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Privacy and the Other Miss M

DOROTHY GLANCY*

I. INTRODUCTION

Two women, separated by a century in time, occupy center stage in this reflection on the famous 1890 law review article, *The Right To Privacy*, by Samuel Warren and Louis Brandeis.[1] The two women never met each other. Nor were either of them, apparently, acquainted with Warren and Brandeis.[2] They are not relatives in any conventional sense of kinship, but they are surely sisters in a different way. They are of special interest to lawyers because both women were famous comic actresses and singers who went to court to vindicate their celebrated identities. This article connects their stories as two public people who have embodied one aspect of Warren and Brandeis' idea of the right to privacy. Their names are Bette Midler and Marion Manola. Bette Midler is widely acclaimed as "The Divine Miss M." A century earlier, Marion Manola was also a famous Miss M who, in her own way, was also divine.

Although there are many differences between the two women, their stories contain certain similarities worth considering in connection with Warren and Brandeis' famous 1890 law review article. Although neither secured legal protection for what she called her

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1. Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890). I have discussed at some length the larger historical context of the Warren and Brandeis article. *See*, Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979); *see also* J.T. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY ch. 1 (1989).

2. It is possible that Warren and Brandeis had seen, or even met Marion Manola, who was the featured singer for the opening "Pops" concert at the Music Hall in Boston during the middle of October 1890. Newspaper accounts describe this October 19, 1890, concert as presenting the full Germania Orchestra and the Harvard male quartet, as well as Miss Manola. Warren and Brandeis, who were probably writing their article at the time, may have been in the audience. According to newspaper accounts, Marion Manola had been in Boston several times during the autumn of 1890 to see John Mason, an actor at the Museum Theater, whom she married a few months later. Clipping Files regarding "Marion Manola" in the New York Public Library of the Performing Arts [hereinafter Clipping Files].

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"right to privacy," the two women's stories illuminate an often overlooked aspect of the Warren and Brandeis argument for recognition of a legal right to privacy. That aspect concerns the property rights of performing artists to control the uses of their personalities in advertising.

This proprietary side of the right to privacy is sometimes thought to have little to do with Warren and Brandeis' original idea and argument. Now frequently called by a different name—"right of publicity"[3]—this property right started out as an integral part of the original argument for recognition of the right to privacy. After a century, the original proprietary side of the right to privacy seems to have faded into the background. My project here will be to bring forward for reflection what time has clouded. First, let me introduce each "Divine Miss M" and the story of her interaction with the right to privacy. The implications of the stories of these two women for the meaning of the right to privacy, both as Warren and Brandeis originally conceived it, and as modern courts now enforce it, should then come more clearly into view.

II. Marion Manola v. Stevens & Myers[4]

The world of comic opera and the glittering triviality of the musical theater along New York's Broadway in the gay nineties seem a lot closer to the world of the Divine Miss M than they do to the world of law reviews and legal scholars. It may therefore come as a surprise that the Warren and Brandeis article included as an example of the right to privacy a lawsuit brought by a famous prima donna from the comic opera. The law review article opened with three pages of fairly general discussion of progress and the rights of man.[5] Then,

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3. *See infra*, text accompanying notes 167-171.

4. *Manola Gets An Injunction*, N.Y. Times, June 18, 1890, at 2, col. 2 (order granting injunction); *Miss Manola Seeks An Injunction*, N.Y. Times, June 21, 1890, at 2, col. 2 (N.Y.S. Ct. June 17, 1890).

5. The Warren and Brandeis article contains its share of sexual stereotypes. For example, in discussing human emotions, the article seems to focus only on men: "His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable." Warren & Brandeis, *supra* note 1, at 194 (footnotes omitted). One can, of course, read the article's emphasis on the rights of man as referring to what we would now call "human kind" or "humanity." Perhaps the article's early reference to Marion Manola was a way of underscoring that more inclusive meaning. In any event, the general issues regarding whether Warren and Brandeis were sexists, and their article a reflection of Victorian gender chauvinism, must be left for another day.

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Marion Manola as "Bul-Bul"
1890

from out of this abstract background, stepped the first specific example of a living, breathing person who had vindicated the right to privacy. That individual was a woman. Her name was Miss Marion Manola.

Warren and Brandeis took some pains to describe "[t]he alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago . . . ."[6] This is the way Warren and Brandeis referred to the *New York Times*. It is not consistent with references to the *New York Times* elsewhere in the article. Citing to newspaper accounts in the *New York Times*, Warren and Brandeis described in a footnote the intriguing facts of the case:

> [T]he complainant alleged that while she was playing in the Broadway Theatre, in a role which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued *ex parte*, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition.[7]

Warren and Brandeis described Marion Manola's case as involving "consideration of the right of circulating portraits."[8] They then posed the central question which their article was intended to address: "[W]hether our law will recognize and protect the right to privacy in this and in other respects . . . ."[9] They described this issue as one which "must soon come before our courts for consideration."[10] Recognition of the right to privacy in this respect involved enforcement of a proprietary right to a person's identity. Recognition of the right to privacy in other respects would involve the authors' far more innovative and controversial suggestions regarding legal vindication of emotional aspects of the right to privacy through actions for injuries to feelings, even in the absence of interference with property rights. Although the article described Marion Manola's case as an example of the former, proprietary aspect of the right to privacy, one

6. *Id.* at 195.
7. *Id.* at 195 n.7.
8. *Id.* at 195-96.
9. *Id.* at 196.
10. *Id.*

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of the interesting features of the Warren and Brandeis argument for recognition of the right to privacy was the way their argument artfully joined together both proprietary and emotional aspects of the right to privacy. Such a linkage was certainly the implication of Marion Manola's case.

Who was this Marion Manola? Why did Warren and Brandeis bother to write about her in a law review article urging recognition of the right to privacy? One apparent reason was to emphasize that famous people, even notorious people, and certainly women, should be entitled to legal protection for their privacy rights. Marion Manola's case makes the point, right up front, that the right to privacy was intended to include the right of even a comic opera prima donna on the public stage to prevent the use of her identity without her consent. This aspect of Warren and Brandeis' original notion of the right of privacy becomes much clearer when Marion Manola's lawsuit is set against the background of her own life and times.

Marion Manola led a fast and fascinating life. She was one of the most renowned leading ladies of the American musical stage during the late 1880s and 1890s. Born in 1865 in Oswego, New York, she was raised in Cleveland, Ohio, where she was known as Mina Stevens. She sang in the church choir and in amateur theatricals where she met and married a young man from Cleveland society, Henry Mould. Married at the age of seventeen, she soon had a daughter, Adelaide. After Mr. Mould's business experienced financial difficulty, Mr. and Mrs. Mould disappeared to Europe. Mina Stevens Mould studied to be a grand opera singer in Paris under the tutelage of Madame Marchesi. But, when the family finances became strained, she turned her talent to light opera and made her stage debut in Bath, England, in the operetta, "Falka."[11] She appears to have taken as her stage name the title of a French opera, "Manola."[12]

When Warren and Brandeis wrote about her in 1890, Marion Manola was at the height of her stardom. Not a conventionally pretty

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11. *Our Gallery of Players. XIII. Marion Manola*, THE ILLUSTRATED AMERICAN, Sept. 26, 1891, at 270, col. 1.

12. The plot of the operetta, "Manola," was derived from the French opera, "Le Jour et la Nuit," and involved a man who had one wife by day and another wife by night. G. BORDMAN, AMERICAN MUSICAL THEATER 64 (1986). What it had to do with the woman formerly known as Mrs. Henry Mould is lost in the mists of time. Mr. Henry Mould also took to the musical comedy stage, using the stage name of Carl Irving. Having returned to New York, Carl Irving left the stage in 1888 to go back to being Henry Mould in the iron and steel business. *Our Gallery of Players. XIII. Marion Manola*, *supra* note 11, at 270, col. 2.

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woman, Marion Manola appears in photographs taken in the 1890s to be rather plain.[13] She was neither a glamorous, voluptuous woman, such as her contemporary, Lillian Russell, nor a cute, winsome ingenue, such as her costar Della Fox. An article from 1888 described her simply as a "young singer."[14] In 1890 the *New York Times* described her as "the little singer and actress."[15] She was depicted as "very small" with "fine dark eyes, and a wealth of auburn hair that glistens like burnished copper."[16] She had a lively, riveting personality which caused the *Dramatic Mirror* to rhapsodize, "There is in her face a something more than prettiness, and her slender figure is a graceful relief to the eyes after the numerous over-plump beauties."[17] She left the stage in the late 1890s, her health ruined by addiction to morphine. After the turn of the century, remarried and free of morphine, she returned to the stage as one of the first actresses from the legitimate theater to appear in vaudeville.[18] When she died in 1914, her obituary described her as "a famous light opera star of twenty years ago . . . ."[19]

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13. *See* XV G. ODell, Annals of the New York Stage 340 (1949).

14. *She Doesn't Want the Dog*, N.Y. Times, Sept. 27, 1888, at 5, col. 4.

15. *Manola and Cottrelly*, N.Y. Times, Jan. 17, 1890, at 8, col. 2.

16. *Our Gallery of Players. XIII. Marion Manola*, *supra* note 11, at 270, col. 1.

17. Dramatic Mirror, June 29, 1889, at 14, col. 1, Clipping Files, *supra* note 2.

18. *Death of Marion Manola*, Dramatic Mirror, Oct. 14, 1914, Clipping Files, *supra* note 2.

19. *Marion Manola Dead*, N. Y. Times, Oct. 8, 1914, at 11, col. 5. After Warren and Brandeis wrote about her, Marion Manola's life continued to be entangled with the law. Following her widely-reported 1890 divorce in Boston from her first husband, Henry Mould, she married again in 1891. Her second husband was a Boston actor known as "Handsome Jack" Mason. In 1894 the Masons got into a dispute over compensation with the management of the Tremont Theater in Boston. The *New York Times* recounts the embarrassing situation of Marion Manola being removed from the stage after the theater management brought in another prima donna who was also on stage playing the leading role in "Patience." *Manola Removed from the Stage*, N.Y. Times, June 6, 1894, at 1, col. 4. When Marion Manola divorced Mason in 1900, among the grounds for her complaint was her claim that her husband had addicted her to morphine. Having been granted the divorce, as well as alimony, the newspapers reported that when she brought legal action to force Mason to pay the alimony, Jack Mason had his current girlfriend write the alimony checks to his former wife as an insult. Nevertheless, after Marion Manola married again in 1904, she chose to live across the street from Jack Mason in New Rochelle.

Legal melodrama even touched Marion Manola's death. Marion Manola's third husband was an accountant, George Gates, who was the auditor of one of the early motion picture companies. In the fall of 1914, her husband had been named in a

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The comic opera stage which Marion Manola graced in 1890 was a very lively place. Musical theater in the United States was still in its formative years. During the late 1870s and 1880s, Gilbert and Sullivan operettas, such as "H.M.S. Pinafore," transformed the musical theater as it moved away from grand opera and began to offer a mixture of operetta, French opera bouffe, comic opera, and musical reviews and extravaganzas, which themselves derived in part from minstrel shows.[20] In his history, *American Musical Theater*, Bordman explains:

> Theatrical royalty and its friends found refuge in comic opera, clothed in that genre's universally higher musical pretensions. The higher social order of its characters and its loftier musical aims were the genre's unifying traits. As often as not the form was not even accorded the courtesy of a generally accepted name. One playgoer's comic opera was another's opera bouffe and a third's operetta.[21]

In the next century this musical theater would evolve further into vaudeville and the modern musical comedy.[22]

Marion Manola gained fame as a comic opera prima donna[23] singing with the McCaull Opera Company.[24] Her somewhat stormy

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criminal libel arrest warrant, because he had signed an affidavit that the Vice President and General Manager of the Colonial Motion Picture Corporation had asked him to falsify the books and to make false statements to stockholders. Detectives attempting to serve the arrest warrant had difficulty finding Mr. Gates, so they searched Mrs. Gates' (Marion Manola's) sick room as they hunted for him. The next day, her nerves once again shattered, Marion Manola died at the age of 48 in the course of a gall bladder operation. *Stageland Gossip*, Cincinnati Inquirer, Oct. 7, 1914, Clipping Files, *supra* note 2; *Former Actress Dead*, Baltimore American, Oct. 7, 1914, Clipping Files, *supra* note 2.

20. *See* G. BORDMAN, *supra* note 12, at 1-119.

21. G. BORDMAN, *supra* note 12, at 118.

22. According to Marion Manola's obituary in the *Dramatic Mirror*, Marion Manola "was one of the first legitimate actresses to go into vaudeville." *Death of Marion Manola*, *supra* note 18. Later in the twentieth century, some of Bette Midler's elaborate shows and tours, such as "De Tour" and "Clams on the Halfshell Review" have been happy throwbacks to this very heterogenous genre of musical entertainment.

23. Leading ladies of the comic opera were frequently referred to as operatic prima donnas. They were famous for behaving much as one connotation of "prima donna," referring to a tendency to temperamental overreaction, suggests. Many comic opera prima donnas were more sought after for their physical beauty and entertainment abilities, than for the quality of their voices. Marion Manola was unusual among the American prima donnas of her era, because she was formally trained in grand opera in Europe. In a book written about comic opera prima donnas

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relationship with that company both made her famous and set the stage for the events described by Warren and Brandeis. In the spring of 1889, one year before the incident described in the law review article, the *New York Times* carried a story under the headline, "Marion Manola Pouting: A Speck of War in the M'Caull Opera Company."[25] The article described her as so insulted because one of her fellow actors pushed her on stage, that she refused to appear on stage with the offending actor until he apologized for the public insult. This incident exemplified the temperamental personality for which Marion Manola was widely known.[26] The 1889 newspaper article also described her public role as a stage performer as properly set apart from her private life. The article offered the opinion that Marion Manola should not have refused to perform: "A lady holding her position has no right to allow her personal grievances to influence her to the detriment of her manager's interests. Her proper course, . . . was to fulfill her engagement to her manager and the public, and settle her private grievances in private."[27] The article also reported the unyielding views of the manager, Benjamin

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published ten years after the events described by Warren and Brandeis, Lewis Strang described these women, as for the most part, "without the requisite training, either in the art of singing or in the art of impersonation, that would entitle them to be seriously considered as great vocalists or as great actors. They are, however, past mistresses in the one essential for their profession,—the art of entertaining." *See* L. STRANG, FAMOUS PRIMA DONNAS ix-x (1900). Strang notes that their careers are characterized by "almost universal brevity," with ten years usually limiting their professional lives. The prima donna's fame, Strang suggests, is based on "personal magnetism and physical beauty;" she is a "player of personality," as "[s]he acts herself under every circumstance." *Id.* at x, xii, xiii.

24. The McCaull Opera Company traveled all over the United States, from New York to Boston, to Washington, D.C., to Chicago, and even out to San Francisco. The impresario, Col. John A. McCaull, had been a Confederate officer and a Baltimore lawyer. During the 1880s McCaull became known as "the father of comic opera in America." G. BORDMAN, *supra* note 12, at 54. Manola appears consistently to have referred to her employer as "Colonel McCaull." *See* Manola and Cottrelly, *supra* note 15, at 8, col. 2.

25. *Marion Manola Pouting*, N.Y. Times, June 12, 1889, at 3, col. 2.

26. An undated handwritten letter from Mary E. Remington, Dramatic Editor of the *Grand Rapids Herald* contained in the clipping files of the New York Public Library of the Performing Arts, described Marion Manola as "a woman singularly gifted with rare and wonderful talents, but equally cursed with a vibrant impulsive temperament which has been an irresistible consuming force through the power of its own intensity." Clipping Files, *supra* note 2.

27. *Marion Manola Pouting*, *supra* note 25. Warren and Brandeis were later to suggest, using Marion Manola as an example, that there were privacy interests, particularly those of a proprietary nature, involved even in public activities of public people.

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Stevens, that, "[w]hen Miss Manola deliberately absented herself from the theatre he had no alternative but to ignore her until she returned to her duty."[28] This same manager, Stevens, was the main defendant in the injunctive action recounted by Warren and Brandeis the next year.

Between this incident in June of 1889 and the photographic altercation a year later, Marion Manola was involved in yet another controversy with the McCaull Opera Company. A series of newspaper articles recounted at length Marion Manola's efforts to quit the McCaull Company early in 1890, before her contract was scheduled to end in May. She had already agreed to join the new De Wolf Hopper Opera Bouffe Company later in the spring.[29] Moving to the De Wolf Hopper Company was, Marion Manola told the *New York Times*, "a step much to my advantage in every way—a course which I was bound to pursue."[30] Claiming ill health, she left the McCaull Company in Chicago and returned to New York.[31] McCaull granted her two week's vacation and served on her "a legal notice . . . that she would be held responsible for damages if she did not return to the company at the expiration of that time."[32] The same article reported that, "[t]he threat of a law suit for damages does not seem to trouble the little singer and actress at all."[33]

Within weeks, a New York court had granted Col. McCaull an injunction against Marion Manola to restrain her from singing with another opera company during the spring of 1890.[34] Manola, who was at the time living as a single mother, pleaded concern about her "little daughter, Adelaide," a beautiful nine-year-old child.[35] The

28. *Id.*

29. This was the company which would launch, as its first production, "Castles in the Air," out of which arose the lawsuit Warren and Brandeis described. *See* Warren & Brandeis, *supra* note 1, at 195 n.7.

30. *Manola and Cottrelly, supra* note 15.

31. On New Years eve, while the McCaull Opera Company was in Chicago, Marion Manola and another of the company's leading ladies, Mathilde Cottrelly, apparently clashed. Marion Manola had announced that she was ill and would have to leave the company for the rest of the season. Mme. Cottrelly accused Miss Manola of conspiring to break up the company. The *New York Times* quotes at length from Marion Manola's own description of "the explosion, and it was a terrible one, I can tell you." The newspaper article only barely alludes to the reason for Cottrelly's charges: Marion Manola was in fact about to leave the McCaull Opera Company, along with the company manager and another of its stars, De Wolf Hopper. *Manola and Cottrelly, supra* note 15.

32. *Id.*

33. *Id.*

34. *Against Marion Manola*, N.Y. Times, Feb. 11, 1890, at 8, col. 5.

35. *Manola and Cottrelly, supra* note 15. Marion Manola was, in fact, still

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judge found that Manola's claim that "the support of herself and her child would be endangered by the injunction" was without foundation, as the "plaintiff [McCaull] is willing and anxious for her to complete her engagement at $150 per week, and it will be her own fault if she finds herself without support."[36] This incident gave Marion Manola some experience with the power and process of the courts. Later, when she brought the suit described by Warren and Brandeis, she knew just the lawyer to hire, the same A. H. Hummell[37] who had secured the injunction against her for Col. McCaull.

The injunctive action Warren and Brandeis described occurred five months later, a few weeks after the opening of the De Wolf Hopper Company's first production, "Castles in the Air."[38] The uninspired libretto by C.A. Byrne revolved around the perils of a young man, Bul-Bul (the part played by Marion Manola), who was both deeply in debt and deeply in love with Blanche. Cabolastro was both the potential source of a disguise which would allow Bul-Bul to escape his creditors and Blanche's father. Cabolastro agreed to provide the disguise if Bul-Bul could out-talk Cabolastro's garrulous wife. Bul-Bul's success, both in the war of words and in wooing Blanche, was rewarded by his prospective father-in-law's paying off the young

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married to Henry Mould. She divorced Mould later in 1890 in order to marry Jack Mason. Her daughter Adelaide later married the novelist and playwright Rupert Hughes. *Marion Manola Dead*, *supra* note 19.

36. *Against Marion Manola*, N.Y. Times, Feb. 11, 1890, at 8, col. 5.

37. Hummell also represented Marion Manola in her divorce action against John Mason, a decade later. *Sues Jack Mason*, article dated Feb. 26, 1900, Clipping Files *supra* note 2.

38. Very little that is complimentary seems to have been written about this American operetta, which was, according to Strang "not a great success in New York, but it did very well on the road." *See* L. STRANG, FAMOUS STARS OF LIGHT OPERA 87 (1900). The "Castles In The Air" title alludes to Thoreau's famous advice in *Walden*:

> [I]f one advances confidently in the direction of his dreams, and endeavors to live the life which he has imagined, he will meet with a success unexpected in common hours. . . . If you have built castles in the air, your work need not be lost; that is where they should be. Now put the foundations under them.

H. THOREAU, WALDEN 215 (1854) But the operetta's plot had nothing to do with Thoreau. It was borrowed from Offenbach's *Les Bravards*, and allegedly derived from Cervante's intermezzo, *Les Dos Habliadores*. The music was by Gustave Kerker, a popular New York conductor and composer of the time. G. BORDMAN, *supra* note 12, at 103. Describing the dialogue as "drivelling nonsense," one reviewer commented that "The libretto is simply idiotic." *The Spirit of the Times*, May 10, 1890, in the file regarding "Castles in the Air" in the New York Public Library for the Performing Arts.

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man's debts.[39] However, the plot of the comic opera was not why audiences came to see the De Wolf Hopper Company's new production. They came to see and hear the stars. The role played by the company's leading male star, De Wolf Hopper, was not even related to the plot. Hopper drifted on and off the stage throughout the evening as a freethinking judge, Filacoudre, who pantomimed, clowned, sang, and otherwise "stole the thunder from all other performers."[40] Such was the rather zany context out of which Marion Manola's lawsuit arose. It was a lawsuit in which privacy interests confronted the development of advertising and the invention of photography.

The particular object of Marion Manola's legal complaint was not the comedic chaos of the De Wolf Hopper Opera Company's production, but what appears to have been an advertising stunt staged by the manager, Stevens, to bolster faltering attendance at the show. This theater manager was the same Benjamin Stevens, with whom Marion Manola had tangled in court before.[41] The initial report of the photography incident in the *New York Times* was headlined, "Photographed in Tights: Marion Manola Caught on the Stage by a Camera."[42] The story noted:

> A photographer was placed in one of the boxes, and when an opportunity occurred during the performance a flash light was used and a photograph of the actress was secured. . . . The photographer made no attempt to conceal his presence in the box, but on the contrary, seemed to do all he could to attract the attention of the audience. In this he succeeded fully.[43]

The article ended with a revealing question: "Who will say that the average theatre manager does not know how to advertise his com-

39. *See* G. BORDMAN, *supra* note 12, at 103.

40. D. EWEN, COMPLETE BOOK OF THE AMERICAN MUSICAL THEATER 176 (1959). De Wolf Hopper was famous for his towering height and booming bass voice. In his history of the American musical theater, Bordman recounts that during an 1888 revival of "Prince Methusalem," a Johann Strauss operetta, "somewhere in the second act, De Wolf Hopper departed from the text and inserted a poem, 'Casey at the Bat,' by Ernest Lawrence Thayer. Just how Hopper justified the insertion of this bit of baseball lore into an operetta will probably never be known. But his reading drew insistent encores, and for the rest of his career there was hardly a performance in which Hopper was not called on to recite the piece. The interpolation vividly illustrates the freewheeling attitudes of late 19th-century authors and performers . . . ." G. BORDMAN, *supra* note 12, at 95.

41. *See supra* text accompanying notes 25-28 (regarding the extensively reported pouting episode).

42. *Photographed in Tights*, N.Y. Times, June 15, 1890, at 2, col. 3.

43. *Id.*

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pany?"[44] Three days later, the newspaper referred to Marion Manola's "extensively advertized story,"[45] when it reported that she had secured an injunction. On June 21, 1890 the *New York Times* noted that, "Marion Manola's tights will probably not figure hereafter in comic opera advertisements."[46]

The 1890s were, after all, what Henry James called "the age of advertising."[47] It was a time when Phineas T. Barnum, "the first great advertising genius and the greatest publicity exploiter the world has ever known,"[48] enthralled the American public. Barnum's autobiography, *Struggles and Triumphs*, "sold more copies in the nineteenth century than any book except the Holy Bible."[49] According to Barnum, the aim of advertising was "to extort attention."[50] He proclaimed a grandiose role for advertising as itself a kind of show business.[51] When the theater manager, Stevens, staged his ostentatious event at the expense of Marion Manola, he was simply acting as a late nineteenth century entrepreneur promoting his theatrical production by flamboyant advertising.[52]

The 1890s were also a time when photography had just become more convenient and widely available. Photographers, such as Jacob Riis and Alfred Steiglitz, were beginning to take candid photographs around New York with improved photographic equipment.[53] Daniel Boorstin has described the social significance of these late nineteenth

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44. *Id.*

45. *Manola Gets an Injunction*, *supra* note 4.

46. *Miss Manola Seeks an Injunction*, *supra* note 4.

47. J. Wicke, Advertising Fictions 88 (1988).

48. F. Presbrey, The History and Development of Advertising 211 (1929).

49. J. Wicke, *supra* note 47, at 55.

50. P. Barnum, The Story of My Life 58 (1886).

51. Barnum explained,

> The show business has all phases and grades of dignity, from the exhibition of a monkey to the exposition of that highest art in music or the drama, which entrances empires and secures for the gifted artist a world-wide fame which princes well might envy.

Id. at 57.

52. The account of the incident in *The Illustrated American* reinforces the conclusion that advertising was the real motivation of the manager, Stevens: "[H]e had gained his object. He had attracted the attention of the public, and had obtained any amount of free advertising for his opera. That was all he wanted." *Our Gallery of Players. XIII. Marion Manola*, *supra* note 11, at 270, col. 2.

53. *See generally* H. Gernsheim & A. Gernsheim, The History of Photography 410-22 (1969); J. Lemagny & A. Rouille, A History of Photography: Social and Cultural Perspectives (J. Lloyd, trans. 1986); P. Hales, Silver Cities: The Photography of American Urbanization (1984).

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century technological developments in photography as enormous, because they made experience repeatable in unanticipated ways:

> The decisive innovation was photography . . . as a transformer of experience . . . . Such repeatable experience as was possible in Old World cultures had been mainly through the aristocratic arts of literature, painting, sculpture, and music, or through the popular but limited arts of minstrelsy, folklore, folk art, and folk music. . . .
>
> Photography took the first giant step toward democratizing the repeatable experience.[54]

Of course, the photographic equipment available in the 1890s was quite different from that available today. Neither press reports nor Warren and Brandeis described the type of camera used to take Marion Manola's photograph. It may have been one of the larger wooden box devices. But surreptitious photography was, at that time, primarily associated with George Eastman's new Kodak. In 1888, Eastman had put his new Kodak camera on the market, advertised as "the smallest, lightest and simplest of all Detective Cameras . . . Makes 100 Exposures. Weight 35 oz."[55] This new camera was, according to its advertisements, designed for taking surreptitious photographs of unwitting, and often unwilling, people. The other important photographic advance in the late 1880s was the development of magnesium flash powder which vastly improved the quality and convenience of indoor photography. The flash light used to secure the photograph of Marion Manola on stage would have been provided by the ignition of "smokeless" magnesium powder. Unfortunately, "[s]moke formation remained a great drawback, and so-called 'smokeless' flash powders were only smokeless until lit."[56] The magnesium flash and accompanying smoke would undoubtedly have created considerable commotion in the theater.

Apparently, Marion Manola did not want to have her appearance on the stage in "Castles in the Air" repeated by means of a candid photograph. She also, undoubtedly, did not appreciate having her performance interrupted and upstaged by a theater manager's advertising gimmick. According to the *New York Times*, "[w]hen Miss Manola realized what had been done she threw her mantle over her

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54. D. Boorstin, The Americans: The Democratic Experience 371 (1973). Boorstin devotes all of chapter 42 of his social history of the Americans to "Making Experience Repeatable."

55. *Id.* at 374.

56. H. Gernsheim & A. Gernsheim, *supra*, note 53, at 428.

face and ran off the stage. She returned, however, to finish her performance."[57] Her next move was to go to court to obtain an injunction against use of the surreptitiously taken flash-light photograph. By the end of the week, she had secured "an injunction against the display of photographs of the actress in this style of stage costume."[58] The fact that no one appeared in opposition is a further indication that the real reason for taking the photograph was the manager's desire not so much for photographs as for the publicity which the stunt successfully generated. Marion Manola brought suit to enjoin use of the photograph because she did not choose to have her image used for advertising purposes in that form.

Marion Manola had many reasons for objecting to the use of the photograph. First, she was a trained singer who had studied grand opera. Her voice and her acting ability constituted her professional identity, not her legs. Moreover, Marion Manola may have been uncomfortable in this particular trouser role, or in trouser roles in general.[59] It is also possible that the twenty-four year old single mother experienced gender anxiety in the role of the young man, Bul-Bul.[60] Most of all, she was apparently concerned about here image in the eyes of her nine-year-old daughter.

According to the first of the *New York Times* articles, "[i]t is alleged that Miss Manola refused to be photographed in tights owing to her modesty."[61] However, modesty does not quite capture the reason Marion Manola gave for refusing to allow her image in tights to be used in advertising the comic opera. The *Illustrated American* offered a more detailed explanation:

> Miss Manola had a daughter—Adelaide—a beautiful child of nine, who was being educated at the Convent of Mount St.

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57. *Photographed in Tights*, *supra* note 42.

58. *Miss Manola Seeks an Injunction*, *supra* note 4.

59. It was not then, just as it is not now, particularly unusual for women performers, in grand or light opera, to perform male parts. These parts are still termed "trouser roles," despite the fact that the roles seem to involve the women-playing-boys costumed in tights more often than in trousers. Another of the leading ladies of the late nineteenth-century comic opera described "a fascination about boys' parts . . . . It is something of a study to do them just right, to be feminine and still not to be effiminate. . . . One must never overstep the line of womanliness in seeking masculinity, and she must still make the character a real boy and not a girl disguised as a boy." L. STRANG, *supra* note 23, at 170-71 (quoting a conversation with Marie Celeste).

60. One theater critic reviewing "Castles in the Air" noted that "Marion Manola sang deliciously, but she lacked the swagger for her manish part." *The Spirit of the Times*, *supra*, note 38.

61. *Photographed in Tights*, *supra* note 42.

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> Vincent, near New York. She disliked the idea of her daughter seeing a photograph of her mother dressed in tights for sale in the shops of Broadway, and when the proposition was made to her by the manager of the company, she positively refused to be photographed.
>
> The manager saw a chance for advertising the opera, and at once seized it. The next day all the newspapers contained the story, and for some days afterward women wrote to the journals supporting Miss Manola in her refusal, and expressing admiration for her modesty.[62]

Marion Manola had not been shy about exposing her legs to public view. She did not object to performing in tights on stage. She even posed for a series of charming studio portraits in such costume.[63]

There was nothing unusual about a prima donna appearing on the comic operatic stage in tights in 1890.[64] Writing about the American musical theater of the early 1890s, Bordman notes, "acrobatic clowns and prima donnas dominated the musical stage of the period. The clowns were almost always in grotesque make-up and the prima donnas as often as not in tights, both thereby underscoring the

62. *Our Gallery of Players. XIII. Marion Manola*, *supra* note 11 at 270, col. 2.

63. One of the several photographs made of Marion Manola in the role of Bul-Bul accompanies this article at page 403. The photo files on "Marion Manola" in the New York Public Library of the Performing Arts contain a number of different studio poses of her as Bul-Bul. In some of them she is shown full length in tights. Others simply show her head and shoulders. An August 12, 1890, article in the *New York Times* remarks that the one hundredth performance of the operetta was celebrated by presenting the audience with souvenir pictures of the members of the "Castles in the Air" cast, including Marion Manola. Since no mention is made of tights, it must have been the head and shoulders pose. Given the earlier injunction and attendant publicity, if Marion Manola had been shown in tights, the *New York Times* would almost certainly have noted it. The same article also reports that Marion Manola had left the cast for two days vacation on August 1, and, because she had not returned, had been discharged from the cast for violation of contract. *Manola Is No Longer Bul-Bul*, N.Y. Times, Aug. 12, 1890, at 4, col. 5. Apparently she had gone to Boston to go sailing with Jack Mason on his yacht.

64. Legend has it that tights were invented early in the nineteenth century by a French costumier called Maillot. Until the mid-1870s, stage costumes for ballet tended to hover around the knees. Then Italian ballerinas raised their skirts several inches above their knees and the rest of the dance world began to follow. This stage fashion quickly made its way into the music halls and music theaters. R. STRONG, I. GUEST, R. BUCKLE, B. KAY & LIZ DA COSTA, DESIGNING FOR THE DANCER 56 (1981); G. BORDMAN, *supra*, note 12, at 25-26.

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traditions out of which they came."[65] What she objected to was the use of her picture in tights to advertise the comic opera in which she was appearing. She was determined to control the use of her image and identity in ways that might interfere with her relationship with her convent-educated daughter. Having said that she would not allow such advertising use of her identity, she felt that she had a legal right to enforce that refusal.[66]

Marion Manola's success in getting a court to enforce her right to control the exploitation of her personality obviously intrigued Warren and Brandeis. Their description of her "somewhat notorious case"[67] is curious in a number of ways. To begin with, what Marion Manola succeeded in protecting was not very private. She was, after all, a performer singing and acting on the New York stage, where anyone who bought a ticket could come and see her. In addition, Warren and Brandeis did not have much of a case report about which to write. Marion Manola's lawsuit ended with an ex parte default ruling by an "inferior tribunal."[68] No official report of the decision appears in any published report of judicial decisions.[69] Moreover, Warren and Brandeis described Marion Manola's story with a liveliness unusual for a late nineteenth-century law review article. It seems that Marion Manola's story was one they simply could not resist telling.

For lawyers of this century, Marion Manola's story is of primary interest as an example of legal doctrine. The legal doctrine her case illustrates is a frequently overlooked part of Warren and Brandeis' argument for recognition of the right to privacy. The article's more

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65. G. BORDMAN, *supra*, note 12, at 119. More than twenty years before Marion Manola appeared on stage in tights, Lydia Thompson's famous blond burlesques had entertained audiences in New York. In 1868 Miss Thompson had brought to New York from London, "a troupe of beautiful blond girls, often dressed seductively in tights," who "clowned and crooned in English." These "girls also happily assumed the trouser roles that exploited their shapely limbs." *Id.* If one peruses photographs and sketches of late nineteenth century stage costumes, for example in the work of Degas, women appearing on stage in tights appears to have been commonplace.

66. In this aspect of her story, Marion Manola's action was remarkably parallel to that brought by Bette Midler almost a century later to enforce her refusal to lend her vocal identity to the automobile commercial. *See infra* text accompanying notes 77-84.

67. Warren & Brandeis, *supra* note 1, at 195.

68. *Id.*

69. Ironically, the only source available to Warren and Brandeis for citation was a newspaper. Other parts of their article target newspapers for criticism as major perpetrators of invasions of privacy.

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revolutionary suggestion that the right to privacy provides a legal basis for vindicating feelings and providing redress for emotional injuries has, over the past hundred years, overshadowed this proprietary aspect of the original concept of the right to privacy. The express reason Warren and Brandeis gave for telling the Marion Manola story was to provide an illustration of a judicial decision which "directly involved the . . . right of circulating portraits."[70] In discussing this aspect of the right to privacy, Warren and Brandeis presented it as part of mainstream legal doctrine which protected intangible property rights. But they argued that these intangible property rights should be seen as part of a larger category of legal right, the right to privacy: "[L]egal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy . . . ."[71] The proprietary "principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."[72]

At the beginning of the law review article, Warren and Brandeis suggested a hierarchical relationship between privacy and property in which intellectual property was presented as a subcategory of the more general principle of the right to privacy. Later in the article, when they sought to highlight the distinct nature of the more novel emotional-injury aspect of the right to privacy, they sharply distinguished this emotional aspect of the right to privacy from the right to property. When later discussing rights to prevent the use of surreptitiously taken photographs, they described a close relationship between property and privacy: "The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis" for protecting an individual's right to prevent use of photographs taken without that individual's consent.[73] They had earlier outlined this right to prevent use of unconsented photographs, in connection with Marion Manola's case, as an instance of the proprietary aspect of the right to privacy.

70. Warren & Brandeis, *supra* note 1, at 195-96.

71. *Id.* at 198.

72. *Id.* at 205.

73. *Id.* at 211. The connection indicated by the choice of the word "embracing" need not mean a hierarchical relationship in which property subsumed privacy, or vice versa.

The symbiotic relationship between this proprietary aspect of the right to privacy and the other emotional aspect of the right to privacy was, for Warren and Brandeis, quite close indeed. An important premise of their argument for protecting the right to privacy was the notion that one owned one's self, one's ideas and one's self-image, as a property right worthy of legal protection. They argued that the personal right to psychological integrity similarly should be worthy of legal protection against injuries to one's feelings and self-image. These aspects were two sides, having different practical results, of the legal recognition of the right to "inviolate personality."[74] One side of the right to privacy had to do with proprietary rights. The other side had to do with emotional integrity. These two aspects were encompassed by a single general principle, the right to privacy.[75] Marion Manola's case served as an illustration of Warren and Brandeis' premise that the law of intellectual property already recognized and protected certain proprietary aspects of this complex right to privacy. Most of the rest of their article was devoted to arguing that the emotional or psychological aspects of personality deserved direct legal protection as well. To emphasize that their concept of the right to privacy embraced the property rights of celebrated personalities to control the uses of their identities in advertising, Warren and Brandeis pointed out that a New York court had already determined that Marion Manola had the right to prevent exploitation of her "inviolate personality."[76] Indeed, the comic opera prima donna's personality was her most valuable asset.

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74. *Id.* at 205. Warren and Brandeis explained:

> These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. . . . In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

Id. (footnote omitted).

75. Professor Paul Freund elaborated on this notion of a general principle of a right to privacy in his essay, Freund, *Privacy: One Concept or Many*, in NOMOS XIII: PRIVACY 182 (J. Pennock & J. Chapman eds. 1971).

76. Warren & Brandeis, supra note 1, at 205.

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Warren and Brandeis were also interested in taking a deeper look into the reasons why the law should protect such property rights in an individual's identity. They suggested that the reason why the law enforced Marion Manola's right to prevent the use of her image in advertising without her consent was because such a right was an attribute of her intrinsically valuable human personality. Although Manola's case exemplified the proprietary side of the right to privacy, contemporaries of Warren and Brandeis would have known that the temperamental prima donna's legal action must have primarily reflected her notorious emotional side. After all, at the time Warren and Brandeis wrote about her case, Marion Manola was as famous for her sensitive temperament as she was for her brilliant soprano voice.

III. MIDLER v. FORD MOTOR CO.[77]

A century later, another singer-actress-entertainer, Bette Midler, was also outraged at the way her identity had been taken and used without her consent. Like Marion Manola, Bette Midler went to court. However, what Bette Midler sought to protect was the embodiment of her identity in the sound of her voice, rather than her visual image. Midler's lawsuit targeted an advertising agency (Young & Rubicam) and an automobile company (Ford Motor Company). Midler complained that, after she had turned down Young & Rubicam's request that she sing for a television commercial advertising Ford Motor Company's Mercury Sable automobile, the advertisers hired one of Bette Midler's former back-up singers, Ula Hedwig, to imitate the sound of Midler's hit record of "Do You Want to Dance" for the commercial.[78]

The rights which Bette Midler sought to vindicate were very particular. She did not claim to own the song "Do You Want to Dance."[79] Nor did Midler contend that a recording of her own voice appeared in the television commercial.[80] What Bette Midler did complain about was what the Ninth Circuit ultimately described as "pirat[ing] her identity"[81] by the advertisement's use of what was

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77. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

78. *Id.* at 461.

79. Bobby Freeman, who wrote the song and titled it "Do You Wanna Dance" in 1958, holds the copyright, along with Clockus Music Company. Joint Brief of Defendants-Appellees at 3-4, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (No. 87-6168) [hereinafter Appellees' Brief].

80. *Midler*, 849 F.2d at 463.

81. *Id.*

intended to, and did in fact, sound exactly like the popular recording of her voice to attract attention and to generate good feelings about the automobile shown in the television commercial. Bette Midler was also concerned that the advertisers had done this despite her express refusal to agree to sing for the commercial. The Ninth Circuit agreed: "At issue in this case is only the protection of Midler's voice. The district court described the defendants' conduct as that 'of the average thief.' They decided, 'If we can't buy it, we'll take it.'"[82]

In reversing the district court's summary judgment ruling for defendants, the Ninth Circuit held that Bette Midler could recover damages in tort based on a common law theory "that the defendants here for their own profit in selling their product did appropriate part of her identity."[83] The Ninth Circuit's opinion, written by Judge Noonan, never described the appropriation of Bette Midler's identity as a violation of her right to privacy. However, the theory of liability which allowed Bette Midler to recover damages appears to be remarkably similar to that which Warren and Brandeis had described as the theoretical basis for Marion Manola's injunction. "What is put forward as protectible here is more personal than any work of authorship," wrote the Ninth Circuit in 1988.[84] Almost a hundred years earlier, in 1890, Warren and Brandeis had explored a new theory which would justify just such a protectable interest in connection with that other celebrated Miss M, Marion Manola.

In understanding the theory of liability recognized by the Ninth Circuit in *Midler*, it helps to know something about the plaintiff. Bette Midler is the inventor of the Divine Miss M persona.[85] Recently awarded a Grammy for best record of the year,[86] Bette Midler has published two books,[87] and has been the willing subject of numerous

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82. *Id.* at 462. Ultimately, the Ford Motor Company was dismissed as a defendant before the case went to the jury. This dismissal left the advertising agency, Young & Rubicam, as the sole defendant. A second, post-trial appellate round, with both an appeal by Midler and a cross-appeal by Young & Rubicam, is pending before the Ninth Circuit. In this second appeal, Bette Midler has appealed the trial court's refusal to send her claim for punitive damages to the jury. Young & Rubicam has cross-appealed on an issue involving preemption by federal copyright law.

83. *Id.* at 463-64.

84. *Id.* at 462.

85. J. SPADA, THE DIVINE BETTE MIDLER 45 (1984).

86. For "Wind Beneath My Wings." *See* N.Y. Times, Feb. 23, 1990, at B4 col. 3.

87. B. MIDLER, A VIEW FROM A BROAD (1980); B. MIDLER, THE SAGA OF BABY DIVINE (1983).

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interviews.[88] She has hardly been shy about promoting herself.[89] She was born and raised in a family of modest means in Hawaii, was the valedictorian of her high school class, and at present lives with her husband and daughter in the hills above Hollywood. When she has a new movie or record release, she willingly courts media attention. Outside of her public life, however, she enjoys a certain quiet and unrecognized anonymity. She sometimes enjoys pretending to be a librarian, a career she might have chosen had she not become a singer and movie actress.[90]

Feature articles about Bette Midler have typically mentioned her diminutive stature and contrasted her physical smallness with the larger-than-life, magnetic energy which rivets attention on her when she performs. Like Marion Manola, Bette Midler has become famous, not as a conventional beauty, but rather as an electric performer of great charisma. Writing for the *Rolling Stone* in 1979, Timothy White described having lunch with Bette Midler at the Algonquin Hotel in New York: "[T]here is little outward indication of the great charisma and convulsive energy she exhibits when she steps before the footlights. She is diminutive (five feet one) and deceptively frail looking."[91] At the same time, her performances as "the world's top singer-dancer-comedian-songwriter-actress-author-survivor-thriver-dynamo-divinity"[92] have tended to be larger than life. Midler has joyfully embraced fame and stardom and, at the same time, appears to take pleasure in being able to move unrecognized through the everyday world when she is not performing. So there she is, a complex, even a bit contradictory, personality: an outrageous performer who enjoys no-holds-barred, publicity-seeking raw exhibitionism, who is also a private person of intelligence and sensibility. The public knows quite a lot about the private life and personality of Bette Midler, who willingly discusses with reporters her need "for the great love of an audience,"[93] just as a century earlier Marion Manola's fans had followed in the newspapers Miss Manola's rather different story of

88. *See, e.g.*, Janowitz, *Adventures in Tinseltown*, N.Y. Times, March 22, 1987, VI:32, col. 1.

89. For example, the advertising posters for her "Divine Madness" album show Bette Midler's face superimposed over Mount Rushmore next to George Washington's. Her countenance among the enormous rock sculptures of United States presidents clearly presents a very public, as well as a very large, self-image. A reproduction of this poster is found in SPADA, SUPRA note 85, at 188.

90. Corliss, *Bette Steals Hollywood*, TIME, Mar. 2, 1987 at 70.

91. White, *The Homecoming*, 306 ROLLING STONE, Dec. 13, 1979 at 65.

92. Corliss, *supra* note 90, at 66.

93. White, *supra* note 91, at 63.

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multiple marriages and divorces, of a close relationship with her daughter, and even of a recovery from drug-addiction.

Bette Midler's sense of her own unique individuality is legendary. She has explained that she was named after Bette (pronounced as "Betty") Davis, but has preferred to assert her own strong identity as Bette (sounds like "bet") Midler, the Divine Miss M.[94] In her 1983 children's book, *The Saga of Baby Divine*, Bette Midler described a redheaded Baby Divine born wearing red high-heeled shoes and already calling out, "MORE!"[95] When Baby Divine philosophized in verse about what it meant to be a "minuscule human," she declared:

> My Shoes! My Red Hair! They're my Trump cards! She thought.
> Then her Brain formed this Pithy Bon Mot:
> *Cherish Forever What Makes You Unique*
> *Cause You're Really a Yawn If it Goes!*[96]

It is just such an insistence on the value of her unique identity which appears to have motivated Midler's recent lawsuit. In her legal action against the television commercial, the "trump card" she protected was not her physical appearance, but the sound of her voice.

Unlike Marion Manola, Bette Midler appears to be considerably less temperamental and thin-skinned than the comic opera prima donna of the previous century. But Bette Midler, like Marion Manola before her, has apparently been involved in her share of litigation.[97] For example, she was reportedly sued for $3 million for breach of contract by her Harlettes.[98] One of the plaintiffs in that action was the same Ula Hedwig who imitated Midler's voice in the Ford Motor Company television commercial. According to an unauthorized biography, Bette Midler was even sued by the costume designer who created the famous mermaid costume in which Midler appears on the covers of her *Divine Madness* album and of her book, *A View from A Broad*.[99] Curiously, the only officially reported litigation involving Midler, before her suit against the Ford Motor Company, was a

94. *Id.* at 65.

95. B. MIDLER, THE SAGA OF BABY DIVINE (1983).

96. *Id.* (emphasis in original).

97. M. BEGO, BETTE MIDLER OUTRAGEOUSLY DIVINE: AN UNAUTHORIZED BIOGRAPHY 132-33 (1987).

98. *Id.* at 132.

99. *Id.* at 133. The costume designer reportedly claimed that Midler had insufficiently credited the work of the designer in creating the image of Bette Midler's Delores De Lago character. *Id.*

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lawsuit brought, not by Midler, but by the copyright holder of "Boogie Woogie Bugle Boy," which was one of the songs in her popular 1973 act and album, "The Divine Miss M."[100]

The "Boogie Woogie Bugle Boy" case provides an illuminating contrast to *Midler v. Ford Motor Company*. The "Boogie Woogie Bugle Boy" litigation concerned copyright infringement by a raunchy musical review which had used the song with different words and a different title. Bette Midler was not a litigant, although her rendition of the song is discussed extensively by the court.[101] She knew the defendants, one of whom, Billy Cunningham, had helped give Midler her start as a solo performer by playing piano for her first appearance at the Continental Baths in New York.[102] The defendants admitted that they had listened to Bette Midler's rendition of the song (which itself was a fairly close imitation of the Andrews Sisters' 1940s recording[103]) in coming up with their own suggestive version. The "Boogie Woogie Bugle Boy" case is interesting for several reasons. First, Bette Midler did not bring suit against the defendants who were using one of the songs associated with her, but not replicating the sound of her voice to advertise consumer products. Second, the case illustrates Midler's own frequent imitation of other singers' styles and her use of materials which had been performed by other artists.[104]

This borrowing of material and imitation of vocal styles and sounds is precisely the type of activity which was not the focus of Bette Midler's legal action against Young & Rubicam and the Ford Motor Company. The focus of her lawsuit was the defendants' deliberate use of her identity as embodied in the recorded sound of her voice, not only without her consent, but after she had expressly turned down the advertisers' request for her to sing. When the advertising agency called to ask her to sing for the commercial, they seemingly recognized that there was commercial advertising value in her identity as reflected in the distinctive sound of her voice. In suing the advertisers, Midler was not trying to prevent other singers from doing take-offs on her style of singing. She just did not want to have her personality, as embodied in the distinctive sound of her voice, used to sell automobiles. The Ninth Circuit held that she had such a

100. MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd*, 677 F.2d. 180 (2d Cir. 1981).

101. *Id.* at 449.

102. J. SPADA, *supra* note 85, at 20.

103. M. BEGO, *supra* note 97, at 62; J. SPADA, *supra* note 85, at 48.

104. Bette Midler's first major motion picture role was the title role in "The Rose," in which Midler portrayed a singer who closely resembled Janis Joplin.

right and that it was a property right.[105] The legal basis for her recovery of damages was remarkably similar to the proprietary aspect of the right to privacy which Warren and Brandeis, a century earlier, had described as the right vindicated by Marion Manola. Listen closely to the *Midler* opinion's choice of words in ruling that "a celebrated chanteuse"[106] was entitled to legal protection for a right "more personal than any work of authorship"[107] from "exploitation without her consent."[108] In the distant background, there is an unmistakable echo of Warren and Brandeis' argument for the right of privacy. The shadowy presence of Marion Manola almost comes into view. Of course, neither Warren and Brandeis, nor the right to privacy, nor Marion Manola is directly mentioned in the Ninth Circuit's opinion.

In her first appeal, Midler's briefs to the Ninth Circuit did present a privacy claim, although no citation to Warren and Brandeis appears.[109] Midler's second argument on appeal was: "Defendant's use of a sound-alike to imitate Midler's voice in a television commercial constitutes commercial appropriation under common law . . . rights of privacy."[110] Her opening brief explained that "appropriation of personality under a pure privacy theory [involves] injury to feelings."[111] In a later section, her brief urged:

> Application of the right of privacy theory is particularly appropriate here since Midler has a longstanding conviction that she would not endorse commercial products of any kind. Thus, the Defendants' deceptive imitation of her voice in their Lincoln-Mercury commercial caused her emotional injury as well as the injury to her proprietary interests.[112]

Midler's privacy claim appears in a separate section of the brief just after another claim based on "common law rights of publicity,"[113] and just before a still different statutory claim based on California Civil Code Section 3344, discussed below.[114]

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105. *Midler*, 849 F.2d at 463-64.

106. *Id.* at 461.

107. *Id.* at 462.

108. *Id.* at 461.

109. In fact, one of Bette Midler's lawyers recently requested a copy of the 100-year-old essay from the author of this article.

110. Appellant's Opening Brief at i - ii. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (No. 87-6168).

111. *Id.* at 23.

112. *Id.* at 24.

113. *Id.* at ii.

114. *See infra* text accompanying notes 126-133.

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Midler's opening brief presented her property interests, which the Ninth Circuit ultimately held provided a viable basis for a common law cause of action, under a right of publicity theory.[115] Her reply brief discussed both "Common Law Rights of Privacy and Publicity" in a single section.[116] The reply brief argued:

> Midler respectfully submits that Defendants have simply not shown a logical reason why a celebrity's distinctive voice should be freely exploited for commercial purposes while other aspects of the celebrity's persona are protected by common law doctrines of commercial appropriation. Moreover, there is no reason to exempt imitators who deceive the public into believing they are hearing a celebrity's distinctive voice.[117]

The Ninth Circuit seemed to respond to this argument, when the court recognized a common law right to damages based on the claim that "defendants here for their own profit in selling their product did appropriate part of her identity."[118] However, the court called the right involved neither publicity nor privacy, but property.

The defendants' brief also argued this aspect of the case in terms of privacy and publicity rights, rather than property. Their brief asserted: "Plaintiff does not have a viable claim under . . . invasion of privacy or invasion of the right of publicity."[119] This section of the defendants' brief began by pointing out that "[u]nder California law, no real distinction is made between the interests protected by the right of publicity and those protected by the appropriation branch of the right of privacy."[120] Noting that the "debate over whether the right to control exploitation of one's name or likeness sounds in tort or property is 'pointless,'"[121] the defendants' brief argued that neither right was involved in the *Midler* case. Since "there is nothing in the Sable commercial to suggest that plaintiff is in any way connected with the commercial,"[122] and "[d]efendants did not use plaintiff's [actual] voice in the Sable commercial,"[123] the defendants asserted

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115. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

116. Appellant's Reply Brief at 8. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (No. 87-6168) [hereinafter Appellant's Reply Brief].

117. *Id.* at 11-12.

118. *Midler*, 849 F.2d at 463-64.

119. Appellees' Brief, *supra* note 79, at i.

120. *Id.* at 21 (citing Lugosi v. Universal Pictures, 25 Cal. 3d 813, 824, 603 P.2d 425, 431, 160 Cal. Rptr. 323, 329 (1979)).

121. *Id.* at 21-22. The Ninth Circuit seems implicitly to have agreed.

122. *Id.* at 27.

123. *Id.* at 28.

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that there was no privacy or publicity theory of liability available to Midler.[124]

The Ninth Circuit did not adopt the arguments presented in any of the briefs. Rather, the court described a different theory of liability, which is in some ways similar to the proprietary aspect of the right of privacy which Warren and Brandeis had described in connection with the Marion Manola case. The Ninth Circuit opinion is remarkably succinct. After describing the factual context, with emphasis on the deliberateness of the defendants' conduct, the court placed its ruling outside the purview of both first amendment protection and federal copyright law: "A voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectible here is more personal than any work of authorship."[125] Moreover, the opinion makes clear that the theory of liability which the court recognized was not based on common law privacy rights, nor on statutory rights under California Civil Code Section 3344,[126] which provides for general damages when a person has been injured by unconsented use of that individual's "name, voice, signature, photograph or likeness in any manner."[127]

The Ninth Circuit's opinion did, however, refer to Civil Code Section 3344 as implicit legislative recognition of common law property rights to an individual's identity in addition to those provided by the statute. Since the final subsection of Section 3344 notes that, "[t]he remedies provided for in this section are cumulative and shall be in addition to any others provided for by law,"[128] California law must protect some additional common law rights not covered in the statute. Among these common law rights were property rights similar to those described in another statute, Civil Code Section 990.[129] The California legislature enacted Civil Code Section 990 after a California Supreme Court decision that the rights under Section 3344 were personal and could not pass to the heirs of deceased personalities.[130] This additional Civil Code section was designed to protect what the statute explicitly describes as descendible "property rights" in the

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124. *Id.* at 21-22.

125. *Midler*, 849 F.2d at 462.

126. *Id.*

127. CAL. CIV. CODE § 3344(a) (West Supp. 1990). For an explanation why Civil Code § 3344 does not appear to include vocal likeness within the term "likeness," see Weinstein, *Commercial Appropriation of Name or Likeness: Section 3344 and the Common Law*, 52 L.A. BAR J. 430, 438 (1977).

128. CAL. CIV. CODE § 3344(g) (West Supp. 1990).

129. CAL. CIV. CODE § 990 (West Supp. 1990).

130. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 824, 603 P.2d 425, 431, 160 Cal. Rptr. 323, 329 (1979).

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identities of deceased personalities.[131] Reasoning by analogy to Section 990, the Ninth Circuit logically concluded that similar property rights must exist for living people, like Bette Midler.[132] The final subsection of Section 3344 had explicitly left room for such common law property rights. Therefore, the opinion concluded, "[a]ppropriation of such common law [property] rights is a tort in California."[133]

The key precedent for this ruling was a Ninth Circuit case decided on the basis of California law as it existed before either Civil Code Section 3344 or Civil Code Section 990 had been enacted. The case, *Motschenbacher v. R.J. Reynolds Tobacco Co.*,[134] was extensively briefed by both parties in the *Midler* appeal. In *Motschenbacher*, the Ninth Circuit had recognized tort liability for interference with a "proprietary interest"[135] injured by "an appropriation of the attributes of one's identity."[136] *Motschenbacher* involved an altered photograph of a famous race car driver's car. The driver was in the car, but not recognizable.[137] Nevertheless, the *Midler* opinion described Motschenbacher as having been "physically used" in the television commercial.[138] Midler's identity was not used in such a physical way, but, the court concluded, she was nevertheless subjected to a similar "injury from 'an appropriation of the attributes of one's identity.'"[139]

Perhaps the most interesting aspect of the opinion is the way it artfully evoked Midler's property right in her celebrated identity. The court's explanation began by asking a series of rhetorical questions: "Why did the defendants ask Midler to sing if her voice was not of value to them? Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them?"[140] The court immediately answered its own questions: "What they sought was an attribute of Midler's identity. Its value was what the market would have paid for Midler to have

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131. CAL. CIV. CODE § 990 (West Supp. 1990). This Section was enacted in 1984. 1984 Cal. Stats. ch. 1704 § 1. The same 1984 statute also made a number of revisions to Civil Code § 3344. 1984 Cal. Stat. ch. 1704 § 2.

132. *Midler*, 849 F.2d at 463.

133. *Id.*

134. 498 F.2d 821 (9th Cir. 1974).

135. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825 (9th Cir. 1974).

136. *Id.* at 824.

137. *Id.* at 822.

138. *Midler*, 849 F.2d at 463.

139. *Id.* (citing Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974)).

140. *Id.*

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sung the commercial in person."[141] Since Bette Midler's identity, as embodied in the sound of her voice, was treated as having value by the defendants, the court reasoned that the defendants should not be allowed to deny her valuable property right in it. Moreover, the court pointed out, the legislature of the State of California had recognized just such a property right in identity when the legislature enacted Civil Code Section 990.

To establish that the sound of Midler's singing voice constituted an element of her identity,[142] in the same way the appearance of Motschenbacher's car was an element of his identity, the Ninth Circuit relied on insights from a remarkable book of philosophy, *Listening and Voice: A Phenomenology of Sound* by Don Ihde.[143] The *Midler* opinion briefly quoted from a section of the book which discussed auditory fields and auras:

> The experience of an auditory aura is "like" the experience of music in which intentionality though keenly aware, "lets be" the musical presence so that the sound rushes over and through one. But it is not like music in that the temptation to become disembodied, to allow oneself to float away beyond the instrumentation is absent. Rather, in the face-to-face speaking the other is there, embodied, while exceeding his outline-body, but the other is in my focus as there before me face to face. It is in his speaking that he fills the space between us and by it I am auditorily immersed and penetrated as sound "physically" *invades* my own body.[144]

The insight that hearing the sound of a distinctive voice causes one to identify and emotionally respond to the person whose voice is

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141. *Id.*

142. The *Midler* opinion had earlier distinguished other decisions which had denied liability for vocal imitation, for example, Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962). *Lahr* involved a television commercial for Lestoil which used a Lahr-like voice for a cartoon figure of a duck. This vocal imitation was held by the First Circuit not to be grounds for a cause of action in unfair competition. *Cf.*, Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971) (unfair competition claim involving use of the song, "These Boots Are Made For Walkin'").

143. D. IHDE, LISTENING AND VOICE: A PHENOMENOLOGY OF SOUND (1976). It is difficult to describe objectively the book's meaning because Ihde's method is more evocative than analytic and argumentative. The book's author describes his own book in the preface as "a prolegomena to an ontology of listening with suggestions for the implications of a philosophy of sound." *Id.* at ix.

144. *Id.* at 79.

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heard, made the crucial connection between the sound of Midler's voice and her property rights in her own identity.[145]

Neither party cited the Ihde work in the briefs on appeal. Rather, Midler's argument regarding the embodiment of her identity in the sound of her voice relied on testimony, such as the declarations quoted in her reply brief. For example, Ken Fritz, a personal manager in the entertainment business, stated, "When I saw this commercial I thought Bette Midler was doing the singing on the commercial. To me, it sounded like Bette Midler."[146] Ula Hedwig, Midler's former back-up singer who sang in the commercial, described her task of imitating "Bette Midler's voice as closely as possible. . . . Bette Midler's singing voice is very distinctive, and I believe that I was able to imitate her in the recording for the television commercial due to the many years I have worked as a Harlette."[147]

Focusing on the deliberateness of the defendants' conduct in seeking to acquire the value of the sound of Bette Midler's voice for their television commercial, the Ninth Circuit seemed to hoist the defendants on their own petards: "[W]hen a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."[148] The court was convinced that the defendants got just what they wanted. Since they took what they wanted, despite Midler's refusal to sell it and without paying for it, the defendants committed a tort. They lifted the value of her identity, almost as if they had stolen her purse. Such a theory of liability for purloining a famous person's identity is reminiscent of the explanation Warren and Brandeis gave for the legal vindication Marion Manola secured.

IV. BETWEEN THE TWO MISS M^S

Almost a hundred years separate the stories of the two Miss M^s. There are also numerous differences between the legal rights discussed by Warren and Brandeis in connection with Marion Manola and those

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145. A computer search by the author of both major computer-assisted legal research systems uncovers no other citation to the Ihde work. One wonders slightly about the esoteric field of phenomenology working its way into the legal analysis in the opinion.

146. Appellant's Reply Brief, *supra* note 116, at 7. The Ninth Circuit refers to this declaration in its opinion. *Midler* 849 F.2d at 462.

147. Appellant's Reply Brief, *supra* note 116, at 7. The Ninth Circuit's opinion also alludes to this declaration in its opinion. *Midler*, 849 F.2d at 461.

148. *Midler*, 849 F.2d at 463.

recognized by the Ninth Circuit in approving Bette Midler's cause of action. Three of these differences in legal doctrine are particularly interesting: the nature of the rationale, the structure of the legal doctrine and the type of remedy.

In the first place, unlike the *Midler* decision's detailed rationale, the legal doctrine behind Marion Manola's case was not provided by the court which ruled in Marion Manola's favor. The explanation was supplied by Warren and Brandeis. As noted earlier, there is no published judicial opinion in Marion Manola's case. The New York court simply granted, ex parte, the injunctive relief the comic opera prima donna had requested. So far as anyone knows, the court gave no reasons for ruling in her favor. Warren and Brandeis were the ones who suggested a rationale for this ruling when they discussed the case in their law review article. They explained the court's grant of an injunction against the use of photographs taken without Manola's consent as designed to protect her proprietary right not to have her picture used without her consent. They presented this right as part of the right to an "inviolate personality,"[149] which involved psychological and emotional interests as well.[150] In contrast, the Ninth Circuit's published opinion provides the court's own logical rationale, discussed above, for recognizing Bette Midler's right to recover the fair market value of the use of the sound of her voice.

A second difference between the legal rights asserted by the two Miss M[s] is structural. The Ninth Circuit's discussion of Midler's property right in her identity is unconnected with other types of rights or injuries. Unlike the Warren and Brandeis essay which interrelates proprietary with emotional rights, the opinion in *Midler* rests the court's decision on a free-standing property right unconnected to any overarching right to privacy, or principle of "inviolate personality," which might also protect against injuries to Midler's feelings. The Ninth Circuit's rationale is really not directly concerned with Bette Midler's feelings at all. This separation of property rights in a person's identity from privacy rights against emotional injuries is structurally quite different from Warren and Brandeis' approach which connects these rights under the broader rubric of a right to privacy.

This separation of property rights in identity is a distinctive feature of California law regarding publicity/privacy rights. The reasons for the split between privacy and property rights in California law are partly historical. The tort right of privacy came into California

149. Warren & Brandeis, *supra* note 1, 205.
150. *Id.* at 206.

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law in 1931, in the court of appeal's decision in *Melvin v. Reid.*[151] *Melvin* involved the motion picture, "The Red Kimono," which used the name and life story of a reformed prostitute who had been acquitted of murder seven years earlier. Relying on article I, section 1 of the California constitution, which at that time guaranteed "certain inalienable rights, among which are those of . . . pursuing and obtaining . . . happiness,"[152] the court approved Mrs. Melvin's right of privacy cause of action. In this cause of action, Mrs. Melvin complained of "grievous mental and physical suffering to her damage in the sum of fifty thousand dollars."[153] Holding that such a privacy right was "an incident of the person and not of property,"[154] the court of appeal expressly rejected all three of Mrs. Melvin's other causes of action based on property claims to her name and life story.[155] Thus, this first recognition of a cause of action under California law for invasion of privacy specifically rejected proprietary aspects of privacy such as those Warren and Brandeis had discussed in connection with Marion Manola's case.

However, rejection of property rights in a person's identity in *Melvin v. Reid* does not mean that the property right recognized in *Midler* is in any sense illegitimate. California law changed a great deal during the fifty years between *Melvin* and *Midler*. A 1955 court of appeal decision recognized a common law cause of action for use of an attorney's name in an advertisement for photocopiers,[156] although the court held that the actionable injury was to the lawyer's subjective feelings, mental peace and happiness. Enactment of Civil Code Section 3344 in 1971 established a statutory cause of action for intentional commercial use of a person's name or likeness and provided minimum damages of $300.[157] In 1984, further legislation

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151. 112 Cal. App. 285, 297 P. 91 (1931).

152. *See* Melvin v. Reid, 112 Cal. App. 285, 291, 297 P. 91, 93 (1931) (citing 152 Cal. Const. art. I, § 1). A 1974 initiative expressly added "privacy" to these state constitutional guarantees. Cal. Const. art. I, § 1 (new section adopted Nov. 5, 1974).

153. *Melvin*, 112 Cal. App. at 287, 297 P. at 91.

154. *Id.* at 290, 297 P. at 93. The court of appeal repeatedly insisted that she had no property rights in her name and the incidents of her life.

155. 112 Cal. App. at 292, 297 P. at 94.

156. Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

157. 1971 Cal. Stat. ch. 1595 § 1. *See* Comment, *Commercial Appropriation Of An Individual's Name, Photograph or Likeness: A New Remedy For Californians*, 3 Pac. L.J. 651 (1972), which sketches the legislative history of the enactment of Civil Code § 3344; *see also*, Weinstein, *supra* note 112. In 1984, Civil Code § 3344 was

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amended Section 3344 and adopted a new section, Civil Code Section 990. Civil Code Section 990 characterized the rights it protected as "property rights," so that they would continue to exist as a basis for legal action after the death of the individual whose identity was protected under the statute. These property rights were similar to those discussed by Warren and Brandeis in connection with Marion Manola's case.

California's statutory property rights, and the parallel common law right recognized in *Midler*, are, however, conceptually quite different from Warren's and Brandeis' notion of proprietary privacy rights integrally related to a larger legal principle. It was this larger principle, called the right to privacy, which was Warren's and Brandeis' main concern in their article. In contrast, the property rights in personal identity recognized in *Midler*, and in Civil Code Section 990, exist independently of any such general right to privacy. Since no overarching privacy principle explicitly intertwines both proprietary and emotional aspects of the right to privacy in California decisional law and legislation, none is discussed in the *Midler* opinion.

A third difference between the legal rights asserted by the two Miss M³ relates to the nature of the remedy. Consonant with the Ninth Circuit's recognition of a free-standing property right in Bette Midler's identity, the remedy suggested in *Midler* is restitutionary. This remedy was designed to restore to Midler the value of what the advertisers had taken from her, as well as to extract from them the unjust enrichment they received from using her identity. Such a damage remedy is very different from the injunctive remedy Marion Manola sought and secured. Marion Manola did not seek payment for the use of her picture to advertise the comic opera in which she was appearing. She sought and secured control over the use of her image. The injury Marion Manola sought to prevent was not pecuniary but rather an injury to her feelings—her outrage at the way she had been treated and her desire to preserve her image in the eyes of her daughter.

In contrast, the remedial aspects of the *Midler* opinion are not concerned with vindicating injuries to Bette Midler's feelings, her emotional well-being or her sense of self-control. The Ninth Circuit's

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amended to provide for minimum damages of $750 as well as punitive damages and attorney's fees. 1984 Cal. Stat. ch. 1704 § 2. The 1984 amendments also provided a method for calculating actual damages which included "profits from the unauthorized use that are attributable to the use." CAL. CIV. CODE § 3344(a) (West Supp. 1990). A similar damages provision was included in Civil Code §990(a). 1984 Cal. Stats. ch. 1704 §§1.

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theory of liability is solely concerned with restoring to Bette Midler what an advertising agency would have had to have paid to persuade her to sing background for its automobile commercial. The remedy therefore simply required payment for what had been taken. The jury instructions in the trial which followed the Ninth Circuit's decision described this remedial doctrine as follows:

> When the distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the singer's rights have been violated. In such a case, the singer is entitled to the fair market value of what was taken.
>
> Thus, the only questions you must decide are:
>
> (1) Whether Young & Rubicam deliberately imitated Bette Midler's voice in producing Ford Motor Co.'s Sable automobile television commercial.
>
> If the answer to the first question is "Yes," then,
>
> (2) [you must decide] the fair market value of Bette Midler's voice.
>
> Most of you are familiar with the term "copyright." Copyright law protects authors of original works, such as the song *Do You Want To Dance?*. There are no issues of copyright law, as such, for you to decide in this case. However, in deciding whether or not Young & Rubicam deliberately imitated Bette Midler's voice, you must keep in mind that Y&R had the right to use the song. You must also keep in mind that the mere imitation of a performance contained in a recording is not a violation of the copyright law. Thus, the issue is whether or not Bette Midler's voice was deliberately imitated.[158]

The evidence presented to the jury with regard to the fair market value of Bette Midler's voice covered a wide range from about $45,000 to over $1 million. In the end, it appears that the jury compromised with a verdict of $400,000 in compensatory damages for the television commercial's use of a deliberate imitation of Midler's voice recorded on her hit record. The jury verdict seems somewhat quixotic, since it is supposed to represent what the advertising agency would have had to pay Bette Midler to sing background music for the automobile commercial, despite the fact that she had refused to sing for this or any other commercial.[159]

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158. Callagy, BETTE, WHOSE SONG IS IT ANYWAY?, ADWEEK, Nov. 13, 1989, at 33-35.

159. "Its value was what the market would have paid for Midler to have sung the commercial in person." *Midler*, 849 F.2d at 463.

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Bette Midler's second appeal, which seeks reversal of the trial court's decision not to allow her punitive damage claim to go to the jury, seems to indicate that the restitutionary remedy outlined in the Ninth Circuit's opinion did not fully respond to her outrage at the way defendants had treated her. Restoration of the fair market value of her property rights in her vocal identity, as used in the television commercial, seemed to have been only part of what Midler had in mind when she brought suit. Just as Marion Manola before her, Bette Midler appeared to have desired something more than just to be paid fair market value for the property rights to the distinctive sound of her voice. Bette Midler, like Marion Manola almost a century earlier, had not wanted to sell herself in such a way, in the first place.

V. PROPERTY AND PRIVACY

A person's identity is not, of course, exactly like other forms of property. The value of a famous identity depends on legal enforcement of control over the uses of the identity. In discussing proprietary aspects of the right to privacy, the late Edward Bloustein remarked:

> [C]reation of . . . advertising value is not founded on competition among bidders for a scarce resource; rather, it is founded on the law which artificially creates a scarcity by giving the individual a property right it its use. . . . A name and likeness can only command a commercial price in a society that permits a person to control the conditions under which he may use his name and likeness for commercial purposes.[160]

Explaining why the law should give such a person as Marion Manola control over the commercial use of her identity was Warren and Brandeis' main concern. They suggested a theoretical explanation in terms of a general right to privacy. Warren and Brandeis presented this theory as a new structure of legal doctrine which justified both protecting the property rights asserted by Marion Manola and vindicating related emotional rights as well. Accordingly, Warren and Brandeis advocated legal recognition of the "principle of inviolate personality,"[161] which encompassed more than one legal right: both property rights to control the commercial uses of an individual's personality and tort rights to damages for injuries to an individual's feelings. They described Marion Manola's right to control photo-

160. Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 GA. L. REV. 429, 448-49 (1978).

161. Warren & Brandeis, *supra* note 1, at 205.

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graphic images of her as an intriguing example of the first of these subcategories. They presented it as a reasonably conventional intangible property right related via the principle of inviolate personality to the much more controversial rights to legal protection for an individual's feelings. The latter, more controversial subcategory, involving emotional rights, became the main focus of their argument.

In discussing proprietary privacy rights, such as those asserted by Marion Manola, Warren and Brandeis reflected a handful of contemporary court decisions regarding the use of photographs, such as *Pollard v. Photographic Co.*[162] and domestic portraits, such as *Prince Albert v. Strange.*[163] To these reported cases, Warren and Brandeis added Marion Manola's unreported case as a dramatic illustration of how enforcement of the right to privacy already tacitly operated to restore control over an individual's image and identity to that individual. In these cases, the monetary value of the image was not what was really at issue. Rather, the real concern was about returning control over a person's image to the individual portrayed. There was also an element of concern about vindication against the offensiveness of having an unwilling person's personality used for commercial purposes.

The first reported decision which discussed Warren and Brandeis' novel idea of a privacy principle connecting property rights with rights against emotional injuries, was the decision by the New York Supreme Court, Special Term, in *Schuyler v. Curtis.*[164] The same court which granted Marion Manola her injunction also issued and continued the injunction discussed in *Schuyler*. *Schuyler* involved a plan by the Woman's Memorial Association to place a life-size statue of a deceased philanthropist, Mrs. George Schuyler, next to a statue of Susan B. Anthony at the 1893 Columbian Exposition in Chicago. Mrs. Schuyler's heirs objected to the very thought of the image of the late New York society matron appearing next to that of Ms. Anthony, whom the court described as a "well-known agitator."[165] The heirs succeeded in enjoining this use of the late Mrs. Schuyler's image. Presenting the case as not directly concerned with property rights in Mrs. Schuyler's image, Judge O'Brien described it as involving the issuance of an injunction in circumstances where damages would not have been recoverable in an action at law. Quoting from the decision

162. 40 Ch. D. 345 (1888).

163. 41 Eng. Rep. 1171 (1849).

164. 15 N.Y.S. 787 (Sup. Ct. 1891). This decision was ultimately overturned by the New York Court of Appeals. 147 N.Y. 434, 42 N.E. 22 (1895).

165. *Schuyler*, 15 N.Y.S. at 787.

in *Pollard*, the *Schuyler* opinion noted that "the right to grant an injunction does not depend in any way on the existence of property."[166] After determining that Mrs. Schuyler was not a public character who had waived her right to privacy, the court rested its decision on "the principle that the right to which protection is given is the right to privacy."[167]

The specific question in *Schuyler* was whether an injunction could be issued "to prevent what . . . [the courts] considered and treated as a wrong,"[168] without any basis in a property claim. This issue regarding the proper grounds for an injunction, specifically whether an injunction could be granted when there had been no showing of damages to property, was rather hotly contested at the time. Warren and Brandeis seemed to be aware of the controversy over the proper basis for issuing injunctions but not interested in discussing it at length. They simply noted that among the "remedies for an invasion of the right of privacy" should be "[a]n injunction, in perhaps a very limited class of cases."[169]

The major scholarly response to Warren and Brandeis came from Herbert Spencer Hadley in 1894.[170] Hadley was particularly concerned about the proper basis for an injunction. Hadley was also quite candid: "The writer believes that the right to privacy does not exist."[171] Hadley's article is noteworthy for present purposes, because he insisted that in cases where there was no property right, there could be no legal right. He claimed that Warren and Brandeis had argued that property rights in intellectual property, including photographs, were "a mere fiction."[172] Hadley was unable even to see, much less to accept, the central premise of the Warren and Brandeis article: that the law should recognize a general right to privacy which

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166. 15 N.Y.S. at 787-88 (citing Pollard v. Photographic Co., 40 Ch. Div. 345 (1888)).

167. 15 N.Y.S. at 789. Judge O'Brien later defended his ruling in *Schuyler* in a law review article. *See*, O'Brien, *The Right of Privacy*, 2 Colum. L. Rev. 437 (1902).

168. 15 N.Y.S. at 788.

169. Warren & Brandeis, *supra* note 1, at 219.

170. Hadley, *The Right to Privacy*, 3 Nw. L. Rev. 1 (1894).

171. *Id.* at 3.

172. *Id.* at 1. Hadley portrayed Warren and Brandeis as arguing that "the real basis of the jurisdiction" for granting injunctions against unconsented use of photographs "consisted in the protection of 'personal feelings,' the protection of the 'sanctity of private life,' and a general attention to that important trait of character and culture . . . —amenity." *Id.* at 1-2. Later in his article, Hadley raised the concern that injunctions enforcing the right to privacy might interfere with freedom of expression. *Id.* at 17-18.

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justified and explained why property rights in intellectual property deserve legal protection.

Hadley complained:

> If the law should become established in pursuance with these [Warren and Brandeis'] suggestions, it is submitted that the "right" would be found to be so completely pruned away that the shadow remaining would hardly furnish sufficient substance to interest the ordinary man or woman in this busy world of ours.[173]

For Hadley, and others of his day, the right to privacy was a shadow without substance, because it was not based in property. Hadley could not quite make out its shape and outline and was not persuaded of the existence of what he could not see. In the 1890s the received structure of legal doctrine, as Hadley and others saw it, did not include Warren and Brandeis' concept of a right to privacy. For Hadley, there was no general legal principle which explained such cases as Marion Manola's. Hadley was in a sense stuck at the level of looking only at conventional property rights. He could not imagine a broader, more general right to privacy which might embrace the right to property, particularly intangible intellectual property. The right to privacy for which Warren and Brandeis argued was, of course, a different structure of legal doctrine, a new paradigm, or way of looking at common law rights, including property rights.[174] Unable to envision and unwilling to accept this new structure of legal doctrine, Hadley rejected the right to privacy as, quite simply, wrong.

Hadley's inability to imagine a structure of legal rights in which the right to privacy included, but was not limited to, property rights in a person's identity, found echoes in some of the early court decisions which considered the right to privacy. The most notable of these early decisions was ***Roberson v. Rochester Folding Box Co.***,[175] the first high court decision regarding a claim explicitly based on the right to privacy. The ***Roberson*** decision rejected the right to privacy. Expressly disapproving the injunction in *Schuyler*,[176] discussed above, the ***Roberson*** decision also implicitly rejected the unreported lower court decision in Marion Manola's case.[177]

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173. *Id.* at 3.

174. *Cf.*, T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).

175. 171 N.Y. 538, 64 N.E. 442 (1902).

176. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 551, 64 N.E. 442, 445. (Citing Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (N.Y. Ct. Ap. 1895)).

177. The *Roberson* majority opinion does not discuss *Manola*, but it does discuss *Schuyler*.

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Although the *Roberson* majority discussed the Warren and Brandeis law review article, there are unmistakable signs that the author of the majority opinion, Chief Judge Parker, may not have read the actual article.[178] The majority opinion even got the title wrong. The title he cited was "Rights of a Citizen to His Reputation," a slightly garbled version of the title of an article by the newspaper editor, E.L. Godkin, published in *Scribner's Magazine* in July 1890.[179] However, Chief Judge Parker did appear to have read, and to have taken to heart, Hadley's article which had insisted that the law does not and should not recognize a right to privacy, only property rights. The *Roberson* majority found no property rights on the part of Miss Roberson in the photographs made of her. The damages she claimed were only for injuries to her feelings from the use of her picture in advertising flour. Without a property right, the majority held, she had no legal ground either for an injunction or for damages.[180]

Judge Gray, who apparently had read and understood the Warren and Brandeis article, dissented. His dissent argued that Miss Roberson's right to privacy should have been protected as an aspect of her property rights, albeit of an unconventional, non-monetary sort. Even assuming that "[t]he right to grant the injunction . . . depends upon the existence of property in any right which belongs to a person,"[181] Judge Gray argued that Miss Roberson should have been granted an injunction against the use of the photographs. His dissenting opinion asserted that, "the issuance of the injunction does not, in such a case [as Miss. Roberson's], depend upon the amount of the damages in dollars and cents."[182] In Judge Gray's view, Miss Roberson's privacy rights should have been protected as an aspect of her property rights in her own image and identity just as they had been, according to Warren and Brandeis, in Marion Manola's case. Judge Gray urged recognition of a connection between Miss Roberson's privacy rights and her property rights in her identity. This connection between privacy and property was palpable to Judge Gray because he consid-

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178. There is a frequently repeated remark that the Warren and Brandeis article is more often cited than read. *Cf.*, McCarthy, *supra* note 1, at 1-8, *citing* Barron, *Warren & Brandeis, The Right to Privacy: Demystifying a Landmark Citation*, 13 Suffolk U.L. Rev. 875, 877 (1979).

179. Godkin, *The Rights of the Citizen to his Own Reputation*, 8 Scribner's Magazine, July 1890 at 58. Warren and Brandeis cited Godkin's article as an example of discussion of "the evil of the invasion of privacy by the newspapers." Warren & Brandeis, *supra* note 1, at 195.

180. *Roberson*, 171 N.Y. at 556-57, 64 N.E. at 447-48.

181. *Roberson*, 171 N.Y. at 565, 64 N.E. at 451 (Gray, J., dissenting).

182. *Id* at 566, 64 N.E. at 451 (Gray, J., dissenting).

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ered these property rights from the point of view of the new structure of legal doctrine, or paradigm, which Warren and Brandeis had suggested in their article. Unlike the majority, Judge Gray seems to have remembered what Marion Manola's case signified.

In *Pavesich v. New England Life Ins.*[183] the Georgia Supreme Court agreed with Judge Gray's dissenting perspective. Moreover, the Georgia court did more than just remember Marion Manola's case; the court's opinion discussed it at some length.[184] Approving a theory of liability which allowed recovery of damages for injury to feelings, Justice Cobb's opinion argued that Mr. Pavesich, an artist, owned himself and his identity, just as surely as any property could be owned. Justice Cobb repeatedly expressed wonder that others had been unable to see the privacy principle which encompassed both property and emotional rights:

> The form and features of the plaintiff are his own. The defendant insurance company and its agent had no more authority to display them in public for the purpose of advertising the business in which they were engaged than they would have had to compel the plaintiff to place himself upon exhibition for this purpose. The latter procedure would have been unauthorized and unjustifiable, as every one will admit, and the former was equally an invasion of the rights of his person.[185]

Toward the end of his opinion, Justice Cobb even "venture[d] to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . . ."[186] The latter reference was to the judges who had joined the majority in *Roberson* in rejecting the right to privacy.

VI. CONCLUSION

Modern decisions, such as that of the Ninth Circuit in *Midler*, now routinely recognize property rights in a person's identity as an established aspect of American law. Courts in these property-in-identity cases typically do not discuss Warren and Brandeis and often

183. 122 Ga. 190, 50 S.E. 68 (1905).
184. Pavesich v. New England Life Ins., 122 Ga. 190, 50 S.E. 68, 74 (1905).
185. *Id.* at 217, 50 S.E. at 79.
186. *Id.* at 220, 50 S.E. at 81.

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do not even mention the right to privacy.[187] Often courts discussing these property rights in a person's identity treat them as a separate category, often called right of publicity,[188] distinct from rights to damages for injuries to feelings, such as the privacy rights protected in *Pavesich*. This approach began with Judge Frank's decision for the Second Circuit in *Haelan Laboratories v. Topps Chewing Gum*.[189] Since the United States Supreme Court's approval of Ohio's right of publicity cause of action in *Zacchini v. Scripps-Howard Broadcasting Company*,[190] courts have increasingly described these property rights in identity as rights of publicity, rather than rights to privacy.[191]

And yet, standing behind these property rights and publicity rights decisions is an implicit theoretical background which helps to explain and to justify why, in the face of other important societal interests, such as freedom of expression and the objectives served by copyright law, the law ought to recognize and protect this particular form of property.[192] In modern cases, like Bette Midler's, such theoretical considerations often remain in the background. Sometimes, however, it is worthwhile to reflect on these larger theories and to read again Warren and Brandeis' famous article which first explored these ideas. There are many reasons why one enjoys retelling the stories of Marion Manola and Bette Midler. In seeking to understand what has happened to the proprietary aspects of the right to privacy, it is particularly interesting and enlightening to consider together the rights asserted by the two divine Miss M^s^.

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187. *See, e.g.*, Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953); O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941); State *ex rel.* Elvis Presley International Memorial Foundation v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

188. For a thorough discussion of these cases and the right of publicity in general, see Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986).

189. 202 F.2d 866 (2d Cir. 1953).

190. 433 U.S. 562 (1977).

191. *See* Halpern, *supra* note 168, and J. MCCARTHY, *supra* note 1, at ch. 3; *see also* Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

192. In considering the underlying reasons for protecting property rights, legal philosophers have suggested a reciprocal relationship between protection of property rights and the human personalities which hold them. *See, e.g.*, Radin, *Property and Personhood*, 34 STAN. L. REV. 957. (1982). The privacy-related property rights in personality vindicated by Marion Manola and Bette Midler are interesting examples of property rights accorded legal protection in part because of the intrinsic value of the persons who hold the rights.

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