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The Inalienable Right of Publicity

JENNIFER E. ROTHMAN*

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INTRODUCTION

This Article challenges the conventional wisdom that the right of publicity is universally and uncontroversially alienable. Although there are different definitions of alienability, I use the term in a broad sense to indicate that an entitlement is transferable in gross without any restrictions on its sale, donation, or ownership.¹ Courts and scholars have routinely described the right of publicity as such a freely transferable property right. The leading treatise author in the field, J. Thomas McCarthy, has observed that the “rule of free assignability in gross of the right of publicity has never been seriously questioned.”² The Supreme Court of Georgia has gone even further, concluding that the right of publicity “could hardly be called a ‘right’” if it were not freely assignable.³ Thus, the right of publicity is most often described as sitting at one end of the alienability spectrum—that of free or complete alienability.⁴

Despite such broad claims of unfettered alienability, courts have limited the transferability of publicity rights in a variety of instances. No one has developed a robust account of why such limits should exist or what their contours should be. This Article remedies this significant omission. In the process of doing so,

1. See Terrance McConnell, *The Nature and Basis of Inalienable Rights*, 3 LAW & PHIL. 25, 27 (1984) (defining something as inalienable when it “is not transferable to the ownership of another”); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985) (“Inalienability can be defined as any restriction on the transferability, ownership, or use of an entitlement.”); see also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849–55 (1987) (noting that there are a number of different possible meanings for “inalienability”). I include for purposes of this discussion both voluntary and involuntary transfers, although some have suggested that only prohibitions on voluntary transfers should be included in the definition of inalienability. See, e.g., Radin, *supra*, at 1853.

2. 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 10:13 (2d ed. 2011); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995) (stating that “[t]he interest in the commercial value of a person’s identity . . . is freely assignable to others”).

3. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 704 (Ga. 1982).

4. Alienability is not a simple on–off switch. Instead, it can best be thought of as a spectrum, ranging from free or complete alienability (where there are no restrictions on transfers or ownership) to partial or limited alienability (where a variety of restrictions limit alienability, such as prohibitions on sales but not on donations or gifts) to complete inalienability (where no transfers are possible). See Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 *passim* (2009) (suggesting a broad spectrum of alienability); Rose-Ackerman, *supra* note 1, at 935–37 & *passim* (providing a taxonomy of different types of restrictions on transferability, ownership, and use).

the Article presents a shift in right of publicity law from thinking about “publicity-holders” to thinking about “identity-holders.”

For those less familiar with the right of publicity, it has sometimes been described as a property right in one’s personality.⁵ More precisely, it is a state law cause of action (either at common law or by statute) that provides damages and injunctive relief if a person or business uses another person’s name, likeness, voice, or other indicia of identity without permission, usually for a commercial purpose (though sometimes for any purpose or advantage).⁶ Publicity rights have been justified on a variety of grounds including autonomy, dignity, natural rights, labor-reward, and unjust enrichment.⁷ Each of these primary justifications for the right of publicity is rooted in the rights and interests of the underlying person upon whom the right initially vests.

If publicity rights are alienable, then the publicity-holder (the person who owns the right of publicity) need not be the same person as the person upon whom the publicity rights are based (the individual with whom publicity rights first vest and whose identity is the one that must be used to show a violation of those publicity rights). Accordingly, it is necessary to make a distinction between the publicity-holder and what I call the identity-holder. The identity-holder is the person whose name, likeness, or other indicia of identity is used and, when used without permission, forms the basis of a right of publicity violation. The publicity-holder, by contrast, is the person who owns the property interest in (commercial) uses of that identity.⁸ So, for example, the talented musician and composer Prince is an identity-holder, but if he assigns his right of publicity to his music label, let’s say Warner Brothers Records, then Warner Brothers would be the publicity-holder.⁹ The distinction between identity-holders and publicity-holders is a crucial one, but one that I have not seen made elsewhere. Without making such a distinction, it is impossible to describe (let alone justify) an alienable right of publicity.

Alienability unquestionably serves publicity-holders, but it is less clear that it is in the best interests of identity-holders. Many scholars and courts have assumed (often implicitly) that publicity-holders’ and identity-holders’ interests are aligned, but this is not always the case.¹⁰ A number of recent and high-

5. It was in part from this proposition—that there is a property right in one’s personality—that Samuel Warren and Louis Brandeis divined the right to privacy. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205, 207, 211 (1890).

6. More than half of the states have recognized a right of publicity either at common law or by statute. See 1 MCCARTHY, *supra* note 2, §§ 6:1, 6:3; see also Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 202 n.9 (2002).

7. See discussion *infra* section IV.B.

8. As I will discuss, publicity rights are not universally limited to commercial uses of identity. See *infra* notes 122–27 and accompanying text.

9. Prince famously objected to Warner Brothers’ control over his music by changing his name to an unpronounceable symbol and writing the word “slave” on his face. See Jon Pareles, *A Re-Inventor of His World and Himself*, N.Y. TIMES, Nov. 17, 1996, <http://www.nytimes.com/1996/11/17/arts/a-re-inventor-of-his-world-and-himself.html?scp=1&sq=&pagewanted=1>.

10. See *infra* text accompanying notes 21–57.

profile disputes highlight some of the dangers of alienating publicity rights from the identity-holders upon whom those rights are based. In several pending cases, current and former college athletes are suing a video game company and the National Collegiate Athletic Association (NCAA) for licensing and using their identities without permission in video games and other “commercial” enterprises.¹¹ The NCAA claims that it has the right to license the players’ identities because the players gave the NCAA perpetual rights to the players’ names and likenesses, at least for use in the context of the NCAA. Student athletes allegedly are required to sign broad releases of their publicity rights to the NCAA as a condition for playing collegiate sports.¹² If the NCAA were to obtain sufficiently broad assignments of these athletes’ publicity rights, the NCAA could significantly limit the future professional opportunities of the athletes and constrain their ability to develop and direct their own identities.¹³ For example, if the NCAA were to own the players’ publicity rights, then it could prevent those players from joining the National Football League (NFL)—which requires players to license, waive, or sometimes assign their publicity rights, at least for purposes of promotion and telecasts. The NCAA could also block the players from making endorsements or appearing in commercials, posters, or other merchandizing. The NCAA could do this as a publicity-holder because it would have the right to prevent anyone—even the identity-holder—from using the athlete’s identity without its permission.¹⁴

Aspiring musicians, actors, and models also have signed predatory blanket, long-term (sometimes perpetual) assignments and licenses of their publicity rights. Even in reality television series, such as *American Idol* and *The Apprentice*, participants routinely assign or license their publicity rights and life stories to the shows’ producers for no additional compensation and as a condition for participation.¹⁵ The profound and longstanding damage of assignments of publicity rights is perhaps most apparent when children are involved—parents can assign their children’s publicity rights to third parties and neither the children (once grown) nor the parents can reclaim the rights.¹⁶ Despite the possibility of such problematic transfers of publicity rights, assignability has been the least

11. There are eleven pending cases involving the NCAA’s licensing of student athletes’ names, likenesses, or other indicia of identity to Electronic Arts (a video game company). Nine of these have been consolidated in the Northern District of California. See *In re Student–Athlete Name & Likeness Litig.*, 763 F. Supp. 2d 1379, 1379 (J.P.M.L. 2011); see also *infra* notes 12 & 41 and accompanying text. In nine of the lawsuits the student athletes have sued the NCAA directly.

12. See, e.g., Complaint at 6–7, *Thrower v. NCAA*, No. C10-00632 (N.D. Cal. Feb. 12, 2010) [hereinafter *Thrower Complaint*]; Complaint at 5–6, *O’Bannon, Jr. v. NCAA*, No. CV 09 3329 (N.D. Cal. July 21, 2009) [hereinafter *O’Bannon Complaint*].

13. See discussion *infra* section I.A.

14. Although the NCAA has not asserted a right to block players from using their identities, if it had a valid assignment in gross of the student athletes’ publicity rights, then it would have the ability to do so. See discussion *infra* notes 40–43 and accompanying text.

15. See *infra* notes 48–53 and accompanying text.

16. Cf. *Falooona ex rel. Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986) (upholding photographic releases in the context of nude photographs of children); *Shields v. Gross*, 448

contested feature of publicity rights with few scholars or courts questioning the legitimacy of assignments or long-term, exclusive licenses of publicity rights to third parties.

It is not just assignability, however, that may unduly burden identity-holders. If publicity rights are freely alienable property, then creditors and ex-spouses should be able to take a piece, if not the entirety, of a person's right of publicity. This could lead to a significant loss of control over one's identity, sometimes forcing unwanted commercialization and commodification of one's image and thwarting the purported justifications for having publicity rights. Perhaps because of some of these concerns, courts have often curtailed the alienability of publicity rights outside of the context of voluntary assignments.

Consider one recent example: To facilitate the collection of an unpaid judgment, the estate of Ronald Goldman filed a motion seeking the assignment and transfer to it of Orenthal James (O.J.) Simpson's right of publicity. Simpson, the former NFL superstar and Hertz car rental pitchman, was found liable for the deaths of Ronald Goldman and Nicole Brown Simpson, and a \$33.5 million civil judgment issued against him, which he vowed never to pay.¹⁷ If the right of publicity were indeed fully alienable, then there should have been no doubt as to the outcome of the motion. Copyrights and patents, to which the right of publicity is often compared,¹⁸ are transferrable in such circumstances. In fact, the copyright to Simpson's book, *If I Did It*, was transferred to the Goldman family after a similar motion was filed seeking its assignment.¹⁹ Yet, the district court denied the motion to transfer Simpson's publicity rights. The judge likened such an alienation of his right of publicity to forcing Simpson into "involuntary servitude" and concluded that the right of publicity could never be transferred to creditors.²⁰

This Article explores the legitimacy of this and other decisions that fly in the face of the established doctrine that the right of publicity is freely alienable. The Article begins in Part I by identifying and considering the contested areas of alienability in right of publicity law. The consideration of these contested areas of alienability, as well as some areas that are not contested but perhaps should be, challenges the conventional wisdom about publicity rights. These contested

N.E.2d 108 (N.Y. 1983) (rejecting actress Brooke Shields's right of publicity claim against a photographer who took pictures of her naked when she was a child).

17. Although Simpson was acquitted of criminal murder charges, he lost the civil case against him for wrongful death.

18. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573, 575–76 (1977) (comparing right of publicity to patents and copyrights).

19. The Goldman family subsequently published the book, listing themselves as the authors on the cover. They added to the book an essay by the Goldmans (titled "He Did It") and a prologue by Pablo F. Fenjves (O.J. Simpson's ghostwriter), both of which suggest that the book is a confession. They also changed the cover art by minimizing the "if" in the title to a small font that few would see and added the subtitle "Confessions of the Killer." *THE GOLDMAN FAMILY, IF I DID IT: CONFESSIONS OF THE KILLER* (2007).

20. *Goldman v. Simpson*, No. SC03-6340, slip op. at 12–13 (Cal. Super. Ct. Oct. 31, 2006).

areas include assignability, postmortem publicity rights, the division of marital property, creditors' rights, and bankruptcy law. This discussion highlights that the alienability of the right of publicity is far from universal and is limited in a number of significant ways. Not only is the right of publicity not freely alienable, but efforts to treat it as such are more problematic than most courts and scholars have realized.

In Part II, I offer a critique of the common starting point for debates over the right of publicity's alienability or lack thereof. The debate to date has largely revolved around arguments over whether publicity rights are better situated as privacy rights or property rights. I point out reasons why this debate has not been particularly fruitful and has prevented scholars from asking the more important and fundamental question: Even if the right of publicity is a property right, should it be fully alienable?

In Part III, I bring to bear the literature that has analyzed inalienability in other contexts. I consider the common points of analysis in such debates, including economic efficiency, fundamental rights, and anticommodification concerns. These dominant frameworks for thinking about alienability provide reasons to limit the alienability of publicity rights.

In Part IV, I examine several additional and salient considerations for evaluating whether a right or entitlement should be alienable. First, I identify *separability* as a crucial component of alienability. Because it is impossible to strip identity-holders of their identities and some degree of control over that identity, it is impossible to actually separate publicity rights from identity-holders. This lack of separability either negates the possibility of alienability entirely or suggests that publicity rights must be extremely limited in nature if they are to be treated as alienable. Second, I consider *justifiability*—whether alienability furthers the underlying purposes of the right of publicity or instead works at cross-purposes. The most compelling justifications for having a right of publicity in the first place point toward limiting the right's alienability. Finally, I consider *reciprocity* concerns. Property ownership comes with both benefits and burdens. To the extent alienability creates burdens that we cannot tolerate, the alienability of the property may itself be suspect.

In Part V, I consider some of the implications of determining that the right of publicity should either be inalienable or have significantly limited alienability.

This reconceptualization of the right of publicity suggests new ways of thinking about the competing interests of the public, who sometimes also have a stake in accessing and using public personas. It also lends insights to other areas of the law in which we struggle with the appropriate nature of alienability, such as sales of organs, blood, babies, personal data, and moral rights.

I. CONTESTED AREAS OF ALIENABILITY

In this Part, I seek to problematize what largely has been unquestioned. Alienability is claimed to be one of the key features of the right of publicity and one of the main advantages of the shift from using a privacy-based framework

for protecting against the misappropriation of identity. Despite this heralded feature, the alienability of publicity rights in practice is both incomplete and contested. My analysis reveals not only that publicity rights are not fully alienable, but also that alienability itself has limited value for identity-holders—the stakeholders whose interests purportedly justify making publicity rights alienable.

Although alienability is largely embraced in the context of *voluntary* assignments, it has sometimes been rejected when publicity rights are at issue in less volitional contexts—for example, after an identity-holder’s death, in the disbursement of marital property in a divorce, and in bankruptcy proceedings or other actions involving creditors. These contested and limited areas of alienability may simply be part of a slow doctrinal movement away from the personal, privacy-based origins of publicity rights and toward a property-based rubric, but I think the inconsistency of the treatment of publicity rights and the slow and inconsistent pace of change likely suggests much more—a discomfort with fully alienating publicity rights from an identity-holder. Although identity-holders may garner short-term economic advantages from alienation, such alienation may cause long-term economic and dignitary harms that call into question the legitimacy of alienability, even in the context of voluntary assignments.

I will discuss each of the contested and contestable pockets of alienability in turn. My goal is to provide a sense of the broad scope of the alienability issues at play in the right of publicity context and to present a big-picture view that reveals the limits on the right’s alienability. I want to acknowledge, however, that, in the context of this project, I cannot fully develop all of the relevant law in each area.

A. VOLUNTARY ASSIGNMENTS

Early privacy cases provided a cause of action for the misappropriation of one’s name, likeness, or other indicia of identity, but that right (like other privacy rights) was deemed personal and unassignable. Courts and businesses claimed that this lack of assignability was an impediment to fully monetizing the value of public personalities, such as actors and athletes.²¹ In response, publicity rights were created. Ever since then, courts, legislatures, and scholars have frequently referred to the broad assignability of the right of publicity (including assignments in gross and in perpetuity) without reflecting on the merits, or really demerits, of such assignability for identity-holders. The Restatement (Third) of Unfair Competition states matter-of-factly that “[t]he interest in the commercial value of a person’s identity is in the nature of a property right and is freely assignable to others.”²² The leading treatise in the field similarly concludes that the right’s “free assignability . . . has never been seriously questioned.”²³

21. *E.g.*, *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *see also infra* text accompanying notes 29–34.

22. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995).

23. McCARTHY, *supra* note 2.

This conventional wisdom, however, is not universally true. The assignability of publicity rights is far from settled, even in the two jurisdictions (California and New York) in which assignments of those rights are most frequently made. In New York, for example, the placement of the right of publicity within New York's privacy statute has led some courts and commentators to conclude that the right is not assignable.²⁴ A number of states have modeled their statutes on the New York privacy statute, so if the right cannot be assigned under New York law, then it may not be assignable in those states either.²⁵ Similarly, despite the common view that the right of publicity in California is assignable, the question has never been directly addressed and there are reasons to question whether the law permits such assignments. The assignability of the statutory *inter vivos* right is not expressly provided for by the relevant statute (in contrast to the postmortem statute) and the common law right has been treated as personal in nature.²⁶ Some states have expressly prohibited transfers of the right of publicity. In Nebraska, for example, the relevant statute explicitly bars the alienation of the right.²⁷ Even in states with statutes that provide that the right of publicity is "freely transferable," some of these statutes suggest that the individual upon

24. See N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2010); 1 McCARTHY, *supra* note 2, § 6:94 (suggesting that courts will not permit assignees to sue under the statute); see also *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585–86 (2d Cir. 1990) (concluding that publicity rights in New York are not descendible); Lawrence Edward Savell, *Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 ALB. L. REV. 1, 38 (1983) (“[The rights set forth in N.Y. Civ. Rights Law §§ 50–51] cannot be enforced by another despite assignment or inheritance.”). But see *Cory v. Nintendo of Am., Inc.*, 592 N.Y.S.2d 6, 8 (App. Div. 1993) (denying model's right of publicity claim because use of his image in video game was authorized by his agent to whom his publicity rights had been assigned); *Ippolito v. Ono-Lennon*, 526 N.Y.S.2d 877, 879, 883 (Sup. Ct. 1988) (suggesting that rights under §§ 50–51 can be “sold,” “assigned,” or “disposed of”).

25. See, e.g., R.I. GEN. LAWS ANN. §§ 9-1-28, 9-1-28.1 (West 2010); VA. CODE ANN. § 8.01-40 (2007); WIS. STAT. § 995.50 (2009). Although New York law is influential in interpreting such statutes, it is not binding on those states. See *Brown v. Am. Broad. Co.*, 704 F.2d 1296, 1302 (4th Cir. 1983) (suggesting that even though interpretations of New York statute are persuasive, they are not binding on Virginia courts); *Tropeano v. Atl. Monthly Co.*, 400 N.E.2d 847, 848–50 (Mass. 1980) (holding that the interpretation of the Massachusetts privacy statute need not follow New York law, even though it was originally modeled on that state's statute).

26. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) (holding that, under the common law, the “right to exploit name and likeness is personal to the artist”); Stephen F. Rohde, *Dracula: Still Undead*, CAL. LAW., Apr. 1985, at 51, 53 (“[A] strong argument can be made that a living personality cannot assign or transfer the rights recognized under § 3344[. California's statutory right of publicity.]”); cf. *Goldman v. Simpson*, No. SC03-6340, slip op. at 11–12 (Cal. Super. Ct. Oct. 31, 2006) (citing *Lugosi* when holding that the personal nature of the right of publicity precludes involuntary transfers of that right). Compare CAL. CIV. CODE § 3344 (West 2010) (silent on transferability), with *id.* § 3344.1(b) (expressly providing for transferability and descendibility of the postmortem right). Although a number of California courts have suggested that the right of publicity is assignable, none have directly addressed the question. See, e.g., *KNB Enters. v. Matthews*, 78 Cal. App. 4th 362, 365 n.2 (2000) (noting that no one in the case challenged the assignability of publicity rights under California law); see also *Upper Deck Authenticated, Ltd. v. CPG Direct*, 971 F. Supp. 1337, 1348–49 (S.D. Cal. 1997) (suggesting, without deciding, that California's common law right of publicity may be unassignable).

27. NEB. REV. STAT. § 20-207 (2010).

whom the right is based—what I have called the identity-holder—could either continue to sue for violations after an assignment or could object to an assignee’s lawsuit.²⁸

Not only is assignability not universally accepted, but the common conclusion that assignability benefits identity-holders is not always true. Despite the claim that the right of publicity was the only way to protect the economic and dignitary interests of performers, athletes, and others, the assignability of publicity rights largely promotes the interests of publicity-holders, sometimes at the expense of these identity-holders. The case credited with creating the right of publicity in 1953, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Co.*, is a case in point.²⁹ *Haelan* is often posited as protecting identity-holders, who, absent an alienable right of publicity, could not commercialize their identities. Peter Felcher and Edward Rubin, for example, describe the case as “protect[ing] the ability of baseball players to profit from the use of their photographs.”³⁰ This common description, however, obscures the reality that, at its heart, *Haelan* is a dispute between the identity-holders and the publicity-holder; a dispute in which the right of publicity works to the advantage of the publicity-holder rather than the identity-holders.

In *Haelan*, the identity-holders, baseball players, allegedly granted the exclusive use of their names and likenesses to a gum manufacturer, Haelan Laboratories, for use on baseball cards that were included in its packages of gum (under the Bowman Gum label). In violation of this contract, some players also granted permission to an agent of Topps Chewing Gum to use their names and likenesses on its competing baseball cards. Haelan then sued Topps for using the players’ names and images in violation of its prior rights.

In its decision, the court created a “right of publicity” that would be a fully alienable property right and concluded that the ballplayers had transferred this right of publicity to Haelan (at least in the context of baseball cards). Instead of limiting Haelan to suing the players directly for breach of contract or the other company for interference with contract,³¹ the court went further claiming that,

28. See, e.g., OHIO REV. CODE ANN. §§ 2741.01, 2741.06 (West 2010) (suggesting that personality holder could object to a civil action filed by the assignee); 42 PA. CONS. STAT. ANN. § 8316(b) (West 2010) (authorizing both the “natural person” and any “authorized” person to sue). There are no cases to date that have interpreted these aspects of the statutes.

29. 202 F.2d 866 (2d Cir. 1953). Although *Haelan* may have been the first case to adopt a “right of publicity,” it was not the first to suggest that there was a property right in personality. Nor did the court coin the term. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) (justifying a right to privacy because there already existed a “right to publicity”).

30. See, e.g., Peter L. Felcher & Edward L. Rubin, Commentary, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1125 (1980); see also Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1350–51 (2009) (suggesting that *Haelan* focused on the dignitary interests of the ballplayers).

31. In a related case, Haelan successfully sued and received injunctive relief on the basis of an interference with contract theory. See *Haelan Labs., Inc. v. Topps Chewing Gum, Co.*, 112 F. Supp. 904, 910–11 (E.D.N.Y. 1953).

without the possibility of exclusive assignment, baseball players and other “prominent persons” could “yield . . . no money” for the use of their identities.³² This conclusion lacked any analysis to support it and seems to defy logic. An identity-holder can endorse a product or give permission for the use of his image and be compensated for doing so without assigning the right to his identity to another person or entity. The facts of *Haelan* demonstrate exactly that—the ballplayers at the time were compensated for their endorsements prior to the existence of an assignable right of publicity.³³

Despite the court’s claim to the contrary, *Haelan*’s lawsuit against Topps had little to do with protecting the ballplayers’ interests. Instead, the court protected *Haelan*’s corporate interests, not those of the players. Under the logic of *Haelan*, *Haelan* was given power not only over the competing company, but also against the players. Now that the right of publicity had been converted from a personal interest to a property right, it could be transferred from the players to *Haelan*. Although preventing a baseball player from appearing on other baseball cards may appear minor, especially if one operates on a purely economic plane, there is a significant dignitary harm from having a third-party publicity-holder wield the power to stop an identity-holder from choosing how and when to publicly exhibit himself or images of himself.

Shortly after *Haelan* was decided, the most prominent law review article calling for the adoption of a right of publicity was published. Although rarely described this way, this article by Melville Nimmer essentially reflected the interests of the film industry that stood to gain much from the adoption of publicity rights.³⁴ At the time he wrote, Nimmer was an attorney for Paramount Pictures.³⁵ Paramount and other movie studios had long sought to control their actors, especially their public personas; the creation of a right of publicity that could be assigned by performers to the studios would be a powerful new tool for the industry.³⁶ Tellingly, Nimmer advocated that even animals should re-

32. *Haelan*, 202 F.2d at 868.

33. The court suggested that assignments of publicity rights were already taking place. The commonness of compensation for uses of names and likenesses, however, is different from these rights being assigned to third parties. At the time of *Haelan*, athletes routinely gave permission to many different parties to use their names and likenesses, but the players ignored the exclusivity of any of these agreements. Martin Kane, *The Baseball Bubble Trouble*, *SPORTS ILLUSTRATED*, Aug. 16, 1954, at 38, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1128303/index.htm>. This state of affairs makes inaccurate the claim that an assignable right of publicity was customary before *Haelan*. Even if such assignments had been routine, such a fact would not make them doctrinally or normatively appropriate. For a broader critique of using unmediated custom to establish the scope of intellectual property rights, see Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 *passim* (2007).

34. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

35. *Id.* at 203.

36. It was not merely coincidental that the right of publicity emerged after the rise of the star system, the breakdown of the studio system, and the defeat of long-term employment contracts with actors in the mid-1940s. See JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 143–207 (1991) (describing these historical developments and the chronology of events leading up to the adoption of the right of publicity). Although Professor Gaines, a cultural theorist, puts weight on the

ceive a right of publicity.³⁷ The dog “Lassie” unquestionably did not stand to gain financially or emotionally from protecting his identity. Instead, if television and film companies owned Lassie’s and other animal actors’ rights of publicity, they would be the ones to gain by doing so. This new-found understanding of the right of publicity’s creation demonstrates that, even from the very beginning, identity-holders and publicity-holders have been likely to have different interests.

Although identity-holders have rarely sued assignees or licensees of their publicity rights, the few examples when they have evocatively demonstrate the downside of permitting assignments of publicity rights. Several cases, for example, raise the troubling prospect that parents could assign their children’s rights of publicity with no opportunity for the children to recapture them. In *Faloon* ex rel. *Fredrickson v. Hustler Magazine, Inc.*, for example, the Fifth Circuit concluded that parents, who had signed releases for the use of their children’s images in photographs of their children in the nude, could not reclaim those images or control unanticipated future uses of those photographs (including their use in hard-core pornographic forums).³⁸ Nor could the children, who were the subjects of those photographs, do so, even upon reaching the age of majority. One common assumption supporting this holding is that parents will act in their children’s best interests, but a number of prominent examples suggest otherwise.³⁹ Moreover, given that publicity rights can be assigned in gross, rather than simply waived or assigned for the limited purpose of a single photograph, even well-meaning parents may assign future control over their children’s public persona to third parties.

Adults, especially young ones, have also assigned or licensed their publicity rights to third parties in ways that may or have come back to haunt them.⁴⁰

individual as the basis for generating and justifying publicity rights, the story she tells also fits with my more skeptical view that the right was one of corporate design to counteract greater independence and power among actors. Cf. *De Haviland v. Warner Bros. Pictures, Inc.*, 153 P.2d 983, 987 (Cal. Dist. Ct. App. 1944) (limiting an employment contract with a studio to seven years and striking down the longstanding practice that studios had used to extend seven-year contracts far beyond that term); David Denby, *Fallen Idols: Have Stars Lost Their Magic?*, *NEW YORKER*, Oct. 22, 2007, at 104, 108 (describing the studio system and the *De Haviland* case).

37. Nimmer, *supra* note 34, at 210, 216, 222.

38. 799 F.2d 1000, 1004–07 (5th Cir. 1986) (analyzing the issues under a privacy rubric); *see also Faloon*, 607 F. Supp. 1341, 1353–55, 1359–61 (N.D. Tex. 1985).

39. *See, e.g.*, *Shields v. Gross*, 448 N.E.2d 108, 111 (N.Y. 1983) (rejecting actress Brooke Shields’s right of publicity claim for nude photographs of her taken when she was a child). In a particularly appalling piece of this litigation, Shields actually had to get permission to include these photographs in her own autobiography. *Id.* at 109. I have criticized elsewhere such a turn of events. *See* Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 *CORNELL L. REV.* 463, 517–18, 521–22 (2010).

40. Some of these problematic agreements are worded as licenses rather than as assignments. Even though licenses and assignments are technically different, courts have sometimes considered licenses as transfers of the right of publicity, *see, e.g.*, *Haelan Labs., Inc. v. Topps Chewing Gum, Co.*, 202 F.2d 866, 866–68 (2d Cir. 1953), and both exclusive licenses (especially long-term or perpetual ones) and assignments give publicity-holders and licensees similar control over identity-holders and third parties.

As noted in the Introduction, this issue recently has arisen in the context of college athletics. Former college athletes have filed a number of cases challenging the release of their publicity rights to the NCAA, which subsequently licensed their names, photographs, and other identifying features for use in video games and other commercial ventures.⁴¹ Players are allegedly required as part of their participation in the collegiate sports programs to “relinquish all rights in *perpetuity* to the commercial use of their images, including after they graduate.”⁴² The players challenge both whether the releases are valid and, if they are, whether they in fact grant publicity rights broadly and in perpetuity, as the NCAA claims.⁴³

If the NCAA were able to obtain a broad assignment of the student athletes’ rights of publicity, this would not only prevent the players from controlling how their images are used by the NCAA but also potentially prevent the players from publicly using their identities without the NCAA’s permission. Such assignments could interfere with the ability of these athletes to play in the National Basketball Association (NBA) or NFL, enter endorsement contracts, appear in

41. See, e.g., Thrower Complaint, *supra* note 12, at 2 (involving a former college football player who brought claims against NCAA for licensing his persona); Complaint at 1, Rhodes v. NCAA, No. 09-05378 (N.D. Cal. Nov. 13, 2009) (same); Complaint at 1, Wimprine v. NCAA, No. 09-05134 (N.D. Cal. Oct. 29, 2009) (same); Complaint at 1, Newsome v. NCAA, No. 09-04882 (N.D. Cal. Oct. 14, 2009) (same); Complaint at 1, Anderson v. NCAA, No. 09-05100 (N.D. Cal. Oct. 27, 2009) (same); O’Bannon Complaint, *supra* note 12 (involving a former UCLA basketball player who challenged NCAA’s licensing of his image and identity); Complaint at 9, Keller v. Elec. Arts, Inc., No. 09-1967 (N.D. Cal. May 5, 2009) (involving a former college football player who brought claims against NCAA for licensing his persona).

42. O’Bannon v. NCAA, No. C 09-1967 CW, 2010 WL 445190, at *1 (Feb. 8, 2010) (emphasis added) (describing plaintiff’s claims); O’Bannon Complaint, *supra* note 12, at 4–5 (emphasis added); see also Thrower Complaint, *supra* note 12, at 6–17.

43. My focus here is not on the appropriate outcome of these specific cases, which raise myriad other issues, but instead on whether such releases (broadly construed) under the best of circumstances—legal representation and informed consent—should be permissible. The release forms signed seem to grant much narrower rights than those claimed by the NCAA. See, e.g., NCAA Form 08-3a, Part III, Exh. 2, Hubbard v. Elec. Arts, Inc., No. 27878, (Cir. Ct. Tenn. Sept. 10, 2009); *NCAA Bylaw 12.5.1.1 Institutional, Charitable, Education, and Nonprofit Promotions Release*, http://grfx.cstv.com/photos/schools/scar/genrel/auto_pdf/2011-12/misc_non_event/sa-appearance-form-1.pdf (last visited Oct. 9, 2012). Even if the releases are invalidated or narrowly interpreted, the NCAA’s claim to such rights may be irrelevant. The uses by Electronic Arts of the players’ names, likenesses, and other identifying data may be lawful even if the assignments, licenses, or waivers of publicity rights were not. Some of the relevant images and information were taken from copyrighted works (the broadcast games) that the players consented to appear in and that were lawfully licensed. See *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1145–46 (9th Cir. 2006) (holding that copyright law preempted the right of publicity claim based on licensing of a copyrighted song that plaintiff had performed while under contract with a record label); *Rothman*, *supra* note 6, *passim* (contending that copyright law should preempt the right of publicity in such instances). In addition, the First Amendment likely protects the use of the names and statistics of real players. See *C.B.C. Dist. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (holding that the First Amendment protects the use of baseball players’ names and statistical information in fantasy sports leagues). The First Amendment issue is currently on appeal to the Ninth Circuit Court of Appeals. See Oral Argument, *Keller v. Elec. Arts, Inc.*, No. 10-15387 (9th Cir. Feb. 14, 2011), available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000007013.

advertisements, make certain public appearances, and stop others from using their likenesses.

Athletes who play professional sports also often assign or broadly license their publicity rights to their leagues or related entities.⁴⁴ Both NFL players and Major League Baseball (MLB) players have challenged the licensing of their names, images, and other indicia of identity that has been approved by their leagues.⁴⁵ Aspiring musicians similarly have granted recording labels broad and perpetual rights to the use of their identities, including uses beyond the scope of the particular recordings covered by their contracts.⁴⁶ Some labels have even obtained the ability to bar the recording artists from approving any uses of their identities in public, at least in the context of the music business, during the duration of their recording contracts.⁴⁷ Reality television show contestants routinely sign away rights to their commercial personalities and their life stories.⁴⁸ Shows that do not automatically assign contestants' publicity rights often contain a future assignment clause giving producers the option to force an exclusive assignment or license of a contestant's right of publicity at a later time.⁴⁹ At least one release explicitly states that the producers can prevent former contestants from appearing in public in the future or publicizing themselves or their acts.⁵⁰ Interestingly, these reality show releases prohibit anyone from participating whose publicity rights are owned by or licensed to another party.⁵¹ Accordingly, current and former student athletes are not eligible to

44. See, e.g., *Neal v. Elec. Arts, Inc.*, 374 F. Supp. 2d 574, 577 (W.D. Mich. 2005) (describing standard NFL Player Contract that included the assignment of "the exclusive right to use and to grant . . . the right to use his name, signature facsimile, voice, picture, photograph, likeness, and/or biographical information . . . in group licensing programs"); cf. *Aikman v. AAA Sports, Inc.*, No. 92-1457, 1992 WL 204397, at *3 (S.D.N.Y. Aug. 11, 1992) (describing the existence of irrevocable, exclusive licenses of NFL player's names and likenesses).

45. See, e.g., *Dryer v. Nat'l Football League*, 689 F. Supp. 2d 1113 (D. Minn. 2010); *Neal*, 374 F. Supp. 2d at 574; *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Ct. App. 2001).

46. See, e.g., Sample Recording Contract Language From Record Executive, David Lessoff (on file with author) (granting perpetual right to use artist's name, likeness, and other indicia of identity "for all purposes of trade . . . and the general goodwill of Company"). The recording industry has thus far been more reasonable than many other industries, often limiting use rights to the promotion of recordings that were created while a performer was signed with that label. However, if broad assignments of the right of publicity are permissible, record labels could shift to more aggressive assignments in the future.

47. *Flim and the B.B.'s Contract with Warner Bros. Music* (Aug. 31, 1989) (on file with author) (prohibiting band members from authorizing use of name, likeness, voice, other indicia of identity, or performing in the context of the music industry for a term of up to twelve years).

48. See, e.g., Release, *The Apprentice*, at 2, (granting rights to Applicant's "voice, actions, likeness, name, appearance and biographical materials," both in conjunction with and "separately" from the program); Release, *America's Got Talent*, at 6 (granting exclusive rights in perpetuity to contestant's "name, likeness, voice . . . sounds, signature, [and] biographical data" not only in connection with the program but "otherwise").

49. See, e.g., Personal Release, *The X Factor* (Season 1), at 1.

50. Release, *America's Got Talent*, at 8.

51. *American Idol* Registration and Audition Rules (Season 10), at 1 (on file with author) (prohibiting contestants from having "a current agreement relating to the use of your name, voice and/or likeness"); see also Release, *The X Factor*, *supra* note 49, at 1 (stating that a person cannot participate if anyone else has the right to use that person's name, voice, likeness, or any combination of the three).

participate, for example, in *American Idol*, if their publicity rights are assigned or licensed to the NCAA. Models also often assign their publicity rights to others, and in the case of the adult entertainment industry, some companies routinely require their models to assign their rights of publicity in gross and in perpetuity.⁵² Some managers and agents also have their clients (most often actors) assign or exclusively license their publicity rights to them.⁵³

All of these situations call into question the contention that assignability serves the interests of identity-holders and the common view that identity-holders and publicity-holders always share the same interests. Undoubtedly, some of the worst excesses of assignments could be addressed through the relevant contracts. The most powerful movie stars and others who have the leverage to negotiate fair, or even favorable, contract terms related to the use of their identities will be able to defuse many of the potential harms that stem from an alienable right of publicity, but others with less power, such as aspiring actors and musicians or student athletes will continue to be burdened by oppressive, broad, long-term (even perpetual) assignments, and exclusive licenses of their publicity rights.⁵⁴ Some of these assignments and licenses could be challenged on a variety of grounds other than alienability (for example, on contract or employment law grounds, such as being unconscionable or akin to disfavored noncompete clauses),⁵⁵ but it is preferable to evaluate whether such assignments and licenses should be permissible in the first place before considering a variety of second-best options to address the resulting harm of such transfers. Furthermore, to date, contract law has had little success in limiting or invalidating assignments or licenses of publicity rights.⁵⁶ Notably, the most

52. Cf. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1108 (9th Cir. 2007); Complaint at 4, *Perfect 10, Inc. v. Netsaits B.V.*, No. 10-1773 (S.D. Cal. Aug. 25, 2010); Complaint at 8, 18, 22–23, 26, 33, 44–45, *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077 (C.D. Cal. 2004) (No. CV-02-7624).

53. See, e.g., *Cory v. Nintendo of Am., Inc.*, 592 N.Y.S.2d 6, 8–9 (App. Div. 1993).

54. Cf. GAINES, *supra* note 36, at 160–64 (describing the disparity in actor contracts during the Golden Age of Hollywood); ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 33, 128 (2010) (discussing the bargaining differential between authors and artists and those who own their works); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 *RUTGERS L.J.* 347, 409–12 (1993).

55. See U.C.C. § 2-302(1) (describing the ability of courts to decline to enforce unconscionable contracts or terms); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (same); *Kelton v. Stravinski*, 41 Cal. Rptr. 3d 877, 881–83 (Ct. App. 2006) (describing “the general rule . . . that covenants not to compete are void” and invalidating a noncompete agreement between business partners); Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 *PHIL. & PUB. AFFAIRS* 205, 205 (2000) (“The unconscionability doctrine in contract law enables a court to decline to enforce a contract whose terms are seriously one-sided, overreaching, exploitative, or otherwise manifestly unfair.”); see also CAL. BUS. & PROF. CODE § 16600 (voiding, with several exceptions, contracts that restrain the freedom of individuals to “engage[e] in a lawful profession, trade, or business”).

56. See, e.g., *Cepeda v. Swift & Co.*, 291 F. Supp. 242, 245–47 (E.D. Mo. 1968) (holding that grant of exclusive rights to use baseball player’s name, signature, and image on sporting goods gave assignee the ability to authorize a meat processing company to use the player’s image and signature in an advertisement over that player’s objections); *Cory*, 592 N.Y.S.2d at 8–9 (denying model’s right of publicity claim because use of his image in video game was authorized by his agent, whom the court

prominent treatise author in the field has concluded that contract law will rarely stand in the way of voluntarily-entered transfers of publicity rights even if such transfers are all-encompassing and in perpetuity.⁵⁷

B. BANKRUPTCY AND CREDITORS

If the right of publicity were freely alienable, then it should be capable of assignment to creditors. Melissa Jacoby and Diane Zimmerman, therefore, understandably have argued that the right of publicity is part of a debtor's estate and accordingly must be subject to capture by creditors.⁵⁸ If publicity rights are deemed property by state law, then they should be "property of the estate" for bankruptcy purposes absent an express exemption.⁵⁹ Other forms of intellectual property routinely are included in debtors' estates and assigned to creditors.⁶⁰

treated as having the unilateral right to authorize use of the model's name and image); *cf.* Faloona *ex rel.* Fredrickson v. Hustler Magazine, Inc., 799 F.2d 1000, 1005 (5th Cir. 1986) (upholding photographic release in the context of a republication of photographs of naked children that were repurposed for use in a pornographic magazine).

Courts also have increasingly tolerated contracts that significantly restrict the freedom of individuals in the employment context. *See, e.g.,* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 648–57 (Tex. 2006) (upholding a noncompete clause when it is reasonable and there is no "greater restraint than is necessary to protect the goodwill or other business interest of the promisee" (quoting TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2006))). In some instances, courts have even forced specific performance of personal services contracts involving unique performers or blocked such performers from working elsewhere for the duration of their contracts. *See* CAL. CIV. CODE § 3423(e) (Deering 2005) (allowing injunction to force specific performance of a personal services contract "where the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law"); Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 *passim* (1992) (discussing the U.S. adoption over time of the *Lumley* doctrine from England that allows producers to prevent performers who breach their contracts from performing elsewhere); *see also* CATHERINE L. FISK, *WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1930 passim* (2009) (tracing the history of employment contracts and the trend toward accepting ever-greater restrictions on workers). *But see* Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383 *passim* (1993) (criticizing the differential treatment of contracts regarding human capital, in part because he contends that the frequent reluctance to enforce specific performance and covenants not to compete is unjustifiable).

57. McCARTHY, *supra* note 2, § 10:14 (suggesting that contract law should only limit assignments if they were made under duress, in the context of fraud, or under other circumstances that call into question consent).

58. Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322 *passim* (2002).

59. 11 U.S.C. § 541(a)(1) (defining property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case"). There are several exemptions from inclusion in the debtor's estate, including some retirement plans, small sums of personal property, a residence, and a single motor vehicle. *See* 11 U.S.C. §§ 522(b)(3)(c)–(d)(2), 541(b)(5), (7); *see also* WILLIAM L. NORTON JR., *NORTON BANKRUPTCY LAW AND PRACTICE* § 176:15 (3d ed. 2008) (updated 2012) (discussing the exemption provisions).

60. *See, e.g.,* Chesapeake Fiber Packaging Corp. v. Sebro Packaging Corp., 143 B.R. 360, 372 (Bankr. D. Md. 1992) ("[I]t is undisputed that property of the debtor's estate includes 'the debtor's intellectual property, such as interest in patents, trademarks, and copyrights.'" (quoting *United States v. Inslaw Inc.*, 932 F.2d 1467, 1471 (D.C. Cir. 1991))); *see also* Cusano v. Klein, 264 F.3d 936, 946–47

Nevertheless, no court has held that the right of publicity is an asset for purposes of bankruptcy or that it is assignable to satisfy debts.⁶¹ In fact, the only court to directly address the issue held that the right of publicity cannot be assigned to creditors. As noted, a California superior court rejected a motion to assign O.J. Simpson's right of publicity to his judgment-creditors, the Goldmans, even though other intellectual property, such as Simpson's copyright to the book *If I Did It*, was transferred to them.⁶² Only two published cases to date have suggested that the right of publicity might be part of a debtor's estate, but neither case directly posed the question and neither suggested (even in dicta) that a forced assignment or liquidation might be warranted in such instances.⁶³

The court in *Goldman v. Simpson* rejected the claim by a creditor because of concern that putting control over a person's identity in the hands of a third party is akin to "involuntary servitude."⁶⁴ As I will further elaborate, if the right of publicity is transferred to a creditor, that creditor would be able to affirmatively control the use of the identity-holder's name, likeness, and other indicia of identity. The creditor could also prevent the identity-holder from making any endorsements and could even block some public appearances.⁶⁵ Undoubtedly informed by such concerns, the Illinois legislature explicitly banned the transfer of the right of publicity to creditors in the state's Right of Publicity Act, even though the state otherwise recognizes the right of publicity as a transferable property right.⁶⁶

(9th Cir. 2001) (concluding that copyrighted works are part of bankruptcy estate); *Constant v. Advanced Micro-Devices, Inc.*, No. 92-56475, 1993 WL 501665, at *1, *3-4 (9th Cir. Dec. 3, 1993) (affirming transfer of debtor's patents and copyrights to creditor); *NORTON*, *supra* note 59, § 177:25 (concluding that "property of the estate" includes "any intellectual property or rights thereto that the debtor may own"). I note that there are some limits on the transfer of IP licenses, especially in the context of trademarks or if the transfer would violate the contractual terms of a license (or force performance on third parties who had not agreed to work for or with the creditors). See *NORTON*, *supra* note 59, §§ 177:30-31, 177:37.

61. See *Jacoby & Zimmerman*, *supra* note 58, at 1347. A search of Westlaw and Lexis from 2000-2012 reveals no new cases. For a brief survey of some of the high profile bankruptcies in which the right of publicity was implicated but not addressed, see *id.* at 1325-26.

62. *Goldman v. Simpson*, No. SC03-6340, slip op. at 12 (Cal. Super. Ct., Oct. 31, 2006); see also *In re Lorraine Brooke Assocs., Inc.*, No. 07-12641-BKC-AJC, 2007 WL 7061312, at *2-3 (Bankr. S.D. Fla. July 2, 2007) (seeking (but failing) to prevent transfer of copyright and related rights to *If I Did It* by having the relevant shell company declare bankruptcy).

63. See *Marradi v. Capital Entm't Indus., Inc.*, No. CV 01-02622 DDP, 2002 U.S. Dist. LEXIS 28488, at *22-24 (C.D. Cal. Nov. 22, 2002) (noting that a debtor's settlement agreement with a creditor included an assignment of the debtor's right of publicity but only for "purposes of promoting and marking" copyrighted works that the creditors owned); *In re Jones*, 445 B.R. 677, 688, 726 & n.132, 730-31 (Bankr. N.D. Tex. 2011) (pointing to the failure of the debtor to report his right of publicity on his list of assets as a sign of fraud and awarding recovery to the creditor that did not include any valuation or assignment of debtor's right of publicity). Although *Marradi* noted that the debtor's settlement with creditors assigned his right of publicity in the limited context of particular copyrighted works, the federal district court nevertheless suggested that, if the works at issue were altered, the debtor might continue to have a right of publicity claim against the creditors. See *id.*

64. *Simpson*, at 12.

65. See *infra* text accompanying notes 119-42.

66. See 765 ILL. COMP. STAT. ANN. § 1075/15 (LexisNexis 2010).

C. MARITAL PROPERTY

If the right of publicity is freely alienable property, then it should be subject to division in a divorce. Only a handful of cases, however, have treated the right of publicity (or something thought to encompass its value) as marital property, and even these courts have struggled with how to divide and quantify the right of publicity.

Only courts in New York and New Jersey have suggested that the right of publicity or “celebrity goodwill” is marital property subject to division at the time of the dissolution of a marriage.⁶⁷ It is not clear, however, that these handful of cases actually involve the right of publicity. Instead, a broader and more nebulous concept of “professional goodwill” may simply be being applied to the context of celebrities in the same way that it has been applied to valuations of the professional careers of attorneys, investment bankers, and former congressional representatives.⁶⁸ In these professional goodwill cases, some states have decided that spouses should receive a portion of their ex-spouse’s future earnings if an enhanced earning potential results from a spouse’s contribution to the other’s professional success or development. In *Elkus v. Elkus*, a New York appellate court explicitly endorsed this approach, noting that the ex-husband enhanced the value of the famous opera singer, Frederica Von Stade’s career and therefore deserved a percentage of the enhanced value of her celebrity goodwill.⁶⁹

The concept of goodwill and its inclusion in divorce assets has been controversial, and not all states have agreed on how it should be treated. Some states have rejected the inclusion of goodwill entirely or at least have done so when the goodwill is personal in nature.⁷⁰ So if the sole basis for concluding that

67. See, e.g., *Elkus v. Elkus*, 572 N.Y.S.2d 901, 904 (App. Div. 1991) (holding that opera singer Frederica Von Stade’s celebrity status was marital property); *Piscopo v. Piscopo*, 557 A.2d 1040, 1042–43 (N.J. Super. Ct. App. Div. 1989) (holding that well-known comedian Joe Piscopo’s professional goodwill was a marital asset subject to distribution).

68. See, e.g., *Piscopo*, 557 A.2d at 1042–43 (referring to “celebrity goodwill” and *Piscopo*’s “business” but not to the “right of publicity”); *Moll v. Moll*, 722 N.Y.S.2d 732, 734–38 (N.Y. Sup. Ct. 2001) (suggesting that issue in celebrity cases was about exceptional earning capacity and professional goodwill, not publicity rights, and holding that a spouse could receive a portion of professional goodwill from husband’s work as a stockbroker); see also *Dugan v. Dugan*, 457 A.2d 1, 6 (N.J. 1983) (holding that goodwill in an attorney’s practice was marital property subject to equitable distribution); *Hougie v. Hougie*, 689 N.Y.S.2d 490, 491 (App. Div. 1999) (concluding that enhanced earning capacity of investment banker was marital property); *Martin v. Martin*, 614 N.Y.S.2d 775, 777 (App. Div. 1994) (affirming treatment of enhanced earning capacity of former Congressional representative as marital property). But see, *Piscopo v. Piscopo*, 555 A.2d 1190, 1192 (N.J. Super. Ct. Ch. Div. 1988) (pointing to treatment of the “right of publicity” as marital property); *Golub v. Golub*, 527 N.Y.S.2d 946, 949–50 (Sup. Ct. 1998) (pointing to the treatment of publicity rights as property to conclude that the “right of publicity” is marital property), *abrogated by McSparron v. McSparron*, 87 N.Y.2d 275 (N.Y. 1995).

69. *Elkus*, 572 N.Y.S.2d at 904–05.

70. See, e.g., *In re Marriage of Claydon*, 715 N.E.2d 1201, 1204 (Ill. App. Ct. 1999) (concluding that “goodwill” should not be valued separately as a marital asset); *Ahern v. Ahern*, 938 A.2d 35, 39 (Me. 2008) (holding that goodwill is not marital property); *Dorsey v. Dorsey*, 972 So. 2d 48, 53 (Miss. Ct. App. 2008) (same); *Taylor v. Taylor*, 386 N.W.2d 851, 857–58 (Neb. 1986) (rejecting inclusion of

the right of publicity is marital property is that it fits within the goodwill analysis, many states would decline to treat it as marital property.

Moreover, even the few courts that have categorized celebrity goodwill as marital property have not ultimately treated it as alienable. No court, for example, has given a nonidentity-holding spouse any rights to use, waive, license, or transfer publicity rights.⁷¹ Nor have courts forced sales of publicity rights to facilitate splitting this marital asset—something that happens in the context of other marital property, including a household residence. Even in the few cases to have suggested that publicity rights or celebrity goodwill might count as marital property, none has actually awarded a portion of that property to the claiming spouse. In each instance, the courts concluded that they could not ascertain with sufficient specificity the monetary value at stake.⁷²

This treatment differs from how copyrights and patents have been treated in divorces. Forced assignments of patents have been permitted in some divorces,⁷³ and coownership of copyrighted works has also been ordered.⁷⁴ Such assignments or coownership means that the noninventor and nonauthor spouses may freely license or use the invention or work without the author's or inventor's permission. These noncreator spouses may even be able to grant exclusive licenses.⁷⁵ No court has suggested similar treatment of publicity rights.

goodwill in assets when it depended on “professional reputation and continuing presence of a particular individual”).

71. See, e.g., *Piscopo*, 555 A.2d at 1190 (holding that celebrity goodwill is marital property that can be evaluated and distributed but making no mention of the right to use, waive, license, or transfer the rights).

72. See, e.g., *Sterling v. Sterling*, No. 310833/99, 2001 WL 968262, at *10 (N.Y. Sup. Ct. July 31, 2001) (discussing the final outcomes in *Elkus* and *Golub*).

73. See, e.g., *Finnegan v. Finnegan*, 148 P.2d 37, 38 (Cal. Dist. Ct. App. 1944) (holding that a patent must be assigned to an ex-spouse and that such an assignment does not conflict with federal patent law).

74. See, e.g., *Worth v. Worth*, 241 Cal. Rptr. 135, 137–38 (Ct. App. 1987) (holding that copyrighted works completed during marriage are community property even though copyright initially vests in the author-spouse). The appellate court in *Worth* suggested that the spouse should be treated as a coowner under community property principles. *Id.* at 139 n.5. But see *Rodrigue v. Rodrigue*, 218 F.3d 432, 435–43 (5th Cir. 2000) (suggesting that the nonauthor spouse should not have the right to exercise copyright privileges even if he is entitled to profits from the copyrighted work); David Nimmer, *Copyright Ownership by the Marital Community: Evaluating Worth*, 36 UCLA L. REV. 383, 411–15 (1988) (criticizing the suggestion in *Worth* that a spouse should be treated as a coowner).

75. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.10 (rev. ed. 2011); Nimmer, *supra* note 74, at 393–94. Some courts and scholars have suggested that federal copyright law should preempt such a conclusion. See, e.g., *Rodrigue*, 218 F.3d at 435–43; Nimmer, *supra* note 74. No one has questioned, however, whether patents and copyrights are marital property subject to division. Instead, the dispute is over whether ex-spouses can have a controlling interest in the property or whether the spouses qualify as “authors” or “inventors” under copyright and patent law.

D. POSTMORTEM RIGHTS AND DESCENDIBILITY

Privacy rights terminate with the death of the privacy-holder.⁷⁶ Once a person is dead, she can no longer suffer the dignitary or emotional harms that flow from a violation of privacy rights.⁷⁷ Because the right of publicity has often been treated as a property right, many courts and scholars have concluded, without further reflection, that it—unlike a privacy right—is capable of being devised or bequeathed upon death.⁷⁸ If the right of publicity were a freely alienable property right, it should indeed be descendible. The descendibility of publicity rights, however, has not been universally accepted, and, even to the extent that a postmortem right of publicity has been adopted, in a majority of states that recognize publicity rights its limited contours reveal a partial and constrained alienability.⁷⁹

Several states have outright rejected a postmortem right of publicity.⁸⁰ Some have done so on the basis that a violation of the right of publicity remains a privacy-based tort and *ipso facto* is not devisable.⁸¹ States that have descendible publicity rights have often established them by statute after courts in those states rejected their descendibility at common law.⁸² California (which has both a common law and statutory right of publicity) exemplifies this treatment. The common law right in California is not devisable,⁸³ but the state has passed a statute that provides for a postmortem right of publicity.⁸⁴

Even in states that recognize a postmortem right of publicity, the right has

76. See, e.g., *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979); *Nicholas v. Nicholas*, 83 P.3d 214, 228–29 (Kan. 2004); see also RESTATEMENT (SECOND) OF TORTS § 652I (1977).

77. Jurisdictions are split on whether privacy violations that accrued prior to death can be brought by the estate after a plaintiff's death. See MCCARTHY, *supra* note 2, § 9:3.

78. See, e.g., *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 325–26 (6th Cir. 2001) (concluding that Michigan's right of publicity is descendible because it is a property right); *Presley v. Russen*, 513 F. Supp. 1339, 1355 (D.N.J. 1981) (same for New Jersey); see also *Lugosi*, 603 P.2d at 437, 445 (Bird, J., dissenting) (framing descendibility issue as turning on whether the right of publicity is a personal, privacy right or a proprietary, assignable right); Richard B. Hoffman, *The Right of Publicity—Heirs' Right, Advertisers' Windfall, or Courts' Nightmare*, 31 DEPAUL L. REV. 1, 36, 44 & *passim* (1981) (concluding that, because publicity rights are property rights, they should be descendible without restriction).

79. See MCCARTHY, *supra* note 2, § 9:17. Nineteen states to date have recognized a postmortem right—fourteen by statute and five by common law.

80. See, e.g., *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (noting that there is no postmortem right of publicity in New York); *Hagen v. Dahmer*, No. Civ. A. 94-c-0485, 1995 WL 822644, at *4 (E.D. Wis. Oct. 13, 1995) (rejecting postmortem right under Wisconsin common law).

81. See, e.g., *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (noting that there is no postmortem right of publicity in New York); *Hagen v. Dahmer*, No. Civ. A. 94-c-0485, 1995 WL 822644, at *4 (E.D. Wis. Oct. 13, 1995) (rejecting postmortem right under Wisconsin common law).

82. See, e.g., *Reeves v. United Artists*, 572 F. Supp. 1231, 1234–35 (N.D. Ohio 1983), *aff'd* 765 F.2d 79, 80 (6th Cir. 1985) (rejecting a postmortem right in Ohio); see also OHIO REV. CODE ANN. § 2741.02, (subsequently providing a postmortem right of publicity).

83. *Lugosi*, 603 P.2d at 431.

84. CAL. CIV. CODE § 3344.1 (West 2010).

been limited in a number of ways that are not consistent with a freely alienable property interest. For example, some postmortem statutes restrict the parties with whom the right can vest.⁸⁵ Many states also limit the duration of postmortem rights. The duration of postmortem publicity rights ranges from twenty to forty to one hundred years after death, to without limitation, or to forever but only if continuously used.⁸⁶ Although limits on duration are not strictly speaking the same as limits on alienability, they contribute to the picture of a right that, far from being an unfettered property right, is highly limited in nature and most often a result of legislation rather than a common law property right. Taken together, the limits on the survivability of the right and the possible heirs and beneficiaries of that right belie its treatment as a freely alienable property interest.

* * *

In sum, this discussion of contested areas of alienability suggests that there is enormous doctrinal ambivalence about treating the right of publicity as freely alienable despite rhetoric to the contrary. When courts and scholars engage with whether the right of publicity should be alienable, they often focus on the question of whether the right is properly categorized as property. I will next turn to a discussion of why the answer to this question turns out to be less important in evaluating the contested alienability of the right of publicity than many have thought.

II. THE RED HERRING OF THE PROPERTY VERSUS PRIVACY DEBATE

To the extent that the contested areas of alienability have been considered by courts and scholars, the analysis has often focused on determining whether publicity rights are property (and therefore assumed to be freely alienable), or instead whether they are really privacy-based, personal rights (and therefore *not* alienable).⁸⁷ For example, courts and scholars who have assessed publicity

85. Some right of publicity statutes limit the usual intestate inheritance principles by permitting only certain heirs (such as a surviving spouse or child); if such heirs are not alive, then the right is extinguished. *See, e.g.*, FLA. STAT. ANN. § 540.08(1)(c) (West 2007) (limiting intestate inheritance to spouse or children); 765 ILL. COMP. STAT. ANN. § 1075/15 (LexisNexis 2010) (limiting intestate inheritance to spouse, parents, children, and grandchildren). The Kentucky statute vests postmortem rights only in the hands of the executor or administrator of the estate. *See* KY. REV. STAT. ANN. § 391.170(2) (LexisNexis 2010). Several states also require heirs or beneficiaries to register postmortem rights with the state, otherwise they are not permitted to assert those rights against others. *See, e.g.*, NEV. REV. STAT. § 597.800 (2012).

86. *See* MCCARTHY, *supra* note 2, § 9:17.

87. *See, e.g.*, John Frow, *Elvis' Fame: The Commodity Form and the Form of the Person*, 7 CARDOZO STUDIES IN L. & LIT. 131, 159 (1995) (concluding that, because the right of publicity is a property right, it is accordingly both assignable and descendible); Allen M. Parkman, *Human Capital as Property in Celebrity Divorces*, 29 FAM. L.Q. 141, 145 (1995) (concluding that celebrity goodwill should be treated as property and therefore divided upon dissolution); Jonathan L. Kranz, Note, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 CARDOZO ARTS & ENT. L.J. 917, 918 (1995) (classifying the right of publicity as property and then concluding that it is therefore marital property subject to disbursement); Robin P. Rosen, Note, *A Critical Analysis of Celebrity Careers as Property*

rights as privacy rights have rejected descendibility, whereas those that have categorized them as property rights have often concluded that they are descendible (for at least some period of time).⁸⁸ As David Westfall and David Landau have observed, this simplistic property-based analysis has eclipsed any other thinking about the scope of the right of publicity. They term this the “property syllogism” in which the classification “property” answers any presented question about publicity rights.⁸⁹

The many limits on the alienability of publicity rights described in Part I cannot be explained away, however, by differing jurisdictional views on whether publicity rights are best situated as a property right. Most courts and legislatures have categorized the right of publicity as a property right⁹⁰ but nevertheless limit its alienability. Therefore, the discomfort with alienating publicity rights reveals an undeveloped, but very much present, concern that—even if rooted in property—the right of publicity should have limits placed on its alienability. In some sense then, it is scholars who have seen things in black and white, while the courts in the trenches have taken a more nuanced approach, albeit an underdeveloped and unacknowledged one.

Moreover, even if such a distinction in the case law could hold, its value would be limited. There is significant overlap between privacy-based and property-based misappropriation claims. So much so that a significant number of courts and scholars have considered publicity rights a hybrid of privacy-based and property-based claims or have concluded that there is little point in differentiating between the two categories.⁹¹ Misappropriation of one’s identity

Upon Dissolution of Marriage, 61 GEO. WASH. L. REV. 522, 549 (1993) (concluding that celebrity status and goodwill is not property and accordingly not divisible upon the dissolution of a marriage); see also *supra* notes 23, 58, 68, 78 & *infra* note 88.

88. See *supra* notes 78, 80, 87. Compare *Lugosi*, 603 P.2d at 431 (holding that common law publicity rights are rooted in privacy and therefore not descendible), and Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 *passim* (1985) (rejecting a postmortem right of publicity because the right is a personal, liberty interest), with *State ex rel. Elvis Presley Int’l Mem’l Found. v. Crowell*, 733 S.W.2d 89, 95–97 (Tenn. Ct. App. 1987) (holding that the common law right of publicity in that state is property and therefore descendible), and Hoffman, *supra* note 78, *passim* (concluding that the right of publicity is descendible because it is a property right).

89. See David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 72 (2005). But cf. George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 465 (1991) (“Characterization of a value as property does not solve the question of content of this right.”).

90. See MCCARTHY, *supra* note 2, § 10:7 (“[C]ourts have uniformly held that the right of publicity is a ‘property’ right.”). Some right of publicity statutes expressly state that publicity rights are “property.” See, e.g., CAL. CIV. CODE § 3344.1 (West 2010) (protecting postmortem publicity rights). The Restatement (Second) of Torts and the Restatement (Third) of Unfair Competition also identify the right of publicity as a property right. See RESTATEMENT (SECOND) TORTS § 652C cmt. a (1977) (describing misappropriation of a name or likeness as a “property right” even though it also protects dignitary interests, such as “mental distress”); RESTATEMENT (THIRD) UNFAIR COMPETITION § 46 cmt. g (1995).

91. See, e.g., *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“Whether [the right of publicity is] labelled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has

can cause both commercial *and* dignitary harms. To force a separation of those injuries, and to categorize one as purely emotional in nature (privacy rights) and one as purely economic in nature (publicity rights) creates a false dichotomy that devalues the complexity of the relevant harm as well as the experiences of the injured party. Such a delineation also defies the meaning of the terms privacy and publicity. Although some have suggested that the dividing line between privacy and publicity rights is between commercial and dignitary harms,⁹² there is no need to separate these injuries from one another when both injuries result from the same underlying wrong. A public figure can suffer both emotional distress when her identity is used without permission and also a commercial loss from detrimental publicity or from lost endorsement fees.⁹³

In some of the earliest cases to recognize a common law right to privacy, the overlap of dignitary and economic interests is particularly apparent. In *Pavesich v. New England Life Insurance Co.*, the Georgia Supreme Court recognized a common law right to privacy on the basis of facts that would today constitute both right of publicity and right to privacy claims.⁹⁴ The case involved the use of a nonpublic figure's image in an advertisement for life insurance without his consent.⁹⁵ The complaint was based on unwanted publicity, but, because the plaintiff did not have a recognized public identity, he would not have garnered a significant endorsement or modeling fee even if he had agreed to appear in the advertisement. The harm therefore focused on dignitary and emotional distress, with the invasion being *publicizing* a person's image in a commercial advertisement—an image that was *publicly* known even if the underlying person was not a celebrity. Similarly, the 1902 New York case of *Roberson v. Rochester Folding Box Co.* involved the use of a young woman's likeness on a package of flour—a prototypical right of publicity case.⁹⁶ Although her harms were largely claims of emotional distress, the use was commercial in nature and her visage could hardly be considered something private.

Privacy rights themselves also originated from a property-based rubric. The

pecuniary worth."); MCCARTHY, *supra* note 2, § 10:8 (“[There is] little point in debating in the abstract whether the right of publicity is or is not ‘property.’”). Despite McCarthy’s pronouncement that the label is not worth debating, he nevertheless concludes that “[t]he right of publicity is ‘property.’” *Id.*

92. See, e.g., *Haelan*, 202 F.2d at 868 (“[M]any prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for . . . [uses of their likenesses].”); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1200–11 (1986).

93. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992) (describing mental distress arising out of an unauthorized use of singer Tom Waits’s identity and affirming that the right of publicity gives remedy to both economic and emotional injuries); see also *infra* text accompanying notes 199–205.

94. 50 S.E. 68 (Ga. 1905).

95. *Id.* at 81.

96. 64 N.E. 442, 442 (N.Y. 1902). The court rejected the plaintiff’s claim. *Id.* at 447. This outcome led to such an outcry that New York soon passed a statutory right to privacy that encompassed Roberson’s misappropriation claim.

Georgia Supreme Court in *Pavesich* concluded that the right to privacy existed and that violations of that right were torts—but it justified the right in part on the basis of property law.⁹⁷ The court quoted extensively from the persuasive dissent by Judge Gray in *Roberson*. Judge Gray contended (and the Georgia Supreme Court agreed) that one should recognize privacy rights because a person should have property rights in her person: “I think that the plaintiff has the same *property* in the right to be protected against the use of her face for defendants’ commercial purposes as she would have if they were publishing her literary compositions.”⁹⁸

The justification of the right to privacy through a property rubric is longstanding. Samuel Warren and Louis Brandeis’s seminal article on *The Right to Privacy* relied on property law, including copyright law, to establish that there were precedents for protecting personality and privacy interests.⁹⁹ Philosophers and jurists have long suggested that people have property rights in themselves. John Locke famously wrote: “[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself.”¹⁰⁰ It was from this starting point that Locke built his labor-based theory of property ownership. Although today property scholars debate whether a person’s body or identity is capable of being “property,” this is more of a debate over what work we want the legal category of property to do than a challenge to longstanding concepts of property that have traditionally encompassed our bodies, names, likenesses, and, by extension, a right to privacy.

Even putting aside the synergy between the underlying justifications for and evolution of privacy and publicity rights, both rights are enforced through the tort system.¹⁰¹ Both are also enforced by a combination of liability and property rules; in each case, injunctive relief and monetary damages are available.¹⁰² Viewed in this light, publicity rights and privacy rights are not so different—they both are entitlements that individuals hold and can enforce through a variety of remedies.

97. *Pavesich*, 50 S.E. at 69.

98. *Id.* at 78–79 (emphasis added) (quoting *Roberson*, 64 N.E. at 450 (Gray, J., dissenting)); see also *Schuyler v. Curtis*, 42 N.E. 22, 23 (N.Y. 1895) (Gray, J., dissenting) (“I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one’s person. If it is a property right with reference to the publication of a catalogue of private etchings, and entitled to be protected against invasion . . . why is it not such with reference to name and reputation?”).

99. See Warren & Brandeis, *supra* note 5, at 194–95, 200–05, 220. Over time our conception of privacy rights has shifted from a property-based understanding to a liberty-based one. See STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 46–47 (1990).

100. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698).

101. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 569, 571, 573 (1977) (referring to the right of publicity as a tort); McCARTHY, *supra* note 2, § 10:09 (discussing the enforcement of the right of publicity as a tort).

102. Such overlaps (between property and tort cases) led Douglas Melamed and Guido Calabresi, in their now renowned article, to question the forced division between these bodies of law. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 *passim* (1972).

Admittedly, the categorization of publicity rights as property has some doctrinal significance—for example, the question of whether something is “property” can determine whether something is taxable and how it will be taxed, and whether it is part of a debtor’s estate or a divisible marital asset.¹⁰³ My contention, however, is not that courts should more rigorously follow their determination that the right of publicity is property and then extrapolate from this conclusion that it must be alienable. Instead, I think the consideration of whether publicity rights are property sidesteps the fundamental question of whether—even if property—publicity rights should be alienable.

Limits can be placed and have been placed on the alienability of property in various contexts as a matter of public policy, at common law, or by statute. To say that privacy rights are personal and not alienable while publicity rights are property and hence alienable, is therefore to elide the underlying question of whether publicity rights *should* be alienable even if they are categorized as property. Furthermore, even if publicity rights are alienable in some contexts, they need not be freely alienable in every context. Understanding when and if the right of publicity should be alienable regardless of whether it is “property” is one of the central pieces of this project. It is to this question that I now turn.

III. RECONSIDERING THE ALIENABILITY OF PUBLICITY RIGHTS

Although most property is alienable and alienability itself is often featured as an important stick in the bundle of sticks that constitutes property,¹⁰⁴ some property has significant restrictions placed on its alienability.¹⁰⁵ A robust literature has developed to explain when and why we restrain (or should restrain) the alienability of property in various contexts.¹⁰⁶ Such analyses have focused on

103. See, e.g., I.R.C. § 2031(a) (1988) (“The value of the gross estate of the decedent shall be determined by including . . . the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.”).

104. See, e.g., RESTATEMENT (FIRST) OF PROPERTY § 489 cmt. a (1944) (“Property interests are, in general, alienable. If a particular property interest is not alienable, this result must be due to some policy against the alienability of such an interest.”); A. JAMES CASNER ET AL, CASES AND TEXT ON PROPERTY 625 (2004) (“The ability to transfer property is one of its most important attributes”); Fennell, *supra* note 4, at 1405, 1443 (describing alienability as one of the primary incidents of property ownership and suggesting that, if something is completely inalienable, it probably should not be categorized as “property”). I do not engage in the debate over whether the bundle-of-sticks analogy is a good one or whether the incidents of ownership or other frameworks are superior. See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 *passim* (1996) (criticizing the bundle-of-sticks approach); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1760–61, 1796–97 (2004) (noting limitations of bundle-of-sticks approach). I use the bundle-of-sticks rubric here because it is useful for making the broader point.

105. RESTATEMENT (THIRD) PROPERTY: SERVITUDES § 3.4 (2000); RESTATEMENT (FIRST) OF PROPERTY § 406; JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 450, 461 (4th ed. 2006); Fennell, *supra* note 4, at 1405–09, 1465 & *passim* (discussing both current limits on alienability and possible uses of inalienability rules to address various “resource tragedies” caused by property’s monopoly rights); Radin, *supra* note 1, at 1853–55; Rose-Ackerman, *supra* note 1, at 942–61.

106. See, e.g., Calabresi & Melamed, *supra* note 102, *passim*; Fennell, *supra* note 4, *passim*; Radin, *supra* note 1, *passim*; Rose-Ackerman, *supra* note 1, *passim*; see also Michael Abramowicz, *On the*

ways to address “contested commodities” (such as organs and babies),¹⁰⁷ negative externalities (such as pollution or overharvesting),¹⁰⁸ and fundamental rights.¹⁰⁹ Despite such a developed discussion in property law more broadly, few scholars or courts have considered whether it is appropriate for the right of publicity to be alienable and under what circumstances.

In this Part, I will begin to rectify this omission by identifying the common justifications for limiting or prohibiting the alienability of property and other entitlements. For each of these justifications, I will consider how the right of publicity fares under such an analysis. In particular, I will consider the inalienability of fundamental rights, commodification theory, and welfare-maximization.¹¹⁰ I have chosen each of these paradigms because they are the dominant ones in legal scholarship about limits on alienability. I do not endorse any one of these frames over another but think that each one provides a number of insights that suggest reasons to limit the alienability of the right of publicity.

A. FUNDAMENTAL RIGHTS

Fundamental rights have long been deemed inalienable. In fact, such rights are often defined by this feature and simply termed “inalienable rights.”¹¹¹ The United States Constitution expressly protects the rights of life, liberty, and property and the freedoms of speech, religion, and association.¹¹² Each of these rights, among others, is inalienable and cannot be given away or sold by the rights holder.¹¹³ These rights are personal to the holder and do not survive the holder’s death.

Scholars have developed a variety of justifications for prohibiting the alienation of fundamental rights. Guido Calabresi and Douglas Melamed, for example, suggest that fundamental rights are inalienable for paternalistic or

Alienability of Legal Claims, 114 YALE L.J. 697 *passim* (2005) (cataloguing some of this literature and considering its application to legal claims).

107. Margaret Radin defines “contested commodities” as things that “are related to persons and the nature of human life” and about which there may be concerns with treating them as marketable commodities. See MARGARET JANE RADIN, *CONTESTED COMMODITIES*, at xi (1996).

108. See, e.g., Rose-Ackerman, *supra* note 1, at 933, 937–61.

109. See, e.g., Calabresi & Melamed, *supra* note 102, at 1098–1105.

110. Distributive justice concerns and our commitment to equality have also been discussed as justifications for inalienability rules. See, e.g., Calabresi & Melamed, *supra* note 102, at 1100; Radin, *supra* note 1, at 1868–69, 1903. I will not discuss distributive justice concerns here because they do not map on well to the right of publicity; everyone has a right of publicity and those who have the most valuable publicity rights are the least likely to be economically pressured into selling them. Cf. Radin, *supra* note 1, at 1909–17.

111. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[A]ll men are created equal, [] endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 762 (1884) (“The right to follow any of the common occupations of life is an inalienable right . . .”).

112. U.S. CONST. amends. I, IV, V, IX, XIII, XIV.

113. See Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1335–37 (2000) (discussing the inalienability of the right to vote); Rose-Ackerman, *supra* note 1, at 937, 961–68.

self-paternalistic reasons. The state seeks to protect individuals from making bad decisions, or our past selves prevent our future selves from doing something dumb or shortsighted, like selling ourselves into slavery or abandoning our right to free speech.¹¹⁴ Margaret Radin justifies the inalienability of fundamental rights because such limits are “freedom-enhancing.”¹¹⁵ From her perspective, we are free to do many things but not free to give away or sell our freedom.¹¹⁶ This echoes John Stuart Mill’s early articulation of this basis for preventing people from selling themselves into slavery. “It is not freedom, to be allowed to alienate [one’s] freedom.”¹¹⁷ Another posited justification for prohibiting the alienation of fundamental rights is the anticipated harm to third parties and to society more broadly from witnessing others lose their essential liberties. We all benefit from the universal protection of shared and fundamental freedoms, leading some to argue that we all are diminished by another person’s loss of such freedoms.¹¹⁸

If fundamental rights are inalienable—which I think they should be—then, regardless of which foundation one chooses to justify that inalienability, there are reasons to significantly limit the alienability of the right of publicity. The right of publicity could itself be viewed as a fundamental right or, alternatively, as so rooted in the rights of liberty, free speech, and freedom of association that consideration of its alienability should be done in light of the longstanding inalienability of these fundamental rights.

If alienated, the right of publicity can be used to severely restrict the liberty, free speech, and associational rights of identity-holders. A publicity-holder can limit what an identity-holder can say or do and can compel speech and associations by using the identity-holder’s image, name, or likeness. If publicity rights are fully alienable, more than simply the income that flows from the exercise of such rights would be transferred. Forcing the transfer of O.J. Simpson’s right of publicity to the Goldmans, for example, would have meant several things. Although the Goldmans could not have forced Simpson to physically make appearances, they could have forced him to virtually appear and to endorse various products. The family would have been able to create and sell Simpson merchandizing—for example, t-shirts and mugs with Simpson’s

114. See Calabresi & Melamed, *supra* note 102, at 1112–13.

115. See Radin, *supra* note 1, at 1899.

116. See *id.* at 1901–03.

117. JOHN STUART MILL, ON LIBERTY 60–61 (1859). Radin supports Mill’s sentiment but suggests that it only makes sense in the context of a view of positive, rather than negative, liberty—a position that Mill rejected. See Radin, *supra* note 1, at 1901–03.

118. See, e.g., Calabresi & Melamed, *supra* note 102, at 1112; Radin, *supra* note 1, at 1854 & n.21; Rose-Ackerman, *supra* note 1, at 961–68 (describing the inalienability of the right to vote as being rooted in the broader foundations of our democracy); Laurence Tribe, Commentary, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 (1985) (“[R]ights that are relational and systemic are necessarily inalienable: individuals cannot waive them because individuals are not their sole focus.”).

name and his photograph saying “I Did It.”¹¹⁹ They also could have digitally created images of him for use in both commercial and entertainment contexts.¹²⁰

The Goldmans also would have had the ability to *stop* Simpson from exploiting his identity, including preventing him from making public appearances or endorsements. Because the Goldmans would hold his right of publicity, they could prevent others—including Simpson, the identity-holder—from using any indicia of his identity in public, certainly for any commercial purpose, but perhaps even more broadly. Although it does not seem to have been their primary motivation, one could imagine that the Goldmans might have wanted to limit Simpson’s appearances promoting his forthcoming book, *If I Did It*, which was announced for release shortly after the Goldmans filed their motion to transfer his right of publicity to them. Perhaps they also might have wanted to put a stop to Simpson’s new reality series—*Juiced*—a show that not only allowed Simpson to generate income, but also possibly an audience’s goodwill.¹²¹

Some have expressed a lack of sympathy for Simpson, but there is reason to be concerned about the possibility that a person could lose control over his identity. This is particularly true because the reach of any publicity-holder’s control over an identity-holder is uncertain. The scope of the right of publicity itself is not clearly delineated; for example, there is no consensus as to whether only commercial uses are at stake. Some states’ right of publicity laws encompass uses for any advantage—whether commercial or not.¹²² Even in states where the right of publicity is limited to commercial uses, there is disagreement

119. This would not be defamatory because the Goldmans won a wrongful death suit against Simpson.

120. Such reanimations using preexisting images of individuals have occurred in a number of instances, most notably with deceased performers. For example, after his death, Fred Astaire was reanimated using a vacuum cleaner in a commercial for Dirt Devil. Gene Shalit, *Dancing with the Devil*, N.J. STAR-LEDGER, Jan. 29, 1997, at 14. Such computer-generated performers are sometimes referred to as “synthespians.” See Jerome E. Weinstein, *Abbott and Costello Meet Frankenstein, Dracula and the Wolf Man in the Year 2000 or the Birth of the Synthespian*, 32 BEVERLY HILLS B. ASS’N J. 32, 33–35 (1997).

121. See Leitch, *O.J. Simpson, Unplugged*, DEADSPIN (May 12, 2006, 3:15 PM), <http://deadspin.com/173428/oj-simpson-unplugged>. The video of the short-lived series remains available for purchase. See *Juiced*, AMAZON.COM, <http://www.amazon.com/Juiced-Starring-Simpson-Platinum-Collectors/dp/B001AY0FT6>. The Goldmans have often complained that the media paints Simpson in a positive light, for example, by referring to him in an intimate and affectionate manner as “O.J.” See, e.g., Interview by Juanita Watson with Kim and Fred Goldman (Dec. 2008), available at <http://www.readerviews.com/InterviewGoldman.html>. It is therefore not far-fetched to envision them trying to prevent such a show from airing.

122. See, e.g., N.Y. CIV. RIGHTS LAW § 51 (McKinney 2010) (defining purposes of trade more broadly than commercial uses); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983) (noting that California’s common law right permits recovery for uses that work to the “defendant’s advantage, commercially or otherwise”), superseded by statute, CAL. CIV. CODE § 3344 (West 1984), as recognized in *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713 (Ct. App. 2000).

about how broadly or narrowly such uses are defined.¹²³ A host of related and unanswered questions therefore arise about what identity-holders who lack ownership of their publicity rights could do. Would an identity-holder need to get permission from the publicity-holder before lending her name to a comic book?¹²⁴ Could a bankrupt civil rights leader sell posters with his picture and an inspiring quote?¹²⁵ Could a celebrity agree to an interview and fashion spread in a magazine without the publicity-holder's consent?¹²⁶ Could an identity-holder sell or even give away her own autograph?¹²⁷ In each instance, it seems possible that a publicity-holder could challenge such actions by identity-holders.

Although often overlooked in discussions of publicity rights, the ability to control how one's image is publicly presented plays a fundamental role in how our identity is created and develops. As Mark McKenna has observed, putting the control over one's identity in the hands of third parties permits others to author the "text of [that individual's] identity."¹²⁸ When publicity-holders control identity-holders' rights of publicity, they wield significant control over the construction of an identity-holder's public persona. Such control implicates the right to liberty.¹²⁹ It is therefore not surprising that courts and commentators have frequently compared nonconsensual uses of an individual's identity to involuntary servitude and slavery.¹³⁰ The Supreme Court of Georgia suggested

123. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (permitting right of publicity action based on use of identity in television news broadcast); *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619 (6th Cir. 2000) (allowing right of publicity action to proceed, arising out of an action figure from a motion picture); *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994) (permitting right of publicity action based on décor in a restaurant); see also *infra* notes 124–27 and accompanying text.

124. Compare *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (holding that use of name in comic book series violated a hockey player's right of publicity), with *Winter v. D.C. Comics*, 30 Cal. 4th 881, 891 (2003) (holding that use of names and likenesses of musicians in comic book series was protected by First Amendment).

125. Cf. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982) (holding that the sale of commemorative busts of a civil rights leader violated his postmortem right of publicity).

126. Cf. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 873 (C.D. Cal. 1999) (holding that use of actor's image (altered from a movie still) in a fashion spread in a magazine violated his right of publicity), *rev'd*, 255 F.3d 1180, 1184–86 (9th Cir. 2001) (reversed on First Amendment grounds based on conclusion that photo spread was not purely an advertisement).

127. Cf. *Ryan v. Volpone Stamp Co., Inc.*, 107 F. Supp. 2d 369, 372–75, 391–93 (S.D.N.Y. 2000) (holding that the use of a person's name and signature without permission is a right of publicity violation).

128. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 229, 291 & *passim* (2005) (arguing that publicity rights are best justified as protecting "autonomous self-definition"); see also Kwall, *supra* note 30, at 1346–53 (highlighting the dignitary justifications for a right of publicity).

129. Cf. Rothman, *supra* note 39, at 500–02 (discussing the right to liberty's protection of space needed for identity formation and development).

130. See Kwall, *supra* note 54, at 128 (quoting Joel Anderson, *What's Wrong With This Picture? Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 25 LOY. L.A. ENT. L. REV. 155, 170–71 (2005)) (suggesting that the possibility of digitally animating persons based on preexisting images is akin to "slavery"); Frow, *supra* note 87, *passim* (analogizing to slavery to justify publicity

that there is little difference between using someone's image and physically "compel[ling] the plaintiff to place himself upon exhibition for this purpose."¹³¹ Losing control over how one's image and name are used places an identity-holder "under the control of another . . . in reality a slave, without hope of freedom, held to service by a merciless master."¹³² Losing one's physical and spiritual freedom through actual enslavement is unquestionably a much greater harm than losing control over one's public persona, but the common analogy to slavery highlights the significance of placing control over one's persona in the hands of a third party.

Even though there are some limits on what publicity-holders can do with another's identity, such limits are less constraining than they might at first appear. As previously discussed, even the most restrictive limit—the bar on forced labor—still leaves ample room for publicity-holders to use the image or name of an identity-holder and to reanimate the identity-holder using computer technology. Publicity-holders may also be able to prevent identity-holders from appearing in public in certain contexts. Furthermore, other limits on publicity-holders provide only modest constraints. For example, even though publicity-holders will need to abide by defamation law, it may be easy to avoid violating this law. One cannot defame an identity-holder by being truthful. Therefore, if the Goldman family had obtained Simpson's right of publicity, it could have disseminated t-shirts with Simpson's name and face on them with a slogan saying, "I Did It," or even more directly, "He Killed Them." They would not have risked a defamation action by doing so because Simpson was found liable for wrongful death in civil court.

Similarly, because publicity-holders own the public identity of the identity-holders, endorsement or sponsorship claims using that person's identity may not rise to the level of false or misleading advertising or endorsements. Publicity-holders have the right to approve or reject any endorsement using a person's identity. So long as the publicity-holder steers clear of suggesting that the underlying person approved a specific message or that she uses a particular product or service (if she does not), the relevant endorsement or advertisement could be viewed as accurate.¹³³ Furthermore, if control over one's identity can be stripped from an identity-holder, then over time consumers will come to understand that the underlying individual may not have the authority to approve

rights); cf. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 102, 110 (analogizing treatment of student athletes by NCAA to the institution of slavery); Taylor Branch, *Replies to Letters*, THE ATLANTIC, Dec. 2011, at 14 (defending his analogy to slavery in context of unpaid student labor and the NCAA's control over players' identities and future opportunities); *South Park: Crack Baby Athletic Association* (Comedy Central television broadcast May 25, 2011) (calling student athletes "slaves").

131. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 79 (Ga. 1905).

132. *Id.* at 80.

133. Federal Trade Commission regulations, however, require ongoing approval from an "endorsing" celebrity or other spokesperson. See 16 C.F.R. § 255.1. Thus, federal regulations may preclude such unilateral actions by publicity-holders.

or disapprove of specific uses of her identity. Accordingly, consumers will not be misled by uses of a person's identity even if the identity-holder has not approved of the specific use of her identity. If a publicity-holder can never unilaterally endorse a product without violating false advertising or false endorsement laws, then this suggests that no transfer of publicity rights has taken place.¹³⁴

Melissa Jacoby and Diane Zimmerman concede that if the right of publicity is transferred to creditors, then an identity-holder may "lose control over the use of her identity."¹³⁵ Publicity-holders will "get[] to make the decisions about the commercial associations to be made with [the identity-holder's] public identity."¹³⁶ They contend, however, that such limits on identity-holders' rights of association and free speech are both constitutional and normatively unproblematic, at least in the debtor-creditor context, because bankruptcy is voluntarily declared, and the limits on associational rights will not constrain "deep-seated belief systems, political affiliations, or concern with social causes."¹³⁷

I question such conclusions. First, the voluntariness of bankruptcy and divorce is debatable. The entire basis for making bankruptcy possible (or divorce for that matter) would be undermined by punitive penalties meted out on the basis of the "voluntariness" of filing such actions. We want people to be able to exit from bad relationships and from debt so burdensome that, without the opportunity to make a (somewhat) fresh start, people would be trapped.¹³⁸ Moreover, some bankruptcy declarations are expressly involuntary,¹³⁹ and sometimes only one spouse wants to end a marriage. Second, even if we view bankruptcy and divorce as voluntary (or at least some instances of them), we do not permit even the *voluntary* alienation of fundamental rights.

Finally, the ability to control a person's right of publicity and to prevent that person from using her identity publicly in a number of contexts interferes with the freedom of association; this is true even if we discount harm from forcing or prohibiting *commercial* associations. For example, the actor James Franco might want to associate himself with a group that supports probiotics and an all-natural diet (for a variety of social and political reasons, as well as commercial ones). As part of his commitment to this cause, let's suppose that Franco wants to express his love of Greek yogurt. A publicity-holder (that holds Franco's right of publicity) could potentially *block* such an endorsement (even if uncompensated) because it is something that the publicity-holder would like to negotiate itself (for example, with Chobani) or prohibit (because it wants to

134. For a more developed discussion of the inseparability of a person's identity from the underlying identity-holder, see discussion *infra* section IV.A.

135. Jacoby & Zimmerman, *supra* note 58, at 1357.

136. *Id.* at 1357-58.

137. *Id.* at 1350-67.

138. *Cf.* Boddie v. Connecticut, 401 U.S. 371, 383-84 (1971) (holding that a state cannot deny access to divorce for the indigent).

139. *See* 11 U.S.C. § 303 (2006); NORTON, *supra* note 59, § 171:4.

endorse a traditional yogurt, like Yoplait, even though it contains high-fructose corn syrup that Franco opposes or simply because associations with yogurt are not in the publicity-holder's master plan for Franco's "brand"). A publicity-holder could also *force* associations on Franco that not only have a commercial message but also a variety of political and personal ones. Yoplait is only one of many possibilities. For example, a publicity-holder could use Franco's name and image to endorse ExxonMobil, a company that Franco might object to because it discriminates against gays and lesbians or because of the company's environmental or human rights track records.¹⁴⁰ These examples demonstrate that, even if limited to a commercial context, actions taken by publicity-holders can significantly burden identity-holders' rights to free speech and association far beyond purely commercial associations. Creditors should not be able to force debtors to give up fundamental constitutional rights to satisfy their debts, nor should they or anyone else be able to force an identity-holder to cede control over his identity.

Professors Jacoby and Zimmerman also accept burdens on the liberty of identity-holders because they view such restrictions as "passive" rather than "active." They conclude that only active control—in other words, forced labor by the identity-holder, such as requiring an identity-holder to physically show up and perform for a commercial—is problematic.¹⁴¹ Even though forced nonlabor may not be as problematic as forced labor, it still works a significant constraint on an individual's freedom. Additionally, the burdens are much greater than Jacoby and Zimmerman seem to appreciate. For example, if an actor could not assign, license, or waive right of publicity claims for the limited purposes of a motion picture or television series because a third party owns her publicity rights, producers would not hire that actor. Studios would need to negotiate separately with the publicity-holder, who may not agree to authorize the use. Studios may not want to get involved in the whole mess, may not want to negotiate with multiple parties, or may not be willing to pay the publicity-holder's price. In such instances, the identity-holder would not be able to earn income from her mainline profession because her publicity rights would be held by a third party. Moreover, with the ability to use preexisting images and computer animation, members of the public may not be able to distinguish between (passive) uses of identity and (active) forced labor. The public percep-

140. ExxonMobil does not have a policy prohibiting discrimination based on sexual orientation and its shareholders have repeatedly voted down proposals for a company-wide nondiscrimination policy. See Robin McGehee, *ExxonMobil Fuels Discrimination*, HUFFINGTON POST BLOG (June 6, 2012, 7:16 PM), http://www.huffingtonpost.com/robin-mcgehee/exxonmobil-lgbt-discrimination_b_1569737.html. ExxonMobil has also been criticized by environmental and human rights activists. See Bill Mears, *Exxon Mobil to Face Lawsuit Over Alleged Human Rights Violations*, CNN (July 8, 2011), http://articles.cnn.com/2011-07-08/justice/exxon.mobil.lawsuit_1_claim-immunity-face-lawsuit-aceh?_s=PM:CRIME; see also Associated Press, *Activists Launch Campaign Against ExxonMobil*, NBC NEWS (July 13, 2005, 8:50 AM), http://www.msnbc.msn.com/id/8561348/ns/us_news-environment/t/activists-launch-campaign-against-exxonmobil/.

141. Jacoby & Zimmerman, *supra* note 58, at 1351–52, 1355.

tion that forced labor has been sanctioned may work an injury to the collective psyche as well as to the individual identity-holder.¹⁴²

Of course, no one has complete control over the creation of his or her identity (or identities).¹⁴³ Public figures, in particular, cede some control over their persona to the public;¹⁴⁴ however, there is a big difference between the general public shaping the construction of an identity that is largely controlled by the identity-holder, and a third-party publicity-holder controlling more directly the identity-holder's public image. In such instances, the identity-holder's opportunities to engage in an ongoing dialogue with the public that contributes to his or her own self-development are limited. Consider the pop icon Madonna: The public undoubtedly contributed to her popularity and the construction and meaning of her public identity, but Madonna carefully constructed (and changed) her own image throughout her career.¹⁴⁵ The ability of an individual to participate in the dialogue or multilogue about her own identity should be fundamentally protected.¹⁴⁶ This remains true even when individuals have benefitted from having third parties (often corporate entities) manufacture their images.¹⁴⁷

142. See *supra* note 118 and accompanying text. An advertisement itself might not reveal that a person's image or name appeared without her permission, but such information is likely to reach the public. For example, if a publicity-holder held Ellen DeGeneres's right of publicity and reanimated the performer (against her wishes) for use in a Wendy's commercial eating a hamburger, many members of the audience would know that DeGeneres, a long-time vegetarian (now vegan), would not have agreed to be in such an advertisement. Even if viewers did not know this, DeGeneres could easily announce this on her show, to a reporter, or on her blog.

143. See Jane F. Collier et al., *Sanctioned Identities: Legal Constructions of Modern Personhood*, 2 IDENTITIES 1 (SPECIAL ISSUE) *passim* (1997) (challenging the autonomy of identity formation and discussing how social context and the law influence the construction of identity); Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 LAW & SOC'Y REV. 1231, 1231–33, 1237–41 (1994); see also Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1855–56 (1991) (rejecting the notion that we are autonomous individuals who can individually create and control meaning). I use the plural term "identities" because I do not think that a person has one fixed identity but instead has multiple identities in different contexts. This is apparent in the context of actors who perform roles, perform their public selves as actors playing those roles, and then likely have a variety of "private" identities that they perform for themselves and others. See RICHARD DECORDOVA, *PICTURE PERSONALITIES: THE EMERGENCE OF THE STAR SYSTEM IN AMERICA* 110–12 (2001); RICHARD DYER, *STARS* 3–6, 20–21, 60–63 (Paul McDonald ed. 2009).

144. See DECORDOVA, *supra* note 143, at 50–147. But see DYER, *supra* note 143, at 18 (suggesting that audiences have little control over the construction of the crafted personalities that they consume).

145. See Rosemary Coombe, *Author(iz)ing the Celebrity: Engendering Alternative Identities*, in THE CELEBRITY CULTURE READER 721, 728–729 (P. David Marshall ed., 2006). More recently, Lady Gaga has also artfully constructed her public persona (drawing heavily on Madonna for inspiration). See Mike Krumboltz, *What's Your Real Name?*, OMG! FROM YAHOO (March 28, 2011, 1:55 PM), <http://omg.yahoo.com/blogs/now/whats-your-real-name/63> (describing the creation of Lady Gaga's stage name—her real name is Stefani Germanotta); Jon Pareles, *The Queen Pop Needs Her to Be*, N.Y. TIMES, May 22, 2011, at Arts 1 (describing Lady Gaga's development and management of her persona).

146. Cf. Coombe, *supra* note 143, at 1877–80 (describing the importance of participating in cultural dialogue to develop one's own identity).

147. For a discussion of such corporate manufacturing of personalities, see Brooks Barnes, *Facing Fame: It's Not All Fun*, N.Y. TIMES, May 11, 2011, at C1. Disney is notorious for manufacturing tween superstars. *Id.* at C5 ("Creating a breakout tween superstar takes years of careful grooming that hark

Such third-party influence and shaping is not the same as involuntarily (or even voluntarily) and permanently handing over the reins of one's public persona to a third-party publicity-holder.¹⁴⁸

Similarly, although the right of publicity is limited to public uses of someone's identity, it is not possible to separate completely the connections between a person's public and private personas. People have multiple identities (both public and private) that they perform.¹⁴⁹ These different identities are not separable from one another; instead, the boundaries are fluid and flow in and out of one another. Control over even one public identity could therefore bleed over into an individual's private identities.

Accordingly, permitting the alienation of the right of publicity implicates the alienation of fundamental rights—something that our legal system has long prohibited. Having so concluded, it is nevertheless important to note that, even though fundamental rights cannot be alienated, they sometimes can be forfeited (as a result of a criminal conviction) or waived for limited purposes. For example, one cannot alienate one's right to free speech, but one can waive one's speech rights by agreeing to be employed by the government, which brings with it certain restrictions on what one can say—at least while employed there. Similarly, one cannot give up one's right to property, but you can sell a particular parcel of property. Importantly, in the cases of both waivers and forfeits of fundamental rights, the right itself is never transferred to another person; instead, it is either extinguished or retained. Such possibilities, therefore, do not challenge the inalienability of fundamental rights. They do, however, suggest that waivers of liability for use of a person's identity would be permissible even with an inalienable right of publicity. I will elaborate on what sorts of waivers might be appropriate in the context of publicity rights in Part V.

B. COMMODIFICATION AND FORCED COMMERCIALIZATION

Another prominent basis to limit the alienability of entitlements is concern over commodification. Margaret Radin has long advocated for limiting alienability, particularly market-alienability (salability), to disrupt commodification.¹⁵⁰ In the context of certain “contested commodities,” such as babies, blood, organs, and some forms of human capital (for example, sex work and surrogacy), Professor Radin suggests that one reason not to permit sales of these goods or services is to prevent the commodification of personhood. For Radin,

back to Hollywood's studio system days.”). Disney locates likely candidates and packages them as likeable, wholesome, best-friend material. *See id.*; *see also* DECOROVA, *supra* note 143, at 9–11 (describing manufacturing of movie stars); DYER, *supra* note 143, at 12–14 (same).

148. In contrast to an assignment of publicity rights, an identity-holder would be free to sever a relationship with this third party at any point, even if in some instances she would have to pay damages for breaching a contract.

149. For a discussion of some of these multiple identities in the context of actors, see discussion *supra* note 143.

150. *See, e.g.*, Radin, *supra* note 1, *passim*.

commodifying people disrupts human flourishing.¹⁵¹ Market rhetoric “transform[s] the texture of the human world” and turns unique individuals into fungible entities with monetary values.¹⁵² Such commodification injures personhood and can cause a disassociation or alienation from oneself.¹⁵³

I am sympathetic to Radin’s concerns about commodification, but I am less concerned about the (partial) commodification of individuals than she is. As Radin herself notes, in a capitalist society such as ours, it is difficult to segregate commodified from uncommodified personhood.¹⁵⁴ At the same time, perhaps because of our familiarity with the capitalist system, we monetize aspects of people all the time without reducing individuals solely to monetary values.¹⁵⁵ Most relevantly, in the context of the right of publicity, disputes usually arise in situations in which an identity-holder has sought out the commodification of her personhood and already has a commercially valuable persona. This makes commodification concerns somewhat less apt in the right of publicity context. Nevertheless, to the extent that one wishes to discourage commodification, alienating publicity rights will most often (further) commodify the person upon whom those rights are based.¹⁵⁶

A commodification analysis provides several other important insights for right of publicity law and its (purported) alienability in particular. Discussions of the right of publicity often myopically focus on the economic harms caused by uses of a person’s identity while giving little credence to the dignitary harms that also flow from such uses. The commodity-oriented focus of publicity rights has framed our thinking to such an extent that litigants can be discouraged from

151. *Id.* at 1851.

152. *Id.* at 1883–87.

153. *Id.* at 1901–03.

154. *Id.* at 1903, 1915–36 (discussing how, in a nonideal world, it may be better to permit some commodification); see also VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* *passim* (2005) (discussing our society’s mixing of intimacy and money); Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163 *passim* (2000) (noting that one cannot escape the commodification and commercialization of human tissue and, therefore, any analysis must recognize the multiplicity of values at stake); cf. Marjorie M. Shultz, *Questioning Commodification*, 85 CALIF. L. REV. 1841, 1849–50, 1858 (1997) (reviewing RADIN, *supra* note 107 and criticizing Radin’s polarization of commodification and human flourishing and observing that “commodified and noncommodified conceptualizations can co-exist without necessarily being contested or in conflict”).

155. See Mahoney, *supra* note 154, at 204–07 (“Market relationships should not be regarded as necessarily exclusive of considerations of friendship, neighborliness and caring.”); see also Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 845–47 (2010) (criticizing the misconceptions that marriage is never about money and that visits to sex workers are never emotionally intimate).

156. It is possible that a third party could hold a person’s identity with an anticommodification purpose in mind, akin to the Nature Conservancy’s efforts to buy land to preserve it in its natural state. I credit Lee Fennell for pointing out this thought-provoking possibility. Such preservation efforts, however, are possible even if transferability is limited. Moreover, I am skeptical that such organizations will thrive—I suspect that fundraising to support the noncommodification of celebrities will be more difficult than raising funds to preserve land.

raising dignitary harms even though they often experience such harms.¹⁵⁷ In fact, sometimes these dignitary harms far exceed the monetary injuries suffered.¹⁵⁸ This shift in the discourse of misappropriation of identity (from dignitary to monetary harms) has had ripple effects in how people and the judicial system understand and appreciate the nature of the wrong.¹⁵⁹

The purported alienability of the right of publicity contributes to this misguided frame by suggesting that it is possible to separate one's commercial identity from one's other identities. In reality, these identities flow in and out of one another, inseparably intertwined. I will further discuss the inseparability of publicity rights in section IV.A., but it is important to note here that it simply is not possible to conclude that the right of publicity is solely about the opportunity to make money.

Commodification theory also raises legitimate concerns about the *forced* commercialization of a person's identity. As discussed, such forced commodification is possible if publicity rights are split in divorces or assigned to creditors.¹⁶⁰ Estate tax laws also can force heirs and beneficiaries to commodify a decedent's identity against the wishes of the decedent and her devisees. Valuations of publicity rights are made on the basis of evaluating the right at its "highest and best use,"¹⁶¹ which values publicity rights as a fully commercialized, transferable right, even if those who inherit the right do not want to market the deceased's identity. As Ray Madoff has noted, the "system . . . is incapable of recognizing the validity of the decision not to treat celebrity status as a

157. Among the eleven lawsuits pending against the NCAA and Electronic Arts for uses of former and current student athletes' identities, none explicitly claims dignitary harms, although one could imagine that at least some of the players suffered mental distress from the unauthorized uses and manipulation of their identities. See Second Consolidated Amended Class Action Complaint, *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, No. 09-01967, 2011 WL 1642256 (N.D. Cal. May 16, 2011) (focusing on injuries to economic and business interests of players). The lawyers may have avoided dignitary injuries to facilitate class certification, but the omission is nevertheless revealing.

158. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102–06 (9th Cir. 1992); *Christoff v. Nestle USA, Inc.*, 62 Cal. Rptr. 3d 122 (Ct. App. 2007) (describing a jury award of \$330,000 in damages and over \$15 million dollars in profits, even though direct economic injury was the failure to pay a \$2000 modeling fee), *rev'd in part on other grounds*, 97 Cal. Rptr. 3d 798 (Ct. App. 2009); cf. *KWALL*, *supra* note 54, at 8–9; *Kwall*, *supra* note 30, at 1346–53.

159. Cf. RADIN, *supra* note 107, at 88–93 (“[T]he language we use to reason and describe [] shape our reasoning, our description, and the shape (for us) of reality itself. . . . [T]he way we conceive of things matters to who we are.”); Netanel, *supra* note 54, at 441 (discussing the importance of moral-rights discourse to “foster a climate of respect for expressions and the creative process” as well as of “autonomy and community”).

160. See, e.g., *Elkus v. Elkus*, 572 N.Y.S.2d 901, 904 (App. Div. 1991) (dismissing the argument that rights of publicity or celebrity goodwill should not be valued at market rate even though the identity-holder had long avoided endorsing any products or otherwise commercially exploiting her identity).

161. Examination Technique Handbook for Estate Tax Examiners, I.R.M.M.T.4350-31, Ch. 600 reprinted in MICHAEL F. BEAUSANG, JR. VALUATION: GENERAL AND REAL ESTATE, 132-3rd Tax Mgmt Est., Gifts & Tr. Portfolios, B-1001 (BNA 1986); Jeffrey K. Eisen & Allan E. Biblin, *Estate Planning for Clients in the Entertainment Business*, EST. PLAN., Feb. 2006, at 26, 32–33; Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 699 (1995).

commodity.”¹⁶² In fact, a famous person who has sought to avoid publicizing her identity may have a higher value right of publicity at the time of death than a person who has been commercializing her identity during her lifetime, ironically making the tax burden, and hence the degree of forced commercialization, greater when the identity-holder most sought to avoid commodification.¹⁶³

Thus, commodification analysis suggests that right of publicity law needs to consider noneconomic concerns, as well as economic ones, and that the law should be structured in such a way as to support both those who seek to commercialize their identities and those who do not.

C. SOCIAL WELFARE AND ECONOMIC EFFICIENCY

In counterpoint to the commodification analysis is a law-and-economics approach that considers when limits on alienability promote efficiency and overall social welfare, largely, but not exclusively, as measured by economic wealth. Most law-and-economics scholars favor the broad alienability of property as the best way to maximize the efficiency of markets.¹⁶⁴ These scholars have confidence that the market will get things right (or at least better than government intervention would) and see little reason to depart from a default rule that property should be freely transferable.¹⁶⁵ As Richard Epstein has described, we favor alienability because we want property to be transferred to those who can make the best use of the property and for whom it has the highest value, hence maximizing overall social welfare.¹⁶⁶

Despite this strong preference for free alienability, some law-and-economics scholars have acknowledged that there are efficiency-based arguments that support limits on alienability in certain circumstances. These scholars contend that economic analysis can provide significant insights into when property should or should not be alienable. The two primary bases they provide for restricting alienability are: first, when alienability leads to inefficient results (for example, negative externalities that the market cannot ameliorate on its own);¹⁶⁷ and second, when there are significant valuation problems, which themselves

162. Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759, 761–62 (1998); see also RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 139 (2010).

163. Madoff, *supra* note 162, at 762.

164. See Radin, *supra* note 1, at 1851 (noting that law-and-economics theory views all limits on alienability as “problematic”); Rose-Ackerman, *supra* note 1, at 931–32 (discussing the dominant law-and-economics disdain for any restrictions of alienability).

165. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2007); cf. Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 970–72 (1985) (discussing a strong preference for making property fully alienable).

166. Epstein, *supra* note 165, at 972.

167. See, e.g., *id.* at 973–88; Rose-Ackerman, *supra* note 1, at 932–33, 937–40; cf. Fennell, *supra* note 4, *passim* (suggesting that alienability rules could be used to address problems of strategic acquisition (for example, patent holdouts) and resource management challenges (for example, tragedies of commons or anticommons)).

can create inefficiency.¹⁶⁸

Putting aside the thorny question of how the right of publicity could best maximize welfare, one can still identify instances in which the alienation of publicity rights reduces social welfare and is distinctly inefficient. The significant impairments of identity-holders' liberty, free speech, and rights of association should be considered costs of alienating publicity rights. Although such nebulous rights are hard to quantify in economic terms, they deserve to be given sufficient weight even in utilitarian analyses. Even if we set aside such costs, the simple act of separating the right of publicity from identity-holders could lead to a number of inefficiencies. If identity-holders are not the holders of their own publicity rights, then they will have less of an incentive to maintain or enhance the value of their identity. Identity-holders could even (intentionally or not) destroy the value of their publicity rights and publicity-holders would have little power to stop them. Consider Tiger Woods, who was until recently one of the most sought-after celebrity endorsers. At the peak of his endorsements, estimates put his annual total endorsement income from forty to sixty million dollars a year in fees.¹⁶⁹ Scandals involving his "sex addiction," "failed marriage," and car crash (not to mention poor play on the greens) have caused many of the companies that used his image to remove him from their advertisements. Economists have concluded that potentially billions of dollars in the value of his commercial identity were lost almost overnight in the wake of the aforementioned scandals.¹⁷⁰ Similarly, tween stars, like Jamie Lynn Spears, Miley Cyrus, and Demi Lovato, can erase their carefully constructed, wholesome image in one fell swoop with a pregnancy, nude photo, or drug problem,¹⁷¹ thereby greatly decreasing the value of their publicity rights. If someone other than Woods and these tweens owned their publicity rights,¹⁷² these identity-holders would not bear the full cost of their actions.¹⁷³

168. Calabresi & Melamed, *supra* note 102, at 1101.

169. Most of this revenue derived from the licensing of his face and name for use in association with various products. Michael Sokolove, *The Tiger Files: A Taxonomy of a Post-Everything Pop Icon*, N.Y. TIMES, July 14, 2002, at E32.

170. Cf. Christopher R. Knittel & Victor Stango, *Shareholder Value Destruction Following the Tiger Woods Scandal* (Jan. 4, 2010) (suggesting that companies lost \$5–12 billion in wealth as a result of the Woods scandal) (draft on file with author); see also Jonathan Mahler, *The Tiger Bubble*, N.Y. TIMES MAG., Mar. 28, 2010, at 30.

171. Barnes, *supra* note 147, at C5.

172. I note that Tiger Woods's right of publicity is owned by ETW Corp. See *ETW Corp. v. Jireh Publ'g., Inc.*, 332 F.3d 915, 918 (6th Cir. 2003). ETW, however, is a closely held company, mostly in Woods's control. Woods is the chairman of the board and, until 2009, appears to have been the sole shareholder. See Article of Amendment to Articles of Incorporation of ETW Corp. (Filed Jun. 3, 2009), available at <http://sunbiz.org/pdf/56442970.pdf>. Accordingly, even though his right of publicity has been assigned to a corporate entity, it is essentially still in his hands.

173. It is possible that part of any assignment could include obligations to work with a publicity-holder to manage the value of the identity or to refrain from acts that decrease its value. A breach of such obligations could result in damages and perhaps even injunctive relief. Such restrictions, however, seem even more oppressive than a traditional assignment as it forces (in perpetuity) affirmative action on the part of the identity-holder.

Even if an identity-holder has sufficient incentives to cultivate her personality without owning her right of publicity, coordination problems may arise. A publicity-holder and an identity-holder might have different ideas about how to enhance the value of the person's identity. Such a lack of coordination could lead to mixed, and perhaps contradictory, public messages that are likely to lower the value of the relevant right of publicity. Such problems are exacerbated by the number of analogous causes of action that remain fully vested in the hands of identity-holders. The Lanham Act (as well as similar state law claims) still permits false endorsement and sponsorship claims by identity-holders as well as oppositions to registration of trademarks on the basis that a mark falsely suggests a connection to the identity-holder, even if the right of publicity has been transferred.¹⁷⁴ The identity-holder also retains the ability to sue for defamation, false light, and privacy torts. Moreover, some states permit identity-holders to sue for right of publicity violations even if they have "assigned" their rights to others.¹⁷⁵ The continued ability of identity-holders to bring such identity-based claims increases the likelihood of conflicts with publicity-holders' management strategies.¹⁷⁶

Undoubtedly, it is also possible that in some circumstances the assignment of publicity rights could facilitate the coordination and maximization of the value of publicity rights through a combination of cooperation and ongoing contractual control over an identity-holder. An identity-holder may not have the time, interest, or ability to adequately police and enforce her right of publicity, and some third parties may be better situated to publicize and manage a performer's identity than the identity-holder herself. Such cooperative management and policing by a third party does not, however, require the transfer of the right.

The alienation of publicity rights could also lead to consumer confusion over endorsements and affiliation as well as over an identity-holder's actual allegiances and actions. A publicity-holder could endorse a product using an identity-holder's identity even though the particular identity-holder might not in fact use that product. Although publicity-holders would have to be careful in such situations not to cross the line into false advertising territory, even if they stayed within the legal bounds, there would be a social cost to such "endorsements" that do not accurately reflect the identity-holder's preferences—the exact information that consumers want and expect that they are receiving.¹⁷⁷

Publicity rights also pose a host of valuation problems that weigh against alienability. When it is particularly difficult or impossible to value property, some scholars have suggested that limits on alienability may be warranted.

174. See 15 U.S.C. §§ 1052(a), (c), (d) & 1125 (2006).

175. See *supra* note 28 and accompanying text.

176. The availability of these actions also suggests that the right of publicity has not actually been fully transferred. See *supra* and *infra* text accompanying notes 122–27, 133–34, 173–74.

177. See William Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. LAW & ECON. 265, 301–06 (1987) (concluding that misleading or confusing consumers in the trademarks context is inefficient and is one of the primary justifications for trademark law itself).

Under such circumstances, private parties will be unable to efficiently negotiate selling prices and the government (and courts) will have trouble setting prices under a liability rule. Guido Calabresi and Douglas Melamed provide several examples of such challenging valuations—they particularly identify future goods, such as voting rights and education, as difficult to value.¹⁷⁸ In each instance, they conclude that limits on alienability—including complete inalienability—are appropriate.¹⁷⁹ The right of publicity is such a future good and arguably as unquantifiable as the values of education, voting rights, liberty, or free speech.

To value publicity rights, one must assess not only how much a celebrity could collect for commercial endorsements and other commercial uses of her identity, but also how much, if at all, a person would be willing to sacrifice control over her identity. Some individuals do not want to sell their publicity rights at any price. Others would sell for higher or lower prices based on their personal preferences for retaining control over their identities and their willingness to commercialize their identities. Additionally, the uncertain scope of the right of publicity exacerbates valuation problems for both *inter vivos* and *postmortem* publicity rights. The right of publicity is not limited to commercial uses in all jurisdictions, and even when it is, what is considered commercial has greatly expanded from the heartland of commercial uses limited to advertising for products, such as flour or tortilla chips, to uses in comic books, television news, and movie merchandizing.¹⁸⁰ Common defenses to publicity rights, such as the First Amendment and newsworthiness, are also unpredictable.¹⁸¹ Valuing publicity rights, then, is more akin to a prediction of the likely success of a legal dispute than a valuation of a parcel of property.¹⁸²

Postmortem rights can be particularly difficult to value. This is true in part because it is difficult to predict whether death will raise or lower the value of a deceased celebrity's image. James Dean, Marilyn Monroe, and Elvis Presley became *more* valuable after their respective deaths, but most entertainers have a significant drop-off in publicity value once they die and can no longer generate and maintain goodwill.¹⁸³

Of course, difficult valuation issues abound in the law, and courts generally

178. Calabresi & Melamed, *supra* note 102, at 1101.

179. *Id.*

180. *See supra* notes 122–27 and accompanying text.

181. *Compare, e.g., Doe v. TCI Cablevision*, 110 S.W.3d 363, 372–75 (Mo. 2003) (holding that the use of a name in a comic book series is not protected by the First Amendment), *with Winter v. D.C. Comics*, 30 Cal. 4th 881, 888–94 (2003) (holding that the use of names and likenesses in a comic book series was protected by the First Amendment). *See also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (rejecting the First Amendment and newsworthiness defense to right of publicity claim even though use of plaintiff's identity was in the context of a nightly news show).

182. Legal claims have usually been deemed inalienable. For a critique of this state of affairs, see Abramowicz, *supra* note 106, *passim*.

183. *See* Paul L. Caron, *Estate Planning Implications of the Right of Publicity*, TAX NOTES, July 3, 1995, at 95–96; *see also Annual List of Top-Earning Dead Celebrities*, FORBES, Oct. 25, 2010, http://www.forbes.com/2010/10/22/top-earning-dead-celebrities-business-entertainment-dead-celebs-10_land.html.

do not shy away from assessing value even when it is challenging to do so.¹⁸⁴ Nevertheless, the degree of complexity and changeability in the right of publicity context raises significant flags about the ability of private parties and courts to fairly assess and negotiate the pricing of publicity rights. In instances in which they have been called to do so, courts have struggled to value publicity rights. In the context of valuing marital property, for example, even when courts have decided that celebrity goodwill or publicity rights are marital property, none has ultimately awarded ex-spouses any part of the property. In each instance, the courts were unable to value the publicity rights with sufficient certainty to make an award.¹⁸⁵

This analysis highlights the difficulty of alienating a right that—more than being a separable thing (as I will next discuss)—is really a cause of action rooted in the person of the identity-holder. Although I do not think that a law-and-economics analysis gives a satisfying account of the right of publicity or the dangers of alienating that right, it is revealing that, even within the law-and-economics paradigm, one can question the efficiency and feasibility of alienating publicity rights.

* * *

In sum, the most common justifications for limiting alienability suggest bases for restricting the alienability of publicity rights. Alienating the right of publicity burdens fundamental rights, commodifies (sometimes forcibly) personhood, and may be inefficient under a law-and-economics analysis. My point is not that any one of these analyses unequivocally establishes that publicity rights should be inalienable or that any one of them is a complete and fully satisfying rubric. Instead, my claim is that, to the extent we endorse limits on alienability under one of these paradigms (or a combination thereof), there are reasons to think the right of publicity should be in the category of entitlements that have some limits placed on their alienability. I will next turn to three additional considerations that also point toward limiting the alienability of the right of publicity.

IV. OTHER SALIENT CONSIDERATIONS FOR LIMITING ALIENABILITY

Having considered some of the most common bases for limiting alienability, I will now bring to bear three additional considerations of particular salience for publicity rights. These considerations, while touched upon in a variety of contexts in legal scholarship, have either not expressly been viewed as criteria for evaluating whether entitlements or property should be alienable or have only been mentioned in passing. I bring them to the forefront here because they are especially informative in the context of the right of publicity. The first is *separability*—whether the underlying property can be *separated* from the initial

184. See, e.g., *Estate of Curry v. Comm'n of Internal Revenue*, 74 T.C. 540, 547 (T.C. 1980); see also NORTON, *supra* note 59, § 177:26 (discussing the challenges of valuing intellectual property in bankruptcy proceedings).

185. *Sterling v. Sterling*, No. 310833/99, 2001 WL 968262, at *10 (N.Y. Sup. Ct. 2001).

owner of that property. If it cannot, then it is not capable of being alienable. The second consideration is *justifiability*—whether the underlying justifications for creating a particular right or entitlement are furthered or hampered by alienability. If alienability undermines the justifications for the right itself, then alienability should be disfavored. The final criterion that I consider is *reciprocity*—whether alienability can be meted out in a reciprocal fashion such that the benefits and burdens of alienability run with the property. To the extent that the burdens of making property alienable are intolerable, then this may indicate that the property should be inalienable. I will discuss each of these considerations in turn. I note that the analysis here primarily focuses on the *inter vivos* right of publicity.

A. SEPARABILITY

Despite discussions of separability in property scholarship more broadly, it has not been a focal point of alienability discussions. I suspect this is the case because most property is capable of separation from the underlying person who owns it, and for some, separability is itself a defining feature of property with inseparable items or attributes being placed outside of the rubric of property.¹⁸⁶ I do not wish to pick sides in this debate over what constitutes property nor do I think resolution of that question is necessary to evaluate questions of alienability. I therefore consider separability as a limitation on the alienability of entitlements regardless of whether an entitlement is deemed “property.”

Even some of the most contested areas of alienability, such as babies and blood, have not raised the issue of separability because the “property” can easily be seen as separate (or separable) from the underlying person. Discussion of separability in such contexts, therefore, has not focused on the possibility of separation, but instead on limiting the separation of property from individuals when that property is intertwined with their personhood.¹⁸⁷ Most prominently, Margaret Radin has suggested that when objects are intimately tied to our personality, inalienability rules should be used to make them inseparable from us.¹⁸⁸ In such instances, separability is feasible, even if it is not preferred.¹⁸⁹

When property is physically or conceptually *inseparable* from the underlying person with whom it is connected, then alienability is impossible.¹⁹⁰ One’s

186. See, e.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 105–27 (1999); Penner, *supra* note 104, at 802–07; Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 966, 971 (1982). But see Michael G. Heyman, *Goodwill and the Ideal of Equality: Marital Property at the Crossroads*, 31 *U. LOUISVILLE J. FAM. L.* 1, 28–29 (1992) (describing property as anything of “value”); Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 *passim* (1964) (defining, as property, government entitlements that cannot be transferred or sold).

187. See Radin, *supra* note 186, at 971–1015.

188. Radin, *supra* note 1, at 1852, 1891–98; cf. Radin, *supra* note 186, at 991–1015.

189. A family home and a wedding ring, for example, may not be fungible and may be intimately tied to one’s personhood, but they are unquestionably separable from the owner or occupant.

190. Cf. Mahoney, *supra* note 154, at 201 (suggesting, in the context of evaluating the marketability (or lack thereof) of human tissue, that separability could be a useful dividing line for determining

identity (even if limited to one's commercial, public persona) is not a separable "object" but instead an "attribute" of oneself.¹⁹¹ As such, one's identity—including its representation in one's name, likeness, voice, and other indicia—is not detachable from the underlying person. Without any possibility of separation, the alienation of publicity rights should not only be disfavored, it is not possible.

This understanding was accepted early on, before the official creation of the right of publicity. In *Hanna Manufacturing v. Hillerich & Bradsby Co.*, for example, the Fifth Circuit Court of Appeals observed that, even if one's name and likeness are "property," "they are not vendible in gross so as to pass from purchaser to purchaser unconnected with any trade or business. Fame is not merchandise."¹⁹² The court analogized in part to trademark law, where goodwill must be transferred in conjunction with a specific product or service, otherwise the trademark is deemed abandoned and ceases to be protectable property.¹⁹³ The instinct in *Hanna* that any property right in one's name or likeness would cease to have meaning if it were unmoored from the underlying identity-holder is instructive, as is the court's conclusion that you could never "divest" the underlying identity-holder from a property right in his own name or likeness.¹⁹⁴

Despite what seems an obvious conclusion, most courts and scholars today assume that publicity rights are separable from the underlying individual *ipso facto* because they are property rights.¹⁹⁵ Richard Hoffman concludes that publicity rights are "inherently capable of being separated."¹⁹⁶ Robert Post suggests, somewhat circularly, that "personality is commodified [when it] becomes 'something in the outside world, separate from oneself.'"¹⁹⁷ McCarthy quotes this language from Post with approval and adds that the "property right in identity [] can be legally separated from the person in a way that privacy rights cannot."¹⁹⁸ Neither courts nor these scholars, however, have convincingly explained how the separation of a person's identity from that person is possible.

whether human tissue is property and hence alienable or marketable). Physical separability can be an even more complicated consideration than I address here. For example, donated organs and cells, in one sense, can be separated from the underlying person, but, in another sense, the underlying person's DNA remains with them and is inextricably and inseparably linked to that one person.

191. Cf. MARGARET JANE RADIN, REINTERPRETING PROPERTY 191–96 (1993) (noting that substantive constitutive elements of personality" are not alienable but instead are "attribute-properties (permanently inside the person)"); Radin, *supra* note 1, at 1880–81 (criticizing Richard Posner and others for analyzing rape in economic terms because bodily integrity is an "attribute" not an "object").

192. 78 F.2d 763, 766–67 (5th Cir. 1935).

193. *See id.* at 767–68 & n.1.

194. *Id.* at 767.

195. *See, e.g.,* Presley v. Russen, 513 F. Supp. 1339, 1354–55 (D.N.J. 1981) (concluding that, because the right of publicity is a property right, it is "capable of being disassociated from the individual and transferred by him for commercial purposes").

196. *See, e.g.,* Hoffman, *supra* note 78, at 25, 27–29.

197. Robert Post, *Rereading Warren & Brandeis: Privacy, Property & Appropriation*, 41 CASE W. RES. L. REV. 647, 668 (1991) (quoting Radin, *supra* note 186, at 196).

198. MCCARTHY, *supra* note 2, § 10:8.

To the extent that scholars have made any effort to explain how publicity rights could be separable from the underlying identity-holder, they have done so by contending that the right of publicity solely encompasses *economic interests* and that these economic interests can be divorced from the underlying identity-holder.¹⁹⁹ I disagree with such a characterization of publicity rights and also with the proposition that the economic interests are separable from the underlying person.

The right of publicity encompasses rights far beyond the mere collection of income and entitlement to the economic value that flows from uses of a person's identity. The right of publicity provides control over the use of a person's identity and, therefore, ultimately over the person herself. Consequently, publicity rights encompass dignitary interests as well as economic ones, and for some, the dignitary concerns best justify the right's existence.²⁰⁰ It is both normatively and experientially suspect to limit injuries from misappropriation of identity solely to monetary harms. Moreover, many right of publicity statutes expressly encompass rights far beyond commercial uses of one's identity.²⁰¹

Even if the right of publicity were violated only by commercial uses (and "commercial" were narrowly construed, which it often is not), one's commercial identity cannot be easily disentangled from one's noncommercial identity. The mere fact of commodification does not separate out one's identity from one's self. The underlying cause of action for a right of publicity violation, even if held by a third-party publicity-holder, is based solely on the identity-holder and can never be anything other than tied to that underlying person. Without reference to the underlying identity-holder, the right of publicity has no content and the cause of action cannot be satisfied.

Because of this the identity-holder can affect the publicity-holder's interests and the publicity-holder can affect the identity-holder in a way not possible if separation took place. The economic nature—or lack thereof—of the right does not alter these facts. As discussed, when considering the efficiency of such a separation (if possible), I noted that if a third-party publicity-holder had held Tiger Woods's right of publicity, Woods independently would have been able to obliterate much of the value of his publicity rights. The ability of an identity-holder to change the value of his publicity rights regardless of who "owns"

199. See, e.g., Halpern, *supra* note 92, at 1239–55 (proposing that one can separate the "marketable economic value" from the "emotional value" of one's identity); cf. Tal Ganani, Note, *Squeezing the Juice: The Failed Attempt To Acquire O.J. Simpson's Right of Publicity, and Why it Should Have Succeeded*, 26 CARDOZO ARTS & ENT. L.J. 165 (2008) (advocating for splitting the right of publicity into two separate rights: one that is proprietary and can be assigned and the other, which is dignitary in nature, and cannot be assigned).

200. See HUW BEVERLEY-SMITH, *THE COMMERCIAL APPROPRIATION OF PERSONALITY* 6–12, 16, 23–24, 169, 187–89 (2002) (emphasizing the importance of dignitary interests as well as the comingling of economic and dignitary interests); Kwall, *supra* note 30, at 1346–53; McKenna, *supra* note 128, *passim* (developing an "autonomous self-definition" justification for the right of publicity); see also *supra* notes 156–59 and accompanying text.

201. See *supra* notes 122–27 and accompanying text.

them suggests that such rights cannot be unmoored from the underlying person. The identity-holder retains his identity and thereby some control over the value of the publicity rights even after assignment. The very attributes that comprise the right of publicity, therefore, cannot be fully divested and transferred. The retention of related causes of action, such as false advertising claims, further demonstrates such inseparability.²⁰²

At the same time, a publicity-holder can affect the identity-holder's public and private identity. The publicity-holder cannot only harm the value of the underlying right of publicity—in which the identity-holder would have no economic stake (if the right had been transferred)—but the publicity-holder can also cause other economic harms (such as damage to the underlying career of the identity-holder) as well as dignitary and emotional harms to the identity-holder. Publicity-holders can stop identity-holders from making public appearances and from approving public uses of their identities.²⁰³ Publicity-holders can produce merchandise, develop advertising campaigns, and create synthespians (animated digital actors) using the identity-holder's name or likeness.²⁰⁴ The publicity-holder also has the right to stop the public from using any indicia of the person's identity. These rights and powers far exceed the mere exercise of economic interests and affect the liberty of the identity-holder and members of the public. Given the impossibility of disentangling the economic interests from the other interests at stake and the continued connection of the right to the identity-holder, the right of publicity is incapable of complete separation from the underlying identity-holder.²⁰⁵

B. JUSTIFIABILITY: FURTHERING THE GOALS OF THE UNDERLYING ENTITLEMENT

Even if the right of publicity were separable from the underlying identity-holder, making the right alienable undermines the justifications for protecting the right in the first place. Alienability should serve and further the goals of the underlying entitlement. If it does not, then this strongly suggests that the entitlement should not be alienable.²⁰⁶ Even those who strongly favor the

202. See *supra* notes 133–34, 173–76 and accompanying text.

203. See *supra* text accompanying notes 118–49.

204. See *supra* text accompanying notes 118–27. For a further discussion of the emergence of synthespians, see *supra* note 120.

205. For some, this discussion may raise the issue of moral rights in copyrighted works, which in some continental countries have been deemed inalienable. Such inalienable rights include the rights of attribution and integrity. See Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 *CARDOZO ARTS & ENT. L.J.* 1, 34–45, 52–60 (1994). Some of these countries permit the separation of the economic rights that flow from a copyrighted work from the dignitary interests that remain with the author. See Netanel, *supra* note 54, at 383. Such a separation may be possible in the copyright context, but I do not think the distinction between economic and dignitary interests is possible in the right of publicity context because a particular person's identity is not external in the same way that a completed creative work becomes external. The identity-holder remains tied to and integrated with the publicity rights in a much more significant and ongoing way than an author remains tied to a copyrighted work.

206. Epstein, *supra* note 165, at 971.

alienability of property endorse such a basis for restricting alienability. Richard Epstein, for example, has suggested that, when alienability limits freedom and decreases social utility—the justifications behind awarding property rights in the first place (for Epstein)—one must question whether the property should be alienable.²⁰⁷ This explanation for limiting alienability is longstanding. In explaining why a person cannot sell himself into slavery, John Stuart Mill emphasized that the very freedom that justifies permitting a person to do so would be defeated by such an act.

[B]y selling himself for a slave, [the person] abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats . . . the very purpose which is the justification of allowing him to dispose of himself. . . . It is not freedom, to be allowed to alienate his freedom.²⁰⁸

The right of publicity has been justified on the basis of the interests of identity-holders without regard to the economic (or other) interests of nonidentity-holding publicity-holders. The most compelling and most frequent justifications for a right of publicity are: (1) autonomy and personal dignity; (2) natural rights (largely a labor-reward analysis); and (3) unjust enrichment.²⁰⁹ None of these justifications is served by alienability and several of these interests are directly contravened by it. Several of the less compelling justifications for publicity rights—a consumer protection rationale and an incentive rationale—also do not benefit from alienability and may suffer from it. I will discuss each of these justifications and how alienability fits with each. I note first that there are reasons to question the legitimacy of some of these justifications for the right of publicity. My focus here, however, will not be on interrogating each of these justifications; instead, I will mostly accept each and then consider whether that objective is served or undermined by alienability.

The autonomy rationale for the right of publicity suggests that a person has a protected interest in controlling her own identity and in preventing others from using it without permission. A person should be able to control how her name and likeness and other indicia of identity are used. This justification encompasses both the protection of liberty interests and concern over harm to one's dignity and reputation.²¹⁰ Alienating publicity rights from the underlying identity-holder defeats this justification entirely by removing the identity-holder's ability to make choices and take actions relevant to identity formation. Such alienation places control over a person's identity in the hands of a third party in direct contravention of the autonomy-based objective of the entitlement.

207. *Id.*

208. MILL, *supra* note 117, at 60–61; *see also* Radin, *supra* note 1, at 1888–1903; *supra* notes 115–17 and accompanying text.

209. *See* Rothman, *supra* note 6, at 245–248.

210. *See id.* at 247–48 (arguing that giving power to third parties to control our names and likenesses would turn each of us, particularly celebrities, into “puppets with advertisers controlling the strings”).

The natural-rights justification for publicity rights contends that a person should be rewarded or compensated for uses of her identity because she has invested in cultivating the value of her personality.²¹¹ In the case of an actor, for example, one could contend that the commercial value associated with that actor's identity resulted from hard work on the part of that actor to develop her acting skills and her public image. She should accordingly reap the rewards of that labor.²¹² Alienability is not required, however, to further this goal. Identity-holders can be compensated in myriad ways (for example, endorsement fees, salaries, modeling fees) without publicity rights being alienable.²¹³ Alienating publicity rights primarily rewards third parties rather than the underlying identity-holder. Moreover, once alienated, there is no ongoing reward for the labor of cultivating one's identity. Of course, there are many rewards for developing one's identity (such as fees, personal pride, or fame), but these additional rewards call into question this entire rationale for publicity rights. If we take this justification seriously, however, then alienability seems to work at cross-purposes with it.

Related to the natural-rights justification is the unjust enrichment rationale for the right of publicity.²¹⁴ Advertisers, merchandisers, and others who use another's likeness without permission or compensation are unjustly enriched by using this valuable asset without paying for it. The flip side of the unjust enrichment argument is that identity-holders could be unjustly impoverished if others can use their identity. Not only might identity-holders lose out on a potential stream of revenue, but their image and ability to make money—even in their main career—could be harmed by unauthorized uses.

Alienability does not protect against such unjust enrichment or unjust impoverishment. In fact, alienability may exacerbate unjust enrichment and impoverishment by granting windfalls to publicity-holders who buy up identity-holders' publicity rights before their value is ascertained or before a dramatic increase in the value of those rights. Consider, for example, the NCAA "buying" student athletes' publicity rights for virtually nothing—either in exchange for permission to play on a sports team or for some scholarship money. The NCAA then receives a windfall in the sum of hundreds of millions of dollars from licensing

211. See, e.g., *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973–75 (1996); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995); 1 MCCARTHY, *supra* note 2, § 2; J. Thomas McCarthy, *Melville B Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1711 (1987) (describing the natural-rights justification as the most important); Nimmer, *supra* note 34, at 215–16.

212. Some have questioned this justification for publicity rights on the grounds that the value of public figures is more a creation of the public, publicists, filmmakers, or an accident of parentage (such as, being born into a royal family) than a result of efforts by an individual identity-holder. See, e.g., Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 134, 140–47, 175–76, 178–205 (1993); see also Coombe, *supra* note 143, at 1876.

213. See discussion *infra* section V.A.

214. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575–76 (1977); *Lugosi v. Universal Pictures*, 603 P.2d 425, 438–40 (Cal. 1979) (Bird, J., dissenting); Rothman, *supra* note 6, at 246–48.

these players' identities.

A less often mentioned justification for the right of publicity is that publicity rights facilitate the conveyance of accurate information to consumers about what products or services people, particularly celebrities and other public figures, endorse.²¹⁵ To the extent this justification is valid, alienability defeats its purpose by separating out the person whose endorsement is indicated (the identity-holder) from the person who has the authority to endorse (the publicity-holder). The value of the endorsement is dependent on its voluntariness and accuracy as a reflection of the identity-holder's preferences. It may work a significant injury to the consumer to allow publicity-holders to sponsor or endorse products without the identity-holders' approval. Preventing publicity-holders from making such endorsements, however, would mean that the publicity rights have not in fact been transferred but instead remain vested in the identity-holder.

Another, less compelling basis for the right of publicity is an incentive rationale, similar to that used to justify copyright and patent laws.²¹⁶ This justification contends that protecting the right of publicity encourages individuals to develop their careers and personalities with the public reaping the benefits.²¹⁷ Alienability, however, is not necessary to generate incentivizing revenue for the identity-holder because a person can be compensated for waiving or licensing his publicity rights even absent the ability to fully transfer those rights to a third party. Additionally, as discussed, if the right of publicity is alienated, the identity-holder actually may have a *disincentive* to continue to develop his or her personality and career.²¹⁸ Moreover, given that the incentive to develop one's personality that derives from publicity rights is likely small,²¹⁹ any marginal increase in possible revenue from alienability is likely to provide an even more modest incentive.

One could contend that alienability benefits publicity-holders, who will have an enhanced incentive to develop the value of the publicity rights or who will be rewarded for their labor, but publicity rights have never been justified on the basis of these third-party interests. To the extent that the right of publicity is justified on the basis of identity-holders—which it is—its parameters should promote their interests, not those of publicity-holders. Additionally, if we were to reconceptualize publicity rights as promoting publicity-holders' interests—a project outside the scope of this Article—it would require deep engagement

215. I and others have criticized this explanation for publicity rights in part because violations of the right of publicity do not turn on consumer confusion. See Madow, *supra* note 212, at 228–38; Rothman, *supra* note 6, at 263–64; cf. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006) (suggesting that the right of publicity should be limited to instances in which confusion or dilution are established).

216. See *Zacchini*, 433 U.S. at 573–77.

217. See Madow, *supra* note 212, at 206–28 (criticizing this justification); Rothman, *supra* note 6, at 245 n.218 (same).

218. See text accompanying *supra* notes 168–73.

219. See Madow, *supra* note 212, at 206–28; Rothman, *supra* note 6, at 245 n.218.

with the countervailing interests of identity-holders as well as those of the public who might have stronger use interests as compared to third-party publicity-holders.²²⁰

In sum, if the purpose of the right of publicity is to protect an individual from third-party uses of her identity, then making such a right alienable undermines the entire foundation of the right. Alienability leads to forced commercialization and lack of autonomy (commercial or otherwise) and rewards and incentivizes publicity-holders rather than promoting the interests of identity-holders.

C. RECIPROCITY: EQUITABLY DISTRIBUTING THE BENEFITS AND
BURDENS OF ALIENABILITY

The final additional consideration in evaluating alienability that I will examine is whether an entitlement holder or property owner bears both the benefits and burdens of alienability. If we cannot tolerate the burdens of alienability—such as dividing publicity rights in divorce, taxing them, or having creditors gain title to them—then this may signal that the right of publicity should not be alienable.²²¹

Most entitlements require that the holder of an entitlement receive both the benefits and the burdens of that entitlement. A factory owner, for example, cannot collect profits from its production line without also being responsible for paying taxes, ameliorating a nuisance it created, or cleaning up pollution it caused. Joseph Singer's citizenship model of property emphasizes that property owners "have obligations as well as rights" that follow from property ownership.²²²

Scholars to date who have observed some of the anomalous treatment of publicity rights, particularly in the debtor-creditor context, have criticized the treatment of publicity rights on reciprocity grounds. Melissa Jacoby and Diane Zimmerman, for example, have argued that the right of publicity should be treated as a seizable asset because "it is [not] reasonable and fair to create a form of property that is legally cognizable only when it favors the famous or their assigns, but not when the benefits of doing so would flow to ex-spouses,

220. Moreover, in contrast to copyright and patent laws, where we may need incentives (and payments) to encourage the distribution of works and inventions, we do not need to incentivize the publication and dissemination of identities. *See supra* note 217 and accompanying text.

221. I note that an unwillingness to enforce the burdens of alienability, such as transferring property to a creditor, has been pointed to by some as a reason not to treat such entitlements as property. J. E. Penner, for example, has developed a "bankruptcy test" in which he suggests that if we are not comfortable with a particular thing, like a kidney, being transferred to a creditor in bankruptcy, then we should not treat it as property. J. E. Penner, *Misled by 'Property,'* 28 CAN. J.L. & JURIS. 75, 75-77 & n.5 (2005).

222. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 16 (2000); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENV'T'L L. REV. 309, 328-38 (2006).

taxing authorities, or people to whom a celebrity owes money.”²²³ Richard Hoffman similarly contends that the right of publicity “cannot be a personal right as to some aspects and a property right as to others.”²²⁴ Accordingly, these scholars contend that publicity rights should be alienable property for all seasons. At least one court has agreed in the context of dividing up marital property. A New Jersey superior court noted that it would be unfair to treat publicity rights and “celebrity goodwill” as property when it benefits the publicity-holder and not as a property-based interest when a spouse seeks to share in that interest.²²⁵ I note that these scholars and courts do not focus on alienability in their analysis but instead on the right of publicity’s status as property to determine its appropriate treatment.²²⁶

I agree with these assessments that it seems unfair, at least on some level, to permit identity-holders to reap only the benefits of an expansive right of publicity without any of the associated burdens of owning transferable property. I part ways with these scholars, however, over what this conclusion means. I do not think it means that publicity rights should be *more* alienable, but instead that they should be *less* alienable. Publicity rights are not separable and, therefore, the burden on the identity-holder of putting control of her identity into the hands of ex-spouses, the government, creditors, or even assignees is normatively problematic and potentially unconstitutional. Because this is the case, it may be fair to limit the alienability of publicity rights across the board rather than only in ways that benefit identity-holders.

I do not think, however, that a lack of reciprocity independently answers the question of whether an entitlement should be alienable. We can and do make policy determinations to give individuals some benefits (the upside) of property ownership without the burdens associated with that property (the downside). Some states, for example, do this with one’s family home by protecting it from creditors.²²⁷ But there is a recognition that this and other exemptions are *exceptions* to the usual understanding of property ownership that entails burdens as well as benefits. It may be reasonable in certain instances to distribute the benefits and burdens of property unequally, but we need to engage with the question of reciprocity even if ultimately we dismiss it.

V. IMPLICATIONS OF LIMITING THE ALIENABILITY OF THE RIGHT OF PUBLICITY

The foregoing analysis strongly points toward limiting the alienability of publicity rights. Given the inability of the right of publicity to be separated from

223. Jacoby & Zimmerman, *supra* note 58, at 1322–24, 1367; *see also* Melissa B. Jacoby, *Auctioning Kim Basinger: The Imminent Collision of Bankruptcy and the “Right of Publicity,”* 2001 NORTON BANKR. L. ADVISER 1–2 (arguing that “bankruptcy’s lack of recognition of the right of publicity provides one explanation why bankruptcy law is providing too generous a remedy for famous debtors”).

224. Hoffman, *supra* note 78, at 2.

225. *Piscopo v. Piscopo*, 555 A.2d 1190, 1192–93 (N.J. Super. Ct. Ch. Div. 1988).

226. For a critique of this property syllogism, *see* discussion *supra* Part II.

227. *See, e.g.*, FLA. STAT. ANN. § 222 (2012).

the underlying identity-holder, the right cannot be transferred in gross to a third party. Even if such transfers were possible, they should be normatively disfavored. Nevertheless, such a conclusion does not prevent identity-holders from granting limited licenses or waivers to third parties to use their identities.²²⁸ In this final Part, I will briefly elaborate on some of the implications that flow from limiting or prohibiting the alienability of publicity rights.

Before doing so, however, I want to acknowledge that limiting or precluding the alienability of the right of publicity may lead to an existential crisis for the right. Given that alienability is alleged to be a primary and defining feature of the right and to be at the root of its split from privacy rights, one could question whether, absent such alienability, it makes sense to have a separate right of publicity. It may be that, starting from a clean slate, there would be no need for a separate cause of action; instead, we would have a broader understanding of what we mean by privacy rights, and public figures would be permitted to sue under that rubric. But the horse has already long left the gate. The right of publicity is now well established in a majority of states, and I do not think it particularly fruitful to challenge the existence of the right at this point.²²⁹ Such acceptance does not mean, however, that the contours of that right should not be debated or challenged.

A. REVISITING THE ALIENABILITY OF *INTER VIVOS* PUBLICITY RIGHTS

In the context of the *inter vivos* right of publicity, my analysis challenges the fiction that the right can be separated from the underlying identity-holder. Given the impossibility of separating publicity rights from the underlying identity-holder, identity-holders (at least while living) should always be the same as the publicity-holders. Such a prohibition on alienability would mean, contrary to currently accepted (though not universal) doctrine, that *inter vivos* publicity rights cannot be assigned.

The conclusion that the *inter vivos* right is not transferable would not mean that third parties could never use an identity-holder's name or likeness. Identity-holders could continue to waive their right of publicity for particular uses or sell licenses to use their identity (or some particular feature of that identity, such as the name of the person) in a particular context.²³⁰ To prevent waivers or licenses

228. For some, allowing such licenses or waivers suggests a degree of alienability. See Radin, *supra* note 1, at 1853. This is mostly a semantic debate about what we mean by alienability. I do not need to resolve such definitional differences, however, because no matter how we define alienability, the right of publicity has and should have significant restrictions placed on its alienability. Moreover, there is a big difference between waiving the right of publicity entirely (which is not permissible under my analysis) and waiving a claim for a violation of that right in the context of a particular use (which is permissible under my analysis).

229. I note, however, that there have been calls to federalize the right of publicity. My analysis suggests, at the very least, some important limits on any such legislation.

230. There are doctrinal differences between waivers (of rights) and licenses (to use property), but for purposes of this discussion, I need not focus on the distinctions between the two. Regardless of whether a waiver or license is at issue, the scope and duration of either will determine its validity.

from becoming default assignments, there must be significant limits on their scope. Licenses and waivers should be limited to a particular and narrow use for a limited time period: for example, use of one's name or likeness on baseball cards for no more than three years. A one-to-three year period seems reasonable, but courts and legislatures can work out appropriate durations given the reframing of the right and in the context of specific facts. Existing limits on the duration of personal services contracts, as well as on the scope and duration of noncompete clauses, may provide some useful guidance.²³¹

When children are the relevant identity-holders, additional protections are needed. We may want to provide a right to reclaim waivers or licenses of publicity rights upon reaching an age of majority or an independent review at the time of a license or waiver to determine whether such consent is in the interest of the child—something that at least one state has instituted for its child performers (though not models).²³² It also may be appropriate to have more substantial limits on the scope of agreements involving children's rights of publicity.

A more challenging question is whether waivers or licenses of publicity rights should be capable of being exclusive. There is no question that an identity-holder could receive greater monetary remuneration for an exclusive license, but the limits on a person's freedom and identity will often outweigh this potential monetary gain. If the scope and duration of an exclusive license is narrow enough and the remedies are limited (to damages rather than injunctive relief), however, then the burden on an identity-holder may be reasonable.²³³ Under such circumstances, the identity-holder would retain her right of publicity and could never be prevented from using her own identity. Nevertheless, exclusive licensees could be granted standing to enforce publicity rights against third parties, as is done in copyright law.²³⁴

When publicity rights are waived or licensed in a specific context, particu-

231. See, e.g., CAL. CIV. CODE § 2855 (West 2010) (limiting personal services contracts to no more than seven years); *Money & Tax Help, Inc. v. Moody*, 180 S.W.3d 561, 565–67 (Tenn. Ct. App. 2005) (limiting the scope of a noncompete agreement when it prohibited working in a field for three years). My critique of alienating publicity rights, especially such alienability's burdens on autonomy interests, also applies more broadly to burdensome employment contracts. My analysis lends additional fuel to efforts to limit the scope and duration of employment contracts and restrictions on the future labor and activities of employees. I, therefore, do not endorse importing wholesale existing employment and contract law to the context of the right of publicity. Nevertheless, such bodies of law can provide some useful considerations for shaping a more limited right of publicity.

232. See N.Y. ARTS & CULT. AFF. LAW §§ 35.01–.07 (McKinney 2010).

233. This echoes arguments that personal services contracts should be enforced only through damages rather than specific performance. I agree with Randy Barnett's conclusion (in that context) that personal services are intimately intertwined with the underlying person and, therefore, should be inalienable such that no third party can force performance. See Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL. 179, 179–81, 184–95, 197–98, 201–02 (1986).

234. In copyright law, an exclusive license (even if limited in scope and duration) is considered a transfer of copyright ownership (at least a part of the ownership of a divisible copyright), whereas a nonexclusive license is not considered a transfer. See NIMMER ON COPYRIGHT § 10.03 (2005); see also 17 U.S.C. § 101 (2006) (defining a “transfer of copyright ownership” as including exclusive (but not

larly for use in copyrighted works, there can be no durational limit to the waiver (unless explicitly stated) because there can be no right of publicity violation for consensual uses of a person's identity.²³⁵ If an actor agrees to appear in a movie, he cannot subsequently—whether three years or thirty years down the road—object to the continued distribution of the film as a violation of his right of publicity. The actor could, however, object to a new use of his identity outside the terms of the initial contract (for example, if a movie studio, without obtaining additional permission, were to reanimate the actor in a sequel).

Although it is possible that identity-holders could get greater monetary payouts if publicity rights were assignable, they can be adequately compensated for their labor, including their labor in producing their celebrity persona, even if the rights have limited or no alienability. Short-term licensing can generate significant income. Even if some money is left on the table, it is appropriate to leave it there. Just as we do not permit individuals to sell themselves into slavery even if they can get more money by doing so, we should not permit identity-holders to sell off their publicity rights.

Given my contention that no one except identity-holders can hold publicity rights, creditors and ex-spouses should not be able to own (or control) any portion of another person's right of publicity. The bankruptcy system has recognized that some rights are personal in nature and should not be subject to transfer.²³⁶ The right of publicity might be an appropriate site for an express exemption. Only one state to date explicitly exempts the right of publicity from seizure by creditors²³⁷ but, in light of this analysis, such express exemptions are appropriate.

Creditors and ex-spouses, however, may be entitled to a portion of the income that a debtor or ex-spouse makes, including from licensing and endorsement fees. Thus, the Goldmans could not take control over Simpson's right of publicity, but they would continue to collect any income generated by Simpson's use of his name, likeness, or other indicia of his identity. Ex-spouses would not be able to collect ongoing income from use of their former spouse's identity but would be able to get a fair portion of income generated from that identity during their marriage.

nonexclusive) licenses). Because exclusive licenses are treated as transfers, the licensee has standing to enforce the copyright.

235. As I have discussed elsewhere, when performers agree to appear in copyrighted works, they have consented to the use of their identities in that context and cannot subsequently sue for a violation of publicity rights. This is true both because the use was consensual and because of copyright preemption. See Rothman, *supra* note 6, *passim*; see also *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1152–55 (9th Cir. 2010) (holding that a right of publicity claim based on consensual appearance in videos was preempted by copyright law).

236. See *supra* note 59. Common exemptions include a homestead exemption as well as exemptions for home equity, home furnishings, cars, family portraits, wedding rings, and other property that has "tremendous personal importance" but little monetary value. See Jacoby & Zimmerman, *supra* note 58, at 1343 & n.126. Although some of these exemptions can be waived by contract, it is not appropriate to permit such waivers in the context of publicity rights.

237. 765 ILL. COMP. STAT. § 1075/15 (2010).

If the *inter vivos* right of publicity cannot be assigned or otherwise transferred, then publicity rights should not be taxed except when they generate revenue. Income generated from licensing and endorsements by an identity-holder would continue to be subject to taxation.²³⁸ The common practice of identity-holders assigning their rights of publicity to self-owned companies would no longer be possible, but identity-holders would continue to be able to incorporate and have income for uses of their image or likeness flow through these corporations. Identity-holders would still be able to hire management companies to police the enforcement of their rights of publicity and to coordinate the public dissemination and shape of their public identity.

Some implications of this analysis would not dramatically alter the law because, as discussed, there are many pockets of the law in which the alienability of publicity rights already has been limited on an ad hoc basis. The foregoing analysis, nevertheless, provides a basis for explaining these seeming anomalies and for supporting these pockets of inalienability from future challenges, including calls from scholars and some courts to transfer publicity rights from identity-holders to creditors and former spouses.

B. REVISITING POSTMORTEM PUBLICITY RIGHTS AND DESCENDIBILITY

A more challenging issue under the inalienability analysis set forth here is how to address postmortem rights. The identity-based interests of a person cease upon death. The person's identity also becomes *separable* upon death because there is no longer a living person to whom it attaches. Once a person dies, his public image and identity take on a life of their own. In such instances, alienability is possible. We must then consider whether alienability should nevertheless be limited.

Upon death, a person's right of publicity could transform into several different forms (including a freely alienable right or a right of limited alienability held only by close relatives or devisees) or it could dissipate entirely such that no right at all remains. Although I am not convinced that a postmortem right of publicity should exist, to the extent that we recognize such a right (as most states that have considered the question do) the foregoing alienability analysis provides both some justification for a postmortem right and a basis for limiting its scope. Returning to some of the considerations discussed in Parts III and IV, the rights (dignitary and economic) of identity-holders are not of concern once the identity-holder dies. The surviving relatives and other intimate members of the deceased's circles, however, might have their own identity-based and dignitary interests in preventing the commercialization of their loved one's image and in controlling how he or she is depicted in public—particularly in the immediate aftermath of the death. As Roberta Kwall has noted, “the relatives of

238. Recategorizing publicity rights as inalienable may suggest that income generated from licenses and waivers of those rights should be taxed as ordinary income rather than as capital gains, but I leave such characterization issues to tax experts and the IRS.

a decedent will want to protect the reputational interests of the persona.”²³⁹ Despite rejecting the inheritability of publicity rights on the grounds that it is not property, Timothy Terrell and Jane Smith suggest that, to protect a broad understanding of survivors’ privacy interests, it might be appropriate to pass legislation extending some rights to heirs and beneficiaries to control the uses of their loved ones’ identities.²⁴⁰ For example, Martin Luther King Jr.’s family might have found it degrading and otherwise injurious if people had profited from making inflatable sex dolls of him upon his death. The dignitary interests of the survivors point to permitting partial alienability of the right, such that it can transfer to heirs or devisees, at least for a limited time.

Similar concerns have arisen in privacy law. Although postmortem privacy claims are almost universally rejected (unless a claim arose prior to death), a number of states have allowed limited privacy actions by surviving relatives grounded in the survivors’ own privacy interests rather than those of the deceased. For example, a California Court of Appeal recently permitted the parents and siblings of a deceased teenager to bring a privacy-based suit against the highway patrol, whose officers had circulated photographs of their daughter and sister’s mutilated and decapitated head and body.²⁴¹

In the context of publicity rights, it may be appropriate to permit heirs and beneficiaries (and the decedent) to limit some uses of the deceased’s identity, at least in the aftermath of the death. If the justification for alienating publicity rights postmortem rests on dignitary grounds, then it would be appropriate to limit ownership to natural (and connected) persons rather than permitting corporate ownership. The dignitary interests of the deceased would be furthered (hopefully) by her heirs and devisees who would have some control (at least for some period of time) over how the deceased is remembered and treated (at least commercially) in public.

Transferring publicity rights to heirs and devisees provides a powerful tool against commodification. Identity-holders who have steadfastly avoided commercializing their identities during life would know that their identity could be protected postmortem. Transferees who wish for a variety of reasons to limit the commercialization of the deceased’s identity will be able to do so. Of course, heirs and beneficiaries might ignore the wishes of the deceased and actively commercialize the deceased’s identity. The risk that survivors might violate the wishes of the deceased is an acceptable risk, however, because a postmortem right provides the tools to prevent forced commodification against the wishes of the deceased and her heirs, even if those tools are not always used.

The deceased would also be rewarded for labor expended and possibly incentivized to expend such labor during her lifetime by knowing that her

239. Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 *IND. L.J.* 47, 83 (1994).

240. Terrell & Smith, *supra* note 88, at 55–63.

241. *Catsouras v. Dep’t of Cal. Highway Patrol*, 104 *Cal. Rptr. 3d* 352 (Ct. App. 2010).

survivors will reap some monetary rewards as a result. Although I am highly skeptical of the incentive rationale for publicity rights, if we accept for purposes of this discussion that it has some legitimacy, then postmortem rights might provide some, though no doubt a minimal, additional incentive. The control by heirs and devisees would also permit there to be official sponsorship by the estate of the deceased, thus serving consumer-protection goals. Otherwise, if there are no postmortem rights, then there should be no possibility of endorsement or sponsorship after someone's death.

The requirement in some states that there have been commercial exploitation of a person's identity before death in order for postmortem property rights to attach should be rejected. It is counterintuitive and should be normatively disfavored because it gives the least postmortem protection to those who most wanted to keep their identities private and uncommodified. As the Supreme Court of Georgia has said, "a person who avoids commercial exploitation is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life."²⁴²

As with the *inter vivos* right, corporate ownership should not be permitted. Today, many deceased celebrities' rights of publicity are owned by corporations, some of which manage multiple celebrities' rights.²⁴³ When compared to the interests of the public in using deceased personalities, the corporate interests pale in comparison. To the extent that these agencies work on behalf of devisees or heirs who have rights for a limited time, they may continue to have a useful role in facilitating such control and management, but they should not have an ownership interest and certainly not the long-term one that they currently do.

In terms of reciprocity concerns, heirs and beneficiaries would be better able to tolerate the downside of property ownership in terms of taxation and dissolution in divorce because their identities are not directly at stake. Nevertheless, to further the goals of descendibility, we may want to limit taxation. Some scholars have criticized the estate tax for interfering with nonfungible, highly personal property. The tax has sometimes forced individuals to sell prized

242. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 706 (Ga. 1982).

243. *See, e.g., Apple Corps. Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342 (M.D. Tenn. 1993) (noting that the right of publicity for the group and members of the famous band the Beatles, including the deceased John Lennon, is Apple Corps.); *see also Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980) (describing ownership of deceased Elvis Presley's right of publicity by Factors Etc., Inc.). CMG Worldwide and the Roger Richman Agency are prime examples of larger corporate entities that manage multiple deceased celebrities. *See, e.g., CMG WORLDWIDE*, <http://www.cmgworldwide.com/corporate/overview.html> ("[CMG Worldwide is] the premier company for representing the families and estates of deceased celebrities. . . . [It] represents over 200 diverse personalities," such as Jackie Robinson, Joe Louis, and Lou Gehrig; Marilyn Monroe, James Dean, Ingrid Bergman, and Marlon Brando; Duke Ellington, Ella Fitzgerald, and Billie Holiday; and Malcolm X, Amelia Earhart, Lee Strasberg, Mark Twain, and Frank Lloyd Wright) (last visited Oct. 1, 2012); *THE ROGER RICHMAN AGENCY*, <http://www.rogerichman.us/> (controlling deceased personalities such as W.C. Fields, James Cagney, Boris Karloff, Mae West, Marx Brothers, Albert Einstein, and Sigmund Freud) (last visited Oct. 1, 2012).

family homes as well as other property closely linked to the devisees' and the deceased's personhood.²⁴⁴ The federal government has recognized this concern in some contexts, such as a family-owned farm.²⁴⁵ Accordingly, it might be appropriate to exclude the right of publicity from estate taxation through a specific exemption to prevent forced commercialization by heirs to pay off a tax assessment based on assumed maximum commodification. It also may be appropriate to limit transfers to creditors or ex-spouses if they would seek to commercialize an identity that the survivor has actively protected against such commodification.

In light of the foregoing analysis, the durational limit for a postmortem right of publicity that might be the most appropriate is one that grants heirs only a limited postdeath period of rights in which the dignity interests of the survivors are most at issue and the impact on pre-death incentives is likely to be greatest. Alternatively, it might make sense to limit the right to a single generation—the first heirs and beneficiaries—and then the person's identity should enter the public domain.

CONCLUSION

The inalienability analysis of this Article explains and lends guidance to the otherwise incoherent patchwork of decisions limiting the right of publicity's alienability. Limits on alienability from within the property frame can provide a more nuanced approach to evaluating the shape and boundaries of publicity rights than many have assumed possible in the land of property. Identity-holders can, therefore, benefit from the power of "property" without the right "spinning out of control" as some have claimed.²⁴⁶

At the same time, concerns over identity-holders' interests need not eclipse concerns about ever-expanding publicity rights that many contend hamper public engagement with public figures. Instead, thinking about publicity rights as rooted in the underlying identity-holder and her interests provides a frame for focusing on the true interests at stake without resorting to knee-jerk property-based protectionism of publicity-holder interests. Taking identity-holders' interests seriously could lend some support to considering countervailing identity-based interests of users who may sometimes need to engage with public personalities

244. See, e.g., Carolyn C. Jones, *The Moral Hazard of the Estate Tax*, 48 CLEV. ST. L. REV. 729, 738–41 (2000); Madoff, *supra* note 162, *passim*; Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994).

245. See I.R.C., § 1032A (2006); 26 C.F.R. § 20.2032A-3 (1981) (excluding a family-run farm from being valued at highest and best use). The large exclusion from estate taxes also protects many family homes from forced sales. See I.R.C. § 2010(c).

246. For persuasive discussions of how the property rubric can be empowering, see CAROL M. ROSE, *PROPERTY & PERSUASION* 1–46 (1994), and Shultz, *supra* note 154, at 1856–60, which contends that the patient whose spleen was used to generate patentable cell lines in *Moore* might have deserved and benefited from a property-based analysis). See also Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 U. KAN. L. REV. 329 (1996) (criticizing various expansions of right of publicity law, including protections for persona).

for their own identity-based needs.²⁴⁷ In the context of postmortem rights, the countervailing public interest in using a deceased person's image will weigh more strongly against the interests of the heirs or devisees. Accordingly, countervailing speech and liberty interests will more often limit enforcement of publicity rights than in the context of *inter vivos* rights.

The alienability analysis here also suggests that some ongoing debates that revolve around the privacy-versus-property dichotomy might more fruitfully be analyzed from another perspective. When potential property is intimately tied with an individual, focus should not be on debating the merits of property versus personal rights. There are disagreements in information privacy circles, for example, about whether propertizing personal data is the best method to protect such information or is instead the road to hell (paved, of course, with good intentions).²⁴⁸ Such analyses have not considered whether, even if property, the data could be deemed inalienable. In the context of some of the "contested commodities," such as body parts or babies, the focus should also shift away from whether we should consider babies or organs "property," to whether we should permit organs or babies to be alienated from the person with whom they are originally embedded and, if so, how and under what circumstances. In such instances, it is useful to look at longstanding inalienability considerations, such as fundamental rights, commodification, and maximization of social welfare, as well as the additional considerations of separability, justifiability and reciprocity, that are particularly apt in such circumstances.

Property rights are not a simple on-off switch from which everything else flows. Instead, property rights are often limited in a number of ways that accommodate competing interests, including those of the public, tenants, and owners. The right of publicity can serve important goals of protecting people from the dignitary and economic harms that flow from nonconsensual uses of our identities. Viewing such a right as property-based is a powerful rubric and has doctrinal force, but it does not answer the profound question of whether such rights should be alienable. Property is a frame, not an answer for such questions. It is time to tell the Emperor that he has no clothes and to stop repeating, without reflection, the mantra that the right of publicity is freely alienable. It neither should be nor is anything of the kind.

247. See Coombe, *supra* note 143, at 1880 & *passim* (criticizing the use of intellectual property laws to limit the "cultural construction of self and world [using] shared cultural symbols"); Madow, *supra* note 212, at 127-47, 185-96, 238-40 (suggesting that the public has a strong claim to use celebrity identities to construct its own diverse cultural and personal meanings); cf. Rothman, *supra* note 39, *passim* (developing a substantive due process analysis to protect identity-based uses of copyrighted works).

248. Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283 *passim* (2000) (discussing the debate between a property-based and tort-based approach to protecting information privacy and advocating for a tort-based approach); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125 *passim* (2000) (advocating against a property-law rubric for personal data because of concerns over making such data alienable).