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Privacy, Publicity, and the Portrayal of Real People by the Media

Peter L. Felcher[†] and Edward L. Rubin[‡]

In the course of their various productions, the news and entertainment media¹ frequently portray real people without authorization. The public policy embodied in the First Amendment² protects, and may even encourage, such portrayals; they are regarded as "an essential incident of life in a society which places primary value on freedom of speech and press."³ But unauthorized publicity can cause those portrayed substantial harm; it may disrupt their lives,⁴ hurt their feelings,⁵ or decrease their ability to profit from their names, likenesses or other attributes.⁶ As a result, there is a countervailing public policy that such harm should not be permitted. The portrayal of real people by the media thus brings two important public policies into conflict.

Courts have responded to this conflict by attempting to define a series of rights enabling individuals to enjoin or to recover damages for unauthorized portrayals.⁷ To the traditional cause of action for

[†] Partner, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York.

[‡] Law Clerk to the Honorable Jon O. Newman, Court of Appeals for the Second Circuit.

1. The term "media" will be used broadly in this article, to include any medium for transmission of a portrayal to the public—newspapers, magazines, motion pictures, television, posters, and commercial products. A portrayal may be defined as any generally disseminated representation of a natural person.

2. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .")

3. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

4. *E.g.*, *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (defendant's revelation of plaintiff's past crime causes estrangement of daughter).

5. *E.g.*, *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (description of unusual ailment embarrasses victim).

6. *E.g.*, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (broadcast of performance impairs performer's ability to earn living as entertainer).

7. *See, e.g.*, *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1215 (1979) (injunctive relief); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (money damages).

libel, two newer rights have been added, the "right of privacy"⁸ and the "right of publicity."⁹ Some courts have exhibited a certain sophistication in recognizing that the identification of such rights merely states a legal conclusion, and does not, by itself, provide a full set of legal principles for granting relief.¹⁰ The courts have been less successful, however, in determining precisely what the legal principles protecting people from unauthorized portrayals should be. The principles that have been offered thus far are unclear, and often fail to provide an adequate explanation for the results that the courts have reached.

The absence of articulated principles, however, does not mean that the decisions have been random, or that no principles can be discovered. This article will demonstrate that courts are guided by certain well-accepted and clearly identifiable social policies in resolving conflicts over media portrayals. It will further demonstrate that coherent legal principles can be derived from those policies, and that these principles, although infrequently articulated by the courts, account for the prevailing pattern of court decisions. The article proposes that the terms "privacy" and "publicity" should be abandoned in the analysis of media portrayal cases, and replaced with an explicit recognition of the principles that courts actually use.

I. The Present Law Regarding Media Portrayals

This century has seen substantial growth in the legal protection afforded individuals who are unwillingly portrayed by the media. Previously, the principal protection was provided by the law of libel.¹¹

8. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The injury involved is conceived as being a violation of the person's right "to be let alone." This term was first used in T. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888). It was then quoted in Warren & Brandeis, *supra*, at 195.

9. See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). The injury involved is conceived as the misappropriation of a person's economic interest in his name, likeness, characteristics or activities.

10. See, e.g., *Carson v. National Bank of Commerce Trust & Sav.*, 501 F.2d 1082, 1084-85 (8th Cir. 1974); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

11. See I F. HARPER & F. JAMES, *THE LAW OF TORTS* 677-79 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117, at 802 (4th ed. 1971).

The copyright laws are also relevant to the modern media, but they have only limited applicability to portrayals. To be sure, they protect artistic creations, see 17 U.S.C. § 201(a) (1976) ("Copyright in a work . . . vests initially in the author or authors of the work.") Few portrayals, however, aside from stage or motion picture simulations of performers, rely on verbatim presentations of an author's works. Those aspects of a person that are most likely to be portrayed—his name, likeness, characteristics and life history—are excluded from copyright protection by the new statute, *id.* § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . ."), and may well be beyond the constitutional limits of the copyright clause, see I NIMMER ON COPYRIGHT § 1.08[c] (1978) [hereinafter cited as NIMMER].

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But the development of the mass media, combined with a recognition of the limits of libel law, stimulated the articulation of new legal rights. The first of these, dating from the end of the last century, was the “right of privacy.” Within the last few decades, a second approach has been developed, based on the idea of a “right of publicity.” Today, these two rights provide the basis for a number of the suits against the media for the portrayal of real people.

The new rights have not proven to be satisfactory, however, as legal rationales for granting recovery. The case law has failed to articulate their boundaries, their operation, or even their basic nature with any degree of precision. In addition, recent decisions have introduced a similar instability into the previously well-established law of libel. The primary explanation for the lack of clarity in the current law of media portrayals is the failure of all three rationales—libel, privacy, and publicity—to include within their frameworks the First Amendment considerations that are inevitably involved when suits are brought against the media. As a result, the First Amendment must be brought in by the court as an external limitation on rights that have been defined in isolation from it. Treated in this way, the First Amendment, like any other *deus ex machina*, produces uncertainties and distortions in what should be a logical, coherent structure.

A. *Libel Law and Media Portrayals*

The law of libel is the most venerable basis for remedies against media portrayals, and it provides powerful protection in certain situations.¹² There have always been substantial limitations on the reach of libel law, however; it extends only to statements that harm a person’s reputation in the community,¹³ and its protection can be

Furthermore, any brief quotation from artistic works that a portrayal may incorporate is likely to be protected by the doctrine of “fair use,” now codified at 17 U.S.C. § 107 (1976). *See, e.g.*, *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (biography of Howard Hughes based partially on copyrighted articles protected by fair use doctrine).

12. *See generally* 1 F. HARPER & F. JAMES, *supra* note 11, 349-473; W. PROSSER, *supra* note 11, § 111. Libel law is the branch of defamation law dealing with statements that are embodied in tangible form. *See id.* § 112, at 753. Media portrayals clearly fall within this category, with the exception of those that are broadcast; even in this latter group, the common judicial response has been to consider broadcast defamation as libel, *see, e.g.*, *Wanamaker v. Lewis*, 173 F. Supp. 126 (D.D.C. 1959).

13. *See, e.g.*, *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639-40 (2d Cir. 1975) (for multiple offender presently serving 21-year sentence at federal penitentiary, no statement about criminal associations would damage reputation sufficiently to be considered libelous); W. PROSSER, *supra* note 11, § 111, at 739-44. *Compare* *Wandt v. Hearst’s Chicago American*, 129 Wis. 419, 109 N.W. 70 (1906) (statement that person has attempted suicide is libelous) *with* *Cardiff v. Brooklyn Eagle, Inc.*, 190 Misc. 730, 75 N.Y.S.2d 222 (Sup. Ct. 1947) (statement that person is dead is not libelous).

claimed only by living persons.¹⁴ In addition, a variety of privileges and defenses shield defendants against libel actions, of which the most important are the privilege of fair comment on matters of "public interest,"¹⁵ and the defense that the statement in question is true.¹⁶ These privileges and defenses have traditionally placed many aspects of portrayals beyond the reach of libel law.¹⁷ As has been frequently observed, the concept of libel simply does not take into account the enormous power and variety of the modern media.¹⁸

In recent years, the scope of libel law has been further limited by a series of Supreme Court decisions specifying the degree of fault that must be demonstrated before recovery will be granted. The result of these cases has been not only to limit libel law, but also to confuse it. It is clear that the Supreme Court has abolished strict liability for libel, at least where media defendants are concerned, and replaced it with a standard requiring proof of either actual malice or negligence.¹⁹ But the Court has further held that the choice between these degrees of fault will depend on whether the plaintiff is a "public figure" or a "private figure."²⁰ Some commentators consider this approach excessively restrictive of First Amendment freedom,²¹ while others regard it as excessively lenient,²² but virtually all agree that it is excessively vague.²³ The Court has suggested three features characterizing public figures—as-

14. See, e.g., *Insull v. New York World-Telegram Corp.*, 172 F. Supp. 615, 635 (N.D. Ill. 1959) (dictum) (citing cases); *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 721-25, 325 P.2d 659, 662-64 (1958).

15. See, e.g., *Fisher v. Washington Post Co.*, 212 A.2d 335 (D.C. App. 1965); *Catalfo v. Shenton*, 102 N.H. 47, 149 A.2d 871 (1959). See generally Thayer, *Fair Comment As A Defense*, 1950 Wis. L. REV. 288.

16. See, e.g., *Cowman v. LaVine*, 234 N.W.2d 114, 125 (Iowa 1975) (dictum); *Cochrane v. Wittbold*, 359 Mich. 402, 409, 102 N.W.2d 459, 463 (1960); RESTATEMENT (SECOND) OF TORTS § 581A (1976).

17. For example, the disclosure of truthful information about a person's private affairs, the presentation of favorable or neutral distortions of his life, or the use of any medium or mode of presentation that he finds distasteful all lie outside the ambit of libel law. See Warren & Brandeis, *supra* note 8, at 195-98.

18. See generally Harrett & Thornton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425 (1949); Silver, *Libel, The "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065 (1978); Warren & Brandeis, *supra* note 8.

19. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

20. See *Hutchinson v. Proxmire*, 47 U.S.L.W. 4827 (U.S. June 26, 1979); *Wolston v. Reader's Digest Ass'n*, 47 U.S.L.W. 4840 (U.S. June 26, 1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

21. See, e.g., Note, *The Editorial Function and the Gertz Public Figure Standard*, 87 YALE L.J. 1723 (1978).

22. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

23. See, e.g., Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1213-19 (1976); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1113 n.39 (1979); Note, *supra* note 21, at 1742-45.

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sumption of risk, access to the media, and participation in a public controversy.²⁴ Of these, however, the first is often regarded as an unfortunate legal fiction in the general law of torts,²⁵ and thus constitutes a poor analytic tool for making constitutional distinctions; the second does not correspond to the results of the cases, as it would include the wealthy and the powerful, but exclude those who were outspoken but obscure;²⁶ and the third is precisely the test that the Court itself abandoned as being too vague.²⁷ As a result, the standard of fault that a given plaintiff must establish in a libel suit is frequently unclear.

In any event a majority of the portrayals that were beyond the reach of libel law when the recent constitutional adjudication started remain beyond it now. Thus many individuals who find their portrayal by the media objectionable must look to the law of privacy or of publicity for protection.

B. *The Right of Privacy*

The right of privacy has emerged as a leading basis on which courts will grant recovery for media portrayals. Despite a few earlier cases, the concept is generally regarded as owing its origin to Samuel Warren's and Louis Brandeis' famous 1890 law review article,²⁸ in which the authors attempted to establish that the right of privacy was part of the existing common law; in the process of searching for this right, they succeeded in inventing it. During the decades that followed, the majority of states recognized the right of privacy as part of their common law.²⁹ In New York, where the courts refused to do so,³⁰ the right

24. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

25. See, e.g., *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 48-57, 155 A.2d 90, 93-97 (1959) (assumption of risk not separate concept; refers either to consent or to contributory negligence); James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

26. In fact, the cases suggest precisely the opposite result. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (wealthy, socially prominent person is private figure); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 140-41, 155 (1967) (plurality opinion) (retired general who spoke to crowd during riot is public figure); cf. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940) (in privacy context, impoverished, reclusive person who was public figure as child remains so as adult).

27. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). It has been widely argued, however, that the public interest concept, see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality opinion), remains at the core of the Court's present test, despite the Court's purported rejection of it. See *Time, Inc. v. Firestone*, 424 U.S. 448, 487-88 (1976) (Marshall, J., dissenting); Hill, *supra* note 23, 1217-19; Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 175-78 (1977).

28. Warren & Brandeis, *supra* note 8. For discussion of this article's seminal role, see M. SLOUGH, *PRIVACY, FREEDOM AND RESPONSIBILITY* 27-42 (1969).

29. See W. PROSSER, *supra* note 11, § 117, at 803. The right of privacy was included in RESTATEMENT OF TORTS § 867 (1939).

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

was established by legislative enactment.³¹ At present, recognition of the right of privacy is virtually universal; when the Eighth Circuit, in a diversity case, found itself constrained to hold that no such right existed in Nebraska, it conceded that this situation was clearly aberrational.³²

The general agreement that the right of privacy exists, however, has not been matched by similar unanimity about what the right of privacy includes. The classic definition, employed by Warren and Brandeis, is that it is based on "the right 'to be let alone.'"³³ That makes a passably good slogan, but it is not particularly helpful as a definition, being vaguer than the term it purports to define. A more detailed effort is Dean Prosser's widely quoted statement: "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 'to be let alone.'"³⁴ Prosser's four invasions are: (1) intrusion upon physical solitude; (2) public disclosure of private facts; (3) publicity that places someone in a false light; and (4) appropriation of one's name or likeness for another's benefit.³⁵

31. 1903 N.Y. Laws ch. 132, §§ 1-2, *codified as amended*, N.Y. CIV. RIGHTS LAW §§ 50-52 (McKinney 1976). Four other states have statutory privacy rights of various dimensions. *See* MASS. ANN. LAWS ch. 214, § 1B (Michie/Law. Co-op Cum. Supp. 1978); OKLA. STAT. ANN. tit. 21, §§ 839-40 (West 1978); R.I. GEN. LAWS § 9-1-28 (Cum. Supp. 1978); VA. CODE § 18.2-216.1 (Cum. Supp. 1979).

The New York statute differs somewhat from the common law right of privacy, most notably in that it extends exclusively to publications that use the person's name or likeness, and that are designed for "advertising" or "purposes of trade." New York courts have emphasized that privacy suits must rest on statutory grounds. *See, e.g.*, *Kiss v. County of Putnam*, 59 A.D.2d 773, 398 N.Y.S.2d 729 (1977). Nonetheless, the importance of New York law has meant that New York cases, even though based on statute, have often been regarded as leading precedents, and have become part of the common law tradition. *See, e.g.*, *Commonwealth v. Wiseman*, 356 Mass. 251, 259, 261, 249 N.E.2d 610, 616, 617 (1969), *cert. denied*, 398 U.S. 960 (1970) (citing New York cases); *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 78-79, 232 A.2d 458, 461-62 (Super. Ct. Div. 1967) (same); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 385-86 (1960) ("Except as the statute itself limits the extent of the right, the New York decisions are quite consistent with the common law as it has been worked out in other states. . . .") *See generally* Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 21 (1934) (incorporation of statutory rules into common law).

32. *Carson v. National Bank of Commerce Trust & Sav.*, 501 F.2d 1082, 1085 (8th Cir. 1974). Only two other states, Minnesota and Wisconsin, refuse to recognize the right of privacy by either common law or statute. *See Hendry v. Conner*, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975); *Slawek v. Stroh*, 62 Wis. 2d 295, 315, 215 N.W.2d 9, 20 (1974).

33. Warren & Brandeis, *supra* note 8, at 195 (quoting Judge Cooley).

34. W. PROSSER, *supra* note 11, § 117, at 804.

35. *Id.* at 804-14. This formulation has been repeatedly quoted by courts, and has served as the conceptual foundation for a number of the leading cases. *See, e.g.*, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-73 & 574 n.11 (1977); *Lugosi v. Universal Pictures Co.*, 139 Cal. Rptr. 35, 38 (Ct. App. 1977). Moreover, Dean Prosser's formulation is now enshrined in RESTATEMENT (SECOND) OF TORTS § 652A (1976). While

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While these are certainly comprehensible concepts, the scope of the protection that they offer remains far from clear. Part of the confusion results from the fact that the term "privacy" includes various injuries unrelated to media portrayals. Intrusion, the first of Prosser's categories, does not involve any form of publication, and thus has no particular connection with the media.³⁶ The three remaining types of injury identified by Prosser, although commonly associated with media portrayals, may also arise in unrelated contexts; a private detective or a doctor may reveal private facts, or present a person in a false light,³⁷ and a person's name may be misappropriated by an impostor.³⁸ Moreover, a number of commentators define "privacy" in more expansive terms than Prosser does, linking it to autonomy, dignity, or other soaring conceptions that reach far beyond both the issue of media portrayals and the general law of torts.³⁹

There is no reason, of course, why any general formulation of the right of privacy must focus on the issue of media portrayals. But the context of these portrayals differs sharply from other contexts in which a privacy right may be invoked. No particular public policy favors the intruder, the impostor,⁴⁰ or the government bureaucrat who reveals confidential information.⁴¹ In contrast, the media are generally pro-

Warren and Brandeis created the idea of a right of privacy, Prosser was the major influence on its current formulation. See Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 963-64 (1964).

36. See, e.g., *Rugg v. McCarty*, 173 Colo. 170, 173-76, 476 P.2d 753, 754-56 (1970) (oppressive debt collection efforts constitute invasion of privacy); *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 794-97 (Me. 1976) (photograph of dying person for use in medical records constitutes invasion of privacy). It is possible, of course, for media reporters to be guilty of this sort of intrusion. See, e.g., *Green Valley School, Inc. v. Cowles Fla. Broadcasting, Inc.*, 327 So. 2d 810 (Fla. App. 1976) (participation of reporters in police search of private school); *Le Mistral, Inc. v. Columbia Broadcasting Sys., Inc.*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978) (unauthorized entry of television camera crew into private restaurant). But such intrusions are independent of the reporters' right to publish the material they have acquired. See, e.g., *id.* at 494, 402 N.Y.S.2d at 817.

37. See, e.g., *Horne v. Patton*, 291 Ala. 701, 287 So. 2d 824 (1973) (disclosure of private facts in medical records by doctor); *Devlin v. Greiner*, 147 N.J. Super. 446, 371 A.2d 380 (Super. Ct. Law Div. 1977) (false report by private investigator in divorce proceedings regarding wife's amorous activities).

38. See, e.g., *Schlessman v. Schlessman*, 50 Ohio App. 2d 179, 361 N.E.2d 1347 (1975) (forgery of daughter-in-law's name on tax return); *Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941) (unauthorized use of name on telegram to governor).

39. See, e.g., Bloustein, *supra* note 35 (human dignity); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977) (autonomy); cf. Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978) (arguing that Justice Douglas developed unified idea of privacy based on principles of individuality).

40. See notes 36 & 38 *supra*.

41. See *Doe v. McMillan*, 412 U.S. 306 (1973) (government officials liable for disclosure of school records in congressional committee report); *Menard v. Mitchell*, 328 F. Supp. 718 (D.D.C. 1971), *modified sub nom.* *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974) (government officials liable for disclosure of arrest records).

tected by one of our strongest public policies—the First Amendment's guarantee of free speech. This policy, which will inevitably be involved when protection against media portrayals is sought, necessarily has a profound effect upon privacy suits involving such portrayals.⁴²

To some extent, the nature of this effect is similar to that in libel law. In situations where a media portrayal was potentially actionable on privacy grounds, the First Amendment has been applied to determine what degree of fault will lead to liability.⁴³ The impact of the First Amendment on the right of privacy, however, goes well beyond the imposition of a constitutional fault standard. It also goes beyond the creation of specific privileges against privacy suits, which, like the fault standard, seem to follow the pattern established in libel law.⁴⁴ The

42. Attempts to link the tort law right of privacy to broader concepts, *see* note 39 *supra*, create even greater confusion than the use of the term privacy to cover intrusion or impersonation. While certain types of constitutional rights have also been labeled privacy, *see* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right to be free of government regulation of personal decisionmaking); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Fourth Amendment right to be free of unreasonable search or seizure), the general approach has been to treat the constitutional right of privacy as quite separate from its common law namesake, *e.g.*, *Hill*, *supra* note 23, at 1254 n.222 (1976); Note, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1409-10 (1976). A crucial distinction between the two types of rights is that the common law right operates as a control on private behavior, while the constitutional right operates as a control on government. The two rights are necessarily different because our concept of appropriate behavior for private persons and government officials is different. *See, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 513-21 (1976) (constitutionality of ban on picketing depends on whether state action is present); *Bivens v. Six Unknown Agents*, 403 U.S. 388, 391-92 (1971) (it is not correct "to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens").

For one case decided on the theory that the common law and constitutional rights are closely related, *see* *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 932 (C.D. Cal. 1968) (reporter's photograph of person in home violates both common law and constitutional right of privacy). *Dietemann*, however, appears to be an isolated and not particularly convincing example. *See* *Morris v. Danna*, 411 F. Supp. 1300, 1303-05 (D. Minn. 1976), *aff'd*, 547 F.2d 436 (8th Cir. 1977) (privacy tort claim does not state cause of action under Constitution).

43. *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (applying prevailing constitutional fault standard for libel to action under New York privacy statute). Under this approach, it may be that the defamation law distinction in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), would be applied to privacy actions, so that public figures would be required to prove actual malice, while private figures could recover for negligent violations. *See* *Rinsley v. Brandt*, 446 F. Supp. 850 (D. Kan. 1977) (applying *Gertz* public-private distinction to privacy action); *Hill*, *supra* note 23, at 1274 & n.321. The Supreme Court, however, has not addressed the issue of fault standard for privacy actions since it changed the standard for defamation actions in *Gertz*.

44. *W. PROSSER, supra* note 11, § 118. *See, e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (accurate publication of material obtained from official court records immune from privacy suit); *cf. Sciandra v. Lynett*, 409 Pa. 595, 187 A.2d 586 (1963) (in absence of intentional injury, reports of official documents are immune from defamation actions); RESTATEMENT OF TORTS § 611 (1938) (same). *But see* *Hill, supra* note 23, at 1264-68

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First Amendment's impact on privacy, in fact, goes to the very conception of the right itself. Although constitutional decisions have left the definition of libel relatively unchanged,⁴⁵ the basic scope of privacy rights has been determined largely on the basis of First Amendment considerations. Nondefamatory portrayals are protected from liability if they are deemed newsworthy or in the public interest, if they are partially informative, or if they possess artistic merit. Thus publication of facts relating to the birth of a child to a twelve year old girl,⁴⁶ the contents of memoranda stolen from a legislator's files,⁴⁷ and an innocent person's presence at the scene of a crime⁴⁸ have been held to be immune from privacy actions under a newsworthiness standard. Similarly, fictionalized accounts of the lives of well-known people, including accounts that depict entirely imaginary events, have been protected on the theory that they could inform or entertain the public.⁴⁹ As a result, the First Amendment is the predominant factor in determining the scope of an individual's right to sue the media for portrayals that impinge upon his privacy.

The right of privacy, however, has not developed as a residual category or as a coordinate aspect of constitutional adjudication. Although the leading commentators, including Warren and Brandeis, have recognized that the right of privacy could conflict with First Amendment values,⁵⁰ they have proceeded to define this right as an independent legal concept, with its own policy justifications.⁵¹ Con-

(arguing that protection granted by Court in *Cox* exceeds common law protection). If Professor Hill is correct, then the impact of the First Amendment on privacy actions is greater still in that it tends to create privileges that go beyond their defamation law analogues.

45. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (First Amendment does not prohibit states from providing remedies for types of speech regarded as defamatory at common law); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (dictum) (same); *cf.* note 139 *infra* (citing cases holding remedy for libel consistent with First Amendment).

46. *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

47. *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

48. *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955).

49. *E.g.*, *Hicks v. Casablanca Records & Filmworks*, 464 F. Supp. 426 (S.D.N.Y. 1978) (largely fictionalized account of incident in Agatha Christie's life); *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970) (fictionalized account based on lives of Leopold and Loeb, including entirely imaginary incident).

50. Warren & Brandeis, *supra* note 8, at 214 (right of privacy cannot "prohibit any publication of matter which is of public or general interest"). See W. PROSSER, *supra* note 11, at § 118 (discussion of constitutional privilege). Professor Kalven suggested that the First Amendment privilege might vitiate the right of privacy in its entirety. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 355-37 (1966). But neither Kalven, nor Warren and Brandeis, nor the other commentators have attempted to develop a single framework that would incorporate both First Amendment and privacy considerations.

51. See, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 652A (1976) ("One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the

sequently, their definitions give no clue why the right of privacy lapses when a public figure or a newsworthy event is involved. There is no inherent reason why someone whose parents were involved in a highly publicized trial does not have a "right to be let alone,"⁵² or why someone whose personal habits are reported in the media has no cause of action when those habits are sufficiently bizarre that they are of general public interest.⁵³ This makes all these definitions somewhat problematic, since they define the right in terms of its maximum possible extent, without reference to the limitations derived from predominant principles of constitutional law.

The problem that arises when the right of privacy is initially defined without reference to constitutional law is that it then becomes necessary to resolve inevitable conflicts between the two. Specifically, it becomes necessary to explain why the right of privacy applies in certain situations, but must yield to the First Amendment in others. One common explanation is based on the idea of waiver; a public figure is viewed as having waived his right of privacy by virtue of his status.⁵⁴

other."); Warren & Brandeis, *supra* note 8, at 195-96 ("Recent inventions and business methods call attention to the next step which must be taken for the protection of the person. . . . [T]he question [is] whether our law will recognize and protect the right to privacy. . . .") In his treatise, Dean Prosser devotes one chapter to defining the right of privacy, and then discusses constitutional privilege to avoid liability in a separate chapter. W. PROSSER, *supra* note 11, §§ 117 (right of privacy), 118 (constitutional privilege).

52. See *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977) ("In the course of extensive public debate revolving about the Rosenberg trial appellants were cast into the limelight and became 'public figures'. . . ."); cf. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (child prodigy remains public figure as adult).

53. See *Virgil v. Sports Illustrated*, 424 F. Supp. 1286 (S.D. Cal. 1976) (habits included diving off stairs, extinguishing cigarettes in mouth, eating spiders; privacy suit dismissed on summary judgment).

54. See, e.g., *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134, 139 (S.D.N.Y. 1953) (privilege against common law right of privacy generally recognized either on ground of public interest or "under a doctrine of waiver by prominent public figures or those involved in events of public interest"); *Cohen v. Marx*, 94 Cal. App. 2d 704, 705, 211 P.2d 320, 321 (1949) (public person "relinquishes a part of his right of privacy"). Reliance on this waiver rationale is apparent in recent Supreme Court cases holding that particular people are not public figures. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), the Court described the plaintiff as having "relinquished no part of his interest in the protection of his own good name." In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the plaintiff's decision to initiate a divorce action that ultimately became highly publicized was held not to make her a public figure, since that was the only way for her to vindicate her rights. *Id.* at 454, 457. Similarly, in *Wolston v. Reader's Digest Ass'n*, 47 U.S.L.W. 4840 (U.S. June 26, 1979), the Court indicated that plaintiff's failure to answer a subpoena had not made him a public figure since he was motivated by illness, rather than by any desire to make a political statement. *Id.* at 4842-43. There is a suggestion in these decisions that becoming a public figure is a conscious, almost culpable, choice.

Of course, a genuine waiver or relinquishment of privacy-based rights can occur. See, e.g., *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 282-83, 262 P.2d 808, 813-14 (1953) (consent to be photographed represents relinquishment of privacy rights). But an explicit waiver of this kind is much more similar to a contractual grant, see, e.g., *Wrangell v. C.F. Hathaway Co.*, 22 A.D.2d 649, 253 N.Y.S.2d 41 (1964) ("Man in Hathaway Shirt" cannot object on privacy grounds when picture used to sell women's blouses, but may have breach of

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Clearly, however, this explanation is not meant to be taken literally. A waiver is generally defined as "an intentional relinquishment or abandonment of a known right or privilege,"⁵⁵ and it seems rather fanciful to suggest that someone has voluntarily agreed to publicity about his private life when he accepts a part in a motion picture,⁵⁶ or graduates from college at the age of sixteen,⁵⁷ or speaks out on a subject of public concern.⁵⁸ The concept of waiver involved in these cases is that of a constructive waiver—in other words, it is merely a way of restating the conclusion that public figures have no right of privacy due to the countervailing and more powerful commands of the First Amendment.

Another method of resolving the conflict between the First Amendment and the right of privacy is to employ the balancing test that is familiar from so many other areas of constitutional adjudication. Using this test, courts weigh the competing values of publication and privacy; where the publication is speech protected by the First Amendment, it is deemed to outweigh the rights of the individual portrayed.⁵⁹ Balancing may sometimes be a useful analytic tool, but only when the factors that are being balanced are genuinely comparable. This generally requires an analysis cast in terms of the underlying social policy justifications of the competing rights. If such an analysis is to be done with the First Amendment and the right of privacy, however, it would appear to be more confusing than clarifying to define the right of

contract claim), than to the kinds of waivers used in the public figure cases. Explicit waivers are real agreements representing the actual intentions of the parties; constructive waivers are merely imaginary legal superstructures, employed to justify conclusions reached on other grounds.

55. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

56. *See Paramount Pictures, Inc. v. Leader Press, Inc.*, 24 F. Supp. 1004 (W.D. Okla. 1938), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939).

57. *See Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

58. *E.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 140-41, 155 (1967) (plurality opinion) (person who spoke to crowd during riot is public figure); *cf.* *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977) (children of Rosenbergs public figures because they were cast into public debate about parents' trial). The individuals in these cases may have voluntarily performed certain acts, but they did not voluntarily agree to publicity of any kind. The volition required for a genuine waiver is much more closely linked to a conscious relinquishment of one's rights than the volition involved in these cases. While the Supreme Court's two most recent decisions regarding public and private figures, *Hutchinson v. Proxmire*, 47 U.S.L.W. 4827 (U.S. June 26, 1979); *Wolston v. Reader's Digest Ass'n*, 47 U.S.L.W. 4840 (U.S. June 26, 1979), may be viewed as reducing the likelihood that one may become a public figure by a purely involuntary act, they do not solve this basic problem with the waiver argument.

59. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (balancing test applied in libel context); *Sidis v. F-R Publishing Co.*, 113 F.2d 806, 808-10 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (balancing test applied in privacy context). *See generally* Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777 (1975).

privacy in advance, and in isolation from the First Amendment, and then balance one against the other as separate rights. Moreover, such balancing implies that rights of equal value are involved, when in reality the First Amendment necessarily takes precedence over any competing, non-constitutional policy.

C. *The Right of Publicity*

Despite the expansive form in which it has been cast, the right of privacy has not proved adequate to cover all the nondefamatory portrayals that injure identifiable personal interests; portrayals that cause economic injury to well-known people, for example, do not rest securely within the right of privacy. Although such portrayals could conceivably be considered a part of Prosser's fourth category, misappropriation, courts traditionally have exhibited a certain hostility to claims for relief against media portrayals that contain no invasions of the person's private life,⁶⁰ and the few older cases in which relief was granted were based on breach of contract.⁶¹ Indeed the very word "privacy" sounds contradictory when applied to claims of this nature. Many of the individuals involved are professional performers of one sort or another, such as actors or athletes; their complaint is not that they have received publicity, but that they have failed to receive its benefits.⁶² As several

60. See, e.g., *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942) (college football player has no cause of action when photograph is used on schedules published by beer company); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (performer has no cause of action for breach of privacy when his trained animal act performed during football game is telecast). Relief was sometimes granted to well-known people for unauthorized use of their names. See *von Thodorovich v. Franz Josef Beneficial Ass'n*, 154 F. 911 (E.D. Pa. 1907); *Edison v. Edison Polyform & Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (1907). But the basis of this relief was generally that the person involved, well-known though he might be, had not sought publicity, or at least had not sought publicity of the kind he received, and thus had suffered a violation of his desire for privacy.

61. E.g., *Lunceford v. Wilcox*, 88 N.Y.S.2d 225 (N.Y. City Ct. 1949) (contract with Jimmie Lunceford's widow for use of name in continuing "Jimmie Lunceford's Orchestra" enforced); cf. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917) (contract for exclusive use of name enforced). Several other early cases were based on the related idea of unfair competition. See, e.g., *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) (unauthorized play-by-play broadcast of baseball game); *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (Ct. App. 1928) (imitation of Charlie Chaplin's name, clothing and behavior). In these cases, the performer or broadcaster was considered to have a property right with which it was unfair to interfere. The difficulty with this rationale was that it focused on the well-established aspect of this type of suit, that a person's property could not be expropriated by another, to the exclusion of the more difficult question of how the property was created.

62. See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 487 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (unauthorized use of film of boxer for television broadcast); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (unauthorized use of baseball players' photographs on bubble gum cards).

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courts have noted, publicity, far from being unwelcome to such people, is their very livelihood.⁶³ To describe this right to profit from one's general notoriety as a right of privacy was naturally perceived as a misuse of language and law.

In order to resolve some of the anomalies involving the right to profit from one's name or likeness, a number of courts and commentators have separated this right from the right of privacy and identified it as an independent concept termed the "right of publicity." Direct recognition of the right of publicity first came in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,⁶⁴ a 1953 case that raised the question of whether an exclusive contract right to photograph a person was legally cognizable. The court, through Judge Jerome Frank, held that it was: "We think that, in addition to and independent of [the] right of privacy . . . 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 . . ." ⁶⁵ This conclusion was soon seconded in a leading article by Professor Nimmer.⁶⁶ During the years that followed, the right of publicity gradually gained acceptance; by the 1970s, judicial recognition had been granted in a substantial number of jurisdictions.⁶⁷

The right of publicity has been defined with surprising consistency by courts and commentators; it is generally conceived as comprising a person's right in the use of his name, likeness, activities, or personal characteristics.⁶⁸ This amicable unanimity in defining the right is somewhat illusory, however, for there is considerable disagreement about

63. See, e.g., *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 316 (Pa. Ct. C.P. Phila. County 1957).

64. 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

65. *Id.* at 868.

66. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

67. The right of publicity has been explicitly recognized in many of the leading commercial jurisdictions. See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956) (Pennsylvania, New Jersey, Delaware, New York); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953) (New York); *Lugosi v. Universal Pictures Co.*, 139 Cal. Rptr. 35 (Ct. App. 1977) (California); *Canessa v. J. I. Kislak, Inc.*, 97 N.J. Super. 327, 351-52, 235 A.2d 62, 76 (Super. Ct. Law Div. 1967) (New Jersey); *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 231-34, 351 N.E.2d 454, 458-60 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977) (Ohio).

68. E.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569 (1977) (right of publicity is performer's "personal control over commercial display and exploitation of his personality and the exercise of his talents") (quoting decision below, 47 Ohio St. 2d 224, 231, 351 N.E.2d 454, 459 (1976)) (footnote omitted); *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969) (ballplayer "has a valuable property right in his name, photograph and image and . . . he may sell these property rights").

what the definition means. To begin with, there is no consistent test for determining how far the right of publicity extends. The language of some courts would suggest that virtually any recognizable attribute would be protected.⁶⁹ But a number of other decisions have refused to extend the right of publicity nearly as far.⁷⁰ As a result, the extent to which a person's attributes are protected by the right of publicity remains unclear.

This lack of clarity is closely linked to a deeper conceptual problem. The First Amendment inevitably defines the operation and extent of the right of publicity; once the defendant can establish that the expression in question is protected, he will almost invariably prevail.⁷¹ But the right of publicity, like the right of privacy, has been defined as if it existed in isolation from the First Amendment. In *Zacchini v. Scripps-Howard Broadcasting Co.*,⁷² the Supreme Court suggested that the right of publicity is less limited by First Amendment principles, since it does not withhold the material in question from the public, but only determines who will benefit from its dissemination. Even assuming that this argument is correct,⁷³ it only alters the scope of constitutional protection, without clarifying the relationship between

69. See, e.g., *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (distinctive racing car); *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (distinctive speaking style); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (general physical impression); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (playing statistics); *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. (BNA) 541 (Super Ct. L.A. County 1972), *rev'd on other grounds*, 139 Cal. Rptr. 35 (Ct. App. 1977) (likeness and characterization).

70. E.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971) (no relief for imitation of singing style); *National Football League v. Governor of Del.*, 435 F. Supp. 1372, 1377-78 (D. Del. 1977) (no relief for use of football scores); *Booth v. Curtis Publishing Co.*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962) (no relief for use of photograph related to news story in advertisement of magazine carrying story); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969) (no relief for use of facts about personal life).

71. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 6, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969) ("Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.") See *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975) (photograph of celebrity used for advertising of magazine where magazine carried news stories about person is protected by First Amendment); *Frosch v. Grossett & Dunlap, Inc.*, No. 01527/75 (N.Y. Sup. Ct. Jan. 29, 1979) (sensationalized biography, which plaintiff claimed was merchandise found to be protected by First Amendment).

72. 433 U.S. 562, 578 (1977). See Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 549-57 (1976); cf. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180 (1970) (copyright does not abridge First Amendment because does not restrain expression of ideas).

73. But see pp. 1620-21 *infra* (arguing that there is no real distinction between restricting and controlling information).

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the First Amendment and the right of publicity. This is evident from the *Zacchini* case itself, in which the Supreme Court had to decide whether a telecast of a "human cannonball" act was protected against any right of publicity claims. The Court's conclusion was that the telecast had gone beyond the bounds of First Amendment protection by appropriating Zacchini's "entire act."⁷⁴ As Justice Powell's dissent suggested, this is not a particularly clear standard, and it is unlikely to be available in the majority of cases.⁷⁵ More importantly, since the standard is ultimately based on First Amendment considerations, it still remains necessary to consider the constitutional issue when defining the extent of publicity rights.

So long as the relationship between the right of publicity and the First Amendment is not confronted directly, inconsistent holdings are virtually inevitable. For example, a commercially distributed poster of Pat Paulsen, during his facetious campaign for the presidency, was held to be protected speech,⁷⁶ but a poster of Elvis Presley, announcing his death, was held to be unprotected, and thus subject to another's right of publicity.⁷⁷ In order for these two cases to be reconciled, the tension between publicity rights and free speech must be addressed directly. As with privacy, it seems counterproductive to develop a definition of a legal remedy against media portrayals that fails to incorporate the commands of the First Amendment.⁷⁸

74. 433 U.S. at 575.

75. *Id.* at 579 & n.1 (Powell, J., dissenting).

76. *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968).

77. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1215 (1979).

78. Further confusion has been engendered by the relationship that the right of publicity bears to Dean Prosser's category of appropriation of one's name or likeness for commercial purposes. It is precisely such misappropriations that first gave rise to the idea of a right of publicity. See *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). But this right covers only some kinds of commercial appropriations. Because the right of publicity rests on the idea of damage to property of demonstrated economic worth, it does not extend to the misappropriation of a person's name or likeness when that person has not previously exploited these attributes in some commercial manner. Misappropriations of this kind, which were the issue in many of the most venerable privacy cases, *e.g.*, *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (unauthorized use of likeness and testimonial in advertisement); *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (unauthorized use of likeness in advertisement), remain privacy cases still, *e.g.*, *Olan Mills, Inc. v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962) (use of photograph to advertise sample of defendant's photography work); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959) (reprinting news item containing person's name and photograph in advertisement). This partial overlap between the right of publicity and the privacy tort of misappropriation increases the uncertainty surrounding the right of publicity.

D. *The Problems with the Existing Approaches*

Because the rights of privacy and publicity, together with the law of libel, have been defined in isolation from the First Amendment, these rights provide incomplete and unsatisfactory rationales for the resolution of cases involving media portrayals. To be sure, the result could have been considerably more unfortunate. Privacy and publicity could have become judicial devices to obscure and attenuate the media's First Amendment protection. In fact, most courts have managed to incorporate First Amendment concerns into their decisions, albeit with a certain grinding of conceptual gears. But the absence of any explicitly stated general principles combining the media's right to portray real people with the individual's right to avoid such portrayals has led to a number of difficulties.

One such difficulty is that some courts have been led astray in their efforts to apply the existing rationales and have consequently reached unsupportable conclusions. A notable example was *Commonwealth v. Wiseman*.⁷⁹ In a film entitled *Titicut Follies*, Wiseman documented the squalid conditions at a state hospital for the criminally insane, focusing on the naked and neglected state in which the inmates were kept. The Supreme Judicial Court of Massachusetts enjoined general exhibition of the film on the grounds that it invaded the privacy rights of the inmates.⁸⁰ There is, however, a crucial difference between photographing a person who is naked and documenting the fact that the person is being kept in a state of nakedness and neglect, particularly when his keeper is the state. Because the court relied on the general idea of privacy, it failed to perceive this difference; consequently it confused voyeurism with social commentary.⁸¹ A clearer focus on the First Amendment issues involved would have avoided this confusion.⁸²

79. 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970).

80. *Id.* at 258-61, 249 N.E.2d at 615-17. In addition, the court held that Wiseman had exceeded the scope of permission granted him to make the film by the administrator of the facility. *Id.* at 261, 249 N.E.2d at 617. This was treated as an alternative ground for the decision at some points, and a contributing factor at others, *see id.* at 258-61, 249 N.E.2d at 615-17.

81. The court raised the issue that Wiseman's film might be protected under the First Amendment as a matter of valid public interest, but rejected it after balancing the free speech interest against the privacy rights of the inmates. *Id.* at 261, 249 N.E.2d at 617. This conclusion fails to give adequate weights to the free speech interest. The alternative ground for the holding, that Wiseman had exceeded the scope of permission, *see id.*, also ignores the importance of free speech, because it fails to consider whether Wiseman's activities were protected by the First Amendment. Instead, the court relied on the general notion of privacy to establish that the administrator's efforts to limit filming by Wiseman were valid.

82. *Cf. Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944), *aff'd*, 159 Fla. 31, 30 So. 2d 635 (1947) (nominal damages awarded for description of woman's unattractive characteristics in autobiography); *Polakoff v. Harcourt Brace Jovanovich, Inc.*, 3 MEDIA L. REP. (BNA)

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The most complex and controversial example of the confusion resulting from the present state of the law involves the extent to which the right of publicity is devisable. The right of privacy was traditionally regarded as a personal right, which inhered in the individual during his lifetime and vanished with him at his death.⁸³ When the right of publicity was separated from the right of privacy, its independent existence was justified by characterizing it as a property right.⁸⁴ This characterization seemed a natural one when the right was first articulated, since the early cases involved a person's ability to make a profit from his name, likeness, or other attributes, and since the most common way to do so is to sell exclusive rights to use these characteristics. Designation of a publicity right as property could have several rather wide-ranging implications, however. It could imply that the right, like other property rights, is not only transferable, but that it is taxable; that it can serve as a capital asset, or as security for a loan; and that it should be taken into account in a divorce settlement. But the most important of all is the implication that the right of publicity is devisable and can thus be asserted by the heirs of a celebrity. When first presented with this theory, courts found it sufficiently disconcerting to reject it outright.⁸⁵ However, after two decades of agreement that the right of publicity is a property right, the idea became more palatable, and several courts held that the right could be inherited.⁸⁶

2516 (N.Y. Sup. Ct. 1978) (potential privacy claim recognized for fictionalized but non-defamatory account of Lucky Luciano's lawyer). In *Cason*, the behavior portrayed was in no sense private; it was the person's general demeanor, observable by anyone in the author's community. In *Polakoff*, nothing was revealed, and no serious distortions occurred. The author simply added dramatic incidents to the plaintiff's admitted relationship with Luciano, an approach that seems well within the bounds of dramatic license. As in *Wiseman*, the privacy analysis in these cases obscured the First Amendment protection that ordinarily attaches to autobiography and fictionalized history.

83. See *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418 (7th Cir.), cert. denied, 382 U.S. 883 (1965); *Frosch v. Grossett & Dunlap, Inc.*, No. 01527/75 (N.Y. Sup. Ct. Jan. 30, 1979); W. PROSSER, *supra* note 11, § 117, at 814-15.

84. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953), the characterization of the right of publicity as a property right was regarded as an arbitrary exercise in classification. Judge Frank wrote that whether the right is "labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." *Id.* at 868. But other courts have flatly stated that a property right is involved. *E.g.*, *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); see Gordon, *Right of Property in Name, Likeness and Personal History*, 55 Nw. U.L. Rev. 553 (1960).

85. *E.g.*, *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 653-54, 344 P.2d 799, 801 (1959); *Schumann v. Loew's, Inc.*, 144 N.Y.S.2d 27, 30 (Sup. Ct. 1955).

86. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975) ("There appears to be no logical reason to terminate this right [of publicity] upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a 'property right.'") (footnote omitted); *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. (BNA)

One of these cases has since been reversed;⁸⁷ other cases have proposed different rationales and came to different conclusions about the circumstances under which inheritance may occur.⁸⁸ The devisability of the right of publicity, therefore, remains a subject of disagreement among courts, and the basis on which the issue is to be resolved remains unclear.

The existing approaches regarding privacy and publicity rights have produced a problem that is far more serious than wrongly decided or conflicting cases, however. This problem is the general uncertainty about the way in which the relevant principles are to be applied. Those involved in creating media productions that employ portrayals will naturally want to know the limits of potential liability. But if one uses the concepts of privacy and publicity rights as analytic tools, it is simply impossible to predict with any certainty how a court will decide a particular case. Many difficult but common situations, such as fictionalized accounts of people's lives or commercial products that use a person's attributes, cannot be assessed solely in terms of privacy or publicity. As a result, the courts are forced to rely on a variety of other criteria such as public interest, newsworthiness, entertainment value, and commercialism. The existing rationales of privacy and publicity fail to provide an explanation for use of these criteria; consequently, those rationales cannot account for the prevailing pattern of court decisions.

Unpredictability is less than ideal in any area of law, but it has always been regarded as particularly undesirable when issues of free speech are concerned. It is generally held that First Amendment rights require "breathing space," and uncertainty about the legal standards that control these rights is regarded as having a "chilling effect" on freedom of expression.⁸⁹ This doctrine is based on the notion that

541, 551 (Super. Ct. L.A. County 1972), *rev'd*, 139 Cal. Rptr. 35 (Ct. App. 1977) ("Bela Lugosi's interest or right in his likeness and appearance as Count Dracula was a property right of such character and substance that it did not terminate with his death but descended to his heirs.") See Note, *supra* note 72, at 541-49; Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 U.C.L.A. L. Rev. 1103 (1975).

87. *Lugosi v. Universal Pictures Co.*, 139 Cal. Rptr. 35 (Ct. App. 1977).

88. *E.g.*, *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1215 (1979) (right to exploit name and likeness devisable if exercised and translated into contractual right during person's life); *Hicks v. Casablanca Records & Filmworks*, 464 F. Supp. 426 (S.D.N.Y. 1978) (right devisable if exploited during life). See pp. 1618-20 *infra*.

89. See, *e.g.*, *Gooding v. Wilson*, 405 U.S. 518 (1972) (vague statute forbidding abusive language); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (overbroad statute forbidding subversive activities and propaganda). The term "breathing space," in its constitutional sense, was first employed in *NAACP v. Button*, 371 U.S. 415, 433 (1963) (Brennan, J.); the

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First Amendment freedoms “are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”⁹⁰

The chilling effect of unpredictable standards upon portrayals of real people by the media is not merely a metaphor, but a very real threat. Many portrayals are a part of elaborately produced motion pictures, television dramas, or stage presentations, involving financiers, distributors, exhibitors, and other diverse participants. Because a successful suit can result in substantial damages, or even an injunction against continued presentation of a production that may have cost millions of dollars,⁹¹ there is a natural unwillingness to assume these risks in questionable cases. This will be particularly true if insurance against these risks is unavailable because of the uncertainty of the prevailing legal rules. As a result of this uncertainty, the public is likely to be denied access to presentations that would otherwise have taken place, and the goals of the First Amendment will have been frustrated.

II. New Principles for the Prevailing Pattern of Court Decisions

Despite the finality with which they are often invoked, the right of privacy, the right of publicity, and even so well established an idea as libel are not self-explanatory legal principles, but merely ways of stating legal conclusions. They represent conceptualizations of sets of circumstances in which courts will grant relief to individuals portrayed by the media. Whether these rights are useful conceptualizations depends on whether they are based on coherent and persuasive legal reasoning. The difficulty that courts have experienced in ascribing precise meaning to the privacy and publicity rights and applying them to the facts presented by the cases would suggest that they are not so

phrase chilling effect is derived from language in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Invalidation of the statutes involved in these cases is based on two closely related ideas: first, that a statute imposing limits on First Amendment rights is invalid if it is overbroad, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); and second, that such a statute is invalid if it is overly vague, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

Although these doctrines have characteristically been applied to statutes, examination of the rationales that underlie them indicates that they are equally applicable to common law decisions. And it has been clearly established that the common law can be as repugnant to the First Amendment as a legislative enactment. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); cf. *Eric R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“[W]hether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern.”)

90. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

91. See note 7 *supra* (citing cases).

based. All the problems discussed in the preceding section—the failure to account satisfactorily for basic First Amendment considerations, the confusion of terms, and the uncertain extent of the protections afforded—reveal the tension between the legal rights that courts have identified and the results that they have reached.

Rather than taking the rights of privacy and publicity as given, it is preferable to return to the initial issue, the portrayal of real people by the media, in order to consider the basic social policies that control this area of law and the principles of decision that can be derived from these policies. A careful reading of the existing cases suggests that there are a number of social policies at work, of which the First Amendment is the most important. In light of these policies, two principles that courts actually use in reaching their decisions can be discerned. The primary principle, derived directly from First Amendment considerations, centers on the purpose of the portrayal: if it serves an informative or cultural function, it will be immune from liability; if it serves no such function but merely exploits the individual portrayed, immunity will not be granted. In the latter case, courts then look to the second principle, which is based on the concept of identifiable harm: if the portrayed individual can demonstrate some observable injury, of a generally accepted nature, courts will grant relief; if no such harm is apparent, relief will be denied. These two principles account for court decisions regarding media portrayals more consistently than any rules that can be stated solely in terms of the rights of privacy and publicity.

A. *The Policy Basis of the Prevailing Pattern*

The primary social policy that determines the legal protection afforded to media portrayals is based on the First Amendment guarantee of free speech and press.⁹² Although various explanations for this policy have been advanced, the prevailing view is that free speech serves

92. The failure of the right of privacy to incorporate First Amendment concerns appears to be a product of the era in which these rights were first articulated. Although Warren and Brandeis were aware of the free speech issue, *see* note 50 *supra*, they were writing some four decades before the first invalidations of laws on First Amendment grounds, *see, e.g.*, *Stromberg v. California*, 283 U.S. 359 (1931), and three decades before a consistent body of free speech dissents had been developed, *see, e.g.*, *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). The few First Amendment challenges that came before the Supreme Court were rejected without apparent difficulty. *See* *Davis v. Massachusetts*, 167 U.S. 43 (1897) (upholding ordinance requiring permit to speak on Boston Common); *In re Rapier*, 143 U.S. 110 (1892) (upholding statute prohibiting passage of lottery advertisements through mails). *Cf.* *Patterson v. Colorado*, 205 U.S. 454 (1907) (upholding contempt conviction for criticism of state supreme court). *But cf. id.* at 463 (Harlan, J., dissenting) (brief free speech discussion).

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socially useful functions. The most crucial and widely accepted of these functions is maintaining the integrity of the political process that constitutes our system of self-government.⁹³ Thus, any nondefamatory speech that contributes to the public debate of political or social issues will receive protection from the First Amendment. A second function of free speech is to communicate and expand our cultural experience. This leads to the protection of creative, imaginative, and even merely whimsical forms of expression. The second function may not be as uniformly accepted as the first, but most commentators include it among the social purposes that the First Amendment serves, either by viewing it as an independent function,⁹⁴ or by adopting an expansive notion of public debate and public issues.⁹⁵

The effect of these First Amendment policies on the rules regarding media portrayals can be traced in terms of the types of portrayals involved. Media portrayals of real people can be characterized as having one of three possible purposes—they may inform, they may entertain, or they may be designed only to sell a product, and thus be essentially commercial in nature. To be sure, these three purposes will often tend to merge, so that they may be regarded as representing portions of a continuum, rather than as discrete and mutually exclusive elements. Nonetheless, recognition of these different purposes can serve as a useful starting point for analysis.

Portrayals that are primarily informative are often designated news. Typically, such portrayals are found in newspaper, magazine, and radio or television reporting, but they may also be included in books, scholarly articles, and television or motion picture documentaries.⁹⁶ The distinguishing characteristic of such portrayals is that they attempt to describe, interpret, or assess the real world. Because these informative portrayals are viewed as essential to the process of public debate, they are afforded the fullest First Amendment protection. Thus, when

93. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (Murphy, J.) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the experiences of their period."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 1-27 (1948); Bork, *supra* note 22, at 26.

94. See, e.g., T. EMERSON, *supra* note 93, at 6-7; Scanlon, *A Theory of Freedom of Expression*, 1 *PHILOSOPHY & PUB. AFF.* 204 (1972).

95. See, e.g., Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245, 257. For a general discussion of the varying approaches to First Amendment theory, see Wellington, *supra* note 23.

96. E.g., *Humiston v. Universal Film Mfg. Co.*, 189 A.D. 467, 178 N.Y.S. 752 (1919) (newsreels); *Rosemount Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969) (biography).

courts can discern an informative value in the portrayal in question, they are likely to render it virtually immune from liability.

A second category of portrayals consists of those works that are primarily designed for artistic or entertainment purposes. Included in this category are fictionalized history, stage, motion picture or television simulations of real events, mimicry, parody, and purely fictional works set against an historical background. Because the portrayal of real people is involved, these works often will have some informational content; they are distinguished from the first category, however, because they employ conscious departures from accurate reporting. The First Amendment protection granted to such works may be based on both their informative and cultural functions. To some extent, they share with news the function of informing the public about real people and events. Such works, however, also constitute an important part of the intellectual and creative activity that our society values very highly. To this genre, after all, history owes its origins,⁹⁷ and literature owes many of its finest masterpieces. The recent spate of motion picture and television dramas based on real events indicates the continuing vitality of fictionalizations.⁹⁸

The cultural function of this type of entertainment provides an independent basis for First Amendment protection.⁹⁹ To the extent that this function is not as highly valued a basis for First Amendment protection as the informative one, a lower level of protection for purely entertainment oriented portrayals might be expected. This tendency toward differential treatment is tempered, however, by the hesitation of courts to make fine distinctions in cases in which free speech issues are involved. As the Supreme Court has observed, "[t]he line between the informing and the entertaining is too elusive for the protection of [the First Amendment]."¹⁰⁰ Consequently, any difference in the protection afforded news and entertainment portrayals is likely to be a question of subtle shadings rather than explicitly different standards.

97. Ancient historians made extensive use of imaginary dramatization, particularly in reporting speeches. See S. USHER, *THE HISTORIANS OF GREECE AND ROME* (1969).

98. See, e.g., *Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978) (involving book and motion picture *Dog Day Afternoon*, fictionalized accounts of Brooklyn bank robbery); *Cohn v. NBC*, 3 MEDIA L. REP. 1999 (BNA) (N.Y. Sup. Ct. 1978), modified, 67 A.D.2d 140, 414 N.Y.S.2d 906 (1979) (involving *Tail Gunner Joe*, fictionalized television account of McCarthy period); Rintels, *In Defense of the Television 'Docu-Drama'*, N.Y. Times, Apr. 22, 1979, § 2, at 1; Silver, *supra* note 18.

99. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.")

100. *Winters v. New York*, 333 U.S. 507, 510 (1948).

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The final category of media portrayals consists of those that neither inform nor entertain, but merely sell a specific product. These portrayals may be part of advertising campaigns that attempt to establish the quality or glamour of their product by invoking a well-known figure. Alternatively, the portrayal itself may be the product, as is the case with posters and other memorabilia. To be sure, the media, operated largely by private corporations, are generally interested in selling products. But when these products serve informative or cultural functions, they are accorded a social value that transcends commercial enterprise. If no such functions are present in a commercial product, a portrayal will be granted little First Amendment protection.¹⁰¹ While there is a social policy encouraging commercial enterprise and the free use of public information for commercial gain,¹⁰² it is not regarded as being of constitutional proportions.

Thus the primary social policy in the area of media portrayals is one that limits the right of the individual portrayed to obtain relief. There are several countervailing policies, however, that support suits against the media by individuals who are portrayed. The most important of these policies, and the one that led directly to the initial conception of privacy rights, is the protection of the freedom of the individual.¹⁰³ Public disclosure of personal information often constitutes an enormous constraint on a person's activities. Certain disclosures can lead to the kind of social stigma that has been recognized in constitutional law

101. *Compare* *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1215 (1979) (rejecting claim of First Amendment privilege for use of photograph on poster of Elvis Presley) *with* *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 474 (1971) (accepting claim of First Amendment privilege for use of non-celebrity's picture on magazine cover because photograph was related to news story); *compare* *Rosemont Enterprises, Inc. v. Urban Sys., Inc.*, 72 Misc. 2d 788, 790, 340 N.Y.S.2d 144, 146 (Sup. Ct.), *modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973) (holding producers of board game based on life of Howard Hughes liable because, "[i]n reality, defendants are not disseminating news. They are not educating the public as to the achievements of Howard Hughes. They are selling a commodity, a commercial product. . . ."); *with* *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 6, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969) ("The publication of a biography is clearly outside the ambit of the 'commercial use' contemplated by the right of publicity and such right can have no application to the publication of factual material which is constitutionally protected.")

While courts no longer refuse to protect speech because it is in a commercial context, they tend to restrict protection to the communication of information. *See, e.g.*, *Bates v. State Bar*, 433 U.S. 350 (1977) (advertising by lawyers); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (price advertising of drugs).

102. *Cf.* *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938) (permitting imitation of unpatented product in interest of commerce and competition); *Smith v. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968) (permitting use of trademark in comparative advertising in interest of competition).

103. *See generally* A. WESTIN, *PRIVACY AND FREEDOM* (1970).

as a direct infringement of a person's liberty.¹⁰⁴ It is on this basis that the disclosure of a person's past crimes can be actionable.¹⁰⁵ In addition, there are many activities in which people choose to engage, but that they do not like to have generally publicized; various types of sexual behavior constitute the most obvious example.¹⁰⁶ Thus disclosure of personal information can restrict a person's present activities by either imposing the burden of past behavior or by raising the threat of future revelation. Granting recovery for such disclosures is regarded by courts as a means of discouraging these restrictions and thus advancing the policy of individual freedom.

A second policy motivating courts to grant recovery for media portrayals is the desire to prevent fraudulent business practices.¹⁰⁷ Media portrayals that represent such practices are generally unauthorized endorsements—advertisements that use a person's photograph or testimonial without his consent to recommend a product.¹⁰⁸ Such a portrayal victimizes the individual by creating the false impression of a particular business relationship between him and the advertiser.¹⁰⁹ It also victimizes the consuming public, because an unauthorized endorsement is essentially a false claim about the product. Thus the

104. Compare *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (sheriff's posting of person's picture as excessive drinker violates constitutionally protected liberty interest) with *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905) (circulation of innocent person's photograph by private parties as part of local "Rogue's Gallery" violates right of privacy). But cf. *Paul v. Davis*, 424 U.S. 693 (1976). Although the *Paul* opinion asserted that it did not overrule *Constantineau*, it refused to find that circulation of a list of suspected shoplifters by the police violated protected liberty interests. However, the court specifically indicated that protection of such interests was the province of tort law. *Id.* at 697.

105. See, e.g., *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (Ct. App. 1931).

106. See, e.g., *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951); *Sutton v. Hearst Corp.*, 277 A.D. 155, 98 N.Y.S.2d 233 (1950).

107. For statutory manifestations of this policy, see Federal Trade Commission Act, 15 U.S.C. § 45 (1976) (forbidding deceptive practices and unfair competition); Securities Act of 1933, *id.* §§ 77a-77aa; Truth in Lending Act, *id.* §§ 1601-1677; Magnuson-Moss Warranty Act, *id.* §§ 2301-2312.

108. See, e.g., *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Hawaii 374, 441 P.2d 141 (1968); *Eick v. Perk Dog Food*, 347 Ill. App. 293, 106 N.E.2d 742 (1952). See generally Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637 (1973).

109. See Treece, *supra* note 108, at 638-41. Professor Treece also argues that an unauthorized endorsement does economic damage to the individual portrayed, since it deprives the person of the money the advertiser would have given him to obtain the endorsement. *Id.* at 641-48. This will be true, however, only if the courts or legislatures are willing to provide a remedy for unauthorized endorsements; in the absence of such a remedy, economic harm of this type would not occur, since the advertiser could freely use portrayals. While the argument that an unauthorized endorsement represents unfair appropriation of another's services has a strong equitable appeal, it cannot be translated into economic damage to the individual portrayed until a legal right, based on some independent social policy, has been established.

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harm that this policy seeks to prevent is linked to both personal and economic interests.

When the harm inflicted by a media portrayal is essentially economic in nature, still another social policy applies: that of encouraging individual achievement by allowing people to profit from their own efforts. The underlying assumption is that the greater the possibilities for personal profit, the more likely people are to pursue creative activities. The copyright laws are one expression of this policy,¹¹⁰ but their reach is somewhat limited, especially when measured against the capabilities of modern media. As a result, additional remedies are needed to fulfill this social policy. These remedies can extend to virtually any recognizable attribute of a person that has become marketable as a result of that person's efforts—his face, characterization, voice, playing statistics, or even his distinctive racing car.¹¹¹

There are thus two sets of social policies connected with the portrayal of real people by the media. The first, which is related to free speech, focuses on the purpose of the portrayal and acts as a limit on the ability of the individual to obtain relief. The second, and necessarily subsidiary, set of policies involves the freedom of the individual, the guarantee of fair commercial practice, and the encouragement of personal endeavor. These policies focus on the harm suffered by the individual and provide a basis on which the individual can obtain relief. Because these two sets of policies have guided courts in reaching their decisions in the area of media portrayals, it is from these policies that principles explaining the prevailing pattern of the court decisions can be derived.

B. *The Principle of Media Purpose*

In view of the predominant policy favoring freedom of expression, an analysis of media portrayals should begin by considering the purpose of the portrayal in question.¹¹² If the portrayal is deemed to serve a

110. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("ultimate aim" of copyright law is "to stimulate artistic creativity for the general public good"); 1 NIMMER, *supra* note 11, § 1.03[A], at 1-28 ("[T]he primary purpose of copyright is not to reward the author but is rather to secure 'the general benefits derived by the public from the labors of authors'. . .") (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

111. See note 69 *supra* (citing cases).

112. The more common method of analysis, it should be noted, is to begin with the type of harm alleged by the plaintiff, rather with than the type of portrayal. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569-73 (1977); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485-86 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); W. PROSSER, *supra* note 11, § 117, at 804-14. The difficulty with this approach is that it creates a presumption in favor of compensation, thereby ignoring First Amendment concerns and requiring them to be factored in at a subsequent stage of the analysis. See pp. 1585-88, 1590-91 *supra*.

socially useful function by contributing to either public debate or general culture, it will be entitled to First Amendment protection and will almost always be immune from liability. The most common reason why courts decide that a particular portrayal is not entitled to such protection is that it exploits the individual portrayed. In other words, the portrayal has no appreciable value as either public information or as creative entertainment, but simply makes use of the individual's attributes.¹¹³ The operation of this principle can be demonstrated by considering decided cases involving each of the three basic types of media portrayals—those designed to inform, those designed to entertain, and those designed to sell a product.

As indicated above, informative portrayals—those intended to describe the real world—are given the most far-reaching First Amendment protection because they are seen as essential to public debate of political or social issues. There are, however, certain types of information that are considered to be of little value for this purpose. A primary example is a portrayal that is incorrect, in the sense that it purports to convey information about a person's involvement with an issue of genuine public concern, when the person in fact has no connection with that issue.¹¹⁴ In such cases, connecting the person portrayed with the issue serves no socially valuable function; it merely makes use of the person's attributes. Alternatively, media portrayals may provide information that is true, but that is irrelevant to any issue that may be part of the public decisionmaking process. Such portrayals derive their appeal from the mere fact that they divulge personal information that would not otherwise be available to the public.¹¹⁵ This material may be of

113. The term exploitation is used here in the sense of selfish use of another's attributes for one's own ends without authorization. It should be distinguished from another meaning—that of turning one's own attributes to commercial advantage or authorizing others to do so. The latter usage is often found in entertainment industry agreements.

114. See, e.g., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (entirely fabricated interview in newspaper story held actionable); *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D.D.C. 1948) (picture of honest cab driver illustrating article about dishonesty of cabdrivers held actionable); *Metzger v. Dell Publishing Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955) (photograph incorrectly identifying boy as gang member held actionable). As the Supreme Court stated in the defamation context, "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). It is possible, however, that such false statements will be protected nonetheless if they are clearly presented as fictional and have sufficient cultural value. See pp. 1604-05 *infra*.

115. See, e.g., *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (identification by name and photograph of woman who suffered from unusual ailment); cf. *Doe v. Roe*, 42 A.D.2d 559, 345 N.Y.S.2d 560, *aff'd*, 33 N.Y.2d 902, 307 N.E.2d 823, 352 N.Y.S.2d 626 (1973), *cert. granted*, 417 U.S. 907 (1974), *cert. dismissed*, 420 U.S. 307 (1975) (publication of psychiatric case history).

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enormous “public interest,” in the sense that there is a ready market for it. It serves no First Amendment function, however, and is thus essentially exploitative in nature. For example, the fact that a particular person used to be a prostitute or a thief, or that a particular person is suffering from an unusual ailment,¹¹⁶ although informative in the strictest sense, is a kind of information that is not regarded as immune from liability. In contrast, an account of personal affairs that is connected to any matter of independent news value, whether to a larger issue or to a person who has previously been the subject of valid news, will probably be protected.¹¹⁷

In making determinations of this kind, courts consider the form of the portrayal as well as its content. Form provides courts with a means of gauging the underlying purpose of the portrayal at issue. Thus the poster of comedian Pat Paulsen was held to be news partially because posters are such a familiar mode of campaign dialogue.¹¹⁸ But the poster of Elvis Presley, labeled “In Memory,” was denied protected status as an announcement of death.¹¹⁹ The court in the latter case declined to state its reasons,¹²⁰ but at least one reason must have been the fact that full-color wall posters are simply not a common form of obituary notice. A similar consideration probably accounts for the outcome in *Zacchini*, in which the Supreme Court held that a news story about a human cannonball act would be protected under the First Amendment, but that broadcasting the entire act would not be.¹²¹ This conclusion appears to be based on the belief that broadcasting an entire act is more similar in form to the commercial broadcast of a sporting

116. See, e.g., *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (thief); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (Ct. App. 1931) (prostitute); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (disease).

117. See, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969) (biography of Howard Hughes is matter of public interest to which privacy and publicity interests must yield); *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956) (birth of child to pre-teenager an event of public interest).

118. *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 449-50, 299 N.Y.S.2d 501, 507-08 (Sup. Ct. 1968); cf. *Davis v. Duryea*, N.Y. Law Journal, June 7, 1979 at 10, col. 5 (N.Y. Sup. Ct. June 6, 1979) (use of news photograph of person in political campaign constitutionally protected as part of valid public debate).

119. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1215 (1979).

120. The court's explanation for distinguishing the Paulsen case was stated, in full, as follows: “We cannot accept Pro Arts contention that the legend ‘IN MEMORY . . .’ placed its poster in the same category as one picturing a presidential candidate, albeit a mock candidate. We hold, therefore, that Pro Arts’ poster of Presley was not privileged as celebrating a newsworthy event.” *Id.* at 222 (ellipsis in original).

121. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574-75 (1977).

event, which has long been recognized as a matter of license,¹²² than it is to an informative report about the results of the event.¹²³

When dealing with portrayals designed primarily for entertainment purposes, courts have employed a similar distinction between portrayals that serve a social function and those that are essentially exploitative in nature. A social function for entertainment portrayals can be based on the work's informative component or on its aesthetic qualities. Portrayals intended primarily as entertainment often contain information by depicting real people. This is generally regarded as sufficient to fulfill the public-issue requirement of the First Amendment; consequently, works of this kind will be protected to the same extent as purely informative works.¹²⁴ A non-informative entertainment portrayal, on the other hand, must rely on its own creative elements as the basis of its claim of social value; if it is the product of some observable creative effort, it will often be deemed worthy of protection. Thus a fictitious work may safely use the names or attributes of real people, provided that the resulting portrayal is clearly presented as fiction.¹²⁵ But a work that merely capitalizes on the attributes of

122. See *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938). The broadcast of an entire sporting event is regarded as a commercial product, rather than news, and an unauthorized use can thus be found exploitative.

123. Form also serves as a basis for decision by providing a measure of the seriousness of a portrayal. A thoughtful, carefully presented portrayal, e.g., *Taylor v. K.T.V.B.*, 96 Idaho 202, 525 P.2d 984 (1974) (news coverage); *Toscani v. Hersey*, 271 A.D. 445, 65 N.Y.S.2d 814 (1946) (novel by John Hersey), is more likely to be shielded from liability than a sensationalized presentation, e.g., *Sutton v. Hearst Corp.*, 277 A.D. 155, 98 N.Y.S.2d 233 (1950) (sensationalized article about personal relationship); *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959) (sensationalized account of wedding and divorce). This is often true because a thoughtful, serious work is generally linked to subjects of public debate, while sensational accounts frequently do little more than reveal personal information for its own sake. This same consideration can be seen as an important factor in some of the Supreme Court's defamation decisions. See *Hutchinson v. Proxmire*, 47 U.S.L.W. 4827 (U.S. June 26, 1979) (satirical critique of federal grantee in context of attack on government spending); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (flippant account of socialite's divorce).

Of course, sensationalism alone does not deprive a work of First Amendment protection. See *Frosch v. Grossett & Dunlap, Inc.*, No. 10527/75 (N.Y. Sup. Ct. Jan. 29, 1979) (biography, even if sensational, is constitutionally protected). However, it often constitutes evidence that the work may lack independent value.

124. See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977) ("It is immaterial to [plaintiffs'] privacy claim whether Nizer's book is viewed as a historical or a fictional work."); *Toscani v. Hersey*, 271 A.D. 445, 65 N.Y.S.2d 814 (1946).

125. E.g., *Hicks v. Casablanca Records & Filmworks*, 464 F. Supp. 426 (S.D.N.Y. 1978) (film based on entirely fictionalized incident in Agatha Christie's life protected by First Amendment); *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970) (heavily fictionalized film based on lives of Leopold and Loeb protected by First Amendment). *But cf.* *Polakoff v. Harcourt Brace Jovanovich, Inc.*, 3 MEDIA L. REP. (BNA) 2516 (N.Y. Sup. Ct. 1978) (fictionalized account of real attorney's involvement with Lucky Luciano held actionable as invasion of privacy).

Similarly, a casual reference in an otherwise independent work will not incur liability.

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another, without contributing anything substantially unique or new, is likely to be subject to liability.¹²⁶ In works of the latter type, nothing is added to our cultural experience; consequently, the First Amendment protection generally provided for creative work is not available.¹²⁷

The distinction between imitation and parody is based on the same principle. Imitation is primarily an attempt to duplicate the characteristics of another, either to delude the public or to compensate for an absence of creative effort. Parody, on the other hand, makes use of another's attributes as part of a larger presentation, in which a considerable amount of the content is provided by the parodist. For this reason, imitation is generally actionable,¹²⁸ while parody tends to be protected.¹²⁹ However, if a self-proclaimed parody actually appropriates substantial amounts of the original material, and thus relies on the original rather than its own contributions for its appeal, it will not be protected, no matter how humorous its intent.¹³⁰

See, e.g., Stillman v. Paramount Pictures Corp., 1 Misc. 2d 108, 147 N.Y.S.2d 504 (Sup. Ct. 1956) (single reference to "Stillman's Gym" in motion picture *The Country Girl*); Shubert v. Columbia Pictures Corp., 189 Misc. 734, 72 N.Y.S.2d 851 (Sup. Ct. 1947), *aff'd*, 274 A.D. 751, 80 N.Y.S.2d 724 (1948) (two references to Shubert-owned theater in motion picture *The Jolson Story*).

126. *See* Sinatra v. Wilson, 2 MEDIA L. REP. (BNA) 2008, 2010 (S.D.N.Y. 1977) (allegation that biography of Frank Sinatra was deliberately or recklessly false states valid cause of action); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969) (deliberately false account of baseball player Warren Spahn's life presented as factual biography incurs liability).

127. Cases of this sort clearly demand judgments as to the general nature, purpose and value of the portrayals at issue; being inevitable, these judgments should be explicitly acknowledged. For example, in *University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp.*, 44 Misc. 2d 808, 255 N.Y.S.2d 210 (Sup. Ct. 1964), *rev'd*, 22 A.D.2d 452, 256 N.Y.S.2d 301, *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965), the lower court concluded that a motion picture, *John Goldfarb, Please Come Home*, had misappropriated the name of Notre Dame University, and its president, Father Hesburgh. It based this opinion, at least in part, on its view that the motion picture was "ugly, vulgar and tawdry." 44 Misc. 2d at 814, 255 N.Y.S.2d at 217. The Appellate Division, in reversing, characterized the motion picture as a "broad farce" and a "blunderbuss travesty" that did not constitute misappropriation. 22 A.D.2d at 453, 256 N.Y.S.2d at 303. It seems clear that the Appellate Division's more charitable view of the motion picture's social value contributed heavily to its conclusion that the picture was not a commercial exploitation of the University or its president.

128. *See, e.g.,* Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962) (commercial using imitation of Bert Lahr's voice states cause of action for unfair competition); *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (Ct. App. 1928) (imitation of Charles Chaplin's manner of dress and behavior, using name "Charlie Aplin," constitutes unfair competition); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977) (commercial depicting imitation of Guy Lombardo as "Mr. New Year's Eve" states cause of action for violating right of publicity).

129. *See, e.g.,* Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964) (*Mad Magazine* parody of Irving Berlin song lyrics protected speech); *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903) (parody of actress, including singing of copyrighted song, not actionable).

130. *See* Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (underground comic book using characters based on Walt Disney cartoons constitutes copyright

The third category of portrayals consists of those that neither inform nor entertain, but that serve primarily to sell a product. Portrayals of this kind are exploitative by their very nature: they derive their appeal from the commercial possibilities of a particular celebrity's name, likeness, or other attributes. There are various merchandising portrayals that fall into this category. Placing a picture of a person's face on a T-shirt, for example, has little informative or cultural value; the appeal of such a product depends primarily on the appeal of the person portrayed.¹³¹ It is this dependence on the person and the absence of socially valued purposes in First Amendment terms, rather than the commercial use per se, that renders portrayals in this area more vulnerable to liability. The unauthorized use of a person's attributes to create or sell a product, therefore, will typically lie outside the scope of First Amendment protection and thus will often incur liability.¹³² However, a person is free to sell the right to use his attributes for such purposes;¹³³ indeed, the law encourages the transferability of this right as an incentive to commercial enterprise.¹³⁴

infringement); *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956) (Jack Benny's television sketch based on motion picture *Gas Light* constitutes copyright infringement because, "[i]f the material taken by [Benny] from 'Gas Light' is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue.")

Many of the imitation and parody cases have involved portrayals of fictional work rather than real people and have thus been decided under copyright law. It seems reasonable to assume, however, that privacy or publicity suits in this area would employ similar standards: namely, the substantiality of the imitation and the amount of independent creativity involved. *But cf.* *Price v. Worldvision Enterprises, Inc.*, 455 F. Supp. 252 (S.D.N.Y. 1978) (enjoining television series that contemplated use of Laurel and Hardy comedy routines). The *Price* case appears to define prohibited imitation much more broadly; it is not conclusive, however, since the issue was raised in the context of a *res judicata* discussion, and the First Amendment implications were never considered. See note 190 *infra*.

131. Commercial uses that are similar to pure merchandising in form but have recognizable informative or cultural value will be protected. See, e.g., *Booth v. Curtis Publishing Co.*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962) (photograph used in advertisement related to news story); *Davis v. Duryea*, N.Y. Law Journal, June 7, 1979, at 10, col. 5 (N.Y. Sup. Ct. June 6, 1979) (photograph used in political advertising).

132. See note 69 *supra* (citing cases). The most far-reaching case is *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974), in which use of plaintiff's distinctive racing car in a cigarette advertisement was held actionable, despite the fact that plaintiff was not visible at the wheel, and that all identifying symbols had been painted out. Such a holding would be inconceivable if the portrayal were used in an informative or entertainment vehicle; it is only possible when a purely commercial and thus essentially exploitative portrayal is involved.

133. See, e.g., *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969) (athlete's authorized autograph, once purchased, can be used to promote frankfurters as well as sports goods); *Dahl v. Columbia Pictures*, 12 Misc. 2d 574, 166 N.Y.S.2d 708 (1957) (consent to use likeness in promoting motion picture *Wicked as They Come* extends to poses more revealing than those appearing in motion picture).

134. In encouraging commercial enterprise, see note 102 *supra*, the law has long treated the sale of the privacy, publicity and related rights in one's attributes according to the general principles of contract law. See, e.g., *Long v. Decca Records*, 76 N.Y.S.2d 133 (Sup.

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The principle of media purpose can also be applied to libel cases. Being false by definition, actionable libel will not usually serve an informative function, nor is it likely to be presented in a manner considered culturally valuable.¹³⁵ Consequently, libel may generally be said to exploit the individual portrayed and not to be entitled to absolute First Amendment protection.¹³⁶ The difficulty is that remedies against libel can act as a threat against those who fulfill informative or cultural functions, but lack the time or resources to be certain that their statements are not libelous.¹³⁷ Consequently, the Supreme Court has held that the First Amendment dictates the degree of fault that must be demonstrated before damages can be recovered.

As far as the issue of fault is concerned, an approach could be developed in which a lesser degree of exploitation will result in the application of the actual malice standard,¹³⁸ while portrayals that reflect a more exploitative use of the name or personal characteristics of an individual will be actionable on the basis of negligence. The Supreme Court has articulated a rather different guideline, to be sure, based on whether the person libeled is a "public" or a "private" figure.¹³⁹ This test seems confusing, however, and has led to results that are often difficult to reconcile with the Court's own criteria.¹⁴⁰ In fact, the Court's focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defama-

Ct. 1947); *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). The contractual approach can also operate as a limiting principle, of course, should the purchaser exceed his contractual rights. *See, e.g., Manger v. Kree Institute of Electrolysis*, 233 F.2d 5 (2d Cir. 1956) (liability imposed when prize-winning essay on "Why I Am Glad I Chose Electrolysis as a Career" published in altered form without author's consent).

135. A work that relied on its creative rather than its informative function as the basis of its social value would most likely be presented as a fictionalization, in which case it would usually not be considered libelous. *Cf. Silver, supra* note 18 (arguing that libel law should not be applied to fictionalizations).

136. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues.")

137. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); Anderson, *Libel and Press Self-Censorship*, 53 U. TEX. L. REV. 422 (1975).

138. In this context, "actual malice" means knowing intent, not ill will. *See Herbert v. Lando*, 99 S. Ct. 1635, 1661-62 (1979) (Stewart, J., dissenting); *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29, 52 n.18 (1971) (plurality opinion).

139. *See Hutchinson v. Proxmire*, 47 U.S.L.W. 4827 (U.S. June 26, 1979); *Wolston v. Reader's Digest Ass'n*, 47 U.S.L.W. 4840 (U.S. June 26, 1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

140. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (socially prominent woman, married to member of extremely wealthy family, who had been involved in notorious, 17-month long divorce trial, and had given several press conferences during course of trial, held to be private person). As Justice Marshall indicated in dissent, *id.* at 484-90, Mrs. Firestone met all the criteria for a public figure established by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

tion,"¹⁴¹ is more closely related to the principle of media purpose that has been presented in this article than to its own distinction between private and public figures. The principle of media purpose would suggest that recovery should not be granted for negligent libel when some justification exists for the portrayal in the sense that the person is connected with the issue that is under discussion; instead, the higher fault standard of actual malice should apply. But when the person is improperly connected with that issue, being joined with it by mistake or being too remotely related to it, there is a greater degree of exploitation and any negligent libel should be actionable. Admittedly, the analogy is imperfect, because the concept of media purpose presented in this article is designed to apply to the entire legal analysis, not just the issue of fault. In addition, no suggestion is being made that this standard can be used to predict or explain the outcomes of the decided cases.¹⁴² But it is important to note that by focusing on the relationship between the person portrayed and the issue involved, the Court has adopted an analysis closer to the one presented here than to the Court's own articulated rationale.

C. *The Principle of Identifiable Harm*

The second basic principle governing court decisions about media portrayals is that a portrayal must cause identifiable harm before relief will be granted. This principle is generally subordinated to the first; if a portrayal is found to serve an informative or cultural function, it will generally be immune from liability, even if it causes substantial harm. If a portrayal is simply exploitative, however, the issue of harm will be likely to control the court's decision.

This principle, which is a relatively common one in tort law, is also influenced by First Amendment considerations. A clearly exploitative

141. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). See *Hutchinson v. Proxmire*, 47 U.S.L.W. 4827 (U.S. June 26, 1979); *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977).

142. The standard does account for some of the recent cases holding negligent libel actionable, namely, those cases in which the connection between the person portrayed and the issue under discussion was incorrect or too remote. See, e.g., *Hutchinson v. Proxmire*, 47 U.S.L.W. 4827 (U.S. June 26, 1979) (scientist who merely received federal grant inappropriately used as prime example of wasteful government spending); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private lawyer representing client incorrectly connected with discussion of communism in America). Other decisions applying the negligence standard run counter to the theory, however, see, e.g., *Wolston v. Reader's Digest Ass'n*, 47 U.S.L.W. 4840 (U.S. June 26, 1979) (plaintiff convicted of contempt for not answering subpoena in course of communist spy investigations of 1950s held to have cause of action for book negligently referring to him as communist spy); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (party in highly publicized trial held to have cause of action for negligent libel).

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portrayal is not protected by the First Amendment; courts tend, however, to avoid imposing liability when there is even a possibility of such protection on the ground that First Amendment rights require "breathing space."¹⁴³ As a result, they grant recovery in cases in which exploitation is found only if a clear showing of objectively determinable harm has been made.¹⁴⁴ The types of harm that will qualify are derived from the countervailing social policies that support suits against the media—the encouragement of individual freedom, honest commercial practices, and creativity.

1. *Non-Economic Harm*

Most of the cases that invoke the right of privacy, such as those arising from a disclosure of personal facts or portrayal in a false light, do not involve direct economic injury. Identifiable harm in such cases is usually determined by reference to objective standards other than direct monetary loss. First, the media production must be generally recognizable as a portrayal of the person who is bringing suit. A reference in an informative or entertainment piece might be too elliptical or too heavily fictionalized to meet this requirement.¹⁴⁵ Mere depiction of someone in the position of the plaintiff is not adequate; it must be the plaintiff himself, clearly identified and extensively portrayed.¹⁴⁶

Secondly, the portrayal generally must constitute a disclosure of

143. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 520-22 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967). See generally note 89 *supra* (discussion of chilling effect doctrine).

144. The requirement that harm must occur before relief is granted is a general principle of tort law. However, exceptions to the principle were made at common law for actions involving defamation. See W. PROSSER, *supra* note 11, § 112, at 754-64. As far as the right of privacy is concerned, the way in which it was initially defined strongly suggested that proof of damages should not be required for this sort of suit either. See Warren & Brandeis, *supra* note 8, at 219 (drawing analogy to law of defamation). The same may be said for the right of publicity. See *Nimmer*, *supra* note 66, at 216 (recommending measurement of damages in terms of value of publicity to defendant, rather than in terms of injury to plaintiff). However, as the principle of identifiable harm presented in this article suggests, this position has not been accepted by the courts.

145. See, e.g., *Levy v. Warner Bros. Pictures*, 57 F. Supp. 40 (S.D.N.Y. 1944) (characterization of George M. Cohan's wife in motion picture *Yankee Doodle Dandy* not sufficiently similar to Cohan's first wife); *Toscani v. Hersey*, 271 A.D. 445, 65 N.Y.S.2d 814 (1946) (person used as model for character in John Hersey's *A Bell for Adano* insufficiently recognizable); *University of Notre Dame du Lac v. 20th Century-Fox Film Corp.*, 22 A.D.2d 452, 256 N.Y.S.2d 301 (1964), *aff'd*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965) (fictional president of Notre Dame in motion picture *John Goldfarb, Please Come Home* not sufficiently similar to Father Hesburgh).

146. An interesting effort to make the recognizability requirement an even more stringent limit on privacy suits was presented in *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1971). Defendant argued that the use of a 40 year old photograph of Pola Negri in an advertisement was not actionable because the plaintiff no longer looked like her picture, i.e., she was not recognizable as herself. The court rejected this argument.

private information. Publication of the fact that a person committed a crime many years ago may constitute such a disclosure, and thus provide a basis for recovery, when the person portrayed has rehabilitated himself and established a new reputation.¹⁴⁷ This same disclosure would probably not be a cognizable injury to a person who was publicly known at the time of portrayal as a former criminal.¹⁴⁸ A photograph of a person in his private hospital room is likely to be actionable, but a photograph of someone on a public street is not.¹⁴⁹ The average person can ordinarily recover for an unauthorized photograph of his anatomy, but an exotic dancer will be barred from recovery.¹⁵⁰ Similarly, the revelation that a person is in debt is actionable if his financial condition is not known.¹⁵¹ The information at issue need not have been widely known prior to the portrayal and the person need not be a celebrity, in order for liability to be precluded; it is sufficient if the information is known to people with whom the plaintiff regularly associates. Thus courts have consistently refused to grant relief when a person's open activities, including his failures, love affairs, or character flaws are portrayed,¹⁵² and courts have applied this rule to both the notorious and the obscure.¹⁵³

147. *E.g.*, *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (Ct. App. 1931).

148. *See* *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418, 420 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965) (dictum) (Al Capone would have no privacy claim for portrayal of his past crimes).

149. *Compare* *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (photograph of patient in hospital room actionable) *with* *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953) (photograph of couple embracing on public street not actionable).

150. *Compare* *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939) (publication of x-rays of woman's body actionable) *with* *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (Ct. App. 1966) (publication of exotic dancer's photograph not actionable).

151. *E.g.*, *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962) (creditor liable for repossessing tires on non-delinquent debtor's car in full view of debtor's employer and customers); *Trammell v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941) (newspaper potentially liable for publishing notice of plaintiff's debt after notification that debt was private matter).

152. *See, e.g.*, *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (failures); *Virgil v. Sports Illustrated*, 424 F. Supp. 1286 (S.D. Cal. 1976) (bizarre characteristics); *Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (Ct. App. 1962) (love affairs). *But see* *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944), *aff'd*, 159 Fla. 31, 30 So. 2d 635 (1947) (description of plaintiff, including certain unpleasant characteristics, constituted invasion of privacy, but merited only nominal damages).

153. *E.g.*, *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953) (portrayal of public romantic activities of private persons is not actionable); *Goelet v. Confidential, Inc.*, 5 A.D.2d 226, 17 N.Y.S.2d 223 (1958) (same, for public person). The portrayal of a person in a "false light" or distorted manner may be actionable, even though there is no disclosure of actual facts. But false light cases generally deal with portrayals that are defamatory. *See, e.g.*, *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952) (picture of embracing couple used as example of carnal love); *Metzger v. Dell Publishing*

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Once a disclosure of private information has been proved, the plaintiff must still demonstrate that real injury has been sustained, again by reference to an objective standard. The most persuasive evidence of such injury is some disruption in the plaintiff's life, such as an adverse change in a relationship, or subjection to public contumely. In *Briscoe v. Reader's Digest Association*, for example, the plaintiff asserted that he had been "scorned and abandoned" by his eleven year old daughter and his friends after publication of a story recounting his long-past crime; this constituted a clear, objective circumstance on which to base recovery.¹⁵⁴

If there has been no such objective damage, the plaintiff must rely upon a showing of emotional injury. Such injury can be translated into an objective standard by analogy to the tort law's familiar "reasonable man" test. Consequently, a disclosure must be clearly and universally perceived as humiliating—it must "outrage the community's notions of decency"¹⁵⁵—before relief will be granted. For example, recovery was allowed where a nude figure impersonating Muhammad Ali appeared in a magazine devoted largely to sexual matters¹⁵⁶ and, in *Barber v.*

Co., 207 Misc. 2d 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955) (picture of boy incorrectly identified as that of gang member); *cf.* W. PROSSER, *supra* note 11, § 117, at 813 ("The false light need not necessarily be a defamatory one, although it very often is, so that a defamation action will also lie.") (footnotes omitted). Most of the remaining false light cases would be actionable invasions of privacy or publicity if the facts had been correctly presented. *See, e.g.*, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (newspaper liable for printing invented interview describing personal feelings of woman whose husband had died several months before); *Jumez v. ABC Records, Inc.*, 3 MEDIA L. REP. (BNA) 2324 (S.D.N.Y. 1978) (record company liable to plaintiff for unauthorized use of photograph on cover of album recorded by plaintiff, even though photograph not that of plaintiff); Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 963-67 (1968). Moreover, misinterpretations, or even demonstrable mistakes, are not actionable when the portrayal is found to have a socially valuable purpose. *See Time, Inc. v. Hill*, 385 U.S. 374 (1967) (incorrect portrayal of family's victimization by criminal protected as matter of public interest); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) (account of incidents surrounding Rosenberg spy trial, whether accurate or inaccurate, protected as matter of public interest).

154. 4 Cal. 3d 529, 533, 483 P.2d 34, 36, 93 Cal. Rptr. 866, 868 (1971); *see* Melvin v. Reid, 112 Cal. App. 285, 292, 297 P. 91, 93 (Ct. App. 1931) (plaintiff had "her reputation and social standing destroyed by the publication of the story of her former depravity" in motion picture, *The Red Kimono*); *Tooley v. Canal Motors, Inc.*, 296 So. 2d 453, 453-54 (La. App. 1974) (plaintiff's professional standing as attorney injured by radio advertisement).

155. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

156. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978). Terms such as "outrage" and "decency" often arise in suits involving portrayals that carry sexual implications. *See, e.g.*, *Garner v. Triangle Publications, Inc.*, 97 F. Supp. 546 (S.D.N.Y. 1951) (article describing allegedly improper details of sexual relations); *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939) (x-rays of woman's pelvis); *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964) (photograph of woman with skirt blown up

Time, Inc.,¹⁵⁷ where a news magazine recounted the details of a woman's insatiable appetite with unnecessary specificity and relish.

Courts will not recognize the claims of those who are merely sensitive to publicity, however, nor of those who have a penchant for secrecy.¹⁵⁸ Thus, they have refused to grant recovery for the disclosure of facts about a relative of the plaintiff.¹⁵⁹ Moreover, courts are careful to distinguish between the humiliation caused by an event and the humiliation caused by the event's publication. Thus, they have refused to permit claims by the victims of crimes, because it is generally the crime itself, and not the portrayal recounting it, that is the true source of the plaintiff's distress.¹⁶⁰ In all these cases, the plaintiff's feelings may be genuinely injured, but the injury is too subjective and thus insufficiently identifiable.

The courts' insistence on a showing of identifiable harm is based on one of the social policies that support suits against the media: the concern with maximizing individual freedom. Unless the portrayal causes identifiable injury, there is no clear indication that it has acted as a constraint on the person's activities. Thus, courts will grant relief where the portrayal has led to an objectively observable disruption or generally recognized humiliation. But subjective injuries to feelings will not be recognized as being a sufficiently serious restraint on a person's freedom of action to justify recovery.

A type of harm that is partially personal and partially economic is the unauthorized endorsement of a commercial product. Portrayals

by wind machine); *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952) (photograph of embracing couple used to illustrate article about dangers of carnal love); *Semler v. Ultem Publications, Inc.*, 170 Misc. 551, 9 N.Y.S.2d 319 (City Ct. 1938) (photograph in magazine making "an appeal to sex").

In fact, Professor Hill has suggested that the "shocking character of a disclosure" could provide a general standard for determining whether media portrayals should be subject to liability. Hill, *supra* note 23, at 1258. But the concept of a shocking disclosure is difficult to apply; it seems to relate to the relationship between the portrayal and an actual or hypothetical audience, rather than to the relationship between the portrayal and the person being portrayed.

157. 348 Mo. 1199, 159 S.W.2d 291 (1942).

158. See, e.g., *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953) (photograph of couple embracing in public not actionable); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969) (biography of Howard Hughes not actionable).

159. See, e.g., *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965) (portrayal of Al Capone after his death cannot serve as basis for suit brought by widow and child); *Rozhon v. Triangle Publications, Inc.*, 230 F.2d 359, 362 (7th Cir. 1956) (plaintiff unable to claim invasion of privacy for article about son's death from narcotics).

160. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (publication of rape victim's name); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (account of family's victimization by criminal); *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958) (account of murder in crime magazine).

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of this kind are almost always actionable¹⁶¹ because the requirement of identifiability is relatively easy to meet. The injury arises from the false implication of a business relationship between the advertiser and the individual portrayed, an implication that misrepresents the individual's transactions. This injury is easily recognized. In order to decide whether an unauthorized endorsement has been presented, a court need only examine the advertisement itself to determine whether it states or implies an endorsement, and then examine the relationship between the parties, as it would in any contract case, to determine whether they had agreed to such a result.¹⁶² In the absence of a finding that such an agreement exists, a court will generally impose liability to support the social policy of encouraging honest commercial practices.¹⁶³

2. *Economic Harm*

In contrast to those portrayals that cause non-economic harm, there are others that lead to economic injury by limiting the person's ability to profit from his name, likeness, characteristics, or activities. Once again, the crucial issue is identifiability. If the plaintiff sustains an objectively ascertainable economic loss from the portrayal, damages will frequently be granted. If the loss is hypothetical or speculative, there will generally be no recovery, even if the very same type of portrayal is involved.

In order to prove an economic loss of the requisite identifiability, a person must have been in the process of earning money from the

161. *See, e.g.*, *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Hawaii 374, 441 P.2d 141 (1968); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952).

162. Questions concerning the nature and extent of an authorization can be settled by familiar principles of contract law. *See, e.g.*, *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953) (plaintiff held to have waived right to object to reuse of authorized photograph); *Young v. Greneker Studios, Inc.*, 175 Misc. 1027, 26 N.Y.S.2d 357 (Sup. Ct. 1941) (prohibiting sale of copies of mannequin modeled on employee without employee's consent). A misappropriation claim of this sort may be combined with a right of publicity claim. For example, a celebrity may assert that he has not only been misrepresented by a particular endorsement, but that his general ability to earn money from an independently established business activity has been reduced. *See, e.g.*, *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973) (actor); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314 (Pa. Ct. C.P. Phila. County 1957) (athlete). But to sustain such a claim, the celebrity must prove that he generally earns money from that particular kind of activity.

163. This same rule would apply to a false endorsement used for political rather than commercial purposes. *Cf. Davis v. Duryea*, N.Y. Law Journal, June 7, 1979, at 10, col. 5 (N.Y. Sup. Ct. June 6, 1979) (use of photograph in political campaign protected where no suggestion of endorsement involved). The social policy favoring honest political practices is clearly established. *See Federal Election Campaign Act*, 2 U.S.C. §§ 431-441, 451-454 (1976 & Supp. 1979).

particular attributes appropriated by the portrayal. Evidence to this effect would be a contract granting another party the exclusive right to use the attribute in question. An unauthorized portrayal can reduce the value of that contract, and limit the person's ability to sell any other exclusive rights. For example, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,¹⁶⁴ the case in which the right of publicity was born, the plaintiff sued and prevailed on the basis of an exclusive contract right to use the photographs of certain baseball players. Similarly, a series of recent cases has validated exclusive marketing agreements that Elvis Presley entered into before his death.¹⁶⁵ One court described Presley as having "carved out a separate intangible property right for himself" by granting these exclusive rights.¹⁶⁶

Where no exclusive contract is present, courts tend to grant relief only to those who clearly earn their livelihood from the appropriated attribute.¹⁶⁷ In *Zacchini*, the Supreme Court pointed out that the performance at issue was unique to the plaintiff's family and emphasized that the broadcast had gone "to the heart of [the plaintiff's] ability to earn a living as an entertainer."¹⁶⁸ Other cases in which grounds for recovery were found involved the unauthorized use of an actor's likeness, characterization, or distinctive voice, each of which was clearly central to the person's career.¹⁶⁹ And in one case involving an unauthorized board game, the court explicitly noted that income from endorsements constituted a substantial portion of the plaintiff's earnings.¹⁷⁰

Not only must the plaintiff earn money from his attributes, but the

164. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). See *Uhlaender v. Henrickson*, 316 F. Supp. 1277 (D. Minn. 1970) (unauthorized sale of board game using playing statistics enjoined where baseball players involved had formed association to grant exclusive rights to use these statistics).

165. *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1215 (1979); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Memphis Dev. Foundation v. Factors Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977).

166. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1215 (1979).

167. See, e.g., *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (1978); *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (court could "take judicial notice that there is a fairly active market for exploitation of the faces, names and reputations of celebrities.")

168. 433 U.S. at 576.

169. *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (Bert Lahr's voice); *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973) (Cary Grant's photograph); *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. (BNA) 541 (Super. Ct. L.A. County 1972), *rev'd on other grounds*, 139 Cal. Rptr. 35 (Ct. App. 1977) (Bela Lugosi's "Dracula" characterization).

170. *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 74, 232 A.2d 458, 459 (Super. Ct. Ch. Div. 1967); see *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970) ("A name is commercially valuable as an endorsement of a product or for use for financial gain only because the public recognizes it . . .")

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attributes involved must be precisely those on which the claim is based.¹⁷¹ In addition, the plaintiff must be able to identify actual economic damage resulting from the portrayal. In many imitation cases, courts have refused to grant recovery because the plaintiff was unable to prove that the imitation of a singing or acting style, by itself, caused economic injury.¹⁷² But where it can be proved that the portrayal impairs the earnings of the person portrayed, recovery may be granted.¹⁷³

Once again, this requirement that the plaintiff demonstrate identifiable harm can be traced directly to one of the underlying social policies that motivates the courts to grant recovery against portrayals; in this case, it is the policy of encouraging creative endeavor. The supposition is that protection of a demonstrated ability to make a profit from one's attributes encourages individuals to pursue socially desirable activities. As a result, courts will often find an existing plan to exploit one's own attributes persuasive in granting recovery against a competing use, but will deny recovery on the basis of economic harm when the plaintiff is unable to demonstrate commercial benefit to himself from the attributes portrayed, and a corresponding loss of such benefit as a result of the portrayal.

171. *See, e.g., Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973). Shirley Booth complained that a characterization she had created had been imitated in an advertisement. Recovery was denied on the ground that this characterization was not sufficiently associated with or recognizable as Booth so that its use caused identifiable harm to her career. *Cf. Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (imitation of Bert Lahr's voice states cause of action). In refusing to grant summary judgment for the defendant, the *Lahr* court held that the plaintiff had to prove that his voice was generally recognized, that there was a market for his performances, and that this market was a limited one, so that the imitation would deprive Lahr of performance opportunities, thus causing identifiable economic harm to him.

In *National Football League v. Governor of Del.*, 435 F. Supp. 1372 (D. Del. 1977), the plaintiff NFL sued to enjoin Delaware from using the results of its games as the basis of a state-sponsored lottery. Although the court did not trouble itself to distinguish the board game cases, those cases are in fact distinguishable; professional athletes frequently earn income by giving testimonials, but the NFL is not in the business of gambling on the results of its games. As a result, the NFL was not able to demonstrate identifiable economic damage from the lottery and could not recover on a right of publicity argument.

172. *See Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir.), *cert. denied*, 402 U.S. 906 (1970) (imitation of singing style, by itself, does not state cause of action when no injury to plaintiff can be shown); *Davis v. Trans World Airlines*, 297 F. Supp. 1145 (C.D. Cal. 1965) (same).

173. *See Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (imitation of voice actionable if economic loss can be proved); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (use of playing statistics actionable because it caused measurable decrease in plaintiff's earnings from such information); *cf. De Costa v. Columbia Broadcasting Sys., Inc.*, 520 F.2d 499, 512-13 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976) (although defendant copied plaintiff's characterization of cowboy character "Paladin," plaintiff not entitled to relief because he had never received financial benefit from his characterization).

The principle of identifiable harm that operates in privacy and publicity decisions, like the principle of media purpose, can be applied to the decisions in libel cases. A libel action, like an action based on privacy or publicity, requires a recognizable portrayal.¹⁷⁴ Moreover, libel law requires a plaintiff to demonstrate that the portrayal caused harm according to an objective standard.¹⁷⁵ The one notable difference between privacy or publicity standards and defamation standards is that the common law will sustain a libel suit without proof of special damages.¹⁷⁶ But this is exactly the rule that the Supreme Court reached out to restrict in *Gertz v. Robert Welch, Inc.*¹⁷⁷ Although permitting defamation suits to prevail on a showing of negligence, the *Gertz* Court stated that damages must be limited to "compensation for actual injury" unless the higher standard of recklessness could be met.¹⁷⁸ In so doing, the Court essentially brought the damage requirement for defamation suits involving media portrayals into line with the requirement of identifiable harm.

D. *The Advantages of the Proposed Principles*

On the basis of the two principles identified as guiding court decisions, it is possible to develop a new description of the legal rights of people portrayed by the media. In essence, it may be said that people have the right to be protected against media portrayals that both have an exploitative purpose and cause identifiable harm. To be sure, this description does not have the stirring quality of a right of privacy or publicity. But evocative formulations are of value only if one has decided in advance to champion the right in question, and there is no apparent reason for such partiality; indeed, in this area of law, the First Amendment commands that any bias must run the other way.

It may be argued that the concepts of privacy and publicity are

174. See, e.g., *Davis v. R.K.O. Radio Pictures, Inc.*, 191 F.2d 901 (8th Cir. 1951); W. PROSSER, *supra* note 11, § 111 at 749-51. Cf. *Rosenblatt v. Baer*, 383 U.S. 75, 79-83 (1966) (high level of identifiability constitutionally required).

175. See, e.g., *Lorentz v. R.K.O. Radio Pictures, Inc.*, 155 F.2d 84, 87 (9th Cir.), *cert. denied*, 329 U.S. 727 (1946) (libelous character of statement must be based on "fair and reasonable import of the language used").

176. See, e.g., *Peck v. Tribune Co.*, 214 U.S. 185 (1909); *Wegner v. Rodeo Cowboys Ass'n*, 417 F.2d 881 (10th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); *Hinsdale v. Orange County Publications, Inc.*, 17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966).

177. 418 U.S. 323 (1974).

178. *Id.* at 349. Since the Court stated that "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering" would still provide a basis for liability, *id.* at 350, it probably meant identifiable or recognizable harm when using the term "actual injury." *But cf.* Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L. REV. 519, 560-66 (1979) (confusion in lower court cases as to meaning of *Gertz* damage requirement).

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valuable nonetheless: they are too important, and have become too familiar, to be abandoned simply because they fail to account satisfactorily for the particular class of cases that involve portrayals. But portrayal is not simply a theoretical construct; it is a real issue, characterized by a definable type of media behavior and imposing a definable set of injuries. Moreover, publicity rights are confined exclusively to the portrayal context, while privacy rights, when they go beyond that context, are little more than distinct concepts combined under a single name.¹⁷⁹

The more mundane formulation suggested here would solve many of the problems present in existing case law. To begin with, it would alter the result in those cases in which the rhetoric of privacy or publicity tends to lead to incorrect decisions. In *Commonwealth v. Wiseman*,¹⁸⁰ this new formulation would have made the court much less likely to issue an injunction against Wiseman's film by focusing attention more directly on the First Amendment issue that the case presented. The principle of media purpose would have clearly indicated that the film was protected expression because there was no media exploitation involved. The conclusion that a filmmaker exploits wards of the state by documenting the miserable conditions in which they are kept is one that few courts would be likely to reach.¹⁸¹

179. Most of the other uses of the term privacy involve the distinctly different problem of regulating government, rather than private behavior, *see* note 42 *supra*, or, as in the case of intrusion, involve private behavior that is unrelated to the First Amendment, *see* pp. 1583-84 *supra*.

There are some commentators who would make a different grouping, placing the revelation of private facts together with government intrusions upon family life and government disclosures of information. *See, e.g.*, T. EMERSON, *supra* note 93, at 544-62; Gerety, *supra* note 39. Apart from the difficulty of applying equivalent standards to both public and private agents, this approach suffers from the problem of over-abstraction. It generally rests on concepts such as autonomy or individuality, *see* T. EMERSON, *supra* note 93, at 455-56; A. WESTIN, *supra* note 103, at 32-39; Gerety, *supra* note 39, at 281, concepts that are ultimately no more precise or self-evident than privacy itself. *Cf.* Bloustein, *supra* note 35, at 1000-07 (basing unified idea of privacy on concept of dignity). It should also be noted that these approaches focus on only one of the elements of the analysis presented here, namely, the injury to the individual. The other element of this analysis, the nature and purpose of the agency inflicting the injury, is not adequately considered. As a result, distinctions that would otherwise emerge, such as the difference between protected and unprotected speech, become obscured. To use an analogy, one cannot construct an adequate system of legal remedies based on the mere fact that an individual was purposely struck; it is essential to consider the identity of the attacker—whether he was a policeman, a schoolteacher, a private citizen, or a parent—and the purpose of the attack.

180. 356 Mass. 251, 249 N.E.2d 610, *cert. denied*, 398 U.S. 960 (1969). *See* p. 1592 *supra*.

181. In fact, other courts that adjudicated privacy claims against Wiseman's film came to essentially this conclusion, and refused to grant relief. *See, e.g.*, *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727 (S.D.N.Y. 1967).

Similarly, in *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944), *aff'd*, 159 Fla. 31, 30 So.

Just as the principle of media purpose leads to a more justifiable outcome in *Wiseman*, the principle of identifiable harm clarifies recent case law regarding the question of devisability. A number of courts have held that a cause of action originating with the individual portrayed survives him only if he has contracted for the commercial use of his attributes during his life.¹⁸² This was the basis on which relief was granted in *Factors Etc., Inc. v. Pro Arts, Inc.*,¹⁸³ one of the Elvis Presley cases. The court held that the "exclusive right to exploit the Presley name and likeness, because exercised during Presley's life, survived his death."¹⁸⁴ This result can be reached by applying the concept of identifiable harm. Once a person dies, to state the obvious, he is no longer able to earn a livelihood by marketing his attributes. If he has created a contract, he can leave the proceeds of that contract to his heirs, and any portrayal that detracts from the value of that contract will clearly injure its beneficiaries. But if no contract has been created, the identification of such harm is more difficult. Any claim by a person's heirs grounded in the unrealized *potential* ability of a person to profit from his attributes during his lifetime would appear to be too vague or remote a basis upon which to grant relief.

At least two courts have attempted to create a more expansive doctrine of devisability by holding that the right to profit from one's attributes can be inherited, even in the absence of an explicit contractual right. The decisions in these two cases, *Lugosi v. Universal Pictures Co.*¹⁸⁵ and *Price v. Hal Roach Studios, Inc.*,¹⁸⁶ turn on the assumption

2d 635 (1947), see note 82 *supra*, exploitation was absent, since the plaintiff's behavior was portrayed as one part of the author's account of her own past, and was thus clearly relevant to an informative work. In addition, the behavior was public, so that there was no identifiable harm. *Polakoff v. Harcourt Brace Jovanovich, Inc.*, 3 MEDIA L. REP. (BNA) 2516 (N.Y. Sup. Ct. 1978), see note 82 *supra*, would also be decided differently under the proposed principles. Although the work in question contained fictionalized episodes, these episodes were apparently identified as such, and were aspects of a larger entertainment vehicle of recognizable cultural value.

182. E.g., *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418 (7th Cir.), cert. denied, 382 U.S. 883 (1965); *Miller v. Commissioner*, 299 F.2d 706 (2d Cir. 1962); *Lugosi v. Universal Pictures Co.*, 139 Cal. Rptr. 35 (Ct. App. 1977).

183. 579 F.2d 215 (2d Cir. 1978), cert. denied, 99 S. Ct. 1215 (1979).

184. *Id.* at 222 (footnote omitted).

185. 172 U.S.P.Q. (BNA) 541 (Super. Ct. L.A. County 1972), *rev'd*, 139 Cal. Rptr. 35 (Ct. App. 1977). *Lugosi* involved a grant of rights provision in a contract between the actor and the producer of the motion picture *Dracula*. The trial court, after holding that the grant was restricted to a single motion picture, went on to argue that the remainder of the rights, those not covered by the contract provision, had passed to Lugosi's heirs, and that unauthorized use by Universal clearly injured them. *Id.* at 551-55.

186. 400 F. Supp. 836 (S.D.N.Y. 1975). In *Price*, the widows of Laurel and Hardy attempted to enforce an agreement in which Stanley Laurel and Oliver Hardy's widow granted a producer exclusive rights to use the comedian's attributes in merchandising and other media. By enforcing the agreement, the district court apparently held that Hardy's widow had inherited Hardy's right to profit from his attributes, even in the absence of a specific contract right previously created by Hardy.

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that the right of publicity, being a "property" right, should be devisable to the same extent as any other property. But this result conflicts with the underlying social policies that govern the law of media portrayals. The *Lugosi* and *Price* decisions would impose a considerable burden on free expression because they would leave no apparent limits to the rights a person's heirs could claim. At the same time, they would have little value in encouraging individual creativity. To give a person's heirs control over the exploitation of his attributes and his related publicity rights after his death will obviously not encourage that person's activities. Of course, the possibility of providing for one's heirs may have a motivational effect during one's life. But given the present state of the law, it is possible for a person to establish a bona fide contract to profit from his attributes during his life, and to leave the proceeds to his heirs. The fact that he did not do so indicates that he was not particularly concerned with using and devising this asset, and that such concerns were not a substantial motivation during his life. In that case, permitting the right to profit from one's attributes to be inherited would not fulfill the social policy of encouraging individual creativity.¹⁸⁷

The principle of identifiable harm would demand a different result in the *Lugosi* and *Price* cases, a result that is more consonant with the predominant social policies. This principle would hold that if there were no pre-existing contract right created during the lifetime of the person portrayed, his heirs could not make a showing of harm sufficient to justify recovery.¹⁸⁸ In fact, the courts seem to be moving in this direction at the present time, as the authority of both decisions has been undercut. *Lugosi* has been reversed by an appellate court,¹⁸⁹ while the

187. It can be argued that the *Lugosi* and *Price* courts were misled by the clarity with which the rights asserted by the heirs had been defined, and assumed that these rights were equivalent to rights that had been defined during the person's lifetime and translated into a contract. Alternatively, the *Price* court may have been influenced by the fact that the original grant of rights was made by Laurel himself, although not by Hardy, 400 F. Supp. at 838. It is even arguable that the court was interpreting this contract as having been executed during the "lifetime" of the comedy team, as represented by one of its members.

188. A possible objection to this rule is that it could be avoided by a legal stratagem: a person wanting to pass on his right of publicity would need only to execute a contract granting exclusive rights to his heirs, and then confer this contract on them in his will. But courts could readily find the contract void as counter to public policy or as illusory if it were not executed for genuine business purposes. The crucial question is not whether a person has written a piece of paper and captioned it "contract" instead of "will," but whether a person has actually developed a bona fide way to profit from his attributes, and then left the instrumentality for doing so to his heirs.

189. 139 Cal. Rptr. 35, 39 (Ct. App. 1977) (rejecting idea "that because one's immediate ancestor did not exploit the flood of publicity . . . he received in his lifetime for commercial purposes, the opportunity to have done so is property which descends to his

conclusion in *Price* was explicitly avoided by the Second Circuit in one of the Elvis Presley cases.¹⁹⁰

In addition to guiding courts toward more justifiable results in certain cases, the proposed principles provide more coherent predictive rules for determining potential liability as a result of media portrayals. By so doing, these principles can eliminate much of the chilling effect of the uncertainties that presently beset this area of the law.

One advantage of the new principles is that they provide a single method of analysis for cases involving the portrayal of real people by the media. The increasingly popular dichotomy between privacy and publicity rights is a source of confusion, because the distinction between the two simply does not withstand analysis. In both cases, the legal right is precisely the same: it is the right to be protected against media portrayals for exploitative purposes that cause identifiable harm, a right that combines privacy and publicity considerations. If one has the right to prevent disclosure of a fact, one can sell that right to someone else, who will then publish it. Similarly, if one may sell the right

heirs") (emphasis in original); *accord*, *Guglielmi v. Spelling-Goldberg Productions*, 140 Cal. Rptr. 775 (Ct. App. 1977) (rejecting right of publicity claims advanced by heirs of Rudolph Valentino).

190. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1215 (1979). In a footnote to its holding that Elvis Presley's right of publicity survived his death because it had been exercised during his life, the court said: "Because the right was exploited during Presley's life, we need not, and therefore do not, decide whether the right would survive the death of the celebrity if not exploited during the celebrity's life." *Id.* at 222 n.11. *But cf.* *Price v. Worldvision Enterprises, Inc.*, 455 F. Supp. 252 (S.D.N.Y. 1978) (holding that decision in *Price v. Hal Roach* has res judicata effect on producer attempting to use rights acquired from original defendant to produce television series based on Laurel and Hardy routines). *Worldvision* does not constitute a reaffirmation of the original *Price* decision on the devisability issue, however; if the *Worldvision* court felt that res judicata applied, it was compelled to follow the decision in *Hal Roach*, regardless of the merits. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977).

In *Hicks v. Casablanca Records & Filmworks*, 464 F. Supp. 426 (S.D.N.Y. 1978), a right of publicity suit brought by Agatha Christie's heirs against a fictionalized motion picture account of her eleven-day disappearance in 1926, the court said that the right of publicity was inheritable because Agatha Christie had "exploited" her name during her lifetime, primarily by publishing literary works. *Id.* at 429-30. The court relied upon *Factors* for the conclusion. In *Factors*, however, the portrayal impinged upon a specific contractual right that Elvis Presley had created and transferred, while in *Hicks*, the portrayal merely depicted someone who had transferred contractual rights in certain literary works, but had not attempted to grant rights for the use of her name or personality as such. Thus, *Hicks* fails to meet the test of identifiable harm. It seems clear, however, that the *Factors* case is of greater precedential weight. Not only is it the decision of a higher court, and the sole basis for the reasoning in *Hicks*, but the *Hicks* discussion of the devisability issue did not control the decision in the case. The court held that the portrayal in question was protected by the First Amendment, and was thus immune from liability regardless of the plaintiff's rights.

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to exploit one's attributes, one may also refuse to sell that right, and thus keep it private.¹⁹¹

In addition to uniting those cases currently decided on privacy or publicity grounds, the principles of media exploitation and identifiable harm also relate both groups of cases to the libel cases involving media portrayals. As indicated above, many recoveries for libelous portrayals can be explained on the ground that the portrayal caused identifiable harm without serving a valid social purpose.¹⁹² The more traditional concepts of privacy and publicity offer no such link to libel law. Libel, while it can involve statements about private behavior, just as frequently involves statements about public political activities or business affairs that are in no sense private, and is often far removed from the type of economic loss that would sustain a right of publicity claim.

The proposed principles serve as better predictive rules not only because they represent a unified approach to the issue of media portrayals, but also because they establish a clear analytic process through

191. Several of the leading right of publicity cases have involved people who wanted to restrict, as well as to profit from, the right to publicize their attributes. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 563-64 (1977) (effort to prevent televising of human cannonball act); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969) (effort to restrict authorized use of name to athletic products); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969) (effort to use right of publicity to prevent publication of any biography).

In fact, the entire distinction between personal rights and property rights, which serves as the conceptual basis of the distinction between the rights of privacy and publicity, is a somewhat dubious one. Modern property comes in many forms that could readily be regarded as personal, such as licenses, franchises, and government benefits. *See Reich, The New Property*, 73 *YALE L.J.* 733 (1964). As the Supreme Court said in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972):

[T]he dichotomy between personal liberties and property rights is a false one.

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home or a savings account.

192. In the area of defamation, the proposed principles could replace vague terminology with a clearer method of analysis. While defamation itself is a viable concept, the impact of the First Amendment in this area has led to a distinction between public and private figures that is notable for its obscurity, thereby causing the very "chilling effect" that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was designed to avoid. *See id.* at 279. The proposed principles would eliminate the need to rely on this distinction and possibly lead to more reasonable decisions. *See* notes 140 & 142 *supra*. Instead of focusing on the nature of the person portrayed, the new approach would begin by focusing on the degree of exploitation involved in the portrayal. If a defamatory portrayal exploited the individual by creating a false link between him and a valid public issue, it would be potentially subject to liability for negligence; otherwise, only a knowing falsehood would suffice for liability. The second step of this new approach would be to determine whether any identifiable harm has occurred. This is related, at least in instances where the negligence standard applies, to the "actual injury" requirement of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

which the result can be obtained. Privacy and publicity are ultimately slogans, rather than decisionmaking criteria; once these terms are invoked, it is not at all clear how they should be used, what elements comprise them, and how those elements are to be ordered. The proposed principles establish a two-step process. The first step is to determine whether the portrayal in question is exploitative, using criteria relating to the perceived social value of the type of portrayal involved. If the portrayal is found to be exploitative, the next step is to determine whether the plaintiff has suffered any identifiable harm, of either an economic or a dignitary nature. If both these criteria are satisfied, it is likely that a court will grant recovery. To be sure, most courts do not use these principles explicitly, but the principles do serve as a means of explaining court decisions, and their organization in a logical order renders them a workable predictive device.

In addition to establishing a clear analytic process, the proposed principles possess greater predictive power because they incorporate the First Amendment directly into the analysis. The privacy and publicity approaches begin by ignoring this constitutional command, and then must reintroduce it through the use of vague terms such as "newsworthiness," conclusory arguments based on waiver principles, or unnecessarily elaborate balancing formulae.¹⁹³ That the First Amendment does not regularly fall victim to this process is a testament to the high value generally accorded to it. What clearly does fall victim to the indirectness of the present approach is the clarity and predictability that is so crucial in this area.

By developing rules that directly incorporate First Amendment concerns, the proposed principles make clear, in a way that concepts such as privacy and publicity do not, that the right of individuals to exercise control over media portrayals of themselves is a limited one. A person can prevent exploitative portrayals, provided that he can demonstrate that the portrayal will cause identifiable harm to his economic or his personal interests. But if the portrayal serves a recognized social function of an informative or cultural nature, then any harm he suffers will be beyond the reach of legal remedy. We are willing to tolerate this situation because of the value we attach to general benefits that the media provide. And in a system that also values the rights of individuals, we justify this choice with the conviction that any harm a person suffers is recompensed by the preservation of a greater general freedom.

193. See pp. 1584-88, 1590-91 *supra*.