INVADING THE "HOMES" OF THE HOMELESS: IS EXISTING RIGHT-OF-PRIVACY/PUBLICITY LEGISLATION ADEQUATE?

INTRODUCTION: WHAT'S HER PROBLEM?

A homeless "bag lady's" privacy is invaded and her image appropriated. A photographer snaps a picture of the woman, who, surrounded by her tattered shopping bags, leans against a display window in front of the upscale Fifth Avenue Bergdorf Goodman department store. The photographer sees value in the ironic juxtaposition of poverty and wealth (the two opposing connotations of the "shopping bag"). The homeless woman depicted never signed a release and receives no royalties from sales of the finished product bearing her likeness.

Like many homeless people, Diana, the woman in the photograph, suffers from a mental illness for which she was hospitalized.[1] She is a well-educated woman who holds a master's degree in history from Columbia University. In addition, she is a talented artist who was part of the 1950's Beat Generation, frequenting Greenwich Village cafes and galleries, and using the adopted name, "Starry."[2]

The picture of Diana, captured by photographer Allan Schein,[3] generated a greeting card that one can purchase in New York City boutiques. Several versions of the card have been widely marketed. In one, the inside reads, "Happy Birthday to Someone With a Little Class."[4] A statement on the back explains, "This photo was not a set-up. This is New York as it really is . . . ."[5] Another company published the same photo as a postcard bearing

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[1] *See* Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 YALE L. & POL'Y REV. 1, 6-7 (1996).

> A significant number of homeless people are disabled. About 23 to 30% of the adult homeless population suffer[s] from severe mental illness. About half of the single adults suffer from past or present alcohol or drug addiction. There is some overlap between these groups, with about 23% suffering from more than one of these conditions; overall, about one-half to two-thirds of homeless adults suffer from one or more. About 48 to 80% are seriously depressed or demoralized, three to five times the national average. About 17% are physically disabled. The average life expectancy for homeless people is 51.

Id.

[2] This information was obtained through interviews with members of Diana's family.

[3] Mr. Schein's first name is spelled with two *l*s on the "Shop till you drop" postcard and with one *l* on the birthday card. *See infra* notes 4 and 6.

[4] Photo by Alan Schein, Piece of the Rainbow, P.O. Box 7103, New York, NY 10116.

[5] *Id.*

the caption, "Shop till you drop."[6] A third version shows the image over the slogan, "When the going gets tough, the tough go shopping."[7]

Nine years after publication, the woman is deceased,[8] and the photographer apparently has "gotten away" with his exploit. However, Diana's family members wonder if Diana would have had a valid invasion of privacy or right of publicity claim prior to the expiration of the statute of limitations.[9]

This Note explores two legal options that would have been available to Diana via right of privacy and right of publicity legislation, and the likely outcome of each, had she filed suit during her lifetime.[10] While Diana's right of privacy claim would have been

[6] Photo by Allan Schein, City Sights Postcards, 68 34th St., Brooklyn, NY 11232.

[7] The author is unable to obtain copyright information for this version.

[8] Diana died in 1997.

[9] The statute of limitations on right of privacy actions in New York is one year. *See* N.Y. C.P.L.R. § 215 (McKinney 2000) ("Actions to be commenced within one year: against sheriff, coroner or constable; for escape of prisoner; for assault, battery, false imprisonment, malicious prosecution, libel or slander; for violation of right of privacy; for penalty given to informer; on arbitration award.").

[10] New York has no right of publicity statute. Right of publicity claims in New York must be brought under New York Civil Rights Laws sections 50 or 51.

> 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.

N.Y. Civ. Rights Law § 50 (McKinney 2000).

> 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 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 from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; 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. Nothing contained in this section shall be construed

weak because her "home" was a public thoroughfare,[11] her right of publicity claim would also have been problematic due to her lack of celebrity status. This Note suggests that while the former weakness is difficult to rectify due to constitutional concerns, the latter difficulty can and should be overcome by the courts' adoption, in practice and not merely in theory, of the presumption that the successful sale of a non-celebrity's image is evidence of the value of that image.[12] This Note also argues that the segregation of right of privacy (dignity-based) and right of publicity (commercial value-based claims) is a "messy" business.[13]

This Note highlights how, practically speaking, the arms of right of privacy and right of publicity statutes fall short of embracing homeless people with the protection they were designed to provide. Part I offers an overview of the development of the rights of privacy and publicity. Part II summarizes the aims and evolution of homeless litigation. Part III explores the conflict inherent in applying laws concerned with protecting the "haves" in our society to those who crouch at the bottom of the "have-nots" ladder and lack even the most basic human need, shelter. Part IV proposes a

> to prohibit the copyright owner of a sound recording from disposing of, dealing in, licensing or selling that sound recording to any party, if the right to dispose of, deal in, license or sell such sound recording has been conferred by contract or other written document by such living person or the holder of such right. Nothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law.

Id. § 51.

[11] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 855-56 (5th ed. 1984).

> [T]he thing into which there is intrusion or prying must be, and be entitled to be, private . . . . On the public street, or in any other public place, the plaintiff has no legal right to be alone; . . . . Neither is it such an invasion [of privacy] to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see.

Id.

[12] *See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1, at 1-2 (West 1999).

[13] Many of the early right of privacy cases have a right of publicity feel to them. The primary difference is that in right of privacy claims, the injury is one of emotional distress whereas in right of publicity claims, the injury is one of appropriation of property. While this Note began with the idea of treating Diana's right of privacy claim and her right of publicity claim as two separate and distinct entities, this author found that the line separating the two often blurs. *See* Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999). Haemmerli offers an explanation of doctrinal problems that may have something to do with why this blurring occurs in cases like Diana's. *See id.* She suggests that the prevailing tendency to view a publicity right as "nothing more than an objectified commodity," prevents the latter from being "theoretically reconciled with non-economic personal interests such as those protected by privacy. The resultant (and often convoluted) bifurcation of publicity and privacy interests has engendered intractable doctrinal confusion." *Id.*

solution that is in keeping with our society's ideal of empowering all of its members. The solution suggests that the courts recognize as valuable any person's image when that image sells widely enough to generate considerable profit for the seller.[14] Part IV also discusses several other options that might help homeless people receive compensation when they are exploited for another's financial gain. These other options include a tolling of the statute of limitations and the designation of homeless people as a protected class.[15]

In conclusion, this Note suggests that the time is nigh for courts to recognize that a dignitary interest is undeniably present in the right of publicity cause of action. It argues against separating the individual's dignitary interest in controlling the use of her image from her commercial interest in so doing.[16] Finally, this Note suggests that, if our justice system continues to move toward greater recognition of personal rights that have been overlooked, a future Diana should prevail on both prongs—dignitary and economic—of a future right of publicity test for infringement.

I. The Rights of Privacy and Publicity

A. *The Evolution of the Right of Privacy*

Recognition of the right of privacy is approximately 110 years old.[17] In 1960, Prosser analyzed the right of privacy by breaking it down into four separate categories: intrusion, disclosure, false

[14] While celebrities may be the most frequent invokers of right of publicity law, it is "a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking." McCarthy, *supra* note 12, at 1-2. *But see* Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 Kan. L. Rev. 329, 339 (1996):

> Granting non-celebrities a right of publicity adds little to their arsenal, largely because the invasion of privacy and right of publicity theories take different approaches to the determination of damages. Whereas invasion of privacy damages focus on mental distress, right of publicity damages center around harm to the commercial value of one's identity.

Id.

[15] It is beyond the scope of this Note to examine the right of publicity of homeless people in the context of broadening definitions of property rights. Yet one could certainly view the right of publicity as following the evolutionary path of other benefits, such as government entitlements, which were once considered privileges but are now largely acknowledged as rights. *See generally* Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965) (arguing that a high proportion of property in the United States comprises intangible benefits, a high proportion of those benefits proceed from government, and the customary legal approach to property protects the interests of the rich but not the poor); Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964).

[16] *See generally* Haemmerli, *supra* note 13.

[17] *See* Keeton, *supra* note 11, at 851. Keeton attributes recognition of the right of privacy in 1890 to the article by Warren and Brandeis that was published that year. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

light, and appropriation.[18] Significantly, appropriation is the immediate predecessor to the newer, narrower right of publicity claim.[19]

At the turn of the twentieth century, court decisions in a number of cases reflected a judicial willingness to acknowledge a person's right to protection against appropriation of her name or likeness.[20] Departing from this stance, however, in *Roberson v. Rochester Folding-Box Co.*,[21] the New York Court of Appeals reversed a lower court decision that upheld the right of privacy. The Roberson court decided against the plaintiff/appellee, a young woman whose photograph had been used without her consent to market a company product.[22]

A public outcry arose in response to this decision. In turn, the New York State Legislature enacted a statute making the unauthorized use of the name, portrait or picture of a person for "advertising purposes or for the purposes of trade" both a misdemeanor and a tort.[23]

The *Roberson* court explained its majority decision as expressing, in part, the judges' "fear of undue restriction of liberty of speech and freedom of the press."[24] The potential for conflict between right of privacy legislation and constitutional freedoms, then, had existed since the early days of right of privacy recognition. A number of articles have even challenged the wisdom of recognizing a right of privacy altogether.[25]

While some courts across the United States were split on whether or not to acknowledge a right of privacy, others were immediately wont to do so.[26] Judges made an exception, however, for

[18] *See* McCarthy, *supra* note 12, at 1-18.

[19] For the text of New York's right of privacy laws, N.Y. Civ. Rights Laws §§ 50-51 (McKinney 2000), see *supra* note 10. In states such as New York, where there is no right of publicity statute, the appropriation category of right of privacy cases continues to be the rubric under which right of publicity claims must be considered. *See id.*

[20] *See, e.g.*, Manola v. Stevens, N.Y. Times, June 15, 18, 21, 1890 (N.Y. Sup. Ct. 1890), *cited in* Keeton, *supra* note 11, at 850.

[21] 64 N.E. 442 (N.Y. 1902).

[22] *See id.*

[23] N.Y. Civ. Rights Laws §§ 50-51.

[24] Keeton, *supra* note 11, at 850.

[25] *See, e.g.*, Harry Kalven Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?* 31 Law & Contemp. Probs. 326 (1966); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291 (1983); Richard A. Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393 (1978). These articles argue that enforcement of the right of privacy unconstitutionally limits freedom of speech.

[26] *See, e.g.*, Pasevich v. New England Life Ins. Co., 50 S.E. 68, 80 (Ga. 1905) ("There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject.").

newsworthy items, items in which the public's access to information is deemed preeminent,[27] and judicial decisions based on this exception led to the adoption of a tough standard of recovery in invasion of privacy cases. For example, in *Time, Inc. v. Hill*,[28] a case involving "false light" invasion of privacy,[29] the United States Supreme Court reversed a lower court decision that had awarded the plaintiffs $30,000 under New York law.[30] The standard of recovery that emerged from this decision requires the plaintiff to prove that the defendant published its false light report "with knowledge of its falsity or in reckless disregard of the truth."[31]

The difficulty of this standard reflects the paramount importance to the courts of constitutional protection of freedom of the press. The standard requires that the news media receive great latitude in according "publicity to news, and other matters of public interest."[32] Hence, in *Dora v. Frontline Video, Inc.*,[33] the California Court of Appeal held that a surfing documentary, in which the plaintiff appeared without having given his consent to the filmmaker, fell within the category of public affairs that exempted it from the statutory consent requirement.[34] The California Su-

[27] The high standard for recovery set in "false light" invasion of privacy cases, along with the "newsworthiness" exception to recovery, are indicative of the courts' unwillingness to place an individual's right of privacy above the constitutionally protected freedoms of speech and public access to information. Priority is generally given to the public's right to know and this priority would tend to detract from any invasion of privacy claim brought by a homeless person living on the public streets. *See, e.g.*, KEETON, *supra* note 11, at 850.

[28] 385 U.S. 374 (1967).

[29] "False light" invasion of privacy involves a distorted presentation of the plaintiff to the public. *See* KEETON, *supra* note 11, at 850. The *Pavesich* case can be viewed as comprising a "false light" invasion of privacy claim inasmuch as the advertisement that used Pavesich's photograph included a trumped-up testimonial about the value of purchasing a life insurance policy that Pavesich had never purchased. Pavesich's attorney, however, had relied on another legal ground, in successfully raising a claim of traditional libel. *See* McCARTHY, *supra* note 12, at 1-24.

[30] *See* 385 U.S. at 374. In this case, *Life* magazine claimed that a play based on an incident in which a family had been held hostage for nineteen hours, then released unharmed, was an accurate portrayal, despite the fact that the play inaccurately portrayed the experience as having involved considerable violence. *See id.* at 376-79.

[31] *Id.* at 388.

[32] KEETON, *supra* note 11, at 859; *see also* Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536 (Cal. Ct. App. 1993) (involving the right of publicity); Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596 (1979) (arguing that advertising and merchandising generally lack informative value and tend to exploit the individual for economic gain, and that such use tends to fall outside the scope of First Amendment protection); Bridgette Marie de Gyarfas, *Right of Publicity v. Fiction-Based Art: Which Deserves More Protection?* 15 LOY. L.A. ENT. L. REV. 381, 391 (1995) (discussing the First Amendment as a stumbling block for many right of publicity claims). "There is an inherent conflict between the First Amendment and the right of publicity . . . ." *Id.* Often, when an individual benefits commercially from a constitutionally protected use of another's identity, "this commercial benefit is the result of the unauthorized use of an individual's persona in advertising or merchandising." *Id.*

[33] 15 Cal. App. 4th 536.

[34] *See id.* at 545-46.

preme Court has also put forth a narrow interpretation of the right of publicity, holding that it does not outweigh the value of free expression.[35]

However, not every detail or photograph relating to someone who has entered the public light qualifies for the "newsworthiness" exception.[36] Despite the exceptions for newsworthy events and items of public interest, New York courts, along with courts in other states, have repeatedly demonstrated a commitment to protecting a statutory right of privacy. For example, in *Cohen v. Herbal Concepts, Inc.*,[37] the issue on appeal was whether a photograph that did not show the subjects' faces revealed "sufficiently identifiable likenesses to withstand defendants' motions for summary judgment."[38] A mother and child were photographed from behind without their permission, and the photograph was later used to illustrate an advertisement.[39] The New York Court of Appeals held that the likenesses were sufficient and that plaintiffs had a valid cause of action under section 51 of the New York Civil Rights Law.[40]

Similarly, in another invasion of privacy action, plaintiff Sydney Barrows succeeded in convincing the Appellate Division of the New York Supreme Court to reinstate her cause of action against a former lover who sold photographs of her that he had taken in the course of their previous relationship.[41] Although her arrest on charges of prostitution catapulted Barrows into the public eye, the panel of judges rejected the lower court's reasoning that the "newsworthy event" exception applied.[42]

[35] *See* Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 459 (Cal. 1979) (Bird, C.J., concurring)(holding that constitutionally protected freedom of expression extends to films as well as other works of art and entertainment), *cert. denied*, 462 U.S. 1120 (1983) "The First Amendment is not limited to those who publish without charge. Whether the activity involves newspaper publication or motion picture production, it does not lose its constitutional protection because it is undertaken for profit." *Id.* at 459.

[36] The distinction between what is and is not newsworthy has taken on greater importance in the aftermath of tragedies such as the death of Princess Diana. *See* Rebecca Roiphe, *Anti-Paparazzi Legislation*, 36 HARV. J. ON LEGIS. 250 (1999) (discussing the Personal Privacy Protection Act proposed by Senators Orrin Hatch (R-Utah) and Dianne Feinstein (D-Cal.)). The proposed legislation would make it a federal crime to attempt to photograph or record a person in a way that risks bodily harm. *See id.* It would also make the use of a telephoto lens to take photographs of a subject inside her apartment cognizable as a tort. See generally *id.* for a discussion of the negative aspects of this proposal. While the proposed bill reflects support for legislation that would make it a tort to use a telephoto lens to photograph someone inside his or her apartment, see *id.* at 250, the homeless person, whose "apartment" is the street, would not benefit.

[37] 472 N.E.2d 307 (N.Y. 1984).

[38] *Id.* at 308.

[39] *See id.*

[40] *See id.*; *see also* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2000).

[41] *See* Barrows v. Rozansky, 489 N.Y.S.2d 481, 483 (N.Y. App. Div. 1985).

[42] *See id.* at 485.

As right of privacy claims fall under the rubric of civil rights, the plaintiffs in the aforementioned cases sought injunctive relief and compensation for *emotional distress.* Right of publicity plaintiffs, on the other hand, typically seek monetary compensation for invasion of a property right, the appropriation of one's image, and their demands for relief are for the value of the image appropriated.

B. *Evolution of the Right of Publicity*

Right of publicity claims are generally stronger than right of privacy claims because the former involve a question not of the right to disseminate information, but of proprietorship, *i.e.* who engages in the dissemination, an interest that parallels the interests involved in patent and copyright law.[43] One can define "right of publicity" simply as "the inherent right of every human being to control the commercial use of his or her identity."[44] In the only right of publicity case to reach the Supreme Court, a news broadcast that depicted a performer's entire act without his consent was held to be an infringement of the performer's right of publicity.[45]

The right of publicity traveled a tortuous path toward recognition since its earliest emergence in the context of right of privacy litigation. The Fifth Circuit Court of Appeals, for example, dismissed an early would-be right of publicity case because the judge would not fathom an invasion of privacy claim by a well-known plaintiff, David O'Brien, a professional football player.[46] Nor did O'Brien himself claim a share in the profits generated by the unauthorized use of his photograph to endorse the sale of beer.[47] His primary concern, rather, was that his efforts to discourage young people from drinking had been seriously undermined by this use of his image.[48] The court operated under the assumption that "involuntary advertising publicity was the same as sports publicity. Thus, if O'Brien did not (and could not) object to sports publicity, then he would not be allowed to object to advertising publicity."[49]

By the time the term "right of publicity" first appeared, however, the courts had become more sensitive to the existing lacuna with regard to celebrities. Judge Jerome Frank was the first to speak of a "right of publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum*,[50] a case involving a baseball player who had granted the plaintiff an exclusive right to use his photograph in conjunction with the sales of its gum.[51]

The defendant, a rival manufacturer, aware of the exclusive contract held by plaintiff, induced the ballplayer to enter into another contract authorizing the rival to use the ballplayer's photograph to sell its gum.[52] In remanding the case to the trial court for a closer look at the dates and terms of both contracts, Judge Frank wrote, "This right of publicity would usually yield . . . no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using [celebrities'] pictures."[53]

On the heels of this decision, Melville Nimmer's seminal article on the right of publicity appeared, elucidating the difference between right of privacy and right of publicity as well as explaining why the former will not suffice for plaintiffs whose interest is in the latter.[54] Because right of privacy law hinges on a dignitary interest, "the embarrassing and humiliating impact of the unpermitted advertising use,"[55] it is of little use to a plaintiff who enjoys the limelight but wants to control the use of his name and/or image and derive remuneration therefrom.[56] Right of publicity statutes were thus enacted to protect the interests of celebrities, who tend to be wealthy, and who profit financially from controlling the use of

> If a sale of a photograph for profit, which otherwise would be for trade purposes, is used in 'reasonable connection' with the publication of a 'matter of public interest,' such use is privileged and constitutes protected free speech . . . . However, to be privileged such use must be legitimately related to the informational value of the publication and may not be a mere disguised commercialization of a person's personality.

Id.

[43] *See* de Gyarfas, *supra* note 32, at 389.

> Though the Constitution does explicitly provide protection of inventions under the patent laws, it does not explicitly provide protection for an individual's right of publicity. This constitutional silence regarding the right of publicity may be due to the fact that, at the time the Constitution was written, there was not nearly the value associated with being prominent that there is today.

Id.

[44] McCarthy, *supra* note 12, at 1-2.

[45] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574-75 (1977) (stating that "wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent").

[46] *See* O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941).

[47] *See id.* at 170.

[48] *See id.* at 169. Amazingly, O'Brien's wish to preclude this use of his image was not found to be a valid cause of action. *See id.* at 170; *see also* Haemmerli, *supra* note 13, at 387 (arguing that publicity rights should be grounded in human autonomy).

[49] *O'Brien*, 124 F.2d at 167.

[50] 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

[51] *See id.* at 867.

[52] *See id.*

[53] *Id.* at 868.

[54] *See* Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203 (1954).

[55] McCarthy, *supra* note 12, at 1706-07.

[56] *See id.* at 1707.

their image. Although Nimmer thought that right of publicity relief should not be limited to cases brought by celebrities, his position was somewhat equivocal.[57]

The decisions in cases such as *Canessa v. Kislak*[58] and *Munden v. Harris*,[59] however, support the notion of compensation to non-celebrities. The standard set by the courts is not difficult to meet since the defendant's use of plaintiff's personal identity for commercial purposes results in a presumption of commercial value.[60]

Yet non-celebrities file only a small number of right of publicity actions. While some states, by statute, allow non-celebrities to claim a version of the right of publicity, these states tend to invoke a combination of privacy and property rationales.[61] Despite the early victories in *Canessa* and *Munden*, the operative assumption in right of publicity cases is that "[t]he commercial value of a non-celebrity's identity would generally be significantly less than the

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57 *See* Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 231 n.99 (1999).

> Nimmer allowed that non-celebrities also had a right of publicity. He assumed, however, that they would produce few cases because, being ordinary people with no particular cachet to their names or images, the dollar value of damages for use of their identities would be so slight as to be not worth the trouble of bringing suit.

Id.

58 235 A.2d 62, 80 (N.J. Super. 1967) (stating that a non-celebrity has the right "to be compensated for the commercial use of his or her likeness"). In his decision, Judge Lynch cites a law review article by Harold R. Gordon that again points out the confusion between right of privacy and right of publicity law:

> An analysis of the decided cases through the years leads to the conclusion that much of the confusion and conflict in the decisions arose because litigants chose to sue in almost every case for invasion of privacy (premised on injury to feelings), rather than for the appropriation for commercial exploitation of rights in name, likeness, etc., in situations where injury to feelings had only secondary application. So long as suits were confined (as in most of the early cases) to the advertising exploitation of private individuals plucked from obscurity against their will to invasions by wiretapping, or to similar indignities where injury to feelings was the principal harm, there was little difficulty. However, when the suits began to involve all types of commercial exploitations, particularly of public figures, the decisions became confused.

Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NEV. U. L. REV. 553, 554 (1960).

59 134 S.W. 1076 (Mo. 1911). This case involved the unauthorized use of the photograph of a five-year-old child in a jewelry store advertisement. *See id.* at 1077. "If there is value in [the image], sufficient to excite the cupidity of another, why is [that value] not the property of him who gives it value and from whom the value springs?" *Id.* at 1078.

60 *See* MCCARTHY, *supra* note 12, at 4-17.

61 *See* Langvardt, *supra* note 14, at 339 n.60. This interposition of the mental distress aspect of right of privacy claims and the commercial value aspect of right of publicity claims suggests that, where non-celebrities are concerned, the courts show a reluctance to accord the image commercial value, despite the presumption of value asserted early on in the *Munden* and *Canessa* cases. Yet, if the photograph of Diana, the homeless woman, became very popular, its popularity and profitability would seem to indicate the presence of a greater value in her image than her non-celebrity status alone suggests.

commercial value of a celebrity's identity."[62] The problem with this presumption is that, in deterring non-celebrity right of publicity claims, it leads to unjust enrichment.[63] Therefore, the view of Professor J. Thomas McCarthy is that even if the individual whose image has been infringed has suffered no identifiable loss, the infringer has still been unjustly enriched.[64] He should, therefore, not be permitted to retain any profit that he has unjustly received.[65]

Allowing right of publicity claims to prevail and forcing the infringer to disgorge his profits will deter other such would-be exploiters from attempting to use an individual's image without permission and compensation.[66] The unjust enrichment of the photographer who took and sold the picture of Diana, a woman so destitute that she lived out on the street, appears particularly unscrupulous, notwithstanding the non-celebrity status of the victim.[67] A look at the development of homeless litigation and the problems inherent therein will set the stage for an examination of the interplay of the homeless plaintiff in a right of privacy or right of publicity cause of action.

II. AN OVERVIEW OF HOMELESS LITIGATION

Poverty lawyers representing homeless people have generally concerned themselves with securing basic entitlements for their cli-

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62 *Id.* at 339.

63 *See* Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 98 (1994) ("'Non-excludability' means that it is impossible to exclude people who have not paid to use the resource. These nonpaying users are often called 'free riders.' It is ordinarily desirable for people to pay for a resource so that producers have an incentive to produce it. Unless nonpaying users can somehow be excluded, capitalists might have too little incentive to build lighthouses."). Compare this with the case of Diana, where Diana would be deprived of any incentive she might have to "produce" her image for sale, if anyone else could come along and appropriate it without her permission.

64 *See* MCCARTHY, *supra* note 12, at 11-48.1 to 11.50.

65 *See id.*

66 *See* de Gyarfas, *supra* note 32, at 388.

> The economic rationale for the recognition of a right of publicity is to assure that the one who desires to use the identity of another purchases a license for its use. The rationale in favor of protecting a person's publicity right was best articulated by the United States Supreme Court [in *Zacchini v. Scripps Howard Broad. Co.*, 433 U.S. 526, 576 (1977) (quoting Harry Kalven, Jr. *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966))], "no social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."

Id.

67 *See id.* ("Even if the individual whose persona has been infringed has suffered no identifiable loss, the infringer has still been unjustly enriched and should not be permitted to retain any profit that he has unjustly received.").

ents, such as the right to food and shelter.[68] *Callahan v. Carey*[69] marked the debut of litigation aimed at improving living conditions for New York City's homeless population.[70] The case established an obligation on the part of New York City to provide emergency shelter for homeless men.[71] *Callahan* was soon followed by cases that established the City's responsibility to provide similar shelter for homeless women[72] and families.[73]

In California, a series of cases succeeded in peeling off bureaucratic red tape that hindered the access of homeless people to emergency shelter.[74] Other cases established the right to have realistic housing allowances incorporated into existing programs such as Aid to Families with Dependent Children.[75]

Wes Daniels has examined the courts' changing view of homeless people over the years and how that perspective has metamorphosed.[76] Daniels identifies various assumptions courts have made about the causes of homelessness, and analyzes how these assumptions may influence judicial decision-making.[77] The basic assumptions that Daniels identifies are: personal dereliction, bad luck, structural economic forces, and lifestyle choices.[78] The *Callahan* court expressed its view of the plaintiff as a man responsible for his own predicament through his dependency on drugs and/or alcohol.[79] This view involved the paradox that the responsible person was, at the same time, helpless because his chemical dependency rendered him incapable of improving his circumstances.[80]

Then came an era of relative compassion engendered by the view that homeless people are helpless.[81] The notion of the "dere-

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68 *See, e.g.*, McCain v. Koch, 127 Misc. 2d 23 (N.Y. Sup. Ct. 1984); Eldredge v. Koch, 118 Misc. 2d 163, 163-64 (N.Y. Sup. Ct. 1983); Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10 (N.Y. Sup. Ct. Dec. 5, 1979).

69 N.Y.L.J., Dec. 11, 1979, at 10 (N.Y. Sup. Ct. Dec. 5, 1979).

70 *See* Wes Daniels, *"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 691 (1997).

71 *See Callahan*, N.Y.L.J., Dec. 11, 1979, at 10.

72 *See Eldredge*, 118 Misc. 2d at 163-64.

73 *See McCain*, 127 Misc. 2d at 23-24.

74 *See* Daniels, *supra* note 70, at 693.

75 *See* Massachusetts Coalition for the Homeless v. Sec'y of Human Servs., 511 N.E.2d 603, 607 (Mass. 1987).

76 *See generally* Daniels, *supra* note 70.

77 *See id.* at 695-715.

78 *See id.*

79 *See* N.Y.L.J., Dec. 11, 1979, at 10, 11 (N.Y. Sup. Ct. Dec. 5, 1979).

80 *See* Gary Blasi, *Litigation Concerning Homeless People*, 4 ST. LOUIS U. PUB. L. REV. 433, 435 (1985) ("A value widely shared . . . is that people ought not freeze to death because they are poor, or crazy, or even because they are alcoholics.").

81 *See* Daniels, *supra* note 70, at 702.

The prevailing view seems to have shifted by the mid-1980s and early 1990s from one of personal dereliction and misfortune to an image of large-scale

lict" permutated over time into a view of homeless people as victims of "recurring misfortunes,"[82] wrought by a "harsh economic system."[83] According to Daniels, this view produced a spate of litigation victories, along with many social programs.[84]

But a backlash began when the social programs enacted did not yield the expected results, and thus homelessness persisted.[85] As this growth in homelessness fueled the courts' skepticism, plaintiffs came to be perceived as voluntarily opting for their homeless lifestyle.[86] A string of appellate reversals of lower court decisions in cases such as *Church v. City of Huntsville*[87] and *Tobe v. City of Santa Ana*[88] reflects this trend.

In overturning the intermediate appellate court's decision in *Tobe*, the California Supreme Court cited a senior deputy district attorney's comment that "a necessity defense might be available to 'truly homeless' persons [and that] prosecutorial discretion would be exercised."[89] Similarly, in *Church*, the Eleventh Circuit found that, "The Constitution does not confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands."[90]

Daniels explains that homeless litigation has turned on a "false dichotomy."[91] When lawyers successfully plead that their clients' homelessness is involuntary, judges are more apt to be sympathetic. In *Pottinger v. City of Miami*,[92] Judge Atkins referred to plaintiffs' complaint as alleging "that the City of Miami . . . has a custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily

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helplessness in the face of impersonal, structural forces. A number of courts concluded that the route to homelessness is a path on which people travel involuntarily, and, consequently, found homeless litigants entitled to legal protections unavailable to those who freely chose their condition. In this era, litigants, seen as involuntarily homeless because of economic forces beyond their control, won court victories in such areas as voting rights, eligibility for emergency or safety net public benefits and the "right" to live in public free of punitive treatment by the police.

Id. at 702-703.

82 Hodge v. Ginsberg, 303 S.E.2d 245, 250 (W. Va. 1983) (quoting W. VA. CODE § 9-1-1 (1979)).

83 Thrower v. Perales, 138 Misc. 2d 172, 175 (N.Y. Sup. Ct. 1987).

84 *See* Daniels, *supra* note 70, at 696.

85 *See id.* at 697.

86 *See id.* at 708-09.

87 No. 93-C-1239-S, 1993 WL 646401, at *2 (N.D. Ala. Sept. 23, 1993), *vacated and remanded*, 30 F.3d 1332 (11th Cir. 1994).

88 27 Cal. Rptr. 2d 386, 389 (Cal. Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995).

89 892 P.2d 1145, 1155 n.8 (Cal. 1995).

90 30 F.3d 1332, 1345 (11th Cir. 1994).

91 Daniels, *supra* note 70, at 716.

92 810 F. Supp. 1551 (S.D. Fla. 1992).

life, including sleeping and eating, in the places where they are *forced* to live."[93]

When opponents convince judges that a litigant's homelessness is a voluntary lifestyle choice, the court's response tends to be less favorable. Citing *Love v. City of Chicago*, Daniels points out that courts increasingly "view homeless individuals as people who . . . voluntarily make ongoing choices which the law need not respect."[94] In the long run, a more successful approach might be to convey the stark truth that a lifestyle choice of homelessness is often the result of a person having a limited and poor selection of options.[95]

At any rate, it is worth underlining the reality that the view of homeless people as helpless victims, a view that many courts still adopt, derives, to a surprising extent, from the portrayal of litigants by their attorneys. In an insightful article that delves into the complexity of the relationship between poverty lawyers and their clients, Marie Failinger presents the issue as follows: "The debate about what poverty lawyers must do poignantly contrasts a visionary hope for a 'Beloved Community' in which the poor are heard in their own voice and seen in their own humanity with the reality of daily defeat—clients silenced and bent, sometimes even by their own lawyers."[96]

III. Why Will Diana's Claim(s) Not Succeed?

Cases involving exploitation of a homeless person's image have not been litigated.[97] The idea that a homeless person, whose image is valueless in the eyes of society, could successfully bring a

[93] *Id.* at 1554 (emphasis added).

[94] Daniels, *supra* note 70, at 697-98 (citing Love v. City of Chicago, No. 96-C0396, 1996 U.S. Dist. LEXIS 16041 (N.D. Ill. Oct. 23, 1996)).

[95] *See id.* at 716-17. "When a homeless person is found on the street rather than in a dangerous homeless shelter, 'abandonment quality' housing or a psychiatric hospital, that person's present condition may reflect affirmative decision-making. That person's situation might not meet the test of 'voluntariness' applied in court decisions." *Id.*

> [This article] rests instead on the premise that everyone has an interest in pleasant public places and that no one has an interest in living on the street. Activism and debate should focus on addressing the conditions that require people to live on the street, by defining and implementing solutions to homelessness. Longer-term measures that address the causes of homelessness – as opposed to merely providing emergency relief – offer the only realistic possibility of doing so.

Foscarinis, *supra* note 1, at 3.

[96] Marie A. Failinger, *Face-ing the Other: An Ethics of Encounter and Solidarity in Legal Services Practice*, 67 Fordham L. Rev. 2071, 2071-72 (1999).

[97] This author was unable to find a single example. Indeed, the mere suggestion that such cases could or should be litigated raised the eyebrows of some who were consulted in the writing of this Note.

claim that is frequently brought by sports and entertainment stars may seem too hypothetical to consider seriously.[98] While deconstructing the notion of value is beyond the scope of this Note, a look at the elements responsible for the tension between the proposed litigant (homeless) and the proposed litigation (right of privacy/right of publicity) may bring to light more equitable judicial remedies.

The difficulty with Diana's claim may stem from the essential nature of both right of privacy and right of publicity law. While the right of privacy/publicity statutes and case law assert that a homeless person *should* prevail in a case that involves the unauthorized and uncompensated use of her image for trade and profit, her claim can easily falter upon the premises of the laws. The common law right of privacy unintentionally, yet essentially, excludes homeless people by virtue of its defining characteristics. As we have seen, a right of privacy does not exist on a public street, notwithstanding the fact that the homeless person may be using the street as her "home."[99] An individual's right of privacy, then, cannot thrive, and rarely even survives, in the public domain.[100]

Nor is the right of privacy the only liberty compromised when a person lives in the public eye. The property of homeless people may be of similarly little value in the eyes of law enforcement officials, and this devaluation bears on the question of whether the woman in the photograph could have raised a right of publicity claim.[101]

[98] Yet, it is just such unlikely juxtapositions that are emblematic of a democratic society. Certainly, the fact that at least a few American presidents have had truly humble beginnings (*e.g.*, Presidents Lincoln and Clinton) and the message therein that one's poverty need not preclude him from the American dream has long been invoked to inspire schoolchildren who might otherwise feel that the odds are too strongly stacked against them. It is also possible, in our mobile society, that the very celebrities whose images have acquired dazzling value may have had humble, or even homeless, beginnings.

[99] *See* Keeton, *supra* note 11, at 855.

[100] *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1574-75 (S.D. Fla 1992).

> In the present case, where plaintiffs are in the unfortunate position of having to perform certain life-sustaining activities in public, this court has difficulty finding that they have a reasonable expectation of privacy in those activities . . . . In sum, the law does not yet recognize an individual's legitimate expectation of privacy in such activities as sleeping and eating in public.

Id.

[101] *See* Press Release, ACLU-NC (June 17, 1988), *available at* http://www.aclunc.org/pressrel/980617-homeless.html ("It's as if the City believes homeless people have no property rights. The City's actions evince a rejection of the constitutionally-enshrined idea that every person, regardless of her wealth, should not be deprived of her property without due process of law.") [hereinafter ACLU Press Release].

> . . . [T]he interior of the bedrolls and bags or boxes of personal effects belonging to homeless individuals in this case is perhaps the last trace of privacy they have. In addition, the property of homeless individuals is often located in the parks or under the overpasses that they consider their homes . . . under the

Like the right of privacy, the right of publicity may exclude homeless people by virtue of its essential nature. "People link the person with the items the person endorses and, if that person is famous, that link has value."[102] While a homeless person may become a familiar sight to others who pass by her on the street, this familiarity does not constitute the kind of fame contemplated in the body of right of publicity cases.[103]

In addition, the right of publicity seems to wear two faces: a dignitary interest that derives from right of privacy law and a property interest that places it under the rubric of intellectual property.[104] However, Diana does not have very sure footing on either ground. Why should she not be standing tall on both? Whether or not the mere snapping of the lens violates her right of privacy, a statutory violation takes place once the resultant photo is sold. Moreover, although right of publicity typically involves celebrities whose image enjoys a considerable commercial value, the prevailing view of the courts has been that non-celebrities can also recover in right of publicity actions.[105]

Since the right of publicity is more commonly viewed as a property interest, a court adjudicating such a case will tend to discount the purely dignitary interest that right of privacy litigation protects and that often results in pain and suffering damages.[106] The court would then likely treat the homeless person as a non-celebrity entitled only to nominal compensation. Additionally, the homeless plaintiff might suffer from a form of the prejudice that

> circumstances . . . , it appears that society is prepared to recognize plaintiffs' expectation of privacy in their personal property as reasonable.

Pottinger, 810 F. Supp. at 1572.

[102] McFarland v. Miller, 14 F.3d 912, 919 (3d Cir. 1994), *cited in* Peter Yu, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355, 361 (1998).

[103] While the right of publicity is available, in theory, to non-celebrities, the prospect of nominal compensation will tend to deter such claimants from filing suit for publicity rights violations. *See* Kahn, *supra* note 57, at 213.

[104] *See* Michael Higgins, *A Pitch for the Right of Publicity*, IP MAG. (Dec. 1998), *available at* http://www.fbm.com/home/pubs/2000q1/mjh.html (last visited Nov. 18, 2001).

[105] *See* Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 J. ART. & ENT. L. 227, 253-55 (1999).

[106] *See* J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1705 (1987) (stating that, with the first right of publicity cases, courts were reluctant to acknowledge that when "a plaintiff whose identity was already well known sued under this approach . . . there could be 'indignity' or 'mental distress' since plaintiff's identity was already in widespread use in the news media"). "Accepting the privacy label at its face value, the courts were unwilling to allow a public person to claim that unpermitted commercial use of identity invaded a 'right to be left alone.'" *Id.* Even where the dignitary interest is primary, however, it would not likely benefit homeless people whose strength and resilience is not valued by the law. *See, e.g.*, Daniels, *supra* note 70, at 688 (citing Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L.J. 2107, 2141 (1991)).

hindered the development of right of publicity law from the outset. Just as celebrities once encountered obstacles with this type of claim—"How can someone who thrives on publicity complain of an injury caused by publicity?"—the homeless woman may be viewed as someone who, by choosing to live on the street, has willingly forgone her right of privacy.[107] Just as the court in *O'Brien* ruled that a person who enjoyed publicity could not complain when his image was publicly displayed, a court may be inclined to view someone it perceives as voluntarily opting to live on the street as having no right to complain when her easily appropriated image is displayed on the face of a greeting card.

As we have noted, right of publicity can be perceived as a form of intellectual property law.[108] The property of homeless persons, however, does not generally garner the respect of law enforcement agents.[109] In fact, law enforcement agents may often completely disregard the property rights of homeless people.[110] The courts tend to treat such disregard with a certain amount of deference.[111]

Presumably, the rationale for such disregard is that homeless people's property is frequently kept in public parks or other public venues, violating the law, since homeless people are not allowed to live in these public places. If the homeless person is spending virtually all of her time on the street, then her image is similarly

[107] *See* O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941). The right of privacy and the right of publicity tend to entwine at many points in this discussion. This overlap seems to be an inevitable result of the somewhat artificial assignment of the dignitary interest to right of privacy and the commercial interest to right of publicity. *See, e.g.*, Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47, 70 (1994) (arguing that it is appropriate for the right of publicity to redress economic and emotional injuries that stem from an unauthorized appropriation of an individual's persona).

[108] *See supra* note 43 and accompanying text.

[109] *See* Daniels, *supra* note 70, at 706.

[110] *See* ACLU Press Release, *supra* note 101 (describing small claims actions filed by ten homeless people against the City of San Francisco for property rights violations that occurred during the City's attempts to "clean up" Golden Gate Park). According to the press release, "James B. is HIV positive, and the medications vital to his well-being were among his property seized by city workers. Despite the urgency of locating James B.'s property for medical reasons, which he explained to a Recreation and Park employee, he was not allowed to look for them in the abandoned property storage container." *Id.*

[111] *See* Alicia Hancock Apfel, *Cast Adrift: Homeless Mentally Ill, Alcoholic and Drug Addicted*, 44 CATH. U. L. REV. 551, 581 (1995) (pointing out that "gaining sympathy from the courts is . . . a significant hurdle to overcome" in the context of protecting homeless shelters through the use of the Fair Housing Act).

> The plaintiffs alleged that the District violated the FHA by yielding to community animus toward the mental and physical disabilities of the shelter occupants . . . . The court expressed serious doubt as to whether this type of claim could be brought under the FHA . . . [which] did not protect the inhabitants of the shelters because they were neither "'renters' nor 'buyers.'"

Id.; *see* Johnson v. Dixon, 786 F. Supp. 1, 2-7 (D.C. Cir. 1991).

"inappropriately" kept in a public venue.[112]

Finally, because homeless people are a class that is often, at worst, criminalized[113] or, at best, viewed as opting for an undesirable life-style choice,[114] the courts tend to yield more to public antipathy toward the homeless than to the latter's distress.[115]

As with convicted felons, the privacy claims of the homeless are diluted by the public's perceived need for protection against them.[116] As Maria Foscarinis explains, "Some cities associate homeless people with crime or equate them with 'criminal elements;' others associate activities such as begging with crime . . . ."[117]

She describes the wave of public antipathy for the homeless that has followed the hard-won victories of the 1980s and how this antipathy is reflected in government "crackdowns," where homeless people are arrested and virtually expelled from the cities in which they reside.[118]

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[112] *See* Haemmerli, *supra* note 13, at 388 (critiquing the Lockean-based approach that "encourages attacks by postmodernist critics, who contend that because public identity is a social construct, society is entitled to unfettered access to that identity"). While the identity of the homeless woman is "public" in a literal, rather than a figurative, sense, the postmodernist principle of unfettered access tends to operate against both her privacy and her publicity rights. *See id.*

[113] *See* Foscarinis, *supra* note 1, at 1 (explaining how local governments are using criminal laws to respond to the growing presence of homeless people in public places); Daniels, *supra* note 70, at 697.

[114] *See* Daniels, *supra* note 70, at 713. Daniels notes that in *Joyce v. City and County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994), the court accepted the City's argument that the plaintiffs were not truly homeless since:

> [T]he plaintiffs included people who . . . had declined to live with a daughter because she could not afford to shelter him; found housing unsatisfactory that had been offered by a housing clinic; claimed none of his acquaintances was a suitable roommate; refused to sleep at a drop-in shelter because of fear of the inhabitants; been suspended from public assistance payments for missing appointments; currently had housing and had been "on the streets for at most a few nights."

Daniels, *supra* note 70, at 713.

[115] *See* Apfel, *supra* note 111, at 554 (commenting that "judicial interpretation of the federal disability laws reveals that [the homeless disabled] have fallen through the cracks of the federal disability laws").

[116] *See* Williams v. Barry, 490 F. Supp. 941, 944 (D.C. Cir. 1980).

> [M]any [homeless] people are emotionally unstable . . . [since] "to a great extent the problem of homelessness was caused by a lack of support services for those persons released from [the city's mental hospital]."
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> . . . .
>
> . . . The public would be better served by having homeless persons housed at night rather than *flushing* these people onto the city streets and forcing them to find shelter and food that is beyond their means to obtain.

Id. (emphasis added).

[117] Foscarinis, *supra* note 1, at 3 (explaining that debate about the homeless presumes a polarity between the public's interest in orderly public places and homeless persons' "right" to sleep and beg in public).

[118] *See id.* at 1.

> In one phase of what a court later described as the city's "war on the homeless," [Santa Ana] police conducted a "harassment sweep" in which homeless people

So, the homeless woman, who is literally at the opposite end of the spectrum from the celebrity by reason of her utter lack of valuable property—be it a home, an image, or a right of privacy in her sidewalk abode—would be in danger of failing all of the standard tests that determine whether she has a protectable interest. Meanwhile, her lack of access to more than nominal right of publicity damages is problematic in that it deprives her of a viable cause of action that she might otherwise initiate under the circumstances.

For example, a right of publicity claim may be timely when a right of privacy action is no longer viable. In *Canessa v. J. I. Kislak, Inc.*,[119] the defendants contended that the two-year statute of limitations governing right of privacy claims under New Jersey law barred the plaintiffs' claim.[120] Plaintiffs successfully urged that their claim was not "an action for 'injuries to the person' but, rather, one for a tortious injury to 'property' rights barred only after six years . . . ."[121]

Such questions of procedure might thus lead a non-celebrity to prefer a right of publicity claim to a right of privacy claim. To ensure the viability of such a claim, value should be presumed and calculated based on any income generated by the sale or use of the plaintiff's photo or likeness. Another obstruction to justice, in cases such as Diana's, arises from the particular vulnerability of homeless plaintiffs. The homeless are a group that has only in the past two decades made some precarious strides in obtaining the courts' assistance in solving problems that they face. Such assistance has generally gone toward satisfying the most basic human requirements, adequate nutrition and safe shelter.[122]

It is likely, then, that such a population would be slow to recognize its ability to access the right of publicity, a right that, traditionally, has given rise to lawsuits filed by the rich and famous.

The homeless also have been subject to great indignity merely by virtue of their homelessness. They have, in fact, gone without

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> were handcuffed, transported to an athletic field for booking, chained to benches, marked with numbers, and held for as long as six hours before being released to another location, some for such crimes as dropping a match, a leaf, or a piece of paper or jaywalking."

Id.

[119] 235 A.2d 62 (N.J. Super. 1967).

[120] *See id.* at 63.

[121] *Id.* at 65 (citing N.J. STAT. ANN. § 2A:14-1 (West 2001)). If, substantively, the more valuable recovery option for a non-celebrity is the right of privacy mental distress option, but the more viable one, procedurally, is the right of publicity action due to the longer statute of limitations, then the non-celebrity may find herself in a "Catch-22" situation.

[122] *See, e.g.*, McCain v. Koch, 127 Misc. 2d 23 (N.Y. Sup. Ct. 1984); Eldredge v. Koch, 118 Misc. 2d 163, 163-64 (N.Y. Sup. Ct. 1983); Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10 (N.Y. Sup. Ct. Dec. 5, 1979); Hodge v. Ginsburg, 303 S.E.2d 245 [illegible]

even a modicum of the privacy that most people take for granted. To what extent do homeless people, who are frequently denied access to restaurant restrooms (and consequently have to relieve themselves in public places), bristle at being photographed on a public street? If and when they do bristle, moreover, what is the likelihood that they would feel able to avail themselves of the relief afforded by the civil justice system? Certainly, it would require many to rethink their status.[123]

Another factor complicating the possibility of Diana's right of privacy/publicity recovery was her psychiatric disorder. The question of the extent to which many homeless people can participate coherently in their own advocacy complicates the possibility of judicial remedy. In *Commonwealth v. Wiseman*,[124] a notable 1969 invasion of privacy case, the Supreme Judicial Court of Massachusetts upheld an injunction against a public showing of the film "Titicut Follies," which documented conditions at Massachusetts Correctional Institution at Bridgewater, a facility housing criminally insane persons.[125]

Ironically, the impetus behind the successful lawsuit was the institution, whose motive in seeking the injunction may not have been the protection of the inmates' right of privacy.[126] The mentally ill inmates of the Bridgewater, Massachusetts facility, at that time, enjoyed greater right of privacy/right of publicity protection than do homeless people. The inmates lived in a community of sorts, behind walls, in an institution that could (at least claim to) represent their interests. Homeless people, on the other hand, live in isolation as single individuals or sometimes as individual families, fending for themselves, and at times against one another, out on the street.[127]

Even those homeless people who wend their way to shelters do not enjoy protections equal to those of their non-homeless counterparts.[128] In her comment upon the vulnerability of the home-

[123] In this regard, it is encouraging to note that an empowerment movement is under way, as evidenced by the existence of websites for homeless people. *See, e.g.*, Nat'l Coalition for the Homeless; *2000 Federal Legislative Agenda*, *available at* http://nch.ari.net/00agenda.html (last visited Nov. 16, 2001).

[124] 249 N.E.2d 610 (Mass. 1969).

[125] *See id.* at 612.

[126] *See id.* Though the legal claim was argued as protection of the inmates' right of privacy, the deplorable conditions at Bridgewater certainly caused great embarrassment to Massachusetts and its hospital officials, and it seems likely that this embarrassment spurred the claim for relief. *See id.*

[127] *See* Apfel, *supra* note 111, at 578 n.160 ("A significant number of homeless have become fearful of shelters, which have become havens for drug dealers, recently released convicts or other persons with dubious character.").

[128] *See generally id.*

less, mentally ill, alcoholic, and drug-addicted people, Alicia Hancock Apfel highlights the discrepancy that exists between the protections that federal disability laws theoretically extend to such people and the reality that, since the laws do not offer relief from discriminatory acts directed at services and shelters, the laws ultimately fail to protect homeless disabled persons.[129]

IV. Solutions

A. *Adequate Non-Celebrity Compensation*

The reluctance of some courts to award more than nominal financial compensation to non-celebrity victims of right of publicity infringement opens the door to free-riding by opportunistic individuals. The prospect of nominal compensation hardly provides an incentive for the non-celebrity to file suit. In a system that neglects to protect non-celebrities, a photographer can freely profit from her ability to photograph, or otherwise appropriate the image of, homeless and other vulnerable individuals without fear of facing an infringement suit by them. Since the courts generally take a hostile view toward such windfalls, they should reconsider the bases for concluding that celebrity "cachet" is the standard for determining the marketability of a person's image.[130] Indeed, some companies have run seemingly successful ad campaigns using non-models (who, of course, consented to such use of their image).[131] Casting agents often scout children at public schools in Manhattan, seeking not celebrity cachet, but a child who has the "right look." This Note contends that Diana had the "right look" for photographer Alan Schein's purpose of portraying the irony inherent in the figure of this particular impoverished, homeless woman decrying through her presence the opulent Bergdorf Goodman display.

In our society, where fame can strike overnight and disappear

[129] *See id.* at 576-77; Johnson v. Dixon, 786 F. Supp. 1 (D.C. Cir. 1991) ("[T]he statutory interpretation of 'dwelling' as well as the class of persons that the FHA [Fair Housing Act] intends to protect hinder attempts to protect disabled persons who utilize shelters and day centers.").

[130] *See* de Gyarfas, *supra* note 32, at 391.

Consider the following situations: a scientist discovers a cure for some disease; a passerby heroically saves people from a burning building; or an ordinary person experiences an event that is of interest to the public. [Can Diana's homelessness be construed as such an event?] In these situations, economic incentive is not germane to the non-celebrity's right of publicity claim. Nevertheless these non-celebrities do not lose their right because they are not motivated by economic gain; the courts need to look to other rationale for providing protection to the non-celebrity.

Id.

[131] GAP stores ran one such ad campaign several years ago to advertise its [illegible]

almost as quickly, the line between celebrity and non-celebrity is often hard to draw. Having the "look" of fame—be it "cool" or "classic"—can run a close second in its product-enhancement power. In Diana's case, moreover, her lack of celebrity cachet actually increased the value of the photo. The birthday card version used the depiction of a real, live, down-and-out New Yorker to suggest that this detail added to, rather than diminished, the card's value.[132]

In suggesting the need for a federal right of publicity statute, Eric J. Goodman has emphasized that such a statute "must be available to all persons famous or not."[133] Goodman maintains that the right of publicity must be extended to every individual, not only to persons from a segment of the entertainment industry.[134] Furthermore, Goodman compares the minority view that the persona of a non-celebrity lacks commercial value to the discrimination perpetrated by the Dilution Act of 1995 against non-famous trademarks.[135] Publicity cases subscribing to this view require a minimal degree of fame or notoriety as a prerequisite for relief.[136]

As we have seen, the majority view, while recognizing the value inherent in every person's image, holds that damages should be based on the value of each such image in the marketplace. What exactly does this standard mean? Perhaps Diana's image would have little market value if it were used to sell clothing. As a greeting card, however, it is still being sold on St. Mark's Place, New York City, in multiple versions, almost a decade after it was copyrighted by card manufacturers. Both the variety and the longevity of these cards in the marketplace highlight the tremendous appeal of Diana's image on a greeting card.

Maybe the sense of exploitation that the sale of these cards evokes, and the difficulty of finding a sure legal remedy, point out a problem in the prevailing view of publicity rights. Alice Haemmerli suggests that the problem may lie, in part, in the choice the plaintiff is forced to make between seeking right of privacy (emotional distress) relief or right of publicity (economic) relief.[137] In addition, Haemmerli's article "presents the case for an expansive right of publicity, an autonomy-based property right that breaks with the traditional view of the right of publicity as a solely pecuniary interest in the exploitation of identity."[138] In many respects, the article is "countercultural: not only does it question the traditional doctrinal assertion that the publicity rights claimant cares only about compensation, but it also rejects the nontraditional, postmodernist contention that the right of publicity has been overextended."[139] Alternatively, the article argues "that the right of publicity, far from being overindulged, has been theoretically shortchanged, and that as a property right based on human autonomy, it merits respect and nurturing, rather than the diminution urged upon the courts by critical and postmodernist theoreticians."[140]

[132] This added value is highlighted in the statement on the back of the card, which reads, "This photo is not a set up . . . ." *See supra* note 5 and accompanying text.

[133] Goodman, *supra* note 105, at 252.

[134] *See id.* at 253.

[135] *See id.*; Dilution Act of 1995, 15 U.S.C. § 1125(c) (1998).

[136] *See* Goodman, *supra* note 105, at 253; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

[137] *See* Haemmerli, *supra* note 13, at 386 n.6.

> I propose doctrinal recognition of a right of publicity that allows its owner to object to commercial exploitation of her identity on both moral and economic grounds, rather than having to choose between economics (publicity) and feelings (privacy). Although positive law may recognize both aspects of the right to object to such exploitation, . . . doctrine does not tend to do so. The idea of a unitary publicity right, or of publicity rights as comprising both economic and "personal" rights, is not entirely novel, but it has been overwhelmed by the dominant concept of publicity rights as solely economic.

Id.

B. *Protected Class Status for the Homeless*

The Protected Class Resolution for the Indigent Homeless Population is included in the 2000 agenda for the National Coalition for the Homeless.[141]

> [T]he resolution . . . calls for protection from laws against sleeping in public, acts or laws interfering with the right of homeless people to travel, unfair wages, laws that disregard personal property, violence and hate crimes, and being characterized and treated as non-citizens.[142]

In considering Alicia Hancock Apfel's argument, we have seen that people who are both disabled and homeless often fall through cracks in protections provided by the Americans with Disabilities Act.[143] For example, while the FHA has been invoked successfully to counteract discrimination against disabled people living in group homes, shelter residents have been precluded from similar

[138] *Id.* at 386.

[139] *Id.* at 386-87.

[140] *Id.* at 387.

[141] *See* Nat'l Coalition for the Homeless, *2000 Federal Legislative Agenda, Designation of Protected Class Status for Homeless People*, *available at* http://home.earthlink.net/chuckcurrie/civilrights.html (last visited Mar. 4, 2000).

[142] *Id.*

[143] *See* Apfel, *supra* note 111, at 576; 42 U.S.C. § 12101 (1994).

redress.[144]

This reality seems to point to the need to have homeless people designated a protected class in their own right. Since many, if not all, homeless people suffer from disabilities, the fact that their lack of standard domicile precludes them from benefiting from ADA protections is an injustice that warrants correction. In addition, protected class status might help homeless litigants encourage the court to toll the statute of limitations in any right of privacy/publicity claims they eventually file. Such a tolling should be an option for homeless people who, with all the problems they face, may not have the wherewithal to learn of infringements upon their privacy or publicity rights within the time frame allotted by the applicable statutes. Although it is rare to gain a tolling of the statute of limitations, many such statutes provide for tolling in the case of infancy or insanity.[145]

C. *Statute of Limitations*

One benefit of recognizing homeless people as a protected class is that it might facilitate their claims as disabled individuals. If their disability claims are recognized, there is a chance that the statute of limitations that restricts their ability to file right of privacy or right of publicity actions might be tolled. Although the standard tends to be high, it is an option that should be considered.[146]

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144 *See id.* at 577 (describing governmental and judicial discrimination toward homeless people, shelters, and shelter services); Johnson v. Dixon, 786 F. Supp. 1, 4 (D.D.C. 1991) (stating that the plaintiffs' reliance on the FHA to challenge the closure of two shelters was a "questionable" application of the statute, and that it was "doubtful" that the shelters could be deemed a "dwelling" within the meaning of the Act).

145 *See, e.g.*, N.Y. C.P.L.R. § 208 (McKinney 1999).

> If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues, except, in any action other than for medical, dental or podiatric malpractice, where the person was under a disability due to infancy. This section shall not apply to an action to recover a penalty or forfeiture, or against a sheriff or other officer for an escape.

Id.

146 *See, e.g.*, McCarthy v. Volkswagen of America, 55 N.Y.2d 543, 547-48 (1982) ("A person is 'insane' pursuant to C.P.L.R. 208 for the purposes of tolling the Statute of Limitations if he is unable to manage his business affairs and estate and to comprehend and protect his own legal rights and liabilities because of an over-all inability to function in

In *Bassett v. Sterling Drug, Inc.*,[147] an Ohio federal district court ultimately ruled against the plaintiff in an employment discrimination case that was not timely filed.[148] However, the court held that "in a suit between private parties brought under the ADEA, mental incompetence will toll the period for filing a charge with the EEOC when the surrounding circumstances indicate that equitable tolling is appropriate."[149]

Conclusion

The problem facing the homeless litigant who seeks to file a right of privacy or a right of publicity claim raises complex questions of private rights versus public freedoms and of valuation, on both a commercial level and a human autonomy level.[150] Alice Haemmerli's case for a Kantian right of publicity, idealistic as it sounds, is appealingly melodious in its "emphasis on reason, human value, and self-worth."[151] Were such a right of publicity to become the law, Diana clearly would have a viable claim, for "autonomy implies the individual's right to control the use of her own person, since interference with one's person is a direct infringement of the innate right of freedom."[152] Haemmerli acknowledges that there arises a question of "whether the autonomy right to control the use of one's own person extends to control over images or other objectifications of the self."[153] After considering Kant's theory of property, Haemmerli concludes:

> [I]n a Kantian system, property is inseparably associated with one's "personhood" because property grows out of freedom and freedom is essential to personhood. As to whether a person should be able to claim a property right in the use of her objectified identity, there is no logical reason why she should not and every reason why she should: if one's own image, for example, is treated as an object capable of "being yours or mine," why should it not be claimed by the person who is its natural source?

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society.") This definition of "insanity" arguably applies to a significant number of homeless people. *But see* Lopez v. Citibank, N.A., 808 F.2d 905, 906 (1st Cir. 1987) (explaining that a long line of federal cases "explicitly holds that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations").

147 578 F. Supp. 1244 (S.D. Ohio 1984).

148 *See id.* at 1246.

149 *Id.* at 1247.

150 *See* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 971 (1964) (arguing that Prosser had misconstrued Warren and Brandeis). Bloustein's article defines the right of privacy as one of "inviolate personality" that "defines man's essence as a unique and self-determining being." *Id.*

151 Haemmerli, *supra* note 13, at 414.

152 *Id.* at 416.

153 *Id.* at 417.

> To the extent it is available as some person's property – and if viewed as an object, it must be so available – its source would seem to have the strongest claim. That claim would also necessarily be prior to others' in both temporal and qualitative terms. The connection between a person and her physical characteristics is innate. It therefore logically precedes that of any particular physical manifestation of the image or any manipulation of it by others . . . .[154]

In this system, the basis for determining value is not merely commercial, but more "holistic." While many might cringe at the system's expansiveness, no greater injustice is likely to result from its adoption than from remaining within the confines of the status quo,[155] particularly given the protections against excesses that exist within the Constitution and other legal doctrines such as the first sale doctrine.[156] Just as the courts initially resisted the celebrity's right of publicity, as demonstrated in *O'Brien v. Pabst Sales Co.*,[157] they now often resist the non-celebrity's right of publicity by refusing to recognize that a non-celebrity's image can have significant commercial value, depending on the nature of the appropriation and the advertising or trade purpose for which it is used.[158] For

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154 *Id.* at 418.

155 *See id.* at 389.

> The timing is propitious for an overhaul of the right of publicity. Existing doctrine remains in a state of disarray that leaves room for wrongs without remedies, despite its characterization as a field of "settled" law, with a "self-evident" philosophical basis. Existing practice is equally confused, with fifty state regimes protecting differing aspects of identity, for varied terms, and with disparate remedies. As the right has become more important in economic terms, the need to reassess it, reformulate it, and legislate it at the federal level has become concomitantly more pressing.

Id.

156 *See id.* at 476.

> [T]he Kantian right is expansive in the sense that it theoretically accommodates both economic and moral objections to the unauthorized commercial exploitation of an individual's identity. At the same time, however, it is constrained in practice by the need to balance it against strong competing public needs and First Amendment concerns. The balance between this property right and speech interests is conditioned by the type of speech at issue and the availability of other means of delivering its message; both First Amendment and intellectual property doctrine suggest the latter consideration. Other intellectual property limiting factors, such as fair use and first sale doctrine, are also useful in fashioning controls capable of minimizing any dangers to societal self-expression posed by an expansive right of publicity. Thus, although we begin with a right that is somewhat broader and deeper than its Lockean cousin, it is, in the end, a right that is not only theoretically defensible, but also capable of being safely legislated.

Id.

157 124 F.2d 167 (5th Cir. 1941).

158 *See* Haemmerli, *supra* note 13, at 456 ("If a right of publicity is to exist at all, it is logically inconsistent to limit the scope of relief provided by it on the basis of the plaintiff's status.").

this reason, a formulaic approach that excludes either celebrities (as occurred in *O'Brien*)[159] or non-celebrities (as occurred in *Dora v. Frontline Video, Inc.*)[160] is likely to result in inequities.[161]

The view that right of publicity can isolate the commercial value of one's identity from its dignitary or moral value reflects a certain naïveté in that the commercial value to be determined derives from, and depends upon, the persona of the individual whose identity has been appropriated. That persona, in essence, incorporates both one's dignitary and one's commercial value.

> The term "persona" has long been used to describe the facet of personality that is presented to the outside world. It is a useful and desirable term because it evokes human personality and, in turn, human freedom. . . . [T]his Article proposes the Kantian person (i.e., the autonomous human being capable of rationality and morality) as the source of a moral and economic property right in objective indicia of personality. The term "persona" captures the set of such indicia quite nicely. In addition, "persona" avoids whatever confusion may now surround the term "identity" as a result of decisions in the Ninth Circuit.[162]

Even in the right of publicity's attempt to protect against concern for a diminution of the value of a celebrity's identity through overuse, there looms a concern over injury to one's dignity.[163]

The dignitary and commercial interests of the right of privacy and the right of publicity are corollaries of one another and should be recognized as such. In addition, an understanding that mere acknowledgment of one's rights, which adds to both one's worth and sense of self-worth,[164] should make the availability to homeless people of a right of publicity not seem so far-fetched.[165]

While homeless litigation has not yet reached into this domain, the inevitable push in our society toward equality and em-

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159 *See* 124 F.2d at 167.

160 18 Cal. Rptr. 2d 790 (1993).

161 The reverse is also true, i.e., an overbroad interpretation of protectable identity can lead to problematic rulings. *See* White v. Samsung Elec. America, Inc., 989 F.2d 1512 (9th Cir. 1993) (holding that game show hostess Vanna White could seek relief for an advertisement depicting a robot in a blond wig and slinky dress that was meant to evoke the plaintiff's persona). Haemmerli points out that "the Ninth Circuit has been maligned for its alleged excesses in this area." Haemmerli, *supra* note 13, at 396. "The real problem in *White* was not so much a failure to apply the First Amendment as an overextension of the scope of 'identity' supporting the publicity rights claim." *Id.*

162 Haemmerli, *supra* note 13, at 480.

163 Consider the literal and figurative meanings of the adjective, "cheap," and its exclusively figurative relative, "cheapen."

164 *See id.*

165 This Note does not intend the right itself to become "cheapened" through overuse. In order to be upheld, the infringement would have to be bona fide, resulting in the unjust enrichment of the appropriator.

powerment for all will someday result in recognition of Diana's right to control the use of her image. Perhaps someday, someone like Diana, photographed for another's unjust enrichment, will file suit for violation of her publicity rights and receive compensation that justly reflects the successful sale of the photo. It is no accident, after all, that Diana felt perfectly "at home" in front of Bergdorf Goodman.

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