PRIVACY FROM PHOTOGRAPHY: IS THERE A RIGHT NOT TO BE PHOTOGRAPHED UNDER NEW YORK STATE LAW?

INTRODUCTION

For over one hundred years, New York State law has recognized a statutory right to privacy. Although no common law privacy right exists in New York, a living person whose "name, portrait, [or] picture" has been used without his written consent may sue for both an injunction and for damages pursuant to Civil Rights Law section 51.[1] New York State law also provides for penal sanctions for the use of an unconsented-to photograph: "a person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living

1 N.Y. CIV. RIGHTS LAW § 51 (Consol. 2006).

person without having first obtained the written consent of such person . . . is guilty of a misdemeanor."[2]

In 2005, Erno Nussenzweig brought suit under Civil Rights Law section 51 and its companion statute, section 50, seeking both a permanent injunction to prevent the defendants—a photographer and a gallery owner—from using a photograph taken of him while walking on a public street in New York and damages for the prior use of that photograph.[3] Nussenzweig's suit raised a question quite possibly of first impression: should a citizen of the State of New York retain the right to preclude the use of his likeness where such likeness is displayed in an artistic forum? In response to this question, the Supreme Court of New York balanced the privacy interest asserted by Erno Nussenzweig with the defendants' First Amendment claim for the protection of artwork, ruling in favor of the defendants.[4]

Part I of this Note will closely examine the primary legal issues raised in the *Nussenzweig* case. This section deals with both the procedural and the constitutional claims asserted, the latter of which include the plaintiff's assertion of a privacy right, the defendants' assertion of the right to free speech, and the plaintiff's assertion that the defendants' use of the photograph of him violates his religion. Part II more broadly covers the right to privacy, exceptions to that right, and the constitutional protection of art. Part III then compares New York's privacy laws to similar laws in other states, with a focus on California. Part IV suggests a possible direction for New York's privacy doctrine. Finally, the conclusion argues that, despite the value of protecting art as free speech, the State of New York should recognize the right of every person not to be photographed and exhibited without his or her consent.

PART I: NUSSENZWEIG V. DICORCIA

Facts

The defendants in the *Nussenzweig* case are Philip-Lorca DiCorcia, a professional photographer for over twenty years, and Pace/MacGill (hereinafter "Pace"), a gallery that exhibits and sells photographic art.[5] DiCorcia is a renowned photographer whose

2 *Id.* § 50.

3 Nussenzweig v. DiCorcia, No. 108446/05, 2006 N.Y. Misc. LEXIS 230 (Sup. Ct. N.Y. County Feb. 8, 2006).

4 *Id.* at *5-8.

5 Defendants' Memorandum in Support of Motion for Summary Judgment at 2-4,

works have been exhibited in museums such as the Museum of Modern Art and the Whitney Museum of American Art and included in permanent collections at the Metropolitan Museum of Art and the Guggenheim Museum.[6] From 1999 through 2001, DiCorcia took photographs of strangers walking in Times Square as part of an exhibit entitled "HEADS," which was to be displayed at Pace's gallery.[7] One of the DiCorcia photographs clearly and unmistakably depicted the plaintiff, Erno Nussenzweig, an Orthodox Hasidic Jew.[8] This photograph was displayed in Pace's public exhibition, which was reviewed in local and national newspapers and magazines.[9] The "HEADS" exhibition was also accompanied by an exhibition catalogue of the same title.[10] In addition, defendant DiCorcia created ten edition prints as well as three artist's proofs of the photograph.[11] The total income earned from the sale of the ten prints fell somewhere between $200,000 and $300,000.[12] The plaintiff neither consented to the taking of the photograph nor to its use, sale, or display.[13]

Procedural issues

The *Nussenzweig* court ruled on three procedural issues: (i) the plaintiff's motion seeking a second amendment to his complaint; (ii) the defendants' motion to dismiss under the statute of limitations; and (iii) the defendants' motion to dismiss for failure to state a cause of action.[14] The *Nussenzweig* court resolved each of these procedural matters in the defendants' favor.[15]

The plaintiff sought to amend his complaint for a second time in order to raise "additional factual allegations that he is a Hasidic Jew with deeply held religious beliefs that are violated by defendants' use of the photograph."[16] The court denied the plaintiff's motion on the grounds that the additional allegations

Nussenzweig, 2006 N.Y. Misc. LEXIS 230 (No. 108446/05) [hereinafter Defendants' Memo].

6 *Id.* at 2.

7 *Nussenzweig*, 2006 N.Y. Misc. LEXIS 230, at *3.

8 *Id.*

9 *Id.*

10 Defendants' Memo, *supra* note 5, at 4.

11 *Nussenzweig*, 2006 N.Y. Misc. LEXIS 230, at *3.

12 *Id.*

13 *Id.*

14 *See id.* at *1.

15 *Id.* at *8.

16 *Id.* at *1. The court notes that the "legal ramification" of plaintiff's religious claims was also included in the proposed second amended complaint. *Id.*

failed to add to his case.[17]

The defendants' motion to dismiss first alleged that the statute of limitations barred the plaintiff's suit.[18] A one-year statute of limitations is applicable to suits brought under Civil Rights Law sections 50 and 51.[19] The defendants claimed that the statute of limitations began to accrue at the time of the first publication of the subject matter of the lawsuit, which was more than one year prior to the date on which Nussenzweig commenced his suit.[20] The defendants also asserted that even if the last publication date determined the date on which the statute of limitations began to accrue, the date of accrual still exceeded the one-year limit set by the statute of limitations.[21]

The plaintiff argued in response that "the statute of limitations begins to run from the date of discovery of the wrong," thereby placing his suit within the one-year statute of limitations.[22] The court found, however, that case law in the First Department of the Appellate Division of the New York State Supreme Court followed the position that the one-year statute of limitations on privacy suits begins to run from the date of the first unauthorized use.[23] The court therefore held that the plaintiff's claims were barred by the statute of limitations pursuant to the "single publication rule."[24] Nonetheless, the court elected to consider the merits of the plaintiff's claims due to a lack of consensus among the various appellate departments in New York State.[25]

Finally, the court granted the defendants' motion to dismiss for failure to state a cause of action.[26] The court held that the plaintiff's assertion of a constitutional right to privacy failed to override the First Amendment protection given to a photograph deemed a work of art.[27] Pivotal to this holding, as the court pointed out in its decision, is a finding that the defendants factually demonstrated that the photograph taken of the plaintiff is artwork.[28]

17 *Id.*
18 *Id.* at *2.
19 *Id.* at *4; *see also* N.Y. C.P.L.R. 215 (McKinney 2006).
20 *Nussenzweig*, 2006 N.Y. Misc. LEXIS 230 at *4.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.* at *4-5.
25 *Id.* at *5. The *Nussenzweig* court points out that the Second Department of the Appellate Division, unlike the First Department, does not follow the "single publication rule." *Id.* at *4.
26 *Id.* at *8.
27 *Id.* at *7.
28 *Id.*

Legal issues

The court in the *Nussenzweig* case resolved three basic legal claims. First, the court denied the plaintiff's assertion of a privacy right preventing the use of an unconsented-to photograph.[29] According to New York Civil Rights Law sections 50 and 51, in order for the use of a photograph to violate a subject's right to privacy, the photograph must be used "for advertising purposes, or for the purposes of trade."[30] The plaintiff argued that the sale of prints of a photograph for over $200,000 constituted a use for "the purposes of trade."[31] The plaintiff also asserted that the "defendants' intended purpose was to sell the photograph and reproductions thereof" and that "the sale and/or intended sale of the photograph constitutes a commercial use that is actionable under the privacy laws."[32] The plaintiff bolstered his argument by pointing out that the photographs were displayed in an art gallery, which, unlike a museum, is "a venue operating for profit."[33]

The response by the defendants brought a second essential legal claim before the court. The defendants argued that the sold prints did not constitute a use of the photograph depicting the plaintiff for "trade or advertising" because the prints were considered artwork and, as such, they fell under the category of protected speech or expression.[34]

To demonstrate that the prints were artwork, the defendants noted that defendant DiCorcia's work is internationally respected as artwork.[35] According to the defendants, the fact that the photographs at issue were produced by an artist for display in an art gallery lent credence to the argument that the photographs themselves were works of art.

Relying on New York State precedent, the defendants further argued that the photographs taken of the plaintiff qualified as "artistic expression" and were therefore exempt from New York's

29 *See id*.

30 N.Y. CIV. RIGHTS LAW §§ 50-51 (Consol. 2006).

31 *See* Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 9, *Nussenzweig*, 2006 N.Y. Misc. 230 (No. 108446/05) [hereinafter Plaintiff's Memo].

32 *Nussenzweig*, 2006 N.Y. Misc. LEXIS 230, at *6.

33 *Id.*

34 Defendants' Memo, *supra* note 5, at 7.

35 *Id.* Defendants' Memo notes that defendant photographer's photographs "have been prominently exhibited at The Museum of Modern Art (New York), the Whitney Museum of American Art[,] . . . and many other museums around the world. . . . His work has been the subject of commentary by some of the leading art critics of out time . . . and has been collected in monographs published by some of the world's most respected publishers of art books." *Id.* at 2.

privacy statute.[36] The defendants cited three New York cases which dealt specifically with this issue: *Altbach v. Kulon*, *Simeonov v. Tiegs*, and *Hoepker v. Kruger*.[37] In *Altbach*, the court held an oil painting caricaturing a local judge in an art gallery to be constitutionally protected artwork.[38] Although the defendant in *Altbach* used copies of the caricature as flyers to advertise his art gallery, the court nevertheless protected the flyers as free expression.[39] The *Altbach* court's reasoning, according to the defendants, clearly bolstered their case:

> Since defendant's flyers identified plaintiff as the subject of the caricature and cannot reasonably be read to assert that plaintiff endorsed or recommended either the painting or defendant's gallery, we find that Supreme Court's reasoning concerning the flyers' use of the painting leads inexorably to the conclusion that their use of his name and photograph also is exempt from the proscriptions of *Civil Rights Law sections 50* and *51*. We find that the similarity of poses between the photograph and the painting, together with the content of the advertising copy identifying plaintiff as an experienced attorney, attest to the accuracy of defendant's portrayal of plaintiff's face and posture, while emphasizing that the painting is a caricature and parody of the public image presented in plaintiff's own advertisement. As a result, the photograph's use can readily be viewed as ancillary to a protected artistic expression because it "'prove[s] [the] worth and illustrate[s] [the] content'" of the painting exhibited at defendant's gallery.[40]

The *Altbach* decision, in essence, provided the defendants with a clear-cut example of a New York court finding the use of an unconsented-to photograph to be constitutionally protected artwork.

In *Hoepker*, the court gave First Amendment protection to a collage photograph displayed in the Museum of Contemporary Art, Los Angeles.[41] The photograph in question was printed and sold in many forms, including on postcards and magnets in the museum's gift shop, and was published in a catalog of photographer Kruger's works.[42] The court held that the photograph itself "should be shielded from [the plaintiff's] right of privacy claim by the First Amendment. [It] is pure First

36 *Id.* at 7.
37 *See* Altbach v. Kulon, 754 N.Y.S.2d 709 (App. Div. 3d Dep't 2003); Hoepker v. Kruger, 200 F. Supp. 2d 340 (S.D.N.Y. 2002); Simeonov v. Tiegs, 602 N.Y.S.2d 1014 (Civ. Ct. N.Y. County 1993).
38 *Altbach*, 754 N.Y.S. 2d 709.
39 *Id.*
40 *Id.* at 712-13.
41 *See Hoepker*, 200 F. Supp. 2d 340.
42 *Id.* at 342-43.

Amendment speech in the form of artistic expression . . . and deserves full protection, even against [the plaintiff's] statutorily-protected privacy interests."[43] The sale of variations of the painting also fell under constitutional protection. The court succinctly summed up its finding as follows: "[T]he museums are selling art, albeit on t-shirts and refrigerator magnets."[44] The *Hoepker* decision is especially integral to the defendants' case here, as it provides authority for the proposition that a photograph that garners profits may be considered artwork and thus can be exempt from New York's privacy statute.

In *Simeonov*, the court held that "[a]n artist may make a work of art that includes a recognizable likeness of a person without her or his consent and sell at least a limited number of copies thereof without violating *Civil Rights Law sections 50* and *51*."[45] In that case, defendant Cheryl Tiegs, a well-known public figure, voluntarily permitted the plaintiff to make an alginate impression of her face. The plaintiff, without the consent of Tiegs, then turned that impression into a plaster.[46] The plaster was displayed in Tiegs's apartment, and in the course of the installation of a television set in her apartment, the plaster was shattered.[47] The plaintiff had intended to display the plaster in an exhibit and to sell copies of the plaster for $20,000 each; the plaintiff therefore sued to recover damages allegedly resulting from Tiegs's negligent destruction of the plaster.[48] The court ruled as follows:

> Here, Plaintiff is an artist who created a work of art out of the alginate impression of Defendant TIEGS. The sculpture was Plaintiff's creative expression which grew out of that impression. Just because he incidentally intended to sell a limited number of copies of his creation, that does not mean that he was acting "for the purposes of trade." Part of the protection of free speech under the United States and New York State Constitutions is the right to disseminate the "speech," and that includes selling it, at least under certain circumstances.[49]

The court essentially found that, "[a]lthough a person's right of privacy as protected by *Civil Rights Law sections 50* and *51* is also a very significant right, it must fall to the constitutionally protected

43 *Id.* at 350.
44 *Id.* at 353.
45 *Simeonov*, 602 N.Y.S.2d at 1018.
46 *Id.* at 1015. Alginate is a substance used as a "mold-making material." Wikipedia, the Free Encyclopedia, Alginic acid, http://en.wikipedia.org/wiki/Alginate (last visited Feb. 18, 2008).
47 *Simeonov*, 602 N.Y.S.2d at 1016.
48 *Id.*
49 *Id.* at 1017-18.

right of freedom of speech."[50] The *Simeonov* case further bolsters the *Nussenzweig* defendants' argument that the financially beneficial use of the photograph depicting the plaintiff does not preclude a court from finding that photograph to be constitutionally protected artwork.

In *Nussenzweig*, the defendants also looked beyond cases dealing with likenesses of people in arguing that the photograph of the plaintiff should be considered constitutionally protected artwork. The defendants cited *Time, Inc. v. Hill*, where the United States Supreme Court found that both for-profit and non-profit speakers are granted First Amendment protection, to demonstrate that the profits earned on the plaintiff's photograph do not provide conclusive evidence that the photograph falls under the usage for "trade" laid out in Civil Rights Law sections 50 and 51.[51] The defendants pointed out that in New York State case law, the speech of artists, news publishers, novelists, and motion picture producers "all have been excluded from the ambit of Sections 50 and 51 on free speech grounds, despite the fact that they all operated for profit."[52]

The *Nussenzweig* court accepted the defendants' arguments and found that the photographs in the defendants' exhibit fell under First Amendment protection.[53] In so finding, the court reached beyond the arguments set forth by the plaintiff and the defendants to emphasize that the photographs advertised only the "HEADS" collection, "which is a permitted use under Civil Rights Laws § § 50, 51."[54] The fact that an "extremely *limited* number of the photographs were sold for profit" and that the photographs were displayed in an art gallery "with a commercial objective of financial profitability . . . do[es] not otherwise convert art into something used in trade."[55] The court's finding that the photographs were to be considered artwork despite the profit gained by the defendant photographer and the defendant art gallery, however, was influenced by the procedural posture of the case. The court noted that the plaintiff lost his claim in the

50 *Id.* at 1018.

51 Defendants' Memo, *supra* note 5, at 12; *see also* N.Y. CIV. RIGHTS LAW §§ 50-51 (Consol. 2006). In *Time*, the court held: "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." Time, Inc. v. Hill, 385 U.S. 374, 397 (1967).

52 Defendants' Memo, *supra* note 5, at 13.

53 *See* Nussenzweig v. DiCorcia, No. 108446/05, 2006 N.Y. Misc. LEXIS 230 (Sup. Ct. N.Y. County Feb. 8, 2006).

54 *Id.* at *7. The *Nussenzweig* court reads the New York privacy statute to permit the use of a person's likeness for advertising strictly pertaining to the artistic use of the likeness. *See id.*

55 *Id.*

summary judgment motion because he "d[id] not raise a sufficient factual basis to challenge [the] defendants *prima facie* showing that the photograph is art."[56]

Lastly, the court rejected the plaintiff's claim that the display of his photograph violated his religious rights. The plaintiff argued that the Second Commandment's prohibition on graven images made the photograph taken of him forbidden within his religion.[57] Therefore, the use of that photograph, according to plaintiff, violates his religious beliefs and "interferes with his constitutional right to practice his religion."[58] However, the court rejected the plaintiff's claim and found that the free exercise clause applies only to state actions and not to the actions of individuals.[59] Since the actions at issue were taken only by individuals, the plaintiff could not assert a free exercise claim. Although the court was "sensitive to plaintiff's distress," the court found that this particular distress "is not redressable in the courts of civil law."[60]

PART II: THE RIGHT TO PRIVACY

Development of the Right to Privacy

The "humble origins" of the right to privacy can be traced to a famous Harvard Law Review article by future Supreme Court Justice Louis D. Brandeis and his fellow professor, Samuel Warren.[61] In *The Right to Privacy*, Brandeis and Warren argued for a legal protection of each individual's privacy:[62]

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right "to be let alone." Instantaneous photographs . . . have invaded the sacred precincts of private and domestic life . . . . For years there has

56 *Id.*

57 *Id.*; *see also* MOSHE CARMILLY-WEINBERGER, FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION IN ART 2 (R. R. Bowker Co. 1986):

The Second Commandment (from Exod. 20:3-5; Deut. 5:7-9) states, "Thou shalt have no other Gods before me. Thou shalt not make unto thee a graven image, or any manner of likeness, of anything that is in the heaven above, in the earth beneath, or that is in the water under the earth. Thou shalt not bow down unto them, nor serve them."

This Commandment forms the basis of the Judaic "prohibition of graven images." *Id.*

58 *Nussenzweig*, 2006 N.Y. Misc. LEXIS 230, at *7.

59 *Id.*

60 *Id.*

61 WARREN FREEDMAN, THE RIGHT OF PRIVACY IN THE COMPUTER AGE 1 (Quorum Books 1987).

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

> been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons . . . .
>
> Of the desirability—indeed of the necessity—of some such protection, there can . . . be no doubt.[63]

They pointed out that "the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are . . . but instances and applications of a general right to privacy."[64] The "protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone."[65] The authors expounded upon this point: "The principle which protects personal writings and all other personal productions . . . against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."[66] The authors concluded that "no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person, —the right to one's personality."[67]

A second significant academic step in the development of privacy law came courtesy of Dean Prosser, the famed torts expert. In *Privacy*, Prosser argued that the right to privacy proposed in the Brandeis and Warren article and codified by the legislature of New York and other states consists in actuality of four torts: "[i]ntrusion upon the plaintiff's seclusion of solitude, or into his private affairs"; "[p]ublic disclosure of embarrassing private facts about the plaintiff"; "[p]ublicity which places the plaintiff in a false light in the public eye"; and "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."[68] The fourth tort listed by Prosser, that of "[a]ppropriation . . . of the plaintiff's . . . likeness," has been upheld in the following situations:

> [I]n many . . . states, [where] there are a great many decisions in which the plaintiff has recovered when his name or picture, or other likeness, has been used without his consent to advertise the defendant's product, or to accompany an article sold, to add luster to the name of a corporation, or for other

63 *Id.* at 195-96.
64 *Id.* at 198.
65 *Id.* at 205.
66 *Id.*
67 *Id.* at 207.
68 William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

business purposes.[69]

Prosser next noted that, although the New York and other similar statutes limit the application of this right to privacy to circumstances in which the plaintiff's image is used for advertising or purposes of trade, the narrow statutes in effect do not greatly differ from the common law right to privacy applied in some states.[70] This right is based on the notion that the name of the plaintiff is "a symbol of his identity."[71] For there to be an invasion of a plaintiff's right to privacy under this tort, therefore, there must have been an actual "appropriation" of his identity.[72] For example, an unconsented-to photograph of a plaintiff's dog, house, or automobile would not be grounds for suit under the plaintiff's right to privacy, as the plaintiff's own image is not used or appropriated in such a photograph.[73]

The next element a plaintiff must prove under this tort is that the appropriation by the defendant of the plaintiff's likeness was for the defendant's advantage.[74] According to Prosser, this "advantage," pursuant to privacy statutes, must be "pecuniary," although the common law is more lenient regarding this requirement.[75] Prosser explained that New York courts have held that a "closer and more direct connection" than the defendant's operation for profit is necessary to show that a newspaper or magazine actually used the plaintiff's image to its advantage, so as not to infringe on freedom of the press.[76] In fact, the publication of a photograph in which the plaintiff only "incidentally appears" does not violate the plaintiff's right to privacy.[77]

Prosser pointed out that "[t]he interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity."[78] Consequently, the right to privacy protecting this interest contains certain inherent limitations. The right does not extend to members of plaintiff's family unless their privacy is also invaded; the right is not assignable; it is not applicable to a publication made after the plaintiff is deceased; and it belongs only to an individual, not a corporation.[79]

69 *Id.* at 401-02.
70 *Id.*
71 *Id.* at 403.
72 *Id.*
73 *Id.* at 404-05.
74 *Id.*
75 *Id.* at 405.
76 *Id.*
77 *Id.* at 406; *see also* Dallesandro v. Henry Holt & Co., 166 N.Y.S.2d 805 (App. Div. 1st Dep't 1957).
78 Prosser, *supra* note 68, at 406.
79 *Id.*

Prior to Prosser's codification of the right to privacy, New York State's privacy statute was brought into being by virtue of a judicial prompting from the New York Court of Appeals in *Roberson v. Rochester Folding Box Co.*[80] In *Roberson*, the Court of Appeals declined to establish a common law right to privacy where a flour company "obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff" without the plaintiff's consent.[81] The "25,000 likenesses of the plaintiff . . . ha[d] been conspicuously posted and displayed in stores, warehouses, saloons and other public places," and the plaintiff sought an injunction preventing further use of the photographs as well as damages in the sum of $15,000.[82] The lower court had decided that the plaintiff had a "right to be let alone," a "so-called right of privacy," which had been invaded by the widespread distribution of her image.[83] The Court of Appeals elucidated the right being asserted by the plaintiff in this case:

> The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. . . . [T]he principle which a court of equity is asked to assert in support of a recovery in this action is that the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a portrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances.[84]

The court decided that the adoption of such a right would result in "a vast amount of litigation [which would] border[] upon the absurd," because the assertions of a right to privacy, according to the court, would be limitless.[85] The court ultimately found that

80 Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902).

81 *Id.* at 542. Plaintiff's photograph was used as part of an advertisement for defendant company's product because, according to Prosser, plaintiff was a "pulchritudinous young lady." Prosser, *supra* note 68, at 385.

82 *Roberson*, 171 N.Y. at 542.

83 *Id.* at 544.

84 *Id.*

85 *Id.* at 545.

"[t]he legislative body could very well . . . provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent," as only the legislature can draw "arbitrary distinctions which no court should promulgate as a part of general jurisprudence."[86]

According to Prosser, in deciding the *Roberson* case, the New York Court of Appeals denied the plaintiff protection for the following reasons:

> [The Court of Appeals] declared that the right of privacy did not exist, and that the plaintiff was entitled to no protection whatever . . . . The reasons offered were the lack of precedent, the purely mental character of the injury, the "vast amount of litigation" that might be expected to ensue, the difficulty of drawing any line between public and private figures, and the fear of undue restriction of the freedom of the press.[87]

The response to this decision was widespread disapproval, which prompted a concurring judge to publish a law review article defending the Court of Appeals' decision.[88] New York's ultimate legal response to this decision was the passage of Civil Rights Law sections 50 and 51.[89]

Reaching temporarily beyond the borders of New York, the four-pronged right to privacy was codified in the Restatement (Second) of Torts, section 652A, which provides that "[t]he right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another . . .; or (b) appropriation of the other's name or likeness . . .; or (c) unreasonable publicity given to the other's private life . . .; or (d) publicity that unreasonably places the other in a false light before the public."[90] The comments to section 652C of the Restatement explicate the tort of appropriation of the other's name or likeness:

> [I]nvasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes

86 *Id.* at 545, 555.
87 Prosser, *supra* note 68, at 385.
88 *Id.*
89 *See id.*
90 RESTATEMENT (SECOND) OF TORTS § 652A(2) (1977).

in some states have, however, limited the liability to commercial uses of the name or likeness.[91]

Exceptions to the Right to Privacy

1. The "newsworthiness" and "public figures" exceptions

The privacy law prompted by the *Roberson* decision contains set exceptions clearly discernible in New York State case law. New York courts have indeed carved out a number of exceptions to the right to privacy, in the name of protecting freedom of the press and of speech.[92] First, courts will protect the "privilege of giving . . . publicity to already public figures."[93] Second, courts recognize an exception for "giving publicity to news, and other matters of public interest,"[94] also termed the "newsworthiness exception."[95]

The public figure exception applies to "person[s] who . . . ha[ve] become a 'public personage'."[96] According to Prosser, "included in this category are those who have achieved at least some degree of reputation by appearing before the public . . . . [and] any one who has arrived at a position where public attention is focused upon him as a person."[97] Three justifications are commonly offered for the denial of a right of privacy to public figures. First, there is a theory of implied consent. Under this theory, public figures, by seeking publicity, have implicitly consented to a lack of privacy.[98] A second justification is that the "personalities and . . . affairs [of public figures] already have become public, and can no longer be regarded as their own private business."[99] Public figures also lack a right to privacy because, as Prosser put it, "the press has a privilege, guaranteed by the Constitution, to inform the public about those who have become legitimate matters of public interest."[100] Of course, "even a celebrity [i]s entitled to his private life," and a celebrity is considered a public figure only as to matters that "already have become public."[101]

The second exception is the "privilege of giving publicity to

91 *Id.* § 652C cmt. b.
92 *See* Prosser, *supra* note 68.
93 Prosser, *supra* note 68, at 410.
94 *Id.*
95 Defendants' Memo, *supra* note 5, at 8.
96 Prosser, *supra* note 68, at 410.
97 *Id.* at 410-11.
98 *See id.*
99 *Id.* at 411.
100 *Id.*
101 *Id.*

news, and other matters of public interest."[102] As Prosser explained, "the public [has the right] to know what is going on in the world. . . . [and] all events and items of information which are out of the ordinary humdrum routine."[103] "News," in other words, is not "limited to the dissemination of . . . current events"; rather, it "extends also to information or education, or even entertainment and amusement, by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general."[104]

Two recent cases illustrate the application of these exceptions within New York's privacy law. First, in *Howell v. New York Post Co.*, the New York Court of Appeals upheld the dismissal of the plaintiff's claim of a privacy right violation by the defendant newspaper's publication of a photograph of her in the course of seeking psychiatric treatment.[105] The court, in affirming the Appellate Division, viewed the enactment of New York's privacy statute as a response to the *Roberson* decision and explained the application of that statute.[106] The court first laid out the limits to the application of the statute:

> Although the statute itself does not define the terms "advertising" or "trade" purposes, courts have consistently held that the statute should not be construed to apply to publications concerning newsworthy events or matters of public interest. This is both a matter of legislative intent and a reflection of constitutional values in the area of free speech and free press.[107]

The court continued by explaining that the four-pronged privacy tort laid out by Prosser and affirmed in the Restatement of Torts is inapplicable in New York.[108] The right to privacy in New York, as the *Howell* court stated, "is governed exclusively by *sections 50 and 51 of the Civil Rights Law*; we have no common law of privacy."[109] The court concluded that "[t]he statutory right to privacy is not transgressed unless defendants used plaintiff's photograph in connection with trade or advertising."[110] The plaintiff's picture was put in a newspaper, not in an advertisement, and "if plaintiff's picture accompanied a newspaper article on a matter of public interest, to succeed she must demonstrate that

102 *Id.* at 412.
103 *Id.*
104 *Id.* at 413.
105 Howell v. N.Y. Post Co., 81 N.Y.2d 115 (1993).
106 *Id.*
107 *Id.* at 123.
108 *Id.*
109 *Id.*
110 *Id.* at 124.

the picture bore no real relationship to the article, or that the article was an advertisement in disguise."[111] And since courts are "reluctant to intrude upon reasonable editorial judgments in determining whether there is a real relationship between an article and photograph,"[112] the plaintiff faced a stricter burden of proof, which she failed to meet.

A second significant case within New York State doctrine on the right to privacy is *Messenger v. Gruner*.[113] In *Messenger*, the court held that the unconsented-to use of a photograph willingly taken of the plaintiff, an aspiring model, in a magazine story seemingly portraying the girl in a negative light is not a violation of her right to privacy.[114] In so holding, the court explicated current privacy law in New York. The court began by noting that sections 50 and 51 of the Civil Rights Law are "to be narrowly construed and 'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person'."[115] The court added that "these sections do not apply to reports of newsworthy events or matters of public interest . . . because a newsworthy article is not deemed produced for the purposes of advertising or trade."[116]

The court explained the legal definition of "newsworthiness": "[n]ewsworthiness includes not only descriptions of actual events but also articles concerning political happenings, social trends or any subject of public interest."[117] The court pointed out, however, that "the fact that a publication may have used a person's name or likeness 'solely or primarily to increase the circulation' of a newsworthy article—and thus to increase profits—does not mean that the name or likeness has been used for trade purposes within the meaning of the statute."[118] In other words, "[w]hether an item is newsworthy depends solely on 'the content of the article'—not the publisher's 'motive to increase circulation'."[119]

The court also addressed an additional element of the exceptions to New York State privacy law: "where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is

111 *Id.*
112 *Id.*
113 Messenger v. Gruner, 94 N.Y.2d 436 (2000).
114 *Id.*
115 *Id.* at 441.
116 *Id.*
117 *Id.* at 441-42.
118 *Id.* at 442.
119 *Id.*

an advertisement in disguise."[120] In the present case, the plaintiff's privacy claim failed because even the plaintiff conceded that the magazine article featuring her picture was "newsworthy" and that the picture of her bore a real relationship to the article.[121]

2. The exception for "artwork"

The *Nussenzweig* court, as noted above, codified a third exception to the privacy law of New York: the exception for an image which constitutes a work of art. As the court explained, "an artistic use of an image is a use exempted from action under New York State's privacy laws."[122] The New York courts in each of the three cases previously analyzed, *Altbach*, *Simeonov*, and *Hoepker*, "consistently found 'art' to be constitutionally protected free speech."[123] This exception, though, while affirmed confidently by the *Nussenzweig* court, is in actuality less solidified than the newsworthiness and public figure exceptions detailed above. In fact, the *Nussenzweig* court turned to California and Georgia decisions in order to explain that the exception for art may "limit art to transformative and not duplicative likenesses" and may also limit "exempted use to original works of fine art, but not to distribution of reproductions."[124]

However, according to the *Nussenzweig* decision, New York courts have applied the art exception to privacy law to art that is sold.[125] Citing one fairly recent New York case, *De Gregorio v. CBS, Inc.*,[126] the *Nussenzweig* court held that a "profit motive in itself does not necessarily compel a conclusion that art has been used for trade purposes."[127] Thus, a work of art could be sold and still qualify for First Amendment protection that exempts it from suit under the privacy statute. As the court stated, "[the] First Amendment protection of art is not limited to only starving artists."[128] Whether something is in fact art, however, is "not a subjective determination" but rather a factual one made by the court.[129]

120 *Id.* at 442-43.
121 *Id.*
122 Nussenzweig v. DiCorcia, No. 108446/05, 2006 N.Y. Misc. LEXIS 230, at *6 (Sup. Ct. N.Y. County Feb. 8, 2006).
123 *Id.*
124 *Id.*
125 *See id.*
126 De Gregorio v. CBS, Inc., 473 N.Y.S.2d 922 (Sup. Ct. N.Y. County 1984).
127 *Nussenzweig*, 2006 N.Y. Misc. LEXIS 230, at *7.
128 *Id.*
129 *Id.* The *Nussenzweig* court does not delineate set factors to be relied upon in making such a factual determination. Rather, the court seems to imply that a work is determined to be "art" based on a broad examination of all relevant facts. *Id.*

PART III: THE RIGHT TO PRIVACY ACROSS THE UNITED STATES

In many states, the right to privacy is protected strictly through the common law. In the six states discussed below, the right to privacy, unlike in the majority of the United States, is protected by specially-tailored statutes. Two states, Virginia and Florida, enacted statutes which are substantively weaker than the privacy statutes of New York; the statutes of both states neglect to fully address the use of a photograph by a professional photographer or artist. The statutes passed by the legislatures of Nebraska and Massachusetts, in contrast, more explicitly establish guidelines for photographers using images taken of an individual without that individual's consent. Finally, the right to privacy in California is protected by a statute as well as a common law doctrine that can shed light on the privacy case law of New York. A comparison of these different statutes can perhaps indicate a direction for the common law doctrine building around New York's privacy statutes.

New York Law

In New York, the right to privacy is protected, as noted above, by two separate statutes, reprinted below for purposes of comparison to the statutes of other states. Civil Rights Law section 50 reads as follows:

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.[130]

The companion statute to section 50, Civil Rights Law section 51, provides plaintiffs with the opportunity to sue for an injunction and for damages for violation of section 50. Section 51 provides, in pertinent part, as follows:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, *to prevent and restrain the use thereof*; and may also *sue and recover damages for any injuries*

130 N.Y. CIV. RIGHTS LAW § 50 (Consol. 2006).

> *sustained* by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But *nothing . . . contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed*; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait, picture or voice of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith; or from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith.[131]

The two laws, combined, constitute the foundation of the protection of privacy rights in New York, as New York's common law alone does not protect the right to privacy.[132] The statutes, in addition to explicating the basic right to privacy, also address the specific case of the use of a person's image by a photographer.[133] The statutes seem to provide that a photographer, such as the defendant in the *Nussenzweig* case, may use a photograph taken of an individual as a display within the photographer's professional establishment—namely, a gallery—but must end the display of that photograph if the subject of the photograph objects to the display in writing.[134] Notably, New York's privacy statute makes an exception from the general rule that "written consent first [be] obtained," because a display of a person's image is presumptively permitted and only violates New York's privacy statute once a

131 *Id.* § 51 (emphasis added).

132 *Nussenzweig*, 2006 N.Y. Misc. LEXIS 230, at *1.

133 N.Y. CIV. RIGHTS LAW § 51 (Consol. 2006).

134 *Id.* The language of the statute in fact seems to address the situation in the *Nussenzweig* case:

> [N]othing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation *after written notice objecting thereto has been given by the person portrayed.*

Id. (emphasis added). One could reasonably read the New York privacy statute as permitting a photographer to take a picture of an individual in a public place without the individual's permission but restricting the photographer from using that photograph publicly where the subject of the photograph objects in writing.

written objection is submitted.[135]

Virginia Law

Virginia's codified protection of the right to privacy is formulated in a single statute. Virginia's privacy law provides:

> Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.[136]

Virginia's statute also contains a time limit on suits brought under this provision: "[n]o action shall be commenced under this section more than twenty years after the death of such person."[137]

The Virginia statute, unlike the New York statute, requires the written consent of the subject of a photograph before the photograph is used for "advertising purposes or for the purposes of trade."[138] The statute provides for both an injunction to "prevent and restrain the use" of a photograph for advertising purposes where the subject of the photograph did not provide written consent and also provides for damages where the photograph, despite the lack of the subject's consent, was used.[139] The statute differs from New York's privacy law in that it does not offer a blanket allowance to photographers to use an individual's unconsented-to photograph until the individual files a written objection.[140] In other words, the display of a person's image in Virginia is not presumptively lawful.

Interestingly, a comparison between the Virginia statute and the New York privacy law has already been made by the United States Court of Appeals for the Fourth Circuit. In a well-known defamation case, *Falwell v. Flynt*, the Fourth Circuit noted in dicta

135 *Id.*
136 VA. CODE ANN. § 8.01-40(A) (2006).
137 *Id.* § 8.01-40(B).
138 *Id.* § 8.01-40(A).
139 *Id.*
140 *See id.*; *see also* N.Y. CIV. RIGHTS LAW § 51 (Consol. 2006).

that Virginia's privacy statute is "substantially similar to § 51 of the New York Civil Rights Law."[141] The Fourth Circuit added, moreover, that it "has [previously] looked to the New York courts for guidance in construing the Virginia privacy statute."[142] The Fourth Circuit also included an analysis of New York's privacy law in *Brown v. American Broadcasting Co.,* though the court there declined to "follow New York's lead" in its interpretation of Virginia's privacy law.[143] Although neither of the two Virginia cases referencing New York privacy laws dealt with a violation of privacy through the unconsented-to use of a photograph for artistic purposes, the comparative analysis by the Virginia courts is instructive.

Florida Law

The Florida statute pertaining to the right to privacy begins much like New York's statute. The Florida statute first provides that "[n]o person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use."[144] In its second paragraph, the statute provides for damages and for suits for an injunction preventing the use of an unconsented-to photograph:

> In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.[145]

Arguably the most significant and conspicuous provision in the Florida statute is contained in its third paragraph, which lays out the situations in which the first two provisions of the statute do not apply. In section (3)(a), the Florida statute explicitly includes

141 Falwell v. Flynt, 797 F.2d 1270, 1278 (4th Cir. 1986).
142 *Id.*
143 Brown v. Am. Broad. Co., 704 F.2d 1296, 1302 (4th Cir. 1983).
144 FLA. STAT. ANN. § 540.08(1) (LexisNexis 2006).
145 *Id.* § 540.08(2).

the newsworthiness exception, which is notably missing from the New York statute:

> The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes.[146]

The Florida privacy statute also contains a provision that allows for the use of a photograph, even where the subject of the photograph did not consent to such use, so long as the subject of the photograph is depicted "solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph."[147] The language of the statute, though, need not be broadly interpreted to permit the use of photographs of unidentified individuals. Rather, the statute can be interpreted to allow for the use of photographs solely where the photograph depicts a group of people, where an individual is a "member" of a crowd and therefore cannot easily be singled out and identified.[148]

Nebraska Law

Nebraska, unlike New York, provides for protection of the right to privacy in a single statute. The applicable Nebraska statute provides:

> Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy. The provisions of this section shall not apply to:
>
> (1) The publication, printing, display, or use of the name or likeness of any person in any printed, broadcast, telecast, or other news medium or publication as part of any bona fide news report or presentation or noncommercial advertisement having a current or historical public interest and when such name or likeness is not used for commercial advertising purposes;
>
> (2) The *use of such* name, portrait, *photograph*, or other likeness *in connection with* the resale or other distribution of literary, musical, or *artistic productions* or other articles of merchandise or property when such person has consented to the use of his

146 *Id.* § 540.08(3)(a).
147 *Id.* § 540.08(3)(c).
148 *See id.*

> or her name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof so long as such use does not differ materially in kind, extent, or duration from that authorized by the consent as fairly construed; or
>
> (3) Any photograph of a person solely as a member of the public when such person is not named or otherwise identified in or in connection with the use of such photograph.[149]

The language of the Nebraska statute, at first glance, appears to diverge only superficially from the New York statute, prohibiting the "exploit[ation]" (as opposed to the "use") of a photograph for advertising or "commercial" (rather than "trade") purposes.[150] The statute's first essential divergence from the New York statute is evident in paragraph (1), where the Nebraska statute, like the Florida statute, explicitly includes the newsworthiness exception discussed earlier in this Note, which was not included in New York's privacy law.[151] The Nebraska statute also departs from the New York privacy law in its second paragraph, where it specifies that a photograph of an individual may be used so long as that use does not "differ materially" from the consent originally granted by the individual and clearly required by the statute.[152] The Nebraska statute, in other words, addresses the use of a photograph for artistic purposes but neglects to provide that a photograph may presumptively be used unless written objection is made.[153]

The most significant difference between the New York and Nebraska statutes is evident through an analysis of paragraph (3) of the Nebraska statute, which permits the use of a photograph of an individual, even for advertising purposes, where the individual is not identified and is depicted as part of "the public."[154] This clause of the Nebraska statute seems to provide grounds for extensive litigation about the meaning of "member of the public."[155] Applying the phrase to the *Nussenzweig* case can perhaps illustrate the difficulties that could arise in applying the statute. Clause (3) of the Nebraska statute could be taken to permit the use of the plaintiff's photograph by the defendants, as the plaintiff was not identified in the picture and the picture could be explained as simply depicting an anonymous member of the

149 NEB. REV. STAT. ANN. § 20-202 (LexisNexis 2006) (emphasis added).
150 *Id.*; N.Y. CIV. RIGHTS LAW § 51 (Consol. 2006).
151 *See* NEB. REV. STAT. ANN. § 20-202(1) (LexisNexis 2006); *see also* N.Y. CIV. RIGHTS LAW § 51 (Consol. 2006).
152 NEB. REV. STAT. ANN § 20-202(2) (LexisNexis 2006).
153 *See id.*; *see also* N.Y. CIV. RIGHTS LAW § 51 (Consol. 2006).
154 NEB. REV. STAT. ANN § 20-202(3) (LexisNexis 2006).
155 *Id.*

public. The same provision, however, could also be used to support the plaintiff's argument that the photograph singled him out as an individual, and the fact that the photograph was taken of the plaintiff alone facilitated identification of the plaintiff upon the display of the photograph.

Massachusetts Law

Massachusetts law, like New York law, deals with the right to privacy in two distinct statutes. First, Massachusetts law establishes a basis for a cause of action for invasion of privacy: "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages."[156] Separately, Massachusetts law provides that:

> Any person whose name, portrait or picture is used . . . for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used such person's name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him. *Nothing in this section shall be so construed as to prevent any person practicing the profession of photography from exhibiting in or about his or its establishment specimens of the work of such person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting thereto has been given by the person portrayed.*[157]

The Massachusetts statute here differs from its companion statutes in that the statute expressly deals with the use of a photograph by a professional photographer in an exhibit.[158] The Massachusetts law, like the New York statute, provides for a sort of presumption allowing the display of a photograph in an exhibit, rebuttable only by "written notice objecting" to the display.[159] The above statute, then, implies that once the subject of a photograph displayed in an art exhibit notifies the photographer that he objects to the display, the law requires that the photograph be removed from the exhibit. This implication supports the

156 MASS. ANN. LAWS ch. 214, § 1B (LexisNexis 2007).
157 *Id.* § 3A (emphasis added).
158 *See id.*; *see also* NEB. REV. STAT. ANN § 20-202 (LexisNexis 2006).
159 MASS. ANN. LAWS ch. 214, § 3A (LexisNexis 2007).

Nussenzweig plaintiff's suit for an injunction preventing the further display of his photograph.

California Law

The California privacy statute begins with language that differs slightly from the language used in the comparable New York statute, but essentially focuses on the same proscription:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained.[160]

Interestingly, the statute continues to establish specific guidelines for the award of damages, even going so far as to provide that the "prevailing party in any action under this section shall also be entitled to attorney's fees and costs," but does not explicitly allow for an injunction preventing the further use of the unconsented-to photograph.[161] The California statute also specifically recognizes the newsworthiness exception: "a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required."[162]

The California statute further provides that "[a]s used in this section, 'photograph' means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable."[163] Unlike the comparable statutes in other states, however, the California statute explains the meaning of the word "identifiable" within the context of the statute: "A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use."[164] This definition would, if applied to the *Nussenzweig* case, support the position of the plaintiff: where a picture clearly depicts one person alone, that person would be, under the California statute,

160 CAL. CIV. CODE § 3344(a) (Deering 2006).
161 *Id.*
162 *Id.* § 3344(d).
163 *Id.* § 3344(b).
164 *Id.* § 3344(b)(1).

"identifiable" such that the photograph may not be used for "advertising or selling, or soliciting purchases" without "prior consent."[165]

Unfortunately, the California statute does not provide a detailed explanation of "advertising or selling, or soliciting purchases."[166] The statute offers only a slight clarification:

> The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).[167]

This provision, however, does not shed light on whether the use of a photograph as part of a for-profit exhibit or catalogue would be considered a use requiring the consent of the subject of the photograph. The statute can possibly be read, though, to include such an interpretation. First, an exhibit of artwork is usually intended to "solicit[] purchases," as is a catalogue of the art exhibit.[168] Moreover, focusing on the provision cited immediately above, an art gallery, such as the one which displayed the photograph of the *Nussenzweig* plaintiff, can be categorized as a "commercial medium" under the statute's vague phrasing.[169] The application of the above provision to the facts in the *Nussenzweig* case falters, however, with a close reading of the final sentence of the provision: the statute's requirement of consent for the use of a photograph only where that use is "directly connected with . . . commercial sponsorship or with . . . paid advertising" seems to exclude the use of a photograph by an art gallery.[170] Clearly, the California statute does not fully address the use of a photograph for the purposes of art.

California case law has more specifically addressed the right to privacy in the context of the use of an unconsented-to photograph. In *Gill v. Hearst Publishing Co.*, the Supreme Court of California found that the publication in a magazine of a photograph depicting a couple embracing in a public park did not

165 *Id.* § 3344(a).
166 *Id.*
167 *Id.* § 3344(e).
168 *Id.* § 3344(a).
169 *Id.* § 3344(e).
170 *Id.*

invade that couple's privacy.[171] The court noted that "the right of privacy is determined by the norm of the ordinary man[, and] . . . the alleged objectionable publication must appear offensive in the light of 'ordinary sensibilities'."[172] The court explicated its point in more detailed language:

> [L]iability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues. . . . It is only when the defendant should know that the plaintiff would be justified in feeling seriously hurt by the conduct that a cause of action exists.[173]

In essence, the court held that, since the plaintiffs embraced in public, they in a manner of speaking consented to having their embrace be a public one, thereby waiving their right to privacy regarding this act. A publication of a photograph of their embrace, then, according to the court, "merely permitted other members of the public . . . to see them as they had voluntarily exhibited themselves."[174] The court's reasoning here rests on the legal premise that an invasion of privacy through publication of a photograph cannot take place where the photograph depicts an act willingly displayed in public.

Both the majority opinion in *Gill v. Hearst Publishing Co.* and a rebuttal of the majority's reasoning can be interpreted to support the *Nussenzweig* plaintiff's assertion of a right to privacy. Assuming the majority's reasoning holds true, the plaintiff in *Nussenzweig* could fairly argue that he did not engage in any particular public act like the one committed by the plaintiffs in the *Gill v. Hearst Publishing Co.* case and therefore did not waive his right to privacy. A response that plaintiff's appearance in public constitutes such a waiver does not adequately counter this analysis. Simply walking in public cannot constitute a waiver of the right to privacy—that right, under such reasoning, would be completely eviscerated. The strongly worded dissent in *Gill v. Hearst Publishing Co.* follows this line of reasoning, to a certain degree: "There is no basis for the conclusion that the second a person leaves the portals of his home he consents to have his photograph taken under all circumstances thereafter."[175]

A complete divergence from the majority approach likewise supports the *Nussenzweig* plaintiff's argument. In response to the

171 Gill v. Hearst Publ'g Co., 40 Cal. 2d 224 (1953).
172 *Id.* at 229.
173 *Id.* (quoting RESTATEMENT (FIRST) OF TORTS § 867 cmt. d (1939)).
174 *Gill*, 40 Cal. 2d at 230.
175 *Id.* at 233.

majority opinion, one could fairly assert that there is a great distinction between two individuals allowing the few people surrounding them to see them embrace each other and allowing that embrace to be published in a nationally-distributed magazine. A hypothetical can perhaps best illustrate this point. Imagine a young couple who, hiding their relationship from their parents, manage to get away on a private vacation in another state. They (intentionally) know no one in the state and therefore embrace freely when walking in a public park in this state. These individuals would certainly not want a picture of their embrace to be published in a magazine, as the magazine would extend the publication of their embrace far beyond the publicity they consented to grant to it. The couple may feel comfortable allowing strangers to witness their affection, but they would not want their embrace to be on display for those who know them. Returning to the facts of the *Nussenzweig* case, if a couple displaying affection publicly does not waive the right to privacy, neither does a man strolling anonymously on a New York street. The anonymous man, like the anonymous couple, retains his right to privacy and his right to protect against his actions being made known to anyone but those to whom he has given consent—by walking outside—to see his personal actions and choices.

A second California case raises a challenge to the position of the *Nussenzweig* plaintiff. In *Samuel v. Curtis Publishing Co.*, the United States District Court for the Northern District of California found that the publication of a photograph of the plaintiff trying to convince a woman standing by the San Francisco Golden Gate Bridge not to commit suicide did not violate the plaintiff's privacy, as that photograph depicted him performing an act that was, as the court termed it, "most laudatory."[176] The court specifically noted that since the picture did not depict the plaintiff in a "derogatory pose" and did not "represent that his conduct is in any way reprehensible," it cannot be found to "offend the sensibilities of a normal person" and therefore cannot be found to violate the privacy right of the plaintiff.[177] The court here, following the *Gill* case, held that "[w]here the photograph portrays nothing to shock the ordinary sense of decency or propriety, [and] where there is nothing uncomplimentary or discreditable in the photograph itself, . . . no actionable invasion of the right of privacy occurs."[178] This formulation of the right to privacy seems to quash the argument of the *Nussenzweig* plaintiff,

176 Samuel v. Curtis Publ'g Co., 122 F. Supp. 327, 329 (N.D. Cal. 1954).
177 *Id.*
178 *Id.*

who was not photographed doing anything "uncomplimentary or discreditable."[179] However, the finding here that the picture could be published was not predicated solely on the actual depiction of the plaintiff. The *Samuel* court also dismissed plaintiff's case on the grounds that the photograph of plaintiff "was privileged because it was newsworthy and of general public interest."[180]

Furthermore, although the formulation of the reasonableness requirement for proof of violation of privacy in California case law is persuasive, the standard is not articulated in New York case law. Indeed, the *Nussenzweig* case can be read to indicate that the Hasidic plaintiff's unique religious sensitivities are legally compelling. However, the court could not provide a legal remedy for the offense against the plaintiff's religious sensibilities mainly because the court felt compelled to grant First Amendment protection to the photograph of the plaintiff.[181]

A fair argument can clearly be offered, based on New York law and on comparable laws from other states, that the publication of a photograph violates an individual's right to privacy where the individual, at the very least, puts forth written objection to that publication. The similar provisions in both the New York and Massachusetts statutes permitting the use of a photograph of an individual until that individual objects in writing offer solid grounds for upholding the request of an individual, such as the *Nussenzweig* plaintiff, to cease the display of a photograph. The *Nussenzweig* court, in fact, did not follow the New York statutory provision regarding the effect of written objection to the use of a photograph primarily because of the constitutional argument asserted in defense of such use where the photograph is classified as a work of art. Can the right to privacy be formulated in such a way that it is respected even in the case of a photograph that might deserve the First Amendment protection granted to artwork?

179 *Id.*
180 *Id.*
181 The *Nussenzweig* court used language that clearly indicates sympathy for the offense plaintiff personally took at the display of his photograph: "Clearly, plaintiff finds the use of the photograph bearing his likeness deeply and spiritually offensive. The sincerity of his beliefs is not questioned by defendants or this court[, which is] sensitive to plaintiff's distress." Nussenzweig v. DiCorcia, No. 108446/05, 2006 N.Y. Misc. LEXIS 230, at *7 (Sup. Ct. N.Y. County Feb. 8, 2006).

PART IV: A PROPOSED FUTURE PATH FOR THE RIGHT TO PRIVACY IN NEW YORK

The crux of the *Nussenzweig* plaintiff's dilemma is that the protection of an individual's privacy in New York is trumped by the constitutional protection given to artwork, such as the photograph taken of the plaintiff by a professional photographer. The plaintiff's dilemma in that case, however, is only part of a larger legal challenge that seemingly pits the individual against the United States Constitution. The *Nussenzweig* court appears to find that the dilemma is already resolved in favor of the constitutional protection of free speech and, thereby, works of art.[182]

In a persuasive article, however, Amiel Weisfogel argues that the law does not always clearly come down on the side of art.[183] According to Weisfogel, the "constitutional status of fine art as speech under the First Amendment is uncertain": the law does not always favor a work of art over the right to privacy and the related right to publicity, which is retained by celebrities.[184] Weisfogel further elaborates that "[d]ecisions tend to affirm the protection of one specific genre or other on a case-by-case basis, or else specifically affirm the protection of art with a manifest political content or containing elements of speech, without any inclusive, definitive statement about the status of artistic expression generally."[185] Weisfogel closely analyzes *Simeonov v. Tiegs*, discussed above, pointing out that although the New York court there found that "works of art are a means of disseminating ideas, and as such, the right to create art represents a 'constitutionally protected' right to which the right of privacy 'must fall'," this holding does not pave an easy road for all cases in which the right to privacy is weighed against the First Amendment protection granted to artwork.[186] Indeed, the *Tiegs* court "vague[ly] suggest[ed] that the constitutional protection of art depends on the number of copies of a work being sold" and, even more notably, cites to cases whose dicta "draws into question the accuracy of its statement that artists' First Amendment rights prevail over privacy claims."[187]

Furthermore, Weisfogel references decisions by New York

182 *See id.*
183 *See* Amiel B. Weisfogel, *Fine Art's Uncertain Protection: The New York Right of Privacy Statute and the First Amendment*, 20 COLUM.-VLA J.L. & ARTS 91 (1995).
184 *Id.* at 98. Weisfogel explains: "[t]he right of privacy is associated with ordinary private individuals while the right of publicity concerns celebrities, or people 'in the public eye.'" *Id.* at 93.
185 *Id.* at 98.
186 *Id.* at 99.
187 *Id.*

courts which hold that the First Amendment protects artwork only when the artwork contains a political statement.[188] According to Weisfogel's analysis, "courts would be most resistant to employing . . . constitutional scrutiny when dealing with art that is primarily self-expressive, decorative, or just convivial."[189] Weisfogel notes that in *Bery v. City of New York*, the United States District Court for the Southern District of New York expressly declined to find that "all works of fine art are forms of expression which fall under the First Amendment's protection of 'speech'."[190] The *Bery* court instead held that artwork "bearing words that express political or religious views are much closer to the heartland of First Amendment protection of 'speech' than the apolitical paintings in these cases."[191] Although Weisfogel also references a Supreme Court case finding that "the State right of privacy gives way to the right of the press," his article certainly offers a solid basis for arguing that the right to privacy is not always outweighed by a First Amendment argument.[192]

Perhaps the strongest element of Weisfogel's article in favor of the *Nussenzweig* plaintiff's case is his analysis of the New York privacy statutes. Weisfogel points out that the phrase "for the purposes of trade" in section 50 of the New York Civil Rights Law is "vague [and] undefined."[193] The statute's provision precluding the use of an unconsented-to photograph "for the purposes of trade" could, in fact, include the sale of art.[194] Weisfogel elaborates: "The use of the broad, unqualified term 'trade purposes' suggests that the statute applies to all items which are bought and sold in commerce. Of course, works of fine art fit under this heading."[195] In other words, it is possible to read the New York privacy laws to prohibit even the sale of a photograph taken by an artist, like the photograph of the *Nussenzweig* plaintiff sold in a catalogue.[196] Furthermore, "New York case law emphasizes profit motive in determining whether a particular instance of unauthorized appropriation falls under the trade purposes prong," and the artwork in question in the *Nussenzweig* case was clearly exhibited in a for-profit gallery and sold for profit in a catalogue.[197]

188 *Id.* at 100.
189 *Id.*
190 *Id.* at 101 (citing Bery v. City of New York, 906 F. Supp. 163, 165 (S.D.N.Y. 1995)).
191 *Id.* (citing Bery, 906 F. Supp.at 169).
192 *Id.* at 105 (discussing Time, Inc. v. Hill, 385 U.S. 374 (1967)).
193 *Id.* at 107 (discussing N.Y. CIV. RIGHTS LAW § 50 (Consol. 2006)).
194 *Id.* at 107.
195 *Id.* at 108.
196 *See id.*
197 *Id.* at 109.

This analysis, however, does not completely resolve the legal quagmire the *Nussenzweig* plaintiff faced in his quest to prevent the display of the photograph taken of him. Weisfogel's article indicates that a court could reasonably find that artwork exhibited in a for-profit gallery and sold as part of a catalogue falls under the "advertising" or "trade" purposes requirement of the New York privacy statute.[198] The *Nussenzweig* court still declined to read the New York privacy statute as such.[199] A successful argument for the *Nussenzweig* plaintiff requires reasoning which demonstrates that, even if a court declines to classify a work of art as a commercial item requiring consent prior to use, the statutory right to privacy, for strong policy justifications, should not be subsumed by the First Amendment protection of artwork.

The basis for arguing that the privacy violation inherent in the display of a photograph should trump the First Amendment protection the *Nussenzweig* court rushed to give to the photograph of the plaintiff is, essentially, a petition for a reweighing of values. This argument must face the challenge of weight of authority: the protection given to artwork is clearly a constitutional one, whereas the protection given to an individual's privacy derives only from state statutes. A preliminary response to this substantial point is that, although the right to privacy as pertaining to the use of a photograph is protected by state law, the broader right to privacy, as first recognized in *Griswold v. Connecticut*, inheres in the Constitution itself.[200]

A second, more nuanced response entails an analysis of the right to privacy in the context of a photograph. A definition of "privacy," cited by Andrew McClurg in *Bringing Privacy Law Out of the Closet*, bears mention: "Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others."[201] A further element of the right to privacy is the right to anonymity. As stated by McClurg, "[i]n obscurity, there is privacy."[202] The publication of a photograph of an individual takes away his anonymity and therefore takes away his privacy:

> A photograph intensifies an invasion of privacy in three

198 *Id.*

199 *See* Nussenzweig v. DiCorcia, No. 108446/05, 2006 N.Y. Misc. LEXIS 230, at *5-6 (Sup. Ct. N.Y. County Feb. 8, 2006).

200 *See* Griswold v. Connecticut, 381 U.S. 479 (1965). Although the *Griswold* decision protects the individual from invasions of privacy by government actions, and the *Nussenzweig* decision pertains strictly to individual actions, it bears mentioning that the concept of protecting individual privacy originates in constitutional, not merely state, law.

201 Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1029 (1995).

202 *Id.* at 1033.

> important ways. First, because it makes a permanent record of a scene, it allows the invader to, in effect, take a part of the subject with him. The victim loses control over an aspect of her self. The temporal limitations that are otherwise inherent in public intrusions are eliminated. . . . Second, because of this permanent record, information may be revealed that would not be noticed by transitory observation with the naked eye. . . . Most important, because a photograph creates a permanent record of a scene, it has the potential to multiply the impact of the original invasion through wide dissemination. . . .Moreover, a photograph permits dissemination of an image not just to a larger audience, but to different audiences than the subject intended.[203]

A photograph can indeed be seen to invade an essential right to privacy, a right retained by the individual to determine what information about him is made public or kept anonymous and what images of him are displayed. This right, McClurg seems to argue, inheres in the individual and is a basic human right reflective of the dignity of people which the Bill of Rights is designed to protect. [204] Ultimately, of what libertarian value is the Constitution itself if it cannot protect an individual's "liberty" to determine what information or depictions of him are made public?[205]

A further question regarding the balance of privacy versus free speech arises: what sort of policy do we *want* the New York State privacy law to effect? Even if it can be argued that the doctrine of privacy can trump the free speech doctrine under an interpretation of the current law, is that the sort of goal the law *should* attain? The answer to this question can best be reached through an analysis of the hypothetical results of a verdict in favor of the *Nussenzweig* plaintiff. Imagine that, where a written objection is made, even a photograph classified as a work of art cannot be displayed out of respect for the right to privacy of the person depicted in the photograph. What is the effect on art? And is that effect so negative as to outweigh the very strong policy reasons to fiercely protect the right to privacy?

The photograph of the *Nussenzweig* plaintiff, should New York law bow to privacy over the First Amendment, could not be displayed publicly. However, the photograph would still exist—privacy law would not compel the work of art to be destroyed. The development of artistic works would not be entirely thwarted,

203 *Id.* at 1041-43.
204 *See id.*
205 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

merely the dissemination of them in very specific circumstances. Perhaps it can also be argued that a legal requirement that a display of artwork singling out and depicting a particular person be withdrawn where written objection is made may not, in practice, preclude the display of many works of art. Subjects of artwork most likely would rarely make an official objection; few people would feel as strong a personal objection as was felt by the *Nussenzweig* plaintiff to the display of a neutral depiction of them. A finding in favor of the *Nussenzweig* plaintiff, and a broader conclusion that the protection of individual privacy should take precedence over the protection of artwork, would in the end preclude the display of artwork only where the subjects would be personally offended by the display of the work and as a result would make a written objection. In other words, a finding contrary to the one reached by the *Nussenzweig* court would simultaneously allow for the display of the majority of artistic photographs *and* would protect the privacy—and liberty—of those particular individuals sensitive to such displays.

PART V: CONCLUSION

The right to privacy, though a complicated legal issue, is a right asserted often by the public at large. Both laymen and legal scholars alike view the right to privacy as one that inheres in every individual as an outgrowth of their very humanity. The near-universal respect with which the right is treated speaks to the importance of the right, and countless Supreme Court cases have reinforced the notion that the right to privacy is an essential element of constitutional law and our Constitution itself.

The *Nussenzweig* court, though respectful of the right to privacy asserted by the plaintiff, found that the right to privacy cannot hold up against a First Amendment argument.[206] This finding, however, need not be dispositive of future decisions by New York courts facing a juxtaposition of the right to privacy with the constitutional protection of free speech. Indeed, as Warren Freedman succinctly put it, "people wronged by invasions of privacy should not be denied relief simply because of the right to freedom of speech."[207]

The First Amendment's guarantee of free speech, like the

206 *See* Nussenzweig v. DiCorcia, No. 108446/05, 2006 N.Y. Misc. LEXIS 230 (Sup. Ct. N.Y. County Feb. 8, 2006).

207 WARREN FREEDMAN, THE RIGHT OF PRIVACY IN THE COMPUTER AGE 79 (Quorum Books 1987).

right to privacy, is a core value of American society. Despite the fervent respect granted to the right to free speech, limits on that right are widely recognized. One such limit should be set for where an assertion of the right to free speech would infringe on an individual's right to privacy. The right to privacy "safeguards the interests of individuals in the maintenance of rules of civility. These rules enable individuals to receive and to express respect, and to that extent are constitutive of human dignity."[208]

The right to privacy, then, is essential to society, which our legal system at its core is intended to protect and organize. Although a society which does not foster free speech cannot truly be an open and democratic one, a society and, of course, a government, that does not strive to protect the privacy and dignity of its citizens also cannot ever be a successfully democratic one. Protecting the privacy of a person who was photographed without his consent while walking anonymously down a New York street is an extension of the government's essential role to protect the privacy and human dignity of its citizens. A person who consents to be seen by those surrounding him does not implicitly consent to be seen and studied by visitors at an art exhibit. All people, by virtue of retaining the right to privacy, should have the right to determine the manner in which they and their image are made public. The New York privacy statutes, in light of the significance of the human dignity they protect, should be interpreted by New York courts such that, even in the case of a First Amendment challenge, the right to privacy is able to flourish.

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208 Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 1008 (1989).

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