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From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption

Samantha Barbas
University at Buffalo School of Law

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SAMANTHA BARBAS†

INTRODUCTION

In 1900, a modest young woman named Abigail Roberson unexpectedly found her picture on an ad for Franklin Mills flour.[1] The advertisement was plastered on billboards, walls, and storefronts throughout the country.[2] When Roberson found out about the unauthorized use of her image in the ad, she was outraged.[3] She was distressed that her picture had been associated with a cheap commercial product and "mortified" that her face had been turned into an object and spectacle—"a method of attracting widespread public attention to . . . wares."[4] The public's sympathies were on her side: circulating a woman's picture "as an advertisement for . . . merchandise" was seen as immoral and scandalous.[5] Roberson sued the advertiser for emotional and dignitary injuries—for an invasion of her right to privacy.[6]

Almost three decades later, in 1929, another young woman brought suit in New York state court over the unauthorized commercial use of her image.[7] Gladys Loftus' picture had been used without her consent in an advertisement for a film that was posted conspicuously

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† Associate Professor of Law, SUNY Buffalo Law School. J.D. Stanford Law School; Ph.D., History, University of California, Berkeley.

1. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).
2. *See id.*
3. *Id.*
4. *Id.* at 450 (Gray, J., dissenting).
5. *The Abolition of Breach of Promise Suits*, 10 AM. LAW. 339 (1902).
6. *Roberson*, 64 N.E. at 544.
7. Loftus v. Greenwich Lithographing Co., 182 N.Y.S. 428 (App. Div. 1920).

around New York City.[8] Unlike Roberson, Loftus did not seek recovery for emotional, reputational, or dignitary injuries.[9] Words like "humiliation" and "mortification" appear nowhere in her claim or in the court's opinion. What she sought, instead, was purely pecuniary—she wanted to be paid for the use of her picture.[10]

At the turn of the twentieth century, cases like *Roberson* were not uncommon. Advertisers for various consumer goods regularly used images of random individuals in advertisements without their consent, causing great embarrassment and distress. "[T]he ordinary citizen, man or woman," one critic lamented, "has absolutely no redress against the machinations of the advertising agent who . . . may choose to utilize the picture of any reputable and retiring member of the community as a method of advertising . . . ."[11] This "misuse" of the human face was described as "revolting to common sense and common decency."[12] In response to this seeming plague of commercial exploitation, states began to recognize a tort of invasion of privacy—more specifically, a tort of commercial appropriation of identity, one of the four "branch[es]" of the tort of invasion of privacy.[13] Under the privacy or "appropriation" tort as it then existed, a person whose image had been used in an advertisement without authorization could sue and recover damages for dignitary and emotional harms.[14]

With the growth of a mass consumer culture and the advertising industry in the twentieth century, acts of commercial appropriation and appropriation litigation

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8. *Id.*

9. *Id.*

10. *Id.*

11. *The Miscalled Right of Privacy*, 10 AM. LAW. 293 (1902).

12. *The Right to Privacy*, N.Y. TIMES, Apr. 3, 1904, at 6.

13. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401-06 (1960).

14. *See generally* Jonathan D. 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 (1999) [hereinafter Kahn, *Bringing Dignity Back to Light*].

increased significantly. By the 1950s, however, the typical appropriation claim looked much different than it had in the tort's early years. Cases were more often like *Loftus* than *Roberson*. Plaintiffs sought to recover lost profits from the unauthorized use of their images, rather than compensation for shame, humiliation, or emotional distress. Several states formally reworked the tort so that it no longer principally compensated dignitary and emotional injuries, but rather economic harms—it protected the "pecuniary interest in the commercial exploitation of [] identity."[15] In some states, the appropriation tort was redesignated as a quasi-property interest, a "right of publicity."[16]

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15. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983).

16. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953); Robert C. Post, *Rereading Warren and Brandeis*: *Privacy*, *Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 666-67 (1991). Post wrote:

> Growing out of the appropriation tort, or . . . substituting for the appropriation tort, the right of publicity was designed as a property right that would safeguard the goodwill created by celebrities in their public persona. . . . [T]he "key feature distinguishing the Right of Publicity" from the personal right to privacy is the "measure of damage," which "focuses upon the commercial injury to the plaintiff" instead of upon indignity and mental distress.

Id. In some states, the tort of appropriation still compensates mental distress caused by the unauthorized commercial exploitation of a person's identity—albeit in a narrow and cramped manner, as will be discussed—while the "right of publicity" protects the pecuniary interest in one's identity. *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 368 (Mo. 2003) (en banc); People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269 (Nev. 1995); *see also* Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir. 1995) (While privacy rights protect against "mental distress that accompanies undesired publicity" the right of publicity protects "pecuniary, not emotional, interests."); Post, *supra* at 672 (noting the minority view that still constructs the tort normatively as an "affront to dignity").

As J. Thomas McCarthy has observed, "An infringement of the right of publicity focuses upon injury to the pocketbook, while an invasion of 'appropriation privacy' focuses upon injury to the psyche." J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.8(C) (1987). McCarthy wrote:

> The distinction between these two torts is the interest each seeks to protect. The appropriation tort seeks to protect an individual's personal interest in privacy; the personal injury is measured in terms of the mental anguish that results from the appropriation of an ordinary

This shift from an exclusively dignitary tort to one oriented around profit and "publicity"—from "protecting the integrity of an individual's identity to protecting [its] economic value"[17]—has for decades been the subject of legal writing and commentary. In 1960, William Prosser, in his well-known law review article *Privacy*, was one of the first to observe that the appropriation tort had moved far from its original concern with protecting dignity and "privacy."[18] "The interest protected," he wrote, "is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and [image] as an aspect of his identity."[19] Several scholars since Prosser have similarly noted that the "early association of appropriation claims with such intangible . . . attributes of the self as dignity and the integrity of one's persona" were lost . . . "as property-based conceptions of the legal status of identity have come to the fore."[20] No one seems to dispute that this shift occurred.[21] *Why* it happened,

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> individual's identity. The right of publicity seeks to protect the *property* interest that a celebrity has in his or her name . . . .

Id. (quoting *Bobby Berosini, Ltd.*, 895 P.2d at 1283); *see also* Roberta Rosenthal Kwall*, A Perspective on Human Dignity*, *the First Amendment, and the Right of Publicity*, 50 B.C.L. REV. 1345, 1345-46 (2009) ("Publicity actions typically are regarded as the means to achieve compensation for the loss of financial gain due to a defendant's unauthorized appropriation. In contrast, the right of privacy continues to be regarded as the predicate for actions based on hurt feelings.").

17. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1167 (2006).

18. *See* Prosser, *supra* note 13, at 406; *see also* Kahn, *Bringing Dignity Back to Light*, *supra* note 14, at 226 ("Prosser set the stage for the eclipse of privacy-based concerns for dignity by an interest in the material value of celebrity identity.").

19. Prosser, *supra* note 13, at 406.

20. Kahn, *Bringing Dignity Back to Light*, *supra* note 14, at 223.

21. Dogan & Lemley, *supra* note 17, at 1167, 1172 (separating the "privacy" phase of appropriation from the "right of publicity" phase); Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 853 (1995) [hereinafter Halpern, *The Right of Publicity: Maturation*] ("After forty years of wandering in a definitional wilderness, the right of publicity appears to have reached the promised land of independent status, a distinct right and remedy unmoored from privacy . . ."); Kahn, *Bringing Dignity Back to Light*, *supra* note 14, at 213-14 ("[T]he privacy-based tort of appropriation has receded into the background

however, has yet to be sufficiently explained. Why was the tort action for commercial appropriation of identity, initially rooted in dignitary and privacy interests, eventually eclipsed by a profit-oriented "right of publicity"?[22]

The reigning account in the legal scholarship is the "celebrity thesis." Scholars have argued that the emphasis on profit over privacy was a response to the development of an American celebrity culture in the first half of the twentieth century.[23] By the 1950s, celebrity, particularly film celebrity, had become a source of immense economic value. But celebrities lacked legal means to protect that value. Courts did not permit stars whose images had been commercially exploited without their consent to recover under the appropriation tort as it then existed, as a dignitary tort. The rationale was that a person who made a business out of publicizing herself could not legitimately claim that her dignity or "privacy" had been injured by unwanted publicity. The obvious inadequacy of the existing tort in protecting the economic "needs of Broadway and

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as its flashier cousin, publicity, has risen to prominence."); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 228 (2005); Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203 (1954).

22. *See* Kahn, *Bringing Dignity Back to Light*, *supra* note 14, at 214 (noting that the right of publicity "eclipsed" the tort of invasion of privacy by commercial appropriation); *see also* William Parent, *A New Definition of Privacy for the Law*, 2 L. & PHIL. 305 (1993).

23. McKenna, *supra* note 21, at 228. McKenna writes:

> Celebrities . . . actively seek and profit from attention . . . . [C]ourts and commentators therefore assumed that they suffer no hurt feelings from receiving publicity . . . . Thus, privacy claims were unavailable to celebrities, and they needed some other claim to prevent commercial uses of their identities. The right of publicity was created specifically to meet that need.

Id.; *see also* Mark Bartholomew, *A Right is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 310-11 (2011) [hereinafter Bartholomew, *A Right is Born*]; Joseph R. Grodin, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1127-29 (1953); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality,* 39 VAND. L. REV. 1199, 1205-07 (1986) [hereinafter Halpern, *The Right of Publicity: Commercial Exploitation*]. *See generally* Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People in the Media*, 88 YALE L.J. 1577 (1979).

Hollywood"[24] led courts to develop a "right of publicity" that eventually supplanted or overshadowed the earlier dignity or privacy-based action.[25]

This celebrity thesis is not wrong, though it is incomplete. It is true that the advent of a celebrity culture did create significant "publicity value" in star images. It is also true that the privacy or dignity-based tort did not protect famous people's economic interests in their public personae. But the rise of celebrity culture alone cannot explain why dignity seemed to fall out of the appropriation equation. It does not explain why the unauthorized commercial use of the persona, once regarded primarily as an injury to one's dignity and reputation, came to be viewed as principally, if not exclusively, an economic injury. This article argues that there is something critical missing from the current explanation, and that the missing element is an understanding of the social meanings surrounding the commercial use of the human persona. That a phenomenon once considered to be morally reprehensible, even scandalous, came to be seen by many as more traumatic to the *pocketbook than to the personality* suggests a cultural shift of the first order—a fundamental change in social attitudes towards advertising, consumer culture, and the commercialization of human identity.

This Article offers an alternative account of the tort's transformation, one that explains the change as a function of evolving social norms. The basic argument is that the law

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24. Nimmer, *supra* note 21, at 203.

25. MCCARTHY, *supra* note 16, at § 5.8(B). According to McCarthy:

> "[P]rivacy" law, locked into the traditional rubric of "a right of human dignity to be left alone and private," seemed unable to accommodate the claims of celebrity plaintiffs. It was thought that those who were "celebrities" could suffer no indignity or hurt feelings merely because of exposure in advertising use. While the non-celebrity plaintiff could at least make a show of hurt feelings, the celebrity was thought to be able to make a claim only for the loss of payment of the reasonable value of his or her identity. The traditional law of privacy permitted no such claim. Thus was born the concept of the Right of Publicity. . . . Like Eve from Adam's Rib, the Right of Publicity was carved out of the general right of privacy.

Id.

of appropriation shifted its register in response to changing public views on the morality of advertising and mass consumption. In the last decades of the nineteenth century, when prevailing middle-class values were frugality, modesty, and self-restraint, advertising and the consumer marketplace were associated with forbidden temptation and regarded as corrupt and morally illicit.[26] It was embarrassing and undignified to be publicly associated with consumer products. Using a person's image in an advertisement—commodifying her identity and associating her with the immoral "taint of commerce"—represented an affront to that person's dignity and reputation. The tort of appropriation was created to redress these intangible harms.

By the 1940s, the cultural meaning of mass consumption had entirely transformed.[27] The United States had become a celebrity culture and a consumer culture, obsessed with conspicuous consumption. Being publicly associated with products, and being seen by the public as an endorser of products, were no longer regarded as humiliating and disreputable acts, but rather, in many cases, as glamorous and prestigious. In this milieu, courts began to question whether the use of a person's image in an ad, even if unconsented, was really an insult to one's dignity and reputation. The right of publicity eclipsed the right of privacy when modern consumer culture came to see loss of profit as the more serious and probable consequence of the unauthorized commercial exploitation of a person's image, rather than harm to one's dignity or emotions.

The first two parts of this article narrate the origins of appropriation as a dignity-based tort in the last two decades of the nineteenth century. The appropriation tort originated from a little-known episode that was described at the time

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26. *See e.g.*, T.J. JACKSON LEARS, NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE 1880-1920, at 5 (University of Chicago Press 1994) (1981) [hereinafter LEARS, NO PLACE OF GRACE]; Simon J. Bronner, *Reading Consumer Culture, in* CONSUMING VISIONS: ACCUMULATION AND DISPLAY OF GOODS IN AMERICA 1800-1920, at 13 (Simon J. Bronner ed., 1989).

27. *See* discussion *infra* Part IV.B.

as a crisis of "circulating portraits." As Part I explains, this crisis arose from the convergence of two new social forces in the late 1800s: photography and mass advertising. Advertisers of various consumer products sought to use photographic portraits of people to enliven their advertisements, but such portraits were not easy to obtain. Photographic technologies were crude, and at a time when advertising and the world of consumer goods were regarded as morally unsavory, it was challenging to find people who would pose for ads. In desperation, advertisers stole portraits of individuals from photography studios and used them in ads without the consent of the subjects. As men and women of all backgrounds unexpectedly found their pictures in ads for patent medicines, complexion beautifiers,[28] and 5 cent cigars, they expressed feelings of shame, indignity, and outrage. Few things were more insulting and degrading, it was said, "than the wanton and brutal publication for advertising purposes of the portrait of one who has not consented."[29]

Beginning in the 1890s, these victims of the "circulating portrait" problem began to seek legal redress for injuries to their feelings, reputations, and dignity, as Part II explains. Many of them brought cases for libel, claiming that the advertisers' false depiction of them as endorsers of consumer products was injurious to their reputations. By 1900, they had also begun to sue under the newly invented tort of invasion of privacy. The privacy tort, famously proposed by Warren and Brandeis in 1890 and adopted by several states in the early twentieth century, was designed to redress the dignitary injuries—harms to one's honor, sensibilities, and sense of self—caused by the unauthorized use of one's portrait in an advertisement.[30]

Parts III and IV discuss the demise of the nineteenth century anti-commodification ethos, the rise of a modern consumerist worldview, and the subsequent transformation

28. *See, e.g.*, CHI. TRIB., July 29, 1907.

29. Burdett A. Rich, *What Invasions of Privacy are Unlawful?,* 18 L. STUDENT'S HELPER 238 (1910).

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

of the appropriation action. By the 1920s, earlier moral restrictions on consumerism and material acquisition had begun to weaken. A new spirit of materialism, sensual indulgence, and self-display was beginning to take root. Movie stars and other entertainment performers, who were being paid large sums to lend their images to advertisers, came to be regarded as the epitome of social status and achievement. As the commercialization of identity took on an aura of prestige, the argument that the unauthorized advertising use of one's image subjected one to extreme indignity, opprobrium, and scorn became difficult to maintain. Indeed, many individuals whose identities were used in ads and other commercial venues were no longer asking for recovery for dignitary injuries, but were seeking to recover what the defendant would have paid them for the commercial use of their pictures. In what would surely be an affront to earlier, nineteenth century sensibilities, they sought to make money from their own images. A testament to this new cultural orientation, the law no longer targeted representations that were humiliating and undignified but rather representations that were uncompensated.

This article explains appropriation's transformation through the lens of cultural history. It also seeks to understand trends in American culture from the vantage of tort law. The doctrinal shift that this article describes can be seen as part of a broader cultural, moral, and psychic transformation that ensued as the United States became a consumer culture in the first half of the twentieth century, particularly the first two decades of the century. Historians have written extensively on the "revolution in manners and morals" that occurred in this time, and how Americans used a variety of cultural texts—from literature to art to fashion shows—to evaluate the rapid changes occurring around them and reenvision "new relationships between goods and people."[31] Another venue where this reorientation was taking place, I want to suggest, was legal cases brought over advertising appropriation of personal images. Appropriation cases and the public discourse that surrounded them became forums where the social and personal implications

31. Bronner, *supra* note 26, at 31-32.

of advertising and mass consumerism were discussed and debated. Through appropriation litigation, the law was being used to rethink connections between people, morals, markets, and goods.

I. THE CRISIS OF THE "CIRCULATING PORTRAIT," 1880-1905

The tort of commercial appropriation of identity as a dignity or privacy-based tort originated from the cultural and moral upheaval that took place in the United States in the last two decades of the nineteenth century. It was a response to perceived assaults to the self and the social fabric posed by new modes of production, new forms of technology and communication, and new sources of desire: namely, a new mass market for consumer goods, a commercial advertising industry, and novel photographic technologies. Advertisers' desperation for photographs to use in their advertisements, and their subsequent theft and misappropriation of portraits, led to a social and moral crisis that generated a multifaceted legal response. This problem was described at the time as a crisis of "circulating portraits."

A. *The Origins of Mass Advertising*

In the last quarter of the 1800s, American capitalism shifted from its agrarian base to a new regime of industrial manufacturing. Innovations in technology—in particular, the development of new continuous-process machinery—led to the mass production of low-priced, packaged consumer items.[32] Standardized, inexpensive food products, clothing, and toiletries flooded the market.[33] Manufacturers built large marketing and purchasing networks, and a spectrum of retail businesses, from dry goods stores to department stores, arose in both urban and rural areas across the country.[34] By the 1890s, the nation had established the

32. DANIEL POPE, THE MAKING OF MODERN ADVERTISING 32 (1983).

33. *See id.*

34. *Id.* ("The era of industrialization from the mid-nineteenth century through the 1890s was marked by qualitative change as well as staggering quantitative increase."); *see also* Bronner, *supra* note 26, at 25-26.

social and institutional foundations of what would become, in the twentieth century, a flourishing consumer society.

This rapid growth in productive capacity far outpaced the needs of the population.[35] The remedy for the surplus of commodities became the creation of consumer demand.[36] In order for the economy to function properly, traditional inhibitions to spending—a reverence for the virtues of frugality and restraint—had to be cleared away.[37] As a result, entrepreneurs became preoccupied with selling—with the distribution and traffic of goods.[38] They worked hard to generate yearnings for products, for items that were not necessities, but rather whims, fantasies, and luxuries.

The key agent in the creation and legitimation of consumer desire was advertising.[39] Print advertising for products and services was well-established in the United States, but its nature and role in American society changed substantially in the latter half of the nineteenth century. Before then, the function of advertising had been primarily one of providing facts about products.[40] By the 1880s, advertising's principal purpose was to generate desire and "attempt to influence buyers by any means possible."[41] Early

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35. DAVID M. POTTER, PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER 172-73 (Paperback ed. 2009).

36. *See id.* at 173.

37. *Id.* at 172.

38. William Leach, *Strategists of Display and the Production of Desire, in* CONSUMING VISIONS: ACCUMULATION AND DISPLAY OF GOODS IN AMERICA, 1800-1920, 99, 101 (Simon J. Bronner ed., 1989).

39. POTTER, *supra* note 35, at 172 ("[A]dvertising is not badly needed in an economy of scarcity . . . . It is when . . . abundance prevails—that advertising begins to fulfill a really essential economic function.").

40. *Id.* at 171.

41. SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET 91 (1989). *See also* POTTER, *supra* note 35, at 171; T.J. Jackson Lears, *From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture*, *in* THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980, at 68 (Richard Wightman Fox & T.J. Lears eds., 1983) [hereinafter Lears, *From Salvation to Self-Realization*] ("Amid a mounting din of product claims, many national advertisers shifted their focus from presenting information to attracting attention.").

American advertisers had typically been local wholesalers or retailers, but by the late 1800s, advertising began to be created by the producers of various consumer goods.[42] The first national advertisers of consumer products were mass manufacturers of packaged, brand-name household goods, such as cereals and soaps.[43] By 1900, ads for these household items, and for mass-produced leisure products—bicycles, perfumes, furniture, and fashion items—appeared in a variety of forms, including pamphlets, brochures, window displays, and billboards.[44] Ads also populated newspapers and magazines; by the end of the nineteenth century, most publications "consider[ed] advertisements as a vital source of revenue."[45]

In this era there was no advertising "industry" to speak of.[46] Manufacturers were generally responsible for creating their own advertisements, and ad "agents" secured places for them in periodicals and other public places.[47] As the volume of advertising grew, these manufacturer/advertisers employed increasingly dramatic strategies to distinguish their appeals from those of their competitors. In 1893, Joel Benton, a frequent writer in the advertising trade press, commented that because of the growing competition for

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42. PAMELA WALKER LAIRD, ADVERTISING PROGRESS: AMERICAN BUSINESS AND THE RISE OF CONSUMER MARKETING 53-56 (1998).

43. *See id.*

44. Advertising images began to fill the visual landscape. *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 156 (1993); *see also* RICHARD OHMANN, SELLING CULTURE: MAGAZINES, MARKETS, AND CLASS AT THE TURN OF THE CENTURY 175 (1996) (noting "the saturation of commercial space with commercial messages and images").

45. JULIANN SIVULKA, SOAP, SEX, AND CIGARETTES: A CULTURAL HISTORY OF AMERICAN ADVERTISING 19 (2012). The growth of national advertising in the 1890s dovetailed with the growth of magazine circulation, which increasingly relied on advertising revenues to cut newsstand prices. *Id.*; *see also* LAIRD, *supra* note 42, at 86.

46. SIVULKA, *supra* note 45, at 32.

47. By the 1900s, agencies would be formed for the purposes of creating advertisements as well as securing their placement. MICHAEL SCHUDSON, ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY 169-70 (1984); POPE, *supra* note 32, at 119.

audiences, "the advertiser . . . needs to 'invoke attention and fasten remembrance.'"[48] As a result of this need, "a change has been rapidly coming, . . . calculated to make the style almost more important than the thing said."[49] Each individual advertisement became "engaged in an escalating struggle for the reader's" eye.[50] Images became an important part of this "struggle."[51]

In the mid-1800s, chromolithography, an elaborate method for reproducing hand-drawn images, had been used to illustrate print advertising. At that time, technology did not permit photographs to be printed in newspapers and magazines.[52] By the 1890s, however, the development of the halftone process enabled the mass reproduction of images in the press.[53] The halftone screen process allowed printers to print photographs on pages along with typeset copy.[54] By 1900, the halftone process was a principal technique for publishers of mass illustrated materials and was in common use in newspaper publishing.[55]

With its aura of novelty, glamour, and authenticity, photography soon replaced chromolithography as the

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48. LAIRD, *supra* note 42, at 264.

49. *Id.* at 264-65.

50. POPE, *supra* note 32, at 233-34.

51. LAIRD, *supra* note 42, at 264; SIVULKA, *supra* note 45, at 64 ("Growing competition for consumer goods created a need for images that stood out on the pages of magazines and posters.").

52. *See* KEVIN G. BARNHURST & JOHN NERONE, THE FORM OF NEWS: A HISTORY 114-5 (2001) (discussing the difficulties of picture reproducing in the periodicals of the nineteenth century).

53. NEIL HARRIS, CULTURAL EXCURSIONS: MARKETING APPETITES AND CULTURAL TASTES IN MODERN AMERICA 306 (1990); ROBERT HIRSCH, SEIZING THE LIGHT: A HISTORY OF PHOTOGRAPHY 316 (2000).

54. ELSPETH H. BROWN, THE CORPORATE EYE: PHOTOGRAPHY AND THE RATIONALIZATION OF AMERICAN COMMERCIAL CULTURE, 1884-1929, at 162 (2005).

55. *Id.* at 163; JOHN TAGG, THE BURDEN OF REPRESENTATION: ESSAYS ON PHOTOGRAPHIES AND HISTORIES 56 (1988). The invention of the halftone triggered what has been described as a visual "revolution" in American culture. HARRIS, *supra* note 53, at 306. The generation of Americans living between 1885 and 1910, in the words of historian Neil Harris, went through an "experience of visual reorientation that had few earlier precedents." *Id.*

technology of choice for advertising illustration.[56] During the 1890-1910 period, photography suffused the advertising space in popular magazines. In 1892, according to one observer, "photography is seen to have expanded over more than one-half of the advertising space."[57] Advertisers especially favored photographic portraits—images of the human face—as a means of attracting attention to goods by imbuing products with what was known in the trade as "human interest."[58] They particularly coveted photos of females because of women's association with respectability —women's photos would "succeed in appealing to the 'better' sorts of audiences of both genders," noted one commentator.[59] Several commercial companies, particularly liquor and patent medicines, decided that their ads "ought to be 'brightened by pretty faces,' and they began to use photographs of beautiful women for this purpose."[60] "Pretty girls," it was said, "could . . . sell absolutely everything."[61]

By 1900, photographic portraits appeared in ads for a vast array of consumer products.[62] As one writer noted in 1902, "most magazine advertisements draw attention to . . . the article . . . whenever possible by a photograph."[63] "If a pretty girl holds up the candy or the soap, or a cherubic

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56. LAIRD, *supra* note 42, at 260-61; MILES ORVELL, AMERICAN PHOTOGRAPHY 184 (2003) [hereinafter ORVELL, AMERICAN PHOTOGRAPHY].

57. BROWN, *supra* note 54, at 163 (quoting Walter Scot, a "contemporary observer").

58. Elspeth H. Brown, *From Artists' Model to the 'Natural Girl': Containing Sexuality in Early-Twentieth-Century Modeling, in* FASHIONING MODELS: IMAGE, TEXT AND INDUSTRY 50 (Joanne Entwistle and Elizabeth Wissinger eds., 2012) [hereainfter Brown, *From Artists' Model to the 'Natural Girl'*].

59. LAIRD, *supra* note 42, at 266.

60. LOIS W. BANNER, AMERICAN BEAUTY 262 (1983) [hereinafter BANNER, AMERICAN BEAUTY].

61. HEINZ K. HENISCH & BRIDGET A. HENISCH, THE PHOTOGRAPHIC EXPERIENCE 1839-1914: IMAGES AND ATTITUDES 232 (1994). A series of "pretty girl" advertising images were in use at the turn of the century by such manufacturers as Coca-Cola and Kodak. SIVULKA, *supra* note 45, at 57-58.

62. John Brisben Walker, *Beauty in Advertising Illustrations*, COSMOPOLITAN, Sept. 1902, at 33.

63. *Ethics and Esthetics of Advertising*, INDEP., Jan. 2, 1902, at 53.

youngster eats the health food, so much the better."[64] It did not matter that these pictures were largely irrelevant to the advertised item, explained the advertising trade journal *Printers' Ink*.[65] The philosophy in the publishing field was "better any picture than no picture."[66]

B. *The Photographic Image*

Although the use of photographs in ads was novel in the late nineteenth century, photography was by no means a new medium. In the United States, portrait photography dates back to the 1840s and the invention of the daguerreotype, the first commercially successful photographic technology.[67] By the mid-1800s, photography studios had sprung up in cities across the country.[68] Sitting for one's photograph became a ritual of self-representation for Americans of all classes.[69]

From the start, the photographic medium was understood to be essentially different from other media of representing the self. One outstanding feature was its apparent verisimilitude: "At the heart of the enthusiasm for the new process of photography," historian Miles Orvell writes, "was the simple astonishment and pleasure at seeing an image of external reality reproduced with such fidelity."[70] The photographic image was seen as not merely more accurate than hand drawings but also more authentic.

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64. *Id.*

65. LAIRD, *supra* note 42, at 266.

66. HENISCH, *supra* note 61, at 235 ("Often a photograph, apparently chosen at random and quite irrelevant to the matter in hand, can be found slapped to the back of an advertisement, as a tiny hook to catch an eye.").

67. HENISCH, *supra* note 61, at 1; MILES ORVELL, THE REAL THING: IMITATION AND AUTHENTICITY IN AMERICAN CULTURE, 1880-1940, at 21 (1989) [hereinafter ORVELL, THE REAL THING].

68. ORVELL, AMERICAN PHOTOGRAPHY, *supra* note 56, at 21. "By 1853, three million daguerreotypes were being made annually and there were eighty-six portrait galleries in New York City alone . . . ." TAGG, *supra* note 55, at 43.

69. The photograph "[let] virtually everyone establish a visible self-image," and as such, became an "emblem of [] democracy." ORVELL, AMERICAN PHOTOGRAPHY *supra* note 56, at 21.

70. *Id.* at 19.

It was widely believed that the photographic portrait—particularly of the face—captured the essence of a person.[71] Photographic portraits were not simply a record of appearance but a symbol of the inner self, a "window into the soul."[72] Professional photographers developed a rationale which held that the "true photographic artist" treated surface appearances as expressions of a deep inner reality.[73]

Portraits were typically commissioned for personal uses, and portraits of individuals and families were collected in albums or hung on the walls of homes.[74] Sometimes they were given to others.[75] In the mid-1800s, c*artes-de-visite*, portraits glued to a card with the individual's name printed on the back,[76] were circulated among friends and acquaintances as "calling cards" of personal identity.[77] The ubiquity of photographic portraits and "the near-universality of the experience of sitting for one's daguerreotype circulated throughout America a new regard for visibility, for one's own image as a medium of self-presentation," historian Alan Trachtenberg writes.[78] The men and women who sat for their photographs attended carefully to every detail—clothing, poses, backdrop, expression—to create images that indicated "this is how I

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71. ORVELL, THE REAL THING, *supra* note 67, at 89; *see also* MARY WARNER MARIEN, PHOTOGRAPHY: A CULTURAL HISTORY 74 (2d ed. 2006). "The idea that the human face carries indelible signs of the real character and attributes of a person is ancient." PETER HAMILTON & ROGER HARGREAVES, NATIONAL PORTRAIT GALLERY (GREAT BRITAIN), THE BEAUTIFUL AND THE DAMNED: THE CREATION OF IDENTITY IN NINETEENTH CENTURY PHOTOGRAPHY 63 (2001).

72. LINDA HAVERTY RUGG, PICTURING OURSELVES: PHOTOGRAPHY AND AUTOBIOGRAPHY 88 (2007).

73. ALAN TRACHTENBERG, READING AMERICAN PHOTOGRAPHS: IMAGES AS HISTORY: MATHEW BRADY TO WALKER EVANS 27 (1990).

74. ORVELL, THE REAL THING, supra note 67, at 73.

75. *Id.*

76. *See generally* ROBIN & CAROL WICHARD, VICTORIAN CARTE-DE-VISITE (1999).

77. TAGG, *supra* note 55, at 50.

78. TRACHTENBERG, *supra* note 73, at 29.

look, this is what I do, this is who I am."[79] With great interest and care, people memorialized themselves with their photographs, circulated those images to desired audiences, and displayed them in contexts they wished to be seen.[80]

C. *The Appropriated Image*

Despite their efforts to control their photographic images and the circulation of those images, late nineteenth century photographic subjects found their pictures appropriated for a variety of commercial uses. In this era, the public's fascination with photographic images led to a tremendous market in photographs of all kinds.[81] Photographers retained the negatives of portraits and made unauthorized copies to display as advertisements in their studio windows.[82] Sometimes photographers sold portraits to printers who used them on cards and other decorative items.[83] Often they were sold to dry goods stores and junk shops.[84] In the 1890s, the *New York Tribune* reported that small shops "peddled the second hand stock of the cheapest East Side photograph parlors . . . pictures of bridal couples in full regalia, stiff and unhappy-looking family groups."[85] Collectors would amass pictures for as little as a penny a piece, and there were rooms in homes that were "papered with photographs."[86] Pictures "were dispensed from vending

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79. HIRSCH, *supra* note 53, at 79. *See generally* HENISCH, *supra* note 61, at 13.

80. ORVELL, AMERICAN PHOTOGRAPHY, *supra* note 56, at 13 ("[T]he camera has been the prime instrument for self-representation, capable of fashioning an image for public consumption in a democratic republic where personal identity and national identity were always to be invented and reinvented.").

81. Robert E. Mensel, *"Kodakers Lying in Wait": Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 AM. Q. 24, 32 (1991).

82. *See, e.g.*, Moore v. Rugg, 46 N.W. 141 (Minn. 1890).

83. *See, e.g.*, Pollard v. Photographic Co., L.R. 40 Ch. Div. 345 (1888).

84. *See, e.g.*, Mensel, *supra* note 81, at 32.

85. *Id.* (quoting *Casual Observer*, NEW YORK TRIBUNE, Dec. 18, 1898, at illustrated supplement) (internal quotation marks omitted).

86. *Id.* (quoting 18 PHOTOGRAPHIC TIMES & AM. PHOTOGRAPHER 560 (1888)) (internal quotation marks omitted).

machines, and even given away free in cigarette packs."[87] As a matter of law, it was not yet clear who "owned" the rights to these images— the subject or the photographer—but in a few decisions in the late 1800s, courts had begun to suggest that photographers breached an implied contract if they reproduced or sold a subject's image without her consent.[88]

Advertisers participated vigorously in this semi-illicit market for photographs. A host of technological, practical, and social factors made it difficult for advertisers to obtain photographic images through more systematic, licit channels. Photographs were costly to take and develop.[89] They required cumbersome equipment and could generally be taken only in studios.[90] There was not yet a commercial modeling industry—indeed, it was difficult to find subjects who would actually consent to have their images used in ads.[91] Artists' models occasionally posed for advertisements, but modeling was not considered to be a respectable occupation for women;[92] models were suspected of being prostitutes on the side.[93] In 1894, one commentator contended that women who worked as artists' models "do not allow their names to be spoken out of the studios, as there is an association with the word 'model' which makes a woman looked at askance."[94]

Stage actors and other performers occasionally posed for advertisements, although this was relatively rare before

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87. *Id.*

88. *Moore v. Rugg*, from 1890, established the rule that a photographer employed to make a negative and photographs for another had no right to use the negatives for his own purposes, under a theory of implied contract. *Moore*, 46 N.W. at 141.

89. STUART BANNER, AMERICAN PROPERTY 132 (2011) [hereinafter BANNER, AMERICAN PROPERTY].

90. *See generally* HIRSCH, *supra* note 53, at ch. 2.

91. As historian Elspeth Brown writes, "these new photographically based advertisements required models for their creation, yet there were . . . no such professional models to be found." Brown, *From Artist's Model to the 'Natural Girl,' supra* note 58, at 50.

92. *See id.*

93. *See id.* at 39.

94. George Holme, *Artists' Models*, MUNSEY'S MAG., Feb. 1894, at 527.

1900;[95] Americans' fascination with entertainment stars was largely a product of the twentieth century. In the late nineteenth century, actors and actresses were widely held in social disrepute.[96] The world of stage and show was associated with illicit sexuality and the bohemian underworld,[97] and actresses who sold their images to advertisers were viewed with disdain. By putting their bodies on display for pay, actresses flouted the middle-class female ideal of modesty.[98] Only women of questionable morals, it was said, permitted their bodies to be looked upon by strangers.[99] Advertisers that sought to create a respectable image for their products generally did not use actresses' portraits or endorsements.[100] Society's contempt towards actresses who sold their images to advertisers was both a function of repressive attitudes towards female sexuality and also a reflection of widespread cultural anxieties around mass consumption and the new consumer marketplace.[101]

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95. Historian Marlis Schweitzer notes that "despite middle-class hostility," some advertisers did use the names and images of actresses. Marlis Schweitzer, "*The Mad Search for Beauty": Actresses' Testimonials, the Cosmetics Industry, and the "Democratization of Beauty*," 4 J. OF THE GILDED AGE & PROGRESSIVE ERA 255, 263 (2005). "By the early 1890s, actresses and other popular performers endorsed an ever-widening range of products that included everything from chocolates and cigars to dentifrice and patent medicine." *Id.*

96. *See* BENJAMIN MCARTHUR, ACTORS AND AMERICAN CULTURE, 1880-1920, at 125 (2000) (noting that in the 19th century some church groups viewed actors as the "devil's minions," while among most groups, prejudice towards actors was "generally latent rather than active").

97. Many viewed the actress as a dangerous figure who "consorted with dangerous men, engaged in raucous public behavior, and played up her physical appearance to advance her career." Schweitzer, *supra* note 95, at 261.

98. Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 444 (1990); TAGG, *supra* note 55, at 104.

99. *See, e.g.*, Schweitzer, *supra* note 95, at 262.

100. *Id.* at 264.

101. *Id.* ("Rather than win consumers' trust, actresses' testimonials made consumers skeptical about the products they promoted and the companies selling them.").

D. *The Morality of Consumption*

In the latter half of the nineteenth century, the buying, selling, and advertising of commercial products were highly charged activities with negative moral and social connotations.[102] Immersion in the consumer marketplace—indulgence in the pleasures of spending and material acquisition—clashed with the longstanding middle-class ethic of frugality and restraint. The public was caught between the needs of an economy based on consumer demands and the traditional association of material yearnings with vice and illicit temptation.[103]

For much of the nineteenth century, the core values of the middle-class had been anti-consumerist: plain living, perpetual work, and compulsive saving.[104] People were encouraged to focus on moral and spiritual development, not external appearances, and to derive their honor and status from accomplishments, not possessions. The basis of this moral ideal was a rigid ethic of self-denial, self-control, and deferred gratification.[105] This "Victorian superego"—"internalized (and) systematically demanding," in the words of historian Jackson Lears—was "engrained widely and deeply enough to constitute the mainspring of the dominant culture."[106]

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102. As advertising scholar Pamela Laird has observed, Americans in this era fought a contentious battle between spiritual and material values. LAIRD, *supra* note 42, at 102-03. "Never before had such material opportunities presented themselves to so many, and never since has outspoken . . . morality had such a hold on those same people." *Id.*

103. DANIEL HOROWITZ, THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA, 1875-1940, at 32 (Ivan R. Dee 1992).

104. *Id.* at xviii.

105. These values characterized an industrializing economy and were oriented around social and economic advance. As historian Lawrence Friedman writes, "[t]he ideal in every aspect of life, was self-discipline, moderation, and attention to what Max Weber called the Protestant ethic. This ideal . . . was a pillar on which capitalism, the free market, and economic growth necessarily rested." LAWRENCE MEIR FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 37 (2007).

106. LEARS, NO PLACE OF GRACE, *supra* note 26, at 13, 14-15. Lears writes:

The proliferation of products in the last decade of the 1800s led to vociferous public attacks on consumerism and the perceived immorality of consumer spending.[107] Critics feared that the "upsurge in desire" created by the new material abundance would destroy self-restraint and undermine the moral foundations of the self.[108] Writers penned jeremiads and panegyrics lamenting the threats that materialism posed to American society.[109]

In his *Theory of the Leisure Class* (1899), Thorstein Veblen lambasted "pecuniary emulation" and "conspicuous consumption" as overindulgent and morally bankrupt.[110] "The girl who spends her allowance in candy and matinée tickets is relaxing the moral fibre of her own character," wrote one magazine author.[111] Novels like the 1896 work *The Damnation of Theron Ware*[112] and *Sister Carrie*, from 1900, warned of the consequences of consumer longings: sloth, greed, and loss of self.[113] As Theodore Dreiser wrote of his protagonist Carrie as she gazed into a department store window, "there was nothing there . . . which she did not long to own. The dainty slippers and stockings, the delicately

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> Victorian respectability did not create a genuine cultural consensus; rather, it played a key role in sustaining the hegemony of the dominant social classes. Originating among the middle and upper bourgeoisie, Victorian ideals formed a collective conscience which inspired allegiance from subordinate groups and brought coherence to a politically fragmented society.

Id.

107. Peter N. Stearns, *Stages of Consumerism: Recent Work on the Issues of Periodization*, 69 J. MOD. HIST. 102, 103 (1997).

108. Leach, *supra* note 38, at 101-02.

109. HOROWITZ, *supra* note 103, at xvii (Historically, "Americans have worried about the self-indulgence of consumers and the consequences of comfort, affluence, and luxury. Moralists have argued that a rising or changing standard of living endangered the health of America.").

110. THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS; AN ECONOMIC STUDY OF INSTITUTIONS 88-89, 111 (Aakar Books 2005) (1899).

111. *Saving and Spending*, HARPER'S BAZAAR, June 1906, at 573.

112. Bronner, *supra* note 26, at 18-19.

113. *Id.* at 17-18.

frilled skirts and petticoats . . . all touched her with individual desire."[114]

The marketplace for goods was not only seen as a locus of forbidden desire, but also of corruption, deceit, and trickery.[115] Although Americans shopped in department stores, dry goods shops, and other established consumer emporia by the end of the nineteenth century, the selling of goods was still linked in the popular imagination to the street hawkers and "confidence men" of an earlier era.[116] Advertising pitches of this time were often exaggerated if not totally false.[117] "Between the end of the Civil War and the beginning of the twentieth century, advertisements for dubious health remedies, get-rich-quick schemes, and other outrageous fakery filled the pages of newspapers and magazines," advertising scholar Julianne Sivulka writes.[118] Patent medicines—"cure-all" elixirs that were typically fraudulent if not toxic—were the most commonly advertised product of the 1800s.[119] "To bill it like a circus" was a common expression among advertisers;[120] to many advertisers, the showman P.T. Barnum, known for his frauds on gullible patrons,[121] "served as . . . one of the shining examples of success attained through judicious advertising."[122] The advertisers of consumer products were

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114. THEODORE DREISER, SISTER CARRIE 17 (1900). *See* also Bronner, *supra* note 26, at 20 ("[D]epartment store windows and hotel lobbies become studies in the power and symbolism of things and wealth by showing the unrelenting force of accumulation, the blinding qualities of display, and the commonly fleeting surface rewards.").

115. JACKSON LEARS, FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA 89 (1994) [hereinafter LEARS, FABLES OF ABUNDANCE].

116. ORVELL, THE REAL THING, *supra* note 67, at 53; *see* LEARS, FABLES OF ABUNDANCE, *supra* note 115, at 94-5.

117. *See* POPE, *supra* note 32*,* at 186-87.

118. SIVULKA, *supra* note 45, at 34.

119. POPE, *supra* note 32*,* at 186-87.

120. Laird, *supra* note 42, at 44.

121. A.H. SAXON, P.T. BARNUM: THE LEGEND AND THE MAN 1-2 (1989).

122. Laird, *supra* note 42, at 44 (quoting 4 PRINTERS' INK 548 (1891)) (internal quotation marks omitted); *see also* Mark Bartholomew, *Advertising and the Transformation of Trademark Law*, 38 N.M. L. REV. 1, 18 (2008) [hereinafter Bartholomew, *Advertising*] ("Barnum was known as America's first commercial

viewed by the public as little more than "liars and crooks," bearing "an odor of snake oil."[123]

To the late nineteenth century middle-class sensibility, trafficking in the sensual, earthly, and pedestrian "world of goods" sat uneasily with anti-materialist ideals of frugality, restraint, and self-control. Though Americans were consuming products and product advertising, these activities were still viewed among many sectors of the population with moral skepticism. Respectable persons did not engage in the needless acquisition of consumer products nor succumb to material longings. They did not permit their pictures to be used in advertisements, let alone sell their portraits for advertising use.

E. *The Crisis of Circulating Portraits*

Thus faced with significant difficulties obtaining photographic portraits for ads, advertisers resorted to the photographic "black market." In a practice that may seem odd to the modern sensibility, they purchased or stole portraits or negatives from studio photographers, who sold them without the consent of the subjects, and published them in advertisements for their products. Sometimes the pictures were of public figures, such as authors, singers, and politicians, but more often, they were images of average citizens—ordinary men and women whose images were fungible and ubiquitous, and who would be unlikely and unable to take action against the appropriating advertiser.[124] The newspapers regularly reported stories of ordinary people who quite literally woke up one morning to find their photographs, without consent, emblazoned on ads

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public relations specialist, but he was also reviled for his crass manner and blatant misrepresentations.").

123. STEPHEN FOX, THE MIRROR MAKERS: A HISTORY OF AMERICAN ADVERTISING AND ITS CREATORS 67 (1984) [hereinafter FOX, THE MIRROR MAKERS].

124. On the appropriation of photographs of famous people in this period, see Madow, *supra* note 44, at 152. Celebrity "[h]ats, dolls, canes, bicycles, theaters, toys, dinnerware, furniture, cigars, liquors bore the likenesses, names, or special symbols of various personalities." (quoting Neil Harris, *Who Owns Our Myths? Heroism and Copyright in an Age of Mass Culture*, 52 SOC. RES. 241, 251 (1985)).

for patent medicines, complexion beautifiers,[125] and 5 cent cigars. In one notorious instance that became the subject of a Supreme Court case, a photography studio sold a portrait of a woman to a whiskey company, which used it in an ad for its product.[126] Occasionally advertisers undertook even more aggressive and deceptive means. In a case from 1906 that made the news, a department store saleswoman was approached by her co-worker, who told her that a customer was impressed by her beauty and wanted to have her portrait made. The customer promised her, in exchange for her sitting for the portrait, copies of the photograph. She later found her picture in an ad for a patent medicine.[127]

Advertisers typically chose a person's portrait because of the feelings that the image might invoke in potential consumers. Portraits were selected not because they represented a particular person or identity, but for their ability to generate emotions or associations that would enhance the product's marketability and appeal. Often, the depicted individual represented idealized attributes, such as youth, beauty, innocence, or sophistication. Pictures of babies, stately grandmothers, and "pretty girls" were of particular value in this regard.[128] These images created a "vague sense of desire" towards the advertised items and offered consumers a fantasy of what they might become or how they might feel if they acquired and used them.[129] Images of slender young women, dapper gentlemen, and rosy-cheeked children acquired sudden value in the new connotative economy of mass advertising, an industry that traded in aspiration, emulation, and desire.

By 1890, advertisers' widespread use of misappropriated photographs, or so-called "circulating portraits," had generated a public outcry. The unauthorized use of the pictures of public figures and officials was

125. CHI. TRIB., July 29, 1907.

126. Peck v. Tribune Co., 214 U.S. 185, 188 (1909).

127. *Id.*

128. *See, e.g.*, OHMANN, *supra* note 44, at 185.

129. ORVELL, AMERICAN PHOTOGRAPHY, *supra* note 56, at 185.

condemned as disrespectful and an insult to their dignity.[130] But it was advertisers' "misuse of the faces of private persons" that led to even greater outrage and a sense of moral crisis.[131] As one commentator lamented, it was "the extreme of impudence for a firm or company to take the photograph of any living person, and, without permission, use it as a label for their goods."[132] "Any likeness of anything that is in Heaven above we may expect to see in these days on city walls, slabsided rocks, or country barn doors, as the sign or trade-mark of some quack medicine or shoddy merchandise," mourned one critic.[133] Attractive young women were "liable to the shock of seeing [their pictures] used [in an advertisement] to blazon the alleged merits of a certain brand of cigar or whiskey," and "prominent [citizens had] . . . no immunity from the mortification of seeing [their] photograph[s] run in the advertising columns of a newspaper."[134] No one was immune from "the humiliation of this unbridled license by commercial pirates."[135]

In letters, testimonials, and other cultural texts from this era, the subjects of these "circulating portraits" expressed strong feelings of embarrassment and shame. They were appalled when they found that their images had been used in advertisements for consumer products. The injury was all the more damaging when one's photograph—an intensely intimate representation of self, the "window into the soul"—had been commercially exploited. Friends and acquaintances saw the ads and jeered at them, or were shocked to find a person they had considered to be upstanding and respectable had willingly "sold her face" to an advertiser. In 1904, a woman who found her image on a set of commercial trading stamps alleged that the act "'humiliated' her, 'made her nervous,'" and caused her to be

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130. *See Advertising Brigands*, 2 CASE AND COMMENT 2 (1895).

131. *A Recent Instance*, OUTLOOK, Oct. 4, 1902, at 248.

132. WASH. POST, Sept. 14, 1902.

133. *Advertising Brigands*, *supra* note 135, at 3 (internal quotation marks omitted).

134. *The Right of Privacy*, ATL. CONST., Nov. 10, 1902, at 4.

135. Brief in Support of Petition at 7, Peck v. Tribune Co., 214 U.S. 185 (1909).

laughed at by her peers.[136] The *New York Times* wrote in 1905 that a local beauty queen suffered "mental anguish" when her picture appeared in an ad without her consent. She began to notice that some of her friends were looking at her strangely.[137] "I had such a *sweet* photograph taken of myself the other day, which was in great demand by all my admirers," a woman complained to the editor of a popular magazine.[138] "Imagine my intense horror and disgust at seeing it used for an advertisement . . . ."[139] The unauthorized use of one's photograph in an ad created "a profound sense of exposure and violation."[140]

II. THE LAW AND THE CIRCULATING PORTRAIT

It was not long before the "circulating portrait" problem attracted the attention of the legal world. There was a widespread feeling, two prominent lawyers wrote in 1890, "that the law must afford some remedy for the unauthorized circulation of portraits of private persons."[141] The California legislature passed a statute that made it a misdemeanor to publish the portrait of any person in a newspaper without the individual's consent.[142] The publication of the picture of Mrs. Grover Cleveland in an ad for patent medicine prompted the introduction of a bill in Congress that would ban the exhibition of any photograph or likeness of a woman without her authorization.[143] A bill was introduced in the

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136. Rhodes v. Sperry & Hutchinson Co., 104 N.Y.S. 1102, 1102-03 (App. Div. 1907).

137. Belinda Briggs, *A Monstrous Outrage*, PUCK, Feb. 27, 1884, at 36.

138. *Id.*

139. *Id.*

140. Mensel, *supra* note 81, at 32 ("[M]any people felt a profound sense of exposure and violation upon being photographed, or upon finding their photographs displayed and sold in photo shops, or used in advertisements, without their consent.").

141. Warren & Brandeis, *supra* note 30, at 195.

142. *See* Henry Billings Brown, *The Liberty of the Press*, 2 BRIEF OF PHI DELTA PHI 128, 135 (1900).

143. FREDERICK S. LANE, AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT 52 (2011).

New York legislature that would make it punishable by fine and imprisonment of at least one year "to print or publish in any newspaper, periodical, pamphlet, or book 'any portrait or alleged portrait of any person or individual living in this State without having first obtained his or her written consent.'"[144] Supporters of the bill noted the inexcusable "annoyance" that "had been inflicted upon innocent and quiet people, especially upon women, whose lineaments had been 'disfigured and presented' in public prints without their consent."[145]

The victims of "circulating portraits" were also seeking remedies in court for their dignitary and reputational injuries.[146] Some brought suits for defamation. The claim in these cases was that the unauthorized publication of one's picture in an advertisement lowered his or her reputation because of "its implied suggestion that the person allowed his or her name (or image) to be used for commercial gain."[147] By the turn of the century, many had also begun to initiate tort claims for "invasion of privacy." The privacy tort was developed by legal theorists and courts in this era to address the crisis of the "circulating portrait" and remedy what were described as the dignitary injuries caused by the unauthorized use of a person's picture in an advertisement. Advertising exploitation of a person's photograph was thought to degrade the individual by commodifying his

144. N.Y. TIMES, Mar. 14, 1897.

145. *The Ellsworth Bill*, N.Y. TIMES, Jan. 22, 1898, at 6.

146. Some brought successful actions for breach of contract against photographers who made and circulated unauthorized reprints. But the breach of contract action, as commentators observed, was not a viable remedy in every "circulating portrait" case. It was only applicable when the advertiser had obtained the image from the photographer, and it permitted suit only against the photographer, not the advertiser, with whom the victim had no contractual relationship. The offending use of the photo could be enjoined, and damages could be had for any pecuniary loss caused by the unauthorized use of the image, but in most cases, unless an actor or other public figure was involved, the individual's photo had no market value. Embarrassment and shame—the principal injuries alleged—were not compensable. *See, e.g.*, Moore v. Rugg, 46 N.W. 141, 141 (Minn. 1890).

147. ROCHELLE GURSTEIN, THE REPEAL OF RETICENCE: A HISTORY OF AMERICA'S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART 163-64 (1996).

image.[148] The commercialization of one's persona was regarded as an affront to one's dignity, sense of self, and "privacy."[149]

A. *"Libeled By Advertising"*

In the view of many late nineteenth century legal theorists, the libel tort offered the most viable legal means to combat the "circulating portrait" problem. The essence of the libel tort—an ancient tort dating back to the earliest history of the common law—is the protection of reputation.[150] To prevail in a libel suit, the plaintiff had to demonstrate that the defendant published a false and defamatory statement.[151] A defamatory statement "expose[d] a person to hatred or contempt . . . injure[d] him in his profession or trade or cause[d] him to be shunned by his neighbors . . . ."[152] Traditionally, defamatory statements consisted of moral accusations. Imputations of criminality, deceitfulness, or sexual misconduct were considered so damaging to one's reputation as to be libelous *per se*. Insofar as the unauthorized use of a person's portrait in an advertisement imputed a willingness to exploit one's image that was seen as illicit, acts of commercial appropriation, it was said, "would doubtless be a libel in all [the] states."[153]

In the many libel claims brought over misappropriated portraits, plaintiffs alleged that the unauthorized use of their images in advertisements created an impression of them that was false and immoral and that cast them into disrepute. In a number of cases, the plaintiff argued that the advertisement was defamatory because it falsely

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148. *See* discussion *infra* Part II.A.

149. *See* Edward J. Bloustein, *Privacy as An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 987 (1964).

150. *Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 877 (1956).

151. MARTIN L. NEWELL, THE LAW OF DEFAMATION, LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA 37 (1890).

152. *Id.*

153. John A. Jameson, *The Legal Relations of Photographs*, 8 AM. LAW. REG. 1, 8 (1869).

associated her picture with a disreputable product.[154] In a 1909 libel case, the picture of a senator was published in an ad for a patent medicine called "Doan's Kidney Pills."[155] The senator was not a user of the product and had not endorsed it.[156] The court held that he had a cause of action for libel because patent medicines were known to be fraudulent.[157]

Another genre of "libel by advertising" cases involved false testimonials. In a common practice at the time, advertisers appropriated portraits and published them alongside false testimonials endorsing products.[158] In the libel suits that ensued, the claims were that the advertisements were defamatory because they suggested that the subjects were liars.[159] The famous 1905 case *Pavesich v. New England Life Insurance Co.* involved the publication of the plaintiff's photo in an ad for life insurance that appeared in the *Atlanta Constitution*.[160] The newspaper

154. In a few cases, the purportedly false and defamatory allegation was contained within the four corners of the photograph. In 1901, a young woman brought suit for libel against a magazine that published a doctored photo of her, a picture of her head on top of the body of a woman dressed in "fancy short skirts." *Magazine's Sale Stopped: Injunction Granted in Suit Over Publication of Alleged Garbled Photograph*, N.Y. TIMES, May 16, 1901, at 16. The court concluded that the publication was false and defamatory, as it suggested that she was a woman of questionable sexual morals. *Id.*

155. Foster-Milburn Co. v. Chinn, 120 S.W. 364, 365-66 (Ky. 1909).

156. *See id.*

157. *Id.* at 366; *see also* Martin v. The Picayune, 40 So. 376 (La. 1906); Mackenzie v. Soden Mineral Springs Co., 18 N.Y.S. 240 (Sup. Ct. 1891). A similar conclusion was reached in the 1904 case *Morrison v. Smith*, a libel claim involving the plaintiff's photo published in a magazine advertisement for a risqué novel. *Morrison v. Smith*, 69 N.E. 725 (N.Y. 1904). The woman had not consented to this use of her picture. *Id.* at 726. The court agreed with the plaintiff that the juxtaposition of the photo and the advertising text was libelous, as "it exposed the plaintiff to contempt and to ridicule, if it did not imply disgraceful conduct." *Id.* at 727.

158. Statements from "typical consumers" were included in advertisements, along with their photos, to create a sense of identification with potential customers; expert testimonials were included to bolster the credibility and veracity of the advertised item, which was particularly coveted by manufacturers when it came to dubious products such as patent medicines. *See, e.g.*, OHMANN, *supra* note 44, at 187.

159. *See, e.g.*, Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

160. *Id.* at 68-69.

had obtained the photo, without the plaintiff's authorization, from a photography studio where he had earlier sat for his picture.[161] The photograph was published above a testimonial endorsing the product; the plaintiff did not own, let alone endorse, the defendant's life insurance policy.[162] The court held that the plaintiff had a cause of action for libel because his acquaintances would likely conclude that he had accepted money to make statements about a policy he did not own, that he "lied for a consideration," making him "odious to every decent individual."[163]

In most "libel by advertising" cases, the chief argument was that one's *very appearance in an ad* was defamatory, regardless of the product that was advertised or any words associated with it.[164] It was not merely the public association with a commercial product that was humiliating, but the assumption that viewers would make when they saw the advertisement—that the plaintiff had consented to have her photo used for advertising purposes.[165] Plaintiffs "were scandalized by the possibility that people would assume they actually endorsed commercial products."[166] The implication that a person had "sold her face" to a commercial advertiser would "disgrace her and lay her open to the contempt and ridicule of friends, neighbors, and strangers."[167]

In *Henry v. Cherry & Webb*, the plaintiff's picture appeared, without his consent, in an advertisement for coats in a Providence newspaper.[168] He sued for libel, claiming that appearing before the public in a commercial context

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161. *Id.* at 69.

162. *Id.*

163. *Id.* at 81.

164. *See, e.g.*, *id.*

165. *See, e.g.*, *id.*

166. GURSTEIN, *supra* note 147, at 164.

167. Brief for Petitioner at 46, Peck v. Tribune Co., 214 U.S. 185 (1909) (No. 191).

168. Henry v. Cherry & Webb, 73 A. 97, 98 (R.I. 1909).

caused him to be scorned and shunned by the community.[169] In a 1911 case, *Munden v. Harris*, a Missouri appeals court held that a boy whose portrait had been used in an ad for a jewelry store had a cause of action for libel.[170] The use of his image "as an advertising aid to business" led viewers to make false assumptions about his character, and the plaintiff suffered "vexation and . . . ridicule."[171]

The claims of reputational injury were even stronger when the subject of the portrait was a woman. Because the public display of a woman's face and body, particularly in a commercial context, carried overtones of illicit sexuality, as Thomas Huff writes, "attaching a woman's likeness to a commercial product" was "seen as equivalent to the loss of a woman's virtue or at least an invitation to the loss of that virtue."[172] In *Kunz v. Allen*, a dry goods store surreptitiously took a film of a woman and used it an advertisement.[173] The Kansas Supreme Court observed that the unauthorized use of the woman's image on film would bring her into disrepute, as it would lead viewers to assume that she was a paid model,[174] calling her morals into question. "No woman of ordinary refinement would fail to be humiliated by the unauthorized publication of her portrait" in an advertisement for goods, observed one commentator.[175] "No judge will do violence to legal principles . . . if he recognizes

169. *See id.*

170. Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911).

171. *Id.*

172. Thomas Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777, 785 (1979). As Lisa Pruitt has noted, in the nineteenth and early twentieth centuries, the "vast majority of women who turned to defamation law did so to get redress for statements that impugned their chastity." Lisa Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 419 (2004).

173. Kunz v. Allen, 172 P. 532, 532 (Kan. 1918).

174. *Id.*

175. Rich, *supra* note 29, at 239. Some *actresses* even argued that having their pictures in advertisements was injurious to their reputations. In 1889, an actress began a well-publicized libel suit in New York state court to recover $10,000 damages, for the unauthorized use of pictures of her in an advertisement. *Are Her Pictures Libels?*, N.Y. TIMES, June 29, 1889, at 3.

. . . that this inevitable humiliation which every woman must feel . . . is sufficient to make [the publication] defamatory."[176]

This was the argument in *Peck v. Tribune*, a libel case that reached the U.S. Supreme Court in 1909.[177] *Peck* involved the unauthorized use of a woman's portrait in an advertisement for whiskey.[178] The plaintiff, Elizabeth Peck, was a widow who lived in the small town of Mount Auburn, Iowa.[179] Mrs. Peck had a photograph of herself taken in a portrait studio in a small town north of Mount Auburn in 1904.[180] The photographer, without Peck's knowledge or consent, sold the negatives to the makers of Duffy's Pure Malt Whiskey, which used them in an ad touting the whiskey's properties as a health tonic.[181] "Nurse and Patients Praise Duffy's—Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving, and Curative Properties of Duffy's Pure Malt Whisky," read the ad's headline.[182]

Under the headline appeared a photographic portrait of a woman with the caption, 'Mrs. A. Schuman,' with an address in Chicago. "After years of constant use of your pure malt whiskey, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it," read the testimonial below the portrait.[183] In reality, the person in the picture was not Mrs. Shuman but the plaintiff, Mrs. Peck. Peck was not a nurse, and she was a

176. Rich, *supra* note 29, at 239.

177. Peck v. Tribune Co., 214 U.S. 185, 188 (1909).

178. *Id.*

179. Brief for Petitioner at 2, Peck v. Tribune Co., 214 U.S. 185 (1908) (No. 191).

180. Transcript of Record, at 16, 20-21, Peck v. Tribune Co., 214 U.S. 185 (1907) (No. 480).

181. *Id.*

182. *Id.*

183. Brief for Petitioner at 52, Peck v. Tribune Co., 214 U.S. 185 (1909).

total abstainer from alcohol.[184] The advertisement was published in the *Chicago Tribune*.[185]

Peck, outraged, sued the *Tribune* and another newspaper, Hearst's *Chicago American*, for libel.[186] Peck alleged that the advertisement subjected her—a woman of "spotless reputation and blameless life"[187]—to humiliation and the "scorn, contempt, and ridicule" of her peers,[188] as members of the community would assume that Peck had willingly posed for the ad. The ad was a "direct assault upon her character" because it presented her as a person "who ha[d] loaned or sold her face for advertising purposes."[189]

The trial court concluded that Mrs. Peck had a cause of action for libel. The Seventh Circuit reversed, but the U.S. Supreme Court affirmed.[190] In an opinion by Justice Oliver Wendell Holmes, the Court concluded that an "appreciable fraction" of the population could very well regard Mrs. Peck with contempt, both for appearing to have endorsed whiskey, a product that some might view as disreputable, and for appearing to have "sold her face" for advertising purposes.[191] While there were some people who might view posing for an ad as morally unproblematic, being associated with advertisements could very well "hurt [one's] standing with a considerable and respectable class in the community."[192] Peck had "indisputably suffered a wrong" to her reputation.[193] By "the publication of her picture [in an advertisement], people who recognize the portrait will [be

184. *Id.* at 47.

185. *Id.* at 2.

186. *Id.*

187. Brief in Support of Petition at 2, Peck v. Tribune, 214 U.S. 185 (1909).

188. *Id.* at 46.

189. Reply Brief for Petitioner at 3, Peck v. Tribune Co., 214 U.S. 185 (1909).

190. Peck v. Tribune, 154 F. 330 (7th Cir. 1907), *aff'd*, 214 U.S. 185 (1909).

191. *Peck*, 214 U.S. at 190.

192. *Id.* The *Peck* case instituted what is now known as the "substantial and respectable minority" doctrine in libel law: that a statement need only injure one's esteem in the eyes of some portion of the community to make out a cause of action for libel.

193. *Peck*, 154 F. at 330.

led to] think she has loaned her face . . . in a way a self respecting person would not have consented to."[194]

B. *The "Circulating Portrait" and the Right to Privacy*

By the first decade of the twentieth century, there was a widespread sentiment that the unauthorized use of a person's image in an advertisement could damage that person's reputation for character and good morals. It could also injure one's feelings and sense of dignity. The defamation tort provided a remedy only for social or "relational" injuries—to one's standing in one's community and one's relationship with one's peers.[195] It did not remedy internal injuries, that is, injuries to one's emotions and sense of self. There were a number of cases, legal commentators observed, in which the victims of advertising appropriation suffered serious indignity but were unable to meet defamation law's strict requirement that a publication subject one to public opprobrium—to "hatred, scorn, and contempt." This lacuna in the law of libel led to the development of a dignity-based commercial appropriation tort under the rubric of a "right to privacy."

In their famous 1890 law review article "The Right to Privacy," the Boston lawyers Samuel Warren and Louis Brandeis proposed a tort cause of action that would permit an injunction and damages for emotional and dignitary harms caused by material that publicized one's "private life" in a way that caused mental anguish or embarrassment.[196] The article, as is well-known, was a response to the recent development of "yellow journalism" and gossip columns in the press.[197] It was also a reaction to the advertising appropriation problem—what Warren and Brandeis

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194. *Id.*

195. As Warren and Brandeis wrote, defamation redressed the damage "done to the individual in his external relations to the community, by lowering him in the estimation of his fellows." Warren & Brandeis, *supra* note 30, at 197.

196. *Id.* at 216.

197. Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy*," 2008 MICH. ST. L. REV. 35, 44 n.46 (2008).

described as the "unauthorized circulation of portraits of private persons."[198] Insofar as a photograph of one's face was seen as an intimate representation of the self—as something that was "private"—its unauthorized publication, particularly in a commercial context, constituted an invasion of one's self and one's right to privacy.[199]

The indignity caused by advertising appropriation was, in part, the indignity of being publicized against one's will. The culture of that time valued modesty and reticence, not fame and exposure.[200] The indignity was also a product of the misrepresentation: it was an affront to be publicly identified as an endorser of products when one was not.[201] Above all, it was an insult to have one's image commodified. The use of a person's image in an advertisement was degrading because it reduced that person's identity to a thing, a fungible object no different from the products it was used to shill.[202]

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198. Warren & Brandeis, *supra* note 30, at 195.

199. In the article, Warren and Brandeis devoted significant attention to the "circulating portrait" problem and opined that the question of "whether our law will recognize and protect the right to privacy in this [respect] must soon come before our courts for consideration." *Id.* at 196. They wrote that the right of a person to prevent such "public portraiture" represented the "simplest case" for a legal right to privacy. *Id*. at 196, 213.

200. Rochelle Gurstein has noted the "culture of reticence" in this era in which private life was valued as the locus of intimacy. People did not seek publicity—to expose the private was to devalue intimacy. GURSTEIN, *supra* note 147, at 32.

201. In the words of John Henry Wigmore:

> I am entitled to be judged in public by my actual opinions and utterances. To have false ones ascribed to me is an injury to my feelings of self-respect. . . . The right to privacy is really a right to be protected against a certain kind of injury to feelings. . . . The essential thing is that I do not entertain the convictions falsely ascribed me—that it injures my just feelings of self respect to be classed where I do not care to be classed—and that I am entitled to be protected against such an unauthorized misrepresentation of my personality.

John H. Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 KY. L.J. 3, 8 (1916).

202. As Edward Bloustein pointed out, "[i]n these cases what is demeaning and humiliating is the commercialization of an aspect of personality." Bloustein, *supra* note 149, at 987-88.

1. *Privacy and the Anticommodification Ethos.* To understand why the unauthorized commercial exploitation of the persona would be regarded as a serious indignity—in the words of one commentator, an affront to the self "more formidable and more painful in its consequences than an actual bodily assault might be"[203]—we need to know something about the cultural anxieties around "commodification."

As critics of that time lamented, the United States was becoming a "commodity civilization," a culture of superficiality and materialism "submerged beneath the surface allure of having and displaying possessions."[204] Spiritual and moral values seemed to be lost in the crass pursuit of getting and spending.[205] "The commercial and money-making spirit of the age," observed one writer, had infected "every department of human exertion."[206]

Virtually every domain of life seemed to be overtaken by consumer values. Consumer products "invaded" the home; dinner tables were piled with commercially produced foodstuffs and mass produced clothes hung in closets. At a time when women were regarded as the guardians of the home, the widespread commercial use of female images was seen as the most egregious example of the intrusion of market forces into the sacred domains of personal life. As one commentator observed, it is a piece of glaring bad taste "to invade the sanctity of the home circle and hold up to public gaze . . . the portrait of young women who in nowise court publicity, and in whom the public has no interest except as they are pretty women."[207]

This alleged commodification of human existence not only undermined the moral fabric but also the possibility of

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203. Roberson v. Rochester Folding Box Co., 64 N.E. 442, 450 (N.Y. 1902) (Gray, J., dissenting).

204. Bronner, *supra* note 27, at 13.

205. LEARS, FABLES OF ABUNDANCE, *supra* note 115, at 387.

206. Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 446-47 (1902).

207. CLAUDE COOKMAN, AMERICAN PHOTOJOURNALISM: MOTIVATIONS AND MEANINGS 69 (2009) (quoting *A Step too Far*, JOURNALIST, June 7, 1884, at 3, 3) (internal quotation marks omitted).

autonomy and free will.[208] Many feared that people would no longer be able to define themselves in terms of chosen values and traditions but would instead be controlled by consumer yearnings and persuasive and seductive advertising.[209] Advertisements had become so pervasive and voluminous that they intruded on people's thoughts and consciousness. As Samuel Hopkins Adams warned in *Collier's* magazine, "[t]here is no hour of waking life in which we are not besought, incited, or commanded to buy something of somebody."[210] The ideal of the self-made man appeared to be besieged in a world where people were exhorted to define themselves through conspicuous consumption and the ownership of goods.[211] Individuality would be lost as people sought to create standardized identities through the purchase of standardized, mass-produced products.

The "circulating portrait" emblematized these fears. The appropriated advertising image exploited the depicted individual by turning her photograph into an object and a spectacle. In these ads, the actual identity of the depicted subject was meaningless; the image was valuable insofar as it could evoke a particular mood, status, or feeling to appeal to consumers and sell products. Human likenesses were becoming empty, fungible symbols of desire, and selfhood and individuality were destroyed as living people were reduced to being mere "labels for goods."[212] Men and women who had in no way courted profit or publicity were being "enslaved," their "physiognom[ies] . . . pirated to tout another person's business."[213]

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208. *See, e.g.*, Lears, *From Salvation to Self-Realization, supra* note 41, at 7.

209. "As more and more people became enmeshed in the market's web of interdependence," historian Jackson Lears has written, "liberal ideals of autonomous selfhood became ever more difficult to sustain." *Id.*

210. Samuel Hopkins Adams, *The New World of Trade: The Art of Advertising*, COLLIER'S, May 22, 1909, at 13.

211. *See* LEARS, FABLES OF ABUNDANCE, *supra* note 115, at 37.

212. WASH. POST, Sept. 14, 1902.

213. Wilbur Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693, 695 (1912). As Elizabeth Peck's lawyers wrote in their appeal to the Supreme Court in *Peck v. Tribune*:

2. *"The Right to Privacy."* To Warren and Brandeis and other elite Northern intellectuals of the time, the "circulating portrait" was a testament to the apparent commercialization and degradation of all that was noble and sacred.[214] Warren and Brandeis lamented advertisers' exploitation of portraits, particularly portraits of women; such acts were "gross and depraved."[215] Market values threatened to overtake substantive values. For this reason, they wrote, it was critical that the law protect the intangible, non-fungible, "spiritual" dimensions of personal identity, including one's thoughts, emotions, and visual likeness.[216]

The thrust of the Warren and Brandeis argument was that a "right to privacy" already existed in the common law.[217] Warren and Brandeis cited cases in which the publication of personal photographs,[218] etchings,[219] drawings,[220] and private correspondence[221] were enjoined under common law theories of copyright or breach of contract. These intellectual property rights, they argued,

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> The human face was not meant to be bandied and "blown about the pendent world." It is like precious jewels in a casket. If the owner wishes to bring them forth to charm and dazzle the world it is his privilege to do so; if he choose[s] to keep them safe hidden away from all curious eyes it is likewise his privilege so to use them. There is a limit beyond which the public may not go. There is an enchanted circle which vulgar feet may not profane. The right to privacy like that flaming angel that forever guards the gates of Paradise stands sentinel over every private citizen and says to all the world, "Thus far thou shalt go and no farther. Buy, sell and get gain, traffic and trade, how you will, but you may not along with your wares and merchandise, your pills, Perunas, and Duffy whiskies, print and sell without consent the portraits of private persons to assist you in your business."

Brief for Petitioner at 58, Peck v. Tribune Co., 214 U.S. 185 (1909).

214. *See generally* Warren & Brandeis, *supra* note 30.

215. *Id.* at 214.

216. *Id.* at 197.

217. *Id.* at 193.

218. *See id.* at 208-09.

219. *See id.* at 201.

220. *See id.*

221. *See id.* at 207.

were examples of a broader right to prevent aspects of one's intimate self from unwanted display.[222] Yet the "right to privacy" was not a right of property, they emphasized, but rather a personal right.[223] This effort to detach privacy from property was motivated, in significant part, by a desire to secure damages for victims of advertising appropriation whose images had negligible, if any, commercial value.[224] Damages in cases involving property rights were measured by traditional market tests of unjust enrichment or lost profits. Under the proposed privacy tort, victims of advertising appropriation could recover damages for mental distress and anguish even if their images had no ascertainable market value, as was generally the case with ordinary people whose images had been exploited.[225] This move was controversial at the time because the common law typically did not provide recovery for emotional injuries that were unrelated to other established causes of action.[226]

Even if one's photograph did have market value, the idea of a face as a form of property that could be bought and sold for money was repugnant to the genteel Victorian sensibility. As one writer posited in 1902:

> We may discard entirely the suggestion that a lady has any thing in the nature of a property right in her form or features that is invaded by the circulation of her picture against her will or without her consent. That would be altogether too coarse and too material a suggestion to apply to one of the noblest and most attractive gifts that Providence has bestowed on the human race. A woman's beauty, next to her virtues, is her earthly crown, but . . . it would be a degradation to hedge it about by rules and principles applicable to property in land or chattels.[227]

The "right to privacy" was created to preserve a terrain for the self that was "beyond the reach of market forces."[228]

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222. *See id.*

223. *Id.*

224. *See, e.g.*, Post, *supra* note 16, at 665.

225. *See* Warren & Brandeis, *supra* note 30, at 213-14.

226. Post, *supra* note 16, at 654-55.

227. O'Brien, *supra* note 206, at 439.

228. Kahn, *Bringing Dignity Back to Light*, *supra* note 14, at 216.

3. *Appropriation as a Dignitary Harm*. By 1900, at the height of the "circulating portrait" crisis, a number of cases began to be brought in state courts alleging a "right to privacy" in one's image. Virtually all of the cases involved photographs used without consent in advertisements for consumer goods.[229] The injury alleged was "offense," "mortification," and indignity caused by publicity in a commercial context.

Courts held that plaintiffs could recover damages for emotional and dignitary harms.[230] In *Marks v. Jaffa*, from 1893, the defendant published in his newspaper, as part of a circulation scheme, a picture of two actors from the Yiddish theater, with an invitation to readers to vote on who was the more popular of the two.[231] The court upheld an injunction, citing the Warren and Brandeis article and noting that "[t]he law affords a remedy for the unauthorized circulation of portraits of private persons."[232] In *Foster-Millburn v. Chinn*, the picture of a senator was published alongside a false testimonial in an ad for patent medicine.[233] The court held that "a person is entitled to the right of privacy as to his picture, and that the publication of the picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business, is a violation of the right of privacy."[234] While "[i]t has become a custom in the press to publish the pictures of prominent public men," the court noted, "[i]t is a very different thing for a manufacturer to use without authority such a man's picture to advertise his goods."[235]

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229. *See* Larremore, *supra* note 213, at 694-95 ("Upon the very face of the cases an important distinction appears between those of them that consider privacy pure and simple and those dealing with privacy conjoined with a pecuniary or business interest.").

230. *See, e.g.,* Marks v. Jaffa, 26 N.Y.S. 908 (1893); Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909).

231. *Marks*, 26 N.Y.S. at 909.

232. *Id.* at 909.

233. *Foster-Milburn Co.*, 120 S.W. at 365.

234. *Id.*

235. *Id.* at 366.

The seminal 1905 case *Pavesich v. New England Life Insurance Co.* involved the unauthorized use of the picture of the plaintiff, an artist, in an ad for life insurance.[236] The plaintiff's picture was placed next to a false testimonial: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies."[237] The artist was not famous by any means. His picture was most likely chosen because it suggested health, wisdom, and respectability: the robust, bespectacled plaintiff bore a resemblance to Theodore Roosevelt, who was president at the time. As we have seen, Pavesich brought a claim for libel, alleging reputational harm—that the ad "brought him into ridicule before the world."[238] He also alleged mental distress and dignitary injuries—an invasion of his "right to privacy."[239]

In *Pavesich*, the Georgia Supreme Court became the first state high court to recognize a tort right to privacy. The Court concluded that "the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right."[240] The Court described the "legal wrong . . . perpetrated by the unauthorized use of . . . pictures for advertising purposes."[241] The advertiser's use of the plaintiff's picture was dehumanizing and an encroachment on his "privacy" because it reduced him to a label for goods.[242] His photograph had become a fungible commodity circulated wantonly in the marketplace; the advertisement could be posted "upon the streets [above] the bar of the

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

237. *Id.* at 69.

238. *Id.* at 69.

239. *Id.* at 69.

240. *Id.* at 80-81.

241. *Id.* at 80.

242. *See id.*

saloon keeper, or [on] the walls of a brothel."[243] To the advertiser and to the readers who saw his image, Pavesich's unique identity as a human was meaningless. [244]

4. *The Roberson Case*. As was the case in the "libel by advertising" suits, the most sympathetic "invasion of privacy" plaintiffs were women. In 1904, a young woman who claimed that her picture was used without her consent in a corset advertisement brought suit in a New York state court on the theory that such unwanted publicity was an affront to her dignity and "the violation of the right of a decent woman to privacy."[245] That year, the *New York Times* noted the efforts of a young woman from Rochester to prevent the continued use of her image in an ad for a beauty product.[246] The image "represents a woman, of whom only the face and one arm are visible, parting the curtains of a circular screen standing in a bathtub, and looking out toward the spectator."[247] The *Times* noted that although the image was not in its own right "indecent," it was one that "any decent woman would most strongly resent being publicly shown."[248]

The public outrage around the well-known 1903 case *Roberson v. Rochester Folding Box Co.* attests to the popular feeling that the commercial exploitation of a woman's image was a debasement of her virtue that affronted her reputation, honor, and sense of self.[249] The image of a young woman, Abigail Roberson, had been used without her consent in an ad for Franklin Mills flour.[250] 25,000 copies of the ad were made and "conspicuously posted" in various locations, including "stores, warehouses, [and] saloons."[251]

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243. *Id.*

244. *Id.*

245. *The Right to Privacy*, N.Y. TIMES, April 3, 1904, at 6.

246. *Id.*

247. *Id.*

248. *Id.*

249. Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902).

250. *Id.*

251. *Id.*

The ad contained a drawing of her that was made from a photograph, an extremely "good" likeness.[252] Because the drawing was so realistic, her friends were able to recognize her identity.[253]

The association with a commercial flour product was so "distasteful" to Roberson that she suffered extreme mental distress and had to be treated by a doctor.[254] When Roberson was informed of the use of her likeness she "suffered a severe nervous shock, was confined to her bed, and compelled to employ a physician."[255] She was "greatly humiliated by the scoffs and jeers of persons who have recognized her face."[256] She brought suit against the advertiser, the Rochester Folding Box Company, on the theory that the advertisement had invaded her "privacy."[257] She sought damages in the amount of $15,000 and that the defendants be enjoined from the further publication or circulation of the ad.[258]

The trial court rejected the defendant's motion to dismiss Roberson's claim for invasion of privacy, noting that "[a]ny modest and refined young woman might naturally be extremely shocked and wounded in seeing a lithographic likeness of herself posted in public places as an advertisement of some enterprising business firm."[259] The intermediate court of appeals affirmed,[260] yet the highest court in New York reversed the decision.[261] The court refused to recognize a right of privacy, expressing concern with the potentially inhibitive effect on news publishing:

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252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 443.

258. *Id.* at 442.

259. Roberson v. Rochester Folding-Box Co., 65 N.Y.S. 1109, 1110 (Sup. Ct. 1900).

260. Roberson v. Rochester Folding-Box Co., 64 A.D. 30, 41 (N.Y. App. Div. 1901).

261. *Roberson*, 65 N.E. at 443.

> While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to one publication as to the other.[262]

The court also opined that recognizing a right to privacy would unleash a floodgate of litigation.[263] Such sweeping changes in policy were better suited for the legislative body; the legislature "could very well interfere and arbitrarily 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."[264]

Popular publications were flooded with letters and articles attacking the decision. One writer expressed the prevailing mood when he observed that it was "outrageous that modest women who in no way put themselves before the public" could "be dragged into notoriety by any adventurer who thinks he can fill his pockets by exploiting them."[265] A woman should have a right not to "have her features used and hawked about as a trade mark without her consent."[266] "The handsome, modest, and retiring young woman who finds her features paraded on flour sacks or cigaret[te] wrappers is entitled to a more effective remedy than the one the New York court of appeals says she can resort to," asserted one reader of the *Chicago Tribune*.[267] "If there . . . is[] no law now to cover these savage and horrible practices," wrote the *New York Times*, "then the decent people will say that it is high time that there were such a law."[268]

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262. *Id.*

263. *Id.*

264. *Id.*

265. *The Right of Privacy: Georgia's Highest Court Makes Ruling Adverse to that of Judge Parker*, L.A. TIMES, July 28, 1905, at 4 [hereinafter *The Right of Privacy*, L.A. TIMES].

266. *The Right to Privacy*, N.Y. TIMES, Apr. 3, 1904, at 6.

267. *The Right of Privacy*, CHI. TRIB., July 2, 1902, at 12.

268. *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8.

In response, the New York state legislature passed a Civil Rights Law—a so-called "privacy" statute—that made it both a misdemeanor and a tort to publish, without consent, a person's "name, portrait or picture" for the purposes of "trade."[269] Damages were awarded not for lost profits, but for emotional and dignitary harms.[270] Recovery could be had for the indignities caused when an advertiser "ma[d]e use of a portrait of a beautiful woman to attract attention to some article of trade"[271]—when one's picture "was unauthorizedly published or used . . . in connection with the advertisement of some patent medicine or some other commodity which the advertiser was interested in selling."[272] As historian Rochelle Gurstein has observed, the law was not really a "privacy" statute, but was framed in "narrow terms because it was formulated to placate public anger over the brazen exploitation of Roberson's likeness."[273] For this reason the law addressed only what the judge had called the "commercial and money-making spirit of the age" and not a broader right to privacy, a true "right to be let alone."[274]

In 1904, Virginia enacted a similar anti-appropriation statute.[275] In addition, by 1911, several states had recognized a common law cause of action for "invasion of privacy"; many cases in which a right to privacy was recognized involved advertising exploitation of photographs and other personal images.[276]

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269. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009).

270. Frederick R. Kessler, *A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Privacy Statute*, 15 FORDHAM URB. L.J. 951, 960 (1986).

271. Thompson v. Tillford, 137 N.Y.S. 523, 523 (App. Div. 1912).

272. Moser v. Press Pub. Co., 109 N.Y.S. 963, 965 (Sup. Ct. 1908).

273. GURSTEIN, *supra* note 147, at 159.

274. *Id.*

275. *See* VA. CODE ANN. § 2897a (West 1904).

276. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 71 (Ga. 1905); Foster-Millburn Co. v. Chinn, 120 S.W. 364, 366 (Ky. 1909); Schulman v. Whitaker, 42 So. 227, 228 (La. 1906); Munden v. Harris, 134 S.W. 1076, 1077 (Mo. Ct. App. 1911).

III. THE TRANSITIONAL ERA, 1905-1920

By the early twentieth century, social and legal institutions had turned their attention to the "circulating portrait" problem and the cultural changes that it seemed to represent. The tort of defamation and the newly created tort of invasion of privacy were seen by many as a means to thwart the perceived moral corrosion that accompanied the advent of a mass consumer society. Through libel and privacy lawsuits, the victims of "circulating portraits" would be compensated for injuries to their dignity and reputations, and advertisers would be deterred from such degrading uses of the human persona. The law would be used to make a moral statement that the unauthorized commercial exploitation of a person's image, particularly one's photographic image, violated the norms of respectable society.

Yet even as this legal regime was being established, it was also being undermined.[277] In the same era that the "libel by advertising" cases were coming through the courts and the privacy tort was being recognized, public attitudes towards advertising, consumer culture, and the commercialization of the persona were beginning a historic shift. In the first two decades of the twentieth century, advertising and mass consumption were being resignified in the popular imagination.[278] In a world where paid models, entertainment celebrities, and conspicuous consumption were becoming central to middle-class life, the idea that the unauthorized advertising use of a person's image inevitably assaulted that person's dignity and reputation was beginning to seem anachronistic.

A. *The New Order*

The traces of this new order can be seen in the *Roberson* decision itself.[279] Although the majority in *Roberson* based its decision primarily on the grounds that recognition of a

277. *See* discussion *infra* Part III.A.

278. *See* discussion *infra* Part III.B.

279. Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442-43 (N.Y. 1902).

"right to privacy" would inhibit publishing and open the floodgates of litigation, it also hinted at another basis for the decision: Abigail Roberson had not truly been injured.[280] The court noted that the portrait was a "good one"—attractive and not unflattering in the least.[281] Instead of being humiliated, the court speculated, some women might consider having their images in an ad, particularly if the picture was desirable, to be pleasant and "agreeable."[282] Some women "would have appreciated the compliment to their beauty implied in the selection of the picture."[283]

The court's suggestion that Roberson actually enjoyed the publicity—that she should have felt "complimented by the evidently sincere flattery of the advertiser"[284]—was seen by many to be offensive and outrageous. "The Court of Appeals has told the plaintiff in advance that her grievance is fantastic and illusory. If she should happen to pine away and die of shame on account of such an exhibition of her in public, she will have the consolation of knowing that, in the opinion of that court, she ought to have taken the exposure rather as a compliment."[285] As one contributor to the *New York Times* wrote mockingly, "[i]f the court's wife is lithographed in a cut designed to show off the beauty of the P.T. Corset, or the court's daughter finds her picture engraved on the wrapper of each bottle of Dr. Soakum's Celebrated Liver Cure," "the court . . . would feel naturally gratified that these ladies were so honored."[286]

Yet a few commentators seemed to agree with the court's implication that Roberson's injuries were perhaps

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280. *Id.* at 443.

281. *Id.*

282. *Id.*

283. *Id.*

284. *The Right of Privacy*, L.A. TIMES, *supra* note 266, at 4.

285. *The Right to Privacy*, N.Y. TIMES, Apr. 3, 1904, at 6.

286. Letter to the Editor, *The Right of Privacy*, N.Y. TIMES, Nov. 23, 1902, at 30.

not as serious as she alleged.[287] As one letter to the *New York Times* asked, why was it injurious to have one's image appropriated for advertising use "when the picture is a decent likeness of the individual and shows him or her to be possessed of good qualities"?[288] "Where is the harm done . . . even if such picture is used for advertising purposes"?[289] Might the subjects of commercial publicity, one critic speculated, actually be pleased by it?[290]

These comments, I suggest, evince the stirrings of a nascent consumerist worldview. By 1910, the nation was on its way to becoming a full-fledged consumer society oriented around material possessions and conspicuous consumption. Notions of personal identity and self-fulfillment were increasingly bound up in the acquisition and display of goods. In this cultural environment, there was significantly less moral aversion towards the advertising use of the human persona. Commodifying one's image was no longer viewed as a "prostitution of the personality" but in some cases, as a legitimate source of pleasure, income, and social esteem.

B. *The Transitional Era, 1905-1920*

Historians have regarded the period between 1905 and 1920 as a transitional era between the anti-consumerism of the late nineteenth century and the modern mass consumer society.[291] In this era, there was a "revolution in manners and morals"[292] among the middle and upper classes that led to the weakening of traditional values that had once "vigorously mediated between people and an expanding

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287. J. Flynn, Letter to the Editor, *The Right of Privacy*, N.Y. TIMES, July 13, 1902, at 8; *see also* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902).

288. Flynn, *supra* note 287, at 8.

289. *Id.*

290. Larremore, *supra* note 213, at 702 ("The average person likes to see his picture in a newspaper upon any pretext.").

291. Stearns, *supra* note 107, at 113.

292. FREDERICK LEWIS ALLEN, ONLY YESTERDAY: AN INFORMAL HISTORY OF THE 1920S, at 76 (2000).

market economy," in the words of historian William Leach.[293] The ethos that had advocated perpetual work, saving, and self-denial was beginning to give way to a new set of values advocating leisure, continuous spending, and visible consumption.[294]

In unprecedented numbers, Americans shopped for standardized, ready-made goods that were distributed nationally.[295] Luxury items such as fashionable clothing, home furnishings and brand-new products like bicycles came within the reach and desire of more buyers,[296] and the variety and volume of goods increased significantly.[297] The department store became "the great palace of the new consumer culture where an abundance of goods was proudly displayed and sold, and where shopping became an emotional experience," in the words of historian Simon Bronner.[298] People beheld the promise of consumer items in advertisements, catalogues, magazine illustrations, and other texts in which products were alluringly displayed.[299] The nation's wealth and abundance were beginning to be recast not as agents of moral decadence but rather the fruits of modernity and "civilization."[300] As economist Simon Patten summarized, "the new morality does not consist in saving, but in expanding consumption."[301]

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293. Leach, *supra* note 38, at 101.

294. As historian Susan Strasser writes, "In the culture emerging at the turn of the twentieth century, a culture increasingly organized around the mass production and marketing of consumer goods, new needs surfaced in tandem with new products and with new ways of life that characterized urban industrial society." STRASSER, *supra* note 41, at 16-17.

295. *See, e.g.*, ORVELL, AMERICAN PHOTOGRAPHY, *supra* note 56, at 17; STRASSER, *supra* note 41, at 17.

296. *See* ORVELL, AMERICAN PHOTOGRAPHY, *supra* note 56, at 42.

297. HOROWITZ, *supra* note 103, at xxvi.

298. Bronner, *supra* note 26, at 26.

299. Stearns, *supra* note 107, at 110.

300. *See* SIMON N. PATTEN, THE NEW BASIS OF CIVILIZATION 215 (Oxford Univ. Press 1968) (1921).

301. *Id.*

This embrace of consumption and material pleasures was part of a broader "sensual revolution" in this era. As advertising continuously exhorted people to indulge their material yearnings, as women gained greater political and sexual freedoms, and as strict Victorian attitudes towards sexuality began to seem repressive, the open display of desire became less socially and morally problematic. With enthusiasm and frequency, Americans began to participate not only in consumer behavior on a large scale, but also overtly sensual forms of public entertainment in such venues as dance halls, amusement parks, vaudeville theater, and by 1910, motion picture theaters.[302]

The social status of actors and actresses rose significantly.[303] In a culture that was becoming oriented around desire, materialism, and display, performers were beginning to be seen as icons of fashion and lifestyle.[304] The increasing prestige of actors and actresses led advertisers to covet their photographs as a source of illustrations for product advertisements.[305] By the World War I era, advertisers were regularly negotiating contracts with performers for the use of their images.[306] With changing attitudes towards consumerism and sexuality, earlier proscriptions against the use of women in advertising were fading away.[307] The commodification of women's bodies in such popular cultural venues as movies, vaudeville, and

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302. *See* PETER N. STEARNS, BATTLEGROUND OF DESIRE: THE STRUGGLE FOR SELF-CONTROL IN MODERN AMERICA 121 (1999) ("In emphasizing indulgence and appetite over restraint, consumerism shifted other priorities toward greater pleasure seeking. . . .[C]onsumerism and a more open interest in sex were joined by 1900.").

303. MCARTHUR, *supra* note 96, at 123.

304. As historian Marlis Schweitzer has written, "[a] series of interrelated developments [in the early 1900s] facilitated the transformation of the actress from outcast into role model," including "the gradual professionalization of acting . . . the promotional efforts of press agents . . . and, perhaps most importantly, the emergence of a modern culture oriented towards display and show." Schweitzer, *supra* note 95, at 266.

305. *See, e.g.*, SIVULKA, *supra* note 45, at 74.

306. *See id.*

307. BANNER, AMERICAN BEAUTY, *supra* note 60, at 261-62.

beauty pageants reflected the erosion of the Victorian idea that refined women did not display themselves in public.[308]

In the first decade of the twentieth century, the use of models in ads for products had become a craze,[309] and a commercial modeling industry was developing.[310] A photographer named Beatrice Tonnesen came up with an idea for a "modeling agency," and she made hundreds of advertising pictures using live models which she sold to advertisers.[311] In the 1910s, a photographer named Hiller had amassed the photographs of 3000 models that he sold to magazines and to companies such as Corning and General Electric.[312] Newspaper articles began to describe modeling as a respectable profession for young women.[313]

These developments, and improvements in technology that made photographic images easier and less expensive to take and reproduce, led to the gradual decline of the "circulating portrait" problem. Although there were still notorious instances in which photographic portraits of ordinary people were published in ads without consent, the use of random and irrelevant pictures to adorn ads was becoming passé, in the words of a 1910 advertising trade journal.[314] In a culture that was embracing sensuality and the pleasures of the material, the covert black market in "circulating portraits" was becoming an open market in advertising images, one that was prestigious and lucrative. The prima facie association of commerce and

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308. *See id.* at 261-70.

309. HENISCH, *supra* note 53, at 232-33.

310. *See* BANNER, AMERICAN BEAUTY, *supra* note 60, at 262.

311. *See* Scott Cross, *Beatrice Tonnesen: First Commercial Photographer and Artist*, BEATRICE TONNESEN—PHOTOGRAPHER & ARTIST, http://www.beatrice tonnesen.com/bio/.

312. Brown, *supra* note 58, at 51. "The models assembled for [his] studio included artists' models, working-class men and women seeking a little extra cash . . . as well as a small group of middle-class women who modelled [sic] for the excitement and pleasure of being photographed with exceptional care in their best clothes." *Id.* (internal quotation marks omitted).

313. BANNER, AMERICAN BEAUTY, *supra* note 60, at 261.

314. *See* Schweitzer, *supra* note 95, at 264-65.

commodification with indignity and disrepute had begun to fade.

C. *Personal Images as Property*

A testament to this new order, in a number of early twentieth century "libel by advertising" cases, courts began to question whether the mere appearance of one's image in an ad was so stigmatic that it would lower one's reputation. In a case brought over the unauthorized use of a woman's photograph on the defendant's trading stamps, the court concluded that the woman's appearance in a commercial context would not injure her social standing among her peers.[315] The implication that she had willingly posed for the trading stamps was not necessarily one that would "reflect[] upon [her] character or reputation."[316] In another case where a woman alleged that she was defamed by her mere appearance in an advertisement, the libel claim failed because she could not obtain testimony from any members of the community who thought less of her for having been in an ad.[317]

In 1890, Warren and Brandeis had argued for a tort right to privacy, distinct from a right of property, because the idea of a woman's face or body as a commodity that could be bought and sold was reprehensible to the Victorian sensibility.[318] Yet by 1920, many who argued that a person had a privacy right in his or her image did so on the grounds that one's face or photograph was a form of property.[319] This blurring of privacy and property can be

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315. Rhodes v. Sperry & Hutchinson Co., 104 N.Y.S. 1102, 1102-04 (App. Div. 1907).

316. *Id.* at 1103-04.

317. Kunz v. Allen, 172 P. 532, 533 (Kan. 1918).

318. Warren & Brandeis, *supra* note 30, at 214.

319. Some argued that damages should have been awarded to Abigail Roberson purely for pecuniary loss. *See, e.g.*, Comment, *An Actionable Right of Privacy?*, 12 YALE L.J. 37 (1902). As the *Yale Law Review* wrote, "[t]he use of this young woman's portrait for advertising in itself affirms that it had a more or less definite value for that purpose. . . . [W]henever unusual beauty of face or form makes the exhibition of one's portrait profitable, the right to the

attributed, in part, to the tendency of the early twentieth century legal world to think in terms of property rights, and the then-existing rule that only interference with property rights, not personal rights, could be enjoined.[320] But lawyers' attempts to root privacy in property also suggests new cultural attitudes towards image commodification and the way that personal photographs were becoming valuable objects in a robust and flourishing market for images. As the *Albany Law Journal* wrote in an article on the *Roberson* case, "[i]t is tolerably well known that popular actresses have posed for photographers, and divided with them the profits of property rights in their own forms and features."[321] If a woman "has nothing in the nature of a property right in her own form and features, who has a better right?"[322] In the 1911 case *Munden v. Harris*, which had involved the unauthorized use of a young boy's photo in an ad for jewelry, the plaintiff sought an injunction and damages for an invasion of his privacy.[323] The court held that the publication could be enjoined and that the boy had a right to privacy because his image could be a source of profit and therefore was a form of property.[324] As the court observed:

> One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? . . . If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?[325]

By 1910, many courts that recognized a "privacy" claim against "public portraiture"[326] did so on the grounds "that one has an exclusive right to his picture, on the score of its

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commercial value of that portrait must vest in the original of the picture . . . ." *Id.*

320. *See, e.g.*, Herbert Spencer Hadley, *The Right to Privacy*, 3 NW. L. REV. 1 (1985).

321. *The Right of Privacy*, 64 ALB. L.J. 248, 248 (1902).

322. *Id.*

323. Munden v. Harris, 134 S.W. 1076, 1077 (Mo. Ct. App. 1911).

324. *Id.* at 1079.

325. *Id.* at 1078.

326. Post, *supra* note 16, at 649.

being a property right of material profit."[327] Despite acknowledging the property-like nature of one's image, courts nonetheless awarded damages for personal injury—emotional and dignitary harms. As Robert Post has observed, the tort of appropriation "lurched precariously between formulations of privacy and property."[328] This confusion and ambivalence befits a culture in a state of transition.

Courts in this era continued to acknowledge that one's unauthorized appearance in an advertisement could constitute an injury to one's feelings and reputation and awarded damages on that basis.[329] Yet at the same time, they were beginning to suggest that the human likeness was an object that could be profitably transacted on the open market, particularly when actors, models, and other "professional" endorsers were involved, and implied that such transactions were not necessarily illicit or illegitimate.[330] The moral and social stigma that had surrounded commercial endorsement and the trafficking in human images was beginning to disappear. But courts were not yet ready to treat the image truly like a thing—to commodify the persona and award damages for pecuniary loss caused by the unauthorized commercial exploitation of one's image. The full legal commodification of the image would not take place until the second third of the twentieth century, when consumer culture flourished and was truly integrated into the fabric of American life.

IV. FROM DIGNITY TO PROFIT

In the period between the two world wars, the foundations of modern consumer society took root in the United States.[331] In the 1920s, industrial production almost

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327. *Munden*, 134 S.W. at 1079.

328. Post, *supra* note 16, at 649.

329. *See, e.g.*, Kunz v. Allen, 172 P. 532, 532 (Kan. 1918).

330. *See* discussion *infra* Part IV.

331. THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980, at 103 (Richard Wightman Fox & T.J. Lears eds., 1983).

doubled;[332] movies, radio, cars, magazines, "installment buying, [and] the five day work week" became central cultural institutions.[333] Mass advertising, urban department stores, and other commercial venues exhorted people to fulfill their material desires.[334] Once seen as an assault to the moral foundations of the self and society, engagement with the practices and values of mass consumption had become a means of enhancing one's self and social identity.

A. *Modern American Consumer Culture*

As sociologists Robert and Helen Lynd noted in their classic study *Middletown*, by 1930 the culture of consumption had swept middle-class America.[335] In contrast to the average American in the nineteenth century, the Lynds wrote, the modern residents of Middletown embraced upward mobility as one of their primary goals; they aspired to achieve social respect and status through the acquisition and display of prestigious cars, clothes, and other consumer items.[336]

Advertising continued to forge the link between consumerism, emotional fulfillment, and social status. "In an effort to . . . refute lingering charges of charlatanism, advertising agents . . . began to reinvent themselves as professional businessmen," historian Marlis Schweitzer observes.[337] The industry's new respectability contributed to the credibility and persuasiveness of its messages.[338] By 1920, agencies had developed for the purpose of creating advertisements for manufacturers,[339] and "admen" were

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332. SIVULKA, *supra* note 45, at 120.

333. THE CULTURE OF CONSUMPTION, *supra* note 331, at 103.

334. SIVULKA, *supra* note 45, at 82.

335. *See generally* ROBERT S. LYND & HELEN MERRELL LYND, MIDDLETOWN: A STUDY IN MODERN AMERICAN CULTURE (1959).

336. *Id.*

337. Schweitzer, *supra* note 95, at 264.

338. *Id.*

339. *See* SIVULKA, *supra* note 45, at 98-99.

regarded as white-collar professionals.[340] Advertisers took advantage of recent developments in mass communication—the development of film and radio, and the increased circulation of newspapers and magazines—to disseminate their pitches and slogans to a national audience. They also relied on ever more persuasive appeals, including slick and professional illustrations, both drawn and photographed. In 1894, thirty percent of ads included pictures; by 1919 this had risen to ninety percent.[341] By 1900, annual expenditures on advertising stood at $95,000,000 a year.[342] By 1919, it exceeded half a billion dollars, and by 1929 it reached over a billion dollars.[343] With words and pictures, advertisers linked consumer items to such coveted internal states as self-respect and freedom and promised personal fulfillment through the purchase and use of commercial products.[344]

The motion picture became the nation's premiere form of entertainment in the 1920s, and film actors rose to the position of celebrities.[345] Actors' images commanded mass public attention and, in their own right, became valuable commodities.[346] Though motion picture stars ostensibly "acted," the real basis of their fame was their ability to publicize their images.[347] No longer regarded as a view into the intimate soul, the photograph was coming to be regarded as merely an image, a surface representation distinct from the "real self" that could be infinitely transformed and manipulated for personal gain.[348] The key

340. *See, e.g.*, FOX, *supra* note 123, at 78-117 (discussing the growth of the advertising world and its leaders). *See also* Bartholomew, *Advertising*, *supra* note 122, at 19 ("Often viewed with disapproval in the 1800s, advertisers were held in high regard throughout the first part of the twentieth century.").

341. OHMANN, *supra* note 44, at 176, 179-80.

342. POTTER, *supra* note 35, at 169.

343. *Id.*

344. *See generally* ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY 1920-1940 (1985).

345. *See id.* at 61.

346. *See id.* at 61-64.

347. *See id.*

348. *See id.*

to celebrity stardom was to assemble fragments of cultural meaning into a cohesive image or "star persona" and to vend that image to the public.[349] Sociological studies of the period indicated that many Americans emulated celebrities and their ability to glamorize and publicize their identities and images.[350] They bought the items that stars endorsed; some even dreamed of having their own pictures used in advertisements.[351]

Conspicuous consumption and celebrity became mutually reinforcing phenomena. Actors gained status for their luxurious lifestyles, and consumption was legitimized as it became the preferred leisure activity of the stars.[352] Film celebrity had become an immense source of economic value, and advertisers regularly contracted with movie actors for the use of their personae.[353] By the 1930s, film stars appeared in advertisements for a wide range of consumer products, often commanding huge sums for their images and testimonials.[354] The sign that a Hollywood actor had become a star was her ability to generate income through product endorsements.[355] It was not just film actors who were paid to appear in ads. Americans had become

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349. *See, e.g*, RICHARD DYER, STARS (1979); JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW (1991).

350. *See, e.g.*, HERBERT BLUMER, MOVIES AND CONDUCT (1933).

351. *Id.*

352. One writer noted "that the consumption patterns of Hollywood had become a standard of reference for popular consumption, making it possible for the housewife in Vermont or Oregon to explain to her hairdresser, her dressmaker, or her decorator the ideal that she is trying to realize." STUART EWEN, ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE 89 (1988) (quoting MARGARET FARRAND THORP, AMERICA AT THE MOVIES 113 (1939)) (internal quotation marks omitted); *see also* Madow, *supra* note 44, at 163.

353. GAINES, *supra* note 349, at 159 ("Beginning in the twenties, studios were besieged with requests for star product endorsements . . . ."); *see* Charles Eckert, *The Carole Lombard in the Macy's Window*, in MOVIES AND MASS CULTURE 95, 116 (John Belton ed., 1996) ("The Hollywood studios, with their rosters of contracted stars, had come to occupy a privileged position in the advertising industry.").

354. Schweitzer, *supra* note 95, at 257; *see also* Madow, *supra* note 44, at 166.

355. *See, e.g.*, MARCHAND, *supra* note 344, at 61-64.

fascinated with a pantheon of celebrities—sports stars, stage performers, singers, artists, and socialites, among others—who profitably licensed their images to advertisers and merchandisers.[356] As the cultural studies scholar Jane Gaines has observed, "experts and celebrities, whose personal testimony and photographs appeared in advertisements," began to be regarded like "aristocracy."[357]

The commercial model also rose to a position of cultural envy and esteem.[358] The further development of modeling agencies in this era gave the profession legitimacy and helped transform the model from an "object of opprobrium" to one of status.[359] So coveted had modeling become as an occupation that the John Robert Powers modeling agency, the largest modeling agency of the time, hired a number of New York socialites to model clothes both for fashion shows and advertisements.[360] They found modeling glamorous and "in keeping with their own aspirations for social preferment."[361] The idea that a person might earn social and material success by commercially exploiting one's image marked a fundamental and decisive break with the past. The ability to vend one's likeness meant that one had acquired the looks and charm that were essential forms of cultural capital in an image-based consumer society.

By the end of the third decade of the twentieth century, advertising, mass consumption, and the "world of goods" were no longer imbued with overtones of misdeed and illicit temptation.[362] Individuals staked "a real portion of their

356. "[T]he 'publicity values' of movie and sports stars could now be exploited profitably in a wide range of collateral endeavors." *See* Madow, *supra* note 44, at 166.

357. GAINES, *supra* note 349, at 159.

358. BANNER, AMERICAN BEAUTY, *supra* note 60, at 261-63.

359. *Id.* at 263; Brown, *supra* note 58, at 52-53.

360. BANNER, AMERICAN BEAUTY, *supra* note 60, at 263.

361. *Id.*

362. LEARS, FABLES OF ABUNDANCE, *supra* note 115, at 139. Although, as Lears notes, it is not fair to impute a consumer mindset to everyone: "ordinary Americans . . . preserve[d] vernacular ways of knowing, refusing to conform to the standard[s] held out to them by national advertisers. Regional, religious,

personal identities and their quest for meaning—even their emotional satisfaction—on the search for and acquisition of goods," in the words of historian Peter Stearns.[363] In this world of celebrity and conspicuous consumption, the pinnacle of social achievement, for many, was to acquire goods and be publicly associated with consumer products. Perhaps it was even to turn one's image into a commodity to be sold and displayed before the public.

B. *The Modern Tort of Appropriation*

Consistent with this cultural turn, the post-1920 advertising appropriation cases took on a very different focus and tone than those at the turn of the century. With the proliferation of advertising and consumer culture, there was a marked increase in the number of cases, particularly those brought by celebrities.[364] Plaintiffs, both celebrity and noncelebrity, no longer spoke exclusively in terms of shame, opprobrium, and moral offense. In some cases, they never mentioned any indignity, embarrassment, or reputational harm caused by the commodification of their images. The cry was no longer exclusively, as it had once been, to avoid being made a part of commerce against one's will. Rather, in many instances, it was to protect one's ability to publicize oneself and to extract maximum value from the commercial use of one's image and identity.

Libel by advertising cases became increasingly infrequent.[365] The claim that one's reputation had been ruined by the mere fact of his appearance in an advertisement was largely untenable in the new consumer environment.[366] In 1936, a woman brought suit for libel over the unauthorized use of her photograph in an advertisement

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ethnic, and occupational traditions survived and nurtured alternative modes of conduct and consciousness." *Id.*

363. Stearns, supra note 107, at 105.

364. *See* George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 459 (1991); Kahn, *Bringing Dignity Back to Light*, *supra* note 14, at 230.

365. *See, e.g.*, Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938).

366. *Id.* at 59.

for Melt's Rye and Whole Wheat Bread.[367] The court concluded that it was no shame to be a commercial endorser of bread; "[t]o recommend . . . an item of daily food is not likely to subject one to ridicule or contempt."[368] In the 1941 case *O'Brien v. Pabst Sales Co.*, a football player brought suit over an advertisement that used a picture of him to sell beer.[369] He claimed to have been "greatly embarrassed and humiliated."[370] The court denied him a cause of action, noting that "the business of making and selling beer is a legitimate and eminently respectable business" and that the use of his picture in a beer ad "could not possibly disgrace . . . or cause him damage."[371]

Rather than initiate libel claims, the subjects of unauthorized advertising exploitation were more likely to sue either under the New York "privacy" statute, or the common law privacy tort. By the 1930s, the common law right to privacy had been recognized in several states.[372] While many courts rejected or severely limited a right to privacy that would impose liability for the publication of "news" and other truthful information, the majority of states that recognized a right to privacy did so in the commercial appropriation context.[373] "In every state which recognizes the right of privacy, the name or photograph of a living person may not be used without his permission for purposes of advertising or trade," lawyer Louis Nizer summarized in 1941.[374] "Indeed, in some jurisdictions, this is said to be the sole criterion . . . ."[375]

Although advertisers and retailers apparently did use purloined photos of private individuals on occasion, the

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367. *Id.* at 57-58.

368. *Id.* at 62.

369. O'Brien v. Pabst Sales Co., 124 F.2d 167, 168 (5th Cir. 1941).

370. *Id.* at 169.

371. *Id.* at 169-70.

372. *See, e.g.*, Louis Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526, 553-54 (1941).

373. *See, e.g.*, *id.*

374. *Id.* at 547.

375. *Id.*

typical appropriation case no longer involved "circulating portraits." More often, claims were raised by models, actors, sports figures, and other celebrities whose images had been used in various product endorsements without consent or payment. Although emotional distress and reputational harm were sometimes alleged, the nature of the harm in many cases was quite patently pecuniary.[376] In *Miller v. Madison Square Garden Corp.*, a well-known performer brought a privacy action seeking damages for the unauthorized use of his name and photograph in a program sold to patrons in connection with a bicycle race.[377] The plaintiff admitted "that the use of his name and picture by [the] defendant had not subjected him to any ridicule nor caused him any humiliation whatever."[378] In 1921, an actress sued under the New York "privacy" statute over the unauthorized use of her image in a magazine advertisement.[379] No dignitary harm was alleged.[380] She simply wanted to be paid for the use of her image.[381]

Even noncelebrity plaintiffs were no longer seeing their injuries exclusively in terms of embarrassment or loss of dignity.[382] In the 1920s, an 18-year-old woman recognized her image on an advertising poster for a flour product.[383] She brought a lawsuit seeking $50,000 for the use of her image.[384] A woman from Brooklyn, according to the *New York Times*, was asking for $25,000 for the rights to her picture.[385] In the words of legal scholar George Armstrong, "[y]oung ladies who might have 'taken to bed' in humiliation

376. Miller v. Madison Square Garden Corp., 28 N.Y.S. 2d. 811, 812 (Sup. Ct. 1941).

377. *Id.*

378. *Id.* at 813.

379. Loftus v. Greenwich Lithographing Co., 182 N.Y.S. 428, 428 (App. Div. 1920).

380. *Id.*

381. *Id.*

382. *See, e.g.*, Armstrong, *supra* note 364, at 459.

383. *See id.*

384. *Id.*

385. *Id.*

. . . at the sight of their face on a flour ad were now avidly negotiating these commercial transactions."[386]

This is not to say that people were never genuinely embarrassed or distressed by the use of their pictures to sell products that they had not actually endorsed, or that they were unfailingly enthusiastic about the prospect of commercial publicity. Even celebrities made plausible claims of emotional distress caused by the unauthorized advertising use of their images. Actresses worked hard to control the messages associated with their names and images. They were "notoriously fussy about their photographs" and could react strongly when they were publicly depicted in a way that clashed with the image they wanted to convey.[387] In a 1938 case, a singer brought an action for invasion of privacy on the ground that the defendant had, without her permission, placed a photo of her in an advertisement on the front of a burlesque theater.[388] She considered herself a respectable, legitimate actress and alleged that the implication that she was a mere "showgirl" assaulted her dignity and reputation.[389]

Yet the courts often found it uncompelling when a star, who made her living from mass exposure, complained that her feelings had been assaulted by unwanted publicity.[390] In many privacy cases in which a celebrity alleged dignitary or emotional harms, courts dismissed such allegations out of hand.[391] According to courts, celebrities had developed a

386. *Id.*

387. *See* Schweitzer, *supra* note 95, at 274.

> In 1916, "America's sweetheart" Mary Pickford received a reported 4,000 requests for permission to publish her photograph for advertising purposes before she finally agreed to allow the Pompeian Manufacturing Company . . . to use her image. Seventy poses were made before she was satisfied with the results and willing to release one photograph to the company.
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> *Id.* at 275 n.63.

388. *See* Flake v. Greensboro News Co., 195 S.E. 55, 57-58 (N.C. 1938).

389. *See id.*

390. *See, e.g.*, O'Brien v. Pabst Sales Co., 124 F.2d 167, 168 (5th Cir. 1941); Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338, 340 (1938).

391. *See, e.g.*, *O'Brien*, 124 F.2d at 168; *Martin*, 10 Ohio Op. at 340.

thick skin when it came to publicity and could not claim to be wounded by the unauthorized use of their pictures, even in a commercial context unfavorable to them.[392] One who made a livelihood out of commodifying herself could not claim to be offended when her image was commodified by someone else.[393] In formal legal terms, celebrities had "waived" their right to avoid all unwanted publicity, including unwanted commercial exploitation.[394] As the court concluded in *Martin v. F.I.Y. Theatre Co.*:

> This court is of the opinion that any person following the theatrical business for a life's work has no such right of privacy . . . . Her embarkation on this vocation in life has estopped her from a right to be heard to complain that her personal right of privacy has been invaded.[395]

Courts also recognized, in cases involving both celebrities and noncelebrities, that in many instances pecuniary injuries were the real motive for bringing suit. As a North Carolina appeals court noted in 1938, "[o]ne of the accepted and popular methods of advertising in the present day is to procure and publish the indorsement [sic] of the article being advertised by some well-known person . . . . If the name of a person is a valuable asset in connection with an advertising enterprise, then . . . his face or features are likewise of value."[396] In 1939, a New York state court acknowledged that the state's "privacy" statute was intended "to stop the merchandising in the channels of normal trade of a portrait of a person who occupies a position in which there is monetary value [in] publicizing

392. *See* Madow, *supra* note 44, at 168-69.

393. *See id.*

394. *See* Nimmer, *supra* note 21, at 204. Melville Nimmer wrote:

> Situations may of course occur where exploitation of a plaintiff's publicity values will prove humiliating or embarrassing to him, but in most situations one who has achieved such prominence as to give a publicity value to the use of his name, photograph, and likeness cannot honestly claim that he is humiliated or offended by their use before the public.
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> *Id.* at 207.

395. *Martin*, 10 Ohio Op. at 340.

396. Flake v. Greensboro News Co., 195 S.E. 55, 64 (N.C. 1938).

[one's portrait]."[397] Torts scholars similarly began to reject the conceptualization of appropriation as a privacy or dignity based harm.[398] Leon Green noted in 1932 that "[t]he classification of [appropriation] cases as 'privacy' cases does not hit the mark."[399]

Yet as a matter of formal doctrine, damages for "invasion of privacy" could not be recovered for pecuniary losses, only emotional and dignitary harms. The effect was to leave many subjects of advertising appropriation, particularly celebrity plaintiffs, without compensation for the economic losses they suffered.[400] In *Fisher v. Rosenberg*, the plaintiff was a professional dancer who, while dancing with the famous dancer Irene Castle, had photos taken in two dancing poses.[401] The defendant used these pictures in newspaper advertisements of the defendant's shoes.[402] The plaintiff sued under the New York privacy statute, ostensibly seeking to recover what he might have been paid had he licensed his image to the shoe company.[403] The court awarded only nominal damages, noting that there was no harm to the plaintiff's dignity, as publicity usually inured to the benefit of entertainment stars.[404]

By the 1940s, the law was caught between an earlier worldview that had viewed the unauthorized commercial exploitation of the persona as a moral wrong and the realities of a modern, consumption-driven celebrity culture. The tort of invasion of privacy had been conceptualized as a remedy for the injuries to personal dignity caused by the unauthorized appearance of one's image in an advertisement. Yet emotional and dignitary harms were becoming, in many cases, peripheral to appropriation actions. Courts in the interwar period recognized the

397. Kline v. Robert M. McBride & Co., 11 N.Y.S.2d 674, 682 (Sup. Ct. 1939).

398. *See, e.g.,* Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932).

399. *Id.* at 246.

400. *See* discussion *infra* Part IV.C.

401. Fisher v. Rosenberg, Inc., 23 N.Y.S.2d 677, 678 (Sup. Ct. 1940).

402. *Id.*

403. *Id.*

404. *Id.* at 679.

property-like nature of personal images and that models and celebrities regularly licensed their names, images, and identities to advertisers and manufacturers. They also acknowledged that the late nineteenth century culture of anti-materialism was no longer the backdrop against which appropriation claims were brought. After World War II, courts finally began to reject the idea of commercial appropriation of identity as a dignitary harm and reoriented the tort from a right of privacy to a right of "publicity."

C. *The Right of Publicity*

In the 1950s—the celebrated era of postwar affluence and mass consumption—courts began to formally recognize a "right of publicity," a purely "pecuniary interest in the commercial exploitation of [] identity," distinct from a right of privacy.[405] In the 1953 case *Haelan Labs. Inc. v. Topps Chewing Gum, Inc.*, a case involving a baseball card manufacturer that had used the likeness of a famous baseball player without his consent,[406] a federal appeals court recognized what the lawyer Melville Nimmer famously described as "the right of each person to control and profit from the publicity values which he has created or purchased."[407] As the court concluded:

> It is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.[408]

The court made explicit what had been apparent for several decades—that the act of commercializing one's persona

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405. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d. 831, 834 (6th Cir. 1983).

406. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867-68 (2d Cir. 1953).

407. Nimmer, *supra* note 21, at 218.

408. *Haelan Labs., Inc.*, 202 F.2d at 868.

existed in an entirely different social and moral register than at the time of the right to privacy's invention.[409]

Under this new "right of publicity," damages would be "computed in terms of the value of the publicity appropriated by defendant rather than . . . in terms of the injury sustained by the plaintiff," in the words of Nimmer, who praised the *Haelan* decision in an influential law review article in 1954 and advocated the further development and adoption of a "right of publicity."[410] As Nimmer wrote, privacy doctrine, "first developed to protect the sensibilities of nineteenth century Brahmin Boston, is not adequate to meet the demands of the second half of the twentieth century, particularly with respect to . . . [w]ell known personalities."[411] Celebrities "do not seek the 'solitude and privacy' which Brandeis and Warren sought to protect. Indeed, privacy is the one thing they do 'not want, or need.'"[412] Under the Haelan/Nimmer formulation, the invasion of one's right of publicity would be "actionable regardless of whether the defendant used the publicity in a manner offensive to the sensibilities of the plaintiff."[413] There would be no "waiver" of the right by virtue of the plaintiff's celebrity.

Nimmer's article both acknowledged and contributed to an important shift in the law. A decade later, some states had adopted a "right of publicity" as a property-based interest.[414] The right of publicity protected the "pecuniary interest in identity,"[415] with "identity" broadly defined as representations of one's "persona," including one's name, voice, and likeness.[416] Some states redesignated appropriation as a "proprietary [tort]," a personal right that

409. *See id.*

410. Nimmer, *supra* note 21, at 216, 218.

411. *Id.* at 203.

412. *Id.* at 203-04.

413. *Id.* at 216.

414. Bartholomew, *A Right is Born, supra* note 23, at 313.

415. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983).

416. Bartholomew, *A Right is Born, supra* note 23, at 310-16.

was based on a property interest—the measure of damages was lost profits—but that did not encompass the full "bundle of property rights" associated with legal ownership of property.[417] In his famous 1960 law review article *Privacy*, the noted torts scholar William Prosser asserted, based on a survey of existing case law, that the appropriation tort protected a proprietary interest "in the exclusive use of the plaintiff's name and likeness as an aspect of his identity."[418] The *Second Restatement of Torts* designated the tort of appropriation as protecting a "property right."[419]

In some states, the new appropriation tort merged dignity and property interests—recovery was to be based "both on an individual's right of privacy and on his economic interest in his personality."[420] In a 1953 case, *Eick v. Perk Dog Food*, involving the unauthorized use of the picture of a woman in an ad for dog food, the court held that she could recover both for "mental distress as well as the actual pecuniary damages which the appropriation causes."[421] The New York privacy statute was interpreted to permit damages both for mental anguish and for invasion of one's property interest in one's persona.[422]

Some states that adopted the right of publicity formally retained appropriation as a separate dignity or privacy based tort, but sharply limited the possibility of recovery for emotional distress or dignitary and reputational harm.[423] Courts often rejected such claims on the theory that the only emotional distress that could follow from the unauthorized commercial use of one's image would be the distress at having lost the opportunity to make a profit.[424]

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417. *Id.* at 312-14.

418. Prosser, *supra* note 13, at 406.

419. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977).

420. James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 652 (1973).

421. Eick v. Perk Dog Food Co., 106 N.E.2d 742, 745 (Ill. App. Ct. 1952).

422. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867-68 (2d Cir. 1953).

423. Treece, *supra* note 420, at 641.

424. *Id.* at 640-41. Treece states:

As one legal commentator observed, "[t]he nature of the injury to self-esteem caused by advertising is elusive. . . . So far no scientist has offered evidence that people generally experience displeasure, anger, shock, or hatred when their name or picture appears in an advertisement without their consent."[425]

As the mass media proliferated in the latter twentieth century, and as the commodification of personal image continued to be a source of status and profit, both celebrities and noncelebrities became increasingly protective of the income-generating potential of their images and encountered a legal regime that was friendly to such interests. Movie stars and other celebrities regularly recovered damages for economic injuries caused by the unauthorized use of their images in advertising and other commercial venues. The "right of publicity" or appropriation-publicity tort was not limited only to those who were famous; anyone could obtain damages as long as they could show that their images had commercial value. In *Canessa v. Kislak*, a New Jersey case from 1967, a veteran whose picture had been used in an ad without his authorization sued to recover what he potentially might

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> In reality the injury to sensibilities concept does not normally meaningfully apply when a person routinely permits advertising uses of his name and picture. Any anger or outrage that he might feel hardly flows from the shock of confronting his likeness in an advertisement. Rather, his injury takes the form of diminished income. The harm resides not in the use of his likeness but in the user's failure to pay.

Id. But see Lugosi v. Universal Pictures, 603 P.2d 425, 439 n.11 (Cal. 1979). The dissenting opinion observed the possible types of indignity and mental distress that might flow from the unpermitted commercial use of a person's identity:

> Commercial misappropriations may injure a person's feelings in several ways. First, the person may find any commercial exploitation undesirable and offensive. Second, while certain commercial uses may be acceptable or even desirable, a particular use may be distressing. Third, other individuals, unaware that the use is unauthorized, may disparage one who would sell their identity for that purpose, thereby inducing embarrassment, anger or mental distress.

Id. (internal citation omitted).

425. Treece, *supra* note 420, at 640.

have earned had he licensed his image for advertising use.[426] The court concluded that he had a cause of action to recover lost profits: "plaintiffs' names and likenesses belong to them. As such they are property. They are things of value."[427] Without shame or moral hesitation, men and women of all backgrounds and stations in life sought to extract profit from their images, and such pleas were not seen as immoral or illicit.

CONCLUSION: THE ECLIPSE OF DIGNITY

We should stand back and take notice at how far the law traveled since its origins in the crisis of the "circulating portrait." The appropriation-publicity tort is now oriented largely around economic interests, especially, though not exclusively, the interests of those who make a profession out of commodifying their images. Emotional, reputational, or dignitary harms are rarely, if at all, the basis of recovery. The situation is the reverse of that which gave rise to the "right to privacy." The appropriation tort, or "right of publicity," now largely protects the pocketbooks of those who seek to exploit their own images, not the distress of someone who had no interest in and was deeply offended by being dragged into the world of commerce.

Sounding more like late nineteenth century moralists than twentieth century champions of consumption, a few contemporary legal scholars have mourned the demise of the dignitary tort. Indeed, although we live in a world "thoroughly dominated by market forces and saturated by a culture of consumption,"[428] writes Jonathan Kahn, people may well feel legitimate distress at having their images made to serve "the economic needs and interests of others."[429] In the words of the eminent First Amendment

426. Canessa v. J.I. Kislak, Inc., 235 A.2d. 62, 76 (N.J. Super. Ct. Law Div. 1967).

427. *Id.*

428. Jonathan Kahn, *Enslaving the Image: The Origins of the Tort of Appropriation of Identity Reconsidered*, 2 LEGAL THEORY 301, 306 (1996) [hereinafter Kahn, *Enslaving the Image*].

429. Bloustein, *supra* note 149, at 988; *see* Kahn, *Enslaving the Image*, *supra* note 425, at 306.

scholar Edward Bloustein, "[i]n a community at all sensitive to human values, it is degrading to . . . make a man part of commerce against his will."[430] A person who sought to exploit her identity in one context might well have a legitimate moral aversion to commercial publicity in another, regardless of whether or not she was paid for it. There was an offense to the sensibilities of the person—an affront to one's sense of autonomy and right to self-definition—regardless of any commercial advantage.[431] Kahn laments that courts have come to regard these concerns with dignity, honor, and personal sensibility as outmoded if not antiquated.[432]

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430. Bloustein, *supra* note 149, at 988.

431. In 1967, Hyman Gross criticized Prosser's characterization of the tort as merely infringing upon a proprietary right of the plaintiff. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 50 (1967). Gross stated: "this is a serious mislocation of the gravamen of the wrong. The offense is to sensibility, and more particularly, to those sensibilities of a person which are offended by another's use of his personality *regardless of any advantage*." *Id.*; *see also* McKenna, *supra* note 16, at 229 ("An individual's choices . . . can be viewed as the text of her identity, and unauthorized uses of a person's identity in connection with products or services threaten to recreate that text and affect the way the individual is perceived by others."). Insofar as the individual bears the emotional cost of such perceptions, she has a dignitary or "privacy" interest in preventing commercial uses of her identity. *See id.*; *see also* Alisa M. Weisman, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. CAL. L. REV. 727, 730 (1982).

432. *See* Kahn, *Bringing Dignity Back to Light*, *supra* note 14, at 264-66. When courts have compensated emotional distress caused by commercial exploitation of identity, they have tended to do so on the grounds of the false attribution aspect of the misappropriation—the plaintiff was associated with a truly embarrassing product. *See, e.g.*, Clark v. Celeb Publ'g, Inc., 530 F. Supp. 979, 981-84 (S.D.N.Y. 1981). Few if any recent cases seem to have been won when the alleged injury was the indignity caused by the commercialization itself. In one notable gesture to the anti-commodification ethos, the Ninth Circuit Court of Appeals held that singer Tom Waits could recover damages for emotional harms caused by the commercial appropriation of identity when the makers of Doritos used a sound-alike of his voice—which under California appropriation law was considered an aspect of his "persona"—in a broadcast advertisement. Waits had refused to commercially exploit his voice as a matter of personal integrity. *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1096-1103 (9th Cir. 1992). The court noted that although the injury stemming from violation of Waits' "right of publicity" "'may be largely, or even wholly, of an economic or material nature,' . . . 'it is quite possible that the appropriation of the identity of

As a practical matter, there is probably no going back to the turn-of-the-century, exclusively dignitary model. The social commitments that supported it no longer exist. The "eclipse" of the dignity-based appropriation tort by the profit-oriented appropriation tort or "right of publicity" was a reflection of, and reaction to, fundamental moral and social transformations that took place in the first half of the twentieth century. By the 1950s if not earlier, America had gone from a culture that was deeply skeptical if not hostile to the idea of commercializing the persona to one in which such activities were sources of not only economic but also cultural capital. The reorientation of the appropriation action tracked a major shift in popular perspectives on advertising, the consumer marketplace, and the morality of consumption. It attests to the triumph of consumer values and the commodification of the self and social identity in our modern mass consumer society.

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a celebrity may induce humiliation, embarrassment, and mental distress.'" *Id.* at 1103 (internal citation omitted).