

# UNMASKING THE RIGHT OF PUBLICITY

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## ABSTRACT

This Article examines the potential influence of psychoanalytic thought on the conception of publicity as a right distinct from privacy.

In the landmark case of *Haelan Laboratories v. Topps Chewing Gum*, Judge Jerome Frank articulated the modern right of publicity. The right is now most often seen to protect the strictly *commercial* value of one’s “persona”—the Latin-derived word originally meaning the mask of an actor. Among other criticisms, the right of publicity is frequently accused of lacking a coherent justification, permitting only economic redress against public harms to the persona, and stripping away individual identity by allowing for an alienable, proprietary right in one’s personality. Why might Judge Frank have been motivated to create a transferable intellectual property right in the *monetary* value of one’s persona distinct from the *psychic* harm to feelings, emotions, and dignity protected under the rubric of privacy?

Judge Frank was a leading figure in the American legal realist movement known for his unique and controversial “psychoanalysis of certain legal positions” through seminal works including *Law and the Modern Mind*, *Why Not a Clinical Lawyer-School?*, and *Courts on Trial*. His work drew heavily on the ideas of psychoanalytic thinkers, like Sigmund Freud and Carl Jung, to describe the distorting effects of infantile and unconscious wishes and fantasies on the decision-making process of legal actors and judges. For Judge Frank, the psychoanalytic interplay between dual parts of the personality supported the realist interpretation of lawmaking as a highly subjective and indeterminate activity. Indeed, though Judge Frank provided little rationale for articulating a personality right separate from privacy in *Haelan*, he had given a great deal of attention to the personality in his scholarly works.

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In the spirit of Judge Frank’s psychoanalytic jurisprudence, this Article suggests that the right of publicity’s aim, apart from the personal right to privacy, may be understood through the psychoanalytic conception of the personality—one divided into public and private spheres. In the psychological sense, the term *persona*, or “false self,” refers to an individual’s social façade or front that reflects the role in life the individual is playing. That is, as a metaphor for the actor and their mask, the *persona* is used to indicate the public face of an individual, i.e., the image one presents to others for social or economic advantage, as contrasted with their feelings, emotions, and subjective interpretations of reality anchored in their private “true self.”

However, the law’s continued reliance on a dualistic metaphor of the personality—i.e., divided sharply into inner (private) and outer (public) subparts—appears misguided amidst a growing technology, internet, and social media-driven need for interwoven privacy and publicity rights. The Article thus concludes by examining intersubjective personality theory, which might provide a useful conceptual update in its view of the personality as contextual, relational, and dependent on social interaction—rather than divided sharply between the public and private.

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## INTRODUCTION

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

Jerome Frank<sup>1</sup>

In the landmark 1953 case of *Haelan Laboratories v. Topps Chewing Gum*, Judge Jerome Frank articulated the modern right of publicity.<sup>2</sup> However, that influential decision shed little light on the right's conceptual boundaries or its proper justification.<sup>3</sup> The right of publicity is today seen to protect the strictly commercial value of one's "persona"<sup>4</sup>—the Latin-derived word originally meaning

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<sup>1</sup> JEROME N. FRANK, LAW AND THE MODERN MIND 76 (1930).

<sup>2</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (Frank, J.) ("...This right may be called a 'right of publicity.'"); *see also* *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 148 (3d Cir. 1982); J. THOMAS MCCARTHY, 1 RIGHTS OF PUBLICITY AND PRIVACY, § 1.8 (referring to Judge Frank as the right of publicity's "architect."); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204, 218-23 (1954); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1201 (1986); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1172-73 (2006); *cf.* JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 67 (2018) ("A careful reading of *Haelan Laboratories v. Topps Chewing Gum* indicates that it did not create anything new, but as more and more commentators claimed that the decision did, it was hard to put the genie back in the bottle.").

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

<sup>4</sup> *See, e.g.*, J. THOMAS MCCARTHY, "Persona", 1 RIGHTS OF PUBLICITY AND PRIVACY § 4:46 (2d ed.); Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Right of Publicity*, 20 COLUM.

the mask of an actor.<sup>5</sup> In part because the persona is an ephemeral concept lacking an accepted meaning under the law,<sup>6</sup> the right of publicity's doctrinal scope has not been clearly articulated<sup>7</sup> and its theoretical grounding remains shaky.<sup>8</sup> Among other criticisms, the right of publicity is frequently accused of lacking a coherent justification, allowing only for economic redress against harms to the public persona, and stripping away individual identities by allowing for an alienable, proprietary right in one's personality.<sup>9</sup> Why might Judge Frank have been motivated to create a transferable intellectual property right in the *monetary* value of one's objectified persona, or image, distinct from the inalienable, subjective *psychic* harm to feelings and dignity protected under the rubric of privacy?<sup>10</sup>

Judge Frank was a leading figure in the American legal realist movement known for his unique and controversial “jurisprudence of therapy,” or

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J.L. & ARTS 123 (1996); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47, 47 (1994) (“The right of publicity is a legal theory which enables individuals to protect themselves from unauthorized, commercial appropriations of their personas.”); *see also infra* note 46.

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

<sup>6</sup> *See, e.g.*, Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 829-935 (1997) (discussing the ambiguous nature of the term persona under right of publicity law) Rosina Zapparoni, *Propertising Identity: Understanding the United States Right of Publicity and its Implications—Some Lessons for Australia*, 28(3) MELBOURNE. L. REV. 23 (2004) (describing the persona as an “ephemeral” concept lacking a clear meaning under the law).

<sup>7</sup> *See, e.g.*, Rebecca Tushnet, *A Mask That Eats into the Face: Images and Right of Publicity*, 38 COLUMBIA J.L. & ARTS 157 (2015); Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 1539 (2017); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891 (2017).

<sup>8</sup> *See, e.g.*, Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2006); Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 173-74 (1993).

<sup>9</sup> *See, e.g.*, Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. REV. 185 (2012); Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999).

<sup>10</sup> *See, e.g.*, J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 28:6 (1997) (explaining that misappropriation “centers on damage to human dignity” while the right of publicity “relates to commercial damage to the business value of human identity.”).

“psychoanalysis of certain legal positions,”<sup>11</sup> through seminal works including *Law and the Modern Mind*,<sup>12</sup> *Why Not a Clinical Lawyer-School?*,<sup>13</sup> *Courts on and Trial: Myth and Reality in American Justice*,<sup>14</sup> and *Fate and Freedom: A Philosophy for Free Americans*.<sup>15</sup> His judicial philosophy drew heavily on the ideas of then-cutting edge psychoanalytic thinkers, like Sigmund Freud,<sup>16</sup> Jean Piaget,<sup>17</sup> and Carl Jung,<sup>18</sup> to describe the distorting effects of infantile and unconscious wishes and fantasies on the decision-making process of legal actors and judges.<sup>19</sup> For Judge Frank, the psychoanalytic interplay between disparate parts of the personality supported the realist interpretation of judging as a highly subjective and indeterminate activity.<sup>20</sup>

To this end, Judge Frank believed the “basic legal myth” is that the “Father-as-Infallible-Judge” simply deduces objective legal conclusions from rules.<sup>21</sup> He argued, rather, that judges arrive at decisions based largely on the subjective influences of their individual personalities.<sup>22</sup> In fact, Judge Frank thought that “the conventional image of the law,” i.e., that law is objective and precise, is “a mask, a false-face, made to suit unconscious childish desires.”<sup>23</sup> And Judge Frank’s judicial philosophy was concerned with distinguishing between what he labeled the “public-private dichotomy,” in effect the “internal

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<sup>11</sup> See, e.g., Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC’Y 175, 177 (1991); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEXAS L. REV. 267, 269, (1997).

<sup>12</sup> JEROME N. FRANK, *LAW AND THE MODERN MIND* (1930).

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

<sup>14</sup> JEROME N. FRANK, *FATE AND FREEDOM: A PHILOSOPHY FOR FREE AMERICANS* (1945).

<sup>15</sup> JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

<sup>16</sup> See, e.g., JEROME N. FRANK, *LAW AND THE MODERN MIND* at pp. 326, 359; JEROME FRANK, *FATE AND FREEDOM: A PHILOSOPHY FOR FREE AMERICANS* 64; (Ch. 6, *Psychological Determinism*); see also *infra* Part II.

<sup>17</sup> See, e.g., JEROME N. FRANK, *LAW AND THE MODERN MIND* at pp. 88, 117, 164, 201; *FATE AND FREEDOM: A PHILOSOPHY FOR FREE AMERICANS* 164.

<sup>18</sup> See, e.g., JEROME N. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 395 (1949).

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

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

<sup>21</sup> JEROME N. FRANK, *LAW AND THE MODERN MIND* (1930); see also, e.g., Julius Paul, *Jerome Frank’s Attack on the “Myth” of Legal Certainty*, 36 NEB. L. REV 547 (1957).

<sup>22</sup> JEROME N. FRANK, *LAW AND THE MODERN MIND* (1930).

<sup>23</sup> *Id.* at 76.

and external, psychical and physical, mind and body, subjective and objective.”<sup>24</sup> Indeed, though Judge Frank provided little rationale for articulating a personality right apart from privacy in *Haelan*, he had given a tremendous amount of attention to the personality in his scholarly works.

In the spirit of Judge Frank’s psychoanalytic jurisprudence, this Article suggests that the right of publicity’s aim, as separate from the personal privacy right, may be understood through the psychoanalytic conception of the self—one divided into public and private subparts. In this sense, the term *persona*, or “false self,” refers to an individual’s social façade or front that reflects the role in life the individual is playing.<sup>25</sup> Distinct from an inner, autonomous, and private “true self,” this psychological persona designates only the aspect of the personality that one presents to the world in public to gain social approval or economic advantage: “a kind of mask, designed on one hand to make a definite impression upon others, and on the other to conceal the true nature of the individual.”<sup>26</sup> Indeed, as a “metaphor of the actor and his mask” the persona is used “to indicate the public self of the individual, the image he presents to others, as contrasted with his feelings, cognition and interpretations of reality anchored in his private self.”<sup>27</sup>

However, the conceptual usefulness of such a dualistic metaphor of the self<sup>28</sup>—i.e., one sharply divided into internal (private) and external (public) spheres—is being called into question amidst a growing technology, internet, and social media-driven need for interwoven rights of privacy and publicity.<sup>29</sup> In Jennifer Rothman’s recent book, *The Right of Publicity: Privacy Reimagined for a Public World*, she imagines privacy and publicity as intertwined rights, “protecting individuals’ identities rather than protecting a separable, purely economic interest.”<sup>30</sup> As so-called private individuals increasingly live public lives on

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<sup>24</sup> *Id.* at 77.

<sup>25</sup> CARL JUNG, *PSYCHOLOGICAL TYPES* (1923).

<sup>26</sup> C.G. JUNG, *The Relations Between the Ego and the Unconscious*, in *COLLECTED WORKS 7: TWO ARTICLES ON ANALYTICAL PSYCHOLOGY*, 305 (1928); *see also* ERIC BERNE, *TRANSACTIONAL ANALYSIS IN PSYCHOTHERAPY*, 79 (1966); *cf.* D. W. Winnicott, *Ego distortion in terms of true and false self*, in *THE MATURATIONAL PROCESS AND FACILITATING ENVIRONMENT: STUDIES IN THE THEORY OF EMOTIONAL DEVELOPMENT* 140-57 (New York: International University Press, Inc. 1965).

<sup>27</sup> CHRISTOPHER F. MONTE, *BENEATH THE MASK: AN INTRODUCTION TO THEORIES OF PERSONALITY* (2d. ed. New York: Hot, Rinehart and Winston, 1979).

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

<sup>29</sup> *See generally* JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018); JULIE COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE AND THE PLAY OF EVERYDAY PRACTICE* (2012).

<sup>30</sup> JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 183 (2018).

Facebook, YouTube, Instagram, LinkedIn and other new media, sharp distinctions between public and private figures today do not hold up.<sup>31</sup> As Rothman puts it:

It has done a disservice to public figures to deny the possibility that they too suffer dignitary and emotional harms from nonconsensual uses of their identities. Despite claims to the contrary, their sole objections are not pecuniary in nature, nor should they be forced to pretend that they are. Such requirements unfairly minimize their injuries, and dehumanizes them. Nor should private figures be left out in the cold. Such individuals have sometimes been barred from bringing right of publicity claims because they lack commercial value, while also being denied the ability to bring privacy-based claims, because they have permitted their images or names to enter the public sphere. To adequately protect private figures, or at least those without (commercially) valuable identities, it is appropriate to provide statutory damages to deter unwanted uses when actual damages are likely small or nonexistent.<sup>32</sup>

In support of integrated privacy and publicity rights, this Article suggests that the law consider the right of publicity as protecting an *intersubjective* (i.e., contextual or relational) conception of the self instead of the public aspect of a dualistic one. In line with modern personality theory, intersubjectivity emphasizes embodied experiences and social relations between individuals as integral to the development of the genuine personality, rather than as a mask, or façade, distinct from an underlying authentic self.<sup>33</sup> Unlike in traditional psychoanalytic thought, intersubjectivity does not strive to fit a person's subjective experience into preexisting theoretical frameworks, and individuals "are not viewed as trying to hide or dress themselves up."<sup>34</sup> Such formulations are rather regarded as metaphors that may be helpful in understanding some individuals in some situations, some of the time.<sup>35</sup> Whether the right of publicity should be applicable to both public and private figures, allow claims for emotional and reputational harms as well as economic ones, and the extent to which it should be transferable, are a few important issues that depend on how

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<sup>31</sup> *See id.* at 181; *see also* Part V.

<sup>32</sup> *Id.* at 183.

<sup>33</sup> *See infra* Part V.

<sup>34</sup> *See* PETER BUIRSKI AND PAMELA HAGLUND, MAKING SENSE TOGETHER: THE INTERSUBJECTIVE APPROACH TO PSYCHOTHERAPY 15 (2009).

<sup>35</sup> *Id.*

we conceptualize the self and personality.

This Article proceeds as follows. Part I provides an overview of the right of publicity as a right protecting the strictly commercial and economic value of an individual's "persona" as distinct from privacy's exclusive focus on personal harms to feelings, emotion, and dignity. This bifurcation between privacy and publicity was first articulated in Judge Frank's *Haelan* decision, and its theoretical influence culminated in the United States Supreme Court affirming that rights in one's persona are transferable intellectual property in *Zacchini v. Scripps-Howard Broadcasting Company*.<sup>36</sup> Part II attempts to weave a plausible psychological origin story of the right of publicity by looking to Judge Frank's psychoanalytic jurisprudence. It theorizes that Judge Frank—consciously or unconsciously—might have influenced the right of publicity's proprietary turn based on his own psychoanalytic understanding of a fragmented personality divided into internal and external spheres. Part III, in turn, examines the divided model of the personality common to traditional psychoanalytic thought, especially focusing on the Jungian concept of "persona." Part IV explores the theoretical limitations of the right of publicity's current external, objective, and commercial focus, as exemplified by the actor's mask metaphor. Part V discusses the need for an updated conception of the self in right of publicity jurisprudence, particularly in the realm of new media, and introduces intersubjective personality theory.

## I. THE RIGHT OF PUBLICITY'S IDENTITY CRISIS

The right of publicity is often considered in connection with the typically superficial nature of its landmark cases. From chewing gum<sup>37</sup> to parody trading cards<sup>38</sup> to human cannonballs<sup>39</sup> to *Dracula*<sup>40</sup> to video games featuring professional athletes<sup>41</sup> to Eagles band member Don Henley-branded Henley

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<sup>36</sup> 433 U.S. 562 (1977).

<sup>37</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d. Cir. 1953) (involving rival chewing gum manufacturers).

<sup>38</sup> *Cardtoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959 (10th Cir. 1996) (involving parody trading cards featuring active major league baseball players).

<sup>39</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (involving a human cannonball performance that was broadcasted in its entirety on the news).

<sup>40</sup> *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979) (involving the rights of an actor who had played Count Dracula in the 1927 Deane-Balderston Broadway play).

<sup>41</sup> *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (concerning former quarterback of Rutgers and NCAA Football videogame); *Keller v. Electronic Arts Inc.* 724 F.3d 1268 (9th Cir. 2013) (concerning former quarterback of Arizona State University and NCAA Football videogame).



shirts<sup>42</sup> to Johnny Carson-themed portable toilets<sup>43</sup> to a robot version of Vanna White,<sup>44</sup> and the list goes on and on. However, as a right governing the personality, it takes on a hidden depth and complexity when closely scrutinized. This Part first examines the confusion inherent in the right of publicity's doctrine as a right governing the value of one's "persona," an ephemeral concept. It then examines the influence of Judge Frank's *Haelan* decision on the conceptualization of the right of publicity as an alienable intellectual property right to control the commercial value of one's "persona," distinct from privacy laws' focus on protecting dignity, emotions, and feelings.

### A. Conceptual Confusion

There exists no federally legislated right of publicity. Rather, the right has been adopted by either judicial decision or by statute in the majority of states.<sup>45</sup> While varying state to state, the common law right of publicity is now widely seen as the right to control the *commercial* use and value of one's persona.<sup>46</sup>

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<sup>42</sup> *Henley v. Dillard Dept. Stores*, 46 F. Supp. 2d 587, 589 (N.D. Tex. 1999) ("Sometimes Don tucks it in; other times he wears it loose. It looks great either way. Don loves his Henley; you will too.").

<sup>43</sup> *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (1983) (involving the use of former late-night television host's name and persona as a pun on portable toilets).

<sup>44</sup> *White v. Samsung Electronics American Inc.*, 971 F.2d 1395 (1992) (involving use of an add using a robot dressed in a wig, gown and jewelry that resembled White's hair and dress).

<sup>45</sup> As of 2018, 38 states have some form of common law precedent, while 22 states have a right of publicity statute. *See* Rothman's Roadmap to the Right of Publicity, Statutes and Interactive Map, *available at* [rightofpublicity.com/statutes](http://rightofpublicity.com/statutes) (last visited October 13, 2018).

<sup>46</sup> *See, e.g., Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978) ("The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona.'"); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 289 (2d Cir. 1981) (Mansfield, dissenting: "The right of publicity ... protects against the unauthorized appropriation of an individual's very persona which would result in unearned commercial gain to another."); *Onassis v. Christian Dior-New York, Inc.*, 122 Misc. 2d 603, 472 N.Y.S.2d 254, 260, (Sup 1984), judgment *aff'd*, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1st Dep't 1985) (The New York statute "is intended to protect the essence of the person, his or her identity or persona from being unwillingly or unknowingly misappropriated for the profit of another."); *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) ("[T]he tort of misappropriation of name or likeness protects a person's persona. A persona does not fall within the subject matter of copyright. . .").

The right of publicity generally requires three elements to be actionable: (1) use of an individual's persona; (2) for commercial purposes; (3) without plaintiff's consent. As one court defines it, the "distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona.'"<sup>47</sup> However, the proper definition of "persona" is unclear and typically considered some combination of the economic value in one's "name, image or likeness."<sup>48</sup>

While the persona has been described in the case law as "the essence of [a] person,"<sup>49</sup> it is usually regarded for right of publicity purposes as a strictly commercial creation. One judge's view is that "the right of publicity protects the persona—the public image that makes people want to identify with the object person, and thereby imbues his name or likeness with commercial value marketable to those that seek such identification."<sup>50</sup> The right of publicity, according to one appellate court, "protects against the unauthorized appropriation of an individual's very persona which would result in unearned commercial gain to another."<sup>51</sup> But author of the leading treatise on publicity law, J. Thomas McCarthy, notes that the word persona has a semantic problem in the right of publicity context, presenting two distinct meanings—(1) the commercial persona and (2) the human persona:

- (1) "Persona describes that bundle of commercial values embodied in the "identity" of a person. A "persona" has commercial value in that it can attract consumers' attention to an advertisement or product. In creating a right of publicity, the law recognizes the existence of this economic reality; and
- (2) "Persona" describes in a single word the various ways by which a human being can be identified. Judge Werker uses the word in this sense when he observed that, "The right of publicity comprises a person's right

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<sup>47</sup> *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978) (citing *Zacchini*, 433 U.S. at 573).

<sup>48</sup> *See, e.g.*, Rothman's Roadmap to the Right of Publicity, The Law, available at <https://www.rightofpublicityroadmap.com/law> (last visited October 16, 2018).

<sup>49</sup> *Onassis v. Christian Dior-New York, Inc.*, 122 Misc. 2d 603, 610, 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1985).

<sup>50</sup> *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983), opinion supplemented, 578 F. Supp. 59 (S.D.N.Y. 1983).

<sup>51</sup> *Factors Etc., Inc. v. Pro Arts, Inc.* 652 F.2d 278, 289 (2d. Cir. 1981).

to own, protect and commercially exploit his own name, likeness and persona.” A more terse definition would be that the right of publicity protects a human persona—period.<sup>52</sup>

And the Merriam-Webster dictionary, for instance, defines persona in multiple ways, each potentially relevant in the right of publicity context: (1) “a character assumed by an author in a written work”; (2) “from Latin,” either (a) “an individual’s social façade or front that especially in the analytic psychology of C. G. Jung reflects the role in life the individual is playing” or (b) “the personality that a person (such as an actor or politician) projects in public: image”; or (3) “a character in a fictional presentation (such a novel or play).”<sup>53</sup> The Jungian definition, 2(a), will be explored further in Part III, as especially relevant given Judge Frank’s psychoanalytic approach to understanding the law.<sup>54</sup>

Confusion over what the persona means tends to manifest in both common law decisions and states’ legislative drafting of the right. Some states interpret persona narrowly and others more expansively. For example, Indiana’s statute refers to the property interest in a personality’s “(1) name, (2) voice, (3) signature, (4) photograph, (5) image, (6) likeness, (7) distinctive appearance, (8) gestures, or (9) mannerisms.”<sup>55</sup> Virginia, in contrast, limits the right of publicity to name or picture.<sup>56</sup> Jennifer Rothman notes that while publicity was initially limited to protecting one’s name and likeness, “a broader concept arose” following Judge Frank’s *Haelan* decision, “one often referred to as a ‘persona.’”<sup>57</sup> And such use of one’s persona leads to greater liability than for using their name or likeness “because it encompasses any use—including the mere evocation—of that person’s identity.”<sup>58</sup>

The dominant conception of the persona in right of publicity jurisprudence as a commercial, objective, and economic one has certain negative consequences. The right of publicity, as a proprietary rather than personal right, is alienable and sometimes descendible to the heirs of a deceased persona-

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<sup>52</sup> J. THOMAS MCCARTHY, § 4:46.“Persona”, 1 RIGHTS OF PUBLICITY AND PRIVACY § 4:46 (2d ed.) (internal citations omitted).

<sup>53</sup>See Merriam-Webster Online Dictionary, available at <https://www.merriam-webster.com/dictionary/persona>.

<sup>54</sup> See *infra* Part II.

<sup>55</sup> Ind. Code § 32-36-1-0.2 et seq. enacted July 1, 1994.

<sup>56</sup> See, e.g., *WLJA-TV v. Levin*, 564 S.E.2d 383 (Va. 2002).

<sup>57</sup> JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 89 (2018).

<sup>58</sup> *Id.*

holder.<sup>59</sup> Despite this breadth, it lacks depth. Recovery under the right of publicity is most often limited to economic harms rather than harms to dignity and feelings.<sup>60</sup> Given this economic focus, the right is often criticized by courts and commentators for lacking a coherent justification and clear conceptual boundaries. As Alice Hammerli notes, “in the process of defining the right of publicity as a strict economic right . . . the right of publicity lost a crucial part of its *raison d’être* as a right based on, and protective of, personal autonomy.”<sup>61</sup>

While not often mentioned in the case law, aspiring actors, musicians, and models, who, unlike celebrities, have little leverage in contract negotiation, may lose control of their names, images, or personas by long-term license or assignment.<sup>62</sup> For example, reality television contestants must sometimes sign over their rights to their personas to producers or production companies as a prerequisite to appearing on the show. Consider the predatory nature of the following redacted representation of language in a Publishing Agreement between a television film studio and prospective reality television contestant who is not otherwise famous:

Participant hereby grants the Producer the perpetual, exclusive right, but not the obligation to use and authorize others to use Participant’s name(s), voice, image, photograph, personal characteristics, persona, life-story, signature, actual or simulated likeness, expressions, performance, attributes, personal experiences and biographical information (collectively, Persona”) in and in connection with the production, distribution, advertising, publicity, promotion, merchandising, exhibition and other exploitation of all versions and formats of the Program (including its title) and the businesses, services, programs

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<sup>59</sup> See, e.g., *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354 (D.N.J. 1981) (“[T]his right [of publicity], having been characterized by New Jersey courts as a property right, rather than as a right personal to and attached to the individual, is capable of being disassociated from the individual and transferred to him for commercial purposes.”); 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 10:13 (2d ed. 2011); Restatement (Third) of Unfair Competition § 46 cmt. g (1995) (stating that “[t]he interest in the commercial value of a person’s identity . . . is freely assignable to others.”). *But see generally* Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. REV. 185 (2012) (noting that, contrary to the popular conception, the right of publicity often has significant limits on its assignability as compared with other proprietary rights).

<sup>60</sup> See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572 (1977).

<sup>61</sup> Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999).

<sup>62</sup> *Id.* at 186.

and/or products of Producer and its licenses, sub-licensees and assigns (including all advertising, publicity, and promotion and materials associated therewith) and/or in connection with any episode of the Program in which Participant does not appear, including without limitation in billing, cast credits, advertising, promoting or publicizing any such episode, in any manner, in any and all media and by any means now known or hereafter devised. Producer may include photographs or other images or depictions of the Persona of Participant in or in relation to any exploitation of the Program and all documentaries, “behind-the-scenes,” the making of featurettes, promotional films and videos of the Program in any manner and by any means throughout the universe.

Moreover, social media companies, like Facebook and Twitter, have claimed the ability to use the names and images of their users for advertising and endorsement purposes.<sup>63</sup> Consider the following abridged representation from Facebook’s terms of service agreement:

Permission to use your name, profile picture, and information about your actions with ads and sponsored content: You give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you.<sup>64</sup>

And conceivably, these social media companies could change their terms of service or privacy policies to allow broader rights in their users’ personas, using their names, images, or likeness for other purposes as well.<sup>65</sup>

In certain cases, parents have transferred rights in the identities of their underage children, who have struggled to get them back upon reaching the age of legal maturity.<sup>66</sup> For those with lucrative public personas, creditors,

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<sup>63</sup> *Id.*; see also *infra* Part V.

<sup>64</sup> Facebook, Terms of Service, available at <https://www.facebook.com/terms.php>. (last visited September 20, 2018).

<sup>65</sup> Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. REV. 185, 187 (2012).

<sup>66</sup> *Id.* (citing *Shields v. Gross*, 448 N.E. 2d 108 (N.Y. 1983) (involving the child actress Brooke Shields’s mother having assigned her right of publicity to photographers and Shield attempting to regain it without success)).

employers, or ex-spouses might be able to take ownership of their identities during cases of monetary or familial disputes. Student athletes have been made to sign broad publicity releases to the NCAA as a condition for playing sports at the collegiate level, giving the NCAA the right to license (and potentially even assign) players' personas indefinitely. In these ways, the alienable right of publicity can be thought of as stripping away the identity of individuals by making that identity akin to a mask in the form of a transferable, commercial intellectual property right.<sup>67</sup>

The next subpart focuses on how a personality right encompassing one's objectified and external persona as a commodity, distinct from any emphasis on inner and subjective feelings and emotions, arose.

## B. *Haelan's* Influence

Despite the common wisdom that publicity simply derived from privacy, the issue is considerably more complex. Privacy, especially the tort of commercial appropriation of identity, was initially focused on the right to control one's "publicity," i.e., how and when one's name or image could be used by others in public.<sup>68</sup> This tort was developed, at least in part, in response to the advent of the portable camera, which enabled widespread commercial exploitation.<sup>69</sup> Several cases, beginning as early as the late 1800s, involved the nonconsensual use of names and photos of random individuals, typically on products and in advertisements.<sup>70</sup> Performers objected to the taking of their names, images, and photographs without permission in newspapers and promotions,<sup>71</sup> typically recovering damages for dignitary and emotional, rather than economic, harms.<sup>72</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 *BUFF. L. REV.* 1119, 1120 (2013).

<sup>69</sup> JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 11 (2018).

<sup>70</sup> See, e.g., *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (involving plaintiff finding her picture on an ad for Franklin Mills flour); *Loftus v. Greenwich Lithographing Co.*, 182 N.Y.S. 428 (App. Div. 1920) (involving plaintiff's picture being used without her consent for an advertisement for a film in New York City).

<sup>71</sup> See, e.g., *id.*; cf. Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 *N.Y.U. L. REV.* 1322, 1328 (2002) ("The right of publicity had its origins in a body of tort law that was designed to protect personal privacy.").

<sup>72</sup> See generally Jonathan D. Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 *CARDOZO ARTS & ENT. L.J.* 213 (1999).

The formal right of privacy can be traced back to Samuel Warren and Louis Brandeis's seminal 1890 *Harvard Law Review* article, *The Right to Privacy*.<sup>73</sup> There, consistent with the goals of privacy law in that era, the two then-lawyers articulated the normative bases for a right intended to protect the press from *publishing* private facts and photographs.<sup>74</sup> Warren and Brandeis wrote:

The common law secures to each individual the right of determining, ordinarily, to *what extent* his *thoughts, sentiments, and emotions* shall be *communicated* to others . . . the existence of this right does not depend on the particular method of expression adopted . . . the right is lost only when the author communicates his production to the public—in other words, *publishes* it.<sup>75</sup>

Based on Warren and Brandeis's widely influential article, courts followed with holdings that “hurt feelings” were the sine qua non of a claim of privacy. Common law and statutory recognition of the right of privacy was predicated upon the interest of an individual in the exclusive nature of their personality. Privacy rights came to serve as a “vehicle for the protection of an internal interest, the feelings of one who involuntarily has been publicly ‘used.’”<sup>76</sup> In other words, a “subjective, emotional harm flowing from exposure.”<sup>77</sup> As one court put it, “[r]elief is available under the applicable privacy law only for acts that invade plaintiffs’ privacy and consequently bruise their feelings . . . Its primary purpose . . . is to protect the feelings and privacy of the ‘little man.’”<sup>78</sup>

It was not until 1960, however, that William Prosser's seminal article, simply titled *Privacy*, carved four distinct invasions of privacy out of the still developing doctrine.<sup>79</sup> As Prosser summarizes:

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<sup>73</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

<sup>74</sup> Cf. Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128 (Jan 29, 2016) (exploring the possibility that Warren's motivation for writing *The Right to Privacy* may have been about his drive to protect his younger siblings, especially his gay brother Ned).

<sup>75</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 199-200 (1890).

<sup>76</sup> Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1202 (1986) (emphasis added).

<sup>77</sup> *Id.*

<sup>78</sup> *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (quoting, in part, *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 842 n. 23 (1979)).

<sup>79</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); *see also* Neil M. Richards

What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, “to be let alone.”<sup>80</sup>

To this end, Prosser described four separate torts: (1) intrusion upon the plaintiff’s seclusion or solitude, or into his or her private affairs;<sup>81</sup> (2) public disclosure of embarrassing private facts about the plaintiff;<sup>82</sup> (3) false light in the public eye;<sup>83</sup> and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.<sup>84</sup> While the first three torts focus on emotional harm to the subject, the fourth alludes to Judge Frank’s articulation of a “right of publicity” seven years prior in the 1953 Second Circuit Court of Appeals decision, *Haelan Laboratories v. Topps Chewing Gum*.<sup>85</sup>

That is, Judge Frank recognized in *Haelan*, for the first time, an *alienable* licensing right in the value of an objectified image, i.e., a persona, as distinct from the non-assignable and personal right to privacy.<sup>86</sup> A breach of contract case at bottom, *Haelan* held that a professional baseball player could sell to a

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and Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887 (2010) (noting that beyond Prosser’s 1960 *California Law Review* article, Prosser was engaged with tort privacy scholarship from the 1940s until his death in 1972, and providing a critical assessment of Prosser’s legacy in that regard).

<sup>80</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

<sup>81</sup> *Id.* at 389-392.

<sup>82</sup> *Id.* at 392-398.

<sup>83</sup> *Id.* at 398-401.

<sup>84</sup> *Id.* at 401-406.

<sup>85</sup> *Id.* at 406-407 (“[Appropriation’s] proprietary nature is clearly indicated by a decision of the Second Circuit that an exclusive license has what has been called a ‘right of publicity,’ which entitles him to enjoin the use of the name or likeness by a third person. Although this decision has not yet been followed, it would seem clearly to be justified.”).

<sup>86</sup> *See, e.g.*, Brian L. Frye, *Incidental Intellectual Property*, 33 ENTERTAIN. SPORTS LAWYER (Winter 2017) (“[T]he Second Circuit effectively created a new kind of intellectual property, the “right of publicity,” which gives people an alienable right in the commercial use of their name and likeness. After *Haelan*, not only could people prevent the commercial use of their name and likeness without their permission, but also they could transfer the right to control the commercial use of their name and likeness to someone else.”).



third party the exclusive right to use his image on baseball cards.<sup>87</sup> The facts involved the plaintiff (Haelan), a chewing gum manufacturer, entering into a contract with a baseball player providing Haelan with the exclusive right to use the player's photographs to be sold in connection with Haelan's chewing gum during the term of the contract.<sup>88</sup> Defendant (Topps), a rival chewing gum manufacturer who knew of the contract between Haelan and the baseball player, deliberately induced the baseball player to contract with Topps to use the player's same photograph during the term of Haelan's contract.<sup>89</sup> The baseball player then went and contracted with Topps for the photograph during the designated term of Haelan's exclusive contract.<sup>90</sup>

When Haelan sued, Topps countered that "the contract with plaintiff was no more than a release by the ball-player to plaintiff of the liability which, absent the release, plaintiff would have incurred in using the ball-player's photograph, because such a use, without his consent, would be an invasion of his right of privacy."<sup>91</sup> And, under New York law, "this statutory right of privacy is personal, not assignable; therefore, Haelan's contract vested in plaintiff no 'property' right or other legal interest which defendant's conduct invaded."<sup>92</sup>

Judge Frank, along with Judge Clark<sup>93</sup> and Chief Judge Swan (concurring), held that the privacy statute did not limit plaintiff's rights.<sup>94</sup> Rather, the Second Circuit found that New York recognized an independent common law right protecting commercial interests in contrast to the personal and emotional ones protected under privacy.<sup>95</sup> Moreover, such a right was assignable, thus granting Haelan—who did not hold the baseball player's right of privacy—a cause of action.<sup>96</sup> Judge Frank writes:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph,

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<sup>87</sup> *Haelan*, 202 F.2d at 869.

<sup>88</sup> *Id.* at 867.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> In looking at the letters and internal memoranda exchanged in the case, it seems that Judge Clark contributed only rather minor edits and suggestions to Judge Frank's written opinion, though documents alluded to the fact that they had discussed the matter in some detail orally. Special thanks to the Lillian Goldman Law Library at Yale Law School where the Jerome Frank papers are archived.

<sup>94</sup> *Haelan*, 202 F.2d at 868-89.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

i.e., the right to grant the exclusive privilege of *publishing* his picture, and that such a grant may be validly made “in gross” i.e., without any accompanying transfer of a business or anything else . . . . This right may be called a “right of publicity.” For it is common knowledge that many prominent persons (especially actors and ball-players), *far from having their feelings bruised* through public exposure of their likenesses, would *feel sorely deprived* if they *no longer received money* for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.<sup>97</sup>

To be sure, Judge Frank had a practical reason for articulating a publicity right in this circumstance. Privacy rights, as non-severable from the right-holder, could not accommodate a transferable cause of action for the plaintiff based on the plaintiff’s contract to use celebrity baseball players’ likenesses in connection with the sale of chewing gum. Yet Judge Frank need not have created a new intellectual property right to get his desired result. Judge Swan had concurred in the judgment insofar as the opinion “deals with the defendant’s liability for intentionally inducing a ball-player to breach a contract which gave plaintiff the exclusive privilege of using his picture.”<sup>98</sup> Thus, the Second Circuit’s analysis could have sounded entirely in tort law and achieved a similar result. But it did not.

Judge Frank’s opinion further gives little useful insight as to his rationale for creating a “right of publicity” beyond the following rather shallow description:

[A] man has no legal interest in the publication of his picture other than his right of privacy, i.e., a *personal and non-assignable* right not to have his *feelings hurt* by such a publication . . . . We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the *publicity value* of his photograph, i.e., the right to grant the exclusive *privilege of publishing* his picture, and that such a grant may validly be made “in gross,” i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a “property” right is immaterial; for here, as often elsewhere, the tag “*property*” simply symbolizes the fact

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<sup>97</sup> *Id.* at 868 (emphasis added).

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

that courts enforce a claim which has *pecuniary worth*.<sup>99</sup>

Judge Frank's analysis has been much maligned by commentators. Stacey Dogan has written that “[g]iven the magnitude of its impact, *Haelan* was a remarkably terse decision—skimpy in its discussion of precedent, short on normative rationale, and utterly lacking in an examination of potential consequences.”<sup>100</sup> *Haelan*, in effect, “created a sort of rogue intellectual property right, lacking internal limits and disciplined only by the intervention of the First Amendment.”<sup>101</sup> Mark McKenna writes that “[b]ecause the right of publicity has focused entirely on the economic value of a celebrity's identity, courts considering claims have no basis to differentiate among the variety of ways in which others might exploit that value.”<sup>102</sup> Michael Madow notes that Judge Frank offered no rationale for the right of publicity beyond that celebrities who were denied image revenues would “feel sorely deprived,” failed to evaluate the potential costs of such a right, and his opinion “contained not a trace of moral or conceptual uneasiness about the commodification of personality.”<sup>103</sup> Indeed, as Sheldon Halpern puts it, it was “natural and obvious for Judge Frank that celebrity personas should be treated as garden variety commodities, to be bought and sold in the market like any other.”<sup>104</sup>

Despite its flaws, the *Haelan* formulation caught on as “the principal support for the doctrine that the right of publicity protects a distinct economic interest in personality.”<sup>105</sup> In Melville Nimmer's 1954 law review article, called *The Right of Publicity* after Judge Frank's articulation, Nimmer theorized a dichotomy between privacy and publicity.<sup>106</sup> He called the right of publicity the “reverse side” of privacy, conceptualizing a public right in excess of privacy and unfair competition.<sup>107</sup> Nimmer argued that privacy law:

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

<sup>100</sup> Stacey Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* (Rochelle Cooper Dreyfuss and Jane C. Ginsburg, eds. Cambridge University Press 2014) at 17-18.

<sup>101</sup> *Id.*

<sup>102</sup> Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 226 (2005).

<sup>103</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 173–74 (1993).

<sup>104</sup> Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1202 (1986).

<sup>105</sup> *Id.*

<sup>106</sup> See generally Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

<sup>107</sup> *Id.* at 204.

Is not adequate to meet the demands of the second half of the twentieth century . . . With the tremendous strides in communications, advertising, and entertainment techniques, the *public personality* has found that the use of his name, photograph, and likeness has taken on a *pecuniary* value undreamed of at the turn of the century.<sup>108</sup>

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

[W]e think the reader will conclude, as do we, that the word of power most frequently employed by the courts is either ‘privacy’ or ‘property,’ the latter usage being not infrequently colored by the contract rights of a performer or of an entrepreneur. There are, speaking very generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him, arguably, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur.<sup>109</sup>

And another court, for example, noted that “[i]t is evident that courts address intrusions on feelings, reputation and privacy only when an individual has elected not to engage in personal commercialization. By contrast, when a ‘persona’ is in effect a product, and when that product has already been marketed to good advantage, the appropriation by another of that valuable property has more to do with unfair competition than it does with the right to be left alone.”<sup>110</sup>

And in 1977, the Supreme Court affirmed the *Haelan* interpretation of the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.* In *Zacchini*, the Court held that the press has no constitutional right to broadcast a performer’s entire act without consent or compensation, and remarked that publicity rights have “little to do with . . . feelings or reputation.”<sup>111</sup> From then on, a harm to

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<sup>108</sup> *Id.* at 203 (emphasis added).

<sup>109</sup> *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 486 (3d Cir. 1956).

<sup>110</sup> *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 283 (S.D.N.Y. 1977), *aff’d* sub nom. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978).

<sup>111</sup> *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572 (1977). (holding that the news broadcasting of petitioner’s “human cannonball” performer’s

feelings claim would be inconsistent with the Supreme Court's articulation of the right. As Jennifer Rothman notes:

A careful reading of *Haelan Laboratories v. Topps Chewing Gum* indicates that it did not create anything new, but as more and more commentators claimed that the decision did, it was hard to put the genie back in the bottle . . . over the decades that followed *Haelan*, parties advocating for an expansive, transferable property-like right, distinct from the right of privacy, began to prevail in many states, particularly in federal courts applying their best guess about what state courts might decide about their own states' laws. The right of publicity then exploded across the country and expanded in scope far beyond what even its initial proponents had advocated.<sup>112</sup>

Thus, though the right of publicity developed in “a kind of analytical fog,”<sup>113</sup> it has come to be widely interpreted as a property right protecting strictly commercial interests rather than rights personal to an individual—i.e., an emotional extension of one's personality. As Alice Haemmerli explains, the doctrines of privacy and publicity “developed in a schizoid manner: publicity rights were purely economic property rights, as distinct from ‘personal’ privacy rights.”<sup>114</sup> On the other hand, the cause of action in a privacy case, following *Haelan*, came to be regarded entirely as internal, concerning only mental harm, or “one's own peace of mind.”<sup>115</sup> Even injury to one's “character or reputation,” which had previously been allowed, would not suffice.<sup>116</sup> Rather, only a “direct wrong of a *personal* character resulting in injury to the feelings *without regard to any effect* which the publication may have on the property, business, pecuniary

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entire fifteen-second long act, while in the public interest, did not immunize defendant, news media, from civil liability concerning violation of petitioner's right of publicity); see also Douglas G. Baird, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185 (1978) (noting that the *Zacchini* decision was based on the justification of promoting economic incentives, like copyright law).

<sup>112</sup> JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 36 (2018).

<sup>113</sup> Timothy Terrell and Jane Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L. J. 1, 2 n.2 (1985)).

<sup>114</sup> Alice Haemmerli, *Whose Who: The Case for a Kantian Right of Publicity*, 49 DUKE L. J. 383, 406 (1999).

<sup>115</sup> *Fairfield v. Am. Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 86, 291 P.2d 194, 197 (1955).

<sup>116</sup> *Id.*

interest, or the standing of the individual in the community.”<sup>117</sup>

Conceptualizing the right of publicity as a property right in the persona allows a level of comfort with the right being assignable, descendible, survivable, taxable, and capable of division in the case of divorce.<sup>118</sup> Samantha Barbas concludes that the right of publicity “is now oriented largely around economic interests, especially, though not exclusively, the interests of those who make a profession out of commodifying their images. Emotional, reputational, or dignitary harms are rarely, if at all, the basis of recovery.”<sup>119</sup> Indeed, the right of publicity as predicated on Judge Frank’s interpretation of New York law in *Haelan* has been accepted and its doctrine has grown more sophisticated in the nearly 70 years since it was decided.<sup>120</sup>

This doctrinal sophistication has yielded a hydra-like triad of sub-rights which can usefully be described as the mirror image of the privacy torts. As Eric Johnson writes in his recent article, *Disentangling the Right of Publicity*, even all these years later, “courts have yet to clearly articulate what the right of publicity is.”<sup>121</sup> In an attempt to remedy this misunderstanding, Johnson commendably unearths three separate rights under the umbrella of a “right of publicity”: (1) an endorsement right, (2) a merchandising entitlement, and (3) the right against virtual impressment.<sup>122</sup> This triad mirrors public versions of the privacy torts: (1) intrusion upon seclusion; (2) public disclosure; (3) false light, and (4) appropriation of name or likeness. In fact, Johnson’s article carves out right of publicity doctrine in much the same way as Prosser’s classic *Privacy* did for its namesake.

In sum, the right of publicity has come to protect the persona as a free-standing intellectual property right apart from the human person. As J. Thomas McCarthy has observed, “infringement of the right of publicity focuses upon injury to the *pocketbook*” while an invasion of ‘appropriation privacy’ focuses

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<sup>117</sup> *Id.*

<sup>118</sup> *See infra* Part IV.

<sup>119</sup> Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1119, 1187 (2013).

<sup>120</sup> Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1202 (1986).

<sup>121</sup> Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 893 (2017); *cf.* Judith Jarvis Thomson, *The Right to Privacy*, in 4 PHILOSOPHY & PUBLIC AFFAIRS 295 (1975) (remarking that “the most striking thing about the right to *privacy* is that nobody seems to have any very clear idea what it is.”) (emphasis added).

<sup>122</sup> *Id.*; *see also* JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 3 (2018) (explaining that due to state law variation, “[t]he right of publicity, then, rather than a single, uniform right, is in reality many different laws.”).

upon injury to the *psyche*.<sup>123</sup> The next Part theorizes that Judge Frank—consciously or unconsciously—may have influenced this commercial and proprietary shift in right of publicity jurisprudence based on a psychoanalytic understanding of the self, or personality, which is fragmented into public and private subparts.

## II. JUDGE JEROME FRANK'S PSYCHOANALYTIC JURISPRUDENCE

In attempting to better understand the division between privacy and publicity, this Part looks to the judicial philosophy of the right of publicity's founder, Judge Jerome Frank. While Judge Frank gave few clues as to his motives in the *Haelan* decision, his controversial psychological realism was in fact largely built around a psychoanalytic model of the personality, stressing external and internal divisions. Judge Frank's dualistic understanding of the personality could, conceivably, have motivated or influenced his drawing of such a sharp divide in *Haelan* between the objective, commercial persona and subjective harm to the inner person's dignity and feelings. Perhaps that is why it was "*natural* and *obvious* for Judge Frank that celebrity personas should be treated as garden variety commodities."<sup>124</sup> Moreover, the rise of psychoanalysis as an important influence on legal doctrine and theory coincided with the development of the right of publicity as a strictly economic right. As Anne Dailey notes:

In 1930, Jerome Frank published his seminal book, *Law and the Modern Mind*, which drew on psychoanalytic ideas to describe the distorting effects of infantile wishes and fantasies on the decision making of legal actors and judges. Over the following decades, the ascendance of

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<sup>123</sup> J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5.8(C) (1987). According to McCarthy:

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

*Id.* (emphasis in original).

<sup>124</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 173–74 (1993).

psychoanalysis was reflected in legal scholarship on the insanity defense, child custody, and jurisprudence. Indeed, by the 1970s, psychoanalysts had even joined the Harvard and Yale law school faculties.<sup>125</sup>

Regardless, the psychoanalytic division of the self into internal and external aspects might provide a useful metaphor for understanding the right of publicity's protection of the persona, the "actor's mask," as distinct from the inner person or psyche—emotions, feelings, and dignity-based privacy.<sup>126</sup>

Even before his appointment to the Second Circuit Court of Appeals in 1941,<sup>127</sup> Judge Frank was a leading, though polarizing, figure in the American legal realist movement.<sup>128</sup> He was known for his unique "psychological realism" exemplified in many works including the seminal 1930 book *Law and the Modern Mind*—his most influential work<sup>129</sup>—as well as several other books and articles

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<sup>125</sup> Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 180 (2010) (internal citations omitted).

<sup>126</sup> See, e.g., Lewis Kirshner, *The concept of the self in psychoanalytic theory and its philosophical foundations*, 39 (1) J AM PSYCHOANAL ASSOC. 157 (1991) (noting that, at least historically, "[p]sychoanalysis has not utilized Hegel's conception of the intersubjective origins of the self, in which the self emerges only in an encounter with another subject" but instead reflects "a homuncular self internal to consciousness and the isolation of the subject from other selves.").

<sup>127</sup> The son of a lawyer, Judge Frank was born in 1889. He received a Ph.B from the University of Chicago in 1909 after studying under Charles Merriam who was developing a psychological approach to political science. He soon went on to enroll at the University of Chicago Law School and graduated in 1912 with the highest grades in the school's history. Upon graduation, he worked at a large corporate law firm in Chicago and then left to practice law at another corporate firm in New York City. Judge underwent psychoanalysis while in New York and soon after, in 1930, wrote *Law and the Modern Mind*. Between 1933 and 1941, he bounced back and forth between private practice and Franklin D. Roosevelt's "New Deal" administration, before being appointed to the United States Court of Appeals for the Second Circuit, despite experiencing anti-Semitism during the appointment process. See Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175, 176 (1991).

<sup>128</sup> See, e.g., Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEXAS L. REV. 267, 269, (1997) ("Even among Realists, of course, Frank's view represented a particular sort of extreme—as Frank himself recognized") (citing Jerome Frank, *Are Judges Human? (pt. 1)*, 80 U. PA. L. REV. 17, 22-23, 30 n.31 (1931)); Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791 (2016) (noting that much of Judge Frank's legal philosophy "has since been soundly repudiated in American legal thinking.").

<sup>129</sup> See, e.g., Charles E. Clark, *Jerome N. Frank*, 66 YALE L.J. 817, 817 (noting that *Law and the Modern Mind* "fell like a bomb on the legal world."); Walter Wheeler Cook, *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 82-83 (1931)



such as *Courts on Trial: Myth and Reality in American Justice*,<sup>130</sup> *Fate and Freedom: A Philosophy for Free Americans*,<sup>131</sup> *Are Judges Human?*,<sup>132</sup> *Judicial Fact-Finding and Psychology*,<sup>133</sup> and *Why Not a Clinical Lawyer-School?*,<sup>134</sup> the latter of which established perhaps the first formal call for clinical legal education.

Judge Frank's jurisprudence has come to be regarded as a "jurisprudence of therapy" or a "psychoanalysis of certain legal positions"<sup>135</sup> because of its reliance on the ideas of thinkers like Sigmund Freud,<sup>136</sup> Jean Piaget<sup>137</sup> and Carl Jung<sup>138</sup>—among others, whose work he cited in creating an "elaborate psychoanalytical apparatus" as an explanation of the "persistent longing of lawyers and non-lawyers for a patently unachievable legal stability."<sup>139</sup> Judge Frank published the bulk of his work between 1930 and 1953, the year he wrote the *Haelan* decision.<sup>140</sup>

Judge Frank underwent six months of intensive psychoanalysis in 1930, after which he published *Law and the Modern Mind*.<sup>141</sup> The book, considered potentially the foremost realist discussion of law and psychoanalysis,<sup>142</sup> identifies his theory of a "basic legal myth," unconsciously reinforced by lawyers, judges, and the public, that the law is objective and certain, and that applying legal rules

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(describing the book as "excit[ing]" "keen, cogent," and "unique."); Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 BUFFALO L. REV. 1127 (2010) (noting that *Law and the Modern Mind* is still regarded as a "legal classic" and Frank's "most famous contribution to legal theory.").

<sup>130</sup> JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

<sup>131</sup> JEROME N. FRANK, *FATE AND FREEDOM* (1945).

<sup>132</sup> Jerome Frank, *Are Judges Human? Part 1: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17 (1931); Jerome Frank, *Are Judges Human? Part 2: As Through a Class Darkly*, 80 U. PA. L. REV. 233 (1931).

<sup>133</sup> Jerome N. Frank, *Judicial Fact-Finding and Psychology*, 14 OHIO STATE L.J. 183 (1953).

<sup>134</sup> Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

<sup>135</sup> Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175, 177 (1991).

<sup>136</sup> See *supra* note 16.

<sup>137</sup> See *supra* note 17.

<sup>138</sup> See *supra* note 18.

<sup>139</sup> Edward F. Barrett, *Confessions and Avoidance—Reflections on Rereading Judge Frank's Law and the Modern Mind*, 24 NOTRE DAME L. REV. 447, 449 (1949).

<sup>140</sup> See Shyamkrishna Balganes, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 814 (2016).

<sup>141</sup> Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175, 177 (1991).

<sup>142</sup> Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 180 (2010); Peter Goodrich, *Habermas and the Postal Rule*, 17 CARDOZO L. REV. 1457, 1476 (1996).

to specific cases is a mechanical task performed by judges. For Judge Frank, rather, the “personality of the judge is the pivotal factor in law administration and the law varies with the personality of the judge who happens to pass upon any given case.”<sup>143</sup> As Judge Frank puts it:

[Most people] retain a yearning for Someone or Something, qualitatively resembling father, to aid them in dissipating the fear of chance and change . . . To the child the father is the Infallible Judge, the Maker of the definite rules of conduct. He knows precisely what is right and what is wrong and, as head of the family, sits in judgment and punishes misdeeds. The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible Judge. That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child's Father-Judge. That childish longing is an important element in the explanation of the absurdly unrealistic notion that law is, or can be made, entirely certain and definitely predictable.<sup>144</sup>

While Judge Frank maintained and refined this psychoanalytic approach to understanding the law throughout his career, as a lawyer, scholar, and later a judge,<sup>145</sup> he first became interested in the works of Freud while a student at the

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<sup>143</sup> JEROME N. FRANK, *LAW AND THE MODERN MIND* 119-20 (1930).

<sup>144</sup> *Id.* at 19.

<sup>145</sup> Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 *J.L. & SOC'Y* 175, 177 (1991). For examples of this continual reliance on psychoanalytic thinking in Judge Frank's later works in the 1950s, see JEROME FRANK, *FATE AND FREEDOM* 65 (1956) (“Our justification lies in the fact that psychoanalytic research has taught us that all these tendencies [described by Freud and Marx] are an expression of the same instinctive activities; in relations between the sexes these instincts force their way toward sexual union, but, in other circumstances, they are diverted from this aim or prevented from reaching it, though always preserving enough of their original nature to keep their identity recognizable.”); JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 395 (1949) (citing CARL JUNG, *PSYCHOLOGICAL TYPES* (1923) (Ch. 7) (“Excessive classicism, with its excessive worship of abstractions,

University of Chicago before undergoing psychoanalysis himself.<sup>146</sup> As Neil Duxbury writes in *Jerome Frank and the Legacy of Legal Realism*,

Frank clearly found in psychoanalysis his panacea: just as psychoanalysis had purged him of his inner conflicts so too, with comparable results, he believed it might be applied to the judicial system. Without pausing to consider whether or not psychoanalysis—concerned at core with human individuals—might plausibly be re-cast as an institutional theory, Frank appeared basically to resolve that it could provide an all-encompassing framework for judicial critique and reform.<sup>147</sup>

Indeed, for Judge Frank, “Freud’s conception of the psyche as a dynamic interplay between id, ego, and superego appeared to support the American Legal Realist interpretation of judging as a highly subjective and indeterminate activity.”<sup>148</sup>

As Joseph Goldstein, in his seminal essay *Psychoanalysis and Jurisprudence*, wrote regarding psychoanalysis as an institutional theory of law:

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

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has its psychological roots in a morbid fear of particulars, of unives. To ‘the man with the abstracting attitude, says Jung, ‘the world is filled with powerfully operating and therefore dangerous objects; these inspire him with fear, and with a consciousness of his own impotence: he withdraws himself from a too close contact with the world, thus to create those . . . formulae with which he hopes to gain the upper hand.’ Craving ‘fixed bounds, seeking a negation . . . of irreconcilable diversities,’ by abstractions he ‘conjures impressions into a law-abiding form,’ and thereby ‘depotentiates’ particulars, puts an end to their ‘tyrannical hold,’ there ‘threatening quality.’ Thus he strives to rob life of what are to him its dangerous spontaneities. His attempted use of abstractions wholly to ‘confine the changing and irregular within law abiding limits’ is ‘at bottom a magical procedure . . .’”).

<sup>146</sup> Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC’Y 175, 176 (1991).

<sup>147</sup> *Id.* at 177.

<sup>148</sup> Archie Zariski, *Sympathy and Empathy in Therapeutic Jurisprudence from a Psychoanalytic Perspective: From Freud to Posner and Beyond*, 1 INT’L J. THERAPEUTIC JURIS. 291, 300 (2016); Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 180 (2010).

depend heavily on assumptions about man's internal world.<sup>149</sup>

Under this dualistic viewpoint, Judge Frank thought “[t]he key to reform was thus not *observation* of judicial behavior, but rather for judges themselves to engage in individual *introspection* as to their own thoughts, feelings, beliefs, purposes, goals, and assumptions.”<sup>150</sup> Under the umbrella of the “basic legal myth,” Judge Frank sought to bring into focus three subjective ideas about the law: (1) indeterminacy, (2) hunches, and (3) fact skepticism—in contrast to the formalist view of the law as an objective science.<sup>151</sup> This “conventional image of the law,” was, for Judge Frank, “a mask, a false-face, made to suit unconscious childish desires,”<sup>152</sup> that hides the reality that the law is never capable of providing exact and discernible answers.<sup>153</sup>

First, Judge Frank believed that legal and judicial thinking is inherently imprecise and indeterminate. “The trouble with legal thinking,” says Judge Frank, “is not the mental inadequacies of the lawyers. It is the very nature of law, its role as a father substitute, that stirs up unconscious attitudes, concealed desires, illusory ideals, which gets in the way of realistic observation of the workings and significance of law.”<sup>154</sup> Lawyers and judges “like the laymen, fail to recognize fully the essential plastic and mutable character of law” and erroneously believe that “rules either are or can be made essentially immutable.”<sup>155</sup> In effect, lawyers are not being “consciously deceptive” in perpetuating the myth; the myth—that the law is a science—is unconscious. Judge Frank writes regarding what he refers to as the “public-private dichotomy:”

[I]t is the child's naïve egocentricity, his unconsciousness of self, which leads him to regard his own perspective as immediately objective and absolute; to assimilate *external*

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<sup>149</sup> Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L. J. 1053, 1054 (1968).

<sup>150</sup> Charles L. Barzun, *Jerome Frank and the Modern Mind*, BUFFALO L. REV. 1127, 1162 (2009).

<sup>151</sup> See, e.g., Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 814-821 (2016).

<sup>152</sup> *Supra* note 1.

<sup>153</sup> See e.g., BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 10-11 (2007) (referring to Judge Frank's belief system as “global indeterminacy”); see also Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 816 (2016).

<sup>154</sup> JEROME N. FRANK, LAW AND THE MODERN MIND (1930).

<sup>155</sup> *Id.* at 9.

*processes* to schemas arising from his own *internal* experiences, attributing to the *outer world* characteristics which properly belong to his *mind* . . . and, generally speaking, to fail to differentiate between the *internal* and *external*, *psychical* and *physical*, *mind* and *body*, *subjective* and *objective*.<sup>156</sup>

The consequence of this legal myth is that “demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary.”<sup>157</sup> To this end, Judge Frank sought to show that “judging” does not involve the mechanical application of legal rules to facts, but also involves actual lawmaking.”<sup>158</sup> Legal rules and principles, for Judge Frank, are merely “psychological pulleys, psychic levers, mental bridges or ladders, means of orientation, [or] modes of reflection . . .,” rather than a hard constraint on legal and judicial thinking.<sup>159</sup>

Second, given that legal rules are not the primary determinates of judicial reasoning, but rather these “psychological pulleys,” Judge Frank’s account of how judges decide individual cases was based on subjective hunches.<sup>160</sup> For Judge Frank, the hunch represents the judge’s subjective reactions to the facts and circumstances—“that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.”<sup>161</sup> The facts generate the hunch, Judge Frank believed, which is then filtered through the judge’s impulses and unconscious biases.<sup>162</sup>

Third, distinct from other legal realists, Judge Frank believed in “fact skepticism,” i.e., that uncertainty in legal decision-making resulted not just from uncertainty in the law (i.e., rule skepticism), but from biased interpretations of the facts of a case as well. In several of his later works, Judge Frank claimed that every federal judge should undergo compulsory psychoanalysis so as to clear

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<sup>156</sup> *Id.* at 77.

<sup>157</sup> *Id.* at 11.

<sup>158</sup> See, e.g., Shyamkrishna Balganesh, *The Questionable Origins of Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 816 (2016).

<sup>159</sup> JEROME N. FRANK, LAW AND THE MODERN MIND 77 (1930).

<sup>160</sup> Which he adopted from Judge Joseph Hutcheson’s 1929 article, *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decisions*. 14 CORNELL. L. Q. 274 (1929).

<sup>161</sup> JEROME N. FRANK, LAW AND THE MODERN MIND 278 (1930).

<sup>162</sup> *Id.* at 116 (“The judge, in arriving at his hunch, does not nicely separate his belief as to the “facts” from his conclusion as to the “law”; his general hunch is more integral and composite, and affects his report—both to himself and the public—concerning the facts . . . The judge’s decision is determined by a hunch arrived at long after the event on the basis of his reaction to fallible testimony.”).

their mind of subjective biases, unconscious prejudices, and peculiar thought processes, a theme which he remarked further on in other works.<sup>163</sup> Judges, as human beings, cannot “prevent their personal preferences from governing their decisions” unless “each judge, with the assistance of a psychiatrist, engage in a voyage of self-exploration and so become conscious of those sub-threshold biases.”<sup>164</sup>

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

The conventional image of the law is, of course, a mask, a false-face, made to suit unconscious childish desires. But that false-face terrifies even the persons who have made it. The law, as they picture it, will not allow the judges to indulge their feelings, their sympathies, for the persons appearing as suitors in the courtroom; the law, they believe, when properly administered, creates impersonal and artificial rules, which command respect because they guard against any human “weakness” in the judge . . . The judge, wearing a false-face, which makes him seem like the child’s stern father, gravely recites the impersonal and artificial rules which command respect.<sup>165</sup>

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<sup>163</sup> See JEROME N. FRANK, COURTS ON TRIAL 226-27 (1949); Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 678 (1957); Jerome Frank, *Say It with Music*, 61 HARV. L. REV. 921, 955 (1948); see also Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B. U. L. REV. 1049, 1066 (2006) (“Jerome Frank thought judges should undergo psychoanalysis, as he had done; this is a ridiculous suggestion.”); Fred Rodell, Book Review, *Courts on Trial: Myth and Reality in American Justice, by Jerome Frank*, 25 IND. L. J. 114, 119 (1949) (suggesting “that the compulsory psychoanalysis of every prospective judge, which Judge Frank does propose, is less radical or utopian than others might believe”); Brendan F. Brown, *Jerome Frank and the Natural Law*, 5 THE CATHOLIC LAWYER 133, 141 (1959).

<sup>164</sup> Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 678 (1957).

<sup>165</sup> JEROME N. FRANK, LAW AND THE MODERN MIND (1930) (emphasis added). Indeed, Judge Frank’s description of the legal personality is very similar to what Carl Jung writes regarding the psychoanalytic persona, for instance, which will be explored in the next Part:

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

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

### III. THE PSYCHOANALYTIC MODEL OF THE DIVIDED SELF

This Part examines the psychoanalytic concept of the self, especially focusing on the “persona,” the psychological corollary to the aspect of the personality which the right of publicity protects. In the spirit of Judge Frank's psychoanalytic approach to the law, support for a hard separation between privacy and publicity might be found in this psychoanalytic view of the fragmented self, which dispenses with the model of an undivided ‘self’ or ‘soul’.<sup>166</sup> The major characteristic of this undivided, autonomous self was that it constitutes our core and is “the subject” of both our mental and physical actions.<sup>167</sup> Yet, traditional psychoanalysis retained Rene Descartes dualism between mind and body, hence its emphasis on inner and outer dimensions of the personality.<sup>168</sup> As Robert Stolorow explains, “Freud's psychoanalysis expanded the Cartesian mind, Descartes's ‘thinking thing,’ to include a vast unconscious realm.” However, “the Freudian mind remained a Cartesian mind, a self-enclosed worldless subject or mental apparatus containing and working over mental contents and radically separated from its surround.”<sup>169</sup>

#### 1. *Freud's Ego and Id*

At least in a mainstream Western sense, Sigmund Freud introduced the theory of a fragmented or layered person—one divided into subparts: the id, the ego, and the super-ego.<sup>170</sup> In Freud's 1919 work, *The Interpretation of Dreams*, he sought to demonstrate that a person's outer behavior and appearance were not

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

C.G. JUNG, COLLECTIVE WORKS 9, PART I, *Archetypes of the Collective Unconscious* at 43 (1935).

<sup>166</sup> See, e.g., Alex Watson, *Who Am I? The Self/Subject According to Psychoanalytic Theory*. SAGE Open 4(3), available at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:12328212>.

<sup>167</sup> *Id.*

<sup>168</sup> Robert D. Stolorow, *Post-Cartesian Psychoanalysis as Phenomenological Contextualism*, at 2, in *WORLD, AFFECTIVITY, TRAUMA: HEIDEGGER AND POST-CARTESIAN PSYCHOANALYSIS* (Routledge, 2011).

<sup>169</sup> *Id.*

<sup>170</sup> See, e.g., SIGMUND FREUD, *THE EGO AND THE ID*. 18 (1923).

necessarily the same as their inner needs and longings.<sup>171</sup> As an example, Freud claims that dreaming cannot be explained if we conceptualize ourselves as a unity.<sup>172</sup> In other words, Freud asks “who is the dreamer?” as distinct from the waking person, to illustrate that the self is not a unity, but rather an “amalgamation of two separate people.”<sup>173</sup>

As Freud claimed in *The Pleasure Principle*, the experience of psychic pain is also evidence of a divided self.<sup>174</sup> In this early formulation of Freud’s theory, he outlines a conflict between a primitive and instinctual layer of the psyche in contrast to the ego, which rests uneasily atop the psychic appetite, and effects a kind of compromise between base instinct and social necessity. To the extent that the conscious self (the ego) can provide gratification to its unconscious component (instinct), the self, as a whole, experiences gratification. Yet, to the extent that the ego fails to do so, the conscious self experiences pain.<sup>175</sup>

The nature of Freud’s two parts of the self (which he later modified in his 1923 work, *The Ego and the Id*), is less important than the dualism he articulated, which provides the beginnings of a psychoanalytic rhetoric that includes a dichotomy between an extroverted ego and an introverted id.<sup>176</sup> For Freud, the personality that is outwardly expressed is a compromise between these competing impulses.

According to Freud’s mature theory, the ego is the public-facing portion of the self that interfaces with the outside world and makes the calculations and compromises necessary for socialization,<sup>177</sup> which tends to align with the concerns implicated by the right of publicity. As Freud puts it, the ego is “that part of the id which has been modified by the direct influence of the external

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<sup>171</sup> See SEARS A. ELDRIDGE, *MASK IMPROVISATION FOR ACTOR TRAINING & PERFORMANCE: THE COMPELLING IMAGE* 13 (Northwestern University Press).

<sup>172</sup> SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 5 (1919) (emphasis added).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Though Freud uses the language of consciousness to distinguish parts of the self, he cautions that his more particular distinction is functional, i.e., between coherence and repression: “We escape ambiguity if we contrast not the conscious and the unconscious, but the coherent ego and the repressed. Much in the ego is certainly unconscious itself, just what may be called the kernel of the ego; only a part of it comes under the category of preconscious.” *Id.*

<sup>176</sup> See, e.g., S. Cooper, *Id.* in *ENCYCLOPEDIA OF PSYCHOLOGY* 116 (Oxford University Press 2000) (“In Freudian theory, the id is the division of the psyche that is totally unconscious and serves as the source of instinctual impulses and demands for immediate satisfaction of primitive needs. The ego is that which is conscious in a person, most immediately controls thought and behavior, and is most in touch with external reality.”).

<sup>177</sup> SIGMUND FREUD, *BEYOND THE PLEASURE PRINCIPLE* (1920).



world.”<sup>178</sup> The ego, which is most in touch with external reality, stands in sharp contrast with the unconscious and introverted id—the libido or sex impulse,<sup>179</sup> which aligns with the kinds of shame that Warren and Brandeis were seeking to keep hidden in *The Right to Privacy*. The super-ego is not so much a third part of the self as it is the apex of the ego, a standard to which the ego strives based on ideals provided externally.<sup>180</sup>

In sum, for Freud, the self is appropriately represented as a plurality of id, ego and superego, with the id comprising the internal psychic structure as compared to the externally motivated ego and superego.<sup>181</sup> Building off of Freud’s theory of the person, continued psychological research, such as by Jung and Winnicott, expanded on his partition of the person into an “outer self” as contrasted with an “inner or true self.”<sup>182</sup>

## 2. *Jung’s Persona and Shadow*

Freud’s contemporary, Carl Jung, provides the closest descriptive corollary to the divide between privacy and publicity, labeling the “persona” as the outward and external face of the psyche, or “the mask of the actor.”<sup>183</sup> As described in *Beneath the Mask*, a text on theories of personality: “The metaphor of the actor and his mask was used by Carl Jung . . . to indicate the public self of the individual, the image he presents to others, as contrasted with his feelings, cognition and interpretations of reality anchored in his private self.”<sup>184</sup> Jung contrasted this “arbitrary segment of the collective psyche”<sup>185</sup> with the inner attitude of the person, which he refers to as the “shadow”—that part of the self which an individual represses or keeps hidden<sup>186</sup> The persona is one of the most widely adopted aspects of Jungian psychology, and, like Jung’s concepts of introversion and extraversion, has attained common and colloquial usage.<sup>187</sup>

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<sup>178</sup> SIGMUND FREUD, *THE EGO AND THE ID* 25 (1923).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 18.

<sup>181</sup> See Alex Watson, *Who Am I? The Self/Subject According to Psychoanalytic Theory*, at 4, available at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:12328212>.

<sup>182</sup> ROBERT H. HOPCKE, *PERSONA: WHERE SACRED MEETS PROFANE* (1995).

<sup>183</sup> C.G. JUNG, *COLLECTIVE WORKS* 9, PART I, *Archetypes of the Collective Unconscious* at 43 (1935).

<sup>184</sup> CHRISTOPHER F. MONTE AND ROBERT N. SOLLOD, *BENEATH THE MASK: AN INTRODUCTION TO THEORIES OF PERSONALITY* (2d. ed. New York: Hot, Rinehart and Winston, 1979).

<sup>185</sup> C.G. JUNG, *The Relations Between the Ego and the Unconscious*, in *COLLECTED WORKS* 7: TWO ARTICLES ON ANALYTICAL PSYCHOLOGY, 247 (1928).

<sup>186</sup> ROBERT H. HOPCKE, *PERSONA: WHERE SACRED MEETS PROFANE* 10 (1995); Compare ANITA L. ALLEN, *UNPOPULAR PRIVACY: WHAT MUST WE HIDE*.

<sup>187</sup> See, e.g., ERIC BERNE, *SEX IN HUMAN LOVING* 98 (Penguin 1973).

In his seminal work, *Psychological Types*, Jung describes the persona as the outer, extraverted workings of a person, i.e., “how one appears to oneself and the world, but not what one is.”<sup>188</sup> Distinct from the “true self,” the psychological persona designates only the aspect of the personality that one presents to the world in public to gain social approval or economic advantage: “a kind of mask, designed on one hand to make a definite impression upon others, and on the other to conceal the true nature of the individual.”<sup>189</sup> Similar to Judge Frank’s depiction of the legal persona, Jung notes that “[e]very calling or profession has its own characteristic persona. It is easy to study these things nowadays, when the photographs of public personalities so frequently appear in the process. A certain kind of behavior is forced on them by the world, and professional people endeavor to come up with these expectations.”<sup>190</sup> Further, as Jungian analyst Daryl Sharp notes, “by rewarding a particular persona, the outside world invites identification with it. Money, respect and power come to those who can perform single-mindedly and well in a social role.”<sup>191</sup>

The persona, as an ideal, external image, is “exclusively concerned with the relation to objects,” i.e., people and things in the material world.<sup>192</sup> Jung typically spoke disparaging of the persona as “nothing real; it is a compromise between the individual and society as to what a man should appear to be.”<sup>193</sup> Jung also explained the persona’s deceptive nature as the surface-level part of the whole person:

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

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<sup>188</sup> C.G. JUNG, *Psychological Types*, in COLLECTED WORKS 6, 218 (Princeton 1971).

<sup>189</sup> C.G. JUNG, *The Relations Between the Ego and the Unconscious*, in COLLECTED WORKS 7: TWO ARTICLES ON ANALYTICAL PSYCHOLOGY, 305 (1928); see also ERIC BERNE, TRANSACTIONAL ANALYSIS IN PSYCHOTHERAPY 79 (1966); cf. D. W. Winnicott, *Ego distortion in terms of true and false self*, in THE MATURATIONAL PROCESS AND FACILITATING ENVIRONMENT: STUDIES IN THE THEORY OF EMOTIONAL DEVELOPMENT 140-57 (New York: International University Press, Inc. 1990).

<sup>190</sup> C.G. JUNG, *Concerning Rebirth*, in COLLECTED WORKS 9: PART I. THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS 221 (1940).

<sup>191</sup> DARYL SHARP, DIGESTING JUNG: FOOD FOR THE JOURNEY 22 (1996).

<sup>192</sup> ROBERT H. HOPCKE, PERSONA: WHERE SACRED MEETS PROFANE 10 (1995).

<sup>193</sup> C.G. JUNG, *The Persona as a Segment of the Collective Psyche*, para 245, in COLLECTED WORKS VOLUME 7: TWO ESSAYS IN ANALYTIC PSYCHOLOGY (1966).

one is individual, whereas one is simply acting a role through which the collective psyche speaks.<sup>194</sup>

According to Jung, analysis of the persona involves “strip[ping] off the mask, and discover[ing] that what seemed to be individual is at bottom collective; in other words, that the persona was only a mask of the collective psyche.”<sup>195</sup> An individual “takes a name, earns a title, exercises a function, he is this or that,” but as compared to “the essential individuality of the person concerned,” these objective aspects are “only a secondary reality, a compromise formation.”<sup>196</sup> The persona is thus “a semblance, a two-dimensional reality” of an individual’s true nature,<sup>197</sup> or, even more disparagingly, a “false self” consisting of “an acquired personality compounded of perverted beliefs, as distinct from the inner ‘true self.’”<sup>198</sup>

And Jung also spoke of the etymology of the term persona, from *per sonare*, meaning “to sound through, derived from the way in which ancient masks were fitted with tubes, not unlike megaphones, which the actors behind the mask used to project their voices toward the audience.”<sup>199</sup> The psychologist Anthony Stevens refers to it as “the social archetype” or the “conformity archetype.”<sup>200</sup> In effect, “[o]ne could say, with a little exaggeration, that the persona is that which in reality one is not, but which oneself as well as others think one is.”<sup>201</sup> As Jung puts it:

It would be wrong to leave the matter as it stands without at the same time recognizing that there is, after all, something individual to the peculiar choice and delineation of the persona, and that despite the exclusive identity of the ego-consciousness with the persona, the unconscious self, *one's real individuality*, is always present and makes itself felt indirectly if not directly. Although the

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<sup>194</sup> 9:1 CARL G. JUNG, *Archetypes of the Collective Unconscious*, in *THE COLLECTED WORKS OF C.G. JUNG* 221 (1969).

<sup>195</sup> C.G. JUNG, *The Persona as a Segment of the Collective Psyche*, para 158, in *COLLECTED WORKS VOLUME 7: TWO ESSAYS IN ANALYTIC PSYCHOLOGY* (1966).

<sup>196</sup> *Id.* at pars. 245f.

<sup>197</sup> *Id.* at pars 155-156.

<sup>198</sup> CARL JUNG, *PSYCHOLOGICAL TYPES*, Para. 370 (1923).

<sup>199</sup> ROBERT H. HOPCKE, *PERSONA: WHERE SACRED MEETS PROFANE* (1995), (citing *Comments on a Doctoral Thesis*, in C. G. JUNG SPEAKING: INTERVIEWS AND ENCOUNTERS 210 (William McGuire and R. F. C. Hull eds. (Princeton: Princeton University Press, 1977)).

<sup>200</sup> ANTHONY STEVENS, *ON JUNG* 47 (1994).

<sup>201</sup> C.G. JUNG, *Concerning Rebirth*, in *COLLECTED WORKS 9: PART I. THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS* 221 (1940).

ego-consciousness is at first identical with the persona—that compromise role in which we parade before the community—yet the unconscious self can never be repressed to the point of extinction.<sup>202</sup>

In contrast to the persona, Jung called the inner and unconscious aspect of the personality the shadow—i.e., “what was hidden under the mask of conventional adaptation.”<sup>203</sup> The shadow in the Jungian model encompasses the unknown dark side, i.e., the least desirable aspects, of one’s personality.<sup>204</sup> Similar to Freud’s id, the shadow is irrational and instinctive, comprising the unconscious part of the psyche.<sup>205</sup> In contrast to the social, collective, and public persona, the shadow is “fed by the neglected and repressed collective values,”<sup>206</sup> and “personifies everything that the subject refuses to acknowledge about himself.”<sup>207</sup> This may include “such things as egotism, mental laziness, and sloppiness; unreal fantasies, schemes and plots; carelessness and cowardice; inordinate love of money and possessions.”<sup>208</sup> In effect, the shadow aspect of the personality is dark “because it predominantly consists of the primitive, negative, socially or religiously depreciated human emotions and impulses such as hunger for power, selfishness, greed, envy, anger or rage.”<sup>209</sup> Like the Freudian id, the Jungian shadow can thus be seen to align with the personal shame that Warren and Brandeis wanted to protect in *The Right to Privacy*, in contrast to the persona’s public and communicatory role, as articulated in *Haelan*.

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

The demands of propriety and good manners are an added

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<sup>202</sup> C.G. JUNG, TWO ESSAYS ON ANALYTICAL PSYCHOLOGY VOL. 7 247 (1953).

<sup>203</sup> C.G. JUNG, THE PSYCHOLOGY OF THE TRANSFERENCE 238-9 (1954).

<sup>204</sup> *See, e.g.*, C.G. JUNG, *Aion* (1951), in COLLECTED WORKS 9, PART II at 14 (“The shadow is a moral problem that challenges the whole ego-personality, for no one can become conscious of the shadow without considerable moral effort. To become conscious of it involves recognizing the dark aspects of the personality as present and real.”).

<sup>205</sup> ANTHONY STEVENS, ON JUNG 43 (1990).

<sup>206</sup> MICHAEL FORDHAM, JUNGIAN PSYCHOTHERAPY 5 (1978).

<sup>207</sup> C. G. JUNG, THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS 284 (1996).

<sup>208</sup> M-L VON FRANZ, *The Process of Individuation*, in C. G. JUNG, MAN AND HIS SYMBOLS 175 (1978).

<sup>209</sup> GWILYM WYN ROBERTS AND ANDREW MACHON, APPRECIATIVE HEALTHCARE PRACTICE: A GUIDE TO COMPASSIONATE, PERSON-CENTERED CARE 72 (2015).

inducement to assume a becoming mask. What goes on behind the mask is then called “private life.” This painfully familiar division of consciousness into two figures, often preposterously different, is an incisive psychological operation that is bound to have repercussions on the unconscious.<sup>210</sup>

In sum, Jung treats the outer “persona” as merely a “shallow, brittle, conformist kind of personality,”<sup>211</sup> perhaps undeserving of dignitary, emotional, and non-commercial considerations, and, in its collective rather than individual aspect, easily severable from the identity-holder.

#### IV. PUBLICITY AND THE FALSE SELF

This Part examines the consequences of a right protecting the mask of the actor, in the metaphorical sense, apart from the actor herself. Under the psychoanalytic view, we see a theoretical split between the false façade, or persona, and the inner self. This is consistent with the right of privacy’s protection of seclusion, secrecy, and hurt feelings, in contrast to the right of publicity as concerning public figures and their commercial interests. Judge Frank did not specifically mention psychoanalytic influences in *Haelan*. However, it would make sense that, in ascribing to a psychoanalytic viewpoint—

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<sup>210</sup> C.G. JUNG, TWO ESSAYS ON ANALYTICAL PSYCHOLOGY VOL. 7 193 (1953).

<sup>211</sup> See ANTHONY STEVENS, ON JUNG 43 (1990). Psychoanalyst D.E. Winnicott later elaborated on this psychoanalytic dichotomy between the private self and the public self. Winnicott drew a distinction between a “false self” that is both the natural product of socialization and a potentially corrupt artifact of social pressures, and an introverted, authentic, and spontaneous true self, which he linked to Freud’s concept of the id. Thus, the exterior false self serves a defensive function for the interior “true self,” which it masks. D. W. WINNICOTT, CLINICAL VARIETIES OF TRANSFERENCE (1955-56) (“In the cases on which my work is based there has been what I call a true self hidden, protected by a false self. This false self is no doubt an aspect of the true self. It hides and protects it, and it reacts to the adaptation failures and develops a pattern corresponding to the pattern of environmental failure.”); D. W. Winnicott, *Ego distortion in terms of true and false self*, in THE MATURATIONAL PROCESS AND THE FACILITATING ENVIRONMENT: STUDIES IN THE THEORY OF EMOTIONAL DEVELOPMENT 140-157 (1965). This psychological emphasis on the true self and the false self somewhat mirrors sociologist Erving Goffman’s model of the front stage and the back stage prevalent in privacy law scholarship, except with emphasis in publicity law on the front stage instead of the back stage. Under Goffman’s theory, in the “presentation of self in everyday life,” we do not see the self, but rather only a reflection or image of the self. E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

including as applied to the institution of law—it was “natural and obvious for Judge Frank”<sup>212</sup> to bifurcate personality rights into inner private and outer public dimensions, as his influencers around that time period were doing.<sup>213</sup> This theory is consistent with the right of publicity as the “reverse side of the coin of privacy,” or in other words, its opposite.

Privacy law scholars frequently use visual metaphors<sup>214</sup> to describe privacy-related problems. Examples of such metaphors include the anthropomorphic figure of Big Brother from George Orwell’s *Nineteen Eighty-Four*<sup>215</sup> or Jeremy Bentham’s image of the Panopticon prison<sup>216</sup> to describe

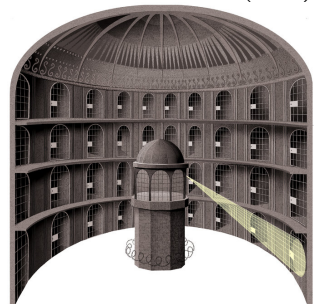
<sup>212</sup> Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1201 (1986).

<sup>213</sup> Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1054 (1968).

<sup>214</sup> See, e.g., JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE*, Ch. 5, p. 14 (2012) (discussing the use of visual metaphors and spatial metaphors in privacy law commentary); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001) (arguing that the privacy problem created through computer databases and the Internet is better captured by Franz Kafka’s *The Trial* rather than by Big Brother); Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA HIGH TECH. L.J. 27 (1995); Orin S. Kerr, *Internet Surveillance Law after the USA Patriot Act: The Big Brother that Isn’t*, 97 NW. U. L. REV. 607 (2003).



<sup>215</sup> Frederic Guimont; from GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).



<sup>216</sup> Adam Simpson

privacy problems. Along these lines, Jung's persona as actor's mask<sup>217</sup> perhaps serves as an accurate metaphor for the right of publicity's current aim. The actor's mask is descriptive of the right of publicity's transformation from a personal right under the rubric of privacy, rooted in the individual, to an intellectual right external to the person, an object of property which can be bought and sold like a commodity.<sup>218</sup> The actor's mask conception of publicity supports its transferability and strictly commercial nature, and thus its status as an intellectual property right.<sup>219</sup> An actor can take off their mask and do with it what they wish, hence the right of publicity's alienability. And when the actor dies, her mask survives her, hence its descendibility under certain state laws. The actor likely will not have an emotional attachment to that mask as an object distinct from its subject, hence the right of publicity's economic focus.

Despite its descriptive accuracy, though, the actor's mask metaphor is problematic from a normative perspective. For what reason should we justify protecting only the public aspect, or external image, of an individual? As Alice Haemmerli writes, "as nothing more than a claim to an objectified commodity, [the right of publicity] cannot be theoretically reconciled with non-economic personal interests such as those protected by privacy."<sup>220</sup> Indeed, the common justifications for a property right in an outer self are not wholly persuasive.<sup>221</sup>



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<sup>218</sup> See JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 7 (2018).

<sup>219</sup> Cf. Brian L. Frye, *The Athlete's Two Bodies: Reflections on the Ontology of Celebrity*, *INCITE JOURNAL OF EXPERIMENTAL MEDIA* #7/8: Sports ("Warren and Brandeis unwittingly enabled the creation of the modern concept of celebrity by creating the right to privacy, which implicitly recognized the existence of an intangible identity in every tangible person. And the creation of the right of publicity in *Haelan* realized that concept by implicitly defining a celebrity as the union of two bodies: a tangible and mortal person, and an intangible and immortal celebrity identity.") available at <http://www.incite-online.net/frye7-8.html>.

<sup>220</sup> Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 *DUKE L.J.* 383, 388 (1999).

<sup>221</sup> See, e.g., Marshall A. Leaffer, *Sheldon Halpern and the Right of Publicity*, 78 *OHIO STATE L.J.* 273, 277 (2017) ("The literature is voluminous, and I have yet to encounter totally persuasive justification for this all-inclusive right for the misappropriation of persona.").

Because of the strictly commercial nature of the right, the primary justifications focus on economic incentives, natural rights, unjust enrichment, and consumer protection, to the relative exclusion of personhood and autonomy. This Part will now briefly touch on these justifications and their criticisms.<sup>222</sup>

A popular justification for the right of publicity is built on John Locke's labor theory of property. That is, "every person is entitled to the fruit of their labors unless there are important countervailing public policy considerations."<sup>223</sup> According to Locke, a system of private property was needed to determine how to allocate rivalrous objects in the case of conflicting claims.<sup>224</sup> Labor, as a morally significant act, was Locke's solution. The person who labored for the property is the one who should prevail in the case of opposing claims. And labor makes exclusive ownership acceptable.<sup>225</sup> By this logic, the celebrity status that is associated with the right of publicity is one that comes from hard work and determination.<sup>226</sup> But this justification is suspect in the case of the right of publicity. Mark McKenna argues that because identity, as an intangible, is nonrivalrous and thus not scarce, it need not be appropriated exclusively and thus Lockean property theory has little applicability in a property right over the persona.<sup>227</sup> It might also be that adherence to Locke is misplaced because of its reliance on a sort of libertarian free will that probably does not exist. Not all personalities "work hard" for their fame. Many were in the right place at the right time. For others, talent comes very naturally.<sup>228</sup>

Further, it is unclear if the issue of "fame," i.e., as analogous to a physical commodity, is what is valuable and being exploited by advertisers. Advertisers choose personas to place in advertisements because of the meaning that they hold in our collective society. If such meaning is developed by the public in its

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<sup>222</sup> Several other scholars provide more detailed explanations of the normative issues faced by the right of publicity's economic, commercial, and external focus. *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 173–74 (1993); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2006).

<sup>223</sup> *See, e.g.*, Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

<sup>224</sup> JOHN LOCKE, TWO TREATIES OF GOVERNMENT § 27, at 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

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

<sup>226</sup> *See, e.g.*, Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

<sup>227</sup> Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 256 (2006).

<sup>228</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 189 (1993).



collective aspect, it seems like a stretch for the celebrity to claim that her labor is entirely responsible for its value; fame and meaning are conferred onto celebrities by the public and not built up by a celebrity in the same way that a carpenter builds a chair from wood.<sup>229</sup> In sum, it is not altogether convincing that labor should provide the principle justification for a personality right.

Unjust enrichment provides another possible justification for protecting the public persona. Because public personalities do at least *something* to bring about their fame, allowing others to exploit it might be seen to unjustly enrich them at the expense of the persona-holder.<sup>230</sup> Our society tends to be concerned about free riding—allowing others to reap where they have not sown.<sup>231</sup> No matter how or who actually created the value, a new valuable asset has been created and allowing others to profit from it might simply be unfair. The right of publicity might correct this unfairness. That is, it gives public figures the legal means to control their marketable fame and keep others from appropriating that fame for their own benefit.<sup>232</sup> One issue with the unjust enrichment justification, though, is that it assumes that personas are original; rather, public personalities typically build their images and personalities by appropriating things from society and culture.<sup>233</sup> Madonna, for example, built her persona on an “ironic reworking of the Hollywood myth of ‘the blonde.’”<sup>234</sup> Additionally, a focus on unjust enrichment tends to concentrate, perhaps erroneously, on the profits of the infringer, rather than the harm to the publicity-holder, in evaluating harm.<sup>235</sup>

Much like in copyright law, the right of publicity is sometimes rationalized, including by the Supreme Court, as promoting an economic incentives structure.<sup>236</sup> Giving people control over their masks “induces people

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<sup>229</sup> *Id.* at 185.

<sup>230</sup> J. THOMAS MCCARTHY, 1 RIGHTS OF PUBLICITY AND PRIVACY, at §2:2.

<sup>231</sup> *Id.* at §2:6.

<sup>232</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 196 (1993).

<sup>233</sup> *Id.* at 196-7.

<sup>234</sup> *Id.* at 177 (“How much does she owe to Marilyn Monroe? To the directors . . . who made the films in which Monroe appeared? To Andy Warhol and the Kennedy brothers, who helped elevate her to iconic status?”).

<sup>235</sup> Jesse Koehler, *Fraley v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963, 996 (2013).

<sup>236</sup> *See, e.g.,* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (“Ohio’s decision to protect petitioner’s right of publicity . . . provides an economic incentive for him to make the investment required to produce a performance of interest to the public.”); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 206 (1993) (“It is frequently asserted that the purpose of the right of publicity, like that of copyright, is to provide an economic incentive for enterprise, creativity, and achievement.”); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161,

to expend the time, effort, and resources necessary to develop talents and produce works that ultimately benefit society as a whole.”<sup>237</sup> Control encourages activities that are socially valuable by making up for the downsides of being in the spotlight, which is important in a world where fame is fickle. If this protection was not available, the idea goes, less people would be willing to venture out onto the stage of publication. However, the financial rewards for achieving fame are often great without the needed control incentive.<sup>238</sup> Moreover, incentives for achieving success in a given (public) field and incentives to develop a public persona, while sometimes overlapping, are typically readily distinct. As Mark McKenna notes:

It is possible that someone would work extremely hard to become the world’s best golfer, thereby creating demand to see that individual golf, but still fail to create a public persona that draws people to purchase products. The inverse is also true: While many of the most marketable athletes are at the top of their sports, some commercially marketable people are decidedly not. For example, despite

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1186 (2006) (“A final justification offered for the right of publicity is that the grant of such control is needed to encourage investment in the development of a public persona.”); Vincent M. de Grandpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 73, 74 (2001).

<sup>237</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *CALIF. L. REV.* 127 (1993).

<sup>238</sup> A lesser-used alternative economic justification for the right of publicity is allocative efficiency, a variation on the “tragedy of the commons” argument for private property. See, e.g., Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 *UCLA ENT. L. REV.* 97, 99 (1994). It assumes that the persona is a scarce resource, and absent allocation through a property regime, would be ruined by overuse. See Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 *U. PITT. L. REV.* 225, 268 (2006). Landes and Posner argue that “[t]he motive [in providing stronger publicity rights] is not to encourage greater investment in becoming a celebrity (the incremental encouragement would doubtless be minimal), but to prevent the premature exhaustion of the commercial value of the celebrity’s name or likeness.” WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 223 (Harvard University Press 2003). Thus, under this theory, the law should grant an individual rights in their persona so that they may control its uses and maximize its advertising value. Yet McKenna points out the theory is an odd fit for publicity, among other reasons, in that the persona is subject to depletion only in an abstract sense, and is at odds with the well-known maxim that “all publicity is good publicity”—that is, publicity “tends to feed off of itself and, as a result, many uses actually increase the value of a celebrity’s identity, whatever the character of those uses.” *Id.*

her lack of athletic success, tennis player Anna Kournikova has been among the most well-known and marketable female athletes. Evidently it is not necessarily the same characteristics that lead to success both within one's native field and within the market for commercial endorsements.<sup>239</sup>

And if the right of publicity incentivizes anything, it is not clear that it is incentivizing anything productive, perhaps leading to overinvestment in celebrity and producing more people who are "famous for being famous," such as the Kardashians.<sup>240</sup> Moreover, a right seeking to incentivize investment in celebrity personas will tend to afford protection only to those personas which are commercially valuable, leaving others whose images have entered the public arena without recourse.<sup>241</sup>

A consumer protection justification is also sometimes invoked, analogous to trademark law.<sup>242</sup> That is, the right of publicity might be needed to protect consumers from being confused or misled about product endorsements.<sup>243</sup> The right of publicity, under this justification, seeks to protect consumers from wrongly thinking that a celebrity endorsed or sponsored a product when he or she has not. It is unclear, though, that consumers are typically damaged by confusion as to source of one's identity, though there are times where that might be the case. Regardless, the right of publicity gives the celebrity a cause of action for claims even when consumers would not believe the advertisements are endorsements.

One could also argue that such a consumer confusion-oriented justification makes the right of publicity redundant to the Lanham (Trademark) Act. That is, if the true concern of the right of publicity is consumer protection, then perhaps amendments should be made to expand the Lanham Act rather than having the right of publicity constitute a separate cause of action.<sup>244</sup> Though as Dogan and Lemley have convincingly pointed out, limiting applicability of the right of publicity to cases involving confusion of some kind

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<sup>239</sup> *Id.* at 259.

<sup>240</sup> JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 101 (2018); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187 (2006).

<sup>241</sup> Joshua L. Simmons and Miranda D. Means, *Split Personality*, Vol. 10 No. 5 Landslide, May/June 2018 at 2.

<sup>242</sup> See, e.g., Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).

<sup>243</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 228 (1993).

<sup>244</sup> *Id.* at 234-5.

or another might be a helpful mechanism in cabining the right, which is widely seen as lacking conceptual boundaries, to certain situations.<sup>245</sup>

Thus, the conceptualization of the right of publicity as protecting the external self leaves us with justifications imported from other intellectual property regimes, which, while facially promising, are ultimately unconvincing. Further, these justifications support the right of publicity as a freely transferable intellectual property right, which, as mentioned in Part I, has several negative consequences.<sup>246</sup>

In attempting to bring the focus from the actor's mask back to the actor, several commentators have proposed autonomy-based justifications for the right of publicity. Jennifer Rothman believes that "the best justifications, perhaps the only legitimate ones, for the right of publicity are not those rooted in analogies to IP but those focused on protecting a person's identity, particularly the person's name or likeness, when the uses are likely to cause dignitary, emotional, or economic harms."<sup>247</sup> To this end, Alice Haemmerli and Mark McKenna have offered two significant examples of theories that involve the right of publicity as protecting an autonomous self.

Haemmerli proposes a Kantian view of the right of publicity. In contrast to the Lockean conception, which focuses on the right of publicity as a property right *external* to the individual, Haemmerli's focus is on the internal autonomous self. For Haemmerli, a normative underpinning based on Immanuel Kant's idealist philosophy shifts the focus of the right of publicity from a strictly economic right to one also focused on morality and personhood, viewing "the individual as an autonomous being preceding the creation of property."<sup>248</sup> Indeed, Kant viewed the individual as an autonomous and moral being—freedom, for Kant, is an innate right: the "sole and original right that belongs to every human being by virtue of his humanity," and, in invoking a notion of control and self-determination, "the attribute of a human being his own master."<sup>249</sup> This central concept of autonomy in Kantian philosophy, for Haemmerli, lent itself to a philosophical justification for the right of publicity:

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<sup>245</sup> Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006); Mark A. Lemley, *Privacy, Property and Publicity*, (forthcoming 2019) (draft available on SSRN).

<sup>246</sup> *But see generally* Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. REV. 185 (2012) (arguing that the right of publicity is less alienable than most commentators believe it to be).

<sup>247</sup> JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 181 (2018).

<sup>248</sup> Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 413 (1999).

<sup>249</sup> IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 44 (John Ladd trans. and ed., Library of Liberal Arts 1965) (1797).

“Autonomy implies the individual’s right to control the use of her own person, since interference with one’s person is a direct infringement of the innate right of freedom (which takes concrete form in social life as liberty or freedom from compulsion by others).”<sup>250</sup>

Haemmerli then goes on to link this concept of personal autonomy with Kant’s theory of property, which, together, might be seen to establish a link in objectified identity. Under the Kantian framework, property stems from human freedom: “it is an a priori assumption of practical reason that any and every object of my will be viewed and treated as something that has the objective possibility of being yours or mine.”<sup>251</sup> Thus, in the Kantian system, property is inseparable from one’s personhood because property grows from freedom and freedom is essential to personhood.<sup>252</sup> If one’s own external image is treated as an object capable of being “yours or mine,” then perhaps it is best claimed by the person who serves as its natural source.<sup>253</sup> As Haemmerli puts it:

[A]n innate right to one’s persona, and an accompanying property right in the uses and control of the objectification of that persona, can be grounded in idealist philosophy (keeping in mind that image-as-object may also be qualified as having a subjective, personal, inward aspect and that it is not a “thing” like any other). Like intellectual property, image can be viewed as unique, a product of the peculiar mix of mental, psychological, and physical attributes that make the progenitor the individual she is . . . Even more broadly, this philosophical orientation permits us to reconceive the right of publicity as a freedom-based property right with both moral and economic characteristics, rather than being forced to make a dichotomous choice between a privacy right concerned with moral injury on the one hand, or a purely pecuniary publicity right on the other.<sup>254</sup>

Similarly, Mark McKenna has proposed an alternative justification for the right of publicity based on individual autonomous self-definition, which like

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<sup>250</sup> Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 416 (1999) (citing *id.*).

<sup>251</sup> IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 52 (John Ladd trans. and ed., Library of Liberal Arts 1965) (1797).

<sup>252</sup> Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 418 (1999).

<sup>253</sup> *Id.* at 417.

<sup>254</sup> *Id.* at 421-22.

Haemmerli's theory, would support an emphasis on the emotional harms caused by the commercial use of one's identity.<sup>255</sup> McKenna argues that the appropriation of identity implicates an individual's ability to "autonomously define" themselves, thus inflicting harm.<sup>256</sup> According to McKenna, while the "unauthorized commercial use of a private citizen's identity, like publication of private facts, threatens the private citizen's anonymity, it also implicates a very different interest in autonomous self-definition."<sup>257</sup> That is, "because an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning."<sup>258</sup>

This interest, while important in the privacy context, appears to be equally relevant for individuals with public personas.<sup>259</sup> In this way, McKenna would seek to distinguish between identity appropriation claims on one hand, and traditional privacy claims on the other—rather than claims between public figures and private citizens.<sup>260</sup> As McKenna articulates it, "[b]ecause the things with which individuals choose to associate reflect the way they wish to be perceived, unauthorized use of one's identity in connection with products or services threatens to define that individual to the world."<sup>261</sup>

Rather than protecting the actor's mask in the vein of the psychoanalytic theory of persona, these personhood theories seek to extend the right of publicity to the inner, autonomous self, i.e., the actor rather than the mask. Yet, in focusing on the inner, "true self," these justifications presuppose that the self has a transcendental aspect, or an "essential underlying identity," rather than seeing the image, itself, as contributing to the creation of, or even equivalent to, that identity.<sup>262</sup> In this way, these theories retreat, from the purely external, to the other extreme in referring to an isolated, subjective, and autonomous self.<sup>263</sup> In other words, a shift from the objective, third-person perspective to the

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<sup>255</sup> Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 279 (2006).

<sup>256</sup> *See id.* at 280 n.169.

<sup>257</sup> *Id.*

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

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 280.

<sup>261</sup> *Id.* at 294.

<sup>262</sup> Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 425-6 (1999).

<sup>263</sup> *See, e.g.,* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 279 (2006) (claiming that "Haemmerli's analysis," while flawed in certain respects, "offers an opportunity to re-examine the harm of identity appropriation with a renewed emphasis on individual autonomy and the emotional harms caused by the commercial use of one's identity.").

subjective, first-person perspective.

While an improvement over the justifications rooted in analogies to intellectual property—indeed, such theories focus on the right of publicity as protecting emotional and dignitary harms in addition to commercial ones, as well as justify limits to its alienability—there is perhaps an alternative middle ground. To this end, the next Part proposes a conception of the self that emphasizes the interdisciplinary concept of intersubjectivity—i.e., existing between, or shared between, conscious minds—as particularly relevant in its emphasis on relationships between individuals.<sup>264</sup> Indeed, given its focus on the contextual nature of interactions between people, intersubjectivity has been proposed as an update to the classical psychoanalytic dualistic view of the self previously examined in Part III.<sup>265</sup>

## V. PUBLICITY AND THE INTERSUBJECTIVE SELF

In shifting to the prescriptive, this Part suggests that right of publicity law pivot from the public-private dualism that has plagued personality jurisprudence since Judge Frank decided *Haelan*. As an alternative, it proposes an intersubjective concept of the self, i.e., focusing on the role of social relations as integral to the development of the personality.<sup>266</sup> Consider that publicity law is viewed from the objective third-person perspective, focusing on the external image—the image-as-object capable of being owned and transferred. Privacy law, on the other hand, is viewed from the subjective first-person perspective—the perception of reality from within one's perspective, as exemplified by its focus on inner feelings, emotions, and dignity.<sup>267</sup> While commentators, like McKenna, Haemmerli, and Rothman, have suggested that publicity retreat from

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<sup>264</sup> See *infra* Part V.

<sup>265</sup> See, e.g., Werner Bohleber, *The concept of intersubjectivity in psychoanalysis: Taking critical stock*, 94 INT. J. PSYCHOANAL 799-823 (2013) (noting that “[t]he past two or three decades have seen nearly all psychoanalytical schools of thought undergo a change towards a stronger intersubjective orientation.”).

<sup>266</sup> See, e.g., ROBERT STOLOROW AND GEORGE E. ATWOOD, *FACES IN A CROWD: INTERSUBJECTIVITY IN PERSONALITY THEORY* (2001); Stolorow, R. D. & Atwood, G. E. (1992), *Contexts of Being: The Intersubjective Foundations of Psychological Life*. Hillsdale, NJ: The Analytic Press; Robert D. Stolorow, *Post-Cartesian Psychoanalysis as Phenomenological Contextualism*, at 9, in *WORLD, AFFECTIVITY, TRAUMA: HEIDEGGER AND POST-CARTESIAN PSYCHOANALYSIS* (Routledge, 2011); Werner Bohleber, *The concept of intersubjectivity in psychoanalysis: Taking critical stock*, 94 INT. J. PSYCHOANAL 799-823 (2013); *THE INTERSUBJECTIVE PERSPECTIVE*, edited by R D Stolorow, G E Atwood and B Brandchaft, Jason Aronson, (1994).

<sup>267</sup> See, e.g., Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991); Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV 779 (1996).

the objective to the subjective viewpoint, this Part attempts to view publicity from the intersubjective, “second-person” perspective—a transactional, relational, and collective one.<sup>268</sup>

As touched on in Part III, traditional psychoanalysis was pervaded by the Cartesian “myth of the isolated mind.”<sup>269</sup> The philosophy of Rene Descartes severed mind from body, conceiving of the mind as a “thinking thing” with “an inside” that “looks out on an external world” from which it is essentially estranged.<sup>270</sup> This metaphysical dualism “concretized the idea of a complete separation between mind and world, between subject and object.”<sup>271</sup> A universal feature of the Cartesian mind “is the contrast between inner and outer.”<sup>272</sup> Inner reality is considered to be subjective and psychic while outer reality is objective, material, and extended in space.<sup>273</sup> The mind is a container, with fantasies, ideas, emotions, drives and instincts, separate from external reality.<sup>274</sup>

Consistent with this mindset, consider Judge Frank’s statement that legal rules are just “psychological pulleys” or “psychic levers,”<sup>275</sup> and his emphasis on separating “internal and external, psychical and physical, mind and body, subjective and objective.”<sup>276</sup> In psychoanalysis, this split appears in the contrast between psychical reality and external reality.<sup>277</sup> And in the law, we see the consequences of this dualism in the split between privacy—focused on psychic inner reality, and publicity—focused on the material image.

In contrast, personality, as a whole, has more recently been found to be contextual in nature—the result of “emergent properties of ongoing dynamic

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<sup>268</sup> See generally Christian de Quincey, *Intersubjectivity: Exploring Consciousness from the Second-Person Perspective*, 320 THE JOURNAL OF TRANSPERSONAL PSYCHOLOGY (2000).

<sup>269</sup> Stolorow, R. D. & Atwood, G. E. (1992), *Contexts of Being: The Intersubjective Foundations of Psychological Life*. Hillsdale, NJ: The Analytic Press; cf. Lewis Kirshner, *The concept of the self in psychoanalytic theory and its philosophical foundations*, 39 (1) J AM PSYCHOANAL ASSOC. 157 (1991) (“Psychoanalysis is a heritor of this empiricist view of a self isolated from experience, a central core of self inside the mind which views the mind and ideas passing before it”) (internal citations omitted).

<sup>270</sup> Robert D. Stolorow, *Post-Cartesian Psychoanalysis as Phenomenological Contextualism*, at 2, in *WORLD, AFFECTIVITY, TRAUMA: HEIDEGGER AND POST-CARTESIAN PSYCHOANALYSIS* (Routledge, 2011).

<sup>271</sup> *Id.* at 9.

<sup>272</sup> Donna M. Orange, *From Cartesian Minds to Experiential Worlds in Psychoanalysis*, at 6, for Multiple Perspectives in Subjectivity (Rome, March 26, 1999).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> See *supra* note 153.

<sup>276</sup> See *supra* note 150.

<sup>277</sup> Donna M. Orange, *From Cartesian Minds to Experiential Worlds in Psychoanalysis*, at 5, for Multiple Perspectives in Subjectivity (Rome, March 26, 1999).



intersubjective systems.”<sup>278</sup> As Robert Stolorow notes in works such as *Post-Cartesian Psychoanalysis as Phenomenological Contextualism*, intersubjectivity theory reformulates selfhood and personality in terms that more directly capture relational experience. One’s “subjective emotional experience—is something that from birth onward is regulated, or mis-regulated, within ongoing relational systems.”<sup>279</sup> Thus, an individual’s subjective experience of self is not autonomous or static, but rather is continually being constructed in the present out of past experiences and the current context in which the individual finds herself. One’s personality “is always codetermined by features of the surround and the unique meanings into which these are assimilated.”<sup>280</sup>

Importantly, intersubjectivity does not strive to fit a person’s subjective experience into preexisting theoretical frameworks like “id and ego,” “persona and shadow,” true self and false self,” or “public and private.”<sup>281</sup> Such formulations are rather regarded as metaphors that may be helpful in understanding some people and some situations, some of the time.<sup>282</sup> Indeed, individuals “are not viewed as trying to hide or dress themselves up”; rather, their presentations are seen as “dynamic solutions” to navigating identity, relationships, and communities.<sup>283</sup> It is through these interpersonal experiences that the self develops.<sup>284</sup>

The adoption of an intersubjective viewpoint of the self in publicity law is consistent with the formulations of self already put forth by several privacy theorists. In his seminal *Privacy, Intimacy, and Personhood*, Jeffrey Reimann argues that the self is “created in social interaction rather than flowering innately from inborn seeds.”<sup>285</sup> The creation of the self, person, or identity “is an ongoing social process—not just something which occurs once and for all during

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<sup>278</sup> Robert D. Stolorow, *Post-Cartesian Psychoanalysis as Phenomenological Contextualism*, at 19, in *WORLD, AFFECTIVITY, TRAUMA: HEIDEGGER AND POST-CARTESIAN PSYCHOANALYSIS* (Routledge, 2011).

<sup>279</sup> *Id.* at 12.

<sup>280</sup> ROBERT STOLOROW AND GEORGE E. ATWOOD, *CONTEXTS OF BEING: THE INTERSUBJECTIVE FOUNDATIONS OF PSYCHOLOGICAL LIFE* 21 (1992).

<sup>281</sup> See PETER BUIRSKI AND PAMELA HAGLUND, *MAKING SENSE TOGETHER: THE INTERSUBJECTIVE APPROACH TO PSYCHOTHERAPY* 15 (2009).

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

<sup>283</sup> *Id.* at 4.

<sup>284</sup> Perhaps the first formulation of an intersubjective viewpoint was put forth by the philosopher Edmund Husserl, the founder of phenomenology, in the early twentieth century. *See, e.g.*, EDMUND HUSSERL, *CARTESIAN MEDITATIONS* (1931) (claiming that intersubjective experience plays a fundamental role in our conception of ourselves as objectively existing subjects, our relations with other subjects, and our interpretation of space and time).

<sup>285</sup> Jeffrey Reimann, *Privacy, Intimacy, and Personhood*, 6 *PHILOSOPHY & PUBLIC AFFAIRS* 26, 39 (1976).

childhood.”<sup>286</sup> For Reiman, “the self requires the social rituals of privacy to exist.”<sup>287</sup> According to Reiman:

The right to privacy is the right to the existence of a social practice which makes it possible for me to think of this existence as mine. This means that it is the right to conditions necessary for me to think of myself as the kind of entity for whom it would be meaningful and important to claim personal and property rights.<sup>288</sup>

Invoking the concept of intersubjectivity specifically, Valerie Steeves has attempted to reconceptualize privacy “as a dynamic process of negotiating personal boundaries in intersubjective relations . . . By placing privacy in the social context of intersubjectivity, privacy can be more fully understood as we negotiate our relations with others on a daily basis.”<sup>289</sup> For Julie Cohen, similarly, “the idea of privacy as a defensive bulwark for the autonomous self is an artifact of a preexisting cultural construction; it does not reveal anything inevitable about privacy or about selfhood.”<sup>290</sup> Cohen writes about a “postliberal,” socially constructed conception of the self as supportive of a dynamic right of privacy, which contrasts sharply with the metaphorical division between public and private inherent in the psychoanalytic model. Cohen also notes that privacy law has long assumed that the self has “an autonomous core—an essential self identifiable after the residue of influence,” e.g., something like the Jungian persona or false self, “has been subtracted.”<sup>291</sup> Yet this must be incorrect because “we are born and remain situated within social and cultural contexts.”<sup>292</sup>

Rather, the self who is the real subject of privacy law (and personally law more generally, by extension) is a social construction “emerging gradually from a preexisting cultural and relational substrate.”<sup>293</sup> According to Cohen’s interdisciplinary account:

The most defensible theoretical foundation for an understanding of the self-society relation emerges at the intersection of poststructuralism and phenomenology:

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<sup>286</sup> *Id.* at 39-40.

<sup>287</sup> *Id.* at 40.

<sup>288</sup> *Id.* at 43.

<sup>289</sup> VALERIE STEEVES, *Reclaiming the Social Value of Privacy*, in LESSONS FROM THE IDENTITY TRAIL 192 (Oxford University Press 2008).

<sup>290</sup> Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1908 (2012).

<sup>291</sup> JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 113 (2012).

<sup>292</sup> Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1908 (2012).

<sup>293</sup> *Id.* at 1905.

selfhood is a product of both social shaping and embodied experience. People are born into networks of relationships, practices, and beliefs, and those networks profoundly shape the processes of self-construction . . . . Over time, they may encounter and experiment with a variety of such inputs and engage in a correspondingly diverse and ad hoc mix of behaviors that defies neat theoretical simplification. On this understanding of the self-society relation, the variables that are most important relate not to idealized autonomy but rather to the nature and quality of the surrounding social and environmental factors that both constrain and shape processes of self-articulation.<sup>294</sup>

Given that the self is constructed or distilled from within social relations, the right of publicity should not be diametrically opposed to privacy. Rather, the extent to which the self is revealed or concealed, embedded or withdrawn, from social relations is part of the same act or phenomenon under both privacy and publicity. In effect, intersubjectivity shifts the concept of the self from noun to

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<sup>294</sup> Julie Cohen, *Turning Privacy Inside Out*, 20.1 THEORETICAL INQUIRIES IN LAW at 9 (forthcoming 2019); see also *id.* at 1907. Along the lines of this intersubjective self is the conception by prominent Japanese philosopher Nishida Kitaro of the Kyoto School. Kitaro sought to integrate Zen and Western philosophy in his novel approach to understanding the self and world.<sup>294</sup> See D.S. Clarke, Jr., *Introduction*, in NISHIDA KITARO BY NISHITANI KEIJI eds. (1991) (noting that Kitaro's philosophy laid the foundation for the Kyoto School of philosophy, the Japanese philosophical movement which assimilated western philosophy and religious ideas and used them to reformulate moral and religious insights unique to the East Asian cultural tradition). Kitaro rejects the notion of the self as existing within a stable external reality, instead seeing the self as an expression constituted within and by relation with other selves. NISHIDA KITARO, *LAST WRITINGS: NOTHINGNESS AND THE RELIGIOUS WORLDVIEW* 53 (1993). Where Cohen criticizes the "traditional liberal self," Kitaro similarly notes that the Kantian moral, autonomous self can live only in what he refers to as a "Kingdom of Ends," that is, an external order of things. *Id.* at 60. Thus, morality and identity, for Kitaro, unlike Kant, does not dictate the definition of the self with which we must work, but itself emerges out of, and as the product of, relationships with others. Indeed, Kitaro notes that "the world becomes a synthetic unity, a 'consciousness in general,' through the negation of the individual and the affirmation of the universal." *Id.* at 63. Kitaro's takeaway from this point is that we create a community—or public world—not just by our internal self, but via a community of minds such that our self-display—our external image, in other words—is a creation of the public at large. *Id.* Kitaro's conceptualization of a self, in its focus on the integration of internal and external dimensions, sounds more in tune with the needs of modern personality rights jurisprudence than Kant's subjective idealism or Locke's objective empiricism.

verb, i.e., from an isolated mind to an expressive communicative act. In this way, publicity, like privacy, may be conceptualized not just as protecting objective or subjective identity, but as a social construction used in negotiating relations with others.<sup>295</sup>

In Jennifer Rothman's recent book, *The Right of Publicity: Privacy Reimagined for a Public World*, she imagines privacy and publicity as intertwined rights, "protecting individuals' identities rather than protecting a separable, purely economic interest."<sup>296</sup> To this end, Rothman notes that public and private figures should be able to recover for both financial and personal injuries, publicity rights should be applicable to both public and private figures, and that the right of publicity should be limited in its alienability.<sup>297</sup> Rothman writes that it "has done a disservice to public figures to deny the possibility that they too suffer dignitary and emotional harms from nonconsensual uses of their identities."<sup>298</sup> In spite of claims to the contrary, the objections of public figures are not solely pecuniary in nature, nor should they be made to pretend as if they are.<sup>299</sup> Such an economic requirement minimizes injuries to public figures and dehumanizes them.<sup>300</sup> On the other hand, private figures should not be barred from bringing right of publicity claims simply because their personas lack commercial value, while at the same time being prohibited from bringing claims based on privacy because they let their personas enter the public arena.<sup>301</sup>

Rothman thus proposes that right of publicity laws should provide minimum statutory damages to protect private figures without commercially valuable identities, when economic damages would be difficult to show, small, or nonexistent.<sup>302</sup> A reimagined right of publicity could address problems such as revenge porn, mugshot websites charging fees for the take down of photos, Twitter-licensed trading cards displaying the names and likenesses of users, and Facebook and LinkedIn use of its users personas for advertising, endorsement, and data harvesting purposes.<sup>303</sup>

This proposed integration of privacy and publicity laws is particularly important as the "distance between the public and private continues to dwindle,

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<sup>295</sup> VALERIE STEEVES, *Reclaiming the Social Value of Privacy*, IN LESSONS FROM THE IDENTITY TRAIL 206 (Oxford University Press 2008).

<sup>296</sup> JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 183 (2018).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

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

<sup>303</sup> Jennifer Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 CARDOZO ARTS & ENT. L. J., 573, 588-592 (2018).

as contemporary media further blur the lines between separating private and public.”<sup>304</sup> To this end, social media, in particular, allows individuals to connect on “social plans that are neither conventionally public nor entirely private.”<sup>305</sup> While in Judge Frank’s time, it was easy enough to separate public figures from private individuals, that distinction is less obvious in networked spaces as individuals record and archive their performances of self and personality. Technology-enabled social networks “allow diverse individuals to reconstruct their primary identity dimensions into more fluid and situational-based identities—depending on the particular social media platform they are employing and with which set of segmented audience.”<sup>306</sup> And the “self (and others) can further edit, duplicate, and remix these performances, which, accessible via a variety of search protocols, reach a variety of networked audiences and publics.”<sup>307</sup>

In effect, we are shifting to networks via technology, enabling “the self to traverse from privacy and publicity and back by cultivating a variety of social behaviors or performances.”<sup>308</sup> Some of these performances, even among otherwise private figures, are widely seen, even going viral, and these individuals, who are not wealthy or otherwise famous, have emotional, reputational, and (sometimes) economic attachments to their identities. The “distinctions between public and private figures make little sense today as so-called private figures increasingly live public or quasi-public lives on Instagram, Twitter, Facebook, Pinterest, Periscope, and other online fora,” each of which are rapidly evolving.<sup>309</sup>

Yet, Margaret Ryznar, for example, has recently called social networks “a science fiction nightmare due to their capacity to gather and misuse the data on their users.”<sup>310</sup> The law should aim to prevent such misuse and the right of publicity could play an integral role in doing so. Perhaps the right of publicity can be used as a legal mechanism both to encourage identity formation and to

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<sup>304</sup> ZIZI PAPACHARISSI AND PAIGE L. GIBSON, Ch. 7, *Fifteen Minutes of Privacy: Privacy, Sociality, and Publicity on Social Network Sites*, in PRIVACY ONLINE (S. Trepte and L. Reinecke eds.) (2011).

<sup>305</sup> *Id.*

<sup>306</sup> STELLA TING-TOOMEY AND TENZEN DORJEE, COMMUNICATING ACROSS CULTURES 8 (2d. ed. 2018).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 181 (2018).

<sup>310</sup> See Margaret Ryznar, Blog Post, “I Quit Facebook, But What About Those Who Remain?” Prawfsblawg (September 26, 2018), available at <http://prawfsblawg.blogs.com/prawfsblawg/2018/09/i-quit-facebook-but-what-about-those-who-remain-.html>.

regulate interactivity across interactive digital technologies and new media, such as social media, virtual worlds and communities, websites (especially user-generated content), blogs, podcasts, and online videos.

In attempting a reworked justification for the right of publicity, then, we might consider the social dynamics of new media. James Grimmelman, in his seminal article, *Saving Facebook*, writes about three factors of social networking: (1) identity, (2) relationship, and (3) community.<sup>311</sup>

As to identity, “a social network site lets you say who you are.”<sup>312</sup> Social media users’ online profiles let them cultivate a persona that influences how others think of them.<sup>313</sup> Online interactions allows new media users to use their posted name or nickname, home or profile page, photos, and written postings to this effect.<sup>314</sup> Many users choose to display the most flattering images of themselves as possible. And social media profiles need not be “an expression of consumerism; instead letting users communicate “prestige, differentiation, authenticity, and theatrical persona” using a common cultural language.<sup>315</sup> Thus, “social-network-site profiles are wholly social artifacts: controlled impressions for a specific audience, as much performative as informative.”<sup>316</sup>

The second goal, relationship, attests to the fact that social network sites, at least ideally, allow users to deepen their connections to their current friends and make new ones.<sup>317</sup> Social network sites can provide contexts for interaction as well as help transmit social cues that facilitate offline interactions.<sup>318</sup> Social media websites “work for relationship building because they also provide semi-public, explicit ways to enact relationships.”<sup>319</sup> Sharing personal information is a central component of intimacy.<sup>320</sup> Social networks allow for relationship building by providing public or semi-public ways of enacting relationships.<sup>321</sup> For example, “adding someone as a contact also (by default) gives them access to your profile information, a form of minor intimacy that signals trust.”<sup>322</sup> These building blocks provide a foundation for more complex interactions.<sup>323</sup>

Finally, the third goal, community, allows an individual “to be

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<sup>311</sup> James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149-57 (2009).

<sup>312</sup> *Id.* at 1152.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 1153.

<sup>317</sup> *Id.* at 1154.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

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

<sup>321</sup> *Id.* at 1155.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

recognized as a valued member of one's various communities" by allowing for the establishment of a social position.<sup>324</sup> Social media allows individuals to visualize digital communities.<sup>325</sup> By representing relationships as hyperlinks, websites "spatialize social networks, mapping the connections within them." It therefore becomes possible to conceptualize an individual's identity within a networked space, which Julie Cohen describes as "a nexus of social practice by embodied human beings."<sup>326</sup>

To the extent that the right of publicity can become a vehicle for regulating and promoting identity, relationships, and community in the context of technology, internet, and social media platforms, such regulation and promotion may provide an apt justification for the right, in at least cases involving advertisements and endorsements. As examples of the technology-related need for interwoven rights of privacy and publicity, consider the *Fraleley v. Facebook*<sup>327</sup> and *Perkins v. LinkedIn*<sup>328</sup> cases. Both illustrate the recent flood of right of publicity litigations in the context of social media,<sup>329</sup> effectively bringing the "right of publicity to the masses."<sup>330</sup> *Fraleley* and *Perkins* highlight the need for a refocused right of publicity in the areas of recovery for personal and reputational injuries as well as financial, applicability to both public and private figures, and appropriate consent as to the transfer of one's identity to third parties. Indeed, given their facts and the issues at stake—private figures seeking to protect their identity and social positions while using new media—these cases can illustrate a potential recasting of the right of publicity's focus from objectivity to intersubjectivity, i.e., not in protecting the commodified image, but instead in regulating the dynamics of new media, which would, in turn, facilitate identity-building through social interaction.

Both cases involved class actions lawsuits brought under California's right of publicity statute, California Civil Code § 3344, which reads in part:

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<sup>324</sup> *Id.* at 1157.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* (citing Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 236 (2007)).

<sup>327</sup> *Fraleley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

<sup>328</sup> *Perkins v. LinkedIn Corporation*, 53 F.Supp.3d 1222 (N.D. Cal. 2014).

<sup>329</sup> Other cases include *Cohen v. Facebook, Inc. (Cohen I)*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011) (recognizing that mental harm could conceivably constitute injury for purposes of California's right of publicity, though dismissing the action against Facebook based on the facts alleged); *Cohen v. Facebook, Inc. (Cohen II)*, C 10-5282 RS, 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011); *C.M.D., et al. v. Facebook, Inc.*, Order No. C 12-1216 RS (N.D. Cal. Mar. 26 2014).

<sup>330</sup> Pillsbury Winthrop Shaw Pittman LLP, "Social media brings the right of publicity to the masses," Internet & Social Media Law Blog (October 7, 2015), available at <https://www.lexology.com/library/detail.aspx?g=c4439120-2339-4253-8fe3-247ab285098b>.

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>331</sup>

In *Fraleley*, the plaintiffs—Facebook users—brought a putative class action under California's right of publicity statute against Facebook, Inc. The claim involved the use of plaintiffs' names and likenesses in Facebook's "Sponsored Stories" feature.<sup>332</sup> As part of Sponsored Stories, Facebook used its users' names and images in paid advertisements stating that the user had "liked" certain companies or brands, e.g., "Angel Fraley likes Rosetta Stone."<sup>333</sup> According to plaintiffs, Facebook broadcasted these misleading endorsements which conflicted with how users wanted to present themselves online. Plaintiffs alleged that they did not know that the use of the "Like" button would be "interpreted and publicized by Facebook as an endorsement of those advertisers' products, services, or brands."<sup>334</sup>

In *Perkins*, similarly, a class of plaintiffs alleged that LinkedIn Corporation—creators of the popular professional networking platform—violated their right of publicity by harvesting email addresses from the contact lists of email accounts associated with Plaintiffs' LinkedIn accounts and by sending repeated invitations to join LinkedIn to the harvested email addresses.<sup>335</sup> Specifically, *Perkins* involved a challenge to LinkedIn's use of a service called "Add Connections," which allows LinkedIn users to import contacts from their external email accounts and email connection invitations to their contacts inviting them to connect on LinkedIn, using Plaintiffs' names and likenesses in the endorsement emails (e.g., "I'd like to add you to my professional network – Paul Perkins").<sup>336</sup> Upon receiving a member's authorization, LinkedIn would send an invitation email to the member's email contacts who were not already LinkedIn members. If that connection invitation is not accepted within a certain amount of time, up to two emails are sent reminding the recipient that the connection invite is pending.<sup>337</sup>

Based on the right of publicity's commercial focus, plaintiffs in both

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<sup>331</sup> CAL. CIV. CODE § 3344(a) (West 2014).

<sup>332</sup> *Fraleley*, 830 F. Supp. 2d at 790-92.

<sup>333</sup> *Id.* at 792.

<sup>334</sup> *Id.*

<sup>335</sup> *Perkins*, 53 F. Supp. 3d at 1225.

<sup>336</sup> *Id.* at 1200.

<sup>337</sup> *Id.*



cases had difficulties recovering because (1) as private figures, their personas had little financial value for assessing injury, and (2) they had assigned their rights of publicity—in the form of name and likeness—to Facebook and LinkedIn, for advertising and endorsement purposes. That is, Facebook and LinkedIn alleged that plaintiffs had consented to their Terms of Service which each contained a broad publicity license in exchange for using the platforms.

In terms of the injury, the *Fraleley* court explained that California's right of publicity—despite being one of a minority of jurisdictions to actually incorporate statutory damages for non-economic injuries—was primarily a vehicle to prevent the commercial use and protect the economic value of the persona, and thus plaintiffs were limited to alleging economic rather than emotional harm.<sup>338</sup> To get past a motion to dismiss, plaintiffs had to plead economic injury, which was focused externally:

Plaintiffs here do not allege that their personal browsing histories have economic value to advertisers wishing to target advertisements at Plaintiffs themselves, nor that their demographic information has economic value for general marketing and analytics purposes. Rather, they allege that their individual, personalized endorsements of products, services, and brands *to their friends and acquaintances* has *concrete, provable value in the economy at large*, which can be measured by the additional profit Facebook earns from selling Sponsored Stories compared to its sale of regular advertisers . . . Based on these *concrete* allegations, Plaintiffs assert that they have a *tangible* property interest in their personal endorsement of Facebook advertisers' products to their Facebook Friends, and that Facebook has been unlawfully profiting from the nonconsensual exploitation of Plaintiffs' statutory right of publicity.<sup>339</sup>

Yet, had plaintiffs also been able to plead mental or reputational harm, they would have had a stronger case. Consider that the motivation of plaintiffs, social media users, was primarily for relational—identity, relationship, and community benefit—rather than economic gain.<sup>340</sup> In this light, the economic theory, in the form of unjust enrichment, seems to be a “clumsy tool” to redress

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<sup>338</sup> *Fraleley*, 830 F. Supp. 2d at 806.

<sup>339</sup> *Id.* at 799. The Court in *Fraleley* found particularly persuasive Facebook CEO Mark Zuckerberg's quote: “A trusted referral influences people more than the best broadcast message. A trusted referral is the Holy Grail of advertising.” *Id.*

<sup>340</sup> Alison Storella, *It's Selfie-Evident: Spectrums of Alienability and Copyrighted Content on Social Media*, 94 B.U. L. REV. 2045, 2071 (2014).

injuries that primarily derive from intersubjective factors rather than commercial ones.<sup>341</sup> If right of publicity law was receptive to it, plaintiffs could have argued, in addition to their unjust enrichment argument, that the misleading endorsements simply conflicted with how Facebook or LinkedIn users wanted to present themselves online.

That is, the facts in *Fraleley*, for instance, indicated that plaintiffs routinely clicked “Like” on the Facebook pages of brands and companies for purposes other than to express support for them. When Facebook and LinkedIn broadcasted misleading endorsements in Sponsored Stories and Add Connections, it conflicted with users’ values. As Jesse Koehler points out, as to the plaintiffs in *Fraleley*:

Such messages could have caused users non-economic harm in the form of humiliation and impairment of reputation by presenting them to their “friends” as proponents of brands and companies that they did not in fact endorse. Moreover, if users had restricted the visibility of the “Likes” section of their profile to only certain “friends” or to no one but themselves, the broadcasting of these “Likes” through “Sponsored Stories” would certainly have caused them embarrassment and feelings of powerlessness as their selected privacy settings led to a greater expectation of privacy. The unavailability of an option to opt-out of social marketing paired with the lack of transparency about what happens when a user clicks the “Like” button strengthens the support for a finding of non-economic harm.<sup>342</sup>

In *Perkins*, plaintiffs similarly alleged that LinkedIn had used their names and likenesses to personally endorse LinkedIn’s services for its commercial benefit and to the detriment of plaintiffs. Here, plaintiffs also attempted to plead reputational harm, though. As evidence for harm to users’ reputations, in a message thread on LinkedIn’s Help Center, one user described LinkedIn’s Add Connections process as “deceptive, misleading and purposely vague.”<sup>343</sup> Other users stated that they were “extremely upset at the repercussions” of LinkedIn’s “hacking,” and that “LinkedIn should stop the spammy practices of sending out invitations to people’s address book without their explicit request to do so. Another user wrote: “There is a specific group of people whom I absolutely

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<sup>341</sup> *Id.*

<sup>342</sup> Jesse Koehler, *Fraleley v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963, 989 (2013).

<sup>343</sup> *Perkins*, 53 F. Supp. 3d at 1201.

must avoid for ethical reasons. This feature has sent out invitations on its own initiative twice, and my first notice each time was that one of these people ‘accepted’ my invitations. Terrible.”<sup>344</sup> Yet another user wrote: “at this point I’m finding LinkedIn more of a problem in terms of hurting my reputation than helping it. What’s more the invitations are NOT people in my address book. They are people I don’t know. I find this entire issue extremely unprofessional on [LinkedIn’s] part. You would think with all these members with the same problem [that LinkedIn] would respond with a fix.”<sup>345</sup>

Yet, while the *Perkins* court agreed with plaintiffs that LinkedIn’s personalized endorsements had “concrete and provable economic value,” and that LinkedIn had misappropriated its users’ names to promote LinkedIn and grow its membership, plaintiffs ran into difficulties in pleading reputational injury. Consistent with the subject-object split, the court cited precedent distinguishing “injury to the character or reputation” from “injury to the feelings resulting from harm to one’s reputation.”<sup>346</sup> While California’s right of publicity statute is one of the few that allows minimum statutory damages for mental harm, the district court held that it could not compensate for reputational harm. Rather, plaintiffs could only be compensated for the *effect* any such reputational damage might have on one’s feelings and emotions. Thus, the non-economic injury in this case could not comprise the actual injury to plaintiffs’ reputations, but rather only the uncertainty and worry regarding these reputations.<sup>347</sup>

A focus on the distinctions between external—economic and reputational—and mental harm—feelings and emotions—seems especially mistaken in the digital and social media context where the divisions between privacy and publicity are particularly unclear. As seen in both *Fraley* and *Perkins*, the plaintiffs’ struggled to show that they were “actually harmed in any meaningful way,”<sup>348</sup> despite clear harm from a relational standpoint. The right

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<sup>344</sup> *Id.* at 1237.

<sup>345</sup> *Id.*

<sup>346</sup> *Perkins*, 53 F. Supp. 3d at 1243 (“Minimum statutory [right of publicity] damages, thus, do not recompense mere reputational harm; rather, this remedy compensates for the effect any such reputational harm might have on one’s feelings or peace of mind.”) (citing *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 72 Cal. Rptr. 3d 194 (2008)).

<sup>347</sup> *Id.*

<sup>348</sup> *See, e.g., Fraley*, 966 S. Supp. 2d at 942 (order granting motion for final approval of settlement agreement) (“[P]laintiffs faced a substantial burden in showing they were injured by the Sponsored Stories. While plaintiffs pleaded a sufficient basis for injury to support constitutional standing, it is far from clear that they could ever have shown they were actually harmed in any meaningful way . . . . Plaintiffs also faced a substantial hurdle in proving a lack of consent, either express or implied. While those issues could not be adjudicated in Facebook’s favor at the pleading stage, there was a significant risk that at some later juncture, plaintiffs would be found to have consented . . .”).

of publicity's economic focus, and its difficulty in weighing non-market considerations, such as mental harm and reputation, seriously limits the remedies available to social media users—and for that matter any private figure whose identity does not have readily measurable commercial value—who attempt to seek recourse for the unauthorized use of their personas.<sup>349</sup> An approach that instead focuses not just on profit or benefit the misappropriating party received, but also on the harm—economic, reputational, and mental—incurred by the violated party would better conceptualize the wrongdoing done to plaintiffs.<sup>350</sup>

Beyond the element of harm, though, most fundamental to taking an intersubjective, or relational, approach to the right of publicity involves the so-far undertheorized consent element. Of the right of publicity's three major elements—(1) use of an individual's persona; (2) for commercial purposes; (3) without plaintiffs consent—the latter is the least often discussed in the literature.<sup>351</sup> Facebook and LinkedIn had argued that plaintiffs had consented to use of their names and likenesses in advertising by agreeing to its Terms of Service.<sup>352</sup> According to the *Fraleley* court, for example, plaintiffs “faced a substantial hurdle in proving a lack of consent, either express or implied. While those issues could not be adjudicated in Facebook's favor at the pleading stage, there was a significant risk that at some later juncture, plaintiffs would be found to have consented.”<sup>353</sup>

As a result of the settlement in *Fraleley and Perkins*, which otherwise involved a modest payout to class members,<sup>354</sup> Facebook and LinkedIn simply amended their terms of service to explicitly include consent for use of users'

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<sup>349</sup> Alison C. Storella, *It's Selfie-Evident: Spectrums of Alienability and Copyrighted Content on Social Media*, 94 B.U. L. REV. 2045, 2072 (2014).

<sup>350</sup> See Jesse Koehler, *Fraleley v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963, 996 (2013) (“If future plaintiffs and courts instead adopt the holistic approach of focusing on the harm incurred on plaintiffs rather than the profits of the infringer, plaintiffs will be more likely to recover.”).

<sup>351</sup> See, e.g., William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing* 2009 U. ILL. L. REV. 1105 (2009); Paul Ohm, *Branding Privacy*, 97 MINN. L. REV. 907 (2013). The issue, though, has been heavily theorized in terms of contract law generally. See, e.g., BRIAN BIX, *Consent and Contracts*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT (Andreas Muller & Peter Shaber (eds.) Routledge, 2018); Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CAS. W. RES. L. REV. 57 (2012).

<sup>352</sup> *Fraleley*, 966 F. Supp. 2d at 804-806.

<sup>353</sup> *Id.* at 939, 942.

<sup>354</sup> See, e.g., Eric Goldman, *The Perkins v. LinkedIn Class Action Was Badly Bungled*, Forbes.com (Oct. 3, 2015), available at <https://www.forbes.com/sites/ericgoldman/2015/10/03/the-perkins-v-linkedin-class-action-settlement-notification-was-badly-bungled/#5190d7844e0c>.

personas for advertising or endorsement purposes. For example, Facebook's Terms of Service now reads:

You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.<sup>355</sup>

Courts have since found this boilerplate consent provision enforceable, even in the context of minors.<sup>356</sup> Thus, while the plaintiffs in *Fraley* and *Perkins* scored a small moral victory by demonstrating that private figures can successfully assert right of publicity claims, as a practical matter, the weakness of the cases in alleging not just economic harm, but also lack of consent weakened any potential settlement opportunity.

As of now, social media platforms have the complete ability to draft their way out of liability for right of publicity violations via disclosures and terms of service.<sup>357</sup> In the last few years, as a result, right of publicity claims have dried up in the context of social media. The right is thus able to do little to lessen the unequal power dynamics between the users of new media and social networking platforms.

Had plaintiffs been able to demonstrate stronger showings of harm and lack of consent, though, the settlement might have resulted in Facebook or

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<sup>355</sup> Terms of Service, FACEBOOK, available at <https://www.facebook.com/terms.php> (As compared to the previous vaguer language, which provided that users' "grant [Facebook] a non-exclusive, transferable, sub-licensable, royalty-free worldwide license to use any IP content that you post on or in connection with Facebook.")

<sup>356</sup> See *C.M.D., et al. v. Facebook, Inc.*, Order No. C 12-1216 RS (N.D. Cal. Mar. 26, 2014). Here, a group of minors who had opted out of the *Fraley* settlement argued that Facebook's terms are not legally enforceable as to the class. Specifically, that the contract represents a type of contract into which a minor cannot legally enter under California law; or alternatively, that the contract was voidable when entered into with minors. The district court rejected these arguments and granted Facebook's motion to dismiss. *Id.*

<sup>357</sup> See, e.g., Pillsbury Winthrop Shaw Pittman LLP, "Social media brings the right of publicity to the masses," Internet & Social Media Law Blog (October 7, 2015), available at <https://www.lexology.com/library/detail.aspx?g=c4439120-2339-4253-8fc3-247ab285098b>.

LinkedIn providing an actual opt-out, or even opt-in, regime. Users would then be able to opt-out or opt-in to “Add Connections” or “Sponsored Stories” on a notification-by-notification basis. This is the sort of meaningful consent that would promote stronger control of one’s identity, as well as strengthen, rather than weaken, digital relationships and communities. Indeed, blanket consent to advertising and endorsement programs generally is meaningless, as users will not be able to predict what brand, company, or user they might be asked to provide an endorsement of.<sup>358</sup>

Thus, future commentary on the right of publicity might focus not just on what sorts of injury qualify for redress, be they emotional, reputational or economic ones, and of the scope of its alienability generally, but also from a contractual lens, i.e., what constitutes adequate *consent* for purposes of the transfer of one’s personality. While imposing outright limits on the right of publicity’s free transferability is one option, e.g., preventing the transferability of the right of publicity via total assignment,<sup>359</sup> courts or (especially) legislators could alternatively consider a heightened standard of consent in the right of publicity context, which might be especially appropriate in the context of personality rights. Commentators, such as Margaret Jane Radin in her groundbreaking work *Boilerplate*, have put forth significant arguments that language in terms and conditions, which many website users will never read, should not be enough to constitute consent to a license of something as integral as publication of one’s identity for blanket use in advertising.<sup>360</sup> Perhaps social networks and other new media should be required under the law to obtain the *knowing* consent of its users before it can use their personas for purposes of advertising, on a notification-by-notification basis.

In these and other ways, recasting the right of publicity through an intersubjective lens might allow the right to contribute to the development of not just the self, but of digital relationships and community—a far cry from publicity’s commonly held stereotype as a hedonic vehicle bolstering the rights of already wealthy celebrities and trampling on the First Amendment. Indeed, as to publicity rights, perhaps the metaphor of the actor’s mask is no longer a particularly apt one.

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<sup>358</sup> See James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1198 (2009).

<sup>359</sup> See e.g., Jennifer Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 CARDOZO ARTS & ENT. L. J., 573, 588-592 (2018).

<sup>360</sup> See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013) (providing a comprehensive treatment of the problems posed by the increasing use of terms and conditions, demonstrating how their use has degraded traditional notions of consent, and thus sacrificed our core rights and liberties); see also Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 92, 94 (2011) (arguing “that the binary choice between alienability and inalienability is over-simplistic, if not outright arbitrary.”).

## CONCLUSION

No one can fully answer the metaphysical question of what the self is. However, we can come up with a better model, or metaphor, of the personality for purposes of the law which is more effective than what we currently have. The extent to which the right of publicity should be alienable, whether it should allow claims for emotional and reputational harms as well as economic ones, and what constitutes adequate consent for its transfer, are a few important issues that depend on what our view of the self and personality are. To this end, the subject-object split common to traditional psychoanalytic thought is insufficient in considering the modern intertwined need for privacy and publicity. Intersubjective personality theory, in viewing the self as contextual, relational, and dependent on social interaction, provides a useful conceptual update. Indeed, it may be impractical to separate the mask from the actor in the manner Judge Frank's *Haelan* opinion did in theorizing a proprietary right of publicity apart from the personal right to privacy—whether intentionally or unintentionally, consciously or unconsciously.