *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1st Dep't 1981), which presented these same facts, the court ruled in favor of the model under the New York right of privacy statute, *see id.* at 442-44, 438 N.Y.S.2d at 1013-14, but could well have decided the case under the right of publicity although it stated in dictum that New York common law fails to recognize the right of publicity. *See id.* at 435, 438, 438 N.Y.S.2d at 1009, 1011.

107. *See infra* notes 136-43 and accompanying text.

108. *See infra* notes 144-85 and accompanying text.

109. This development apparently happened because misappropriation of photograph cases, which were novel at the beginning of the century but have become increasingly frequent, implicate both the right to be let alone and the right to control the exploitation of one's persona. *See Nimmer, supra* note 12, at 204 (publicity "may be regarded as the reverse side of the coin of privacy"); Pilpel, *The Right of Publicity*, 27 BULL. OF THE COPYRIGHT SOC'Y 249, 262 (1979-80) ("[a]t one and the same time, totally apart from your privacy interests, you have a potentially exploitable right of publicity which enables you . . . to prevent others from commercially exploiting your name and likeness and which permits you . . . to do so") [hereinafter Pilpel].

110. *Haelan Laboratories*, 202 F.2d at 868.

111. *Id.*

112. While the unauthorized commercial exploitation of an individual's name or likeness implicates both the right of privacy and the right of publicity, it is the appropriation branch of the privacy tort that protects his mental well-being and the right of publicity that protects his financial interest. *Cf. Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134 (S.D.N.Y. 1953). In other words:

Rather than recognizing the legal right to protection against the injury to feelings which results from the commercial appropriation of elements of personality [and is protected by the privacy statute, the] "right of publicity" recognizes the pecuniary value which attaches to the names and pictures of public figures . . . and the right of such people to this financial benefit.

*Id.* at 139-40; *see also Uhlaender*, 316 F. Supp. at 1279-80 ("[a]lthough misappropriation of one's name, likeness or personality for commercial use has been considered as one species of the general tort of invasion of privacy, many authorities suggest that misappropriation is a distinctly independent tort"); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 387, 280 N.W.2d 129, 132 (1979) ("[f]rom almost the very outset of the recognition of the right of privacy, there has been an intermingling or confusion of the right of privacy and the right of control of the commercial aspects of one's identity").

has the right to control the exploitation of his photograph.<sup>113</sup> So emerged the right of publicity.

Unlike the right of privacy and New York's privacy statute,<sup>114</sup> the right of publicity does not protect personal concerns—those concerns that have meaning solely in conjunction with a specific individual, as opposed to property, which has value regardless of who owns it.<sup>115</sup> In other words, the former right protects Brinkley from the helpless feeling of being used, a feeling with which others can only empathize rather than feel on their own when Brinkley is exploited. The latter right ensures the financial stake she has in carefully marketing her image. In safeguarding this proprietary interest, the right of publicity fosters two<sup>116</sup> related

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113. *Haelan Laboratories*, 202 F.2d at 868.

114. See *supra* notes 55-67, 88-98 and accompanying text.

115. See *Zacchini*, 433 U.S. at 573 (purpose of right of publicity has "little to do with protecting feelings or reputation"); *Chaplin*, 15 F.R.D. at 139 (rather than protecting "against the injury to feelings which results from the commercial appropriation of elements of personality, [the] 'right of publicity' recognizes the pecuniary value which attaches to the names and pictures of public figures"); Pilpel, *supra* note 109, at 253-57 (right of publicity does not protect against injury to feelings but violation of property right).

116. Scholars have asserted that the right of publicity vindicates other interests as well. For example, the right of publicity fosters production of creative works by providing a financial incentive for people to develop their talents. See *Zacchini*, 433 U.S. at 576 ("protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public"); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) ("[v]indication of the right will tend to encourage achievement"); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 287 (2d Cir. 1981) (right of publicity vindicates "public policy of providing incentives for individual enterprise and investment of capital"), *cert. denied*, 456 U.S. 927 (1982); *Memphis*, 616 F.2d at 958 (purpose served by recognition of descendible right of publicity would be "the encouragement of effort and creativity"); Hoffman, *Limitations on the Right of Publicity*, 28 BULL. OF THE COPYRIGHT SOC'Y 111, 118 (1980) (right of publicity fosters "production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them") [hereinafter Hoffman]; Horowitz, *An Analysis of the Right of Publicity*, 6 ART & THE LAW 39, 39 (1981) (protecting individual's investment in developing his identity by creation of property right encourages people to develop skills necessary for public recognition, resulting in individual creativity and cultural advancement) [hereinafter Horowitz].

The incentive for creativity argument stems from an analogy to copyright, another branch of intellectual property. See *Carson*, 698 F.2d at 838 (Kennedy, J., dissenting) (citing Hoffman, *supra*, at 118). Unlike a copyrightable work, however, a marketable personality is usually the by-product—rather than the objective—of a creative effort. See *Memphis*, 616 F.2d at 958. As judge Merritt stated in *Memphis*:

Although fame and stardom may be ends in themselves, they are normally by-products of one's activities and personal attributes, as well as luck and promotion. The basic motivations are the desire to achieve success



policies.<sup>117</sup> First, by guaranteeing recompense for the commercial exploitation of an individual's persona, the right of publicity vindicates the individual's natural right of property in the fruit of his labors.<sup>118</sup> Thus, Brinkley alone deserves to profit from the marketable persona she has developed over the years. Second, by prohibiting the misappropriation of a person's identity, the right prevents unjust enrichment of infringers.<sup>119</sup> Otherwise, the opportunistic merchant could enjoy wind-

or excellence in a chosen field, the desire to contribute to the happiness or improvement of one's fellows and the desire to receive the psychic and financial rewards of achievement.

*Id.*

In an apparent analogy to trademark law, other commentators suggest that the right of publicity serves to mitigate consumer confusion in advertising. See *Hirsch*, 90 Wis. 2d at 401, 280 N.W. at 139; Hoffman, *supra*, at 118; Treece, *supra* note 12, at 647. This assertion, however, in fact implicates common law trademark and unfair competition laws rather than right of publicity law.

117. See *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220-21 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979), rev'd on other grounds, 652 F.2d 278 (2d Cir. 1981); *Cepeda*, 415 F.2d at 1206; *Price*, 400 F. Supp. at 844; CAL. CIV. CODE § 990(b) (West Supp. 1987); KY. REV. STAT. ANN. § 391.170(1) (*Michie/Bobbs-Merrill* 1984); TENN. CODE ANN. § 47-25-1103(a) (1984); cf. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 819, 603 P.2d 425, 428, 160 Cal. Rptr. 323, 326 (1979) (en banc) (quoting W. PROSSER, *LAW OF TORTS* 807 (4th ed. 1971)) (right of publicity "is a right of value upon which plaintiff can capitalize by selling licenses'") (emphasis added).

118. See *Bi-Rite Enters.*, 757 F.2d at 445 ("[i]n the area of publicity rights . . . the law must balance the competing goals . . . of facilitating public access to valuable images . . . and . . . rewarding individual effort"); *Carson*, 698 F.2d at 837 (the identity of a celebrity "has a pecuniary value which the right of publicity should vindicate"); *Grant*, 367 F. Supp. at 879 ("right of publicity" is somewhat akin to the exclusive right of a commercial enterprise to the benefits to be derived from the goodwill and secondary meaning that it has managed to build up in its name"); *Uhlaender*, 316 F. Supp. at 1282 ("[a] celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property") (emphasis added); *Nimmer*, *supra* note 12, at 216 (courts should recognize right of publicity lest "persons who have long and laboriously nurtured the fruit of publicity values . . . be deprived of them").

119. *Zacchini*, 433 U.S. at 576 (quoting Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326, 331 (1966)) (justification for protecting right of publicity "is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay"); *Carson*, 698 F.2d at 837 ("[v]indication of the right will also tend to prevent unjust enrichment by persons such as appellee who seek commercially to exploit the identity of celebrities without their consent"); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 289 (2d Cir. 1981) (*Mansfield, J.*, dissenting) (right of publicity "protects against the unauthorized appropriation of an individual's very persona which would result in unearned commercial gain

fall gains attributable, not to his own effort, but that of Brinkley.

Since the *Haelan* decision, commentators,<sup>120</sup> courts<sup>121</sup> and a few legislatures<sup>122</sup> have elucidated the scope and limitations of the right of publicity. While every person has a right of publicity,<sup>123</sup> it is usually asserted by one who has achieved "celebrity" status because without such renown, damages—determined by the value of the misappropriation<sup>124</sup>—are

to another'), *cert. denied*, 456 U.S. 927 (1982); Hoffman, *supra* note 116, at 118 (right of publicity serves society by preventing "unjust enrichment"); Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 527 (1976) ("claim founded upon the right of publicity acknowledges the desire and need for publicity that inhere in most public figures, but seeks to restrain a defendant from appropriating the pecuniary fruits of a public figure's efforts to achieve recognition").

120. See *supra* note 12.

121. See *supra* note 10.

122. See *supra* note 11.

123. See FLA. STAT. ANN. § 540.08(1) (West 1972) (prohibiting unauthorized exploitation of name or likeness "of any natural person") (emphasis added); TENN. CODE ANN. § 47-25-1103(a) (1984) ("[e]very individual has a property right in the use of his name, photograph or likeness in any medium in any manner") (emphasis added); McLane, *The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening to Eviscerate a Recognized State Right*, 20 CAL. W.L. REV. 415, 417 (1984) (unfair not to compensate the unknown because exploitation would not occur unless persona had some value); Nimmer, *supra* note 12, at 217 ("it would probably be preferable not to impose an arbitrary [celebrity] limit on the right but rather to rely upon the rule of damages"); cf. *Zacchini*, 433 U.S. at 576 ("[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay' ") (citation omitted); *T.J. Hooker v. Columbia Pictures Indus., Inc.*, 551 F. Supp. 1060, 1062 (N.D. Ill. 1982) (if defendant had appropriated commercial value of plaintiff woodcarver's name, he would have stated proper right of publicity cause of action); *Price*, 400 F. Supp. at 847, *quoted in Ali*, 447 F. Supp. at 729 (stating that prominence should not effect waiver of right, and implying that right exists regardless of celebrity status). *But see Bi-Rite Enters.*, 757 F.2d at 442 ("well known individuals [have a right] to control commercial exploitation of their names and likenesses"); *Memphis*, 616 F.2d at 957 ("[t]he famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality"); Hoffman, *The Right of Publicity: An Analytical Update*, 14 INTELL. PROP. L. REV. 1, 13-14 (1982) (prominence of plaintiff is threshold question in right of publicity action); Simon, *supra* note 12, at 708 (same).

124. See *Martin Luther King*, 694 F.2d at 680 (value to user); *Grant*, 367 F. Supp. at 881 (fair market value). Some statutes provide for the recovery of profits not accounted for in the determination of actual damages. See CAL. CIV. CODE § 990(a) (West Supp. 1987); TENN. CODE ANN. § 47-25-1106(d) (1984). The California statute guarantees at least \$750 to any plaintiff with a successful cause of action. CAL. CIV. CODE § 990(a) (West Supp. 1987). Several statutes also allow punitive damages. See, e.g., FLA. STAT. ANN. § 540.08(2) (West 1972); VA. CODE ANN. § 8.01-40(A) (1984).

It should be noted that plaintiffs usually seek injunctions in addition to damages. See FLA. STAT. ANN. § 540.08(2) (West 1972); VA. CODE ANN. § 8.01-40(A) (1984). Plaintiffs may, however, seek restitution as an alternative to damages. See *Treece*,

inconsequential.<sup>125</sup> In order to make this right valuable,<sup>126</sup> an individual may assign his right of publicity to third parties with products or services that would benefit from association with the individual.<sup>127</sup> Acknowledging the right's proprietary nature,<sup>128</sup> an increasing number of jurisdictions now have a descendible right of publicity—that is, they permit the celebrity's heirs to bring suit after his death.<sup>129</sup>

Like the right of privacy,<sup>130</sup> however, the right of publicity fails to safeguard an otherwise protectable identity when the value of free expression outweighs the proprietary (or personal, in the case of the right of privacy) interests at issue.<sup>131</sup> The first amendment protects biography of public figures and commentary on newsworthy

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*supra* note 12, at 648; see also BLACK'S LAW DICTIONARY 1180 (5th ed. 1979). The Tennessee statute even permits impoundment and destruction of offending materials. TENN. CODE ANN. § 47-25-1106(b) to -1106(c) (1984).

125. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 n.11 (9th Cir. 1974) ("[g]enerally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered"); Nimmer, *supra* note 12, at 216.

126. See *Haelan Laboratories*, 202 F.2d at 868; Nimmer, *supra* note 12, at 209.

127. See, e.g., *Bi-Rite Enters.*, 757 F.2d at 442; *Cepeda*, 415 F.2d at 1206; *Haelan Laboratories*, 202 F.2d at 868; *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978); *Lugosi*, 25 Cal. 3d at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329 (case preempted by legislation creating a descendible right of publicity).

128. Compare *Uhlaender*, 316 F. Supp. at 1280 (right of publicity is property) and Nimmer, *supra* note 12, at 216 (same) with *Bi-Rite Enters.*, 757 F.2d at 442 (quoting PROSSER & KEETON, *supra* note 37, § 117, at 854) ("[i]t seems quite pointless to dispute over whether such a right is to be classified as 'property'; it is at least clearly proprietary in its nature. 'Once protected by law, it is a right of value upon which the plaintiff can capitalize by selling licenses'") and *Haelan Laboratories*, 202 F.2d at 868 (same).

129. See, e.g., *Martin Luther King*, 694 F.2d at 682 (certified questions answered by Supreme Court of Georgia); *Price*, 400 F. Supp. at 844 (interpretation of New York law by federal court); CAL. CIV. CODE § 990(b) (West Supp. 1987); FLA. STAT. ANN. § 540.08(1)(c) (West 1972); KY. REV. STAT. ANN. § 391.170(2) (Michie/Bobbs-Merrill 1984); TENN. CODE ANN. § 47-25-1103(b) (1984); VA. CODE ANN. § 8.01-40 (1984); see also *Sims*, *supra* note 12, at 453. But see *Memphis*, 616 F.2d at 959 (right of publicity not descendible); *Lugosi*, 25 Cal. 3d at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329 (right of publicity not descendible without exploitation by the decedent). It is significant, however, that these decisions relied in part on the fact that the states whose law was at issue had not codified a descendible right of publicity at that time. Subsequent passage of right of publicity statutes with descendibility provisions by these states has weakened these decisions considerably. See CAL. CRV. CODE § 990 (West Supp. 1987); TENN. CODE ANN. § 47-25-1104 (1984).

130. Nimmer, *supra* note 12, at 216.

131. See *Zacchini*, 433 U.S. at 574; *Bi-Rite Enters.*, 757 F.2d at 445 (dictum); *Factors Etc.*, 652 F.2d at 288 (Mansfield, J., dissenting); Horowitz, *supra* note 116, at 41.

matters.<sup>132</sup> Consciously fictionalized accounts, in contrast, receive no protection.<sup>133</sup>

### C. Comparison of New York's Right of Privacy Statute and the Right of Publicity

This section contrasts New York's right of privacy statute with the right of publicity. After examining the policies underlying the statute and the right of publicity,<sup>134</sup> the section considers the applicability of both to certain situations.<sup>135</sup>

#### 1. Purpose of the Rights

In protecting a personal rather than a pecuniary interest, the right of privacy differs fundamentally from the right of publicity.<sup>136</sup> New York's right of privacy statute, however, contains language proscribing the *commercial* appropriation of a person's name or picture.<sup>137</sup> Therefore, celebrities, who are particularly susceptible to abuse of this nature,<sup>138</sup> have used the statute to remedy economic harm. For example, in *Brinkley v. Casablancas*,<sup>139</sup> the Appellate Division, First Department, enjoined the defendant from marketing

132. Compare *Zacchini*, 433 U.S. at 574 (limiting right of publicity) and TENN. CODE ANN. §§ 47-25-1107(a) to -1107(b) (1984) (same) with *Time, Inc. v. Hill*, 385 U.S. 374, 383-84 (1967) (limiting right of privacy) and N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987) (same).

133. Compare *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 127-29, 233 N.E.2d 840, 842-43, 286 N.Y.S.2d 832, 834-35 (1967) (applying first amendment exemptions noted in *Spahn*, which construed New York's right of privacy statute, to right of publicity), quoted in *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430-31 (S.D.N.Y. 1978) with *Time*, 385 U.S. at 384 (right of privacy).

134. See *infra* notes 136-43 and accompanying text.

135. See *infra* notes 144-96 and accompanying text.

136. See *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975) ("protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation, on the other hand, are different in theory and in scope"); see also *supra* notes 114-15 and accompanying text. But see *Hicks*, 464 F. Supp. at 430 ("rights of privacy and . . . publicity are intertwined due to the similarity between the nature of the interests protected by each").

137. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987).

138. See, e.g., *Brinkley v. Casablancas*, 80 A.D.2d 428, 444, 438 N.Y.S.2d 1004, 1014 (1st Dep't 1981) (fashion model obtained injunction and damages against distributor who sold posters of model without her consent); *Onassis v. Christian Dior-New York, Inc.*, 122 Misc. 2d 603, 616, 472 N.Y.S.2d 254, 263 (Sup. Ct. N.Y. County 1984) (court enjoined use and distribution of magazine advertisement picturing model who was plaintiff's look-alike).

139. 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1st Dep't 1981).

unauthorized posters of Christie Brinkley, and awarded damages to the model under the New York right of privacy statute.<sup>140</sup> Brinkley had used the statute to protect a pecuniary, not a personal, interest: concern about market saturation and poor marketing affecting her future earnings potential motivated the action.<sup>141</sup> Thus, although recovery under the statute satisfied the plaintiff involved, the recovery rested on an inapposite theory.<sup>142</sup> In sum, a statute designed to ameliorate emotional injury is now often pressed to remedy economic harm.<sup>143</sup>

## 2. *Scope of Protection*

Not only does current use of New York's right of privacy statute fail to comport with its purpose,<sup>144</sup> but the language of the statute inadequately remedies the abuses to which plaintiffs direct such use.<sup>145</sup> The privacy statute, which encompasses "name, portrait or picture,"<sup>146</sup> covers only a limited portion of persona. Generally, only full names are protected,<sup>147</sup> although a surname alone may qualify if it has become associated with an individual.<sup>148</sup> Indeed, without unequivocal identification with a person, even a full name may go without protection.<sup>149</sup> While strict construction of the statute usually

140. *Id.* at 442, 438 N.Y.S.2d at 1013.

141. *See id.* at 430-31, 438 N.Y.S.2d at 1006.

142. *See supra* note 136 and accompanying text.

143. *See id.*

144. *See supra* notes 136-43 and accompanying text.

145. *See* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987); *see also infra* notes 146-85 and accompanying text.

146. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987) (reprinted *supra* notes 94, 97).

147. *See* *Allen v. Gordon*, 86 A.D.2d 514, 515, 446 N.Y.S.2d 48, 50 (1st Dep't 1982) (naming character in book "Dr. Allen" permitted); *Pfaudler v. Pfaudler Co.*, 114 Misc. 477, 478, 186 N.Y.S. 725, 726 (Sup. Ct. Monroe County 1921) (" 'name' as used in the statute must mean a person's full name"). *But see* *Orsini v. Eastern Wine Corp.*, 190 Misc. 235, 236, 73 N.Y.S.2d 426, 427 (Sup. Ct. N.Y. County 1947) (use of surname in conjunction with family coat of arms enjoined), *aff'd*, 273 A.D. 947, 78 N.Y.S.2d 224 (1st Dep't 1948).

148. *See* *Adrian v. Unterman*, 281 A.D. 81, 88, 118 N.Y.S.2d 121, 127 (1st Dep't 1952) (court protects against use of name of famous women's dress designer named "Adrian"), *aff'd*, 306 N.Y. 771, 118 N.E.2d 477 (1954).

149. *See* *Nebb v. Bell Syndicate, Inc.*, 41 F. Supp. 929, 930 (S.D.N.Y. 1941) (suit by Mr. and Mrs. Rudy Nebb to enjoin defendant's publication of cartoon with similarly-named characters dismissed because defendant did not trade on secondary meaning or reputation of plaintiffs' names); *People ex rel. Maggio v.*

blocks actions based on the appropriation of an assumed name or nickname,<sup>150</sup> the courts will not block an action when the public has come to associate the new name with the individual.<sup>151</sup> Therefore, because society failed to identify a particular individual as "Dr. Seuss," a court refused to protect the well-known pseudonym.<sup>152</sup> In addition, the statute does not extend to business, corporate or partnership names.<sup>153</sup>

The phrase "portrait or picture" has received a somewhat broader interpretation than the term "name."<sup>154</sup> Although the portrait or picture used need not be exact,<sup>155</sup> mere word portraits are not actionable.<sup>156</sup> Other representations, such as drawings, sculptures and

Charles Scribner's Sons, 205 Misc. 818, 822, 130 N.Y.S.2d 514, 519 (N.Y.C. Magis. Ct. Kings County 1954) (use of character named "Angelo Maggio" in "From Here to Eternity" did not violate Joseph Anthony Maggio's right of privacy, although like character, he was stationed in Hawaii during World War II); *Swacker v. Wright*, 154 Misc. 822, 823, 277 N.Y.S. 296, 298 (Sup. Ct. Nassau County 1935) (mere use, without particular identification, of "Frank Swacker" in cast of characters and "Swacker" in text of book permissible).

150. See *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 355 (S.D.N.Y. 1968) (no cause of action for exploitation of "Dr. Seuss" because statute "does not protect an assumed or trade name"); *Maggio*, 205 Misc. at 822, 130 N.Y.S.2d at 519 (statute "does not protect a nickname known to a few intimates").

151. See *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891, 894 (2d Cir. 1937) ("Aunt Jemima" is protected by statute because "stage name has come to be closely and widely identified with the person who bears it"). The court's language on this issue is dictum, however, because it subsequently held the statute inapplicable to the case due to previous trademark ownership of the name. See *id.*

152. See *Geisel*, 295 F. Supp. at 355-56.

153. See *Davis v. R.K.O. Radio Pictures, Inc.*, 16 F. Supp. 195, 196 (S.D.N.Y. 1936); *Shubert v. Columbia Pictures Corp.*, 189 Misc. 734, 742, 72 N.Y.S.2d 851, 858 (Sup. Ct. N.Y. County 1947); *Jaccard v. R.H. Macy & Co.*, 176 Misc. 88, 89, 26 N.Y.S.2d 829, 830 (Sup. Ct. N.Y. County 1941), *aff'd*, 265 A.D. 15, 37 N.Y.S.2d 570 (1st Dep't 1942). *But cf.* *Cornell Univ. v. Messing Bakeries, Inc.*, 285 A.D. 490, 492, 138 N.Y.S.2d 280, 282 (3d Dep't) ("educational institution which has won large public prestige [need not] . . . have that prestige diluted by a commercial use of its name") (case decided under law of trademark and unfair competition without mention of privacy statute), *aff'd*, 309 N.Y. 722, 128 N.E.2d 421 (1955).

154. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987).

155. See *Cohen v. Herbal Concepts, Inc.*, 100 A.D.2d 175, 179, 473 N.Y.S.2d 426, 429 (1st Dep't) (phrase "does not require that there be an identifiable facial representation . . . [but] includes any representation of the person"), *aff'd*, 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984); *Loftus v. Greenwich Lithographing Co.*, 192 A.D. 251, 256, 182 N.Y.S. 428, 431 (1st Dep't 1920) (portrait appearing in advertising matter protected under statute, although not exact reproduction); *Onassis*, 122 Misc. 2d at 611, 472 N.Y.S.2d at 261 (phrase encompasses "not only actuality, but the close and purposeful resemblance to reality").

156. *Toscani v. Hersey*, 271 A.D. 445, 448, 65 N.Y.S.2d 814, 817 (1st Dep't

mannequins, may be protected.<sup>157</sup> Nonetheless, protection requires recognizability of the plaintiff as the individual portrayed<sup>158</sup> and intent by the defendant to exploit plaintiff's likeness.<sup>159</sup> Moreover, even if the defendant purposefully exploits the likeness of a sufficiently identifiable plaintiff, the phrase permits such use when it is "incidental" to advertising.<sup>160</sup>

The right of publicity, on the other hand, provides greater protection of a plaintiff's name, portrait or picture. The right protects nicknames,<sup>161</sup> business names<sup>162</sup> and personal names, regardless of particular identification with a person.<sup>163</sup> Moreover, the right of publicity extends protection to aspects of persona entirely beyond

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1946). *Contra* Levey v. Warner Bros. Pictures, 57 F. Supp. 40, 42 (S.D.N.Y. 1944) (dictum).

157. See *Young v. Greneker Studios, Inc.*, 175 Misc. 1027, 1028, 26 N.Y.S.2d 357, 358-59 (Sup. Ct. N.Y. County 1941) (in view of definitions of "portrait" as carved or molded figure, statue, sculpture, visible representation or likeness, image, copy, and likeness of individual produced by art, as in oils, water-color, crayon, engraving, photography or sculpture, the court held that a picture or portrait "is not necessarily a photograph . . . [of a] person, but includes any representation of . . . [a] person . . . , whether by photograph, painting or sculpture").

158. *Allen v. National Video, Inc.*, 610 F. Supp. 612, 624 (S.D.N.Y. 1985) (exploitation of photograph gives rise to cause of action when court can conclude, as matter of law, "that most persons who could identify an actual photograph of [the celebrity] would be likely to think that [it] was actually his picture") (dictum because court ultimately decided case under law of unfair competition and trademarks); *Negri v. Schering Corp.*, 333 F. Supp. 101, 103 (S.D.N.Y. 1971) (for valid cause of action, "picture used must be a clear representation of the plaintiff, recognizable from the advertisement itself"); *Levey*, 57 F. Supp. at 42 (statute "require[s] a clear representation of a person").

159. *Compare* *Galella v. Onassis*, 353 F. Supp. 196, 233 (S.D.N.Y. 1972) (photographer's use of celebrity's photograph on Christmas cards photographer sent to his editors violated statute), *aff'd in part, rev'd in part on other grounds*, 487 F.2d 986 (2d Cir. 1973) with *Freed v. Loew's Inc.*, 175 Misc. 616, 617-18, 24 N.Y.S.2d 679, 680-81 (Sup. Ct. Bronx County 1940) (artist's poster, which improved on physique and features of plaintiff model with no intention of exhibiting plaintiff, not actionable under statute).

160. *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 350, 223 N.Y.S.2d 737, 744 (1st Dep't) ("so long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the statute was not violated, albeit the reproduction appeared in other media for purposes of advertising the periodical"), *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962), *quoted in* *Namath v. Sports Illustrated*, 48 A.D.2d 487, 488, 371 N.Y.S.2d 10, 12 (1st Dep't 1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

161. See *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 403, 280 N.W.2d 129, 140 (1979) ("Crazylegs").

162. See *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 683 (11th Cir. 1983) ("Martin Luther King, Jr., Center for Social Change, Inc.").

163. See *supra* notes 100-103 and accompanying text.

the statute: voice,<sup>164</sup> style<sup>165</sup> and personal attributes.<sup>166</sup>

### 3. Nature of Exploitation Prohibited

The right of privacy statute bars a specific type of exploitation, namely exploitation "for advertising purposes, or for the purposes of trade."<sup>167</sup> Although "advertising purposes," connoting solicitation of patronage,<sup>168</sup> receives a broader reading than "purposes of trade,"<sup>169</sup>

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164. See CAL. CIV. CODE § 990 (West Supp. 1987) (voice protected); cf. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 716 (9th Cir. 1970) (in case decided on unfair competition grounds but implicating right of publicity, court denied protection of plaintiff singer's voice but implied that result would have differed had plaintiff's "sound [been] uniquely personal," i.e., had no copyright inhered in music and lyrics owned by third party), cert. denied, 402 U.S. 906 (1971); Lahr v. Adell Chem. Co., 300 F.2d 256, 260 (1st Cir. 1962) (in case based on unfair competition but essentially implicating right of publicity, court vacated judgment below dismissing complaint for infringement of actor's distinctive vocal style); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 347 (S.D.N.Y. 1973) (court implied that commercial using imitation of Shirley Booth's voice would be actionable if it used her name or likeness to identify her as voice of fictional television character she portrayed).

165. See Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) ("[i]f the celebrity's *identity* is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used") (emphasis added); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974) (although plaintiff's physical features not identifiable in television commercial exhibiting race car with distinctive styling of the one ordinarily driven by plaintiff, commercial could be enjoined because viewers would associate car with plaintiff); Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 622, 396 N.Y.S.2d 661, 665 (2d Dep't 1977) (automobile commercial on television against New Year's Eve party backdrop, including actor conducting band and using same gestures, musical beat and choice of music with which plaintiff had become associated in public's mind, held actionable).

166. See Groucho Marx Prods., Inc. v. Day & Night Co., 523 F. Supp. 485, 494 (S.D.N.Y. 1981) (character with cigar, mustache and thick eyebrows), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (batting and fielding statistics of baseball players); Palmer v. Schonhorn Enters., Inc., 96 N.J. Super. 72, 79-80, 232 A.2d 458, 462 (1967) (factual profiles of golfers).

167. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987).

168. Lerman v. Flynt Distrib. Co., 745 F.2d 123, 130 (2d Cir. 1984), cert. denied, 471 U.S. 1054 (1985) (quoting Ginsberg v. News Group Publications, 9 Media L. Rep. (BNA) 2014, 2016 (Sup. Ct. Nassau County 1983)); Pagan v. New York Herald Tribune, Inc., 32 A.D.2d 341, 342-43, 301 N.Y.S.2d 120, 122-23 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 941, 258 N.E.2d 727, 310 N.Y.S.2d 327 (1970); Lahiri v. Daily Mirror, 162 Misc. 776, 780, 295 N.Y.S. 382, 386 (Sup. Ct. N.Y. County 1937).

169. Manger v. Kree Inst. of Electrolysis, Inc., 233 F.2d 5, 9 (2d Cir. 1956) ("advertising purposes" in section 50 is broader than "purposes of trade" in section 51); see Selsman v. Universal Photo Books, Inc., 18 A.D.2d 151, 152, 238 N.Y.S.2d



in essence the phrases contemplate commercial exploitation<sup>170</sup> and exclude non-commercial appropriation.<sup>171</sup> The right of publicity, on the other hand, affords individuals protection from all exploitation of their personas,<sup>172</sup> provided that the exploitation is not privileged.<sup>173</sup> Therefore, non-profit uses that would be actionable under the right of publicity—for example, a charity making and selling a Paul Newman poster without his consent—escape legal sanction of the privacy statute.<sup>174</sup>

#### 4. *Transferability of the Rights*

The right of privacy, entirely statutory in New York,<sup>175</sup> contains

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686, 687 (1st Dep't 1963) (with regard to "uses for advertising purposes," section 50 is to be construed liberally).

170. See *Barrows v. Rozansky*, 111 A.D.2d 105, 106, 489 N.Y.S.2d 481, 484 (1st Dep't 1985) ("only judicially recognized relief for invasion of privacy in New York is the protection afforded the commercial misappropriation of a person's name or picture"); *Davis v. High Soc'y Magazine, Inc.*, 90 A.D.2d 374, 378, 457 N.Y.S.2d 308, 312 (2d Dep't 1982) ("only the commercial use of a person's name or likeness without permission is prohibited"); *D'Agostino v. Pan American World Airways, Inc.*, 79 A.D.2d 646, 647, 433 N.Y.S.2d 823, 824 (2d Dep't 1980) ("New York recognizes no right to judicial relief for the invasion of privacy beyond protection from . . . commercial misappropriation").

171. See *Cardy v. Maxwell*, 9 Misc. 2d 329, 331-32, 169 N.Y.S.2d 547, 551 (Sup. Ct. N.Y. County 1957) (statute, protecting right of privacy in certain situations, is "aimed at exploitation for purposes of commerce. Being partly penal, *its scope must be strictly construed and may not be enlarged to include any unauthorized use with a mercenary motive*") (emphasis added).

172. See *supra* note 102.

173. See *supra* notes 130-33 and accompanying text.

174. Analogous cases illustrate this point. Compare *Davis v. Duryea*, 99 Misc. 2d 933, 940, 417 N.Y.S.2d 624, 629 (Sup. Ct. N.Y. County 1979) ("use of a photograph or public personage's name in any appropriate form during a political campaign is a constitutionally protected activity" that does not violate right of privacy statute) with *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 93, 229 P. 317, 319 (1924) (court enjoined unauthorized use of political candidate's "valuable" name for political party allegedly espousing his views). See also *Griffin v. Harris Beach*, 112 A.D.2d 514, 516, 490 N.Y.S.2d 919, 921 (3d Dep't 1985) (permitted use of individual's name as plaintiff in federal court action brought to defeat plan for use of federal funds to finance hotel project); *McGraw v. Watkins*, 49 A.D.2d 958, 959, 373 N.Y.S.2d 663, 665 (3d Dep't 1975) (court denied injunction against publication of nude photograph of plaintiff because plaintiff had failed to allege commercial use thereof); *Wallace v. Weiss*, 82 Misc. 2d 1053, 1055, 372 N.Y.S.2d 416, 420 (Sup. Ct. Monroe County 1975) (court allowed free distribution of non-profit student magazine with picture of plaintiff that had no connection to advertisement).

175. See *supra* note 71 and accompanying text.

several gaps. It is a personal right<sup>176</sup> incapable of assignment<sup>177</sup> or inheritance.<sup>178</sup> Furthermore, relatives of a New Yorker cannot enforce his right of privacy through a derivative action.<sup>179</sup> Surprisingly, however, the courts may enforce a contract made for the use of a decedent's name in favor of the survivor.<sup>180</sup>

The right of publicity, on the other hand, is assignable,<sup>181</sup> and courts have increasingly recognized it as descendible.<sup>182</sup> Without assignability, the value of a right to exploit one's name or picture is greatly reduced.<sup>183</sup> In addition, descendibility vindicates the rights of those, like Martin Luther King, who consciously avoided exploitation of their valuable personas during their lives<sup>184</sup> and those, like Bela Lugosi, who had planned subsequent exploitation of their rights of publicity but died unexpectedly.<sup>185</sup>

In sum, New York's right of privacy statute contains gaps that

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176. See, e.g., *Runyon v. United States*, 281 F.2d 590, 592 (1960); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953); *Bowman Gum, Inc. v. Topps Chewing Gum, Inc.*, 103 F. Supp. 944, 953 (E.D.N.Y. 1952); *Rosemont Enters., Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 7, 294 N.Y.S.2d 122, 129 (Sup. Ct. N.Y. County 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1st Dep't 1969); Savell, *supra* note 46, at 38.

177. See *Haelan Laboratories*, 202 F.2d at 868; *Price*, 400 F. Supp. at 844; *Brinkley*, 80 A.D.2d at 436, 438 N.Y.S.2d at 1010; *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 621, 396 N.Y.S.2d 661, 664 (2d Dep't 1977); *Rosemont Enters.*, 58 Misc. 2d at 7, 294 N.Y.S.2d at 129; Savell, *supra* note 46, at 38.

178. See *Runyon*, 281 F.2d at 592; *Brinkley v. Casablancas*, 80 A.D.2d 428, 436, 438 N.Y.S.2d 1004, 1010 (1st Dep't 1981); *Lombardo*, 58 A.D.2d at 621, 396 N.Y.S.2d at 664; Savell, *supra* note 46, at 38.

179. See *Schuyler v. Curtis*, 147 N.Y. 434, 451, 42 N.E. 22, 27 (1895); *Russell v. Marlboro Books*, 18 Misc. 2d 166, 189, 183 N.Y.S.2d 8, 34 (Sup. Ct. N.Y. County 1959); Savell, *supra* note 46, at 38.

180. See *Lunceford v. Wilcox*, 88 N.Y.S.2d 225, 228 (N.Y.C. Ct. N.Y. County 1949). *But cf. Runyon*, 281 F.2d at 592 (holding that son of deceased person has no right to assign his father's right of privacy but failing to nullify contract).

181. See, e.g., *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 680 (11th Cir. 1983); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 282 (S.D.N.Y. 1977); see *supra* note 127 and accompanying text.

182. See *supra* note 129.

183. See *supra* notes 126-27 and accompanying text.

184. *Martin Luther King*, 694 F.2d at 683; *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (right of publicity protects living plaintiff who chooses not to exploit his persona).

185. *Cf. Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 79, 232 A.2d 458, 462 (1967) (prominent individuals "may not all desire to capitalize upon their names in the commercial field, beyond or apart from that in which they have reached their known excellence. However, because they presently do not should not be justification for others to do so because of the void").

leave worthy plaintiffs without redress.<sup>186</sup> Drafted over eighty years ago<sup>187</sup> to address the situation presented by *Roberson* in which the plaintiff's picture is used for advertising without his consent,<sup>188</sup> the language inadequately remedies the abuses to which plaintiffs now direct it.<sup>189</sup> Strict construction of the statute<sup>190</sup> further constrains its application.<sup>191</sup>

In contrast, the right of publicity would provide broader protection to citizens of New York by filling these gaps.<sup>192</sup> The state should not redress economic harm with a statute enacted to protect an individual's feelings, when another doctrine, the right of publicity, directly addresses the situation.<sup>193</sup> As a practical matter, the law should protect aspects of persona, such as nickname, voice, style and personal attributes, whose misappropriation has commercial ramifications.<sup>194</sup> Similarly, the law should prevent not-for-profit exploitations because they also diminish future earnings potential by saturating the market.<sup>195</sup> Most importantly, like all other forms of property, the proprietary interest a person has in his persona should be assignable and descendible.<sup>196</sup>

### III. Recognition of a Common Law Right of Publicity in New York

The existence of worthy plaintiffs without remedies<sup>197</sup> and the

186. See *supra* notes 144-85 and accompanying text.

187. 1903 N.Y. Laws ch. 132, §§ 1-2 (now, as amended, N.Y. CIV. RIGHTS LAW §§ 50, 51 (West 1976 & Supp. 1987)).

188. See *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902); see also *supra* notes 73-75 and accompanying text.

189. See *supra* notes 144-85 and accompanying text.

190. See *Ann-Margret v. High Soc'y Magazine, Inc.*, 498 F. Supp. 401, 404 (S.D.N.Y. 1980) (statute construed strictly to avoid conflict with dissemination of information protected by first amendment); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 439, 434 N.E.2d 1319, 1321, 449 N.Y.S.2d 941, 943 (1982), *cert. denied*, 459 U.S. 1146 (1983) (statute construed strictly to follow legislative intent of limiting scope of protection to *Roberson*-type situation); *Onassis v. Christian Dior-New York, Inc.*, 122 Misc. 2d 603, 607, 472 N.Y.S.2d 254, 258 (Sup. Ct. N.Y. County 1984) (statute construed strictly in recognition that statutory right is in derogation of common law). *But see Time, Inc. v. Hill*, 385 U.S. 374, 381-82 (1967) (statute applies to situations beyond the facts of *Roberson* although first amendment limits its application).

191. See *infra* notes 220-30 and accompanying text.

192. See *infra* notes 234-37 and accompanying text.

193. See *supra* notes 136-43 and accompanying text.

194. See *supra* notes 144-66 and accompanying text.

195. See *supra* notes 167-74 and accompanying text.

196. See *supra* notes 175-85 and accompanying text.

197. See *supra* notes 144-85 and accompanying text; *infra* notes 220-30 and accompanying text.

confusion from unsettled law in the field<sup>198</sup> demonstrate the need for New York courts to acknowledge a right of publicity. While scholars commenting on the right in general have suggested state<sup>199</sup> or federal<sup>200</sup> legislation, others indicate that the Copyright Act of 1976 pre-empts much right-of-publicity law.<sup>201</sup> A discussion of these propositions exceeds the scope of this Note. Rather, this Note now addresses the propriety of judicial recognition of a common law<sup>202</sup> right of publicity in New York.<sup>203</sup> After briefly discussing the history of judge-made law, this section considers the amenability of the right of publicity to common law creation in New York. The section concludes with an analysis and refutation of arguments opposing judicial lawmaking as a general proposition.

### A. History of Judge-Made Law

The courts have significantly influenced the evolution of our law.<sup>204</sup> Indeed, until this century, the judiciary dominated lawmaking.<sup>205</sup> The

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198. See *supra* notes 21-28 and accompanying text.

199. See Sims, *supra* note 12, at 455 n.16 (focusing on survivability issue).

200. See Simon, *supra* note 12, at 755; see also Sims, *supra* note 12, at 455.

201. See Shipley, *Publicity Never Dies, It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673 (1981); Note, *Copyright and the Right of Publicity: One Pea in Two Pods?*, 71 GEO. L.J. 1567 (1983).

202. For the purposes of this Note, the phrase "common law" does not refer to constitutional adjudication or statutory interpretation; rather, "common law" refers to non-constitutional decisional law in areas not considered by the legislature.

203. The judiciary complements, rather than competes with, the legislature. See Breitell, *The Lawmakers*, 65 COLUM L. REV. 749, 759 (1965) [hereinafter Breitell I]; Hart, Comment on Paper Delivered by Charles D. Breitell entitled *The Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 40 (Paulsen ed. 1959) [hereinafter Hart, *Comment*]. As a result of this complementary relationship, even judicial action on the right of publicity that stirs a legislative response may be appropriate. See Note, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. CAL. L. REV. 727, 761-68 (1982) (advocating judicial recognition of right of publicity).

204. The powerful effect of judges on the law, viewed with apprehension in the Reagan era, has a long history in the United States. "From 1800 on, strong-minded American judges, whose work was recorded, influenced their courts and the law." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 135 (2d ed. 1985) [hereinafter FRIEDMAN, AMERICAN LAW]. According to another authority, "[a] hundred years ago, case law was—or seemed—the dominant ingredient of American law, and legislation of only secondary importance." H. JONES, J. KERNOCHAN & A. MURPHY, LEGAL METHOD CASES AND TEXT MATERIALS 2 (1980) [hereinafter JONES, LEGAL METHOD]. In describing post-revolutionary American jurisprudence, another scholar stated that "[t]he federal Congress did little; the state legislatures did less. The judges became our preferred problem-solvers." G. GILMORE, THE AGES OF AMERICAN LAW 35-36 (1977) [hereinafter GILMORE, AGES OF AMERICAN LAW].

205. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) [hereinafter CALABRESI, AGE OF STATUTES].

opinions of Justice Cardozo, especially those written as a member of New York's Court of Appeals, powerfully illustrate the impact judges have had on the development of the law.<sup>206</sup> Justice Holmes even went so far as to assert that the only law was what the court decided.<sup>207</sup>

Holmes' exuberance notwithstanding, the judiciary as an institution has performed in a more conservative manner.<sup>208</sup> Its role was, and remains today, to adjudicate disputes unresolvable by private means,<sup>209</sup> through pre-existing and reasonably knowable rules.<sup>210</sup> The courts balance "the competing values of stability in the law, served by adherence to precedent, and responsiveness to social change, which may call for the abandonment of an outworn legal doctrine."<sup>211</sup> In practice, courts accomplish their task in two ways: (1) interpreting statutes; and (2) making common law.<sup>212</sup>

Today, many legislatures,<sup>213</sup> including that of New York,<sup>214</sup> convene

206. See, e.g., *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928) (negligence); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (products liability).

207. See Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 461 (1897) ("[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law").

208. See *infra* notes 209-12 and accompanying text.

209. See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 185 (1958) [hereinafter HART & SACKS, *LEGAL PROCESS*]; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 227, 235 (1973) (case law arises when judges decide controversies) [hereinafter Wellington]; cf. JONES, *LEGAL METHOD*, *supra* note 204, at 3.

210. See Wellington, *supra* note 209, at 235; cf. CALABRESI, *AGE OF STATUTES*, *supra* note 205, at 164.

211. JONES, *LEGAL METHOD*, *supra* note 204, at 4.

212. HART & SACKS, *LEGAL PROCESS*, *supra* note 209, at 366-68.

213. For example, the United States Congress assembles annually on January 3, unless Congress "shall by law appoint a different day." U.S. CONST. amend. XX, § 2. In recent years, Congress has remained in session almost the entire year. See 1987-1988 OFFICIAL CONGRESSIONAL DIRECTORY: 100TH CONGRESS, GOVERNMENT PRINTING OFFICE 670-71 (1987) (table presenting duration of recent sessions) [hereinafter CONGRESSIONAL DIRECTORY].

Durational limits on state legislative sessions were eased during the 1960s and 1970s. See Pound, *The State Legislatures*, in *THE BOOK OF THE STATES, THE COUNCIL OF STATE GOVERNMENTS* 77 (1986). Although the trend has stopped, see *id.*, "[t]he legislatures of California, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin have lengthy sessions." *Id.*; see *THE BOOK OF THE STATES, THE COUNCIL OF STATE GOVERNMENTS* 83-85 (1986) (tables indicating that sessions of these states are unlimited) [hereinafter *BOOK OF STATES*].

214. Every year, the New York State Legislature convenes "on the first Wednesday following the first Monday in January." N.Y. CONST. art. XIII, § 4. The legislature "remains in session until it has concluded its business." *THE NEW YORK RED BOOK*

year-round. As a result, federal and state law has undergone "statutorification."<sup>215</sup> Despite the proliferation of statutes, legal problems amenable to judge-made solutions remain. To establish a principle that courts should confine their activity to statutory interpretation would be futile.<sup>216</sup> The courts *do* make law today,<sup>217</sup> perhaps more a result of, than in spite of, the proliferation of statutes.<sup>218</sup> As the Supreme Court recently observed, "state courts . . . are general common law courts and . . . possess a general power to develop and apply their own rules of decision."<sup>219</sup>

## B. A Common Law Right of Publicity in New York

In *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,<sup>220</sup> the heirs of the late reverend and a non-profit corporation, the assignee of the right to use his name or likeness and certain of his copyrights, sued to enjoin an opportunistic merchant from distributing miniature plastic busts of the leader without consent.<sup>221</sup> In answer to certified questions from the Eleventh Circuit, the Georgia Supreme Court recognized a common law right of publicity that descends<sup>222</sup> without exploitation by

31 (G. Mitchell ed. 1987-1988) [hereinafter THE RED BOOK]. In recent years, the legislature has required the whole year for this task. See *id.* at 94 (table presenting duration of recent sessions); see also MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 1982-83, 884 (1982-83) (same).

215. CALABRESI, AGE OF STATUTES, *supra* note 205, at 1 (citing with approval GILMORE, AGES OF AMERICAN LAW, *supra* note 204, at 95 ("orgy of statute making")); JONES, LEGAL METHOD, *supra* note 204, at 3 ("legislation has fully come of age as a form of American law").

216. See Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821, 839 (1961) [hereinafter Friedmann]; see also Traynor, Comment on Paper Delivered by Charles D. Breitel entitled *The Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 52 (Paulsen ed. 1959) ("wide agreement [now exists] that a judge can and should participate creatively in the development of the common law") [hereinafter Traynor, *Comment*].

217. Commentators agree on this point. "It is now a commonplace that courts, not only of common-law jurisdiction but also those which have codified statutory law as their base, participate in the lawmaking process." Breitel I, *supra* note 203, at 765. "Courts, too, have their distinctive contributions to make" in the development of the law. Hart, *Comment*, *supra* note 203, at 40.

218. See Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U.L. REV. 401, 401 (1968) (as statutorification has brought an increasing number of areas within the regulation of necessarily broad statutes, "[t]he old saying that a judge's word is law now has fresh validity. A modern judge has the last word in a steadily widening area of unprecedented controversies") [hereinafter Traynor].

219. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981).

220. 694 F.2d 674 (11th Cir. 1983).

221. *Id.* at 675.

222. *Id.* at 682.

the decedent during his lifetime.<sup>223</sup> Thus, the court reversed the judgment of the district court in favor of the defendant and remanded the case for further proceedings, including the assessment of damages.<sup>224</sup> In New York, however, the plaintiff's cause of action would fail. First, the scope of the right of privacy statute does not include statuettes.<sup>225</sup> Indeed, unauthorized use of King's distinctive voice in a radio advertisement would also elude sanction in New York.<sup>226</sup> Second, and more importantly, the statute protects against the exploitation of living persons only.<sup>227</sup> Thus, though King chose not to exploit the image he created,<sup>228</sup> had he planned to bequeath a valuable right of publicity to his relatives,<sup>229</sup> New York law would not vindicate this desire.<sup>230</sup> Because of its huge media industry<sup>231</sup> and concomitantly large number of recognizable figures, New York should protect the commercial interest these individuals have in the marketing of their images. Nonetheless, even the most worthy plaintiff receives no protection from opportunistic New York retailers.

Having demonstrated that the right of privacy statute leaves badly harmed plaintiffs remediless, the final inquiry concerns the propriety of judicial acknowledgement of a common law right of publicity in New York. Like private law in general,<sup>232</sup> and tort law in particular,<sup>233</sup> the right of publicity is an appropriate subject for judicial lawmaking. The recognition in New York of such a right—which protects not only name and picture but all aspects of persona<sup>234</sup> from both commercial and non-commercial exploitation<sup>235</sup> and is both assignable and descendible<sup>236</sup>—would fill gaps in the state's right of privacy statute.<sup>237</sup> Interstitial lawmaking, such as that implicated by recog-

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223. *Id.* at 683.

224. *Id.* at 675, 680.

225. *See supra* notes 154-66 and accompanying text.

226. *See supra* note 164 and accompanying text.

227. *See* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987).

228. *See* Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Prods., Inc., 694 F.2d 674, 683 (11th Cir. 1983).

229. *Cf. id.* at 675 (King did assign rights to several of his copyrighted speeches).

230. *See supra* note 227 and accompanying text.

231. *See* Savell, *supra* note 46, at 3 n.5. *See generally* 100 Largest Media Companies, Advertising Age, June 27, 1985, *passim*.

232. *Cf.* JONES, LEGAL METHOD, *supra* note 204, at 2.

233. *See* Friedmann, *supra* note 216, at 839 (noting amenability of family and criminal law, and especially tort law, to common law development).

234. *See supra* notes 146-66 and accompanying text.

235. *See supra* notes 167-74 and accompanying text.

236. *See supra* notes 175-85 and accompanying text.

237. *See supra* notes 146-96 and accompanying text.

dition of the right of publicity in New York, is a proper judicial activity which does not usurp the legislature's prerogative.<sup>238</sup>

Furthermore, the right of publicity possesses certain characteristics that make it particularly well-suited for recognition at common law. Judge-made law is appropriate when the legal landscape merits a new rule whose articulation does not strain the court's competence.<sup>239</sup> In New York, worthy plaintiffs need relief that the courts can articulate without special expertise.<sup>240</sup>

Indeed, New York's judiciary may have already recognized the right implicitly.<sup>241</sup> In *Lombardo v. Doyle, Dane & Bernbach, Inc.*,<sup>242</sup> for instance, the Second Department of the Appellate Division held that the plaintiff had a valid cause of action for the exploitation of his style under the common law, although he had no action under the privacy statute.<sup>243</sup> In *Madison Square Garden Corp. v. Universal Pictures Company*,<sup>244</sup> the first department seemed to recognize publicity rights in an action for unfair competition when it stated, "the complaint sufficiently alleges a misappropriation of plaintiff's property rights."<sup>245</sup> And in *Gautier v. Pro-Football, Inc.*,<sup>246</sup> Judge Des-

238. In many areas, it is still proper for the courts to adjust the rights and liabilities of litigants to changing conditions. See Friedmann, *supra* note 216, at 841 ("large groups" of such cases); see also CALABRESI, AGE OF STATUTES, *supra* note 205, at 163 ("fair number" of such cases may remain). In general, the courts should focus their activity on interstitial areas, deciding whether to fill legislative gaps, extend statutes or retain existing law. See Friedmann, *supra* note 216, at 837. But see Breitel I, *supra* note 203, at 769 (several reasons "make for a strong lawmaking function in the courts, far beyond the interstitial and gap-filling") (emphasis added).

239. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 163 ("[i]t will occur in areas in which the new rule to be promulgated is clearly mandated by the legal landscape and in which a statement of the rule does not involve detailed language and technical data beyond a court's competence"); cf. Friedmann, *supra* note 216, at 841 ("courts are neither equipped nor called upon to undertake" lawmaking in areas requiring "comprehensive administrative arrangements"). Thus, the courts should ordinarily demur from lawmaking when the issue is particularly complex, especially if it requires technical expertise. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981). But see *id.* at 349 & n.25 (Blackmun, J., dissenting) (complexity "is hardly a suitable basis for denying . . . courts the power to adjudicate").

240. See *supra* notes 145-96 and accompanying text.

241. See Nimmer, *supra* note 12, at 218-23 (discussing several New York cases purportedly recognizing right of publicity).

242. 58 A.D.2d 620, 396 N.Y.S.2d 661 (2d Dep't 1977).

243. See *id.* at 622, 396 N.Y.S.2d at 664-65 (televised car commercial presented against New Year's Eve party backdrop, including actor conducting band and using same gestures, musical beat and choice of music with which plaintiff had become associated in mind of public held actionable under common law).

244. 255 A.D. 459, 7 N.Y.S.2d 845 (1st Dep't 1938).

245. *Id.* at 464, 7 N.Y.S.2d at 850.

246. 304 N.Y. 354, 107 N.E.2d 485 (1952).



mond's concurrence to an opinion denying plaintiff protection under New York's right of privacy statute suggested that redress "for the telecasting of [the plaintiff's] show" might be justified, although certainly not under a privacy theory.<sup>247</sup> Even if these cases fail to demonstrate implicit recognition of the right of publicity, as was asserted in *Stephano v. News Group Publications, Inc.*<sup>248</sup> and not denied in *Southeast Bank, N.A. v. Lawrence*,<sup>249</sup> a judge-made right of publicity would merely supplement the existing body of judge-made intellectual property law in the areas of unfair competition, anti-dilution and common law copyright—which all seek to maintain commercial morality and discourage unjust enrichment—rather than establish an entirely new body of law requiring particularized knowledge.<sup>250</sup>

Moreover, as illustrated by the development of the right of publicity in the federal courts, purportedly under New York law,<sup>251</sup> the right of publicity lends itself to case-by-case evolution,<sup>252</sup> and thus invites the development of common law.<sup>253</sup> The New York courts, therefore, need not hesitate to begin explicating the doctrine.

In determining when to revise a rule to serve contemporary society, courts consider both the circumstances surrounding the rule's initial appearance and developments affecting the relevant legal landscape.<sup>254</sup>

247. *Id.* at 361, 107 N.E.2d at 489 (Desmond, J., concurring).

248. 64 N.Y.2d 174, 183, 474 N.E.2d 580, 584, 485 N.Y.S.2d 220, 224 (1984); see *supra* note 25 and accompanying text.

249. 66 N.Y.2d 910, 912, 489 N.E.2d 744, 745, 498 N.Y.S.2d 775, 776 (1985); see *supra* notes 26-27 and accompanying text.

250. See *supra* notes 238-39 and accompanying text. See generally E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 2-3 (2d ed. 1982).

251. See *supra* notes 21-23 and accompanying text.

252. See *supra* note 23.

253. *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981) (common law is inappropriate when continuous attention, rather than "sporadic" or "ad hoc" address, is required); *id.* at 352 (Blackmun, J., dissenting) (common law useful when case-by-case resolution necessary); CALABRESI, AGE OF STATUTES, *supra* note 205, at 163 (proper judicial lawmaking today "will also occur in areas in which, despite the usual demands of modern society for quick and certain rules, a slow judicial development of a new rule is still acceptable or even desirable").

254. See generally CALABRESI, AGE OF STATUTES, *supra* note 205, at 120-45. Calabresi also mentions a third factor: the effect judicial action or inaction will have on the legislature with respect to the rule. With regard to this factor, which Calabresi calls "[a]symmetries in inertia," *id.* at 124, the courts should be most inclined to revise a rule of dubious current value when the legislature is unlikely to address the issue otherwise. See *id.* at 124-29; see also Breitel I, *supra* note 203, at 768 (courts will consider "the ease or difficulty with which . . . [a statute] may be amended"). Under this view, by resisting much needed amendment to the right of privacy statute twice in the last decade, see *infra* note 362, the legislature is signaling the court that revision of the statute, whose entire current application

When assessing the origin of a rule, courts first examine its age<sup>255</sup>—most agree that the older the rule, the more willing a court will be to change it because it is more likely to be obsolete.<sup>256</sup> New York's right of privacy statute, passed in its essential form over seventy-five years ago,<sup>257</sup> is an old rule. Although rules obsolesce at different rates, older rules are less likely to be responsive to current problems.<sup>258</sup> While the statute still achieves its purpose,<sup>259</sup> it fails to address certain contemporary exploitations.<sup>260</sup>

Also, courts consider the circumstances of the rule's creation.<sup>261</sup> If the legislature established the rule through deliberation and temperance, the rule will receive far more deference than one created through inadvertance or overreaction.<sup>262</sup> In passing the right of privacy statute, the New York Legislature quickly and decisively responded<sup>263</sup> to the outrageous invasion of Ms. Roberson's right to be let alone<sup>264</sup> by creating privacy rights vesting in the individual.<sup>265</sup> Extensive public debate preceding enactment assured that the statute properly remedied that situation.<sup>266</sup> The circumstances behind the right of privacy statute indicate a willingness to protect individuals from exploitation generally. The right of publicity is merely another form of protection, albeit commercial. Thus, a court should not hesitate to create a right of publicity.

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is limited, requires judicial action. In essence, however, this argument restates the legislative acquiescence doctrine discredited subsequently. See *infra* notes 307-12 and accompanying text.

255. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 131-34.

256. See Stone, *The Common Law in the United States*, in THE FUTURE OF THE COMMON LAW 123-25 (1937) (endurance of old rule indicates its universality). But see Traynor, *supra* note 218, at 414 (mere fact of rule's endurance discourages its testing and consequent change to comport with new realities).

257. Compare 1903 N.Y. Laws ch. 132, §§ 1-2 with N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987).

258. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 132-33 ("likelihood that a new statute is based on distinctions that are not currently valid is much less than if the statute were old").

259. See *supra* note 136 and accompanying text.

260. See *supra* notes 145-96 and accompanying text.

261. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 120-45.

262. See *id.* at 132 ("newborn statute may be the result of inadvertence, overreaction to a particular set of events, or a legislative response to temporary majority at war with more persistent societal views"); Breitel I, *supra* note 203, at 768 (courts will consider "the base of public support for the statute, the care and deliberateness with which its purpose was made known and promoted, and the ease or difficulty with which it was enacted").

263. See *supra* notes 83-87, 262 and accompanying text.

264. See *supra* note 75.

265. See 1903 N.Y. Laws ch. 132, §§ 1-2.

266. See *supra* notes 83-86 and accompanying text.

Furthermore, courts examine the policy behind the rule.<sup>267</sup> Creation of the right of privacy statute, first theorized thirteen years before its enactment,<sup>268</sup> broadened protection of individuals to include their right to be let alone.<sup>269</sup> A rule intended to expand rights, such as New York's right of privacy statute,<sup>270</sup> is more properly expanded, by the recognition of a common law right of publicity in this case, than one that denied or restricted rights.<sup>271</sup>

In addition, the courts examine how the legal landscape—*i.e.*, the legal rules and moral principles currently prevailing—<sup>272</sup> surrounding the rule has changed since its creation.<sup>273</sup> In essence, courts using this process seek to apply “some concept of what the law ought to be,”<sup>274</sup> and can base such a decision only on policy.<sup>275</sup> This

267. See Breitel I, *supra* note 203, at 768; see also Wellington, *supra* note 209, at 233. Wellington distinguishes principle from policy—“the latter is an instrumental justification for a rule, while the former is not.” *Id.* at 223-24. According to him:

The breach of a strong duty (one created by a rule that is justified primarily by a principle) empowers a court to pay less attention, in the remedy it fashions, to the surprise of the defendant than does the breach of a weak duty (one created by a rule primarily justified by a policy).

*Id.* at 233.

268. See Warren & Brandeis, *supra* note 37, at 193.

269. See *supra* notes 73-99 and accompanying text.

270. See *id.* Amendments exempting certain practices of photographers and merchants have subsequently narrowed the scope of protection provided by the statute. See N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1987).

271. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 139-40; *cf.* Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957), *quoted in* Illinois v. City of Milwaukee, 406 U.S. 91, 103 n.5 (1972).

272. See Wellington, *supra* note 209, at 231.

273. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 129-31.

274. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608 (1958) [hereinafter Hart], *quoted in* Friedmann, *supra* note 216, at 823. As Friedmann elaborated:

[O]utside a “core of settled meaning,” there is “a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. . . .” The application of the law to specific cases in the penumbra area is admitted not to be a matter of logical deduction and reasoning. “[T]he criterion which makes a decision sound in such cases is some concept of what the law ought to be.”

Friedmann, *supra* note 216, at 823 (quoting Hart, *supra*, at 607-608).

275. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 349 (1981) (Blackmun, J., dissenting) (“[w]hen choosing the precise legal principles to apply, common law courts draw upon relevant standards of conduct available in their communities”). In an earlier case, Judge Learned Hand stated:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sym-

analysis includes an examination of the common law around the rule,<sup>276</sup> related statutes,<sup>277</sup> constitutional law<sup>278</sup> and scholarly discussion of the issue.<sup>279</sup>

Applying such an analysis to the right of publicity question, a court would find that although the age of regional telegraphic communications has given way to the modern era of media ubiquity, New York's right of privacy statute retains its turn of the century form.<sup>280</sup> The persona, however, has assumed a public value entirely distinct from its traditional meaning.<sup>281</sup> Judges and legislators in other states have ascertained and adjusted to this development through common law and statutory lawmaking.<sup>282</sup> Scholars, too, support the concept of a right of publicity with virtual unanimity.<sup>283</sup> It is both timely and fitting that courts extend New York's right of privacy, an expansionist rule in the first place,<sup>284</sup> to provide plaintiffs with full protection of their personas.<sup>285</sup>

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pathetic and imaginative discovery is the surest guide to their meaning. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *quoted in* Friedmann, *supra* note 216, at 831; *id.* at 826 (policy element in judicial decision making may be refined, "[b]ut there must always remain a point at which a choice has to be made").

276. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 129; Friedmann, *supra* note 216, at 838 (appropriate to fashion common law when rule occupies position in broad common law field); Wellington, *supra* note 209, at 236.

277. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 129-30; Friedmann, *supra* note 216, at 837 (recent debate of pertinent legislation should discourage courts from making law); Wellington, *supra* note 209, at 236.

278. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 130; Wellington, *supra* note 209, at 236.

279. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 131; Wellington, *supra* note 209, at 237 (political platforms, speeches and campaign promises; public opinion polls; and professional articles).

280. Compare N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987) with 1903 N.Y. Laws ch. 132, §§ 1-2.

281. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973).

282. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 824, 603 P.2d 425, 431, 160 Cal. Rptr. 323, 329 (1979) (en banc) (recognizing non-descendible right of publicity); *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 145, 296 S.E.2d 697, 705 (1982) (recognizing descendible right of publicity); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 403, 280 N.W.2d 129, 140 (1979) (extending right of publicity's scope to nicknames). See *supra* note 11 for statutes establishing, to a greater or lesser degree, a right of publicity under state law.

283. See *supra* note 12.

284. See *supra* notes 269-71 and accompanying text.

285. See *supra* note 271 and accompanying text (expansionist rule allows greater common law development); *supra* notes 73-99 and accompanying text (demonstrating that right of privacy statute expanded protectable rights of New York plaintiffs).

### C. Rationales for Judge-Made Law

Presuming the desirability of the right of publicity, some authority maintains that only legislatures should create the right because courts are not empowered to make such law.<sup>286</sup> New York's Legislature, however, has failed to augment the statute's protection of individuals in any manner,<sup>287</sup> least of all to extend protection to voice, style and personal attributes, to non-commercial appropriations and to heirs and legatees.<sup>288</sup> Given the New York Legislature's inertia toward creation of a right of publicity and the right's amenability to judicial acknowledgement in the state, this Section considers the lack of power argument in the context of various arguments proffered by supporters of judge-made law to counter it.

Supporters of judicial lawmaking give several justifications for their position.<sup>289</sup> First, under what is known as the implicit delegation doctrine, they assert that by failure to act, elective bodies have

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286. See *infra* notes 294-306 and accompanying text.

287. In both 1976 and 1977, the New York State Law Revision Commission proposed amendments to New York's right of privacy statute so that the law might include Prosser's intrusion branch of the privacy tort. Memorandum of the Law Revision Commission Relating to Expansion of the Civil Right of Privacy, [1977] N.Y. LAW REV. COMM'N REP., reprinted in [1977] N.Y. Laws 2231 (McKinney); Memorandum of the Law Revision Commission Relating to Expansion of the Civil Right of Privacy, [1976] N.Y. LAW REV. COMM'N REP., reprinted in [1976] 2 N.Y. Laws 2234 (McKinney). The bills, which would have added language protecting an individual from "an unreasonable invasion of privacy that would be highly offensive to a reasonable person," N.Y.S. 3304, N.Y.A. 6771, 200th Sess. (1977); N.Y.S. 7693, N.Y.A. 10351, 199th Sess. (1976), languished in committee without ever reaching the full house for a vote. Legislative History of the Law Revision Commission's Recommendation Submitted in 1977 Relating to Expansion of the Civil Right of Privacy, [1978] N.Y. LAW REV. COMM'N REP., reprinted in [1978] N.Y. Laws 1603 (McKinney); Legislative History of the Law Revision Commission's Recommendation Submitted in 1976 Relating to Expansion of the Civil Right of Privacy, [1977] N.Y. LAW REV. COMM'N REP., reprinted in [1977] 2 N.Y. Laws 2189 (McKinney).

288. Legislators have not proposed any right of publicity amendments, although commentators have suggested it. See, e.g., Sims, *supra* note 12, at 498.

289. See generally CALABRESI, AGE OF STATUTES, *supra* note 205, at 92-96. This Note does not consider judicial lawmaking necessitated by the passage of statutes with terms so broad in meaning that construction inevitably gives way to creation. The author believes such judicial activity more closely resembles statutory construction than common law creation. See Traynor, *supra* note 218, at 419-20. Nonetheless, the purposeful enactment of broad statutes is a compelling justification for judicial lawmaking in the statutory era. See Breitel I, *supra* note 203, at 761. Chief Judge Breitel has stated the argument this way:

The legislature often legislates in broad stark terms with the intention of passing deliberately to the courts the burden of further elaboration in lawmaking upon the skeletal statutory schemes enacted. . . . Statutes using standards of reason, standards of discretion, or other terms of broad definition are designed to leave the balance of the lawmaking

implicitly delegated this power to the courts.<sup>290</sup> Although the legislature's failure to act may imply authorization of judges to make law, other explanations often exist. Legislative inaction may indicate distraction, time insufficiency or evasion of politically sensitive issues.<sup>291</sup> Cognizant of these other explanations,<sup>292</sup> supporters of the implicit delegation doctrine reason, in essence, that necessity justifies recognition of a rule.<sup>293</sup>

Such reasoning, however, encourages the courts to take an aggressive antimajoritarian approach to non-constitutional matters,<sup>294</sup> thus undermining the separation of powers principle.<sup>295</sup> Not only does an "end-justifies-the-means" attitude concerning judicial law-making disregard this country's embrace of a tripartite government empowering the legislature with primary responsibility for lawmaking but it also obscures the policies supporting that choice. On the one hand, through bicameralism,<sup>296</sup> opposing lobbies,<sup>297</sup> rules for deliberation<sup>298</sup>

process to the courts, and sometimes to the executive.

*Id.*; cf. Friedmann, *supra* note 216, at 829 (legislator can "transfer a certain legal branch to regulation by judicial fiat . . . when he . . . establishes a dominant directive and enforceable general legal principles controlling this field, a principle that the judge has to develop only to find (not make) the law in the individual case").

290. CALABRESI, AGE OF STATUTES, *supra* note 205, at 92. "[T]he legislative determination to leave certain matters to the courts is often consciously made by the negative device of sheer inaction." Breitel I, *supra* note 203, at 762. *Contra* City of Milwaukee v. Illinois, 451 U.S. 304, 332 n.24 (1981) (failure to enact a statute is "not the best of guides to legislative intent") (citation omitted).

291. See Breitel I, *supra* note 203, at 762 ("it is not always possible to distinguish deliberate deferment in the legislative process from inaction resulting from deadlock or the evasion of responsibilities because of fear of political consequences"); Hart, *Comment*, *supra* note 203, at 47 ("possible reasons for the legislature's failure to act, and hence the possible interpretations of the silence, are always numerous and sometimes innumerable").

292. See Breitel I, *supra* note 203, at 762.

293. See City of Milwaukee v. Illinois, 451 U.S. 304, 325 (1981) ("one of the major concerns underlying the recognition of federal common law in *Illinois v. Milwaukee*" was "that Illinois did not have any forum in which to protect its interests unless federal common law were created"); see also Breitel I, *supra* note 203, at 762 (implicitly).

294. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 163-64.

295. *Id.* at 164; Friedmann, *supra* note 216, at 822.

296. See, e.g., U.S. CONST. art. I, art. II, art. III; N.Y. CONST. art. I, art. II, art. III.

297. See HART & SACKS, LEGAL PROCESS, *supra* note 209, at 740, 829-34 (citations omitted); Breitel I, *supra* note 203, at 762; Wellington, *supra* note 209, at 238, 240-41.

298. In New York, for example, neither house may pass a bill "unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage." N.Y. CONST. art. III, § 14. The requirement may only be circumvented by the Governor, but only upon

and the sheer size of our legislatures,<sup>299</sup> our system of lawmaking engenders inertia. In turn, this legislative inertia creates a presumption of the status quo and hinders the progress of worthy causes.<sup>300</sup> On the other hand, deliberation by a large representative body also protects the public from the excesses of special interests<sup>301</sup> and the dangers of shortsighted statutes.<sup>302</sup> Therefore, the mere need of a right of publicity in New York<sup>303</sup> is not sufficient justification for its recognition by the state's courts.

In addition, legislative inaction sometimes reflects the will of the public to maintain the status quo.<sup>304</sup> In effect, judicial lawmaking under these circumstances overrules the legislature.<sup>305</sup> This situation, too, violates separation of powers and the policies behind it.<sup>306</sup>

The legislative acquiescence doctrine, a corollary of the implicit delegation doctrine, maintains that legislative inaction in the second instance, *i.e.*, after the court has made law, ratifies the common

presentation of a message of necessity outlining facts warranting an immediate vote. *Id.* Nonetheless, the legislators must still have the bill on their desks in final form before passage. *Id.* In addition, no bill shall "be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature." *Id.* Bills "appropriating the public moneys or property for local or private purposes" require the assent of two-thirds of both houses for passage. *Id.* § 20. Finally, three-fifths of the members of either house is necessary to constitute a quorum for final passage of any tax or appropriations bill. *Id.* § 23. *See generally* HART & SACKS, *LEGAL PROCESS*, *supra* note 209, at 745-47.

299. The United States Congress has 535 members. *See* CONGRESSIONAL DIRECTORY, *supra* note 213, at 263 (Senate), 308 (House); 1986-87: THE UNITED STATES GOVERNMENT MANUAL, OFFICE OF THE FEDERAL REGISTER 23-24 (1986). The New York State Legislature contains 211 people. *See* THE RED BOOK, *supra* note 214, at 31. Forty-one other states have legislatures of 100 or more persons. *See* STATE ELECTIVE OFFICIALS & THE LEGISLATURES 1987-88, THE COUNCIL OF STATE GOVERNMENTS vi (1987) (table presenting number of legislators in each state); *see also* BOOK OF STATES, *supra* note 213, at 87 (same).

300. *See* Traynor, *supra* note 218, at 414.

301. *See, e.g.*, HART & SACKS, *LEGAL PROCESS*, *supra* note 209, at 895-902 (quoting Regier, *The Struggle for Federal Food and Drug Legislation*, 1 *LAW & CONTEMP. PROBS.* 3-12 (1933)) (describing slow but eventually successful passage of Food and Drug Act despite minority opposition of powerful business interests).

302. Some authorities maintain that not even the deliberation of large legislatures is sufficient to catch all faulty statutes. *See* Traynor, *supra* note 218, at 426-27 (no quality control on statutes); Breitel, *The Courts and Lawmaking*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 20-21 (Paulsen ed. 1959) [hereinafter Breitel II].

303. *See supra* notes 136-96 and accompanying text.

304. *See* Breitel II, *supra* note 302, at 12.

305. *See, e.g.*, *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied and appeal dismissed*, 423 U.S. 808 (1975) (requiring municipalities to provide realistic opportunity for low and moderate income housing in their land use regulations).

306. *See supra* notes 294-302 and accompanying text.

law just made.<sup>307</sup> This view assumes that law is ubiquitous, that there is no non-law.<sup>308</sup> Accordingly, when the legislature omits to proscribe an act, such as exploitation of another's right of publicity, it effectively approves the act.<sup>309</sup> Under this view, the legislature is an instrument chartered to do nothing in order that something may be done, *i.e.*, that the status quo, with its newly created common law, may be maintained. The legislature, however, is not an institution for the perfunctory recordation of previously determined initiatives, but rather, a deliberative body.<sup>310</sup> Legislative inaction reflects an absence of agreement rather than a ratification; it is not an enactment of the status quo that would render law, which had originally been beyond the scope of judicial lawmaking, interstitial<sup>311</sup> and thus capable of common lawmaking. In other words, the New York Legislature's failure to invalidate a plaintiff's recovery on what were apparently right of publicity grounds does not ratify the common law made in that case.<sup>312</sup>

A third argument justifies judicial power to make law on the ground that such judge-made rules are subject to legislative or popular revision, and hence are acceptable in a democracy.<sup>313</sup> This view,

307. *See supra* note 290.

308. *See* Breitel I, *supra* note 203, at 749.

309. *See id.*

310. In the words of H.L.A. Hart:

A legislature is a deliberative body. It is an instrument for arriving at a consensus, not an instrument for recording a consensus previously arrived at, as if by some mysterious emanation from the electorate. To arrive at a consensus, the legislature follows an elaborate procedure of investigation and consideration eventuating in approval of particular form of words as law. For the courts to treat the legislature as making law by any other means is to treat this procedure and this agreement upon a particular form of words as mere froufrou—without any real function. But it is not froufrou.

Hart, *Comment*, *supra* note 203, at 46-47.

311. The term "interstitial law," as used in this Note, connotes unwritten law that comports with previously articulated rules, but which may only be arrived at by substantial construction and specific application. While courts sometimes venture beyond the interstitial when making law, *see supra* note 305, and some commentators support such activity, *see, e.g.*, Breitel I, *supra* note 203, at 754-55; Traynor, *supra* note 218, at 420, the strong policies underlying this country's separation of powers principle militate against approval of such judicial lawmaking. *See supra* notes 289-302 and accompanying text.

312. *See supra* notes 241-47 and accompanying text.

313. *See* CALABRESI, AGE OF STATUTES, *supra* note 205, at 92-93; *see also* Friedmann, *supra* note 216, at 838 ("the propriety of such judicial initiative is not diminished by the fact that the legislature may proceed to renounce judicial innovation"); Hart, *Comment*, *supra* note 203, at 44 (legislature performs function of review and correction of "grounds of decision developed by the courts"). *Compare*



advocated by those who feel judges should not abdicate their law-making function in the name of judicial restraint,<sup>314</sup> also emphasizes the inertia of the legislature and the public.<sup>315</sup> Furthermore, it implies that judge-made law, as much as legislation generally, reflects the will of the people. Actually, this view suggests that the law does not reflect the beliefs of the majority at all but those of an organized minority with the initiative to seek legal change in the courts and the legislatures. In other words, the interested, who regularly vote, also sue, and the apathetic, who usually do not vote, also do not sue. Therefore, the interested instigate both statutes and decisions and the apathetic are represented only by the foresight of the official lawmakers. Perhaps true, this practical analysis nevertheless conflicts with the theoretical division of powers discussed above.<sup>316</sup>

When analyzed closely, moreover, the inherent limitation argument

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Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (recognizing action for nuisance under federal common law when Congress had not acted on interstate pollution) with City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (refusing to uphold action for nuisance under federal common law after Congress passed statute addressing the problem).

314. See Traynor, *supra* note 218, at 427 (implicitly).

315. See Breitel I, *supra* note 203, at 769.

Popular lawmaking can occur in two ways: referendum or initiative. Referendum is "[t]he process of referring to the electorate for approval a proposed new State constitution or amendment (constitutional referendum) or of a law passed by the legislature (statutory referendum)." BLACK'S LAW DICTIONARY 1152 (5th ed. 1979). Initiative, on the other hand, is "[a]n electoral process whereby designated percentages of the electorate may initiate legislative or constitutional changes through the filing of formal petitions to be acted on by the legislature or the total electorate." *Id.* at 705. In other words, "the referendum enables the voters to accept or reject the legislature's proposals, while the initiative allows the voters both to make their own proposals and to pass upon the proposals of other voters." Ranney, *The United States of America*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 67 (D. Butler ed. 1978).

Every state except Delaware permits constitutional referendums. See BOOK OF STATES, *supra* note 213, at 69. Fewer states, however, allow direct statutory lawmaking. As of 1986, 37 states and the District of Columbia permitted statutory referendums, see *id.* at 215-16 (table), while only 21 states and the District of Columbia allowed statutory initiatives. See *id.* at 214 (table). California "stands alone among the large urban industrial states . . . in employing both the constitutional amendment initiative and direct statutory initiative." Lee, *California*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 88 (D. Butler ed. 1978). New York, in contrast, does not even permit initiative. See BOOK OF STATES, *supra* note 213, at 214 (table). See generally THE POPULAR INTEREST VERSUS THE PUBLIC INTEREST . . . A REPORT ON THE POPULAR INITIATIVE, NEW YORK SENATE RESEARCH SERVICE, TASK FORCE ON CRITICAL PROBLEMS (1979). In addition, use of referendums is limited in New York. The constitution only permits referendums on matters affecting the state's debt, see N.Y. CONST. art. VII, §§ 11, 14, art. XVIII, § 3, and limited situations effecting local governments. See *id.* art. IX, § 1(d), (h). Popular lawmaking has not significantly effected New York.

316. See *supra* notes 294-302 and accompanying text.

proves circular. Limitation, in this case by legislative veto or popular initiative, does not justify a rule, here the propriety of judicial lawmaking. The ability to override judicial determinations does not justify them in the first place. It merely reins in the judiciary once it has improperly acted.

The fourth justification for judicial lawmaking emphasizes the notion that courts do look at election returns, because of the nature of judicial selection,<sup>317</sup> to ascertain the legal landscape.<sup>318</sup> While judges are capable of reading the public will, they do so through institutional blinders.<sup>319</sup> This myopia results from several factors. First, judges can decide cases only on the facts presented,<sup>320</sup> and, generally speaking, those decisions can address only those issues raised by counsel.<sup>321</sup> While the analyses of judges often exceed the issues at hand, the rule of dictum<sup>322</sup> specifically limits the persuasiveness of such assertions.<sup>323</sup> Second, the legislature's apparatus for ascertaining social conditions surpasses that of the court in the resolution of conflicts.<sup>324</sup> Legislatures, unlike the courts, provide greater access to all individuals,<sup>325</sup> the opportunity for more thorough investigation,<sup>326</sup> and

317. See generally Note, *Insulating Incumbent Judges From the Vicissitudes of the Political Arena: Retention Elections As a Viable Alternative*, 15 *FORDHAM URB. L.J.* 743 (1987).

318. See CALABRESI, *AGE OF STATUTES*, *supra* note 205, at 93-94; Wellington, *supra* note 209, at 240 ("no better process available for selecting a socially desirable policy" than judicial process).

319. Although certain judges have tremendous vision, as an institutional matter, judicial procedure, political dependence and systematic isolation narrow the scope of judicial opinions. See Breitel I, *supra* note 203, at 769.

320. See *id.* at 749 ("law is made only at the instigation of those interested").

321. *Id.* at 770 ("courts are limited to viewing the problem as presented in a litigated case within the four corners of its record"); Friedmann, *supra* note 216, at 839 (because courts "develop the law on a case-by-case basis they can not as can the legislature, undertake the establishment of a new legal institution, 'an elaborate procedure of investigation and consideration eventuating in the approval of a particular form of words as law' ") (citations omitted).

322. See JONES, *LEGAL METHOD*, *supra* note 204, at 113-14. "Dicta are pronouncements on points which need not be considered in order to reach a decision and are, therefore, in most cases, pronouncements on points on which the court has not had the benefit of argument." *Id.* at 114. As a result, such pronouncements "may be persuasive, but are not binding." *Id.* at 113.

323. *Id.*

324. See Breitel I, *supra* note 203, at 762; Hart, *Comment*, *supra* note 203, at 45.

325. See Breitel I, *supra* note 203, at 762; Wellington, *supra* note 209, at 238. Litigation is too expensive for many people to test issues affecting them, and even if they have the money, the doctrines of justiciability may preclude a judicial determination on the merits of their issue.

326. See Breitel I, *supra* note 203, at 762. *But see* Wellington, *supra* note 209, at 240-41. In the courts, on the other hand, the rules of evidence constrain investigation. See, e.g., *FED. R. EVID.* 401-402 (permitting admission of narrowly

public debate of countervailing factors.<sup>327</sup> Courts can neither scan the law's foreground nor probe its horizon. Thus, even if New York voters registered overwhelming support for acknowledgment of a right of publicity, judges would not be justified in recognizing the right at common law.

Under a fifth theory, judges should follow their own values in developing common law since it is their educated and disinterested sense of the community interest that is sought.<sup>328</sup> The founding fathers, aware that fair adjudication requires independence of judges, largely insulated the judiciary from outside criticism.<sup>329</sup> Although such seclusion secures for the judiciary an independence that is both necessary for unbiased dispute resolution and foreign to the legislature,<sup>330</sup> removal from a position of political accountability also renders judges less responsive to the needs of the community.<sup>331</sup> Furthermore, this paternalistic view does not comport with respect for our basic majoritarian institutions.<sup>332</sup>

The best and classic justification for judicial lawmaking power, however, emphasizes "the subservience of courts to principles, to rational decisionmaking, and to the whole fabric of the law."<sup>333</sup> The

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defined "relevant evidence"); *id.* 611(c) (proscribing use of leading questions on direct examination in most circumstances); *id.* 802 (prohibiting admission of hearsay evidence in general).

327. See Breitel I, *supra* note 203, at 762; see also HART & SACKS, LEGAL PROCESS, *supra* note 209, at 746-47 (Senate filibuster). *But see id.* at 746 (discussing time limitations on floor debate in Senate and House, and ability of Rules Committee to control debate in latter).

328. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 94-96; Breitel I, *supra* note 203, at 766 (scholars "believe the judicial process, as compared with the political legislative process, is a mine of stimulating opportunities to discuss, develop and rationalize the law. After all, *more judges than legislators read the law reviews and treatises*") (emphasis added); Friedmann, *supra* note 216, at 836 ("the importation of personal ideology or prejudice into a judicial interpretation, in the face of accepted principles of statutory or common law interpretation . . . is extremely rare"); Hart, *Comment*, *supra* note 203, at 42 ("courts are the only institution which is manned by personnel with the training that is requisite . . . for the authoritative exposition of principle").

329. See U.S. CONST. art. III, § 1 (particularly lifetime tenure and irreducible salary clauses).

330. See Breitel I, *supra* note 203, at 761.

331. See *id.* at 770.

332. See *supra* notes 294-302 and accompanying text.

333. CALABRESI, AGE OF STATUTES, *supra* note 205, at 96. Another commentator states:

The judicial process is based on reasoning and presupposes . . . that its determinations are justified only when explained or explainable in reason. No poll, no majority vote of the affected, no rule of expediency, and certainly no confessedly subjective or idiosyncratic view justifies a judicial determination. Emphatically, no claim of might, physical or political, justifies a judicial determination.

Breitel I, *supra* note 203, at 772.

judicial process, properly administered, can develop law only incrementally.<sup>334</sup> When courts express this power cautiously, they can advance society.<sup>335</sup> Indeed, one scholar has stated that the strength of the common law derives "from the manner in which it has been forged from actual experience by the hammer and anvil of litigation."<sup>336</sup> While judicial lawmaking raises theoretical problems regarding the separation of powers,<sup>337</sup> as a pragmatic matter, the slow development of common law has benefited society<sup>338</sup> and no legislature has banned common law in its state.<sup>339</sup> Practically, the slow development of common law provides legislatures with the opportunity to observe new approaches without taking responsibility for them. If it disagrees with the approach, the legislature can overrule the decision.<sup>340</sup> In conclusion, the slow development of common law consistent with existing rules constitutes proper judicial action.

In sum, courts have historically adjudicated disputes by two means: interpreting statutes and making common law.<sup>341</sup> While today's active legislatures address a much broader spectrum of legal issues than

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334. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 4.

335. See Wellington, *supra* note 209, at 236; *cf.* Breitel I, *supra* note 203, at 770-71 (antimajoritarian judiciary "is not the proper organ for lawmaking on the molar scale in a democratically organized society").

336. Stone, *The Common Law in the United States*, in THE FUTURE OF THE COMMON LAW 124 (1937).

337. See *supra* notes 294-302 and accompanying text.

338. The development of products liability law in New York powerfully illustrates legal advancement affected by judicial lawmaking. See, e.g., Micallef v. Miehle Co., 39 N.Y. 376, 385-86, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 121-22 (1976) (holding that manufacturer cannot avoid liability for failure to install safety device merely because danger was obvious); Codling v. Paglia, 32 N.Y.2d 330, 335, 298 N.E.2d 622, 624, 345 N.Y.S.2d 461, 463 (1973) (extending liability of manufacturer of defective product to bystander); Goldberg v. Kollsman Instrument, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963) (indicating that manufacturer of defective component part might be liable under warranty in appropriate case); MacPherson v. Buick Motor, Inc., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916) (holding that manufacturer may be liable in negligence for injuries resulting from product that is unreasonably dangerous when manufactured defectively despite lack of privity with plaintiff).

339. *Cf.* U.C.C. § 1-103 (1978) (adopting common law when code does not speak to issue).

340. See, e.g., CAL. CIV. CODE § 990 (West Supp. 1987) (superseding *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (en banc), by permitting descendibility of decedent's right of publicity regardless of its exploitation by decedent); 1903 N.Y. Laws ch. 132, §§ 1-2 (current amended version at N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987)) (superseding *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), by creating right of privacy).

341. See *supra* note 212 and accompanying text.

those of a century ago,<sup>342</sup> room still exists for judicial lawmaking.<sup>343</sup> The limited protection which New York's right of privacy statute gives to individuals with marketable personas, and especially the preclusion of assignment and descent of rights in one's name or likeness,<sup>344</sup> render acknowledgement of the right of publicity by New York courts appropriate. Because explication of the right of publicity requires little technical expertise<sup>345</sup> and may be done on a case-by-case basis,<sup>346</sup> the right is particularly amenable to judicial recognition. Technically, such judicial action would violate the separation of powers doctrine.<sup>347</sup> As a practical matter, however, the practice should be promoted because it provides the legislature with alternatives for which it need not take responsibility and which it may overrule if necessary.<sup>348</sup>

#### IV. Conclusion

New York courts have ample justification for allocating to the legislature the burden of inertia surrounding recognition of the right of publicity.<sup>349</sup> Although the state's right of privacy statute was designed to redress emotional discomfort,<sup>350</sup> today's plaintiffs often use it to compensate for pecuniary harm.<sup>351</sup> The right of publicity, on the other hand, specifically addresses commercial harm.<sup>352</sup> Logic dictates that the courts should apply the doctrine implicated rather than stretch an ill-fitting doctrine to remedy this situation. In addition, the statute's scope, limited to the unauthorized publication of a plaintiff's photograph for advertising purposes situation<sup>353</sup> pre-

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342. See *supra* notes 213-15 and accompanying text.

343. See *supra* notes 144-96 and accompanying text.

344. See *id.*

345. See *supra* notes 239-50 and accompanying text.

346. See *supra* notes 251-53 and accompanying text.

347. See *supra* notes 294-302 and accompanying text.

348. See *supra* notes 333-40 and accompanying text.

349. According to one scholar:

It is the judgmental function . . . of deciding when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it. It is to be the allocator of that burden of inertia which our system of separation of powers and checks and balances mandates.

CALABRESI, AGE OF STATUTES, *supra* note 205, at 164.

350. See *supra* notes 88-92 and accompanying text.

351. See *supra* notes 137-43 and accompanying text.

352. See *supra* notes 114-19 and accompanying text.

353. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976 & Supp. 1987).

sented in *Roberson*,<sup>354</sup> fails to reach abuses of which plaintiffs now complain. These abuses, which include exploitation of an individual's sound<sup>355</sup> or style<sup>356</sup> and even appropriation of a decedent's name or likeness,<sup>357</sup> fall under the aegis of the right of publicity.<sup>358</sup> Finally, strict construction of the statute<sup>359</sup> further constrains its application.<sup>360</sup>

On the one hand, the courts may spur reform "by deliberately stressing an antiquated principle, in the expectation that the legislature will take remedial action."<sup>361</sup> Legislative inaction regarding the right of publicity,<sup>362</sup> however, indicates that recognition of the law requires judicial action.<sup>363</sup> Therefore, by judging the right of privacy rule too limited and developing right of publicity principles to supplement the statute, the courts may ameliorate the situation, prompt statutory reform<sup>364</sup> or even spur majoritarian reaffirmation of the old rule.<sup>365</sup>

Although the state's courts must justify any right of publicity rule they develop and keep it current,<sup>366</sup> they need not "promulgate the new . . . to find that the old fails."<sup>367</sup> In other words, New York courts may recognize a common law right of publicity, overruling its traditional prohibition, without determining the parameters of the right except as regards the plaintiff. In addition, the courts need not obtain majority support for the new common law rule.<sup>368</sup> The

354. 171 N.Y. 538, 64 N.E. 442 (1902).

355. See *supra* note 164 and accompanying text.

356. See *supra* note 165 and accompanying text.

357. See *supra* notes 100-105 and accompanying text.

358. See generally *supra* notes 100-33 and accompanying text.

359. See *supra* note 190.

360. See *supra* note 191.

361. Friedmann, *supra* note 216, at 838; see CALABRESI, AGE OF STATUTES, *supra* note 205, at 156. Another commentator has stated: "The organ for applying law, in this case a court, has no choice whether to decide or not; it cannot avoid decision, whatever one may think; it must decide for one side or another. It does." Breitel I, *supra* note 203, at 749. ♀

362. See *supra* note 287.

363. Cf. *supra* notes 144-96 and accompanying text (presenting other limitations of the statute); see also *supra* note 254 (discussing whether courts should consider asymmetries in inertia before making law).

364. See Friedmann, *supra* note 216, at 842 ("an important aspect of judicial creativeness . . . [is] the development of new principles, not in substitution but in preparation for statutory reform").

365. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 165.

366. See Wellington, *supra* note 209, at 225.

367. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 165.

368. See Wellington, *supra* note 209, at 238 (majority support for judicially created policies is not necessary for we "know enough about interest group politics and public apathy to be confident that many legislative and executive policies would not be endorsed by a popular majority").

examples of federal courts,<sup>369</sup> and state courts<sup>370</sup> and legislatures,<sup>371</sup> however, provide strong support for recognition of a common law right of publicity in New York. The approach of California, whose courts recognized a right of publicity<sup>372</sup> and whose legislature subsequently superseded that common law right by creating a statutory descendible right of publicity,<sup>373</sup> is especially significant because its media industry rivals that of New York.<sup>374</sup> Finally, the common law may attach to outmoded statutes as much as to decisional law.<sup>375</sup> In this way, the New York courts may complement the legislature's action by fulfilling its policy of protecting an individual's persona from commercial exploitation.<sup>376</sup>

369. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953 (1980); *Frank Lloyd Wright Found. v. Heinz*, 229 U.S.P.Q. 201 (W.D. Wis. 1986); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); see also *supra* notes 21-23 and accompanying text.

370. See, e.g., *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982) (Supreme Court of Georgia decided, on certified questions, that common law of the State contained a right of publicity which could descend without lifetime exploitation. This case is particularly noteworthy because Georgia also has a right of privacy, recognized at common law in *Pavesich*, see *supra* notes 47-49 and accompanying text, which closely resembles that in New York); see also *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (superseded by statute creating descendible right); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

371. See *supra* note 11.

372. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

373. See CAL. CIV. CODE §§ 990, 3344 (West Supp. 1987).

374. See generally *100 Largest Media Companies*, Advertising Age, June 27, 1985, *passim*.

375. In other words, just as a common law right of publicity may fill interstices in the common law, it may also extend the right of privacy statute to address commercial aspects within right of publicity doctrine. See CALABRESI, AGE OF STATUTES, *supra* note 205, at 166; Breitel II, *supra* note 302, at 21-22 ("lawmaking role of the courts is not determined primarily by whether stated principles or rules of law are statutory or decisional in origin"), quoted with approval in Friedmann, *supra* note 216, at 833.

376. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 334 (1981) (Blackmun, J., dissenting). One scholar has expounded on the relationship:

Effective collaboration between legislatures and courts requires, on the one hand, that legislatures leave room in their enactments for the exercise by the courts of their distinctive function of reasoned elaboration of the law. It requires, on the other hand, that courts have a conception of their function which is adequate to enable them to make good use of the room which the legislatures leave[] them.

Hart, *Comment*, *supra* note 203, at 43.

In conclusion, while recognition of the right of publicity presents theoretical problems,<sup>377</sup> in practice such judicial action would cause little harm. Today's right of publicity, a creature of yesterday's courts,<sup>378</sup> has benefited society. Indeed, no legislature has rejected a court-made rule recognizing the right of publicity.<sup>379</sup> New York judges should no longer hesitate to follow the lead of their brethren throughout the country.

*Frederick R. Kessler*

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377. See *supra* notes 286-348 and accompanying text.

378. See *supra* notes 21-23 and accompanying text.

379. See CAL. CIV. CODE § 990 (West Supp. 1987) (superseding *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979), by permitting descendibility of right of publicity with exploitation by decedent); TENN. CODE ANN. § 47-25-1103 (1984) (superseding *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980), by permitting descendibility of right of publicity).



