

3-1-1996

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### Recommended Citation

Debra R. Cohen, *The Single Publication Rule: One Action, Not One Law*, 62 Brook. L. Rev. 921 (1996).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol62/iss3/2>

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# THE SINGLE PUBLICATION RULE: ONE ACTION, NOT ONE LAW\*

Debra R. Cohen<sup>†</sup>

## INTRODUCTION

Recovery in one action under one state's law for violation of the right of publicity—the right to control the commercial use of one's identity<sup>1</sup>—arising out of multistate publication<sup>2</sup> seems to be the trend of the nineties. When Samsung ran a

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<sup>1</sup> The right of publicity is the "inherent right of every human being to control the commercial use of his or her identity." J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1.1 (1996). "The decade of the 1970's marked the coming of age of the Right of Publicity. Most courts readily appreciated the commercial property interest in human identity protected by the Right of Publicity." *Id.* § 1.10 (synopsis); see *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977); *McFarland v. Miller*, 14 F.3d 912, 917 (3d Cir. 1994); *Factors Etc. Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 289 (2d Cir. 1981) (Mansfield, J., dissenting), *cert. denied*, 456 U.S. 927 (1982); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354 (D.N.J. 1981); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978); Sheldon W. Halpern, *The Right of Publicity, Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1201 (1986); Melville B. Nimmer, *Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) (defining the right as "the right of each person to control and profit from the publicity values which he has created or purchased"); Richard Cameron Cray, Comment, *Choice of Law in Right of Publicity*, 31 UCLA L. REV. 640, 640 (1984) ("The right of publicity may be defined as the right to control the commercial exploitation of an individual's name, likeness, personality, and goodwill.").

<sup>2</sup> "Publication," as used herein, is a legal term of art. The legal definition of "publication" is communication to third parties. "Publication means communication to a third person; and until the words have reached such a person there is no publication, and no tort." William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 961 (1953). "Every communication of language by one to another is a publication." JOHN TOWNSEND, *A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL* § 95 (3d ed. 1877). Mass media publication generally crosses state lines; therefore, unless otherwise indicated, publication addressed in this Article is deemed to be multistate publication.

nationwide print advertisement for VCRs depicting a robot dressed to resemble her, Vanna White sued for violation of her right of publicity.<sup>3</sup> Under California law she recovered \$403,000.<sup>4</sup> When a SalsaRio Doritos radio commercial imitating Tom Waits's distinctive raspy and gravelly voice aired nationwide, he sued Frito Lay for violation of his right of publicity.<sup>5</sup> Under California law he recovered \$2,375,000.<sup>6</sup> Bette Midler sued Ford Motor Company for violation of her right of publicity when a television commercial for the Sable, a Ford automobile, imitating her distinctive singing style aired nationwide.<sup>7</sup> Under California law she recovered \$400,000.<sup>8</sup>

Several similar actions are currently pending. Viola Harris, a New York actress, is suing Sony Pictures Entertainment seeking \$250,000 plus punitive damages for violation of her right of publicity. The action followed national advertisements for the Game Show Network which allegedly used Ms. Harris's voice without her consent.<sup>9</sup> Another actor, Leonard Tepper, is suing Woody Fraser Enterprises and ABC for over one million dollars for violation of his right of publicity. The action fol-

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<sup>3</sup> *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993). The advertisement depicted a robot dressed to resemble Vanna White next to a Wheel of Fortune game board.

<sup>4</sup> Milo Geyelin, *Legal Beat—Vanna White Wins Suit*, WALL ST. J., Jan. 21, 1994, at B1; Michael C. Lasky & Howard Weingrad, *Is Permission Needed to Make His Day? Right of Publicity Often Implicated by New Systems*, N.Y. L.J., Mar. 7, 1994, at S1. Vanna White recovered under California's common law right of publicity.

<sup>5</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993). Tom Waits sued Frito-Lay and its advertising agency when the agency aired a radio commercial imitating Waits's distinctive voice in 61 nationwide markets, despite Waits's known policy against doing commercials.

<sup>6</sup> *Id.* Tom Waits recovered under California's common law right of publicity.

<sup>7</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). Bette Midler sued Ford Motor Company and its advertising agency, Young & Rubicam, when they broadcast a television commercial where a singer imitated Midler's distinctive style of singing "Do You Want to Dance," a song Midler had made popular.

<sup>8</sup> *Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991) (unpublished opinion), *cert. denied*, 503 U.S. 951 (1992). Bette Midler recovered under California's common law right of publicity.

<sup>9</sup> *Harris v. Sony Pictures Entertainment Inc.*, No. BC149556 (Cal. Super. Ct. filed May 7, 1996); *Actress Sues Sony Alleging Infringement of Right of Publicity*, ENT. LITIG. REP., July 31, 1996. Viola Harris alleges that she has a distinctive voice, and that Sony Pictures Entertainment used and impersonated her voice without her consent. Ms. Harris is seeking relief for violation of her common law right of publicity; she is also seeking relief under Cal. Civ. Code § 3344 (1984), which provides statutory protection against misappropriation of name or likeness.

lowed national broadcasts by ABC of a television special which allegedly included Mr. Tepper's image without his consent.<sup>10</sup> Both Dennis Rodman and Kareem Abdul-Jabbar have filed suits alleging, among other things, violation of their right of publicity.<sup>11</sup> Still more actions are sure to ensue.<sup>12</sup>

While the right of publicity is currently recognized in half the states, the other half do not recognize this right as a basis for recovery.<sup>13</sup> Nonetheless, Vanna White, Tom Waits and Bette Midler all recovered nationwide damages for violation of California's common law right of publicity. In each case, the court applied California law not only to publication that occurred in California, but also to publication that occurred in other states. In effect, in each case the court created a national right of publicity. In so doing, the court ignored the fact that

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<sup>10</sup> *Tepper v. Woody Fraser Enter. Inc.*, No. 95 Civ. 9528 (N.Y. Sup. Ct. filed Oct. 9, 1995); *Attorneys Take Actor's Deposition in Likeness Misappropriation Case*, ENT. LITIG. REP., Mar. 30, 1996. Leonard Tepper alleges that, without consent, Fraser Enterprises and ABC commercially exploited an HBO Comedy Channel promotional commercial in which he was a principal actor. He is seeking recovery for violation of his statutory right of publicity under N.Y. Civ. Rights Law §§ 50, 51 (1992).

<sup>11</sup> *Rodman v. Fanatix Apparel Inc.*, No. 96-2103 (D.N.J. filed June 3, 1996); *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996). Rodman sued a T-shirt manufacturer alleging that printing shirts with reproductions of his tattoos is a violation of his right of publicity. Abdul-Jabbar sued claiming violation of California's statutory and common law right of publicity when GM used his former name to advertise the Oldsmobile Eighty-Eight during the 1993 NCAA basketball tournament. Summary judgment for General Motors has been reversed and the action remanded for trial on both claims.

<sup>12</sup> Lawyers for O.J. Simpson have threatened to file suit for violation of O.J.'s right of publicity. See J. Sebastian Sinsini, *Fox Ads Tich Off O.J. Lawyers*, DENVER POST, June 24, 1995, at A1; Monica Yant, *Ad Hits Roadblock*, ST. PETERSBURG TIMES, June 21, 1995, at 2B.

<sup>13</sup> "[T]he Right of Publicity has been recognized in some form at common law or by statute by half of the states." MCCARTHY, *supra* note 1, § 6.1 (synopsis). "[T]he right of publicity is alive and flourishing in approximately thirty-two states, either by statute or common law." Beryl Jones, *Identity Crisis: A Vision for the Right of Publicity in the Year 2020*, 20 COLUM.-VLA J.L. & ARTS 1, 5 (1995). "In many states, however, the parameters or even the existence of the right of publicity remains undetermined." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1993). For a state by state analysis, see LDRC 50-STATE SURVEY 1995-96 MEDIA PRIVACY AND RELATED LAW (Henry R. Kaufman ed., 1995); MCCARTHY, *supra* note 1, § 6; Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 DEPAUL J. OF ART & ENT. L. 1, app. A at 31 (1994-95).

each state may create its own publication torts, and that not all states would recognize these publications as a basis for recovery.

The justification for application of a single state's law to nationwide publication is the single publication rule. This rule, which has gained widespread recognition,<sup>14</sup> is a legal fiction which deems a widely disseminated communication—an edition of a newspaper or magazine, or a television or radio broadcast—to be a single communication regardless of the number of people to whom, or the number of states in which, it is circulated. The rule was developed to simplify litigation by preventing multiple suits, thereby protecting the judicial system and defendants while preserving plaintiffs' rights to redress.

The single publication rule operates as a definition of a transaction when courts determine the scope of claim joinder and preclusion. All claims<sup>15</sup> arising out of the transac-

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<sup>14</sup> "The great majority of the states now follow 'the single publication rule.'" RESTATEMENT (SECOND) OF TORTS § 577A Reporter's Note (1977). "The majority of states, attempting to overcome the difficulties of the traditional view, have adopted the single publication rule." Comment, *Multi-State Libel and Conflicts of Law*, 47 NW. U. L. REV. 255, 257 (1953) [hereinafter *Multi-State Libel*].

<sup>15</sup> Generally, the term "claim" is synonymous with "cause of action." "It is fair to say that 'claim' and 'cause of action' have approximately the same meaning." ALLAN D. VESTAL, RES JUDICATA/PRECLUSION V-43 (1969). However, the terms can have different meanings in different contexts and are often used without precision. The definition for one purpose is not necessarily the definition for other purposes. "The term 'cause of action' is used in many different situations, as, for example, where the question is as to the effect of the joinder or nonjoinder of claims, . . . or as to the effect of the Statute of Limitations . . . . The meaning of the term is not necessarily the same in all these situations." RESTATEMENT (FIRST) OF JUDGMENTS tit. D introductory note (1942). "A 'cause of action' may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of *res judicata*." *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933). "[I]t must be noted that the word 'claim' is used in many procedural situations. The courts make a mistake when they carry a meaning from one situation to another." VESTAL, *supra*, at V-44. In a suit deciding appealability of a claim, Judge Clark, in a concurring opinion, clarified that "decisions as to the extent of a 'claim' or a 'cause of action' or a 'transaction' must necessarily be directed to the facts in issue in a particular case and cannot be safely generalized into rigid rules applicable to other factual situations, or other issues such as those of *res judicata*, amendment, joinder . . . or jurisdiction." *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 83, 86 (2d Cir. 1939) (Clark, J., concurring), *rev'g* 25 F. Supp. 781 (S.D.N.Y. 1938).

Accordingly, though paradoxical, there may be many claims in a claim; this might also be phrased "many claims in a cause of action" or "many causes of ac-

tion—the single publication—must be joined in a single composite action.<sup>16</sup> Any subsequent action arising out of the same transaction would, therefore, be precluded.<sup>17</sup> When multistate publication occurs, a single party simultaneously may be injured multiple times in multiple states. Each injury gives rise to a claim for relief. Under the single publication rule, however, the injured party must join all claims for relief in a single composite action.

Almost from its inception, the single publication rule has been expanded beyond its original purpose.<sup>18</sup> In particular, it has been expanded to choice of law. Rather than ascertain the appropriate substantive law for each claim comprising the composite action, courts extend the legal fiction so that they need only ascertain a single state's law to resolve the entire composite action.<sup>19</sup> This ignores the fact that publication

tion in a claim." To avoid confusion in this Article, substantive claims for relief will be referred to as substantive rights or claims; and the litigation unit will be referred to as an action or suit. See Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354, 361 (1934).

<sup>16</sup> A "composite action" is a procedural unit created by joinder of multiple substantive claims for relief in a single action. *Palmisano v. News Syndicate Co.*, 130 F. Supp. 17, 19 n.1 (S.D.N.Y. 1955); *Bigelow v. Sprague*, 5 N.E. 144, 146 (Mass. 1886).

<sup>17</sup> See UNIFORM SINGLE PUBLICATION ACT § 2, 14 U.L.A. 379 (1990); RESTATEMENT (SECOND) OF TORTS § 577A(4)(c) (1977). For the text of these statutes, see *infra* notes 31-32. "[T]he single publication rule determines how many causes of action a plaintiff might have . . ." *Givens v. Quinn*, 877 F. Supp. 485 (W.D. Mo. 1994); see *infra* Section I.A.

<sup>18</sup> "[T]here has been an increasing tendency to employ this single-publication fiction for purposes beyond those for which it was originally devised . . ." Note, *The Single Publication Rule in Libel: A Fiction Misapplied*, 62 HARV. L. REV. 1041, 1042 (1949) [hereinafter *A Fiction Misapplied*]. As Professor Leflar noted, "there has been no general agreement as to what the single publication rule really is. It is assumed to mean that under certain circumstances only one action can be brought—but for what? And where? Is the rule limited . . ." Robert A. Leflar, *The Single Publication Rule*, 25 ROCKY MTN. L. REV. 263, 269 (1953). Courts expanded application of the single publication rule to address other procedural issues in an action including jurisdiction, venue and statutes of limitation. See *infra* note 75.

<sup>19</sup> *Lewis v. Time, Inc.*, 83 F.R.D. 455, 459 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983) (characterizing a single publication as a single wrong); *Palmisano v. News Syndicate Co.*, 130 F. Supp. 17, 19 (S.D.N.Y. 1955) (viewing "libel as a single composite tort for choice-of-law purposes, rather than a separate tort which in each state of impact is governed by that particular state's law"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 150, 153 (1971) (creating a single publication rule for choice of law in multistate defamation and multistate invasion of privacy); Prosser, *supra* note 2, at 962 ("an entire edition of a newspaper or a magazine

based torts are state created rights;<sup>20</sup> application of a single state's law to determine all claims solely because they have been procedurally joined in a composite action encroaches on state sovereignty.<sup>21</sup> It is also contrary to the purpose of substantive law.<sup>22</sup>

At first blush one might think that this scenario raises the typical choice of law problem that arises as a result of the disarray of modern choice of law.<sup>23</sup> It is not that simple.<sup>24</sup>

was to be regarded as a single publication, for which only one cause of action would lie within the state"); Comment, *Characterization of Multi-State Libel in Conflict of Laws*, 48 COLUM. L. REV. 932, 935 (1948) ("These same policy considerations would seem to require that a multi-state libel be characterized as a single tort for conflict of law purposes."); see *infra* Section I.B.

<sup>20</sup> See *infra* notes 146-155 and accompanying text.

<sup>21</sup> See *infra* Section III.C.

<sup>22</sup> See *infra* notes 135-143 and accompanying text.

<sup>23</sup> Choice of law rules are necessary in the United States because each state—a semi-sovereign—has its own laws, and commerce and industry regularly cross state lines. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 (1971); ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW 13-14 (4th ed. 1986); see *infra* notes 164-171 and accompanying text. The purpose of choice of law rules is to ascertain the appropriate substantive law to determine each substantive right in an action which involves multistate contracts. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 1, 2 (1971).

Historically, choice of law in a tort action turned on *lex loci delicti*—the place of the wrong. The place of the wrong was defined as the last event necessary to create a basis for liability. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934). In publication based torts, this was the place of publication. See *infra* note 80.

However, over the past quarter of a century, "legal realism has eaten away at the theoretical underpinnings of strict territoriality for choice of law." Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 473 (1992). In many states, strict territoriality has been replaced with other theories for determining applicable law. These theories include: Restatement (Second) of Conflict of Laws, also known as the "most significant relationship," which examines the following factors when determining the state with the most significant relationship: (a) the needs of the interstate and international system, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of results, and (g) ease in the determination and application of the law to be applied, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); Governmental Interest Analysis, originally advanced by Professor Currie, see BRAINARD CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAWS (1963); Better Law, developed by Professor Leflar, which examines five considerations when determining applicable law: (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental

While a court must always examine the multistate contacts to decide which state's substantive law to apply to a particular issue, the question here is not which state's substantive law applies. Rather, the question here is the preliminary question which is often overlooked: How many substantive issues are present in a composite action, and therefore how many choice of law determinations must be made? Had there been no choice of law revolution and all courts still applied the same choice of law rules,<sup>25</sup> this problem would still exist. If a court extends this legal fiction to choice of law when adjudicating publication based torts, the multiple substantive claims consolidated in a composite action would still be mischaracterized as a single claim. Instead of adjudicating each claim in accordance with the appropriate state law ascertained by an individualized choice of law analysis, all claims would be adjudicated by the law of a single state pursuant to a single choice of law analysis.

While not the typical choice of law problem, deeming multiple substantive claims a single claim for choice of law purposes is not a novelty.<sup>26</sup> Until recently, this appeared to be the

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interests, and (5) application of the better rule of law, see Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586-88 (1966); *Neo-Territorialism*, espoused by, among others, Professor Laycock and Professor Brilmayer, which attempts to modernize strict territoriality. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992). For a discussion of these varied choice of law methodologies that states apply, see EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* §§ 2.4 to 2.17 (2d ed. 1992); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987). For a discussion about some of the choice of law alternatives in publication tort actions, see Cray, *supra* note 1; James R. Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381 (1985); Prosser, *supra* note 2, at 962.

<sup>24</sup> While the current disarray of choice of law certainly adds its own intricacies to the problem, these intricacies are beyond the scope of this Article.

<sup>25</sup> Historically, this would have been the law of the place of publication. RE-STATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934); see *infra* note 80.

<sup>26</sup> Courts and commentators raised these concerns in the 1950s and 1960s when the single publication rule was applied to choice of law in defamation and privacy actions; however, the concerns have not been adequately addressed. See Leflar, *supra* note 18, at 269 ("[I]s it constitutionally permissible for state A, having the single publication rule, to apply its law as determinative of the legal effect of publications occurring in state B by reason of circulation of the libel there?"); Prosser, *supra* note 2, at 999 ("The one conclusion that seems inescapable is that sooner or later something will have to be done about all this."); Harry P. Warner,

common practice in complex litigation.<sup>27</sup> Although publication based torts are not neatly subsumed within the traditional definition of complex litigation,<sup>28</sup> they present a slightly different twist on the same theme. Multistate publication based torts, which arise when a single party is injured multiple times as a result of simultaneous publication in multiple states, are analogous to the nationwide product liability class actions, which arise when multiple parties receive the same or similar injuries as a result of multiple incidents in multiple states.<sup>29</sup>

In this Article, I challenge the courts' expansion of the single publication rule to choice of law. Part I examines the intended use of the rule and the extended use for choice of law purposes. Then, using a hypothetical, Part II illustrates the effect of the rule when applied in a right of publicity action, both as originally intended and as expanded to choice of law. Part III explores the concerns, both theoretical and practical,

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*Multistate Publication in Radio and Television*, 23 LAW & CONTEMP. PROBS. 14, 23-25 (1958) ("May a court apply the substantive law of one state to publications occurring in other jurisdictions?"); Comment, *An Examination of Publication and Choice of Law Problems in Multi-State Libel*, 56 NW. U. L. REV. 823, 826 (1962) ("The truly difficult problem is encountered when an attempt is made to recognize the tort as giving rise to only one cause of action nationally, within a system recognizing fifty-one independent bodies of substantive law.").

<sup>27</sup> "It's surprising to find even partial consensus on choice of law in complex litigation. Yet consensus there is—consensus, at least, that ordinary choice-of-law practices should yield in suits consolidating large numbers of claims and that courts should apply a single law in such cases." Larry Kramer, *Choice-of-Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 547 (1996); see *In re A.H. Robins Co.*, 880 F.2d 709, 741-43 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *In re "Agent Orange Prod. Liab. Litig."*, 580 F. Supp. 690, 706-13 (E.D.N.Y. 1984). But see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996), rev'g 160 F.R.D. 544 (E.D. La. 1995); *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 627 (3d Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-01 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

<sup>28</sup> "Complex litigation' has no fixed definition, and the term sometimes is used to refer to litigation that concerns complex issues even if the dispute takes place only between two parties . . ." AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY 7 (1994). However, with respect to multidistrict litigation and the American Law Institute's project on complex litigation, complex litigation "refers exclusively to multiparty, multiforum litigation; it is characterized by related claims dispersed in several forums and often involving events that occurred over long periods of time." *Id.*

<sup>29</sup> See Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167, 167 n.1 (1985) (delineating two distinct types of multi-claimant tort actions against a single defendant: the multi-tort action and the mass accident tort action).

that arise when this procedural rule is used in contravention of state sovereignty to change substantive law. Finally, based on my conclusion that the single publication rule should be limited to its original purpose, Part IV examines alternative solutions to extending the single publication rule to choice of law—federal substantive law, uniform state laws or depeage.<sup>30</sup>

## I. THE SINGLE PUBLICATION RULE

### A. *Intended Application*

There are two model codifications of the single publication rule: the Uniform Single Publication Act<sup>31</sup> and Section 577A of the Restatement (Second) of Torts ("Restatement").<sup>32</sup> Sub-

<sup>30</sup> Depeage is the "process whereby different issues in a single case arising out of a single set of facts may be decided according to the laws of different states." LEFLAR ET AL., *supra* note 23, § 96; see BLACK'S LAW DICTIONARY 436 (6th ed. 1990); Willis L.M. Reese, *Depeage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973); see also *supra* Section IV.C.

<sup>31</sup> UNIFORM SINGLE PUBLICATION ACT, 14 U.L.A. 375 (1990):

§ 1. *Limitation of Tort Actions Based on Single Publication or Utterance; Damages Recoverable.*

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

§ 2. *Judgment as Res Judicata.*

A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in Section 1 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

The Uniform Single Publication Act has been adopted in eight states: Arizona, California, Idaho, Illinois, Nebraska, New Mexico, North Dakota and Pennsylvania. See LDRC 50-STATE SURVEY 1995-96 CURRENT DEVELOPMENTS IN MEDIA LIBEL LAW (1995); UNIFORM SINGLE PUBLICATION ACT, 14 U.L.A. 57 (Supp. 1996).

<sup>32</sup> RESTATEMENT (SECOND) OF TORTS § 577A (1977):

§ 577A. *Single and Multiple Publications.*

(1) Except as stated in Subsections (2) and (3), each of several communications to a third person by the same defamer is a separate publication.

(2) A single communication heard at the same time by two or more third persons is a single publication.

stantially identical, both define a single publication as any one edition of a book, newspaper or magazine, or any one broadcast over radio or television, or any other similar aggregate communication. With respect to any single publication, both the Uniform Single Publication Act and the Restatement permit only one action for damages<sup>33</sup> and preclude any subsequent actions arising out of the same aggregate communication.<sup>34</sup> Both the Uniform Single Publication Act and the Restatement codify the law as it developed at common law.<sup>35</sup> The rule evolved to protect defendants and courts from "the enormous number of suits which might be brought if publication to each person reached by such an aggregate communication could serve as the foundation for a new cause of action."<sup>36</sup>

(3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.

(4) As to any single publication,

(a) only one action for damages can be maintained;

(b) all damages suffered in all jurisdictions can be recovered in the one action; and

(c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

<sup>33</sup> It is interesting to note that the statutes only address damages and not equitable relief. *See* RESTATEMENT (SECOND) OF TORTS § 577A cmt. e (1977) (requires plaintiff to recover all damages whether caused before or after trial). This raises the question of whether a plaintiff can obtain equitable relief, particularly injunctions, in addition to damages. If injunctive relief were available, this would raise questions regarding the scope of the injunction. *See* David S. Welkowitz, *Preemption, Extraterritoriality, and the Problem of State Antidilution Laws*, 67 TUL. L. REV. 1 (1992).

<sup>34</sup> UNIFORM SINGLE PUBLICATION ACT § 2, 14 U.L.A. 379 (1990); RESTATEMENT (SECOND) OF TORTS § 577A(4)(c) (1977). For the text of these statutes, *see supra* notes 31-32. Technically, when the single publication rule is judicially adopted, the subsequent action would be barred by *res judicata*; when the rule is legislatively adopted, the subsequent action would be barred by rule preclusion.

<sup>35</sup> HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 430-31, Prefatory Note to the Uniform Single Publication Act (1952) [hereinafter NATIONAL CONFERENCE HANDBOOK] ("The intention is to adopt the rule as it has been developed at common law in the states which have accepted it.").

<sup>36</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. c (1971). The rule is often referred to as the multiple publication rule. Originally, the rule developed in England. *Duke of Brunswick v. Harmer*, 14 Q.B. 185, 117 Eng. Rep. 75 (1849). It was later accepted in the United States. *Givens v. Quinn*, 877 F. Supp. 485, 487 (W.D. Mo. 1994) ("English common law, later adopted by American courts, followed the multiple publication rule which provided a cause of action for each copy of a newspaper edition containing a defamatory statement.").

The single publication rule is a procedural mechanism created to deal with concerns raised by the definition of defamation. By definition, defamation and other publication based torts hinge on actual communication to a third party. Until a communication occurs, no claim for relief can be made. Inversely, each communication to a third party gives rise to a distinct right to relief.<sup>37</sup> As technology exploded in the twentieth century, bringing advances in printing and distribution, and the creation of radio and television,<sup>38</sup> concerns grew that a plaintiff could harass a defendant and burden the judicial system by filing as many separate actions as there were publications.<sup>39</sup> Although not a common occurrence,<sup>40</sup> the potential for abuse existed.<sup>41</sup> Seeking to avoid "chain libel suits,"<sup>42</sup>

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<sup>37</sup> *Duke of Brunswick v. Harmer*, 14 Q.B. 185, 117 Eng. Rep. 75 (1849); RESTATEMENT (SECOND) OF TORTS § 577A cmt. a (1971) ("It is the general rule that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises."); RESTATEMENT (FIRST) OF TORTS § 578 cmt. b (1938) ("Each time a libelous article is brought to the attention of a third person, a new publication has occurred, and each publication is a separate tort."); MARTIN L. NEWELL, *THE LAW OF SLANDER AND LIBEL* § 192 (4th ed. 1924); WILLIAM B. ODGERS, *A DIGEST OF THE LAW OF LIBEL AND SLANDER* 132 (6th ed. 1929); Prosser, *supra* note 2, at 961 ("until the words have reached such a person there is no publication, no tort").

<sup>38</sup> See *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 432, 420 N.E.2d 377, 381, 438 N.Y.S.2d 496, 500 (1987) ("a society in which mass distribution and nationwide communication now are norms"); Frederick J. Ludwig, "Peace of Mind" in *48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734, 734 (1948) ("Twentieth century technology has brought the radio, television, newsreels and motion pictures. National syndication of columns and international transmission of news and photographs has broadened the reach of journalism.").

<sup>39</sup> "[U]nder the multiple publication rule, if a newspaper prints a hundred thousand copies of an edition containing libelous statements, a plaintiff can bring a hundred thousand causes of action against the newspaper. . . . [T]he rule allows a plaintiff to bring numerous causes of action against a defendant simply to harass the defendant." *Givens v. Quinn*, 877 F. Supp. 485, 488 (W.D. Mo. 1994). "[W]hen the specter of a huge number of lawsuits arose to haunt the courts, many of them moved to moderate the rule." *Church v. Minnesota*, 264 N.W.2d 152, 155 (Minn. 1978) (modern methods of mass communications made the old rule burdensome); Prosser, *supra* note 2, at 962.

<sup>40</sup> Professors Prosser and Leflar refer to a couple of incidents of multiple suits arising out of the same libel. However, these multiple suits were brought against multiple defendants as the libel in question was published in numerous newspapers, so the single publication rule would have no relevance. See Leflar, *supra* note 18; Prosser, *supra* note 2, at 969.

<sup>41</sup> "[W]hen defamation is published in a magazine with national circulation, the person defamed may have as many as 3,900,000 possible causes of action for separate torts, based on the publication to each individual reader. The sum total of

courts relied on preclusion doctrine to limit a plaintiff's ability to bring multiple actions without altering that plaintiff's substantive rights.<sup>43</sup> If there is a final judgment on the merits, preclusion doctrine prohibits any future actions between the same parties arising out of the same transaction.<sup>44</sup> The single publication rule is a catch-phrase for the definition of a transaction for publication based torts when determining the scope of claim preclusion.<sup>45</sup> The single publication rule defines a transaction as an entire edition, broadcast or similar aggregate communication.<sup>46</sup>

As early as 1898, a New York court applied this definition of a transaction to preclude a second action for libel arising from an edition of *The Evening Sun* that had already been the subject of an action.<sup>47</sup> The case did not hold that plaintiff

the causes of action so arising would be more than three times the estimated number of all the reported decisions in the English language . . ." NATIONAL CONFERENCE HANDBOOK, *supra* note 35, at 430, Prefatory Note to the Uniform Single Publication Act.

<sup>42</sup> Prosser, *supra* note 2, at 969.

<sup>43</sup> Preclusion is a subcategory of procedure. Claim preclusion does not address the substantive issues, just that the court has determined as a matter of procedure that it will not hear the matter. RESTATEMENT (SECOND) OF JUDGMENTS 5-13, introduction (1982). Preclusion doctrine advances ends which society deems important. These ends include final resolution of disputes, prevention of harassment and efficient use of the Courts. VESTAL, *supra* note 15, at V7 to V12.

<sup>44</sup> RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-19 (1982).

<sup>45</sup> *A Fiction Misapplied*, *supra* note 18, at 1042. The transaction might also be referred to as a "composite action." See *supra* note 16. The scope of preclusion has changed over time. Under common law pleading, preclusion was limited by the narrow definition of the scope of an action. The modern trend, led by the *Restatement (Second) of Judgments*, defines the scope of an action broadly as a transaction or series of connected transactions, regardless of the number of substantive theories or forms of relief available. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

A transaction is the fact or facts which give one the right to relief. *Interholzinger v. Estate of Dent*, 333 N.W.2d 895 (Neb. 1983). A transaction is not capable of precise definition; courts are expected to define it pragmatically, giving consideration to whether the facts are related in time, space, origin or motivation, whether they comprise a logical unit for trial, and whether the parties would expect the facts to be a single trial. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982). In other words, it is intended to strike a balance between the interests of the defendant and the court in closure and the interest of the plaintiff in vindication of a substantive right. *Id.* § 24(2) cmt. b.

<sup>46</sup> See *supra* notes 31-34 and accompanying text.

<sup>47</sup> *Galligan v. Sun Printing and Publishing Ass'n*, 25 Misc. 355, 54 N.Y.S. 471 (Sup. Ct. N.Y. County 1898); see RESTATEMENT (FIRST) OF JUDGMENTS § 63 (1942). While republication prior to the commencement of an action should not give rise

could not have sought recovery for both libels. Rather, it held that the edition was a single transaction, and all rights for relief arising out of that edition had to be brought in a single action—which in this instance had already been brought.<sup>43</sup> The case indicated that the rule was intended to limit multiple actions arising out of the same transaction; not to affect plaintiff's possible recovery.

The threat of preclusion in a subsequent action forces plaintiffs to join all claims arising out of the single publication in a single composite action. In other words, claim preclusion is intrinsically related to claim joinder.<sup>49</sup> While claim joinder rules are generally written as permissive rules, the threat of preclusion makes them de facto mandatory.<sup>50</sup> Regardless of the perspective, the single publication rule provides a definition of a transaction when dealing with the scope of a publication based tort action. It compels packaging.<sup>51</sup> By promoting packaging of all claims arising out of a single publication in one action, the rule promotes judicial efficiency and protects defendants from multiple harassing suits without altering plaintiffs' substantive rights.<sup>52</sup>

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to a separate action, publication after the commencement of the action would give rise to a second action. *Galligan*, 25 Misc. at 358, 54 N.Y.S. at 473-74; see EARNEST PARIS SEELMAN, *LIBEL AND SLANDER IN NEW YORK* 120 (1933).

<sup>48</sup> *Galligan*, 25 Misc. at 358, 54 N.Y.S. at 473 ("Plaintiff cannot be permitted to split up the alleged libelous article and bring a second action thereon.")

<sup>49</sup> Claim joinder refers to joinder of separate claims for relief in a single action.

<sup>50</sup> Discussing Federal Rule of Civil Procedure 18, which procedurally permits joinder of any and all claims in an action brought in federal court, Professor Freer points out that "this rule is merely the carrot, for it is not mandatory. The stick is claim preclusion, which . . . impels the claimant to assert all transactionally related elements of recovery in a single suit." Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 822 (1989); see FLEMING JAMES, JR., ET AL., *CIVIL PROCEDURE* § 9.1 (4th ed. 1992).

<sup>51</sup> Professor McCoid coined the term "packaging." John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 708 (1976).

<sup>52</sup> The single publication rule is a means of "efficiently litigating all issues and damages claims arising out of a libel in a unitary proceeding. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984); see *Palestri v. Monogram Models, Inc.*, 875 F.2d 66, 68 (3d Cir. 1989) ("a rule which is designed to avoid a multiplicity of lawsuits"); *Buckley v. New York Post Corp.*, 373 F.2d 175, 179-80 (2d Cir. 1967) ("the purpose of the single publication rule is not to deprive a plaintiff defamed in another state of a privilege to sue there . . . , but rather to protect

## B. *Extended Application*

Although originally developed to create a composite action for intrastate publication<sup>53</sup> in defamation actions, courts quickly expanded the single publication rule across state lines<sup>54</sup> and to newly developed publication based torts.<sup>55</sup> The Uniform Single Publication Act expressly applies to actions based on "libel, slander, invasion of privacy or any other tort founded upon a single publication."<sup>56</sup> Although defamation ac-

the defendant—and the courts—from a multiplicity of suits . . . . These goals can be sufficiently accomplished by holding that the plaintiff must collect all his damages in one action . . . ."); *Bailey v. Dell Publishing Co.*, 790 F. Supp. 101 (W.D. Pa.) (holding that the purpose of the single publication rule is to protect publishers from a multitude of lawsuits), *aff'd*, 983 F.2d 1049 (3d Cir. 1992); *Graham v. Today's Spirit*, 468 A.2d 454 (Pa. 1983) (holding the single publication rule is intended to protect the communications industry from undue harassment); *Gaetano v. Sharon Herald Co.*, 231 A.2d 753, 756 (Pa. 1967) (stating that the purpose of the Uniform Single Publication Act, which limits a claimant to one cause of action for a single aggregate communication regardless of the number of copies, is to eliminate successive oppressive harassment, not to fix the site of any claim); RESTATEMENT (SECOND) OF TORTS § 577A cmt. d (1977) ("[T]he single publication rule is obviously to be administered to accomplish its purpose of avoiding multiplicity of suits, as well as harassment of the defendants and possible hardship upon the plaintiff himself."); *A Fiction Misapplied*, *supra* note 18, at 1042; *Multi-State Libel*, *supra* note 14, at 257 ("The theory seems to be to protect the defendant from a multiplicity of harassing actions and to further the cause of administrative convenience.").

<sup>53</sup> Originally, multistate publication created a composite action in each state in which there was publication. In other words, if a newspaper was disseminated in 20 states, a plaintiff could file 20 actions, one in each state. Each of the 20 actions would be a composite action comprised of all substantive rights to relief arising out of all publication in that state. *See Donahue v. Warner Bros. Pictures, Inc.*, 194 F.2d 6 (10th Cir. 1952); *Hartmann v. Time Inc.*, 166 F.2d 127 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948); *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940); *Sheldon-Claire Co. v. Judson Roberts Co.*, 88 F. Supp. 120 (S.D.N.Y. 1949); *Hartmann v. American News Co.*, 69 F. Supp. 736 (D. Wis. 1947); *O'Reilly v. Curtis Publishing Co.*, 31 F. Supp. 364 (D. Mass. 1940); *Prosser*, *supra* note 2, at 964 ("The significant limitation on the 'single publication' rule, however, is that it does not cross a state line.").

<sup>54</sup> *See infra* note 70 and accompanying text.

<sup>55</sup> *See Mortschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 823 n.4 (9th Cir. 1974) (applies to the right of privacy and the right of publicity); *Khaury v. Playboy Publications, Inc.*, 430 F. Supp. 1242, 1345 (S.D.N.Y. 1977) (applies to defamation and right of privacy); *Fouts v. Fawcett Publications*, 116 F. Supp. 535, 537 (D. Conn. 1953) (applies to right of privacy). It is also likely to apply to state antidilution laws when an action is based on publication. *See Welkowitz*, *supra* note 33, at 21.

<sup>56</sup> UNIFORM SINGLE PUBLICATION ACT § 1, 14 U.L.A. 377 (1990); *see supra* note 31 for the text of the Act.

tions, right of privacy actions and right of publicity actions all arise out of publication, they are substantively different claims for relief, and the similarities among these rights should not overshadow the distinctions.

The difference between the right to privacy and the right of publicity provides a good example. The right of privacy was first articulated by Samuel Warren and Louis Brandeis in 1890 in a landmark law review article arguing for distinct protection for individuals from unjustifiable mental pain inflicted by a callous and intrusive press.<sup>57</sup> Over the next century, the theory took root and has sprouted widespread judicial and legislative recognition.<sup>58</sup> The right of privacy protects an individual's right to be left alone.<sup>59</sup> Initially it appeared that the appropriation of a person's name or likeness would be subsumed within the right of privacy.<sup>60</sup> However, this categorization led some courts to deny relief to celebrities who could not claim the injury generally associated with privacy torts.<sup>61</sup>

The right of publicity was first articulated as a right independent of, and in addition to, the right of privacy by Judge Jerome Frank in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>62</sup> Whereas the right of privacy protects reputation

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<sup>57</sup> Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>58</sup> New York was the first state to recognize this right. After *Roberson v. Rochester Folding-Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), where the New York Court of Appeals rejected a common law right of privacy, the New York State Legislature provided a statutory right to privacy which protected a person from the use of his or her name, portrait or picture for commercial purposes without written consent. Ch. 132, §§ 1-2 [1903] N.Y. Laws (current version at N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992)). Shortly thereafter, the Supreme Court of Georgia recognized a common law right of privacy. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). By the 1930s, the right was included in the *Restatement (First) of Torts*, and today the right is recognized in almost all jurisdictions. See RESTATEMENT (FIRST) OF TORTS § 867 (1934).

<sup>59</sup> ROBERT E. KEETON ET AL., PROSSER & KEETON ON TORTS § 117 (5th ed. 1984).

<sup>60</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 406-07 (1960).

<sup>61</sup> *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), cert. denied, 315 U.S. 823 (1942); *Pallas v. Crowley-Milner & Co.*, 54 N.W.2d 595 (Mich. 1952).

<sup>62</sup> 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953). Plaintiff and defendant were rival chewing gum manufacturers. Plaintiff sued defendant for inducing breach of contract, claiming that defendant induced a ballplayer, who had entered into a contract bestowing the exclusive rights to use ballplayer's photograph in connection with the sale of plaintiff's gum, to enter into another contract permitting defendant to use ballplayer's picture in connection with the sale of its

and feelings, the right of publicity protects economic value.<sup>63</sup> Professor Nimmer encouraged the development of a separate right of publicity,<sup>64</sup> and in recent years, this right has gained wider acceptance as a distinct, transferable property right.<sup>65</sup> While the scope of this right is still developing, the 1993 *Restatement of the Law of Unfair Competition* emphasizes that the right of publicity is distinct from the right of privacy.<sup>66</sup>

In addition to the distinctions among the various publication based torts, it is important to remember that there are distinctions among states' substantive laws for each publication based tort.<sup>67</sup> As publication crossed state lines more and

gum. The issue was whether the contract with plaintiff was merely a release from liability under New York's statutory right of privacy, and therefore a personal, nonassignable right, or whether the contract was a transfer of a property right. In reversing the lower court and remanding the case for trial, Judge Frank recognized the right of publicity as a separate right. *Id.* at 867-68.

<sup>63</sup> Haelen, *supra* note 62, at 868. "This 'right of privacy' is not to be confused with the 'right of publicity' . . . . The right of privacy protects individual personality and feelings, the right of publicity protects the commercial value of a name or likeness." *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 85 n.6 (W. Va. 1984); see MCCARTHY, *supra* note 1, § 2.3.

<sup>64</sup> Nimmer, *supra* note 1.

<sup>65</sup> See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 296 S.E.2d 697 (Ga. 1982). For a discussion of the debates regarding whether the right of publicity is a property right and whether the right of publicity is descendible, see George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443 (1991); Lee Goldman, *Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 B.Y.U. L. REV. 597; Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853 (1995); Amy D. Hogue & Michael B. Garfinkel, *The Right of Publicity: Does It Survive Death and Abandonment?*, 30 TORT & INS. L.J. 663 (1995); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993); J. Graham Matherne, *Descendibility of Publicity Rights in Tennessee*, 53 TENN. L. REV. 753, 762-63 (1986); Vicky Gerl Neumeier, *The Right of Publicity and Its Descendibility*, 7 U. MIAMI ENT. & SPORTS L. REV. 287 (1990); Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013 (1995); Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985).

<sup>66</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1993).

<sup>67</sup> "Though law schools teach the same defamation law from Hawaii to Maine, state laws vary widely. In particular, state laws vary on the standards of fault, distinctions between fact and opinion, application of rules of libel per se and per quod, availability of punitive damages, and statutes of limitations. Any of these laws could affect the outcome of a case . . ." John D. Faucher, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation*

more frequently, interstate publication became common.<sup>68</sup> Rather than have a composite action in each state in which there was publication,<sup>69</sup> courts expanded the single publication rule to consolidate all claims arising out of the single publication in one composite action.<sup>70</sup> Because full faith and credit requires each state to recognize the judgment of a sister state, and to afford a judgment the same preclusive effect accorded by the issuing state, the extension of the rule across state lines promoted judicial efficiency by reducing the risk of multiple actions without altering any substantive rights.<sup>71</sup>

If the application of the legal fiction had stopped here, there would be no problem. Indeed, the legal fiction would serve its intended procedural purpose and efficiently facilitate the administration of substantive law. However, it did not stop here. As more claims were consolidated in a single action, the

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Cases, 26 U.C. DAVIS L. REV. 1045, 1052 (1993); see *infra* notes 98, 153-155 and accompanying text.

<sup>68</sup> The development of technology permitted more and more mass media to cross-state lines. Ludwig, *supra* note 38, at 734.

<sup>69</sup> See *supra* note 53.

<sup>70</sup> In an effort to encourage finality and avoid repetitious litigation, courts extended application of the rule across state lines, packaging potential actions arising in multiple states in a single composite action. *Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948); *Palmisano v. News Syndicate Co.*, 130 F. Supp. 17 (S.D.N.Y. 1955); *Anderson v. Hearst Publishing Co.*, 120 F. Supp. 850 (S.D. Cal. 1954); *Fouts v. Fawcett Publications*, 116 F. Supp. 535 (D. Conn. 1953); *Hazlitt v. Fawcett Publications*, 116 F. Supp. 538 (D. Conn. 1953); *Dale System v. Time, Inc.*, 116 F. Supp. 527 (D. Conn. 1953); *Kilian v. Stackpole Sons, Inc.*, 98 F. Supp. 500 (M.D. Pa. 1951). The "rule can cross a state line, so that there is only one cause of action for publication throughout the country." RESTATEMENT (SECOND) OF TORTS § 577A reporter's note (1977).

<sup>71</sup> See U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1994); see *Halvey v. Halvey*, 330 U.S. 610, 614 (1947); *Roche v. McDonald*, 275 U.S. 449 (1928); *Fauntleroy v. Lum*, 210 U.S. 231 (1908); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 94-95 (1971); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976); Eugene F. Scoles, *Interstate Preclusion by Prior Litigation*, 74 NW. U. L. REV. 742 (1979); Gregory S. Getschow, Comment, *If at First You Do Succeed: Recognition of State Preclusive Laws in Subsequent Multistate Actions*, 35 VILL. L. REV. 253 (1990). So long as the jurisdiction rendering the initial judgment recognizes the single publication rule, multiple actions will be prohibited even if the subsequent action is brought in a jurisdiction which does not recognize the rule. Of course, if the jurisdiction rendering the initial judgment does not recognize the single publication rule, the judgment will have no preclusive effect in a sister state, even if that sister state does recognize the rule.

action became increasingly complex.<sup>72</sup> Courts felt that determining the appropriate substantive law for each claim comprising the composite action would be burdensome and unmanageable.<sup>73</sup> If the court did not extend the single publication rule for choice of law purposes, "the forum might be required to consult and apply the local law of every state in which there was publication . . . . This would mean in the case of a nationwide broadcast or of a publication of nation-wide circulation that the forum would, at the least, have to consult and apply the local law of fifty States . . . ."<sup>74</sup>

In an attempt to administer these complex actions efficiently and conveniently, courts expanded the single publication rule to choice of law.<sup>75</sup> Judicial convenience and efficiency

<sup>72</sup> "The imagination reels at the thought of the evidence which must be taken, the rulings on admissibility which must be made, the briefing which must be done, and the instructions which must be given to the jury on the widely varying law of the different jurisdictions . . . . It is no exaggeration to say that such instructions might take a day to read, and that no jury ever lived that could possibly understand them." Prosser, *supra* note 2, at 970.

<sup>73</sup> "If a state's right of publicity could control only intrastate claims, an action seeking nationwide enforcement would require a court to wade through and determine . . . substantive contours of the right in fifty states." Cray, *supra* note 1, at 664. Choice of law rules in composite actions based on nationwide publication require the application of the substantive laws of fifty states. See *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Mattox v. New Syndicate Co.*, 176 F.2d 897, 900 (2d Cir. 1949) (discussed but not decided); *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817, 826 (D.D.C. 1955); *Kelly v. Loew's Inc.*, 76 F. Supp. 473, 482-83 (D. Mass. 1948) (discussed but not decided); *Curley v. Curtis Publishing Co.*, 48 F. Supp. 29, 39 n.3 (D. Mass. 1943); *National Fruit Prod. Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499 (D. Mass. 1942); *O'Reilly v. Curtis Publishing Co.*, 31 F. Supp. 364 (D. Mass. 1940); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. c (1971).

<sup>74</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. c (1971).

<sup>75</sup> *Curley*, 48 F. Supp. at 30 n.3; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. c (1971); Cray, *supra* note 1, at 666 ("practical necessity prompted widespread adoption of the rule that only a single cause of action arose from multistate publication, a cause of action governed by the law of one state"); *Welkowitz*, *supra* note 33, at 21 ("the logic of the single publication rule and judicial economy considerations suggest a single state law should apply to the entire transaction") (citation omitted).

In addition to expanding the rule for choice of law purposes, courts have expanded the rule when determining jurisdiction, venue and the expiration of the statute of limitations. As with the expansion for choice of law purposes, the rationale is judicial efficiency.

Jurisdiction: In an attempt to limit plaintiff's choice of forum, defendants sought to extend the single publication rule such that the single aggregate communication was deemed to have a single situs, usually the place of initial publication. This single situs was deemed to be a single contact for jurisdiction analysis, there-

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by constituting only one contact. This expansion has generally been unsuccessful. "[T]he purpose of the single publication rule is not to deprive a plaintiff defamed in another state of a privilege to sue there . . . but rather to protect the defendant—and the courts—from a multiplicity of suits . . . . These goals can be sufficiently accomplished by holding that the plaintiff must collect all his damages in one action . . . ." *Buckley v. New York Post Corp.*, 373 F.2d 175, 180 (2d Cir. 1967). With respect to publication torts, each publication constitutes a contact, and defendant will likely be subject to jurisdiction wherever it has contacts. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

Venue: Most venue statutes permit a plaintiff to lay venue in, among other places, where the claim or cause of action arose. *See* 28 U.S.C. § 1391(a)(2) (1993) ("a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred"). For publication torts this is usually wherever publication occurred. As with jurisdiction, defendants sought to extend application of the single publication rule to venue, limiting publication to a single situs for purposes of determining where the claim arose. Initially, courts appeared willing to accept this application of the legal fiction. *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344 (Ala. 1943); *Age-Herald Publishing Co. v. Huddleston*, 92 So. 193 (Ala. 1921); *O'Mally v. Statesman Printing*, 91 P.2d 357 (Idaho 1939). However, as with personal jurisdiction, courts realized that "the interests of the defendant are not so dominant as to require a mechanical application of the single publication rule in such a manner that circulating a libel outside that state should be treated as if it never occurred." *Buckley*, 373 F.2d at 180; *see Firstamerica Dev. Corp. v. Daytona Beach News-Journal Corp.*, 196 So. 2d 97 (Fla. 1966). With few exceptions, states no longer extend the single publication rule for purposes of jurisdiction or venue. *But see* FLA. STAT. ch. 770.05 (1996) ("No person shall have more than one choice of venue for damages for libel or slander, invasion of privacy or any other tort founded upon any single publication, exhibition or utterance, such as any one edition of a newspaper, book, or magazine, any one presentation to an audience, any one broadcast over radio or television, or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by plaintiff in all jurisdictions.").

Statutes of Limitations: Publication torts accrue upon publication. Historically, as each publication gave rise to a substantive right of relief for which a plaintiff could file a separate action, the statute of limitations ran separately for each such right, commencing on the date of publication. Defendants were concerned because it inhibited repose; the courts disliked this because the extended risk of potential actions increased the potential burden on the judicial system. As a result, courts extended the single publication rule to the statute of limitations, holding that the period of limitations should run once for each single publication generally commencing on the date of first publication. *See Buckley*, 373 F.2d at 180; *Zuck v. Interstate Publishing Corp.*, 317 F.2d 727 (2d Cir. 1963); *Wolfson v. Syracuse Newspapers, Inc.*, 254 A.D. 211, 212, 4 N.Y.S.2d 640, 641-42 (4th Dep't 1938). What constitutes "first publication" has varied from state to state. Some courts hold publication is complete when the finished product is released for sale. *See Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 119, 125, 81 N.E.2d 45, 48-49 (1948). Other courts hold that publication is complete when the product is distributed to the general public. *See Wheeler v. Dell Publishing Co.*, 300 F.2d 372, 375 n.3 (7th Cir. 1962); *Ogden v. Association of U.S. Army*, 177 F. Supp. 498, 500 (D.D.C. 1959); *Stella v. James J. Farley Ass'n*, 204 Misc. 998, 1006, 122 N.Y.S.2d 322, 330 (Sup. Ct. N.Y. County 1953). Although this mischaracterizes periods of limitations,

are the only rationales offered for extending the single publication rule to choice of law.<sup>76</sup> Neither the Uniform Single Publication Act nor Section 577A of the Restatement contemplate this application of the rule.<sup>77</sup>

At this juncture, it is important to emphasize four things. First, according to the definition of publication based torts, a claim for relief only arises upon publication.<sup>78</sup> Second, each publication gives rise to a claim for relief.<sup>79</sup> Third, traditionally, each claim arises under the law of the place of publication.<sup>80</sup> Fourth, most of the multistate contacts in a publication based tort action are the multiple places of publication. When the single publication rule is extended to choice of law, the choice of law analysis is substantially simplified. Multiple claims for relief are redefined as a single claim with a single situs.<sup>81</sup>

Consider two examples. Example one: Plaintiff, from state A, sues Defendant, from state B, alleging a violation of the right of privacy resulting from one communication to a third party in state C. Example two: Plaintiff, from state A, sues Defendant, from state B, alleging a violation of the right of privacy resulting from a nationwide publication. In example one, there is one claim for relief arising out of a single commu-

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defining them transactionally rather than by substantive right, this application of the single publication rule quickly became widely accepted.

<sup>76</sup> See *infra* notes 73, 75.

<sup>77</sup> See Lionel Rothkrug, *Torts: Defamation: Uniform Single Publication Act: Civil Code Sections 3425.3, 3425.4*, 44 CAL. L. REV. 146, 149 (1956) ("the Uniform Single Publication Act by its terms [does] not purport to solve these conflict of laws problems").

<sup>78</sup> See *supra* notes 2, 37 and accompanying text.

<sup>79</sup> See *supra* notes 2, 37 and accompanying text.

<sup>80</sup> Publication torts arise at the time and place of publication. For communication torts, the tort arises under the law of the place of publication. 50 AM. JUR. 2D *Libel and Slander* § 235 (1995) (stating that publication to a third party is an essential ingredient of actionable defamation); see *supra* note 2. The place of the wrong is the place of communication. The tort is committed where published. See *Stephens v. Columbia Pictures Corp.*, 240 F.2d 764 (2d Cir.), *cert. denied*, 353 U.S. 949 (1957); *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948); *Campbell v. Willmark Serv. Sys.*, 123 F.2d 204, 206 (3d Cir. 1941); *Kelly v. Loew's, Inc.*, 76 F. Supp. 473 (D. Mass. 1948); *Gallegos v. Union-Tribune Publishing Co.*, 16 Cal. Rptr. 185 (1961). *But see Fouts v. Fawcett Publications, Inc.*, 116 F. Supp. 535 (D. Conn. 1953) (holding place of injury is the domicile of the injured person).

<sup>81</sup> The principle has been codified in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 150, 153 (1971); see *id.* § 150 cmt. c.

nication to a third party. In example two, there is a claim for relief for every communication to a third party—potentially hundreds, thousands or even millions of claims. For simplicity, assume that the only question in both examples is the legal question of whether the facts constitute a breach of the right of privacy. Example one is the historic case where there was only one substantive issue in an action.<sup>82</sup> Example two is a result of the single publication rule, which requires consolidation of all claims arising out of a single publication in one action.<sup>83</sup>

As both examples include multistate contacts, the court must determine the applicable state law or laws to determine whether the facts constitute a breach of this right.<sup>84</sup> There is only one claim with one issue in example one; therefore, there is only one choice of law determination. However, technically, as there are hundred, thousands or even millions of claims in example two, there are as many choice of law determinations—one for each claim. Making so many determinations would be a daunting task for courts. As a practical matter, the only difference between each of these claims is the place of publication; therefore all claims with the same place of publication could be grouped together for choice of law purposes, and the action would raise only fifty choice of law determinations.<sup>85</sup> However, in example two, when the single publication rule is expanded to choice of law, instead of ascertaining the appropriate substantive law for each group of claims,<sup>85</sup> courts

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<sup>82</sup> Common law pleading required that an action be reduced to a single issue of law or fact before going to trial. *JAMES ET AL.*, *supra* note 50, § 3.2.

<sup>83</sup> Modern procedure favors consolidation of multiple issues in a single action. Modern procedure includes pleading and joinder rules encouraging "packaging," and the trend towards a broader definition of a "transaction" for preclusion. See Freer, *supra* note 50, at 813-15; McCoid, *supra* note 51, at 707.

<sup>84</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971).

<sup>85</sup> The court could group all issues with the same multistate contacts into subgroups for purposes of choice of law analysis. See Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085, 1086 (1994); see also *In re "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 915-17 (N.D. Cal. 1981); *Miner v. Gillette Co.*, 428 N.E.2d 478, 484 (Ill. 1981), *cert. dismissed*, 459 U.S. 86 (1982).

<sup>85</sup> See Rothkrug, *supra* note 77, at 149 n.21 ("Because the substantive law of defamation differs materially from one jurisdiction to another, it would appear that even if the [single publication] act were uniformly adopted throughout the United States the plaintiff might . . . have to prove the law of the individual jurisdictions in which he was allegedly injured. In other words, if the publication were libel in

make a single choice of law determination for the entire action. The multi-state contacts created by publication are ignored, and the action is treated like example one for the choice of law determination.

This Article does not address the concerns that arise because different states use different choice of law methodologies.<sup>87</sup> While conventional wisdom maintains that the results of a lawsuit should not depend upon where the action is filed,<sup>88</sup> horizontal forum shopping—choosing among state courts where the action may properly be filed—for a favorable outcome does occur.<sup>89</sup> Under the current rules of personal jurisdiction, publishers are subject to personal jurisdiction wherever they publish.<sup>90</sup> Consequently, plaintiffs often are able to

state A and not libel in state B the plaintiff might be entitled to damages for libel only with respect to state A.”)

<sup>87</sup> See *supra* note 23 and accompanying text.

<sup>88</sup> See *supra* note 23 and accompanying text. “One of the primary policies underlying the principles of choice of law is the policy that the same substantive law will be applied in a case regardless of where suit on the case is brought.” ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION 1 (1988). Personal jurisdiction is a separate consideration from choice of law. *Hanson v. Denckla*, 357 U.S. 235, 254 (1958). Choice of law is concerned with substantive law because the results of an action should not change just because the action is filed in a different jurisdiction. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 1, 2 (1971); see Herbert F. Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L.Q. 156, 164 (1930) (“Fairness to the parties requires that the obligations created between them remain unchanged by fortuitous changes in the geographical locations of either until such obligations are settled or otherwise discharged.”); Laycock, *supra* note 23, at 321 (“[C]onflict-of-law rules . . . cannot . . . recognize jurisdiction in more than one state to prescribe the substantive law to govern a case or an issue in a case.”); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966) (“[P]redictability of results includes the ideal that the decision in the litigation on a given set of facts should be the same regardless of where the litigation occurs . . . .”); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1685-89 (1990) [hereinafter *Forum Shopping*] (arguing that a tort ought to be subject to same rule regardless of where litigated).

<sup>89</sup> See *Forum Shopping*, *supra* note 88, at 1678 (“Forum shopping may give a party some degree of control over the choice of substantive law.”). Professor Brown refers to this kind of forum shopping as state-state forum shopping. See George D. Brown, *The Ideologies of Forum Shopping—Why Doesn’t Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 651 (1993).

<sup>90</sup> Publishers are subject to personal jurisdiction wherever publication occurred. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Based on *Keeton*, it seems likely that courts will find personal jurisdiction over a publisher in any state in which the infomercial was broadcast. The expansion of personal jurisdiction in publication based actions provides plaintiffs with more places to sue. “Under current theories of personal jurisdiction plaintiffs are frequently free to sue in more than one state.” Brown, *supra* note 89, at 650.

bring suit in multiple states. Varying choice of law methodologies combined with varying state substantive laws will yield different results in an action dependent only upon on the forum in which the action is filed.<sup>91</sup> Although I question the appropriateness of this result, I leave to the choice of law scholars the debate over the correctness and constitutionality of the various methodologies.<sup>92</sup>

What I object to is that even before a court addresses the issue of which choice of law methodology is appropriate, the court recharacterizes the multiple claims joined in a composite action as a single claim for choice of law purposes. This exacerbates the likelihood of horizontal forum shopping for a favorable outcome. "Allowing one state's law to control an action the major focus of which may be elsewhere seems at the very least unfair and even overbearing."<sup>93</sup> This, in effect, substantively redefines state created publication based torts on a case-by-case basis. When adjudicating a composite action, courts find it simpler to create a national law to determine all rights and liabilities, potentially permitting recovery for injury based on publication in one or more states whose local laws may not even grant plaintiffs a right of action.<sup>94</sup> For judicial convenience and efficiency, courts disregard state sovereignty and disparage the importance of the predictability of substantive state law.

## II. ILLUSTRATING THE PROBLEM

A hypothetical will illustrate the advantages and disadvantages of application of the single publication rule, both as originally intended and as expanded to choice of law. Assume

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<sup>91</sup> "[T]he Court could not possibly foresee that in the next half century state court personal jurisdiction would expand to its present reach or that choice of law doctrine would evolve into an almost complete license to the forum state to apply whatever law it pleases." Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 957 n.60 (1988). If the action were filed in a state following the *Second Restatement* approach, the law of plaintiff's domicile would likely be applied. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 150, 151, 153 (1971). Other states might apply the law of the place of first publication. See *supra* note 80.

<sup>92</sup> See *supra* note 23 and accompanying text.

<sup>93</sup> Welkowitz, *supra* note 33, at 21; see *supra* note 89 and accompanying text.

<sup>94</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. c (1971).

that Publisher, a New York corporation, created an infomercial that includes video footage of a deceased athlete.<sup>95</sup> The infomercial was nationally broadcast one time and was viewed by thousands of people in all fifty states. The widow of the deceased athlete, a California citizen, would like to recover from Publisher because Publisher commercially exploited her late spouse's name and likeness without consent.

For simplicity, regardless of other potential claims, assume that Widow sues only for violation of her postmortem right of publicity. The postmortem right of publicity, a derivative of the right to publicity, is the right of an heir to control the commercial use of a deceased person's identity.<sup>96</sup> This right has been recognized in fourteen states, rejected in three states, and has not been determined in the remaining states.<sup>97</sup> Even in the

<sup>95</sup> For simplicity, assume that Publisher obtained appropriate copyright permission to use the footage, which is possible as someone other than Widow or deceased athlete may own the footage.

<sup>96</sup> See *Groucho Marx Prods., Inc. v. Day & Night Co.*, 689 F.2d 317, 319 (2d Cir. 1982); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 281 (2d Cir. 1981), cert. denied, 456 U.S. 927 (1982); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697, 704-05 (Ga. 1982); *Southeast Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 912, 489 N.E.2d 744, 745, 498 N.Y.S.2d 775, 776 (1985); MCCARTHY, *supra* note 1, § 9.

<sup>97</sup> The postmortem right of publicity is expressly recognized by statute in California, Florida, Indiana, Kentucky, Nevada, Oklahoma, Tennessee and Texas. CAL. CIV. CODE § 990 (West Supp. 1996); FLA. STAT. ANN. § 540.08 (West 1988); IND. CODE ANN. § 32-13-1-8 (Burns 1995); KY. REV. STAT. ANN. § 391.170 (Michie/Bobbs-Merrill 1984); NEV. REV. STAT. ANN. § 597.790 (Michie/Bobbs-Merrill 1994); OKLA. STAT. ANN. tit. 21, § 839.1-3 (West 1983); TENN. CODE ANN. §§ 47-25-1101 to -1108 (1995); TEX. CODE ANN. § 26.003 (West 1996); see MCCARTHY, *supra* note 1, § 9.5. It is implicitly recognized as part of the privacy statutes in Nebraska and Virginia. NEB. REV. STAT. ANN. § 20-201 (Michie 1995); VA. CODE ANN. § 8.01-40 (Michie 1992); see MCCARTHY, *supra* note 1, § 9.5. In 1982, the State of Georgia judicially recognized this right on a certified question from the federal district court. *King Center*, 296 S.E.2d 697 (Ga. 1982). Additionally, federal courts sitting in diversity in Connecticut, New Jersey and Utah have recognized this posthumous right. *Jim Henson Prods. v. John T. Brady & Assoc.*, 867 F. Supp. 175 (S.D.N.Y. 1994) (holding Connecticut, where Henson was domiciled at death, would recognize a postmortem right of publicity); *Nature's Way Prods., Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245 (D. Utah 1990) (judicially recreating a postmortem right of publicity); *Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); see MCCARTHY, *supra* note 1, § 9.5.

Originally, a postmortem right of publicity was recognized under N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992). However, it was subsequently rejected in *Stephano v. New Group Publications, Inc.*, 270 A.D. 1058, 64 N.Y.S.2d 174 (3d Dep't 1984). The postmortem right of publicity has also been rejected by federal

states that have recognized the right, there are marked differences. For example, the duration of the right varies from state to state.<sup>98</sup>

As each publication gives rise to a claim for relief, and the infomercial was nationally broadcast and viewed by thousands of people, Widow has thousands of claims for relief. Regardless of where Widow files suit, the single publication rule would likely apply.<sup>99</sup> Under the intended application of the rule, Widow must consolidate all claims for relief arising out of the national broadcast in a single action. Although there is no express rule requiring this joinder of claims, the threat of subsequent preclusion has the same effect.<sup>100</sup>

The single publication rule is an effective rule of compulsory claim joinder. It promotes the purpose of procedure—to secure the objectives of substantive law efficiently, fairly, conveniently, neutrally and with finality.<sup>101</sup> The threat of preclusion forces a plaintiff to package all claims in a single action. Although the result of the rule is a more complex action, it protects courts from dockets flooded with repetitive claims by Widow based on the single broadcast; it also protects Publisher

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courts sitting in diversity in Ohio and Wisconsin. *Heinz v. Frank Lloyd Wright Found.*, 229 U.S.P.Q. 201 (W.D. Wis. 1986); *Reeves v. United Artists*, 573 F. Supp. 1231 (N.D. Ohio 1983), *aff'd*, 756 F.2d 79 (6th Cir. 1985). Washington is just one of the many states that has not decided the issue. *Joplin Enter. v. Allen*, 795 F. Supp. 349, 351 (W.D. Wash. 1992).

<sup>98</sup> With respect to duration of the right: California (50 years), Florida (40 years), Indiana (100 years), Kentucky (50 years), Nebraska (no duration stated), Nevada (50 years), Oklahoma (100 years), and Virginia (20 years). See MCCARTHY, *supra* note 1, § 9.5; Moore, *supra* note 13, at 39-42 app. B; see also LDRC 50-STATE SURVEY 1996-97 MEDIA PRIVACY AND RELATED LAW (Libel Defense Resource Center ed., 1996-97).

<sup>99</sup> As most jurisdictions recognize the single publication rule, this hypothetical assumes that any jurisdiction in which Widow files suit recognizes it. See *supra* note 14.

<sup>100</sup> See *supra* notes 49-52 and accompanying text. The exception to this is when the publication is considered a republication. The republication doctrine declares that subsequent broadcasts of the infomercial give rise to additional actions. *Foretich v. Glamour*, 753 F. Supp. 955, 960 (D.D.C. 1990); RESTATEMENT (SECOND) OF TORTS § 577A cmt. d, illus. 5 (1977). The modern trends in preclusion doctrine interpreting a transaction broadly indicate Widow should join all claims arising out of any broadcast prior to filing suit.

<sup>101</sup> See FED. R. CIV. P. 1; see also JAMES ET AL., *supra* note 50, § 1.1; Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 845-59 (1984) (setting forth twelve valued features of procedure).

against the burden of multiple suits by Widow.<sup>102</sup> Even Widow benefits because she incurs only the expense of a single suit.<sup>103</sup> Additionally, as a rule of procedural consolidation of claims, the single publication rule has no substantive effect on the outcome.

If application of the single publication rule were limited to this original purpose, the hypothetical could end here. The composite action would be comprised of fifty sub-groups of claims, one for each state in which the infomercial was broadcast.<sup>104</sup> For each sub-group of claims, the court would make an appropriate choice of law determination.<sup>105</sup> For each sub-

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<sup>102</sup> See *supra* note 52.

<sup>103</sup> The cost of bringing a composite action will be greater than a single claim action; however, it will be less expensive than bringing multiple actions, one for each claim. Among other things, savings will result from the fact that Widow need not retain several counsel licensed in multiple jurisdictions.

<sup>104</sup> As the only difference among these claims is the situs of broadcast, all claims broadcast within a state could be consolidated together, for choice of law purposes, as they will have the same multistate contacts. See *supra* note 85.

<sup>105</sup> Actually, as each claim seeks recovery for violation of the postmortem right of publicity, each claim consists of two issues. First, does the right exist? Second, if it does exist, was it violated?

With respect to the first issue, there is general agreement among states that the law of the state of decedent athlete's domicile at death applies to determine transitory rights upon death, including whether a postmortem right of publicity exists. RESTATEMENT (FIRST) OF CONFLICT OF LAWS ch. 7, tit. F (1938); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (1971); *Groucho Marx Prods., Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982); *Factors Etc., Inc. v. Pro Arts Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Jim Henson Prods. v. John T. Brady & Assoc.*, 867 F. Supp. 175, 178 (S.D.N.Y. 1994) ("[T]he parties agree that Connecticut law governs any postmortem right of publicity Jim Henson might have, since he died a citizen and resident of that state."); *Joplin Enters. v. Allen*, 795 F. Supp. 349, 350 (W.D. Wash. 1992) (*Janis Joplin* was domiciled in California; therefore, her right of publicity descended under California law); *South-east Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 912, 489 N.E.2d 744, 745, 498 N.Y.S.2d 775, 776 (1985) (*Tennessee Williams* was domiciled in Florida at the time of his death, therefore, "questions concerning personal property rights [were] determined by reference to the substantive law of the decedent's domicile."). *But see* *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994) (applying the state of the defendant's infringing acts to determine survivability and infringement).

As New York does not currently recognize this right, if decedent athlete had been a citizen of New York, the case would be dismissed for failure to state a claim entitled to relief. See *supra* note 97. If, however, decedent athlete had been a citizen of California, the right would exist and the case would continue. To continue this hypothetical, assume that decedent athlete was a California citizen, and Widow inherited the postmortem right of publicity.

It is in addressing the second issue, whether the right was violated, that expansion of the single publication rule to choice of law becomes relevant. See

group, the determination should result in the application of the substantive law of the state in which publication occurred.<sup>106</sup>

However, faced with this complex composite action, a court would likely feel burdened by the multiple choice of law analyses, even if limited to one for each sub-group. Instead, the court would likely extend the legal fiction of the single publication rule. Rather than determine the appropriate substantive law for each sub-group in the composite action, the court would make a single choice of law determination for the entire action. Although this greatly simplifies the choice of law analysis, it causes the outcome of all consolidated claims to hinge on one state's substantive law regardless of where publication occurred. The result is a judicially created national law for publication based torts.

If the court deemed California substantive law applicable, assuming the right was violated, Widow would recover damages for the nationwide broadcast even though the right does not exist in thirty-seven states. On the other hand, if the court deemed New York substantive law applicable, Widow would be denied recovery for the nationwide broadcast even though the right exists<sup>107</sup> in thirteen states. Neither result is proper.

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*Groucho Marx*, 689 F.2d at 319; *Factors*, 652 F.2d at 281; *Southeast Bank*, 66 N.Y.2d at 912, 489 N.E.2d at 745, 498 N.Y.S.2d at 776.

<sup>106</sup> Notwithstanding the various choice of law methodologies, in publication based torts, nationwide publication requires the application of the substantive laws of all 50 states. See *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956); *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir.) (discussed but not decided), cert. denied, 338 U.S. 858 (1949); *Kelly v. Loew's Inc.*, 76 F. Supp. 473, 482-83 (D. Mass. 1948) (discussed but not decided); *O'Reilly v. Curtis Publishing Co.*, 31 F. Supp. 364 (D. Mass. 1940). In practice, however, the applicable law will depend upon the forum's choice of law rules. As indicated earlier, because of the varying choice of law methodologies, even if application of the single publication law were limited to a rule of joinder, certain choice of law methodologies could result in the application of a single state's law to the entire action. See *supra* notes 24, 80.

<sup>107</sup> Assume for simplicity that where recognized, Widow could satisfy the requirements for violation of the right.

This hypothetical presents an extreme scenario<sup>108</sup> which clearly illustrates the problem of extending the single publication rule to choice of law. Regardless of the publication tort at issue, expansion of the single publication rule for choice of law purposes permits a court to apply the law of a single state nationally to determine all liability. So long as states have different substantive publication tort laws, all claims arising out of multistate publication should not be treated similarly.<sup>109</sup> Even if this is efficient and convenient, application of the law of a single state "is an improper intrusion on state sovereignty,"<sup>110</sup> and undermines the purpose of substantive law. Judicial convenience and efficiency should not be promoted at such great cost. While simplicity has virtue, it is not the underlying principle of a system of government.<sup>111</sup> "[T]he Constitution recognizes higher values than speed and efficiency."<sup>112</sup>

The application of the single publication rule to choice of law permits Widow, through careful selection of forum, to obtain application of a single, plaintiff oriented substantive law. The effect of such a national law is to encourage horizontal forum shopping.<sup>113</sup> While forum shopping may not always be bad, in this instance it produces arbitrary and unconstitutional results.<sup>114</sup>

<sup>108</sup> Unlike the right of publicity, which as a relatively new right is still developing and differs dramatically from state to state, most publication based tort rights have developed in many respects over time into substantially similar bodies of law. See *supra* notes 58, 65. Despite this convergence, states still recognize substantive differences. See Faucher, *supra* note 67, at 1052-53.

<sup>109</sup> See Sedler, *supra* note 85. When dealing with multistate securities transactions, cases have held that more than one state's blue sky laws can apply. See, e.g., *Simms Inv. Co. v. E.F. Hutton & Co.*, 699 F. Supp. 543, 545 (M.D.N.C. 1988); *Lintz v. Carey Manor, Ltd.*, 613 F. Supp. 543, 549-51 (W.D. Va. 1985).

<sup>110</sup> Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice without Gain*, 73 MARQ. L. REV. 76, 82 (1989).

<sup>111</sup> Sanford N. Caust-Ellenbogen, *False Conflicts and Interstate Preclusion: Moving Beyond a Wooden Reading of the Full Faith and Credit Statute*, 58 FORDHAM L. REV. 593, 652 (1990); see *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

<sup>112</sup> *Stanley*, 405 U.S. at 656.

<sup>113</sup> Horizontal forum shopping is choosing among state courts where the action may properly be filed; vertical forum shopping focuses on a choice between federal and state court. Professor Brown refers to these two kinds of forum shopping as state-state forum shopping and federal-state forum shopping, respectively. Brown, *supra* note 89, at 649.

<sup>114</sup> See Brown, *supra* note 89, at 649. "[F]orum shopping is not an evil per se. It is evil only if something evil flows from it." John Hart Ely, *The Irrepressible*

### III. THE CONCERNS

#### A. *The Analogy to Swift v. Tyson*

Expansion of the single publication rule to choice of law permits a state court, or a federal court sitting in diversity, judicially to create national law. Since only one state's substantive law will apply, plaintiffs have incentive to select a forum that will apply plaintiff oriented substantive law. To commence an action, plaintiffs must choose a forum. Many factors may influence this choice; however, concerns arise when the incentives to choose a forum go beyond issues of convenience to issues of state sovereignty and underlying fairness.<sup>115</sup>

These concerns are similar to those raised by the federal general common law created by *Swift v. Tyson*.<sup>116</sup> In *Swift*, the Supreme Court created a federal general common law in an attempt to establish a uniform national law for general, non-local issues. The issue in *Swift* was whether the plaintiff was a holder in due course.<sup>117</sup> In holding that plaintiff was a holder in due course, the Supreme Court ignored state court

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*Myth of Erie*, 87 HARV. L. REV. 693, 710 (1974). "Forum shopping is a natural and permissible activity of all shrewd litigants." Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 834 (1985).

However, forum shopping raises concerns. "The concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit." *Olmstead v. Anderson*, 400 N.W.2d 292, 303 (Mich. 1987). Forum shopping has derogatory connotations; however, it is just a label for selecting a forum, which is part of the process. All the same, the results of forum shopping are troublesome. Warner, *supra* note 26, at 23-25; *Forum Shopping*, *supra* note 88, at 1677-80. "[C]ourts should not permit their own processes to be turned into tools of injustice or used as a means of undermining constitutional values." John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 603 (1984).

<sup>115</sup> *Forum Shopping*, *supra* note 88, at 1684-89.

<sup>116</sup> 41 U.S. 1 (1842) (Section 34 of the Judiciary Act of 1789 was construed narrowly to exclude state judicial decisions, thereby permitting federal courts sitting in diversity to create a federal general common law.).

<sup>117</sup> If *Swift* qualified as a holder in due course, he took the negotiable draft free of any personal defenses Tyson might otherwise assert, and Tyson would have to pay the draft. However, if *Swift* did not qualify as a holder in due course, Tyson could assert his personal defenses, and would not have to pay the draft. Although in most jurisdictions *Swift* would have qualified as a holder in due course, under New York judicial decisions there was precedent to indicate a contrary result.

decisions and adopted a general common law that it envisioned would become uniform national law. Justice Story believed that creating a uniform national law, particularly in the commercial arena, would promote the goals of substantive law; in particular, it would permit a person in one state to know the ramifications of his actions in another state.<sup>118</sup>

Theory and practice, however, were not the same. Following *Swift*, the federal general common law developed in addition to, not instead of, state laws.<sup>119</sup> With two potential standards available, a plaintiff who could satisfy the requirement of diversity jurisdiction could, through careful forum selection, substantially determine the outcome of a case.<sup>120</sup> The ability to determine applicable substantive law based on where the suit was filed encouraged vertical forum shopping—choosing between federal and state court—and resulted in inequitable administration of law.<sup>121</sup> Although there is no precise definition

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<sup>118</sup> *Swift*, 41 U.S. at 19; see *infra* note 156 and accompanying text.

<sup>119</sup> "The underlying assumption of *Swift*, that there would someday be a uniform body of national substantive law, never materialized." Darrell N. Braman, Jr. & Mark D. Neumann, *The Still Unrepressed Myth of Erie*, 18 U. BALT. L. REV. 403, 407 (1989).

<sup>120</sup> See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

<sup>121</sup> *Black & White Taxicab* is the leading example. In the *Taxicab* case, Brown & Yellow, a Kentucky corporation, had contracted with the Louisville & Nashville Railroad Company for the exclusive right to operate at the Bowling Green station and wanted to enjoin Black & White, another Kentucky corporation, from infringing this right. Brown & Yellow recognized that Kentucky courts would, as a matter of judicial decision, find the agreement void and unenforceable. Therefore, to avoid application of Kentucky law, it reincorporated as a Tennessee corporation and filed suit in federal district court where Black & White was enjoined. The Supreme Court upheld the injunction on Black & White asserting that the federal court was not bound by the judicial decisions of the Kentucky court. Brown & Yellow, through manufactured diversity and careful forum selection, obtained application of plaintiff oriented law and, as a result, a plaintiff oriented outcome. Black & White was unable to comply with applicable substantive law as it could not ascertain whose substantive law was applicable. *Id.*

of inequitable administration of law, it has been described as inhibiting uniformity of law,<sup>122</sup> subverting predictability of substantive law<sup>123</sup> and undermining state sovereignty.<sup>124</sup>

In 1938 in *Erie Railroad v. Tompkins*,<sup>125</sup> the Supreme Court overruled *Swift*, holding that a federal court was not free to exercise its independent judgments as to what the substantive common law of a state is or should be.<sup>126</sup> After almost one hundred years, the Supreme Court denounced the federal general common law and held that a federal court sitting in diversity must apply the substantive law of the state in which it sits, regardless of whether the law was statutory or judge made.<sup>127</sup> Federal courts had no authority to create a national law. With the *Erie* decision, the Supreme Court promoted vertical uniformity. By insuring that the same substantive law would be applied regardless of whether the action was filed in state or federal court, the Court eliminated a substantial motivation for vertical forum shopping. The Supreme Court had no intention of eliminating forum selection between federal and state courts, just the particular instances where the fortuity of diversity permitted forum selection motivated only by issues which affect state sovereignty and underlying fairness.

Some commentators assert that in its effort to eliminate vertical forum shopping, the Supreme Court endorsed horizontal forum shopping.<sup>128</sup> This argument is untenable. *Erie* "is

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<sup>122</sup> The Supreme Court described this problem in *Erie Railroad v. Tompkins: Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

*Erie R.R. v. Tompkins*, 304 U.S. 64, 74-75 (1938).

<sup>123</sup> See *Black & White Taxicab*, 276 U.S. at 518.

<sup>124</sup> *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945).

<sup>125</sup> 304 U.S. 64 (1938).

<sup>126</sup> *Id.* at 78.

<sup>127</sup> *Id.* The decision was based on the Rules Decision Act of 1789, which required that, except for matters governed by federal law, the law to be applied in any case is the law of the state, including judicially created law. 28 U.S.C. § 1652 (1948).

<sup>128</sup> Gelfand & Abrams, *supra* note 91, at 955.

the gatekeeper of state law autonomy,"<sup>129</sup> "the very essence of our federalism."<sup>130</sup> There is no indication in the opinion that the elimination of vertical forum shopping was intended to endorse horizontal forum shopping. The issue of horizontal forum shopping was simply never raised in *Erie*.<sup>131</sup>

*Swift* permitted federal courts sitting in diversity actions to create a federal general common law. This in turn permitted plaintiffs to affect the outcome of their cases based on whether the suits were filed in state or federal court. Consequently, this encouraged vertical forum shopping and resulted in the inequitable administration of laws. Analogously, extension of the single publication rule to choice of law permits state courts, or federal courts sitting in diversity, to create a national law for each composite action. This permits plaintiffs to affect the outcome of their action based on the state in which it is filed. The result is to encourage horizontal forum shopping; and this is an instance where horizontal forum shopping fosters the inequitable administration of laws.

In *Erie*, the Supreme Court finally curtailed the creation of a federal general common law. Based on the same notions of state autonomy and federalism, the Supreme Court should stop state courts from creating a national law for publication based torts. If the fortuity of diversity jurisdiction no longer provides plaintiffs with an opportunity to select favorable law,<sup>132</sup> the fortuity of application of the single publication rule to multistate publication similarly should not provide plaintiffs with an opportunity to select favorable law.

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<sup>129</sup> Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1091 (1989).

<sup>130</sup> Ely, *supra* note 114, at 693, 695.

<sup>131</sup> See Henry J. Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 401 (1964). Despite the fact that the action was filed in federal district court in New York, there was no debate over which state's substantive law should apply. The issue was whether Pennsylvania common law, which deemed Tompkins a trespasser to whom Erie owed no duty of care, or general federal common law, which deemed Tompkins a licensee to whom Erie owed a duty of care, applied. *Erie*, 304 U.S. at 69-70.

<sup>132</sup> *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945) ("For the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.")

## B. *The Limits of Procedure*

Application of one law to determine all claims consolidated in a composite action is efficient and convenient. However, efficiency and convenience cannot be fostered in a vacuum.<sup>133</sup> So long as publication based torts are the subject of state law,<sup>134</sup> composite actions should not, as a matter of procedure, be determined pursuant to a single state's substantive law.<sup>135</sup> Procedure defines the process of litigation while substantive law defines the rights and duties of persons in relations with each other.<sup>136</sup>

Procedure, whether codified or common law, is intended to provide a convenient and practical process by which substantive law is administered.<sup>137</sup> Substantive law is intended to provide the guidelines that govern behavior by establishing standards by which disputes are resolved.<sup>138</sup> As Justice Holmes indicated in his famous article, *The Path of the Law*, law is a prediction of what the courts will do.<sup>139</sup> Procedure is

<sup>133</sup> See *supra* note 112 and accompanying text.

<sup>134</sup> See *infra* note 146 and accompanying text.

<sup>135</sup> Cray, *supra* note 1, at 31. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). As recognized earlier, some current choice of law methodologies could cause the same result; however, that is a separate issue.

<sup>136</sup> This distinction has been described as follows:

Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of Courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law regulates the conduct of affairs in the course of judicial proceedings; substantive law regulates the affairs controlled by such proceedings.

JOHN SALMOND, JURISPRUDENCE § 172 (9th ed. 1937); see JAMES ET AL., *supra* note 50, § 1.1.

<sup>137</sup> Substantive law defines the rights and duties of people in relation with each other; procedural law is intended to provide the means by which the substantive rights and duties are redressed and maintained. *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941).

<sup>138</sup> See *State ex rel. Blood v. Gibson Circuit Court*, 157 N.E.2d 475, 478 (Ind. 1959); D. Michael Risinger, "Substance" and "Procedure" revisited with some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumption," 30 UCLA L. REV. 189, 203 (1982) (stating "substantive law creates guides for behavior which may deter or restructure conduct which otherwise would give rise to the controversies the law would then be called upon to resolve").

<sup>139</sup> Resnick, *supra* note 101, at 845.

intended to administer substantive law fairly, efficiently, accurately and at a minimum cost.<sup>140</sup> Although the line between substance and procedure is sometimes hazy and may vary depending on the context,<sup>141</sup> it is clear that the purpose of procedure suggests limitations on procedural innovations.<sup>142</sup> The overriding purpose of procedure is to facilitate the administration of substantive law, not to supplant it or alter it.<sup>143</sup> Efficiency and convenience are not desired at the expense of substance.

If the rules of procedure are intended only to facilitate the administration of substantive law, a defendant need not know which procedural laws govern until faced with a particular action. However, if substantive law is to serve its deterrent purpose, a defendant must be able to ascertain the applicable law prior to acting.<sup>144</sup> Only with this prior knowledge can a

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<sup>140</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

<sup>141</sup> Risinger, *supra* note 138.

<sup>142</sup> Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 228 (1987).

<sup>143</sup> Although it furthers the goals of procedure, it does so at the expense of the purpose of procedure. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). "[R]ules of procedure exist to encourage compliance with substantive law and to resolve disputes about alleged substantive law violations. . . . [T]herefore . . . procedure shouldn't be used to ignore or amend substantive law." Matheson, *supra* note 142, at 228; see JAMES ET AL., *supra* note 50, § 1.1; SALMOND, *supra* note 136; Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 5 (1959) ("[P]rocedure exists only for the purpose of putting the substantive law effectively to work . . ."); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 734-36 (1975) ([P]rocedure should not be used to ignore or amend substantive law); Leubsdorf, *supra* note 114, at 603 ("[C]ourts should not permit their own processes to be turned into tools of injustice or means of undermining constitutional values.").

As an example, 28 U.S.C. § 2072(b) (1994) requires that procedural rules "shall not abridge, enlarge or modify any substantive right." Many states have similar state statutes. See, e.g., 42 PA. CONS. STAT. ANN. § 1722 (West 1982); ALA. CODE § 12-2-7 (Michie 1975); ARK. CODE ANN. § 16-11-302 (Michie 1987).

There are situations where substantive rights require the adoption of less than optimally efficient or convenient procedure, for example, the rules of testamentary privilege and the burdens of production and persuasion. See Risinger, *supra* note 138, at 206.

<sup>144</sup> For example, if plaintiff sues a publisher for libel, neither plaintiff nor defendant need know the particular rules for motion practice or discovery until the suit is filed. But, if a publisher is to be able to act in a manner as to avoid liability, it must be able to ascertain the rights and duties of the applicable laws of

prospective defendant assess the risks and benefits of any action and make informed decisions regarding that action. If a defendant is unable to ascertain the substantive law in advance, issues of fairness and economic efficiency arise. There is a significant cost to a defendant who faces unforeseen risks and cannot rationally plan action as applicable law is not known until plaintiff files suit.<sup>145</sup> At some point, the unforeseen risks could outweigh the expected benefit, and publishers would cease publication despite the attempt of some states to encourage publication through their substantive law.

Tort law in general, and publication based tort law in particular, are areas of substantive law which have historically fallen within the province of the states.<sup>146</sup> Each state creates its substantive law, judicially or legislatively, by balancing the competing interests involved.<sup>147</sup> It is not surprising that states differ on how to regulate conduct and allocate loss; different states have different constituencies.<sup>148</sup> As Justice Brandeis stated in *New State Ice Co. v. Liebmann*, there "must be power in the States . . . to remold through experimentation, our economic practices and institutions to meet changing social

libel prior to publishing.

<sup>145</sup> Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 12 (1991).

<sup>146</sup> Each state determines its own approach to tort issues. Vairo, *supra* note 29, at 172. Although the federal government could preempt state law in the publication tort arena, to date it has generally not done so. See *infra* Section IV.A.

As the Supreme Court recognized in *Erie*, the Constitution "[r]ecognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

With respect to publication based torts, see *Zacchini v. Scripps*, 433 U.S. 562, 578-79 (1977) (concluding that Ohio could, within the limitations provided by the Constitution, define its right of publicity). "[T]he right of publicity arises under state law, with each state free to prescribe its own substantive contours of the right." Cray, *supra* note 1, at 640.

<sup>147</sup> "[I]n the context of our federal system, each state is permitted to determine its own approach to tort issues." Vairo, *supra* note 29, at 172. "[S]tates have primary responsibility for developing legal rules that govern disputes between private persons and adjudicating such disputes in their courts." Sedler & Twerski, *supra* note 110.

<sup>148</sup> Sedler, *supra* note 85, at 1102. In exercising its power, states have adopted different tort rules. Sedler & Twerski, *supra* note 110, at 96-97.

and economic needs."<sup>149</sup> This is how law grows and changes. "[A] single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>150</sup>

When determining publication based rights, each state must balance the competing interests of freedom of expression with personal and commercial rights. In creating these rights, states make different judgments, and the result is different substantive laws.<sup>151</sup> As Justice Hughes indicated,

Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired results, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgement of the legislature.<sup>152</sup>

These judgments result in laws which appear similar, but often contain variations.<sup>153</sup> Some of these variations are subtle,<sup>154</sup> while others are more distinctive.<sup>155</sup>

Returning to the hypothetical, if Publisher of the infomercial could, prior to broadcast, ascertain the applicable substantive law, Publisher could make an ex-ante determination of the risks and benefits associated with a particular publication. If the risk of tort liability were high, Publisher could decide not to broadcast the infomercial at all or limit its broad-

<sup>149</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>150</sup> *Id.*

<sup>151</sup> Examples of areas where different judgments have resulted in different substantive law include abortion, sexual activity and the right to die. See Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life and the Right to Die*, 91 MICH. L. REV. 873, 873 (1993); Gottesman, *supra* note 145, at 2 ("the substantive laws of the various states have grown more divergent"); Kreimer, *supra* note 23, at 452-53.

<sup>152</sup> *Chicago, Burlington & Quincy R.R. Co. v. McQuire*, 219 U.S. 549, 569 (1911).

<sup>153</sup> John Cooper, *Defamation by Satellite*, 132 SOLIC. J. 1021 (1988); see Faucher, *supra* note 67, at 1052-53; Kreimer, *supra* note 23, at 452-53.

<sup>154</sup> See Pielemeier, *supra* note 23, at 384-91.

<sup>155</sup> For example, California statutorily recognizes a posthumous right of publicity. New York does not statutorily recognize such a right, though federal courts faced with the issue have stated that New York would recognize it despite the fact that the legislature has twice rejected such legislation. See *supra* note 98; see also Alan J. Hartwick, *The History of the Right of Publicity in New York, N.Y. L.J.*, Apr. 17, 1992, at 5; Leonard M. Marks & Robert P. Mulvey, *Celebrity Rights Law Needed in New York*, N.Y. L.J., Nov. 6, 1995, at 1.

cast accordingly. Alternatively, Publisher might decide that even if the law were unfavorable, the benefits of publishing outweigh the risk of liability. However, so long as courts create a national law for each composite action, Publisher cannot ascertain applicable law until Widow files suit. In this scenario Publisher cannot perform a rational economic analysis. As Professor Laycock stated, "People cannot obey the law unless they know it; they cannot know the law unless they know which law to learn."<sup>156</sup> If Publisher is to know which law governs its publication, it must be able to identify the governing law prior to publishing. Therefore, with respect to publication based torts, the single publication rule extended to choice of law nullifies the deterrent aspect of the law. When procedure extends to the point that it eviscerates substantive law, it must be reined in.

In addition to subverting Publisher's ability to plan rationally for any individual publication, application of the single publication rule to choice of law undermines uniformity of results. It is generally accepted that if a person commits the same action against the same person in the same state, absent a change of law, the result of the second litigation should be the same as the first. However, if Publisher republishes the same infomercial in the same places, the results will not necessarily be the same, even if the substantive law has remained unchanged. The national law created to adjudicate a composite action is likely to vary depending on the forum in which suit is filed.

For example, if Widow files suit against Publisher for the infomercial broadcast in a court that applies New York law, Publisher would not be liable. If Publisher subsequently rebroadcasts the infomercial, Widow, under the theory of republication, could file a second composite action for damages. In this second action, Widow, hopeful of a better result, would file suit in a different forum.<sup>157</sup> If the second court's single choice of law determination yields a different substantive law, for exam-

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<sup>156</sup> Laycock, *supra* note 23, at 319.

<sup>157</sup> There is no claim preclusion because this is a republication, which constitutes a new cause of action. 50 AM. JUR. 2D *Libel and Slander* § 260 (1995) ("Even in jurisdictions which recognize the single publication rule, . . . the publisher . . . is liable if he reprints it or publishes a new edition."). There may, however, be some issue preclusion.

ple California law,<sup>158</sup> Publisher would be held liable. Without any change in the law, Publisher would be left with conflicting determinations regarding broadcast of the same infomercial. This lack of uniformity leaves Publisher unable to predict the effect of its actions and to plan rationally. This result strips the substantive law of its deterrent purpose.

Supporters of the expansion of the rule for choice of law purposes might offer two arguments in rebuttal. First, a publisher could always assess the risks of a given publication using the "worst case scenario." A publisher is certainly able to determine all potential multistate contacts arising out of a publication and assess the risk based on the law of the state with the most stringent standard.<sup>159</sup> Second, the problem is with choice of law methodologies, not with expansion of the single publication rule. If the problem were caused solely by different states applying different choice of law methodologies, the solution would be the creation of a uniform choice of law or federal choice of law. Under either, the same state's substantive law would be applied regardless of where the suit was filed.

In response to the first of these arguments, forcing publishers to conform to the most restrictive standard, although possible, undermines "the political authority of more permissive states."<sup>160</sup> The economic cost could discourage dissemination of published materials<sup>161</sup> or even inhibit interstate publication altogether.<sup>162</sup> Regarding the second argument, while either uniform choice of law or federal choice of law would restore the deterrent characteristic of substantive law

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<sup>158</sup> It seems likely that plaintiff oriented law would apply in a second section as Widow's attorney, having comprehended the problem in the first suit, would take advantage of the current disarray in choice of law methodologies and choose a forum which would apply plaintiff oriented law.

<sup>159</sup> Ely, *supra* note 114, at 711-12 n.178.

<sup>160</sup> Laycock, *supra* note 23, at 319; *see supra* notes 146-152 and accompanying text.

<sup>161</sup> Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2137 (1991) ("[T]he parties cannot know what law governs their conduct until after they have acted. The resulting uncertainty is unfair, and it discourages desirable interstate activity.")

<sup>162</sup> This inhibition on interstate publication would arguably violate the dormant commerce clause as an unacceptable restraint on interstate commerce. *See Casanova Beverage Co. v. Commissioner of Pub. Safety*, 486 N.W.2d 448, 452 (Minn. Ct. App. 1992).

and resolve concerns relating to predictability and uniformity of results, it would not address the core issue, that is, the authority of a court, as a matter of procedure, to mischaracterize the multiple claims consolidated in a single action as a single claim. Regardless of which state's law the court applies, application of the rule for choice of law would, for procedural efficiency, result in application of a single state's law to publication which occurred in multiple states. In other words, application of the law of a single jurisdiction would still "ride roughshod over important federalism principles."<sup>163</sup>

### C. *Horizontal Federalism*

While a state may create its own tort law, there are limits on its authority to enforce these laws. When a state establishes a publication based right, the operation of that right is limited to intrastate publication; anything else exceeds the state's authority. Although limitations on state sovereignty are a fundamental premise of our system and are commonly accepted in the arena of criminal law, I stress it because courts appear to ignore them, particularly with respect to publication based torts.

States are co-equal sovereigns of equal dignity and authority,<sup>164</sup> each a territorially defined, semi-sovereign entity.<sup>165</sup> Within its boundaries, a state has plenary power to create law and determine issues not ceded to the federal government.<sup>166</sup>

<sup>163</sup> Sedler & Twerski, *supra* note 110, at 77.

<sup>164</sup> States are equal in "power, dignity and authority." *Coyle v. Smith*, 221 U.S. 559, 567 (1911). "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. . . . [T]he laws of one State have no operation outside of its territory . . . ." *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), *overruled by Shaffer v. Heitner*, 433 U.S. 186 (1977). "It remains well-established that a state's sovereignty over persons, property and activities extends only within the state's geographical borders and that therefore its laws have no operation in another state except as allowed by the other state . . . . This root principle is inherent in our system of federalism." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 941 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1103 (1995).

<sup>165</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 (1971).

<sup>166</sup> Limitations on state powers are the express terms or necessary implications of the Constitution. *See Baxter v. Waterville Sewerage Dist.*, 79 A.2d 585, 588 (Me. 1971). Powers not ceded to the federal government for uniform treatment pursuant to the Constitution are retained by the individual states. *See U.S. CONST.* art. I, § 8; *U.S. CONST.* amend. X. "[A]n essential element of state sover-

The corollary to semi-sovereignty is that in order to protect the sovereignty of sister states, the reach of each state's law is necessarily territorially limited. While a state may control events within a state's geographic boundaries, it cannot control events outside them.<sup>167</sup> In *Goldstein v. California*,<sup>168</sup> for instance, the court held that

a copyright granted by a particular State has effect only within its boundaries. If one State grants such protection, the interests of States which do not are not prejudiced since their citizens remain free to copy within their borders those works which may be protected elsewhere.<sup>169</sup>

Though a state may cede application of its own law in favor of another state's law,<sup>170</sup> it has no authority unilaterally to invade the sovereignty of a sister state.<sup>171</sup>

Territorialism is implicit in the Constitution. It arguably stems from the Full Faith and Credit Clause,<sup>172</sup> the Commerce Clause,<sup>173</sup> the Tenth Amendment,<sup>174</sup> or all three.<sup>175</sup>

eignty in the American constitutional system is the states' power to develop legal rules governing disputes between private persons and to adjudicate such disputes in their courts." Sedler, *supra* note 85, at 1088.

<sup>167</sup> "The Constitution was framed on the premise that each state's sovereignty over activities within its boundaries excluded the sovereignty of other states. The understanding that a citizen of one state venturing into another state would be bound by the local law of that other state motivated the adoption of article IV's privileges and immunities clause." Kreimer, *supra* note 23, at 464; see LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS (1991); Welkowitz, *supra* note 33, at 80. "[T]erritorial allocation of authority is too deeply embedded in our law to require justification. If territorial states are a bad idea, our laws must be amended to change the definitions as conceptions of states." Laycock, *supra* note 23, at 318. The exception is comity. A forum may elect to apply another state's law to intrastate activity. *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states."); see *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pennoyer*, 95 U.S. 714 (1877); *Lesnick*, 35 F.3d 939 (4th Cir. 1994); *Casbah Inc. v. Thone*, 651 F.2d 551, 564 n.19 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982) (advertising restrictions); *Bruce Church, Inc. v. United Farm Workers of Am., AFL-CIO*, 816 P.2d 919 (Ariz. Ct. App. 1991) (geographic overbreadth).

<sup>168</sup> 412 U.S. 546 (1973).

<sup>169</sup> *Id.* at 558.

<sup>170</sup> Comity is a courtesy extended when a sovereign defers to another jurisdiction. See *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>171</sup> A state's authority to apply its law is constitutionally limited. Brilmayer, *supra* note 151, at 877. The issue also arises in the context of multistate injunctions. See Welkowitz, *supra* note 33.

<sup>172</sup> U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1978).

<sup>173</sup> U.S. CONST. art. I, § 8.

Some claim it is inferred from the structure of the Constitution as a whole.<sup>176</sup> Regardless of its source, it is inherent in the foundation of our system of federalism.

Full faith and credit<sup>177</sup> is the primary mechanism preserving state sovereignty while preserving national unity.<sup>178</sup> It presupposes a territorially defined system of federalism.<sup>179</sup> A literal reading of full faith and credit requires a state to recognize the legislative acts of sister states, as well as their judicial proceedings.<sup>180</sup> In other words, when the substantive rights and liabilities recognized by each state differ, a court may not enforce the laws of the forum state when another state's law has authority to govern.<sup>181</sup> Although determining which state has the authority to govern may be unclear in some actions, with respect to primary conduct like publication, each state should be able to determine the consequences of publication within its own boundaries.

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<sup>176</sup> U.S. CONST. amend. X.

<sup>177</sup> Welkowitz, *supra* note 33, at 80.

<sup>178</sup> Laycock, *supra* note 23, at 318 ("The territorial allocation of authority is too deeply embedded in our law to require justification."); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987) ("[T]he extraterritoriality principle is not to be located in any particular clause. It is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole.")

<sup>179</sup> U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1994).

<sup>178</sup> "The purpose of full faith and credit was to change the status of states as independent foreign sovereigns and make them integral parts of a single nation." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935); *see* *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501-02 (1939).

<sup>179</sup> *See* Laycock, *supra* note 23, at 315-19; Regan, *supra* note 176, at 1894.

<sup>180</sup> *See* Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 12 (1945); James R. Pielemeier, *Why We Should Worry about Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299, 1301 (1987).

<sup>181</sup> "[T]he essence of the Full Faith and Credit Clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred." *First Nat'l Bank of Chicago v. United Air Lines*, 342 U.S. 396, 400 (1952); *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947). "In conflict of laws, 'state sovereignty' means restricting the opportunities of one state to disregard legitimate concerns of the others." Brilmayer & Lee, *supra* note 114, at 833. State substantive laws are expected to be different; therefore, it matters which law is chosen. Brilmayer & Lee, *supra* note 114, at 852. Full faith and credit is in essence a federal choice of law provision. Laycock, *supra* note 23.

Courts ignore this fundamental principle when they expand the single publication rule to choice of law. Contrary to the intent of full faith and credit, when a court mischaracterizes a composite action as a single claim and makes a single choice of law determination, it undermines all other states' ability to administer their substantive law. As the infomercial hypothetical illustrates, neither New York nor California should be allowed to impose its law to adjudicate what occurred within another state's boundaries. To do so would "unjustifiably intrude upon the state sovereignty which is so fundamental to the American constitutional system."<sup>182</sup>

While supporters of this extension of the single publication rule would argue that regardless of full faith and credit, the Supreme Court permits a court to apply any substantive law it deems proper so long as there is some relationship between the law and the claim such that the application of that law is not arbitrary or unfair,<sup>183</sup> that is not the issue being addressed here. The issue at hand precedes the choice of law determination. It is not what choice of law methodology to use, but whether multiple choice of law determinations are required in a composite action created by the single publication rule.

Here, the Supreme Court has imposed limits on a state's ability to apply forum law to all substantive rights joined in composite action. For example, in *Phillips Petroleum Company v. Shutts*,<sup>184</sup> a class action involving plaintiffs from fifty states adjudicating rights regarding royalty payments from land leases in eleven states, the Supreme Court held that application of Kansas law to determine liability for each member of the class would be arbitrary and fundamentally unfair because Kansas had no relationship with some class members other than the fact that the class action had been filed in Kansas.<sup>185</sup>

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<sup>182</sup> Sedler, *supra* note 85, at 1110. We should "categorically reject any proposition that seeks to have all claims determined by the "law of a single state." Sedler, *supra* note 85, at 1110.

<sup>183</sup> In *Allstate Ins. Co. v. Hague*, 449 U.S. 302, *reh'g denied*, 450 U.S. 971 (1981), a single incident action, the Supreme Court indicated its reluctance to impose serious restrictions on state choice of law rules when it permitted the application of Minnesota law. The case set the current standard, which permits the application of a state's law so long as it is "neither arbitrary nor fundamentally unfair." Whether *Allstate* was correctly decided has been widely debated.

<sup>184</sup> 472 U.S. 797 (1985).

<sup>185</sup> *Id.* at 822-23. In this class action suit, the Supreme Court held that, despite

A composite action arising out of nationwide publication is analogous to the *Shutts* class action. Although unlike the class action because there is only one plaintiff in the composite action, both the composite action and the class action are comprised of numerous substantive claims consolidated in a single action for procedural convenience.<sup>165</sup> Although packaged in a single action for judicial efficiency, the Supreme Court held that all land leases should not, as a matter of procedure, be deemed a single claim subject to a single choice of law determination. The Supreme Court encouraged the use of grouping and a choice of law determination for each group.<sup>167</sup> Similarly, nationwide publication should not be deemed to have a single publication with a single situs for choice of law.

Since *Shutts*, the question of whether a court may, as a matter of procedure, apply one law to multiple substantive claims has arisen in several cases. The answer has been a resounding no.<sup>168</sup> In *In re Rhone-Poulenc Rorer Inc.*,<sup>169</sup> which arose out of a nationwide class action by hemophiliacs infected with the AIDS virus against drug companies that manufacture blood solids, Judge Posner commended the district judge's certification of a class action with respect to particular issues as "an innovative procedure for streamlining adjudication"<sup>170</sup> in a mass tort action. Nonetheless, the certification was overturned. In this case, the district judge proposed that there would be a single trial before a single jury to determine the defendant blood manufacturers' negligence with respect to all members of the infected hemophiliac class. The single jury would be instructed in accordance with a single law. This law, in fact, would not be the law of any state, but rather an amal-

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the fact that the suit was filed there, the application of Kansas substantive law to each of the claims would violate the *Allstate* standard, as many parties had no contacts with Kansas.

<sup>165</sup> *Id.* at 822.

<sup>167</sup> *Id.*; MANUAL FOR COMPLEX LITIGATION § 30.15 (3d ed. 1995); see *supra* note 85.

<sup>168</sup> See *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), *rev'g* 160 F.R.D. 544 (E.D. La. 1995); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), *cert. granted*, *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

<sup>169</sup> 51 F.3d 1293 (7th Cir. 1995).

<sup>170</sup> *Id.* at 1297.

gamation of the various state standards. Despite the district judge's imaginative response to one of the serious challenges raised by complex litigation, the circuit court recognized that certification in this case would exceed "the bounds of allowable judicial discretion."<sup>191</sup> Even had the district judge indicated an intention to choose an existing negligence standard, the application of a single state's standard to these multistate claims would still be unacceptable.<sup>192</sup>

In *Castano v. American Tobacco Company*,<sup>193</sup> the district court certified a class of nicotine-dependent people in an action against tobacco companies on the issues of core liability and punitive damages. The circuit court reversed this certification, holding that the district court "failed to consider how variations in state law affect predominance and superiority . . . . In a multi-state class action, variations in state law may swamp any common issue and defeat predominance."<sup>194</sup>

Application of a single law in a composite action arising out of nationwide publication raises the same issues as the *Rhone-Poulenc* and *Castano* class actions. Although application of a single law is an imaginative response to the choice of law challenge raised in these composite actions, it exceeds the bounds of judicial discretion. There must be an individual choice of law analysis for each claim making up the composite action.<sup>195</sup>

#### IV. ALTERNATIVES TO EXTENDING THE SINGLE PUBLICATION RULE TO CHOICE OF LAW

If the use of the single publication rule for choice of law purposes is improper, the question of what courts should do about the choice of law dilemma that arises when dealing with

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<sup>191</sup> *Id.* at 1299.

<sup>192</sup> "The law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause, may . . . differ among the states . . . . The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch." *Id.* at 1301.

<sup>193</sup> *Castano v. American Tobacco Co.*, 84 F.2d 734 (5th Cir. 1996).

<sup>194</sup> *Id.* at 740, 741.

<sup>195</sup> See *Georgine v. Amchem*, 83 F.3d 610, 627 (3d Cir.) ("[B]ecause we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially."), *cert granted sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996).

publication based composite actions remains. Three alternatives exist: a federal substantive law; a uniform substantive law; and depechage. I concede, however, that none of the alternatives is ideal.

### A. *Federal Substantive Law*

Federal substantive law is the easiest answer, particularly for commercial publication based torts like the right of publicity. Creation of federal substantive law for multistate publication based torts would eliminate the choice of law question, and thereby eliminate the need to expand the single publication rule to choice of law. If there were only one applicable substantive law, courts would no longer face the daunting task of ascertaining and applying multiple substantive laws to multiple claims, and would cease to invade states' sovereignty. Federal substantive law would create predictable and uniform results in publication based tort actions. Prior to publication, publishers could ascertain the governing standard, and with that knowledge make informed business judgments about their actions.

Federal substantive law would not deprive states of the right to legislate publication based tort actions. While in multistate actions federal substantive law would trump state law,<sup>196</sup> state publication based tort law would still govern intrastate publication. Like state copyright law in *Goldstein v. California*, state publication based tort law would have limited application.<sup>197</sup>

If multistate publication based torts rise to the level of national concern, Congress has the authority to regulate the area under the Commerce Clause.<sup>193</sup> However, the cry for a federal substantive law for publication based torts has echoed for decades without result. In the 1950s, Professor Prosser advocated a federal substantive law for multistate defamation claims.<sup>199</sup> More recently, commentators have called for a federal substantive law to deal with multistate violation of the

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<sup>196</sup> U.S. CONST. art. IV, § 2.

<sup>197</sup> See *supra* notes 167-169 and accompanying text.

<sup>198</sup> U.S. CONST. art. I, § 8.

<sup>199</sup> See Prosser, *supra* note 2, at 992-1000.

rights of privacy and publicity.<sup>200</sup> Although the cry continues, Congress has not acted for a number of reasons. First, Congress seems hesitant to intrude in an area historically governed by state law. Second, reaching a political consensus on a single national standard would be a long and arduous road.<sup>201</sup> Third, this would bring multistate publication based torts within the realm of federal question jurisdiction, and potentially add more suits to the already burdened federal court system.<sup>202</sup>

Thus, although federal substantive law is clearly the simplest answer, the federal courts, under *Erie* and its progeny, have no authority to create it. Even though Congress arguably has the authority, it seems unwilling to create it. Therefore, at least for the time being,<sup>203</sup> a federal substantive law will not provide the answer to this dilemma.

### B. *Uniform State Law*

With a congressionally created federal substantive law unlikely, an alternative is for states to adopt uniform state law. If each state adopted the same substantive publication based tort law, there would be only one applicable standard

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<sup>200</sup> See Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 CARDOZO ARTS & ENT. L.J. 1 (1991); J. Steven Bingman, Comment, *A Descendible Right of Publicity: Has the Time Finally Come for a National Standard?*, 17 PEPP. L. REV. 933 (1990); Cray, *supra* note 1; J. Eugene Salmon, Jr., Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179 (1987).

<sup>201</sup> In discussing the creation of a federal choice of law code, the Complex Litigation Project stated "the most direct way to attempt to solve the issues posed [by complex litigation] would be to adopt national standards to govern the conduct of individuals or entities who are engaging in activity having interstate effects . . . . But the possibilities of reaching a political consensus on what the appropriate federal standard should be, as well as expecting Congress to intrude so directly into areas historically governed by state law, appear so slim . . . ." COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 305 (American Law Inst. ed., 1994).

<sup>202</sup> Though many of these cases are already filed in or removed to federal court under diversity jurisdiction, the long-range federal judiciary plan indicates increasing backlog, and Congress is not likely to add to it. See Henry J. Reske, *Long-Range Plan Would Cut Federal Cases*, A.B.A. J., Feb. 1995, at 22.

<sup>203</sup> Kramer, *supra* note 27, at 547.

regardless of where publication occurred. In other words, uniform state law would achieve the same results as federal substantive law.

Like a federal substantive law, a uniform state law would eliminate the benefits of horizontal forum shopping created by expanding the single publication rule to choice of law. If there were only one applicable standard, an opportunity to obtain more favorable law through careful forum selection would no longer exist. Additionally, as all states would have the same standard, there would be no infringement on state sovereignty. With a uniform law, there would be no need to make any choice of law determination, and courts would be spared the daunting burden of ascertaining and applying multiple standards in the composite action. Moreover, a single uniform standard would provide predictable and uniform results, and publishers would be able to ascertain the applicable standard prior to acting.

Unfortunately, with few exceptions,<sup>204</sup> uniform laws have not met with much success. While a uniform law of defamation exists,<sup>205</sup> states generally have not adopted it. Adoption of uniform laws is up to each state; there is no mechanism to force it.<sup>206</sup> Rather than accept the uniform standard, states seem content to continue to exercise their prerogative to balance the competing interests and establish their own laws. As for other publication based torts, no uniform law has yet been promulgated. On the whole, therefore, it does not seem that states are headed in the direction of adopting uniform state laws for publication based torts.

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<sup>204</sup> Uniform laws have been widely adopted in a few commercial areas, particularly the Uniform Commercial Code and Uniform Partnership Act.

<sup>205</sup> There is a uniform law for defamation. UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT OF 1993, 12 U.L.A. pamphlet 128 (1995).

<sup>206</sup> "[T]he [National Conference of Commissioners on Uniform State Law] has no ready ability to ensure that the laws it promulgates are enacted. Not only does the Conference lack legislative power, but it also does not draft its laws as the representative of a body that does." Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV 83, 92 (1993).

### C. *Depecege*

Uniform state law or federal substantive law would eliminate the choice of law issue, thereby negating the need to expand the single publication rule to choice of law. However, for the time being, neither is likely to occur. In the interim, the alternative to expanding the single publication rule to choice of law is depecege.

"Depecege refers to the process of cutting something into pieces. Here it refers to the process of cutting up a case into individual issues, each subject to a separate choice-of-law analysis."<sup>207</sup> Depecege "erects the framework under which different issues in a single case, arising out of a common nucleus of operative facts, may be decided according to the substantive law of different states."<sup>208</sup> Depecege is appropriate when it "(a) would result in the application to each issue of the rule of the state with the greatest concern in the determination of that issue, (b) would serve to effectuate the purpose of each of the rules applied, and (c) would not disappoint the expectations of the parties."<sup>209</sup> Initially, it was applied to distinguish between the law applicable to procedural issues and the law applicable to substantive issues. In recent years, depecege has gained acceptance in choice of law analysis.<sup>210</sup>

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<sup>207</sup> Ruiz v. Blentech Corp., 89 F.3d 320, 324 n.1 (7th Cir. 1996); see *supra* note 30.

<sup>208</sup> Putnam Resources v. Pateman, 958 F.2d 448, 465 (1st Cir. 1992).

<sup>209</sup> Reese, *supra* note 30, at 60.

<sup>210</sup> The concept of depecege was implicitly accepted in early choice of law theory as is evidenced by the concept of the preliminary question. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 7, 10 (1934). It has gained more express acceptance in many of the new choice of law methodologies. See C.L. Wilder, *Depecege in the Choice of Tort Law*, 41 CAL. L. REV. 329, 347 (1967) ("[A]ll agree that choice of law must be made on an issue-by-issue basis and that such choice need not be the same in every case."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971). The *Second Restatement* is issue-oriented; this means that different issues in a single case may be decided by different law. *Id.* § 145 cmt. d; see SCOLES & HAY, *supra* note 23, § 2.13; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.4 (3d ed. 1986). Some examples of current application include *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1304 (5th Cir. 1982) (laws of different states may apply to issues of liability and damages in one action); *Ardoyno v. Kyzar*, 426 F. Supp. 78, 82-83 & n.11 (E.D. La. 1976) (applied Louisiana law on the contract issue and Mississippi law on the slander issue); *Maryland Casualty Co. v. Jacek*, 156 F. Supp. 43, 44-46 (D.N.J. 1957) (applied New Jersey law on the contract issue and New York law on the auto insur-

For composite actions arising out of multistate publication, this means that each claim is one for which the court must make a choice of law determination. Of course, ascertaining and applying multiple substantive laws is exactly the scenario the courts sought to avoid when they expanded the single publication rule to choice of law in the first place. Courts believed that ascertaining and applying so many laws would be burdensome and unmanageable. While I will concede that this approach is more time consuming than the alternative, it is not unmanageable. "[W]hile the task may not be fun, it is . . . far from impossible."<sup>211</sup>

First, the court need not make a choice of law determination for every claim. Like class actions, where the court may create sub-classes based on common characteristics, the court may group claims into sub-groups based on similar multistate contacts.<sup>212</sup> Second, complex consolidated actions are not uncommon. Contemporary litigation practices have forced courts to develop procedural devices to deal with complex litigation.<sup>213</sup> For example, if the choice of law determination requires application of multiple substantive laws, and the court finds it difficult to ascertain the different standards, it has several options; it could request counsel research and present the law, refer the case to a special master, or refer the case to a court appointed expert.<sup>214</sup> Finally, with respect to jury trials, if the court believes the case to be excessively complicated or confusing, it can simplify the issues for the jury through the use of special verdicts.<sup>215</sup>

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ance claim); *Sabell v. Pacific Intermountain Express Co.*, 536 P.2d 1160, 1163-66 (Colo. Ct. App. 1975) (applied Iowa law to determine the standard of care and Colorado law on the issue of comparative negligence).

<sup>211</sup> *Kramer*, *supra* note 27, at 582.

<sup>212</sup> See *supra* note 85; MANUAL FOR COMPLEX LITIGATION, *supra* note 187, § 30.15.

<sup>213</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 187.

<sup>214</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 187, § 21.51.

<sup>215</sup> "Special verdicts . . . are commonly used in complex trials. . . . [T]hey help jurors organize their deliberations, simplify instructions, facilitate partial verdicts . . . ." MANUAL FOR COMPLEX LITIGATION, *supra* note 187, § 22.451.

## CONCLUSION

Perhaps the time has come to reassess our conceptions of state sovereignty.<sup>216</sup> In today's world of interstate and multistate activity, territorially defined states may no longer serve a valuable purpose. The state's role as experimenter may be obsolete. Alternatively, perhaps the time has come to substantively redefine publication based torts. The notion that each publication creates a separate cause of action may no longer be practical in today's world.<sup>217</sup> In fact, it may never have been practical in the United States.<sup>218</sup> If either of these reassessments occur, the need for the single publication rule might be totally eliminated. However, neither the demise of state sovereignty nor a redefinition of publication torts seems likely to occur anytime soon, and courts, as they lack the authority, should not unilaterally undertake the tasks.

Had the courts applied the single publication rule properly in the *Vanna White*, *Tom Waits* and *Bette Midler* right of publicity cases, these courts would have divided each composite action into sub-groups of claims. The division would have been based on the place of publication, as this was the only difference among the multiple claims. For each sub-group, the court would have performed a choice of law analysis and applied the resulting state's substantive law to determine liability.<sup>219</sup> Under different state laws, the right of publicity may not exist, the facts of these cases may not have violated the right of publicity, or damages may have been calculated differently. Therefore, under different state laws, the outcomes likely would have been different.

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<sup>216</sup> "If territorial states are a bad idea, our laws must be amended to change the definitions and conceptions of states." Laycock, *supra* note 23, at 318.

<sup>217</sup> "The magnitude of computer networks and the consequent communications possibilities were nonexistent at the time this [libel] statute was enacted. Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects . . ." *It's in the Cards, Inc. v. Fuschetto*, 535 N.W.2d 11, 14 (Wis. Ct. App. 1995).

<sup>218</sup> Publication based tort actions in England never raised the complications that multistate publication based tort actions in the United States raise. There is only one governing law in England, so the courts never face the issue of multiple governing substantive laws.

<sup>219</sup> California has implicitly adopted depeçage. See *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 167 (1980).

Colleagues have pointed out that even with proper application of the single publication rule, it is possible that only one state's substantive law would apply to all the claims.<sup>220</sup> I must concede that this is true. Under many current choice of law methodologies, the multistate nature of publication is disregarded in the choice of law analysis.<sup>221</sup> In other words, proper application of the rule would not be a panacea; it would not eliminate all horizontal forum shopping that affects state sovereignty and underlying fairness. Plaintiffs could still frustrate the underlying purpose of substantive law and horizontal federalism by choosing a forum that, through choice of law methodologies, would apply plaintiff oriented law. However, the fact that correcting one problem will not resolve all problems is not a valid reason to continue the status quo.

Consequently, after almost a century of experimentation, it is time to rein in courts' expansive uses of the single publication rule. The legal fiction is a definition of a transaction for publication based torts when determining the scope of an action—for preclusion and joinder. It is not a definition of a claim or issue for choice of law.

The threat of subsequent preclusion forces plaintiffs to consolidate all claims in a single action. The result is complex composite actions. While these actions may be unwieldy, that, in itself, is not justification to expand the legal fiction to choice of law. Courts must make the best of a less than ideal situation. Expanding the rule to choice of law exceeds the parameters of procedures—it changes substantive law. Courts “should not lightly alter the part[y’s] substantive rights in the name of convenience and economy.”<sup>222</sup> The single publication rule should create one action, not one law.

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<sup>220</sup> See *supra* note 91 and accompanying text.

<sup>221</sup> In particular, I refer to those states that apply the law of plaintiff's domicile in publication based torts.

<sup>222</sup> Kramer, *supra* note 27, at 581.

