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Abstract
This article is divided into three parts. In Part I, the article explores the notion that under the tort of appropriation, a person's name is understood to implicate critical aspects of her identity. This notion is explored in relation to specific historical cases raising the issues of whether a woman who adopts her husband's name has a property right in that name and whether a person who adopts a professional or stage name has separate rights in that name apart from his legal name. Second, Part II focuses on a person's right to maintain the integrity of his physical image. Finally, Part III examines one interest in his or her "aural image." The paper concludes with the observation that the courts are capable of accommodating society's flexible notions of identity, albeit in an occasionally non-democratic fashion.

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ARTICLES

WHAT'S IN A NAME? LAW'S IDENTITY UNDER THE TORT OF APPROPRIATION

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> "How lawyers talk about identity helps to constitute the identities of themselves and others. If we talk more explicitly about how we all negotiate identities and make choices amid the constraints of relationships with others and patterns of power, we may make room for discussion of what works for whom, and why."
>
> - *Martha Minow*[1]

INTRODUCTION

Lawyers frequently address the issue of identity. Understandings of identity inform myriad decisions, actions, and pronouncements wherever the law is found at work. Such understandings, however, are often implicit, or are articulated in a conclusive manner that presumes the identity at issue to be somehow natural, fixed, or otherwise "given." In either case, the conception of identity deployed by legal practitioners may mask or elide the complexities and nuances of identity at work in real people's lives. Law's "identity" thus conceived is one of limited potential and unrealized opportunities.

Heretofore, much discussion of law and identity has centered on issues of so-called "identity politics."[2] For more than forty years, "identity politics" has

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1. Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 130 (1991).

2. The literature on identity politics is vast and varied. For some representative and influential discussions by legal scholars, see AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielsen & Karen Engle eds., 1995) (hereinafter AFTER IDENTITY); CULTURAL PLURALISM,

informed movements for social justice grounded in struggles to force recognition and empowerment of previously stigmatized or excluded groups, such as African-Americans, women, Native Americans, and gays and lesbians.[3] In recent years, these movements have faced opposition from two quarters.

First, social-justice movements have encountered a backlash from the political right against legal consideration of any identity-based characteristics. This opposition is usually supported with such observations as "the law should be color blind," or "there should be no 'special preferences' for homosexuals."[4] On the other hand, the political left has criticized social-justice movements for validating classifications that both freeze identity and obscure the multiple associations and relationships that make up an individual's identity.[5]

Critics of identity as a legal category also assume that the concept of "identity" is somehow judicially unmanageable. The right argues that judges simply should not touch the issue for fear that judicial interference will somehow pollute the purity of a supposedly objective process of adjudication.[6] The left fears that judges will simply make a muddle of the matter, lacking the subtlety and sophistication to appreciate the dynamics of identity-formation as a social process.[7] Moderates posit the slippery-slope argument that expanding identity recognition beyond the historically accepted category of race would open the floodgates to recognizing identity groups without bounds.[8]

These different positions share the basic legal assumption that identity plays itself out as a legal construct primarily in the arena of equal protection. The very notion that "likes should be treated alike" is grounded in a designation of identity.[9] In contrast, I would like to engage in a program of identity-negotiation that approaches a definition of identity from a different angle. To begin what would almost certainly be a lengthy process of refocusing legal analysis, I concentrate on the tort of appropriation of identity, an area of the law that speaks explicitly, perhaps more so than any other area of law, to the issue of

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IDENTITY POLITICS, AND THE LAW (Austin Sarat & Thomas R. Kearns eds., 1999); MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997).

3. For a general discussion about the history of social movements since World War II, see AFTER IDENTITY, supra note 2, at *xiv*.

4. *See id.* (discussing types of opposition to identity-based characterization).

5. *See id.* (discussing reaction of political left to classification schemes).

6. *See generally* TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996) (discussing development of affirmative action and ways in which individuals' views of race and identity affect present state of affirmative action); PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE (1993) (examining how Americans come to grips with issue of race).

7. For a more comprehensive study of the dynamics of identity, race, and gender, see generally SHANE PHELAN, IDENTITY POLITICS: LESBIAN FEMINISM AND THE LIMITS OF COMMUNITY (1989); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

8. For a thoughtful discussion of this issue, see generally Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855.

9. For a more philosophical discussion of identity, see generally WILLIAM CONNOLY, IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX (1991).

recognizing, constructing, and valuing something it calls "identity."

The tort of appropriation is grounded in the common law right of privacy.[10] The tort proscribes the use, without consent, of a person's name or image for commercial gain.[11] Commodification—that is, rendering a person fungible or otherwise effacing, eliding or fragmenting identity—is a special concern in assessing the tort.[12] Such an appropriation and commodification of identity is considered a blow to a person's dignity, undermining the integrity of his or her self.[13]

Being grounded in privacy law, the policy behind the tort does not focus on the relational status of identity.[14] That is, it does not ask whether one person is being treated differently from another on the basis of some characteristic of identity. Rather, the tort addresses whether a person's identity is receiving appropriate respect and consideration.[15] An appropriation analysis articulates a substantive, rather than comparative, standard for the management of identity.[16]

The tort of appropriation originated from late-nineteenth-century legal doctrine. At that time, genteel elites applied the tort in an attempt to protect the upstanding bourgeois citizen and his family from perceived encroachments by the crass national market economy and the burgeoning tide of new immigrants.[17] It has persisted throughout the century as a basis for asserting personal dignitary interests implicated in protecting the integrity of one's identity.[18] Many states have enacted statutes that codify some form of the tort of appropriation, some of which allow recovery under both common and statutory law.[19]

For the purposes of this article, the tort of appropriation matters less as a substantive protection for particular privacy interests and more as a vehicle by which to explore and analyze how American courts have engaged directly with the legal management of something they recognize as identity. In this context,

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10. *See* Jonathan Kahn, *Enslaving the Image: The Origins of the Tort of Appropriation of Identity Reconsidered*, 2 LEGAL THEORY 301, 302 (1996) (observing that American legal system has recognized person's identity itself as something capable of being stolen).

11. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

12. *See Kahn, supra* note 10, at 320 (noting that commodification, which forces someone to enter world against his/her will, is greatest affront to human dignity because it renders fungible distinct part of individual's identity).

13. *See id.* at 302 n.5 (observing that tort of appropriation defines and recognizes identity itself as personal right involving individual's interest in maintaining integrity of one's identity).

14. *See id.* at 303 (noting that privacy law does not require that like identities be treated alike).

15. *Id.*

16. *See id.* (noting that tort of appropriation does not fall under rubric of equal protection, but rather is recognized as privacy principle).

17. *See id.* at 323 (commenting that appropriation of one's image for commercial purposes was affront because it represented forcible expansion of way of life that influential people in American legal community viewed with apprehension and disdain).

18. This emphasis on asserting personal dignitary interests distinguishes the right of privacy from its cousin, the right of publicity, which typically involves the property interest of a celebrity in controlling the commercial exploitation of her persona. *See id.* at 302 n.5 (observing that right of publicity is property right and law deals with person's image as tangible thing or fungible commodity).

19. *Id.* at 323.

courts have been talking about identity explicitly as a legal interest in a wide array of cases for nearly one hundred years.[20] The courts' discussions are not definitive, but they are illuminating. The discussions provide a useful and potentially powerful starting point from which to begin a systematic assessment of how the American legal system continues to recognize, construct, and value identity.

The resulting analysis reveals that under the jurisprudence of appropriation, identity, as defined under the law, has been articulated in a manner more open, fluid, and sensitive to social context than critics of identity politics have found under other legal regimes. The tort of appropriation provides a valuable resource insofar as it reveals a well-established tradition of managing identity in a non-essentialist manner. However, it must not be accepted uncritically as a model for further legal action. The courts' engagement of identity as a social and historical construct has not necessarily rendered the legal recognition of such conceptions of identity more democratic.

In particular, as appropriation acts to police the boundaries between the public and the private spheres, its application has often reflected and reinforced existing social hierarchies based on gender.[21] In practice, identity can never be a wholly unmarked or neutral category. Put another way, the ways in which identity is marked, elided, or taken for granted inevitably implicate existing networks of power and social meaning.[22]

Consequently, several of the cases examined below deal extensively with the gendered dynamics of court decisions involving women's identity-based claims.[23] These dynamics point out some dangers involved when law enters the realm of identity. Nonetheless, the courts' opinions in these cases also have value beyond their often disturbing and sometimes outrageous results.[24] Most importantly, the opinions reveal a tradition of managing identity by elaborating on models existing within the domain of established legal discourse in an effort to address the legal recognition, construction, and valuation of identity. By bringing that tradition to light, I intend to provide a new set of conceptual tools with which to engage in the ongoing process of negotiating and contesting law's definition of identity.

This Article is divided into three parts. In Part I, the Article discusses the notion that under the tort of appropriation, a person's name is understood to implicate critical aspects of her identity.[25] This notion is explored in relation to

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20. *See generally id.* at 304-06 (discussing historical development of tort of appropriation).

21. For a discussion of privacy, democracy, and discrimination, *see generally* Jean L. Cohen, *Democracy, Difference, and the Right of Privacy, in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL (Seyla Behabib ed., 1996); Anita Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441 (1990).

22. For a sample of the extensive feminist literature on these issues, *see generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

23. See *infra* Part I.A for a discussion of gender dynamics in court decisions.

24. See *infra* Part I.A for a discussion of analyses that may be rooted in gender.

25. See *infra* Part I for a discussion of the link between name and identity.

specific historical cases raising the issues of whether a woman who adopts her husband's name has a property right in that name and whether a person who adopts a professional or stage name has separate rights in that name apart from his legal name. Second, Part II focuses on a person's right to maintain the integrity of his physical image.[26] Finally, Part III examines ones interest in his or her "aural image."[27] The paper concludes with the observation that the courts are capable of accommodating society's flexible notions of identity, albeit in an occasionally non-democratic fashion.[28]

I. WHAT'S IN A NAME?

Claude Levi-Strauss has pointed out that "naming is a mode of classification, and that classification is a necessary precondition to possession."[29] Commenting on Levi-Strauss, anthropologist Anthony Cohen further notes that "his logic would lead us to the conclusion that naming is required for our society to possess a person, that is, to make the person a member."[30] In the law of privacy, as elaborated through the tort of appropriation, we see the state engaged in an ongoing process of defining and bounding the nature and status of names, and hence identity, in society.[31] This process implicates both individual autonomy and the state's powers of inclusion and exclusion.

At first glance, appropriating a name appears to be a cut-and-dried issue. A person has a name. Someone uses the name in an advertisement without consent to help sell a product. Under these circumstances, case law reveals that a tort has been committed.[32]

Names, however, can be tricky things. They can be elusive, even variable over time and place, as evidenced when a woman traditionally takes her husband's surname in marriage.[33] What precisely constitutes a name has also been a problematic distinction. Many people have nicknames, some more distinctive than others. In the case of George "Spanky" McFarland, for example, even the name of a fictional character may become so closely identified with the actor portraying him that the name of the fictional character, in effect, becomes another name for the actor.[34]

Consequently, control over one's name may involve not only determining

26. See *infra* Part II for a discussion of an individual's interest in protecting her physical image.

27. See *infra* Part III for a discussion of "aural images."

28. See *infra* Conclusion for a comment on the malleability of identity.

29. ANTHONY COHEN, SELF CONSCIOUSNESS: AN ALTERNATIVE ANTHROPOLOGY OF IDENTITY 72 (1994).

30. *Id.*

31. See *infra* Parts I.A and I.B.

32. *See, e.g.*, McFarland v. Miller, 14 F.3d 912, 920-21 (3d Cir. 1994) (holding that right to exploit value of fame belongs to individual associated with trait or character because right of publicity is property right based on identity of character or defining trait that becomes associated with individual when he or she gains fame or notoriety).

33. See *infra* Part I.A for a discussion of the appropriation of a woman's married name.

34. *See McFarland*, 14 F.3d at 920-21 (finding property right in identity of character associated with individual).

who uses it and how, but also control over the process of naming itself. Furthermore, this notion of control includes the power to claim a name as one's own or, alternatively, to disclaim a name. Each aspect of control implicates the law in the construction of the self.

A. Appropriation of a Woman's Married Name

The 1931 case of *Melvin v. Reid*[35] demonstrates that a person can have more than one name and that different names may reflect or even evoke different identities. Consider Melvin's situation: in 1925, the commercial film "The Red Kimono" was released.[36] It depicted the true story of a prostitute who had been tried and acquitted of murder in 1918.[37] The film used the true maiden name of the prostitute, Gabrielle Darley.[38] The real Darley had since married and taken her husband's name.[39] At the time of the film's release, she was going by her married name of Gabrielle Darley Melvin, having consciously shed her past identity as Gabrielle Darley, the prostitute acquitted of murder.[40]

Melvin sued for invasion of privacy.[41] The court found in Melvin's favor largely because it considered the use of her name as offensive to "right thinking members of society."[42] It was offensive because Darley had rehabilitated herself and adopted a new name and identity: Gabrielle Darley Melvin. The name "Gabrielle Darley" did not simply identify Melvin to her friends, it forced upon her an identity associated with that name which she had tried to shed. The film's use of the name Darley, then, constituted an oblique sort of appropriation: it deprived Melvin of her current identity by compelling her to become once again her former self, Gabrielle Darley.[43]

There was also a gender-based hierarchy of naming at work in *Melvin* that the court did not specifically discuss.[44] The plaintiff's identity as Melvin derived

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35. 297 P. 91 (Cal. 1931).

36. *Melvin*, 297 P. at 91.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Melvin*, 297 P. at 91. Melvin did not specifically allege "appropriation of identity" *per se*, but the gist of the action was that the film had used her true maiden name for a commercial purpose without her consent. *Id.* at 93-94.

42. *Id.* at 93. Many commentators, adopting Prosser's four-fold classification of privacy torts, have characterized Melvin's suit as involving public disclosure of private facts. *See, e.g.*, G. EDWARD WHITE, TORT LAW IN AMERICA 175 (1985) (classifying *Melvin* as example of unauthorized public disclosure of private information). Certainly, public disclosure was involved in *Melvin*. But the heart of Melvin's complaint and the basis of her sense of injury arose as well from the fact that the information disclosed related specifically to her past identity. The confusion arises, perhaps, from the tendency to conflate appropriation with publicity rights and focus on property-based injuries such as unjust enrichment. White, for example, likens appropriation to copyright. *Id.* at 174.

43. *Melvin*, 297 P. at 93.

44. Anita Allen and Erin Mack note that Melvin won in part because the court was paternalistically trying to protect highly gendered notions of "virtuous womanhood." Allen & Mack, *supra* note 21, at 470. I agree with their interpretation so far as it goes, but they do not discuss the

not only from her efforts at rehabilitation but also from her husband, whose name she took. At issue, therefore, was the power to fix—and to affix—Melvin's name.[45]

"Darley" and "Melvin" each signified something different about the subject: "Darley" signified her notorious life as a prostitute; "Melvin" signified her rehabilitated status as Melvin's wife. "Right thinking members of society" might thereby see that the film soiled the identity not only of a penitent woman, but also of her husband and the institution of marriage through which she had rehabilitated her identity.[46] In the eyes of the court, her married name may have carried more value than her maiden name because it was derived from and subordinated to her husband.[47] By resurrecting her maiden name, the film threatened to invert this hierarchy by wresting control over her identity from her husband.

The relationship between name and identity in Melvin's case is strong. Anthony Giddens defines self-identity as "the self as reflexively understood by the person in terms of his biography."[48] He goes on to observe that "a person's name . . . is a primary element in his biography."[49] Biography is a narrative concept and Giddens marks identity, in turn, as "the capacity to keep a particular narrative going."[50] Appropriation of Melvin's name affronted her individual self-identity insofar as it disrupted the coherence and integrity of her biography—her ability to determine which identity she would claim and at what time.

However, recalling Cohen's remark that naming is also a mark of social possession,[51] we see that the movie also affronted society by undermining the community's claim to name Melvin as a member in good standing. The "Red Kimono," in effect, took Melvin, via her name, out of her community and into the market. This type of naming did not confer social standing so much as it established commodity value. It thereby threatened to subvert socialization by supplanting local norms with market forces as the means for incorporating individuals into the community. In granting Melvin's claim, therefore, the court was not only vindicating her self-identity, but it was also reestablishing community control over the terms of her social membership.

At an intermediate level, the movie also interfered with the husband's ability to "possess" his wife by controlling her name. Thus, while Melvin succeeded in her suit to control her name, her victory also vindicated and reinforced the hierarchy of traditional marriage. The court here recognized

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issue of naming as a social process.

45. *Melvin*, 297 P. at 93.

46. *Id.*

47. *Id.*

48. ANTHONY GIDDENS, MODERNITY AND SELF IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE 53 (1991).

49. *Id.* at 55.

50. *Id.* at 54.

51. COHEN, *supra* note 29, at 72.

identity as fluid, situated in time and space and constructed through varied social practices.[52] On the one hand, these social practices served to maintain a space beyond the reach of commodifying market forces; on the other hand, they reinforced hierarchies of the traditional "private sphere."[53]

The variability of names and the gendered dynamics of some naming processes are especially apparent in a pair of cases involving wives who sued their husbands' mistresses for appropriating the wives' married names. Where *Melvin* involved the power to assign two different names to the same woman, these cases each involved two womens' claims to the same name.[54] In an 1896 case, Anna Hodecker sued Emma Stricker for appropriating her name.[55] Hodecker's complaint alleged that Stricker was then living with her husband, Frederick Hodecker, "in relations immoral and meretricious," and holding herself out to be his wife.[56] Stricker, however, did not call herself "Anna" Hodecker; rather she assumed the name "Mrs." Hodecker,[57] presumably with Frederick's consent.

Nonetheless, Anna Hodecker found the appropriation of the name and status of Mrs. Hodecker to be deeply injurious.[58] As the New York Supreme Court noted, Anna Hodecker argued that "the assumption by the defendant of the name of Hodecker is an assault upon the identity and individuality of the plaintiff. . . ."[59] She sought damages of $10,000 and an injunction against Emma Stricker's use of the name.[60]

This was a case of first impression. The court acknowledged that the claim was not based on libel or slander but rather on the alleged appropriation of the plaintiff's name.[61] However, it dismissed dignitary concerns, asserting that Stricker's actions degraded no one but herself.[62] Ultimately, the court held for the defendant using a narrow, property-based analysis of the interests involved.[63]

The court found it "difficult" to see an invasion of any "proprietary right or interest" of the plaintiff because Stricker did not "seek to personate"

52. *See Melvin*, 297 P. at 93 (noting that Melvin had transformed her identity eight years prior to production of movie, thus completely changing her way of life and finding new role and place in society).

53. *See id.* (discussing how major objective of society is to rehabilitate the "fallen" rather than tear them down).

54. *See* Baumann v. Baumann, 165 N.E. 819, 820 (N.Y. 1929) (concerning two women's legal battle for same name); Hodecker v. Stricker, 39 N.Y.S. 515, 517 (N.Y. Sup. Ct. 1896) (involving two women's claims to same name).

55. *Hodecker*, 39 N.Y.S. at 515.

56. *Id.*

57. *Id.* at 516.

58. *Id.* at 515.

59. *Id.* at 517.

60. *Hodecker*, 39 N.Y.S. at 515.

61. *Id.* at 516.

62. *Id.*

63. *Id.* at 517-18.

Hodecker.[64] It focused instead on "[t]he possibility that others may be misled by the assumed relation of the defendant to [Frederick] Hodecker" which, it asserted, did not concern Anna Hodecker "unless by that means some of her property rights or interests may be brought in question."[65] With no precedent to draw upon, the court simply reduced Anna Hodecker's novel claims of injured identity to the widely recognized property-based interest in reputation.[66]

Warren and Brandeis' landmark article arguing for the validity of a free-standing right to privacy[67] was only six years old at this time and its reasoning had not yet been adopted by any court. The *Hodecker* court concluded that "[t]he question of the identity of the plaintiff as the wife of Hodecker ... is merely a social one."[68] Most telling, perhaps, was the court's suggestion to Anna Hodecker that her best remedy lay in dissolving the marriage.[69]

In declaring the question of identity to be "social," the court was trying to maintain a boundary between the legal and social regulation of propriety. In stark contrast to Warren and Brandeis, who articulated the right of privacy out of a perceived need to use the law to manage the encroachments of modernity,[70] the court in *Hodecker v. Stricker* did not think it necessary to invoke the power of the state to protect the interests of identity. Significantly, Stricker was not seeking to commodify Hodecker's identity or otherwise subject it to market forces. Nor was Hodecker the subject of an aggressive, scandal-mongering press. The *Hodecker* court, perhaps, would therefore have seen little need to invoke the countervailing power of the state to protect the individual from the ravages of modern institutions.

Anna Hodecker was, however, subject to the whims and indiscretions of her husband, and here the court had no desire to intrude.[71] Indeed, the patriarchal family was perhaps the archetypal institution of the bourgeois society which men such as Warren and Brandeis sought to protect. In declaring that the name "Mrs. Hodecker" did not necessarily refer to Anna Hodecker, the court denied Anna any control over her identity as Frederick's wife. Rather, the court implicitly granted control over the status and identity of "Mrs. Hodecker" to Frederick.

Although the suit was against Emma Stricker, Anna's claim really implicated Frederick's power to grant the name "Mrs. Hodecker" to whomever

64. *Id.* at 517.

65. *Hodecker*, 39 N.Y.S. at 517-18.

66. *See id.* at 516 (noting cause of action rests solely on fact that defendant wrongfully appropriated Mrs. Hodecker's name).

67. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

68. *See Hodecker*, 39 N.Y.S. at 518 (noting matters in complaint presented moral questions not to be handled by judiciary).

69. *Id.* at 516.

70. *See* Kahn, *supra* note 10, at 303 (discussing article by Warren and Brandeis). For further commentary on the historical roots of privacy law, see *supra* note 16 and accompanying text.

71. *See Hodecker*, 39 N.Y.S. at 518 (holding facts alleged in complaint did not support cause of action).

he chose.[72] The court refused to challenge the husband's power over his wife's identity. Instead, it crassly proposed to Anna Hodecker that she get a divorce.[73] In other words, the court suggested that if Anna was offended by the appropriation of this particular aspect of her identity, she should simply surrender it so she would no longer be disturbed by the affiliation.[74] The court effectively forced Anna to cede control to her husband of all aspects of her identity which derived from the marital relationship.[75] If the *Hodecker* court manifested any concern for "privacy," it was as a means of reinforcing the private domestic sphere as an arena of unchallenged patriarchal authority.

More than thirty years later, another court reached a similar result in the New York case of *Baumann v. Baumann*.[76] With facts similar to those in *Hodecker*, *Baumann* involved a suit by Berenice Baumann against her husband, Charles, and a woman who was living with him and holding herself out to be "Mrs. Baumann."[77] A lower court granted a broad injunction that, *inter alia*, prohibited the defendants from representing that they were married or that Charles was divorced from Berenice.[78]

The New York State Appellate Court found that such an action lacked merit under the facts of the case and modified the lower court's judgment by striking the injunction.[79] The court reached its conclusion largely by distinguishing between the name "Mrs. Charles Ludwig Baumann" and "Mrs. Berenice L. Baumann."[80] It reasoned that there was no appropriation or impersonation because the defendant had not used the latter name, "Mrs. Berenice L. Baumann."[81]

Unlike *Hodecker*, there was a strong dissent in *Baumann* that argued for Berenice Baumann's right to control her identity:

> Her married name is Mrs. Charles Ludwig Baumann; there is no other such person living. She is known throughout New York in the circle in which she lives by this name. It is more than a name; it is a position, a status, a condition, a relationship, a capacity. A name may mean very little, but the status and relationship which it indicates may mean a great deal, not only to the parties, but to the world.[82]

The dissent concluded that the defendant had "usurped the status, the relationship before the public, which belongs to the plaintiff."[83] In 1932, the

72. *Id.*
73. *Id.* at 516.
74. *Id.* at 518.
75. *Id.*
76. 165 N.E. 819 (N.Y. 1929).
77. *Baumann*, 165 N.E. at 820.
78. *Id.*
79. *Id.* at 822.
80. *Id.* at 821.
81. *Id.*
82. *Baumann*, 165 N.E. at 822 (Crane, J., dissenting).
83. *Id.*

scholar Leon Green[84] seconded this dissenting opinion, asserting that the majority "failed utterly to analyze either the interest involved or the hurt done such interest," which he characterized as Baumann's stake in her "marital personality."[85]

Baumann revolved around the problems presented by the recognition that one person can have multiple names, and one name can be claimed by many persons. The majority and the dissent in *Baumann* were essentially arguing over who had the right to control the identity and status conferred by the name "Mrs. Charles Ludwig Baumann."[86] The dissent took a more contextual approach to the problem, focusing on the actual practices involved in using the name and the effects they had upon the plaintiff.[87] It legitimated the plaintiff's own claimed relation to the name by situating Berenice Baumann within her social circle.[88] Social recognition confirmed her claim to her name and established that, as a practical matter, the defendant's use of the name "Mrs. Charles Ludwig Baumann" implicated Berenice's identity.[89]

The majority took a more rigid approach, divorcing, if you will, the name "Mrs. Charles Ludwig Baumann" from "Mrs. Berenice L. Baumann."[90] It made Mr. Baumann the source or "author" of the name "Mrs. Charles Ludwig Baumann."[91] As in *Hodecker*, the court denied the wife any claim to joint authorship.[92] The implication is that although the plaintiff may have controlled the name Berenice Baumann, or, as in *Hodecker*, her maiden name, the fact that she identified herself as "Mrs. Charles Ludwig Baumann" granted her no claim to control the use of that name. Therefore, under the majority's decision, Berenice indirectly became Charles' creation *and* possession to the extent that she derived her status or identity from being "Mrs. Charles Ludwig Baumann." Once again, the court subordinated names that invoke the status and identity of "wife," and the women who claim those names, to their husbands.

The period between *Hodecker*, in 1896, and *Baumann*, in 1929, saw some significant though problematic extensions of legal protections for women. From the paternalistic, protective labor legislation affirmed by the Supreme Court in *Muller v. Oregon*[93] to the achievement of women's suffrage, the legal status of women in the market and in political life improved markedly.[94] However,

84. *See* WHITE, *supra* note 42, at 76 (dubbing Leon Green "the most influential Realist tort theoretician of the early twentieth century").

85. Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 251 (1932).

86. *Baumann*, 165 N.E. at 819-22 (Crane, J., dissenting).

87. *Id.* at 822.

88. *Id.*

89. *Id.*

90. *Id.* at 821.

91. *Baumann*, 165 N.E. at 821 (Crane, J., dissenting).

92. *Id.* at 822.

93. *See* Muller v. Oregon, 208 U.S. 412, 423 (1908) (affirming decision that state legislation requiring woman employed in laundromat to work more than ten hours daily is unconstitutional).

94. *See generally* JOAN HOFF, LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 192-230 (1991) (noting that legal status of women has changed dramatically during the past

despite the well-intentioned dissent in *Baumann*, little seemed to change regarding married women's legal power to control their identities independently of their husbands.

This complex matter is not easily disposed of with a crude declaration that a sexist legal system declared wives to be the property of their husbands. The issue was not simply control over the physical body or property of the woman. Rather, the law concerned the status of a married woman as an author of one of her own names, implicating her power to control important parts of her identity. The harm to Anna Hodecker and to Berenice Baumann was not physical or monetary. In their cases, the courts amputated part of their identity and gave it to their husbands to do with as they willed.

Two authors, Rosemary Coombe and Michael Madow, each engage problems related to the legal attribution of authorship of names and images.[95] Their analyses focus on property-based rights of publicity but are nonetheless illuminating in the context of privacy-based actions for appropriation of identity—not least because the two interests are so often conflated or confounded by the courts. Coombe and Madow criticize the courts' understanding of the right of publicity for failing to recognize the ways in which celebrity names and images are jointly authored. They argue against monopoly control over the economic value of celebrity, in part because the celebrity's identity is created by a wide variety of people ranging from professional publicists to the audience itself.[96]

In stark contrast to the courts in *Hodecker* and *Baumann*, Coombe and Madow urge that no one person should be given control over an identity with multiple authors.[97] As applied to *Hodecker* and *Baumann*, Coombe and Madow's approach might undermine the patriarchal authority of the husband over his wife's name. Otherwise, however, their approach would afford little relief to the likes of Anna Hodecker or Berenice Baumann, who still could not reclaim their identities.

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quarter-century and white women have received many individual equal rights which men have enjoyed for almost two hundred years); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983) (arguing that dichotomy between market and family has limited effectiveness of social reforms aimed at improving lives of women in American society).

95. Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 368-71 (1992) (discussing value of celebrity image); Michael Madow, *Private Ownership of Public Image*, 81 CAL. L. REV. 127, 134-38, 179-86 (1993) (discussing and dismissing traditional arguments in favor of right of publicity).

96. *See* Coombe, *supra* note 95, at 368-71 (questioning amount of value added to celebrity's name by star's own efforts); Madow, *supra* note 95, at 136 (arguing against McCarthy's view that it is "commonsensical" that celebrities should have exclusive control over commercial use of their identities). Coombe and Madow's reasoning may be extended beyond celebrity because, of course, *all* identities are multiply authored in the sense that they are the product of interaction with history and society.

97. *See* Coombe, *supra* note 95, at 370 (commenting that star image "is authored by multitudes of persons engaged in diverse activities"); Madow, *supra* note 95, at 184 (discussing argument that market value is socially created phenomenon).

The problem is that Coombe and Madow focus on the property-based aspects of identity and overlook the fact that identity may also embody an investment of non-fungible aspects of the self.[98] To a certain degree, *all* identities are multiply authored, but that does not mean that each author's claim to control over identity is equal, particularly when it comes to the non-fungible personal aspects of identity. In this realm, claims must be weighed according to the degree to which an author's self is bound up with the name or image created. Anna Hodecker and Berenice Baumann jointly authored their identity as wives with their husbands. However, the appellation of "Mrs." applied specifically to them. Because its use evoked their selves first and foremost, their privacy-based claims of appropriation should carry greater weight than those of their husbands or their husbands' mistresses.

A 1946 Oklahoma case provides an interesting twist on the issue of control over the use of the appellation "Mrs." In *Bartholomew v. Workman*,[99] George Workman, Jr., a minor, together with his mother Pearl Ethyle Daglish, sued for an injunction to keep Maybelle Bartholomew from listing her phone number in the phone book under the name "Mrs. George Workman."[100] Such a listing might have been perceived as referring to George, Jr.

The boy's father, George Workman, Sr., had died some time before and Maybelle claimed to be his widow.[101] The trial court granted the injunction but the decision was reversed on appeal.[102] The appellate court found no cause of action due to the absence of any showing of peculiar damages or invasion of any privacy rights of the minor, George, Jr.[103] In the course of its opinion, the court cited both *Baumann* and *Hodecker* with approval.[104] Whether or not Maybelle Bartholomew actually had been married to George, Sr. was not crucial to the decision because the court concluded that "[t]here is no other woman having the right to use the name of Mrs. George A. Workman."[105]

The *Bartholomew* court was looking for infringements on tangible, material interests.[106] Applying an analysis based on the law of defamation, the court found no cause of action because there was no allegation that the plaintiff was "damaged in his character or reputation."[107] The court ignored George, Jr.'s privacy-based claim of mental anguish caused by the confusion of his name with

98. *See* Coombe, *supra* note 95, at 370 (implying that artists are not exclusive creators of their images); Madow, *supra* note 95, at 191 (observing that, for example, "[Albert] Einstein was certainly a participant of sorts" in creating his public image, "but he was not the sole and sovereign author of his public image").

99. 169 P.2d 1012 (Okla. 1946).

100. *Bartholomew*, 169 P.2d at 1013.

101. *Id.*

102. *Id.*

103. *Id.* at 1012.

104. *Id.* at 1013-14.

105. *Bartholomew*, 169 P.2d at 1014.

106. *Id.*

107. *Id.*

that used by Maybelle in the phone book.[108]

Implicit in George, Jr.'s complaint is the notion that after his father died he, George, Jr., effectively became "George Workman." If that were so, then Maybelle appropriated a name and status that he believed he should control. Perhaps more than a bit of Oedipal ambition was at work in the child's attempt to take his father's place. George, Jr., however, did not want his father's wife, only his name; or rather, he wanted his own name to eclipse, subsume, or perhaps break free of that of his dead father.

However, in this case the name was the means by which Maybelle was designated as George, Sr.'s wife. Therefore, claiming the name directly implicated the father's power to control that designation. Even from beyond the grave, the father's power here remained paramount over his former wife or minor child.

The court's treatment of the facts of the case indicate that there may have been a moral evaluation of the parties implicit in the court's decision. In reviewing the facts, the court noted that Pearl married George, Sr., on September 9, 1932.[109] George, Jr., was born only *six* months later, on March 21, 1933.[110] They were divorced in 1936.[111] Pearl then married Daglish and subsequently divorced him.[112] She was unmarried when she brought the suit together with her son.[113]

The careful attention paid to dates of birth and marital status of the plaintiffs was not necessary to support the reasoning by which the court reached its conclusions. Rather, it seems to serve no purpose other than to contextualize the plaintiffs' lives for moral appraisal. The court may have dismissed the claims of mental anguish simply because it did not believe these to be the type of plaintiffs who deserved to have their sensibilities protected.

The focus on Pearl's shifting marital status implies that the court perceived in her a moral laxity and disregard for the sanctity of marriage, an impression reinforced by the unstated allusion to the fact that George, Jr., was conceived outside the bounds of holy matrimony. Moreover, Pearl was a single woman twice divorced at the time of the suit, unable even to bring the status of a second husband to bear on her side.[114] In short, in the eyes of the court the plaintiffs appear to have been a morally deficient woman and her almost-bastard child trying to claim a patrimony they did not deserve. The court therefore denied them the status of author of the name "Mrs. George A. Workman," effectively letting it enter the public domain.[115]

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108. *Id.* at 1013.

109. *Id.*

110. *Bartholomew*, 169 P.2d at 1013.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Bartholomew*, 169 P.2d at 1015.

In contrast, the 1941 decision in *Nebb v. Bell*[116] recognizes the possibility of dual authorship where names coincide. In *Nebb*, a comic strip had main characters named "Mr. and Mrs. Rudy Nebb." A real Mr. and Mrs. Rudy Nebb sued under the New York privacy statute but lost when the court found no cause of action, holding that the reference to the plaintiffs amounted to a mere coincidence. Interpreting the privacy statute, the court found that:

> the words "his name" . . . appl[ies] to the use of a name coupled with circumstances tending to refer to the plaintiff and not to a mere similarity of names. Neither the use of another's name, which has acquired an unique significance or secondary meaning in a certain field, nor the trading upon the reputation of another, is involved here.[117]

In this very common sense interpretation of the statute, the court articulated the difference between the form and substance of the name: the same sign may signify different things in different contexts. The mere form of the name "Mr. and Mrs. Rudy Nebb" was not sufficient to capture a part of the identity of these particular Nebbs. The form of the name became invested with the identity of a subject only through its operation within social context and practice.

This is all well and good, but what of the "real" Mr. and Mrs. Rudy Nebb? Did they suffer no harm at all? Was no part of their identity whatsoever implicated by the use of their full name in the comic strip? Clearly they thought so, and their sense of injury deserves to be taken seriously. The real Nebbs were invested in their name as much as any other person. But any name may, in effect, have both fungible and non-fungible attributes.

The court implicitly held that the comic strip's use of the name "Nebb" implicated only the generic, fungible attributes of the name—the parts that were not associated with any real person. To the extent that the comic strip did implicate the real Nebbs' distinctive non-fungible identity, it apparently did so to such a small degree as to constitute a negligible harm in the eyes of the court. The degree of investment of the self in a name, therefore, was not wholly a subjective matter. Rather, it was determined as well by reference to community standards and understandings of the appropriate relation between self and name in any given context.

B. Legal Name v. Professional or Stage Name

Where the cases of *Hodecker*, *Baumann*, and *Workman* involved the right to claim a name, the case of Claire Davis, a psychic who practiced under the professional name "Casandra," turned on the question of what constituted a name before the law in the first place.[118] Davis sued RKO Pictures in 1936 over its use in a movie of a psychic character named "Countess Casandra."[119] The

116. 41 F. Supp. 929 (S.D.N.Y. 1941).

117. *Nebb*, 41 F. Supp. at 930.

118. Davis v. R.K.O. Radio Pictures, 16 F. Supp. 195 (S.D.N.Y. 1936).

119. *Id.* at 195.

court had little difficulty in finding no cause of action under the New York Civil Rights Statute, which codified the right to privacy, because it applied only to "legal names" and not to stage or assumed names.[120] In the course of its opinion, the court defined a legal name as one which "consists of a given name or one given by his parents and a surname or family name, the name descending to him from them."[121] The court concluded that "Casandra" was not the plaintiff's real name because she merely took it on as part of the promotion of her trade.[122]

The court's decision sounds reasonable enough. However, this aura of reasonableness exists precisely because the court is using a history and tradition of dominant social practices to bound the concept of what constitutes a name. Under the court's reasoning, the concept of "name" does not reach to encompass everything a person—or even a group—might want it to mean.

In Davis's case, we see the court enforcing the state's right to designate certain naming practices as normative. Implicit in its reasoning is not only Anthony Cohen's idea that a society possesses a person through naming, but also the notion that society possesses the power to define the value and status of naming practices. Davis was denied legal recognition of her power to name herself because her practice departed from established social norms of naming. She might be granted legal "possession" of the name Claire Davis but she had no legal claim to own the name Casandra.[123]

Significantly, the particular naming practices the court identified as normative derive largely from non- or extra-market processes based largely in traditional family life. True names were given by parents—last names, of course, by fathers—not bought or sold.[124] They were not market-alienable but rather descended along familial lines as gifts given from father to child.[125] Davis, in contrast, took on the name Casandra for market purposes of promoting her trade.[126] The court, therefore, did not consider her investment in her name to be truly personal.[127] Hence, RKO's use of it did not harm her.[128] Moreover, in naming herself, Davis may have been seen to be usurping the prerogative of the male head-of-household.[129]

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120. *Id.* at 196.

121. *Id.* at 197.

122. *Id.*

123. *Davis*, 16 F. Supp. at 196.

124. *Id.* at 197.

125. *Id.*

126. *Id.* at 195.

127. *Id.* at 196-97.

128. *Davis*, 16 F. Supp. at 197.

129. William Prosser noted in 1960 that "[i]t seems clear that a stage or other fictitious name can be so identified with the plaintiff that he is entitled to protection against its use." Prosser, *supra* note 11, at 404. Prosser used the example of "Mark Twain," the pen name of Samuel Clemens, as an example of the type of name the appropriation of which he assumed would give rise to a cause of action. *Id.* at 404 n.174. He did not, however, consider the nature of the relationship between "Twain" and Clemens.

For example, in contrast to Claire Davis, a.k.a. Casandra, Clemens apparently did not take on

We might also note that Davis was a single woman, engaged in a public and rather theatrical trade, who was seeking legal recognition of her power to name herself independent of established social naming practices. The court's decision certainly may rest on a practical concern to prevent a slew of opportunistic law suits by anyone who chooses to call herself by a name that was later used in some public commercial forum. However, it is notable that Davis's claim involved a peculiarly powerful assertion of autonomy by a woman at roughly the same time that another New York court was denying Berenice Baumann control over her married name.

In contrast, later case law moved beyond names given by families to consider that names attached to individuals by society at large might also be deserving of legal recognition, especially when those individuals are male.[130] In a manner seemingly at odds with America's liberal individualistic legal tradition, the key seems to be that society retain a role in naming processes.[131] Such cases further extend the boundaries of names and hence of individual identity as functions of social and historical practices.

For example, in the 1970s, former football great Elroy Hirsch sued S.C. Johnson & Son, Inc., for the unauthorized use of his nickname "Crazylegs" on a shaving gel.[132] Hirsch had gained notoriety during the 1940s and 1950s as an outstanding college and professional football player.[133] During his career as an athlete Hirsch did a number of advertisements, in all of which he was identified as "Crazylegs."[134] The court took judicial notice of the fact that as recently as five days before its decision, Hirsch had been referred to as "Crazylegs" in a Madison, Wisconsin, newspaper.[135] Nonetheless, Hirsch was selective about the commercial use of his name and, for example, refused to do advertisements for cigarettes or alcohol.[136] Hirsch sued Johnson for damages.[137]

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the name Twain as a means to promote trade, but more as an identity-mask. Moreover, the pen-name Twain was widely recognized and accepted throughout society as being identified with the individual person whose given name was Samuel Clemens. Clemens may have originally authored the name Twain but it was only through an established practice of social recognition that Twain could become the equivalent of a legal name for him. Davis, we may note, was certainly known in some social circles as Casandra, but the court implicitly denied the power of those circles to confer legitimacy upon Davis's personally authored name.

130. *See, e.g.*, McFarland v. Miller, 14 F.3d 912, 918-23 (3d Cir. 1994) (discussing male actor's invasion of privacy claim arising from restaurant's use of movie character's name); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 137 (Wis. 1979) (concluding male athlete's cause of action for nickname appropriation not precluded).

131. *See, e.g., McFarland*, 14 F.3d at 922 (stating "[t]he right to publicity protects the value a performer's identity has because that identity has become entwined in the public mind with the name of the person it identifies"); *Hirsch*, 280 N.W.2d at 134 (noting protection of publicity of one's name supported by public policy considerations).

132. *Hirsch*, 280 N.W.2d at 130.

133. *Id.* at 131.

134. *Id.*

135. *Id.* at 131.

136. *Id.* 132.

137. *Hirsch*, 280 N.W.2d at 130. It is notable that no injunction was necessary because the offending advertisements had been removed from circulation. *Id.* at 132.

The Wisconsin Supreme Court found a cause of action based on a somewhat confused conflation of the common law right of privacy as it related to appropriation of identity and the property-based right of publicity.[138] Nevertheless, when discussing the nature of Hirsch's name the court was quite clear:

> The fact that the name, "Crazylegs," used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person.[139]

In contrast to *Davis*, the court recognized that a legal name is not only given at birth or taken in marriage, but may also be attained or constructed in a potentially wide variety of contexts.[140] What mattered, legally, was the social construction of the relation between the individual and what was asserted to be his name.[141]

One difference, perhaps, is that Hirsch's nickname was originally bestowed upon him by fans, almost as a gift, through non-market social processes.[142] Another difference, of course, is that Hirsch was a man. Granting him control over his name validated the status of the autonomous, rugged American individual: he was, after all, a football player. Social recognition may establish the meaning or substance of the name, but control over that meaning is vested in the gridiron warrior.

Although it was undisputed that "Crazylegs" referred to Hirsch,[143] the court acknowledged that the nickname could additionally refer to other individuals.[144] Such an eventuality, the court argued, would not "vitiate the existence of a cause of action" but, "if sufficient proof were adduced," it might "affect the quantum

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138. *See id.* at 130 (noting intermingling of privacy right and publicity right).

139. *Id.* at 137.

140. *Id.*

141. In a strong dissent, Justice Day rejected the majority's more open conception of "name" and its relation to an individual. *Id.* at 140 (Day, J., dissenting). He declared:

> I would . . . hold that two simple words like 'crazy' and 'legs' whether spelled separately or as one word cannot as a matter of law under the facts here be regarded as the commercial 'trade name' property of Mr. Hirsch. The record shows that other athletes have been so designated. If the name Elroy or Hirsch has been used with crazy and legs, a different case would present itself because it would show that Elroy Hirsch was the person whose name was being used for commercial purposes.

Id. at 141-42.

In an earlier case, also involving sports figures, a federal district court, applying a straightforward property-based analysis of publicity rights, found in favor of a group of professional baseball players who sought to enjoin a baseball table game manufacturer from using the players' names and statistical information (batting averages, etc.) without their consent. Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970). In the course of its opinion the court held that a celebrity's "identity"' may be embodied in "statistics and other personal characteristics" that were "the fruit of his labors." *Id.*

142. *Hirsch*, 280 N.W.2d at 131.

143. *Id.* at 132.

144. *Id.* at 137.

of damages should the jury impose liability or it might preclude liability altogether."[145] Now more closely in line with the reasoning of the opinion in *Davis* and *Nebb*, the *Hirsch* court implied that one's investment in a name might be diluted by other claims to the same name.[146] Consequently, although Hirsch may have been deeply invested in his nickname, to the extent that there were other well-known entities—such as S.C. Johnson—similarly invested in the title "Crazylegs," its usage became more coincidental and did not directly implicate Hirsch's identity.[147] The ultimate determination of damages apparently would turn upon the nature and degree of Hirsch's identification with his nickname.[148]

In this context, I use the term "identification" in a dual sense. First, the term refers to the degree to which an individual is identified by others with a name, an important measure both of the commercial value of the name and of the social distinctiveness of the individual's relation to it. Second, the term refers to the degree to which the individual has invested his identity in the name, an important measure of its personal value. For this court, therefore, one's name apparently derived its legal significance from its relation to the individual as a socially distinguished marker and/or as an actual embodiment of aspects of his identity.

The opinion in the 1994 case of *McFarland v. Miller*[149] elaborates further on how courts have confronted the problems of granting legal recognition to identity as manifested in a name. It moves one step beyond the problem of nicknames to address the legal status of fictional names which somehow become attached to real people. George McFarland, the plaintiff, starred as a child actor in a series shown in movie theaters from the 1920s to the 1940s under the title of "Our Gang," and which later aired on television under the name of the "Little Rascals."[150] The characters from those productions have since entered the pantheon of popular culture icons. McFarland played a character named "Spanky,"[151] perhaps the best known of all. Over the years, McFarland steadily

145. *Id.*

146. *Id.* The appropriate analogy here, perhaps, is to the requirement in public nuisance torts that the plaintiff sustain a distinctive injury that marks him out from other affected individuals. *See generally* RESTATEMENT (SECOND) OF TORTS § 821B (Tentative Draft No. 17, 1971) (noting that sixteenth-century English law "first held that a private individual who had suffered particular damage differing from that sustained by the public at large might have a tort action to recover damages for the invasion of the public right"). Like someone breathing smog, the Nebbs felt oppressed by the comic strip, but the strip did not single them out or differentiate them from any other "Mr. and Mrs. Rudy Nebb" who might exist. Nebb v. Bell Syndicate, Inc., 41 F. Supp. 929, 929-30 (S.D.N.Y. 1941).

The analogy seems especially apt if one considers what would happen to a comic strip with a character named "John Smith." As William Prosser noted, "[i]t is the plaintiff's name as a symbol of his identity that is involved here, and not his name as a mere name. There is, as a good many thousand John Smiths can bear witness, no such thing as an exclusive right to the use of any name." Prosser, *supra* note 11, at 403.

147. *Hirsch*, 280 N.W.2d at 137.

148. *Id.*

149. 14 F.3d 912 (3d Cir. 1994).

150. *McFarland*, 14 F.3d at 914.

151. *Id.*

received income from licensing the name Spanky for commercial purposes.[152]

In 1990, McFarland sued a restaurant for the commercial use, without his consent, of the name Spanky together with an image of McFarland as he appeared in his "Our Gang" days.[153] McFarland sought both damages and injunctive relief on claims based on the right of publicity, common law invasion of privacy, unjust enrichment, the Lanham Act, and the New Jersey Consumer Fraud Act.[154] The case provides a clear example of how privacy and property claims may become entwined in a single action for appropriation of identity.

By the time the case reached the Third Circuit Court of Appeals, McFarland had died and his estate was maintaining the suit.[155] For this reason, the decision focused largely on the inheritable property-based rights of publicity involved in the claim.[156] Nonetheless, the court declared that McFarland's personal invasion of privacy claim survived because he invoked it during his lifetime.[157]

The opinion dealt extensively with how the self becomes implicated in a name in ways that go beyond mere investment of material value.[158] It also complicated the meaning of "name" because, of course, Spanky was not McFarland's "real" name, yet he laid claim to it as his own.[159] For our purposes, the most interesting issue in the case is the court's treatment of whether the name of the fictional character Spanky invoked McFarland's identity to a degree sufficient to support a cause of action for appropriation.[160]

The "Little Rascals" and "Our Gang" series depicted a group of children in contemporary realistic settings playing the same characters over a number of years in many films.[161] Given the nature of the presentation, the court found that it was not unreasonable to consider Spanky the character and McFarland the actor as almost one and the same.[162] In a telling footnote, the court distinguished McFarland's situation from that of other actors who also became well-known for portraying particular characters:

> We think the case in which an actor becomes known for a single role such as Batman is different. . . .[Adam] West's association with the role of Batman or Johnny Weismuller's with the role of Tarzan is different than McFarland's identification with Spanky. West's identity did not merge into Batman and Weismuller did not become indistinguishable from Tarzan. McFarland, like Groucho Marx, may have become

152. *Id.* at 915.

153. *Id.* at 914.

154. *Id.* at 916.

155. *McFarland*, 14 F.3d at 914-15, 917.

156. *Id.* at 917.

157. *Id.* at 918.

158. *See id.* at 920 (noting screen persona may become inseparable from actor's own public image).

159. *Id.* at 920-22.

160. *McFarland*, 14 F.3d at 921-22.

161. *Id.* at 914.

162. *Id.* at 921.

> indistinguishable in the public's eye from his stage persona of Spanky.[163]

The court's reference to an actor's identity "merging" with a character is powerful and revealing. The name Spanky implicated two separate personae, one fictional and the other real. The main question for the court was whether McFarland had become "so *inextricably identified* with Spanky McFarland that McFarland's own identity would be invoked by the name Spanky."[164] The "merging" discussed by the court was not only between McFarland and the name "Spanky," but also between McFarland and the fictional persona represented by the name. The court extended the boundary of the self beyond McFarland's given name to a separate referent, Spanky, which itself served as a source of meaning and identity.

McFarland cared about how the identity of Spanky was used precisely because it implicated a part of his own self. The court framed this problem as follows:

> Where an actor's screen persona becomes so associated with him that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image which gives him standing to prevent mere interlopers from using it without authority.[165]

McFarland did not consider himself to be Spanky, yet neither could he separate himself from the Little Rascal. Spanky was like his celluloid conjoined twin, constituting a separate identity but always, inextricably, a part of himself.

The court's reasoning also reflects a certain ambiguity about the source and nature of the identity implicated by the character Spanky. On one hand, the court appeals to the public's objective perception to determine the degree to which McFarland was bound up with the name Spanky.[166] On the other hand, in the court's consideration of how "McFarland's own identity would be invoked by the name Spanky,"[167] there is an unmistakable concern for McFarland's subjective experience of the appropriation.[168] The very term "invoked" connotes the idea of calling McFarland's identity involuntarily into the service of the defendant.

The court resolved significant aspects of the case by a relatively straightforward appeal to publicity rights:

> The right to publicity protects the value a performer's identity has because that identity has become entwined in the public mind with the name of the person it identifies. It is this value that Miller sought to use without authority or right. McFarland, not Miller, crafted the

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163. *Id.* at 920-21 n.15.

164. *Id.* at 921 (emphasis added).

165. *McFarland*, 14 F.3d at 920.

166. *See, e.g., id.* at 914 (reasoning that "the name Spanky McFarland has become so identified with McFarland . . . as to be indistinguishable from him in public perception").

167. *Id.* at 921.

168. *See, e.g., id.* at 922 (implying that because McFarland was "known through most of his life as George 'Spanky' McFarland," he should be able to demonstrate personal identification with the name Spanky).

irrepressible persona of "Our Gang's" Spanky.[169]

The reference to "crafting" a persona again calls to mind the work of Rosemary Coombe and Michael Madow, who critique the idea that a celebrity's identity is not authored by a single person and hence not subject to anyone's sole control.[170] The court here granted McFarland and his heirs monopoly control over the property rights in the name and image of Spanky.[171] Yet, paradoxically, McFarland did not craft the *relationship* between himself and Spanky which served as the basis for his suit.[172] The court repeatedly noted that the "public" had conflated Spanky with McFarland to such an extent that the two had become inextricably entwined.[173] Social perception altered McFarland's identity by melding it with Spanky, thereby creating "George 'Spanky' McFarland."

There is a sense here that McFarland had a new identity foisted upon him by society. Recall that Melvin also had an identity foisted upon her, but it was one of her own experience.[174] Melvin objected to the fact that a specific individual or corporation had resurrected her past identity for commercial gain.[175] McFarland, however, did not object to the creation or restoration of the identity, but merely to its subsequent use by a restaurateur.[176] He accepted, indeed he capitalized upon, the identity which society had authored for him.[177]

If McFarland did not himself author the relationship which altered his identity, by what right could he claim to enjoin its use by others? He could not base his claim exclusively on the property-rights notion of having "crafted" the identity by himself. Perhaps the answer lies in the fact that it was still *his* identity which was being invoked by the name Spanky and no one else's. Although not the sole author of the new identity, McFarland alone was "inextricably identified" with it. That is, the name Spanky not only contained the commercial value of a celebrity product, but also was invested with non-fungible aspects of

169. *Id.* at 922.

170. *See* Coombe, *supra* note 95, at 369-71 (noting that value of celebrity image or identity is result of factors such as public response, fan clubs, and careful cultivating by studios and other representatives); Madow, *supra* note 95, at 140-41 (arguing that consumer appropriates celebrity image and invests it with new meaning).

171. *See McFarland*, 14 F.3d at 921 (stating "there is evidence of identification between the name Spanky and the actor McFarland sufficient to show that he, and now his estate, have a right of publicity").

172. *See id.* at 922 (stating relationship between McFarland and name "Spanky McFarland" was result of public's perception and association of McFarland as Spanky).

173. *See id.* (noting performer's identity "become[s] entwined in the public mind with the name of the person it identifies").

174. *See* Melvin v. Reid, 297 P. 91, 92 (Cal. 1931) (observing that use of incidents from Melvin's life in movie is not actionable wrong for invasion of privacy because incidents used were matter of public record and thus could not be private).

175. *Id.* at 91.

176. *See McFarland*, 14 F.3d at 914 (arguing unauthorized commercial use of name "Spanky McFarland" constituted misappropriation of McFarland's proprietary interest in that name).

177. *See id.* at 914-15 (stating McFarland played TV character "Spanky" as actor, but in real life McFarland also adopted name and capitalized upon benefits and fame "Spanky" had to offer).

McFarland's personal identity.[178]

II. MIRROR, MIRROR: APPROPRIATION OF PHYSICAL IMAGE

Like names, images of the self are many and varied in the law of appropriation It is no coincidence that the tort of appropriation emerged with the development of mass commercial photography, and the use of a photographic image is most commonly associated with the tort.[179] However, courts over the years have found myriad representations to embody aspects of the self sufficient to justify a claim for their appropriation.[180]

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178. David Lange criticizes courts for granting privacy or publicity-based protection to claims involving fictional characters citing, *inter alia*, the case of Bela Lugosi, who sued over the appropriation of his distinctive persona as Dracula. Lugosi v. Universal Pictures, 172 U.S.P.Q. 541 (Cal. Super. 1972), *rev'd* 70 Cal. App. 3d 552 (1977), *aff'd* 603 P.2d 425 (Cal. 1979). In *Lugosi*, the court held that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime. *Lugosi*, 603 P.2d at 431.

Lange also cites Groucho Marx Prods., Inc. v. Day and Night Co., Inc., 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd* 689 F.2d 317 (2d Cir. 1982). In *Groucho*, the lower court held that under New York law the right of publicity was fully descendible and alienable, and that the Marx Brothers retained a fully protected proprietary right over the unique appearance, style, and mannerisms of the Marx Brothers. *Groucho*, 523 F. Supp. at 491-92. This opinion was reversed not because of the ruling, but due to the decision that California law governed, which did not recognize a descendible right of publicity. *Groucho*, 689 F.2d at 318, 320-21.

Lange expresses concern that recognizing individual claims to fictional characters may stifle further artistic or commercial innovation. All characters involve a measure of creative invention. What we and the courts cannot know, he argues, "is how much of these characters the Marx Brothers themselves appropriated from others." David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 161 (1981).

Lange's concerns, however, seem ultimately to stem from the courts' failure to appreciate the degree of independent creative invention used by the defendants in remaking the images to suit their own purposes. Certainly, not only fictional characters appropriate aspects of their identities from other characters. We are all multiply authored to the extent that we are influenced by, and take on, certain characteristics of the various people we encounter throughout our lives. What matters is not appropriation of characteristics, but appropriation of identity. The fact that I shrug my shoulders like my father or have picked up distinctive turns of phrase from my wife does not mean that I have appropriated their identities. Rather, I have adopted certain of their characteristics and made them my own.

Arguably, this is what the Marx Brothers did with certain other Vaudeville acts. The lower court in *Groucho* simply found that the play amounted only to an imitative work lacking in "significant value as pure entertainment." *Id.* at 160 (quoting *Groucho*, 523 F. Supp at 492-94). While I tend to agree with Lange's criticism of the court's conclusion in this regard, this particular result does not necessarily undermine the privacy-based principle that to the extent that a particular usage distinctively and primarily evokes an individual's identity, that person has a valid claim of appropriation. Had the defendants in *Groucho* sufficiently marked their use of the Marx Brothers' characters with their own distinctive and separate identity, the court may well have found in their favor regardless of whether the right of publicity was inheritable. In such a case, one might argue, the contemporary actors would not only appropriate the form of the Marx Brothers characters, but also imbue them with a new and different substance or identity.

179. *See* Kahn, *supra* note 10, at 308 (stating that development of photography opened door to invasions upon right to be let alone, thereby creating need for state regulation and protection of privacy).

180. See *infra* Parts II.A, II.B and III.

These representations include other obvious forms of visual representation such as drawings[181] or sculpture.[182] Additionally, they include the less-obvious example of a fabricated photo-montage which contained only the head of one person placed on another person's body.[183] Pushing the concept of representation even further, courts have found that the use of celebrity look-alikes may constitute appropriation.[184] One case even found appropriation in the use of a look-alike android.[185]

Impersonations may be covered as well.[186] As we saw in the case of George McFarland, fictional characters may also provide the basis for a claim of appropriation.[187] Aural representations have likewise been included as "images" for the purposes of appropriation law where the distinctive vocal style of a celebrity was at issue.[188] Thus, the use of "sound-alikes" may give rise to a claim of appropriation.[189] Finally, beyond a direct representation of a personal attribute of the subject, courts have found that the use of objects or slogans which are strongly identified with the subject may amount to an appropriation of identity.[190]

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181. *See, e.g.*, Ali v. Playgirl, Inc., 447 F. Supp. 723, 726-28 (S.D.N.Y. 1978) (holding that drawing of black man seated in corner of boxing ring accompanied by words "the Greatest" was sufficient likeness of Mohammed Ali to provide cause of action for violation of right of publicity).

182. *See, e.g.*, Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. American Heritage Prods., Inc., 296 S.E.2d 697, 698, 706 (Ga. 1982) (holding marketing of plastic bust of Dr. Martin Luther King, Jr., was misappropriation of his likeness which violated right of publicity).

183. *See* Grant v. Esquire, Inc., 367 F. Supp. 876, 877-81 (S.D.N.Y. 1973) (reversing summary judgment for defendant on basis that use of photograph of Cary Grant's head on torso of model in magazine article would be violation of Grant's right of publicity if likeness was used for trade).

184. *See, e.g.*, Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 622-23, 632 (S.D.N.Y. 1985) (holding use of photographs of Woody Allen look-alike in advertisements constituted "portrait or picture" of Allen in violation of Lanham Act's prohibition against unfair competition); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 258-60 (N.Y. Sup. Ct. 1984) (holding use of photograph in advertisement of Jacqueline Kennedy Onassis look-alike constituted misappropriation of Onassis's "portrait or picture" in violation of right of privacy).

185. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396-99 (9th Cir. 1992) (holding advertisement's use of robot dressed in wig, gown, and jewelry, consciously selected to resemble Vanna White, which posed next to game board easily recognizable as Wheel of Fortune, was misappropriation of White's identity in violation of right to publicity).

186. *See, e.g.*, Estate of Presley v. Russen, 513 F. Supp. 1339, 1348-49, 1354 (D.N.J. 1981) (holding defendant's Elvis impersonation was misappropriation of Presley's likeness as protected by right of publicity).

187. *See* McFarland v. Miller, 14 F3d. 912, 923 (3d Cir. 1994) (holding that naming restaurant "Spanky's," which referenced name of TV character played by George McFarland, was misappropriation of McFarland's image as Spanky McFarland).

188. See *infra* Part III for a discussion of aural-image appropriation.

189. *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098-1100 (9th Cir. 1992) (holding singer, whose unique voice was imitated in radio commercial, had cause of action for misappropriation under right of publicity); Midler v. Ford Motor Co., 849 F.2d 460, 463-64 (9th Cir. 1988) (holding use of Bette Midler "sound-alike" in advertisements constituted misappropriation of Midler's identity).

190. *See, e.g.*, Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983) (holding catch phrase "Here's Johnny," which was coined by Johnny Carson, host of Tonight Show, was sufficient characteristic of Carson's identity, thus naming a corporation "Here's Johnny Portable Toilets" was misappropriation of his identity); Motschenbacher v. R.J. Reynolds Tobacco Co., 498

A. Physical Representations of Identity

The first requirement for finding an appropriation of identity is that the image in question be recognizable as the subject, or as embodying an aspect of the subject's identity.[191] This is not necessarily the same thing as requiring that in the case of a photograph, to state one example, the image actually be of the subject. For example, in the case of *Howell v. New York Post*,[192] the plaintiff sued over the publication in a newspaper of a photograph showing her on the grounds of a private psychiatric hospital in the company of a celebrity. The plaintiff ultimately lost the case because she failed to meet the burden of showing that the photograph did not serve a newsworthy purpose.[193]

Before reaching this conclusion, however, the court first considered the threshold question of whether the plaintiff's face was discernible.[194] The photographic representation of a person who, in fact, happened to be the plaintiff was not enough.[195] To constitute an actionable appropriation of the plaintiff's image, the representation had to be recognizable as distinctly and uniquely belonging to the plaintiff: it must be "identified" with the plaintiff in the sense of embodying aspects of the plaintiffs "identity."[196] Such identification must be made by objective viewers, independent of the subject's own awareness that the picture is, in fact, of her.[197]

In contrast, when Mohammed Ali sued Playgirl magazine for publishing a nude portrait of him, which the court had characterized as "an illustration falling somewhere between representational art and cartoon," the court first established that the drawing did, in fact, portray Ali.[198] It did this by referring not only to the physical likeness but also to the caption "The Greatest," a moniker commonly established in the public mind as a nickname for Ali.[199] Together, nickname and likeness constituted an "image" of Ali.[200]

The mere incidental use of an image, however, does not necessarily

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F.2d 821, 822, 827 (9th Cir. 1974) (holding use of professional race-car driver's car in advertisements constituted cause of action for misappropriation).

191. In considering the issue of whether there has been an appropriation of the plaintiff's identity, Prosser notes that "there is no liability for the publication of a picture of his hand, leg and foot, his dwelling, his automobile, or his dog, with nothing to indicate whose they are." Prosser, *supra* note 11, at 404-05. Although the comment is accurate so far as it goes, Prosser again fails to consider just why this is so. The question is not simply one of objective identification of an attribute by society at large, but also the concomitant subjective investment of one's identity in the image portrayed. The more interesting issue to explore is how social recognition seems to actualize the subject's investment of her identity in any particular image thereby giving rise to a claim of appropriation.

192. 612 N.E.2d 699 (N.Y. 1993).

193. *Howell*, 612 N.E.2d at 703-04.

194. *Id.* at 700.

195. *Id.* at 704.

196. *Id.*

197. *Id.* at 700.

198. Ali v. Playgirl, Inc., 447 F. Supp. 723, 726-27 (S.D.N.Y. 1978).

199. *Id.* at 727.

200. *Id.*

constitute appropriation. In 1979, Sue Crump, a coal miner, sued Beckley Newspapers for, *inter alia*, appropriation of identity based on its publication of her picture accompanying a news article on harassment of women miners.[201] For an earlier article on women coal miners, the defendant had taken some photographs of Crump and, with her knowledge and consent, had published one, together with her name, in 1977.[202] Then, in 1979, in a separate article on harassment of women miners, the defendant had reprinted a different photograph of Crump without her name.[203] Crump never authorized this second use of her picture, although it was taken at the same time as the previously authorized one.[204]

The court found sufficient issues of fact to merit bringing the case to trial.[205] In the course of its opinion, the court made the rather striking observation that:

> [i]n the present case, Crump's photograph was not published because it was *her* likeness, it was published because it was the likeness of a *woman coal miner*. It was merely a file photograph used as a matter of convenience to illustrate an article on women coal miners. This type of incidental use is not enough to make the publication of a person's photograph an appropriation.[206]

Like a name such as "Nebb," an image can also have multiple identities,[207] but then, so can a person.

Commenting on the need to reconcile the shifting and evolving nature of an individual's selfhood with the demand for a "stable, core self," Anthony Cohen suggests that "the answer . . . sees the individual as a basket of selves which come to the surface at different social moments as appropriate. The basket, the container of these selves, is the individual's identity."[208] Using Cohen's notion of identity as containing multiple selves, we may consider that appropriation does not necessarily involve the theft of one's entire self, or all of one's multiple selves. Rather, it usually involves one particular self.

Indeed, appropriation seems harmful, in part, because it threatens to unbalance the "basket" of one's identity by removing and rearranging its contents. Some selves may carry more or less "weight" in maintaining one's identity. Appropriation, then, may be viewed as causing a legally cognizable

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201. Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W.Va. 1984).

202. *Id.* at 75.

203. *Id.*

204. *Id.*

205. *Id.* at 90.

206. *Crump*, 320 S.E.2d at 86 (emphasis in original).

207. In an ethnographic account of Nigerian Songhay trading practices in Harlem, Rosemary Coombe analyzed their merchandising of Malcolm X and the "X" symbol. Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*," 10 AM. U. J. INT'L L. & POL'Y 791, 812-35 (1995). She noted how the ubiquitous "X" had a very different cultural meaning for the Songhay traders than for many other American born residents of Harlem. *Id.* The Songhay were trading on Malcolm X's image, yet they were imbuing it with a different and distinctive identity. *Id.*

208. COHEN, *supra* note 29, at 72.

harm when the particular self that is appropriated is perceived as somehow particularly salient or necessary to the maintenance to one's "stable, core self," or one's overall identity as a unique individual.

In Crump's case, the court considered the possibility that the picture as displayed appropriated only some generic fungible quality that did not distinctively adhere to Crump but, rather, represented all women coal miners.[209] Hence, there might be no, or minimal, effacement of Crump's unique individual identity. Yet the court recognized that that very same image, if used in a different way, might give rise to appropriation if, for example, it were used somehow to trade on the specificity of Crump's identity as invested in that image.[210]

Thus, the degree to which an individual's identity may be bound up with an image may depend not only on her own subjective projection of herself into that image but also upon the use made of it by the appropriator. The use of an unidentifiable arm, or other nonspecific fragment of the body, might not give rise to a claim. Similarly, this use of a "fragment" of the meaning of an image, which alludes to the generic identity of "woman coal miner," might also be acceptable.

The court in *Nebb* found, in effect, that social recognition would condition the degree to which the plaintiff's identity was actually invested in a particular use of his or her name.[211] Similarly, the court in *Crump*, while acknowledging the plaintiff's full investment of herself in her image, found social recognition to condition the degree to which her identity was commodified by a particular use of her image.[212] Unlike *Nebb*, however, the photographer's use of identity in *Crump* involves more than a mere coincidence of signifiers. Here the photograph actually portrayed this specific Sue Crump.[213] There was no other person who happened to share the same physical attributes.

The argument that the photograph in *Crump* represented some "generic" woman miner is not without merit. However, the court's unquestioning acceptance of that argument effectively renders Crump's identity similarly "generic"—that is, it effaces her distinctive individuality. Once again, the readiness with which a court is willing to deprive a woman of control over the maintenance of her identity is unsettling.

This readiness is grounded in the court's understanding that the "relevant" audience or community of viewers would readily read the image as generic. The result, however, may also be colored by the fact that the image appeared as part of a news story and not an advertisement.[214] Therefore, the viewing community

209. *Crump*, 320 S.E.2d at 86.

210. *Id.*

211. *See* Nebb v. Bell, 41 F. Supp. 929, 930 (S.D.N.Y. 1941) (implying that use of another's name, which has unique significance, or trading upon reputation of another is actionable).

212. *See Crump*, 320 S.E.2d at 86 (concluding that using Crump's file photograph to portray likeness of woman coal miner is incidental use of Crump's own likeness).

213. *Id.* at 75.

214. *Id.*

did not construct Crump's image as a commodity.[215] It merely constructed it as a vehicle for the conveyance of information about a matter of public concern.[216] Crump's image thus embodied the distinctive identity of "woman coal miner," an identity Crump herself claimed to share.[217] That identity was not reduced to a fungible commodity through association with a commercial product.[218]

B. Doppelgangers

More problematic is the use of celebrity look-alikes. One might argue that celebrities, in seeking the limelight, have no grounds to complain of the use of their images, whether actual or simulated. Sheldon Halpern notes that courts following the privacy-based notion of appropriation as a harm to identity have tended to find a waiver of the right with respect to celebrities.[219] He also observes, however, that courts have largely finessed the issue by developing the property-based right of publicity to protect celebrities.[220]

Avishai Margalit observes that in mass society, invasions of privacy through gossip affect mainly the rich and famous.[221] He argues, however, that such people "have human dignity, and in a decent society they can and should be allowed to protect their dignity."[222] The question, Margalit asserts, "is whether gossip puts famous people in their place as basically ordinary people—insulting them perhaps, but not humiliating them—or whether it actually makes them seem nonhuman. Does gossip affect only the celebrities' public image, or does it affect their self image as well?"[223] For "gossip" we might well read "appropriation of identity."[224]

Noncommercial uses of identity may be insulting, but do not tend to humiliate or otherwise render the subject nonhuman. Nevertheless, as we see in the cases discussed below, some celebrities do indeed find certain commercial uses of their images to be humiliating.[225] Such uses make the offended celebrity seem "nonhuman" by rendering her identity a fungible commodity or by fragmenting her identity by reducing it to one image or association without her consent. Publicity rights may apply to cases that affect "only the celebrities' public image," but privacy rights still apply where "self image" is implicated.

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215. *Id.* at 86.

216. *Id.*

217. *Crump*, 320 S.E.2d at 86.

218. *Id.*

219. Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1206-07 (1986) (summarizing decisions concluding that celebrity, particularly one who capitalized on notoriety, cannot claim unauthorized commercialization of identity).

220. *Id.* at 1206-07.

221. AVISHAI MARGALIT, THE DECENT SOCIETY 206-07 (1996).

222. *Id.* at 206.

223. *Id.* at 206-207.

224. *See id.* (implying that relationship exists between gossip and appropriation of identity).

225. See *infra* notes 226-274 and accompanying text for a discussion of cases involving appropriation by celebrity look-alikes.

One of the most notorious recent cases of appropriation via look-alike involved an advertisement by designer Christian Dior which included both real celebrities, such as movie reviewer Gene Shalit, together with a woman made up to look like Jacqueline Onassis.[226] Onassis sued seeking an injunction against further dissemination of the advertisement.[227] The context of the image was critical to the court's analysis. The court found that by using the look-alike in an advertisement which also contained real celebrities, the defendant meant to convey that the look-alike really was Onassis, or at the least meant to cause confusion about the subject's identity.[228] The court held for Onassis after determining that the language "portrait or picture" as used in the New York statute governing appropriation contemplated "a representation which conveys the essence and likeness of an individual, not only [sic] actuality, but the close and purposeful resemblance to reality."[229]

"Essence" and "likeness" here become the critical elements of an appropriated image.[230] "Likeness" is a fairly straightforward concept. One interesting observation is that one person's likeness can apparently be represented by a different person who, in effect, becomes a canvas upon which the image is rendered through a deliberate attempt to mimic the appearance of the subject. Again, the *Onassis* court recognized that a likeness does not inhere solely in the individual, but rather is constructed through social perception.

The mimicry, however, must contain more than mere physical resemblance; it must also contain the "essence" of the subject.[231] The court thus implies that some core part of the subject's identity must be captured in the representation in order to establish a claim of appropriation.[232] As the court put it, the statute "is intended to protect the essence of the person, his or her identity or *persona* from being unwillingly or unknowingly misappropriated for the profit of another."[233] What was stolen, then, was not Onassis's image *per se*, but the meaning or substance of her identity that was, in effect, transferred onto the look-alike.[234]

How did this transfer occur? Onassis herself did not pose for the picture in the advertisement, nor did she claim that it was actually a true portrait of her.[235] How then could she be said to have invested her identity in the picture to such a degree that its commercial use served to exploit her?

The court established the fact of appropriation by appeal to the *public perception* of the image.[236] Onassis's identity became implicated in the image

226. Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984).

227. *Id.* at 256.

228. *Id.* at 262.

229. *Id.* at 261.

230. *Id.*

231. *Onassis*, 472 N.Y.S.2d at 260.

232. *See id.* at 261 (noting that there are many aspects of identity, yet legislature only accorded protection to aspects embodied in name and face).

233. *Id.* at 260 (emphasis in original).

234. *Id.* at 262-63.

235. *Id.* at 256.

236. See *supra* note 228 and accompanying text for a discussion of how the juxtaposition of look-

because a "reasonable person" or, more specifically, a person reasonably well-versed in contemporary American culture, would naturally perceive it to be a portrait of her.[237] Public perception, as determined by the norms of the relevant community of observers, here became the vehicle by which the law recognized the investment of one's self in an image.[238]

The image in question in *Onassis* did not come to embody the essence of the individual's self until it was recognized by the community as a representation of that individual.[239] That is, the community played a role in investing an image with the essence of the individual.[240] Nevertheless, to form the basis of an actionable offense, the location of that essence in the image had to be subjectively experienced and confirmed by the person represented.[241] Together, the individual and the community thereby mutually created an image that could be said legally to embody aspects of the individual's personal identity.[242]

To complicate matters still further, the court in Onassis also had to consider the claims of the look-alike herself, who made a living by voluntarily marketing her own image as a likeness of Onassis.[243] That is, two separate and distinct identities were implicated in the look-alike image: Onassis's identity and the look-alike's identity. Paradoxically, it appears that the identity of the person who actually posed for the picture was effaced by the court's decision.[244]

The court, however, did not enjoin the look-alike from making any use at all of her resemblance to Onassis.[245] Rather, it found her impersonations impermissible only when performed in a context calculated to deceive or confuse the viewer as to her true identity.[246] It seems, therefore, that manipulation of public perception was the means by which Onassis's identity was appropriated. The exact same image, presented in a different advertisement—without other real celebrities, for example, or with a clear disclaimer—may not have given rise to a cause of action.

The question of impersonation harkens back to the cases of *Baumann* and *Hodecker*. In those cases, the courts found no "personation" of the plaintiff wives by the women who had taken their married names.[247] In marked contrast

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alike and real-life figures could lead public to believe that the look-alike is actually Onassis.

237. *See Onassis*, 472 N.Y.S.2d at 262 (stating that providing look-alike with appropriate make-up and hairdo transforms her into one of most recognizable women in world).

238. *See id.* (arguing that using one's own picture can be limited if contrived to convey appearance of someone better known).

239. *Id.*

240. *Id.*

241. *Id.*

242. *See Onassis*, 472 N.Y.S.2d at 262.

243. *Id.* at 261-62.

244. *See id.* at 261 (stating that using own face in way to deceive or promote confusion can be enjoined).

245. *Id.* at 263.

246. See *supra* note 238 and accompanying text for discussion of how a court may enjoin the use of one's own picture if contrived to convey the appearance of someone better known.

247. See *supra* Part I.A for a discussion of these cases.

to the finding in Onassis, the court in *Hodecker* found that:

> [t]he possibility that others may be misled by the assumed relation of the defendant to Hodecker does not concern the plaintiff, unless by that means some of her property rights or interests may be brought in question.... The question of the identity of the plaintiff as the wife of Hodecker ... is merely a social one.[248]

The contrasts between *Hodecker* and *Onassis* are revealing. Obviously, there were great changes in women's social, economic, and legal status between 1896 and 1984. More specifically, there is the tremendous difference in social and economic standing between Anna Hodecker and Jacqueline Onassis. The *Hodecker* court also displays the courts' classic late-nineteenth-century reluctance to intrude the state into social affairs.

The intervening case of Berenice Baumann, decided on the eve of the New Deal in 1929, still looks back to *Hodecker*, but its vigorous dissent looks forward to *Onassis*. The court in *Onassis*, writing long after the reforms of the Progressive Era and the New Deal transformed modern governance, readily implicated the state in social questions by interpreting social relations through the prism of the law.[249] Finally, the court in *Onassis* had a clear statute and years of precedent to deal with, whereas the court in *Hodecker* was venturing into new and relatively uncharted waters.[250]

Beyond these conspicuous contrasts, however, lie several other interesting differences. First, as a widow of great wealth and renown, Jacqueline Onassis fully owned her identity. It is interesting to note, however, that Onassis, one of the great female popular icons of Twentieth Century America, derived her status largely through her identification with her two famous husbands. That is, even though she was a powerful and financially independent woman, Onassis's identity remained largely a function of her marital status—a gift, as it were, from her now-deceased husbands.

Second, the look-alike impersonated Onassis in a manner that explicitly commodified her identity. The defendant in *Hodecker* was not directly using her identity for commercial purposes, except insofar as the status of a marriage may be viewed as an economic relationship conferring material benefits.[251] Third, even though *Onassis* undeniably involved a celebrity whose persona might carry great economic value, the court readily recognized the intangible dignitary harm of the impersonation.[252] Onassis herself did not seek monetary damages for unjust enrichment, only the equitable remedy of an injunction—a remedy calculated to protect her identity, not her pocket book.[253] Fourth, the *Onassis* court found a willful attempt to deceive the public as to the identity of the look-

248. Hodecker v. Stricker, 39 N.Y.S. 515, 517-18 (N.Y. Sup. Ct. 1896).

249. *See Onassis*, 472 N.Y.S.2d at 258-62 (enjoining unauthorized use of look-alike's picture pursuant to statute because look-alike picture is contrived to convey appearance of celebrity).

250. *See Hodecker*, 39 N.Y.S. at 515 (noting novelty of action).

251. *Id.* at 516.

252. *Onassis*, 472 N.Y.S.2d at 262.

253. *Id.* at 256.

alike,[254] whereas the court in *Hodecker* found that the defendant did not "seek to personate the plaintiff."[255]

Finally, and most importantly, the court in *Onassis* legally recognized the significance of community perception in investing a particular name or image with a subject's identity.[256] The *Hodecker* court, mired in the late-nineteenth-century *laissez-faire* individualism of the *Lochner* era dismissed such a concern as "merely a social one."[257] To the court, impersonation depended solely on the intent of the defendant.[258] *Onassis*, and other recent cases that focus on the recognizability of an image, represent the development, if only implicit, of the courts' acknowledgment that identity is constructed and maintained through interaction with community perception and practices and that the state, through the courts, has a role in recognizing and managing that interaction.

The courts have also recognized that identity is not static but is constructed, as well as reconstructed, over time. The case of Gabrielle Darley Melvin and her outrage at the unauthorized resurrection of her past identity as Gabrielle Darley is one case in point.[259] More recently, in another case involving a celebrity look-alike, a court more explicitly confronted the problem of the legal status of multiple identities over time.

In 1985, one year after *Onassis*, Woody Allen, the well-known comedian, actor, and movie director, brought suit under New York's privacy statute and the Lanham Act to enjoin the dissemination of an advertisement for a video store that showed a celebrity look-alike portraying Allen.[260] The court ultimately resolved the claim by finding that the advertisement violated the Lanham Act in using a representation which might confuse or mislead consumers.[261] Nonetheless, it also considered at length Allen's privacy-based appropriation claim and reflected upon its legal implications.[262]

The court began with a discussion of whether the advertisement qualified as a "recognizable likeness" of the plaintiff.[263] It found the status of a look-alike to be far more problematic in this regard than a mere photograph or artistic representation.[264] The issue for the court was not whether the look-alike would

254. *Id.* at 262.

255. *Hodecker*, 39 N.Y.S. at 517.

256. *Onassis*, 472 N.Y.S.2d at 263.

257. *Hodecker*, 39 N.Y.S. at 518.

258. Standing between *Hodecker* and *Onassis*, both chronologically and conceptually, the dissent in the 1929 case of *Baumann* would have found appropriation based on the fact that the defendant had "usurped the status, the relationship before the public, which belongs to the plaintiff." Baumann v. Baumann, 165 N.E. 819, 822 (N.Y. 1929) (O'Brien, J., dissenting). See *supra* notes 76-92 and accompanying text for a discussion of this case.

259. See *supra* notes 35-53 and accompanying text for a discussion of *Melvin v. Reid*, 297 P. 91 (Cal. 1931).

260. Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985).

261. *Id.* at 632.

262. *Id.* at 620-25.

263. *Id.* at 623-24.

264. *Id.* at 624.

"remind" people of Allen, but rather whether "most persons who could identify an actual photograph of the plaintiff would be likely to think that this was actually his picture."[265] Again, identification by objective observers located in the subject's community became the basis for investing the image with aspects of the subject's identity.

In this case, however, the look-alike portrayed an earlier "version" of Allen, a past identity which was no longer consonant with his present self. As the court put it, "the hair style and expression [of the look-alike], while characteristic of the endearing 'schlemiel' embodied by plaintiff in his earlier comic works, are out of step with plaintiff's post-'Annie Hall' appearance and the serious image and somber mien that he has projected in recent years."[266] The court found this relevant primarily as it bore on whether an observer would think the image actually was Allen.[267] If so, a claim of appropriation might be warranted. The court found that the advertisement did make a reference to Allen, but it would "hesitate...to conclude that the photograph is, as a matter of law, plaintiff's portrait or picture."[268]

Consider, first, that if the court were concerned only with the property-based aspects of the celebrity image, then all representations of Allen, regardless of the stage of his life portrayed, would presumably be his property. However, because the court was concerned with the privacy-based dignitary aspects of appropriation of identity it had to consider whether this particular image was invested with aspects of Allen's current identity. That is, the court was concerned with which of Allen's personae had been appropriated. If the "schlemiel" persona of the past were sufficiently divorced in the public mind from Allen's current, more serious persona, then there would be no appropriation.

In the law of appropriation, therefore, identity is not fixed and bounded. It shifts and evolves according to time and context. The use of the "schlemiel" persona before Allen had appeared in "Annie Hall" might constitute an appropriation, whereas the use of the exact same image some years later might not. The court recognized that Allen's identity had developed over time.[269] He was literally, and legally, not the same person he once was.[270] To the extent that he retained aspects of the identity embodied by the "schlemiel" image he might be able to bring a claim of appropriation.[271]

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265. *Allen*, 610 F. Supp. at 624. This standard may sound like that applied in cases of defamation where the community must be able to recognize that the defamatory statement refers to the plaintiff. In a case of defamation, however, such perception merely provides the basis for establishing material harm resulting from damage to the plaintiff's standing in the community. In a case of appropriation, community perception itself serves to invest the plaintiff's identity in the image. The plaintiff then sustains a personal dignitary harm through the commodification of her identity in the image.

266. *Id.*

267. *Id.*

268. *Id.* at 624.

269. *Id.* at 617.

270. *Allen*, 610 F. Supp. at 617.

271. *Id.*

However, the court indicated that his newer identity was currently more salient.[272] It established this in large part through reference to the public's perception and understanding of Allen as having left the "schlemiel" behind to become a more serious filmmaker.[273] Allen's present persona, therefore, would not likely be harmed by the advertisement. The advertisement's image of a past self might enslave a past identity, but the identity of Allen as constituted in the current plaintiff before the court was not captured by the look-alike; hence, the court was hesitant to find an appropriation.[274]

III. THE SINCEREST FORM OF FLATTERY: APPROPRIATION OF "AURAL IMAGE"

Courts have moved beyond mere physical representations of an individual in addressing the notion of self. Courts have further gone beyond the visual to find the unauthorized use of certain aural "images" sufficient to support a claim for appropriation. For example, Bette Midler, a popular singer and actress with a highly distinctive vocal style, brought a successful claim against a corporation for using a "sound-alike" in commercial television advertisements.[275]

In the 1980s, Bette Midler had been approached by an advertising agency to perform a song to run with a television commercial for Ford Motor Company.[276] Midler refused, saying she did not do commercials.[277] The agency thereupon hired one of Midler's former back-up singers, whom it told to sound as much like Midler as possible.[278] After the commercial ran, a number of people did indeed believe the voice to be Midler's.[279] Midler subsequently brought suit in California, seeking an injunction and damages.[280]

The Ninth Circuit Court of Appeals found that California statutory law provided no relief because its reach was limited to recovery for the use of the plaintiff's actual voice.[281] Similarly, because Midler did not do commercials, there was no cause of action under the federal Lanham Act as there was no unfair competition or impairment of Midler's professional opportunities.[282] Neither was there an action for copyright infringement because "a voice is not copyrightable. The sounds are not 'fixed'. What is put forward as protectible

272. *Id.* at 618.

273. *Id.* at 624.

274. Allen might have based his claim on grounds similar to Melvin's, namely that the advertisement forced a previous identity upon him. Melvin v. Reid, 297 P. 91, 93 (Cal. 1931). Allen, however, was not offended by the resurrection of his "schlemiel" persona so much as by the commercialization of any image of himself. *Allen*, 610 F. Supp. at 624. There was no question here of his present identity being subordinated to a past identity, as with Melvin. *Id.* The subordination, if any, came from the commodification of his identity. *Id.*

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

276. *Id.* at 461.

277. *Id.*

278. *Id.*

279. *Id.* at 461-62.

280. *Midler*, 849 F.2d at 461.

281. *Id.* at 463.

282. *Id.* at 461.

here is far more personal than any work of authorship."[283]

Following up on the idea of Midler's personal investment in her voice, the court did, however, find that Midler stated a valid cause of action based on the common law tort of appropriation.[284] Drawing a direct analogy to the appropriation of an individual's visual image, the court argued that "[a] voice is as distinctive and personal as a face. . . .The singer manifests herself in the song. To impersonate her voice is to pirate her identity."[285] Like the court in *McFarland*, the *Midler* court focused on the way and degree to which an individual becomes bound up with a representation of herself.[286] Midler was harmed by the sound-alike to the degree that she had "manifested" herself in the song.[287]

The *Midler* court here takes a step beyond traditional appropriation law in recognizing that one's identity may become bound up with something other than one's name or visual image. In basing the cause of action on this relationship, the court used the law to recognize and construct a conception of identity as both worthy of legal protection and capable of being projected. The protection extended beyond the boundary of the corporeal body or its visual representation into such intangible and "unfixed" a thing as the sound of one's voice.[288] As the court in *Allen* recognized that identity may shift over time, the court in *Midler* established that a particular manifestation of identity may be as evanescent and unbounded as the sound of one's voice.[289]

Yet, cognizant of the tensions raised in some of the look-alike cases, the court limited the scope of its holding:

> We need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable. We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.[290]

As in *Allen* and *Onassis*, appropriation depended in part on public perception and on the intent of the defendant. The legal relation between self and image—or, as here, voice—was not constituted solely by the individual subject but, rather, was produced in conjunction with the public and the defendant. That is, Midler's legal interest in her identity as manifested in her voice was contingent not only upon her own production of a "distinctive voice" which captured an aspect of her persona, but also upon public recognition of her voice and upon the defendant's intent to appropriate and commodify her voice.

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283. *Id.* at 462.

284. *Id.* at 463.

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

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

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

At law, Midler's identity was a social production and its status depended upon the court's interpretation of such distinctive cultural practices as the public recognition of celebrity.[291]

CONCLUSION

If we take the jurisprudence of appropriation seriously, then we must reconceive the nature and status of identity within existing legal doctrine. My review of the case law of appropriation reveals a long-established but largely overlooked tradition in American jurisprudence that elaborates a relatively nuanced and complex understanding of law's identity. For nearly one hundred years, courts have been effectively managing complex and fluid categories of identity. The cases exhibit a practical appreciation of the fact that in the context of appropriation, identity is not necessarily a fixed and bounded thing with some essential, unchanging core. Rather, we have seen courts recognize that identity may change over time, that single markers of identity may be shared by multiple subjects who nonetheless remain distinct, and that a single subject may claim multiple identities, each of which implicates important aspects of her self.

Under the jurisprudence of appropriation law identity is recognized, constructed and maintained through social processes that involve negotiations between community and individual. The process of negotiation, however, is not inherently democratic. As we saw in several cases, the social construction of identity may reflect and reinforce existing social hierarchies.

This is not inevitable. The particular realization of law's identity in these cases may be highly problematic, but the courts' general engagement with the status of identity reveals that the American legal system is capable of managing identity in a substantive manner beyond mere comparative standards. Thus, through these cases we may elicit from existing legal traditions a more explicit articulation of how the legal system negotiates identity. In so doing, I hope I have made some room for a more informed discussion of what works for whom, and why.

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291. In a case similar to Midler's, the singer Tom Waits sued Frito-Lay for appropriation based on a radio commercial that used a singer who imitated Waits's distinctive voice. Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992). Following the decision in *Midler*, the court held that a voice, when distinctive and "a sufficient indicia of a celebrity's identity," was protected by the law against appropriation. *Id.* at 1098. Also, as in *Midler*, the court required that the plaintiff be "widely known" to succeed. *Id.* at 1102. It noted as well that the defendant deliberately sought to find a singer who could render a "near perfect" imitation of Waits's voice. *Id.* at 1097. That is, public perception and the intent of the defendant again played a role in the court's recognition of Waits's legal interest in his identity. *Id.* at 1097, 1112.

In an update on the cases, J. Thomas McCarthy reported that, upon remand, a Los Angeles jury returned a verdict of $400,000 for Midler in 1989. In 1992, a Los Angeles federal jury awarded Waits $2,500,000. The Ninth Circuit Court of Appeals affirmed both awards. J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995).