

MURDER WILL OUT: RETHINKING THE RIGHT OF PUBLICITY THROUGH ONE CLASSIC CASE

*Edward J. Larson**

In this article, the author uses the protracted legal battles over the right of publicity stemming from the lasting celebrity created by the so-called “crime of the century” to propose a legal test for applying the right of publicity generally. These legal battles were fought during the 1960s over the right of celebrity slayer Nathan Leopold to control the use of his name and personality in a novel, movie, and stage play. After conflicting lower court decisions that had a chilling effect on writers and publishers, the case was eventually decided against Leopold. The author agrees with this result but argues that, because there has been a tendency to decide such disputes on a case-by-case basis, similar uncertainty continues to arise in analogous cases. He proposes a clear test, easily understood by both creators and users of celebrity personality, which would balance the interests of the parties and bring added predictability to this area of the law.

I. INTRODUCTION

On May 21, 1924, Nathan F. Leopold, Jr. either killed Bobby Franks or helped Richard Loeb to kill him.¹ They both pled guilty to the murder. It quickly became known as “the crime of the century” and retained that dubious designation throughout the seventy-five

* University Professor of History and Hugh & Hazel Darling Chair in Law, Pepperdine University, Malibu, California; B.A., Williams College; J.D., Harvard University; Ph.D., University of Wisconsin-Madison. The author would like to thank Pepperdine reference librarian Jodi Kruger for her extraordinary efforts obtaining primary source materials for this project and David Rabindra for his research assistance. This article is dedicated to the memory of Clarence Clyde Ferguson, Jr. (1924-1983), a teacher, diplomat and civil-rights leader, whose frequent references to his own article in *Rutgers Law Review* while teaching Civil Procedure ingrained warm feeling toward that review in the mind of the author and other students.

1. After police and prosecutors uncovered some evidence connecting them to the murder of Bobby Franks and undermining their alibis, without benefit of counsel despite their wealth and education, Richard Loeb and Nathan Leopold fully confessed to prosecutors and freely provided physical evidence establishing their guilt beyond a reasonable doubt. They later pled guilty to the crime under the advice of exceptionally good counsel. See SIMON BAATZ, FOR THE THRILL OF IT: LEOPOLD, LOEB, AND THE MURDER THAT SHOCKED CHICAGO 131-43, 278-79, 283 (2008).

years left in that spectacularly violent time span.² Over eight decades later, they remain celebrities for this one act. As fact or thinly-masked fiction, the story of their crime and the sensational resulting trial was repeatedly told,³ but not the story of the subsequent legal battle over the publicity rights of the criminals, which this article uses to explore the appropriate scope of such rights.

The image of "Leopold and Loeb," as a crime, whether seen as the fused character of joint killers or distinct personalities of two individuals, has become a fixture in American culture. Since breaking onto the public consciousness in front-page headlines during the summer of 1924, it has provided source material for novels, histories, plays, movies, a popular musical, and even a comic book.⁴ In one of the first books about the crime, published in 1924, the author commented: "[T]he act which created a stir far beyond this country is so frightful, psychologically so incomprehensible, so singular in its unfoldment that, if a Poe or a writer of detective stories wished to unnerve his readers, no better tale could be invented."⁵ Far from diminishing over time, and without any coordinated cultivation, public interest in Leopold and Loeb continued to increase even as its meaning evolved. In a 1990 column, the London *Times* drama critic Sheridan Morley observed, "[a]part from the Oscar Wilde case, few trials of the last century have given quite so much to stage and screen as the Leopold-Loeb affair"⁶—and

2. Chicago newspapers used this term for the crime as early as the day after Nathan Leopold and Richard Loeb confessed to it. *E.g.*, Edwin Balmer, *Erotic Age of Depraved Books is Blamed by Edwin Balmer in Franks Brutal Murder Case*, CHI. HERALD & EXAM'R, June 1, 1924, at 4. A leading historical account of the episode, first published by G.P. Putnam's Sons in 1975 and republished by University of Illinois Press in 1999, uses that designation as its subtitle. HAL HIGDON, *LEOPOLD AND LOEB: THE CRIME OF THE CENTURY* (UNIV. OF ILL. PRESS 1999) (1975).

3. For a classic retelling that presents the crime as an abomination and the trial as epic, see the novel, movie, and play *Compulsion*. MEYER LEVIN, *COMPULSION* (1956); *COMPULSION* (20th Century Fox, 1959). The stage version of *Compulsion* opened on Broadway in 1957. See Brooks Atkinson, *Compulsion: Dramatization of Meyer Levin's Novel About the Leopold-Loeb Murder*, N.Y. TIMES, Nov. 3, 1957, at 137; see also BAATZ, *supra* note 1, at 161 (describing the trial as an "epic battle").

4. Forty years after the murder, Leopold wrote in his own autobiographical retelling of the event:

The details of the crime have been hashed and rehashed so often and in so many different ways. In 1924 there was hardly a person in the United States who didn't have all the details at his fingertips. It's all in the newspapers of the period. Books have been written about it. What could I conceivably add?

NATHAN F. LEOPOLD, JR., *LIFE PLUS 99 YEARS* 25 (1958).

5. MAURICE URSTEIN, *LEOPOLD AND LOEB: A PSYCHIATRIC-PSYCHOLOGICAL STUDY* 1 (1924).

6. Sheridan Morley, *Diary*, THE TIMES (London), Mar. 12, 1990, at 14.

this was in England! After listing several classic plays and movies about the Leopold and Loeb case and noting that a new production about it would open in London the following week, Morley added, “[i]f all goes well, we shall doubtless then get the film of the play of the film of the film of the film of the case.”⁷

Clearly, if people owned the Leopold and Loeb brand, they could still make money by licensing it. No one does. In 1959, as the strength of the image became apparent with the publication of yet another popular novel, play, and movie about the crime, *Compulsion*,⁸ Nathan Leopold emerged from prison to claim ownership of his identity and control of its use by suing those responsible for *Compulsion*, particularly the book’s author, Meyer Levin.⁹ After mixed initial rulings in this case, *Leopold v. Levin*,¹⁰ the Illinois Supreme Court ultimately rejected Leopold’s claims.¹¹ The court’s ruling anticipated and helped to shape the emerging right of publicity.¹² Nearly a half century later, however, the extent of a celebrity’s right of publicity remains disputed even in analogous fact situations.¹³ The rich development of Leopold and Loeb’s identity in American arts and literature demonstrates the wisdom of the Illinois court decision. This Article reviews the history and impact of *Leopold v. Levin* as a means to reevaluate the optimal scope of the right of publicity.

7. *Id.* As one example of the undying attraction of Leopold and Loeb in American culture, during the 1990s, an organization of artists, writers, and actors in Astoria, New York, the Butane Group, once performed three new stage plays based on them in as many years: *Leopold and Loeb Are Dead Now* (1995), *Leopold and Loeb: A Goddamn Laff Riot!* (1995), and *Leopold and Loeb Get It Up* (1993). See The Butane Group, <http://thebutanegroup.org/history.php> (last visited Nov. 13, 2009).

8. LEVIN, *supra* note 3 (novel); COMPULSION, *supra* note 3 (movie). For the play, see Atkinson, *supra* note 3, at 137.

9. See generally *Leopold v. Levin*, 259 N.E.2d 250, 251-52 (Ill. 1970) (restating factual and procedural history of lawsuit between Nathan Leopold and Meyer Levin).

10. Compare *Leopold v. Levin*, No. 59 C 14087, slip op. at 6-7 (Cir. Ct. Ill. Apr. 15, 1964) (finding for Leopold), with *Leopold v. Levin*, No. 59 C 14087, slip op. at 1-2 (Cir. Ct. Ill. Mar. 29, 1968) (finding against Leopold).

11. *Leopold v. Levin*, 259 N.E.2d 250 (Ill. 1970).

12. See, e.g., 1-2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 5:72, 8:45, 8:52, 8:74, 8:76, 8:82, 8:83 (2d ed. 2009) (containing seven references to *Leopold v. Levin* in this basic treatise on the right of publicity).

13. See, e.g., P.J. Huffstutter, *Guarding the Legacy of a Crook*, L.A. TIMES, Nov. 8, 2007, at 1 (depicting efforts by the heir of the bank robber and acknowledged murderer John H. Dillinger to license and control the use of Dillinger’s name by various users, including museums, writers, festivals, video games, and enterprises, including his successful 2001 suit against a non-profit Dillinger Museum operated by the Lake County Convention and Visitors Bureau in Hammond, Indiana).

II. MURDER, THEY WROTE

Nathan Leopold and Richard Loeb initiated one of the most enduring stories in American criminal history on May 21, 1924, when they abducted and murdered 14-year-old Bobby Franks, the third child in a wealthy Chicago family.¹⁴ This act attracted intense local newspaper coverage that turned into national media frenzy when its perpetrators were identified as two well-educated and privileged teenagers who lived in the same affluent Chicago neighborhood as their victim and apparently committed the crime simply for the thrill of killing someone.¹⁵

Journalists, prosecutors, and defense psychiatrists quickly turned up details of these next-door killers and their private behavior that mesmerized the public.¹⁶ The psychological defense on their behalf mounted by their already legendary trial attorney, Clarence Darrow, stirred a national debate over free will, criminal responsibility, and capital punishment.¹⁷ By the end of the trial, no one could determine who had created the public persona of Leopold and Loeb—the boys themselves, the media, the psychologists, the prosecution, or the defense.¹⁸ It was a common enterprise that stamped a complex image on a pair of individuals and their joint act.

The media inserted itself into the affair even before the murder became public.¹⁹ Thereafter, journalists, writers, and other

14. See BAATZ, *supra* note 1, at 4-6 (discussing the Franks family and business of Bobby's father, Jacob Franks).

15. A September 1924 article in the British journal, *The New Statesman*, reported about the case:

The affair has dominated the American newspapers for four months in a fashion that no short description could make real to English readers. In the first fortnight (that is, two months before the trial began), according to the calculation of a well-known American journalist, one Chicago daily gave to the case 228 columns of news, pictures, comment and conjecture. . . . The trial lasted thirty-three days, on every one of which a full page, with splash headlines, was deemed to be a reasonable allowance of space for the report in the papers of the great cities.

Leopold and Loeb, NEW STATESMAN, Sept. 20, 1924, at 669. Within a month after Leopold and Loeb confessed, a newspaper article depicted the case as horrifying "this entire country." Margery Rex, *Elinor Glyn Points to Lesson in Franks Case*, CHI. HERALD & EXAM'R, July 30, 1924, at 2.

16. Paula S. Fass, *Making and Remaking an Event: The Leopold and Loeb Case in American Culture*, 80 J. AM. HIST. 919, 919-20, 930-33 (1993). One contemporary observer noted: "The daily papers have rarely been so eagerly devoured by their readers as at the time of the Leopold-Loeb case." URSTEIN, *supra* note 5, at 1.

17. *Leopold and Loeb*, *supra* note 15, at 670.

18. For a general discussion on the shared creation of celebrity, see David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 948-49 (2008).

19. *Cub Reporters Win Franks Case Glory*, CHI. DAILY NEWS, May 31, 1924, at 3.

commentators molded the public understanding of the murder and the murderers.²⁰ Without necessarily minimizing the gravity of the crime that Leopold and Loeb committed,²¹ chroniclers filled them with meaning and shaped their public identity.²² The crime and trial remain cultural icons into the 21st century, providing inspiration and material for authors, motion-picture makers, and dramatists.²³

III. FROM LEOPOLD AND LOEB TO *LEOPOLD V. LEVIN*

Loeb died in prison at the hand of another prisoner in 1936,²⁴ while the actual facts of the brutal Franks murder remained fresh in people's minds, but Leopold lived long after the original episode had passed into something of a hazy national nightmare. As time wore on, he did not idly allow others to shape his public image. While still in prison and at least in part to improve his chances for parole, Leopold became interested in enhancing that image.²⁵ Of the period prior to 1944, he wrote, "[e]very bit of the enormous amount of publicity I had received over a period of twenty years had been bad."²⁶ Acknowledging that he was known solely as a kidnapper and

20. Fass, *supra* note 16, at 923-29, 938.

21. See John Bartlow Martin, *Murder on His Conscious, Conclusion*, SATURDAY EVENING POST, Apr. 23, 1955, at 137-38 (conveying a highly sympathetic account of Leopold that stresses the gravity of his earlier crime).

22. See *id.* (explaining the roots of their criminality in their formative years of emotional development).

23. The outflow of books, movies, and plays about the crime and trial has continued into the new century. Since 2000, the books on the case include *For the Thrill of It: Leopold, Loeb, and the Murder that Shocked Chicago*, BAATZ, *supra* note 1; DVD movie releases include SWOON (Strand Releasing 2004) and MURDER BY NUMBERS DVD (Warner Home Video 2002); and plays include STEPHEN DOLGINOFF, THRILL ME: THE LEOPOLD & LOEB STORY (2006) (published book of script and lyrics). The Off-Broadway production of *Thrill Me* was repeatedly extended and received numerous awards and award nominations. See *Footnotes*, N.Y. TIMES, July 9, 2005, at B8; see also HAVOK THEATER COMPANY, THRILL ME (2006) (Los Angeles Stage Bill). Other recent plays and movies have developed the Leopold and Loeb persona as well, but none have received as much public attention or critical acclaim as *Swoon* and *Thrill Me*. See, e.g., David Ng, *The Plot Thickens*, L.A. TIMES, Jan. 27, 2008, at F4 (reviewing *Dickie and Babe*, a new play about the case, and comparing its portrayal of Leopold and Loeb with how the relationship was portrayed in *Swoon* and the 1990s Off-Broadway hit about the crime, *Never the Sinner*); David C. Nichols, *Lively Company Lifts 'Leopold'*, L.A. TIMES, May 2, 2003, at E28 (reviewing another new play, *Leopold and Loeb*). Only twenty-two when he became fascinated with the Leopold and Loeb case and wrote *Never the Sinner* as a Northwestern University student, Logan went on to win Oscar nominations as a movie screenwriter. Sid Smith, *'Aviator' Writer's Career Takes Off*, L.A. TIMES, Dec. 31, 2004, at E22.

24. *Grime: Last of Loeb*, TIME, Feb. 10, 1936, <http://www.time.com/time/magazine/article/0,9171,755781,00.html>.

25. HIGDON, *supra* note 2, at 309-10.

26. *Id.* at 310 (quoting Leopold).

murderer, Leopold declared, "I was more than that. I was a human being too."²⁷ In a manner depicted by historian Hal Higdon as "conscious, calculated, but subtle,"²⁸ Leopold began promoting his human side.

Leopold was always an active prisoner. He studied languages, reclassified books in the prison library, took correspondence courses, became an X-ray technician and nurse at the prison hospital, co-founded a prison school with Loeb, and held various clerical positions.²⁹ Initially, he did not seek publicity and refused media requests.³⁰ In 1945, however, when he joined other inmates in volunteering to test new malaria drugs developed for American troops in World War II, Leopold let *Life* magazine show him being bitten by an infected mosquito.³¹ Shortly after, he gave radio interviews and posed for cameras during a ceremony for inmates who agreed to donate their corneas to an eye bank upon death.³²

These efforts to remake his public image intensified as the time approached when Leopold would become eligible for parole. In 1952, he began writing an autobiography that portrayed him as a model prisoner.³³ It included two chapters on the malaria project,³⁴ for example, but little about his childhood or Franks' murder.³⁵ While writing, Leopold sought help from Chicago reporter Meyer Levin, but their collaboration broke down in part due to Levin's interest in exploring psychological motives for the crime.³⁶ In 1955, Leopold cooperated in the preparation of a four-part feature article about his life in prison for the popular *Saturday Evening Post* magazine³⁷⁻

27. *Id.* (quoting Leopold).

28. *Id.* at 309.

29. BAATZ, *supra* note 1, at 428, 433-34; HIGDON, *supra* note 2, at 304. While noting these activities, neither author depicted Leopold as a model prisoner. See BAATZ, *supra* note 1, at 428 (explaining Leopold had an "uneven disciplinary record" and had spent time in solitary confinement); HIGDON, *supra* note 2, at 307-09 (explaining Leopold avoided the warden and rumors circulated of his homosexual activity).

30. LEOPOLD, *supra* note 4, at 335; HIGDON, *supra* note 2, at 309.

31. LEOPOLD, *supra* note 4, at 310, 335; HIGDON, *supra* note 2, at 308-09. On Leopold's participation in the malaria project, see also BAATZ, *supra* note 1, at 434-35. Higdon suggests that Leopold joined the project to gain access to male inmates. HIGDON, *supra* note 2, at 308.

32. See LEOPOLD, *supra* note 4, at 335-36.

33. *Id.* at 24-25; HIGDON, *supra* note 2, at 314.

34. LEOPOLD, *supra* note 4, at 305-38.

35. See *id.* at 24-25 (explaining Leopold's decision to restrict his autobiography to his life after the crime).

36. *Id.* at 367-69; see also HIGDON, *supra* note 2, at 314-15 (discussing Leopold's refusal to let Levin focus his attention on the crime itself, out of fear that it would affect his chance of getting parole).

37. See John Bartlow Martin, *Murder on His Conscious*, pt. 1, SATURDAY EVENING

articles that Levin described as presenting Leopold as “a kind of saintly savant.”³⁸ Commenting on these efforts, Higdon said of Leopold, “[t]hrough his attempts to obtain freedom, he had reestablished himself as a celebrity in the eyes of the general public. His efforts to rehabilitate his image were bearing fruit.”³⁹

After his release from prison in 1957, Leopold continued to buff his public image. He moved to Puerto Rico, married, worked in a church-related community clinic, earned a masters degree in social medicine, taught at the University of Puerto Rico, published a book on local birds, conducted research on a cure for leprosy, and, at his death in 1971, donated his body to science and his corneas for transplantation.⁴⁰ Remarking on his public persona in the context of a proposed documentary motion picture about his life, Leopold wrote in 1964 to Abel Brown, a loyal childhood friend:

You advanced the idea, which I'll admit sounded crazy to me at the time, that I might some day succeed in making my name something to be proud of rather than a symbol of the ultimate in evil. All the rest of the folks involved agreed that this was Utopian – impossible. I certainly was convinced that it was how it was.

But, Abe, even now, after six years, my “public image” – at least down here in Puerto Rico – has begun to change. I am respected by many people, liked, I think, by many people. And this picture, if it is really well done, and if it is not hooted down by such publications as *Time Magazine*, could just give that change in the public image a big, big boost.⁴¹

The motion picture project died. Nevertheless, near the end of his life, Leopold mused about what might happen to his public persona if he discovered a cure for leprosy. “Wouldn't THAT be a note to go out on,” he wrote.⁴² This project failed too.

Intent on rehabilitating his public image, Leopold did not want others to resurrect the dark side of his past. A new generation of Americans had grown up that did not remember the intense media publicity surrounding the 1924 case, and Leopold hoped he could become known for something other than committing the crime of the

POST, Apr. 2, 1955, at 17-18, 86-90; John Bartlow Martin, *Murder on His Conscience*, pt. 2, SATURDAY EVENING POST, Apr. 9, 1955, at 32-33, 65-72; John Bartlow Martin, *Murder on His Conscience*, pt. 3, SATURDAY EVENING POST, Apr. 16, 1955, at 36, 198, 201-02; Martin, *supra* note 21, at 28, 135-38.

38. LEVIN, *supra* note 3, at 117.

39. HIGDON, *supra* note 2, at 314.

40. *See id.* at 332-40. *E.g.*, Higdon wrote, “During his first years out of prison Leopold seemed to be trying to build himself an image as another Dr. Schweitzer.” *Id.* at 334.

41. *Id.* at 338 (quoting Letter from Nathan Leopold to Abel Brown (Mar. 31, 1964)).

42. *Id.* (quoting Letter from Nathan Leopold to Abel Brown (Dec. 17, 1970)).

century.⁴³ He was especially anxious about Levin's work on a psychological novel about the murder. In his autobiography, Leopold wrote about Levin's proposal, "[t]he idea of dredging up the past and rehashing all the horrible details of a tragedy I hoped was buried once and for all was revolting to me."⁴⁴

Levin persisted despite Leopold's express objections. When Levin sought personal information about the crime, Leopold rebuffed him.⁴⁵ Leopold's attorney, noted Chicago defense lawyer Elmer Gertz, sent a threatening letter to at least one potential publisher.⁴⁶ That publisher, presumably McGraw-Hill, which had given Levin an advance contract in 1954, backed off, but Levin found another trade publisher, Simon and Schuster, and his novel, *Compulsion*, became one of the bestselling books of 1956.⁴⁷ The play and movie versions of *Compulsion* followed over the next three years, with Gertz trying to stop both of them.⁴⁸ In *Compulsion*, Leopold, under the pseudonym Judd Steiner, reclaimed the spotlight as a brilliant but deeply disturbed teenager psychologically driven to kill because of his own troubled childhood and an obsession for Richard Loeb.⁴⁹ In 1958, Leopold complained:

Mr. Levin accuses Judd Steiner of felonies I never dreamed of committing. He puts into Judd's mouth and very brain words and thoughts that were never in mine. Some make me blush; some make me want to weep. My God, what I did is horrible enough and the load of guilt I bear on my conscience is already heavy enough without this additional source of turmoil.⁵⁰

He added, "I hope – I know – that I am in no sense today the same person as that horrible, vicious, conceited, 'super-smart' – and pathetically stupid – Judd Steiner in the book."⁵¹ Leopold set out to wrest control of his persona in court.

At the time, Leopold and his attorney faced the hurdle of finding legal grounds for enjoining or penalizing Levin for publishing

43. *See id.* at 314, 324.

44. LEOPOLD, *supra* note 4, at 368.

45. *Id.*

46. *Id.* at 369.

47. *Id.* at 368-69; MEYER LEVIN, THE OBSESSION 103, 116-19 (1973) [hereinafter LEVIN, OBSESSION]; HIGDON, *supra* note 2, at 314-16.

48. *See* ELMER GERTZ, A HANDFUL OF CLIENTS 151 (1965) ("I wanted permission [from the Parole Board] to attempt to persuade Darryl F. Zanuck, the motion-picture producer, that it was not only wrong morally, but unwise in a practical sense, to appropriate Leopold's life for a film . . ."); *see also id.* at 152 ("I stopped [the play] *Compulsion* in Chicago . . .").

49. *Id.* at 175-76; HIGDON, *supra* note 2, at 325-26.

50. LEOPOLD, *supra* note 4, at 370.

51. *Id.*

Compulsion.⁵² In his earlier letter to Levin's potential publisher, Gertz had threatened to bring a libel action against the book but that tort did not fit this case.⁵³ A 1955 Hornbook definition of libel depicted it as written defamation "which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held."⁵⁴ Given Leopold's infamy as the perpetrator of the crime of the century, it would be hard to show that any book could have injured his reputation.⁵⁵ Instead, Gertz turned to the relatively novel property right of publicity, which was then viewed as a part of the emerging tort right of privacy.⁵⁶

The then-current 1955 edition of William L. Prosser's authoritative *Handbook of the Law of Torts* identified nineteen states that recognized the right of privacy, including Illinois,⁵⁷ which as Leopold's home state was the logical jurisdiction for his lawsuit.⁵⁸ Prosser noted:

The courts thus far have been preoccupied with the question whether the tort exists at all, and there has been little discussion of its nature and limitations. It appears in reality to be a complex of four distinct wrongs, which have little in common except that each is an interference with the plaintiff's right "to be left alone."⁵⁹

According to Prosser, the fourth of these wrongs involved "the appropriation of some element of the plaintiff's personality for a commercial use."⁶⁰ Citing a 1952 Illinois case, *Eick v. Perk Dog Food*

52. For Gertz's first-hand account of the matter, see GERTZ, *supra* note 48, at 166-68.

53. LEOPOLD, *supra* note 4, at 369.

54. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 574 (2d ed. 1955). This second edition of Prosser's widely used torts hornbook would have been the latest one available when Leopold filed suit against Levin.

55. Leopold v. Levin, 259 N.E.2d 250, 255-56 (Ill. 1970); GERTZ, *supra* note 48, at 166.

56. GERTZ, *supra* note 48, at 166-67 (describing a property action); *see also id.* at 181 ("relatively novel").

57. PROSSER, *supra* note 54, § 97, at 636-37.

58. *See* GERTZ, *supra* note 48, at 164.

59. PROSSER, *supra* note 54, § 97, at 637. In a subsequent law review article, Prosser developed these "four distinct wrongs" into four distinct torts, the last of which he called identity "appropriation" or the right of publicity. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). This article is generally regarded as one of the foundational articulations of the right. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (calling it an "influential article"); MCCARTHY, *supra* note 12, § 1:19, at 31-32, § 5:61, at 538 (describing article as "famous and immensely influential"); Joseph R. Dreitler, *Comment: The Tiger Woods Case - Has the Sixth Circuit Abandoned Trademark Law?* ETW Corp. v. Jireh Publishing, Inc., 38 AKRON L. REV. 337, 344 (2005) (referring to "Prosser's breakthrough article").

60. PROSSER, *supra* note 54, § 97, at 639.

Co.,⁶¹ Prosser wrote:

The typical case is that of the unauthorized use of his name or picture in the defendant's advertising. Although the protection of his personal feelings is still an important factor in such a case, the effect of the decisions is to recognize or create something resembling a property right, which may be assigned exclusively to one publisher, and has been called a "right of publicity."⁶²

Although Levin did not use Leopold's name in *Compulsion*, ads for the book and movie did.⁶³ Further, *Compulsion* freely employed various aspects of Leopold's character and personality. To regain control over the public uses of his identity, Leopold sought to invoke the then-novel property-based right of publicity.⁶⁴

IV. LEOPOLD'S RETURN TO COURT

On October 2, 1959, Leopold filed a \$1.5 million suit in Chicago circuit court against Levin, his publishers and the producers, distributors, and exhibitors of the play and movie versions of *Compulsion*.⁶⁵ They were accused of having appropriated Leopold's name, likeness and personality for profit in violation of his right to privacy.⁶⁶ The complaint charged that Levin's book wrongly "intermingled fact and fiction to such an extent that they were

61. 106 N.E.2d 742 (Ill. App. Ct. 1952).

62. PROSSER, *supra* note 54, § 97, at 639.

63. Leopold v. Levin, 259 N.E.2d 250, 252 (1970).

64. *Leopold*, 259 N.E.2d at 251; *Author to Fight Suit by Leopold*, N.Y. TIMES, Oct. 4, 1959, at 16; HIGDON, *supra* note 2, at 326-27; BAATZ, *supra* note 1, at 445. In the leading treatise on the topic, Thomas McCarthy credits a landmark article by Melville Nimmer published only five years prior to the filing of Leopold's suit as "the foundation stone of the right of publicity." MCCARTHY, *supra* note 12, § 1:27, at 54. In his article, Nimmer states, "The right of publicity must be recognized as a property (not a personal) right." Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 204, 216 (1954). He concedes the novelty of the right. *Id.* at 218 ("It would be premature to state that the right of publicity has as yet received any substantial degree of judicial recognition."). On the subsequent use of the right of publicity by celebrities to censorship of popular culture, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 134, 138 (1993). Another one of the four wrongs identified by Prosser as falling within the right of privacy also offered potential grounds for Leopold to recover for *Compulsion*. According to Prosser, one group of right-of-privacy cases imposed liability for a disclosure that "violates the ordinary decencies, given to private information about the plaintiff, even though it may be true and no action would lie for defamation." PROSSER, *supra* note 54, at 638. He used the example of a motion picture that "revives the memory of the name and career of a reformed prostitute who was the defendant in a notorious murder trial." *Id.*

65. *Author to Fight Suit by Leopold*, *supra* note 64, at 16; *Leopold*, 259 N.E.2d at 251-52.

66. GERTZ, *supra* note 48, at 175.

indistinguishable” and used Leopold’s name on the back jacket.⁶⁷ Gertz, Leopold’s attorney, later explained his thinking on the case and that of his co-counsel, Harold R. Gordon:

We recognized that anyone had the right to write a biography, a history, or a purely factual account of newsworthy events and personalities. I had doubts, though, whether even a factual treatment of stale events should be protected, if done in bad faith. However, for the purposes of this proceeding we assumed that if Meyer Levin or anyone else had written a straight history, without sensationalism or fictionalizing or commercialization, he would be fully protected.⁶⁸

By this explanation, Gertz attempted to fit the suit under the publicity rights aspect of the right of privacy.⁶⁹ His express hope was to discourage Levin and others from drawing on Leopold’s identity in their creative works.⁷⁰

Levin was indignant and determined to fight the case rather than settle it.⁷¹ Asserting that his client had done “more than anyone else to get Leopold out of prison,” Levin’s attorney accused Leopold of “the basest ingratitude” in filing the suit.⁷² Levin claimed that some members of the parole board credited *Compulsion* with

67. *Id.*

68. *Id.* at 168. Gordon’s thinking on the case was reflected in an article on the right of publicity that he published the following year in a Chicago-based law review. Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960). Gordon’s article argues for a fact versus fiction distinction in applying the right of publicity against books. *Id.* at 571-79. It also asserts that publicity rights should extend to a person who becomes a public figure “by being convicted of a crime.” *Id.* at 590.

69. GERTZ, *supra* note 48, at 166-67. Gordon had successfully used a similar theory in an early case and persuaded Gertz to try his “new ideas” in Leopold’s suit. *Id.* at 166. Following Prosser, Leopold’s suit used the term “right of publicity” and also sought relief for the unauthorized publication of private information in violation of ordinary decencies. See PROSSER, *supra* note 54, § 97, at 638-39. This Article focuses on Leopold’s claim to a right of publicity and uses that term.

70. Gertz expressed this hope in his 1965 autobiography: “If we won, Leopold would no longer have to fear the shocking excesses of fiction writers and sensationalists; they could no longer drag up again his long expiated crime whenever they decided they might make money on it or simply get some creative satisfaction from the effort.” GERTZ, *supra* note 48, at 150. A successful assertion of Leopold’s right to publicity against Levin, could have important “social implications,” Gertz noted. *Id.* (“It may set precedents of lasting force and value”). Referring to Gordon and himself, Gertz added: “We both felt that we were involved in a very great legal adventure and that we would make social history by establishing that no one had the right to appropriate, or expropriate, any man’s name, likeness, life-story, and personality, regardless of what the man had done.” *Id.* at 168.

71. See *id.* at 162-65.

72. *Leopold Assailed as ‘Ingrate’ for Suit*, L.A. TIMES, Oct. 4, 1959, at 35.

changing their mind about Leopold.⁷³ Assailing efforts to rehabilitate Leopold's identity, Levin wrote, "there had been an astute image-creation campaign, picturing him as a master of fourteen languages, a savant, and now a hospital volunteer in a remote monastery, a kind of Dr. Schweitzer!"⁷⁴ Turning to Leopold's claim that he should somehow hold legal rights over the use of his criminal persona, Levin added:

[I]n his lawsuit, Nathan Leopold was daring the highest feat of all – he would at last collect the kidnap-murder ransom, and many times over! It would be handed to him by a court! What a justification for himself, and his dead friend Dickie Loeb!

He and Dickie had done the killing, they were the authors of the action, a sort of natural copyright was claimed, all accounts of the crime must pay royalties to them – or at least to Leopold for his half!⁷⁵

For Levin, the very notion that Leopold might possess a property right in depictions of his criminal identity was outrageous.⁷⁶ His lawyers claimed that Levin's use of Leopold's name and character was protected by First Amendment rights of speech and press freedom.⁷⁷

Leopold won the first round. In 1964, interpreting the right to publicity broadly to limit the unauthorized commercial use of a person's name or likeness, Circuit Court Judge Thomas Kluczynski granted summary judgment for Leopold on the issue of liability.⁷⁸ The decision relied on *Eick*,⁷⁹ in which an Illinois appellate court held that a dog food company was liable for using a blind girl's picture in an ad without her permission.⁸⁰ The ad suggested that the girl would receive a seeing-eye dog if people bought the advertised dog food.⁸¹ In reality, the girl already had a seeing-eye dog and did not need or want another one.⁸² The *Eick* Court, in turn, relied on the groundbreaking 1905 decision, *Pavesich v. New England Life*

73. *Author to Fight Suit by Leopold*, *supra* note 64. Gertz denied that Levin's book helped secure Leopold's parole. GERTZ, *supra* note 48, at 163.

74. LEVIN, *OBSESSION*, *supra* note 47, at 225.

75. *Id.* at 227.

76. GERTZ, *supra* note 48, at 164 ("What does he want?" Levin asked. "To be paid a royalty for the creativity of murder?").

77. *Id.* at 181-82. Regarding applicable Constitutional protections as understood at the time, see PROSSER, *supra* note 54, § 97, at 642-43.

78. *Leopold v. Levin*, No. 59 C 14087, slip op. at 6-7 (Cir. Ct. Ill. Apr. 15, 1964).

79. *Id.*

80. *See Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 743, 748 (Ill. App. Ct. 1952).

81. *Id.*

82. *Id.* at 743.

Insurance Co.,⁸³ which found an insurance company liable for an ad that, without the plaintiff's permission, falsely pictured him as a satisfied policyholder.⁸⁴

Unlike *Leopold*, however, *Eick* and *Pavesich* involved the unauthorized use of the names or likenesses of private persons in connection with the marketing of merchandise unrelated to them.⁸⁵ *Pavesich* added the element of express endorsement.⁸⁶ In contrast, *Leopold* involved the use of the plaintiff's name to promote a fictionalized novel and movie about his public acts.⁸⁷ Declaring that *Leopold* was "legally indistinguishable" from *Eick*,⁸⁸ Judge Kluczynski ruled:

[T]he plaintiff has manifestly established an actionable right of privacy claim arising from the unauthorized use of his name and pictures to advertise both the book and the movie. He is thus entitled to obtain from defendants the measure of damages legally recoverable under such a claim, to be assessed according to the *Eick* case, after receipt in evidence of the properly admissible proof.⁸⁹

He noted, "freedom of speech and of the press does not encompass freedom to exploit commercially or 'make merchandise' of one's name or likeness in an advertisement."⁹⁰ As this judge saw it, *Compulsion* was commercial merchandise and using Leopold's name to promote it violated the right of publicity.⁹¹ He suggested that a fictionalized novel or movie about a living subject might also constitute a wrongful appropriation but, for purposes of summary judgment, decided the case solely on the basis of the ads and promotional material using Leopold's name.⁹²

The 1964 ruling only dealt with liability.⁹³ Setting damages was left for a subsequent hearing.⁹⁴ Later in 1964, on the grounds that the trial court ruling was interlocutory in character, the Illinois

83. 50 S.E. 68 (Ga. 1905).

84. *Eick*, 106 N.E.2d at 744-45.

85. *See id.* at 743; *Pavesich*, 50 S.E. at 68-69.

86. *Pavesich*, 50 S.E. at 72.

87. *Leopold v. Levin*, No. 59 C 14087, slip op. at 6 (Cir. Ct. Ill. Apr. 15, 1964).

88. *Id.*

89. *Id.* at 7.

90. *Id.* at 4.

91. *Id.* at 5-6.

92. *Id.* at 7-8; *see also id.* at 4 ("Apart from plaintiff's claim arising out of his exploitation in the book, play and movie, the record contains much undenied evidence of the use of the plaintiff's name for advertising purposes.")

93. *Id.* at 10.

94. *Id.*

Supreme Court dismissed defendants' appeal.⁹⁵ Despite the rulings against them, the defendants voted not to settle and fought to overturn the judgment.⁹⁶ In the meantime, however, Judge Kluczynski's ruling had the intended chilling effect on *Compulsion*.⁹⁷ Even though the paperback edition had sold over one million copies by then, its publisher let it go out of print.⁹⁸ The movie producer refused to pay Levin any remaining installments on the movie rights.⁹⁹ Copies of the play became so difficult to obtain commercially that Levin himself gave copies to theater groups interested in performing it.¹⁰⁰

Relief came in 1970 for Levin when, after a trial court considering damages vacated the 1964 ruling on liability,¹⁰¹ the Illinois Supreme Court issued a broad decision articulating important limitations to the right of publicity.¹⁰² As the Court defined it,

Leopold's claim is that the constitutional assurances of free speech and press do not permit an invasion of his privacy through the exploitation of his name, likeness and personality for commercial gain in "knowingly fictionalized accounts" of his private life and through the appropriation of his name and likeness in the advertising materials.¹⁰³

Rejecting this claim, the *Leopold* Court distinguished it from the plaintiff's claim in *Eick*, which the Court characterized as a case where "a photograph of a girl who was clearly not a public figure[] was 'appropriated' to promote a purely commercial product."¹⁰⁴ In contrast to these facts, Leopold was a public figure and the commercial product related to his public actions. The Court

95. See *Appeal Against Libel Award for Leopold Is Dismissed*, N.Y. TIMES, Nov. 14, 1964, at 20 (announcing dismissal).

96. See HIGDON, *supra* note 2, at 330.

97. Addressing the lawsuit's chilling effect on fiction writers seeking to use Leopold's persona, Gertz wrote about Leopold and himself, "by the suit we had brought, we were holding them at bay. The stop sign was big and in red letters." GERTZ, *supra* note 48, at 150. For the chilling effect of Leopold's lawsuit, see LEVIN, OBSESSION, *supra* note 47, at 228. On the chilling impact of right-to-publicity rulings generally, see Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1595 (1979); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1179 (2006).

98. HIGDON, *supra* note 2, at 330.

99. *Id.* at 330-31.

100. *Id.*

101. *Leopold v. Levin*, No. 59 C 14087, slip op. at 1-2 (Cir. Ct. Ill. Mar. 29, 1968).

102. *Leopold v. Levin*, 259 N.E.2d 250 (Ill. 1970).

103. *Id.* at 253.

104. *Id.* at 256.

explained:

The reference to the plaintiff in the advertising material concerned the notorious crime to which he had pleaded guilty. His participation was a matter of public and, even, of historical record. That conduct was without benefit of privacy.¹⁰⁵

In short, the court found that Leopold possessed no right of publicity in his crime and prosecution,¹⁰⁶ which it aptly said “remain an American *cause célèbre*.”¹⁰⁷ Levin and others were free to exploit them for profit in books, plays, movies, and other medium.¹⁰⁸ Levin found a new publisher for *Compulsion* soon after Judge Kluczynski’s ruling was vacated¹⁰⁹ and, following the Illinois Supreme Court ruling in 1970, other writers took up the subject matter in creative works mixing fact and fiction that freely used the names, likenesses, and personalities of Leopold and Loeb.¹¹⁰

V. LEARNING FROM *LEOPOLD V. LEVIN*

The discrepancy between the 1964 trial court ruling in *Leopold* and the subsequent Illinois Supreme Court holding illustrates a basic uncertainty in the reach of the right of publicity that continues to confuse the field. The trial court adopted an attractive but unrealistic bright-line “commercial use” test that made actionable any unauthorized use of someone’s identity in “an advertising or a commercial exploitation.”¹¹¹ The court found this test violated by the publisher’s use of Leopold’s name on the jacket cover of *Compulsion*,

105. *Id.*

106. *Id.* at 254. The court, which employed the general term “right of privacy” rather than “right of publicity” in describing the action, also rejected Leopold’s claim that *Compulsion* violated the right to privacy through the nature of its unauthorized publication of private information. *Id.* at 256. According to the court, “the fictionalized aspects of the book and motion picture were reasonably comparable to, or conceivable from facts of record from which they were drawn, or minor in offensiveness when viewed in the light of such facts.” *Id.* As such, the court ruled, “[a]rgument that the community’s notions of decency were outraged here must be regarded as fanciful.” *Id.* In discussing this category of wrong under the right of privacy, the 1955 edition of Prosser’s *Handbook on Torts* referred to unauthorized publication of private information that “violates the ordinary decencies.” PROSSER, *supra* note 54, § 97, at 638. The *Leopold* court used a standard drawn from *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir. 1940), providing that the offending unauthorized publication of private information must “outrage[] the community’s notions of decency.” *Leopold*, 259 N.E.2d at 255-56.

107. *Leopold*, 259 N.E.2d at 254.

108. *See id.*

109. LEVIN, *OBSESSION*, *supra* note 47, at 230.

110. New American Library brought out a new paperback edition of *Compulsion* in 1968, after an Illinois trial court considering damages vacated the summary judgment on liability. *See* HIGDON, *supra* note 2, at 330.

111. *Leopold v. Levin*, No. 59 C 14087, slip op. at 3 (Cir. Ct. Ill. Apr. 15, 1964).

which the judge depicted as a commercial work.¹¹² Presumably there would have been an even greater violation if Levin had also used Leopold's name in the book itself. Liability followed from a literal reading of widely used authorities, such as Prosser's *Law of Torts*, which suggested that "commercial use" was virtually determinative.¹¹³ Although Prosser's popular hornbook cited an exception from liability for "news" reports, especially for news about public figures, it did not expressly stretch that exception to cover other expressive uses of celebrity names, likenesses, or personalities.¹¹⁴ Further, while noting that celebrities, including notorious criminals,¹¹⁵ should generally have a lower expectation of privacy than private individuals,¹¹⁶ it did not apply this potential limitation for the right of publicity to commercial uses of a criminal celebrity's identity in advertising.¹¹⁷

112. See *id.* at 4-5. The court made a similar finding regarding the movie version of *Compulsion*. *Id.* at 5.

113. Prosser's hornbook was cited in the Illinois Supreme Court opinion in *Leopold v. Levin*, 259 N.E.2d 250, 255 (Ill. 1970). The 1955 edition of Prosser's *LAW OF TORTS*, which would have been the current edition when Leopold filed his lawsuit against Levin, writes of the right of publicity in terms of "the appropriation of some element of the plaintiff's personality for a commercial use" and depicts "the unauthorized use of his name or picture in the defendant's advertising" as a typical case. PROSSER, *supra* note 54, § 97, at 639. Covering the issue under the right of privacy, the then-current Restatement of Torts stated: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." RESTATEMENT OF TORTS § 867 (1938). In an official comment on this section, "advertising use" is noted as a factor in favor of finding a violation. *Id.* at cmt. d.

114. See PROSSER, *supra* note 54, § 97, at 643-44 (discussing the limited exception for "news" reports); see also RESTATEMENT OF TORTS § 867 cmt. d (1938).

115. PROSSER, *supra* note 54, § 97, at 643; see also RESTATEMENT OF TORTS § 867 cmt. c (1938).

116. PROSSER, *supra* note 54, § 97, at 642-43; see also RESTATEMENT OF TORTS § 867 cmt. c (1938).

117. In a passage that seems to speak directly to Leopold's case against *Compulsion*, Prosser wrote:

[A] person who intentionally puts himself in the public eye, as in the case of an actor, an inventor, an explorer, or a public officer, has been held to have no right to complain of any publicity which reasonably bears on his activity. Such a public figure does not forfeit all his right of privacy, and he may still recover for unauthorized commercial uses of his name or photograph, for a motion picture based on his life with the addition of fiction or for putting him in a false and humiliating position before the public.

PROSSER, *supra* note 54, § 97, at 642-43 (emphasis added). See generally RESTATEMENT OF TORTS § 867 cmts. c, d (1938). Further blurring the distinction between public and private persons in this context, both the 1964 edition of Prosser's *Handbook on Torts* and the Restatement (Second) of Torts include examples of celebrities successfully using the right of publicity to recover for the unauthorized use of their names or likenesses in advertising. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 112, 848 (3d ed. 1964) [hereinafter PROSSER, 3d ed.]; RESTATEMENT

As the rich and diverse expressive uses of Leopold and Loeb exemplify, American culture feeds on celebrities. They are the common currency of novelists, playwrights, screen writers, and the public. For over eighty years, through an ongoing public conversation about Leopold and Loeb, Americans have expressed, explored, and exposed themselves and their society. Some of these expressions, like *Compulsion*, have been commercial products that used the names of Leopold and Loeb in their advertising.¹¹⁸ Should these common uses be curtailed or subject to the approval of Leopold, Loeb or their estates, American culture would suffer considerable loss. In this respect, Leopold and Loeb illustrate the larger point that Americans draw on celebrity personas to express themselves.¹¹⁹ It could hinder our communication and cripple our culture to restrict by an overbroad interpretation of the right of publicity expressive uses of celebrity identities beyond the limits separately imposed by other aspects of the right of privacy (such as for unreasonable publicity either about one's private life¹²⁰ or placing one in a false light¹²¹) and by defamation tort law.

In its ultimate decision of *Leopold*, the Illinois Supreme Court struck a proper balance of public and private interests. It approved the earlier Illinois appellate court decision in *Eick* granting damages to a blind girl for the unauthorized use of her picture in a dog food ad but denied recovery to Leopold for the unauthorized use of his name to promote a novel and movie based more or less on his public acts.¹²² Stressing that Leopold became and remained a public figure because of Franks' murder, the court held, "[n]o right of privacy attached to matters associated with his participation in that completely publicized crime."¹²³ Presumably under *Eick*, Leopold still could have recovered for the unauthorized use of his name or likeness in an ad for a product unrelated to his crime, such as dog food.¹²⁴

(SECOND) OF TORTS § 652C cmt. b., Illus. 1, 2 (1977).

118. See *Leopold v. Levin*, No. 59C14087, slip op. at 4-5 (Cir. Ct., Cook Co., Ill., Apr. 15, 1964).

119. See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996) (describing celebrities as "an important element of the shared communicative resources of our cultural domain"). See generally Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47, 67 (1994).

120. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

121. See *id.* § 652E.

122. See *Leopold v. Levin*, 259 N.E.2d 250, 254-55 (Ill. 1970).

123. *Id.* at 255.

124. See 106 N.E.2d 742, 748 (Ill. App. Ct. 1952) (holding that a plaintiff could recover damages for a violation of privacy when the defendant used her picture for advertisements without her authorization); see also Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 904-07 (2003) (noting that right of

VI. THE ILL-DEFINED RIGHT OF PUBLICITY

The balance struck by the court in *Leopold* may seem self-evident in context, but it has not resolved the confusion over the limits of the right of publicity.¹²⁵ Since its first enunciation in the 1953 decision *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*,¹²⁶ the right of publicity has steadily expanded both in its reach¹²⁷ and in the number of states that recognize it.¹²⁸ Although some legal commentators continue to question whether it should even exist,¹²⁹ the right of publicity was securely incorporated into the *1995 Restatement (Third) of Unfair Competition*¹³⁰ and appears entrenched in the law.¹³¹ Further, notwithstanding the confusion created by its use by the trial court in *Leopold*, hornbook definitions for the right of publicity still speak in terms of giving people the right to control the “commercial use” of their names and other aspects of their personas.¹³² Rather than clarify the extent of the right, such a

publicity rulings and statutes generally distinguish between the use of a person's name or likeness in ads for a book, movie, or other product about the person and ads for other products).

125. See 259 N.E.2d 250, 254 (Ill. 1970) (recognizing a right of privacy, but holding that Leopold did not have a legally protected right of privacy). For representative commentary on the ongoing confusion, see Felcher & Rubin, *supra* note 97, at 1590 (1979) (“[T]here is no consistent test for determining how far the right of publicity extends.”); Gil Peles, *The Right of Publicity Gone Wild*, 11 UCLA ENT. L. REV. 301, 302 (2004) (“[T]he right of publicity's application is presently more varied and confusing than ever before.”).

126. 202 F.2d 866 (2d Cir. 1953) (decided under New York law). For history on this case as the first to recognize the right to publicity and use that term, see MCCARTHY, *supra* note 12, § 1:26; Nimmer, *supra* note 64, at 221-23; Dogan & Lemley, *supra* note 97, at 1172-73.

127. Dogan & Lemley, *supra* note 97, at 1162 (“[T]he meanings of these terms have steadily swelled, to the point at which virtually any reference to an individual that brings financial benefit to someone else qualifies as a violation of the right of publicity.”); Marshall Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALB. L. REV. 1357, 1359 (2007) (“U.S. publicity law, with its ever expanding contours . . .”).

128. MCCARTHY, *supra* note 12, §§ 6:8-6:9 (listing states that recognize the right of publicity by common law or statute with the dates of recognition).

129. See, e.g., Madow, *supra* note 64, at 134. See also Volokh, *supra* note 124, at 904 (“I generally oppose the right of publicity . . .”).

130. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

131. See Sheldon W. Halpren, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 869 (1995) (noting “[f]orty years of judicial and legislative effort have produced a . . . clearly enumerated independent right of publicity”).

132. See MCCARTHY, *supra* note 12, § 3:1 (“The right of publicity is simply the inherent right of every human being to control the commercial use of his or her identity.”); see also *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (acknowledging “the right to prevent others from using one's name or picture for commercial purposes without consent”); RESTATEMENT (THIRD) OF UNFAIR

definition has simply centered the confusion on what it means to use someone's identity commercially.¹³³ As Levin argued and the *Leopold* court concluded, surely it can not give Leopold control over the uses of his name in a commercial book or movie about the Leopold and Loeb case, even if that book or movie is a fictionalized account like *Compulsion*.¹³⁴

The typical approach to this definitional conundrum has been to start with a broad no-commercial-use standard and then cabin it with exceptions to reach acceptable results in particular cases. In *Leopold* itself, for example, citing Prosser's *Law of Torts* for authority, the court asserted that the right to privacy did not attach to matters associated with a "completely publicized crime."¹³⁵ Of course it might seem strange to enable celebrated criminals or their heirs, through an expansive reading of right of publicity, to profit from or control uses of their criminal fame.¹³⁶ As applied against Leopold or other celebrity criminals, however, this limitation is simply punitive and does not address the public-policy issues raised by limits on the expressive uses of celebrity persona generally. If it is important that writers, artists, and the public can draw on the identity of celebrities, then it should not matter whether those celebrities are sinners or saints. Indeed, the passages from Prosser's *Law of Torts* cited in *Leopold* do not single out celebrity criminals for special treatment but rather assert that the same limits should apply

COMPETITION § 46 (1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .").

133. Dogan & Lemley, *supra* note 97, at 1162. For example, when faced with a right-of-publicity challenge to an unauthorized trade biography of celebrity entrepreneur Howard Hughes, a New York judge ruled on that obviously commercial enterprise, stating that "[t]he publication of a biography is clearly outside the ambit of the 'commercial use' contemplated by the 'right of publicity.'" *Rosemont Enter., Inc. v. Random House, Inc.*, 294 N.Y.S. 2d 122, 129 (1968). Referring to conflicting rulings on such matters, Dogan and Lemley noted, "[W]hile some courts have incorporated First Amendment principles into their definitions of 'commercial,' . . . others apply a broad meaning of that term." Dogan & Lemley, *supra* note 97, at 1175. McCarthy contends that incorporating constitutional limits into the definition of the right of publicity does not clarify matters. MCCARTHY, *supra* note 12, § 8:6.

134. *Leopold v. Levin*, 259 N.E.2d 250, 255-57 (Ill. 1970).

135. *Id.* at 255. See generally *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418 (1965) (denying a post mortem right of publicity under Illinois law to the heirs of gangster Al Capone).

136. Public opposition to criminals profiting from their crimes by selling their stories to publishers led to the adoption of so-called "Son of Sam" laws in New York and elsewhere. The New York law was declared unconstitutional in *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105 (1991). For a recent example of the heir to a notorious criminal invoking the right of publicity to license and control the use of the criminal's identity, see Huffstutter, *supra* note 13, at 1.

to their rights of publicity as apply to those of other celebrities.¹³⁷

Reflecting the fundamental public value placed on expression generally, courts and commentators commonly invoke constitutional doctrines of free speech and press to cabin the right of publicity.¹³⁸ Accordingly, after stating its broad “commercial value” definition of the right, the *Restatement (Third) of Unfair Competition* comments:

The right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression. The use of a person’s identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person’s right of publicity. The scope of the activities embraced within this limitation on the right of publicity has been broadly construed. Thus, the use of person’s name or likeness in news reporting, whether in newspapers, magazines, or broadcast news, does not infringe the right of publicity. The interest in freedom of expression also extends to use in entertainment and other creative works, including both fiction and nonfiction.¹³⁹

This exception would clearly cover the use of Leopold’s personality in *Compulsion* and other novels, plays, and movies about the Leopold and Loeb case. Another comment in the *Restatement* adds that “[u]se of the person’s identity in advertising or promoting such [protected] uses is also not actionable,”¹⁴⁰ which would extend the exception to promotional material about *Compulsion* or other such works. In *Leopold*, the Illinois Supreme Court also had invoked the First Amendment to rule against Leopold, noting that its protection reached movies as well as books and that it “is not affected by the circumstances that the publications are sold for profit.”¹⁴¹

The Constitution alone should not serve as the sole guide to the scope of the right of publicity, however. The *Restatement (Third) of Unfair Competition* recognized this by depicting the right as “fundamentally constrained by *the public and constitutional interest*

137. PROSSER, 3d ed., *supra* note 117, § 112, at 849; *see also* RESTATEMENT OF TORTS § 867 cmt. c (1939).

138. *See* MCCARTHY, *supra* note 12, § 8:22. After quoting the definition of the right to publicity from the *Restatement (Third) of Unfair Competition*, which reflects a common “commercial use” approach to the law, Eugene Volokh writes: “Under standard First Amendment doctrine, this definition can’t be accepted at face value – and in fact many lower courts have held that the First Amendment precludes right of publicity liability in many cases.” Volokh, *supra* note 124, at 905. On the constitutional limits to the right of publicity by writers friendly to the right, *see, e.g.*, MCCARTHY, *supra* note 12, § 8:23 (rev. 2009); PROSSER, 3d ed., *supra* note 117, § 112, at 844-45.

139. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

140. *Id.* § 47 cmt. a.

141. *Leopold v. Levin*, 259 N.E.2d 250, 254 (Ill. 1970).

in freedom of expression”¹⁴² rather than solely by the Constitution. As a creation of common law and state statute, within constitutional limits, the right of publicity should be crafted to serve public interests, including interests in free expression and personal privacy, rather than simply to track some First Amendment standard. Further, commentators have noted the inherent vagaries of applying the broad brush of the First Amendment as a defense to limit the specific reach of the right of publicity.¹⁴³ Judicial ruling on the constitutional limits to the right of publicity have reached different results in similar cases with little guidance coming from the United States Supreme Court.¹⁴⁴ In fact, the Court’s only decision in the field involved the exceptional right-to-publicity situation of a television news program broadcasting a performer’s entire act: a 15-second human cannonball shot.¹⁴⁵ The Court expressly cautioned that, in holding for the performer, it did not address the typical case of the appropriation of a celebrity’s identity in advertising.¹⁴⁶

To bring a semblance of order to constitutional limits in this

142. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995) (emphasis added).

143. *E.g.*, MCCARTHY, *supra* note 12, § 8:38; Felcher & Rubin, *supra* note 97, at 1579 (“Treated in this way, the First Amendment, like any other deus ex machina, produces uncertainties and distortions in what should be a logical, coherent structure.”); Tan, *supra* note 18, at 982-83; Leaffer, *supra* note 127, at 1363-64. *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1786 (2004) (“[I]f there exists a single theory that can explain the First Amendment’s coverage, it has not yet been found.”).

144. *Compare* Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501, 503, 509 (N.Y. Sup. Ct. 1968) (finding no liability for an unauthorized poster of comedian Pat Paulsen bearing the words, “For President”), *with* Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090, 1092 (S.D.N.Y. 1980) (finding liability for an unauthorized poster of singer Elvis Presley bearing the words, “In Memory”), *rev’d on other grounds*, 652 F.2d 278 (2d Cir. 1981) (reversing on the grounds that Presley’s right of publicity did not survive his death). *See generally* Leaffer, *supra* note 127, at 1364 (“The fact is that no judicial consensus has been reached on the contours of the First Amendment vis-à-vis the right of publicity.”); W. Mack Webner & Leigh Ann Lindquist, *Transformation: The Bright Line Between Commercial Publicity Rights and the First Amendment*, 37 AKRON L. REV. 171, 180 (2004) (“Courts continue to differ in the scope of protection they afford [the First Amendment and Right of Publicity].”).

145. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563-66 (1977). On the unusualness of the case, see MCCARTHY, *supra* note 12, § 1:33.

146. *Zacchini*, 433 U.S. at 576. In dissent, Justice Powell noted that the test applied by the court, that of appropriating an entire act, would not be applicable in most right-of-publicity cases. *Id.* at 579 n.1 (Powell, J., dissenting). Underscoring the unusual nature of this case, a leading commentator on the right of publicity notes, “for all practical purposes, the only kind of speech impacted by the right of publicity is commercial speech – advertising – not news.” J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete’s Identity: The Right of Publicity, Endorsement and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 198 (2001).

field, commentators and courts have proposed or discussed various balancing tests for when the right of publicity gives way to the right of free expression.¹⁴⁷ Two of these tests have attracted considerable recent attention among commentators and the courts. One test draws on the fair-use defense in copyright law generally. If a use would satisfy the fair-use test under copyright law, or some appropriately modified form of the fair-use test, then it would not violate the right of publicity either.¹⁴⁸ Another test focuses on one element in the fair-use defense by looking at the extent of originality or “transformation” in the user’s work. First articulating the test in a decision finding the unauthorized depicting of the classic comedy trio, the Three Stooges, on a T-shirt to violate the comedians’ right of publicity, the California Supreme Court wrote: “We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness. And when we use the word ‘expression,’ we mean expression of something other than the likeness of the celebrity.”¹⁴⁹ If the unauthorized work does little more than reproduce a celebrity’s identity for sale as commercial merchandise, then under this test it would violate the right of publicity.¹⁵⁰

Neither drawing on the fair use test nor applying the transformative use test has significantly clarified the murkier reaches of right-of-publicity law.¹⁵¹ Fair use is widely regarded as a vague and unpredictable aspect of copyright law devoid of bright line tests or simple standards and with no promise of any more precise

147. See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996) (balancing the “social purpose” of the defendant’s use against the plaintiff’s interests); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461 (Cal. 1979) (examining whether the proprietary interests in the right of publicity outweigh the value of the free expression); Kwall, *supra* note 119, at 86-88 (balancing potential for decreased incentives, consumer deception, unjust enrichment, and moral versus economic objections); Felcher & Rubin, *supra* note 97, at 1596 (noting that some cases balance “informative or cultural function” of use against whether it “merely exploits the individual portrayed”). See generally MCCARTHY, *supra* note 12, § 8:72 (discussing cases).

148. Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 604-06 (1996); see also MCCARTHY, *supra* note 12, § 8:38.

149. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

150. See *Winter v. DC Comics*, 69 P.3d 473, 477 (Cal. 2003) (“[D]epiction or imitation of the celebrity is the very sum and substance of the work in question.”) (quoting *Comedy III Prods., Inc.*, 21 P.3d at 809); see also Webner & Lindquist, *supra* note 144, at 186-87 (discussing the transformative-use test and when a First Amendment defense will prevail).

151. See MCCARTHY, *supra* note 12, § 8:38 (criticizing borrowing from fair use generally); Volokh, *supra* note 124, at 916-25 (criticizing the transformative-use test).

application to the right of publicity.¹⁵² Further, its purpose in copyright law—the balancing of private incentives and public uses—is not necessarily applicable in the right of publicity context, where protecting private incentives may not be a major concern.¹⁵³ Even in the copyright field, fair use is not the primary means of accommodating constitutional concerns.¹⁵⁴

Derived as it is from the fair-use doctrine, the transformative use test has attracted similar censure.¹⁵⁵ Critics charge that it does not provide clear standards and leads to uncertain and potentially inconsistent results.¹⁵⁶ Whereas one court held that an artist's drawing of the Three Stooges printed on T-shirts did not qualify as transformative,¹⁵⁷ for example, another court claiming to apply the same test found that an artist's life-like drawing of Tiger Woods printed for mass distribution did qualify.¹⁵⁸ Similarly, while the Supreme Court of California said it was "not difficult" to find transformation in a comic book depiction of the country-music Winter Brothers as the half-human and half-worm Autumn Brothers,¹⁵⁹ a lower appellate court had found otherwise.¹⁶⁰ Further, some critics question how the test would apply to writers and artists who seek fidelity to the original in their work.¹⁶¹

152. See 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05 (rev. ed. 2009) ("this [most] obscure doctrine"); MCCARTHY, *supra* note 12, § 8:38 ("obscure and unpredictable"); Dogan & Lemley, *supra* note 97, at 1189 ("[C]opyright's fair use doctrine has morphed into a largely incoherent area of law that hardly deserves emulation."). Even a leading proponent of applying fair use to rights of publicity concedes as much. Barnett, *supra* note 148, at 606 ("The fair use defense is indeed far from simple and predictable in copyright law itself, as Professor McCarthy points out.").

153. Dogan & Lemley, *supra* note 97, at 1188.

154. See MCCARTHY, *supra* note 12, § 8:38, at 163.

155. See Dogan & Lemley, *supra* note 97, at 1178, 1189; F. Jay Dougherty, *All the World's Not a Stoooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 32 (2003).

156. Volokh, *supra* note 124, at 922 ("That we live with this vagueness in copyright doesn't mean that we should extend it elsewhere."); Peles, *supra* note 125, at 314 (holding that the transformative use test "effectively leaves ambiguous the amount of expression that is necessary to be considered transformative").

157. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001).

158. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003).

159. *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003).

160. *Winter v. DC Comics*, 121 Cal. Rptr. 2d 431, 440 (Cal. Ct. App. 2002), *rev'd*, 69 P.3d 473 (Cal. 2003).

161. Dogan & Lemley, *supra* note 97, at 1178; Volokh, *supra* note 124, at 923-25. In its decision crafting the test, the California Supreme Court distinguished between the defendant's drawing of the Three Stooges, in which the court could "discern no significant transformation or creative contribution," and Andy Warhol's Mao silkscreen where, "[t]hrough distortion and the careful manipulation of context,

Particularly in the area of unauthorized celebrity products or merchandise, the extent of the right of publicity remains uncertain today, much as it was when Leopold sued Levin over *Compulsion*.¹⁶² Various definitions and tests for the right of publicity apply in different states and their interpretation or application can be unpredictable.¹⁶³ Even if Leopold would likely lose under all the current standards because his case involved such traditionally protected celebrity merchandise as a novel, play, and movie,¹⁶⁴ he could still use legal threats and lawsuits to deter or discourage others from using his identity much as he did in the 1960s.¹⁶⁵ Other less traditional protected celebrity merchandise, such as T-shirts, posters, and artifacts, face greater uncertainty.¹⁶⁶ In light of the many proposed tests already found wanting, perhaps a simpler approach is needed.

Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images." *Comedy III*, 21 P.3d at 811. Warhol surely expected and received more commercial compensation for his Mao silkscreen than the defendant did for his Stooges drawing.

162. Uncertainty today is not over the use of celebrity identities in novels, plays, and movies (as it was in *Compulsion*) but over their use in merchandise and products, such as T-shirts, posters, prints, sculpture, and bobble-head dolls. Volokh, *supra* note 124, at 908. Compare Charles J. Harder & Henry L. Self III, *Schwarzenegger vs. Bobbleheads: The Case for Schwarzenegger*, 45 SANTA CLARA L. REV. 557, 557 (2005) (arguing that Schwarzenegger had a clear right to limit use of his image in bobble-head dolls), with William T. Gallagher, *Strategic Intellectual Property Litigation, The Right of Publicity, and the Attenuation of Free Speech: Lessons from the Schwarzenegger Bobblehead Doll War*, 45 SANTA CLARA L. REV. 581, 583 (2005) (arguing that the use of Schwarzenegger's likeness in bobble-head dolls should be protected under the First Amendment). Schwarzenegger ultimately settled his suit against the maker of the bobble-head dolls in return for the maker donating a portion of the profits to charity and altering the product. Bobby Caina Calvan, *Schwarzenegger Watches Image Settlement Keeps Gun-Toting Doll off Store Shelves*, BOSTON GLOBE, Sept. 10, 2004, at A2.

163. Peles, *supra* note 125, at 301-02.

164. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995) (protecting such products).

165. For a similar recent legal effort by the heir of the notorious criminal John Dillinger that has had a chilling effect on the use of Dillinger's identity by a public museum, a video-game maker, and the organizers of a town festival, see Huffstutter, *supra* note 13, at 1.

166. For T-shirts, see *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). For posters, compare *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 505-09 (NY Sup. Ct. 1968) (finding no liability), with *Factors Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090, 1092-93 (S.D.N.Y. 1980), *rev'd on other grounds*, 701 F.2d 11, 12 (2d Cir. 1983) (finding liability but later reversed on the grounds that Presley's right of publicity did not survive his death). For artifacts, see *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 705-06 (Ga. 1982) (finding liability for unauthorized bust of civil rights leader Martin Luther King, Jr.).

VII. A MODEST PROPOSAL

At least in part, uncertainty in the scope of the right of publicity arises from starting with the broad no-commercial-use standard and then trying to exclude uses that are protected for constitutional or policy reasons.¹⁶⁷ Even such a strong proponent of the no-commercial-use standard as Thomas McCarthy acknowledges that this approach can make for difficult cases.¹⁶⁸ Rejecting any simple limiting test, such as the copyright fair-use defense, to bring the no-commercial-use standard within bounds, McCarthy writes:

Finding the proper balance [between the right of publicity and the First Amendment] is sometimes a very difficult job. There is no neatly packaged general rule that can be waived like a magic wand to make the solution any easier. The balance must be laboriously hacked out case by case.¹⁶⁹

Hacking out the scope of publicity rights case by case is an open invitation for litigation that inevitably leads to wrong results in some cases and chills the exercise of both a person's right of publicity and a user's freedom of expression.

Leopold's invocation of the right of publicity against *Compulsion* offers a graphic example of the pernicious effects of an overbroad no-commercial-use standard. Filing suit against Levin and others associated with *Compulsion* in 1959, Leopold's lawyers, Gertz and Gordon, asserted that, except for "factual" historical, biographic, or news accounts, the unauthorized use of anyone's identity in a commercial product, including a novel, a play, or a movie like *Compulsion*, should violate the right of publicity.¹⁷⁰ In fact, according to Gertz, simply filing the suit served to hold "fiction writers and sensationalists . . . at bay."¹⁷¹ Further, by helping to legally confirm a no-commercial-use standard for the right of publicity, he hoped that the suit "would make social history."¹⁷²

167. See the RESTATEMENT (THIRD) OF UNFAIR COMPETITION, which begins with a broad no-commercial-use test in section forty-six and, in a section forty-seven comment, states that celebrity merchandise "ordinarily" violates the test but adds, "[i]n some circumstances, however, the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected under the first amendment." RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46, 47 cmt. b (1995). The Restatement justifies limits to the right of publicity on the grounds of "the public and constitutional interest in freedom of expression." *Id.* § 47 cmt. c.

168. MCCARTHY, *supra* note 12, § 8:40, at 167.

169. *Id.*

170. See GERTZ, *supra* note 48, at 168 (explaining the legal theory behind Leopold's suit).

171. *Id.* at 150.

172. *Id.* at 168.

As a user of celebrity persona in his creative work, Levin took a far more critical view of Leopold's suit than Gertz. Confirming Gertz's boast that it kept novelists at bay, Levin described the chilling effect of the action on writers and publishers:

Nathan Leopold's lawsuit seemed to spark a whole series of astounding cases. The descendants of Al Capone filed a multimillion-dollar claim for invasion of privacy against a television station that had broadcast a portrayal of the gangster's life. Then came the case of the wife of the killer of Rasputin, who was suing a television network that had shown a dramatization of the event.

Suddenly an unease spread among writers and publishers, indeed all through the communications industry. If such cases were valid, an enormous source of material would be barred. A form of censorship threatened that was not only terrifying in a commercial sense, but that could in fact close off a perennial wellspring of art. . . .

. . . .

The case was much more than a harassment. If any award at all should be made, it could establish an enormously restrictive precedent.¹⁷³

Levin's fears were realized when the trial court largely accepted a broad no-commercial-use standard in granting Leopold's motion for summary judgment on liability in 1964,¹⁷⁴ *Compulsion*, which had sold over a million copies, went out of print; the movie producer withheld royalties; copies of the play were difficult to obtain.¹⁷⁵ Due to the court's ruling, Levin explained, "the publishers, bookdealers, and film people were in a precarious situation and might even be faced with punitive damages should the book continue to be sold during this period."¹⁷⁶ *Compulsion* reappeared in print only after the 1964 judgment was reversed in a ruling that Levin called "a landmark decision in liberating writers and publishers from a growing threat."¹⁷⁷

The Illinois Supreme Court ruling in *Leopold* and other similar decisions have established that the right of publicity does not ordinarily extend to the use of a person's identity in novels, plays,

173. LEVIN, OBSESSION, *supra* note 47, at 228.

174. *Leopold v. Levin*, No. 59 C 14087, slip op. at 7-8 (Cir. Ct., Cook Co., Ill., Apr. 15, 1964).

175. HIGDON, *supra* note 2, at 330-31.

176. LEVIN, OBSESSION, *supra* note 47, at 229.

177. *Id.* at 230.

movies, or advertising about such uses.¹⁷⁸ Uncertainty and the resulting chilling impact continue, however, for other commercial merchandise that draws on celebrity personas.¹⁷⁹ During the current decade, for example, owners of the publicity rights to celebrity criminal John Dillinger have filed lawsuits or threatened legal action against museums, festivals, video-game manufacturers, historical societies, and a restaurant that used the deceased bank robber's name without permission.¹⁸⁰ Most of these lawsuits or threats ended in settlements or agreements, but Mason City, Iowa, ultimately renamed its "Dillinger Day" festival rather than pay.¹⁸¹ In 2006, an adverse trial-court ruling forced Indiana's Lake County Convention and Visitors Bureau to close its Dillinger Museum until a favorable State Attorney General opinion led to a settlement of the case in 2008.¹⁸² The principal owner of Dillinger's publicity rights gives a strictly no-commercial-use justification for his suits by saying that Mason City officials should obtain permission from him for their Dillinger Days festival because "[t]hey're trying to make money off it."¹⁸³ Of course, a similar profit motive was behind *Compulsion*.

Courts could reduce the level of legal confusion and the resulting chill over uses of celebrity identities by defining the scope of the right of publicity in the affirmative rather than beginning with the no-commercial-use standard and then trying to cabin it with exceptions.¹⁸⁴ Any such definition would begin with advertising.

178. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995); Volokh, *supra* note 124, at 906-08.

179. For example, courts have differed on whether the right of publicity extends to the use of a celebrity's identity on posters and in comic books. Compare Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501 (Sup. Ct. 1968), with Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd on other grounds*, 701 F.2d 11 (2d Cir. 1983) (posters); and compare Winter v. DC Comics, 69 P.3d 473 (Cal. 2003), with Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003) (comic books).

180. Huffstutter, *supra* note 13, at 1; Judy Keen, *If You're Going to Celebrate John Dillinger, Call This Man First*, USA TODAY, June 4, 2007, at 3A.

181. Huffstutter, *supra* note 13, at 1.

182. *Id.*; Keen, *supra* note 180, at 3A; Bill Dolan, *Lake Convention Executive Hails AG's Opinion in Long-running Dillinger Lawsuit*, TIMES OF NORTHWEST IND., Jan. 16, 2008, http://www.nwitimes.com/news/local/article_9fd89408-b477-5aca-a091-989346a7cb33.html; Kass Stone, *Dillinger Museum Reopens*, TIMES OF NORTHWEST IND., Mar. 29, 2008, http://www.nwitimes.com/news/local/article_897271e8-cf23-5e0d-a441-ec441208cc2f.html.

183. Keen, *supra* note 180, at 3A. A similarly broad no-commercial-use interpretation of the right of publicity was given by one of the lawyers representing Tiger Woods in his suit involving a life-like print of the famous golfer. As summarized in one news story, the lawyer said that "the right of publicity is essentially a protection against 'other people making money off of you without your permission.'" Drake Bennett, *Star Power: Celebrities Have a Legal Right to Prevent the Commercial Use of Their Images Without Permission*, BOSTON GLOBE, June 4, 2006, at E1.

184. See Felcher & Rubin, *supra* note 97, at 1591 ("So long as the relationship

Thomas McCarthy, the author of the leading treatise in the field and proponent of a strong right of publicity, notes that “for all practical purposes, the only kind of speech impacted by the right of publicity is commercial speech – advertising – not news, not stories, not entertainment and not entertainment satire and parody – only advertising and other purely commercial uses.”¹⁸⁵ The unauthorized use of someone’s identity in advertising or solicitation presents a classic case for liability.¹⁸⁶ It can mislead the public into thinking that the person had endorsed the product or activity.¹⁸⁷ It also potentially injures persons whose identities are exploited by invading their privacy, defaming their character, diminishing their ability to market their identity, and reducing their financial incentive to develop their identities.¹⁸⁸ If, as McCarthy states, “[t]he vast majority”¹⁸⁹ of right of publicity cases involve advertising, then they could be addressed simply by defining the right to bar the unauthorized use of a person’s identity in advertising or solicitation, with the exception of, as the *Restatement* notes,¹⁹⁰ something that makes a permissible use of the person’s identity in advertising, such as using Leopold’s identity to advertise *Compulsion*.¹⁹¹ This simple rule covers most cases, is easy to apply, and reflects current law.¹⁹²

between the right of publicity and the First Amendment is not confronted directly, inconsistent holdings are virtually inevitable.”).

185. McCarthy & Anderson, *supra* note 146, at 198.

186. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (1995).

187. James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973).

188. For a discussion of these and other justifications for the right of publicity, see MCCARTHY, *supra* note 12, §§ 2:1-2:4. For a critical analysis of them, see also Madow, *supra* note 64, at 179-228.

189. MCCARTHY, *supra* note 12, § 1:23.

190. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (1995).

191. See *Leopold v. Levin*, 259 N.E.2d 250, 255-56 (1970).

192. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (1995) (advertising use “will ordinarily subject user to liability”); MCCARTHY, *supra* note 12, § 1:23 (“[T]he vast majority of cases falling into the ‘appropriation’ category involve the unpermitted use of one’s name or picture for advertising or trade purposes.”). In his initial depiction of the right of publicity, Prosser noted, “The typical case is that of the unauthorized use of [the plaintiff’s] name or picture in the defendant’s advertising.” PROSSER, *supra* note 54, at 639. See also RESTATEMENT (SECOND) OF TORTS § 652C, cmt. b (1977) (“[C]ommon form . . . is the appropriation and use of the plaintiff’s name or likeness to advertise the defendant’s business or product, or for some similar commercial purpose.”). *C.f.*, while noting that courts ordinarily hold the unauthorized use of a person’s identity in advertising to violate the right of publicity, Professor Barnett criticizes this approach (defended by McCarthy) as insufficiently protective of the constitutional rights of advertisers. Barnett, *supra* note 148, at 613 (“I conclude that Professor McCarthy is wrong to reject any defense of fair use, and virtually any First Amendment defense, to right-of-publicity claims based on product advertising.”). As a practical matter, however, another self-proclaimed critic of the right of publicity

Beyond advertising, however, the right of publicity becomes confused and problematic. One court held that an unauthorized poster of the recently deceased entertainer Elvis Presley bearing words "In Memoriam" violated the right to publicity, for example, while another court ruled that an unauthorized poster of comedian Pat Paulsen bearing the words "Paulsen for President" was protected expression.¹⁹³ Similarly, one court held that the exploitation of a former hockey player's identity in a comic book violated the right of publicity while another court ruled that the use of a country-music duet's identity in a comic book did not.¹⁹⁴ While the facts of these paired cases differed, they are close enough to leave commentators searching for a meaningful distinction.¹⁹⁵ Further, as noted in Section V, one court used the transformative-use test to find that a sketch of the Three Stooges on a T-shirt violated the right of publicity while another court using the same test held that a life-like image of Tiger Woods in a large-run print was protected expression.¹⁹⁶ All of these cases involved merchandise that expressed the ideas or thoughts of the creator, the consumer, or both. To differentiate them from commercial novels, plays, or movies, such as *Compulsion*, privileges some more traditionally favored forms of expression over other less traditionally favored ones.¹⁹⁷

Rather than focus on the medium or type of expression, beyond advertising and solicitation, the right of publicity should only proscribe uses that primarily communicate endorsement. Applied to the Dillinger situation, for example, depending on the facts in each situation, this test could bar a restaurant from calling itself John Dillinger's Diner but permit Lake County to operate The Dillinger Museum if only the former would likely convey a message that

acknowledges that a no-advertising-use standard appears acceptable to the courts. See Volokh, *supra* note 124, at 929.

193. Compare Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501, 510 (N.Y. Sup. Ct. 1968), with Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd on other grounds*, 701 F.2d 11 (2d Cir. 1983).

194. Compare Winter v. DC Comics, 69 P.3d 473, 480 (Cal. 2003), with Doe v. TCI Cablevision, 110 S.W.3d 363, 375 (Mo. 2003).

195. See, e.g., Felcher & Rubin, *supra* note 97, at 1591 ("In order for these two cases to be reconciled, the tension between publicity rights and free speech must be addressed directly.").

196. Compare Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001), with ETW Crop. V. Jired Publ'g Inc., 332 F.3d 915, 934-36 (6th Cir. 2003).

197. See Volokh, *supra* note 124, at 908-11 (criticizing the apparent distinction in applying the right of publicity to "high information content" works such as books or movies" versus "low information content" works" such as T-shirts and noting that no such distinction is made in applying the First Amendment generally, which the U.S. Supreme Court has held to protect the "right to wear a jacket with a three-word slogan").

Dillinger or his heirs have endorsed the activity.¹⁹⁸ Reasonable people could differ on individual cases, of course, but conveying a message of endorsement is the type of determination that users, consumers and jurors can more readily make than an abstract decision about whether a particular use is sufficiently expressive or transformative to merit constitutional protection. Importantly, while providing meaningful protection to publicity rights, it should not raise First Amendment concerns because people do not have a constitutional right falsely to communicate that someone has endorsed their product or activity.¹⁹⁹

Further, a no-endorsement test for merchandise and activities advances policy objectives underlying the right of publicity. One common justification for the right of publicity drawn from trademark law is to protect consumers from being misled about whether a trusted celebrity has endorsed a particular product or activity.²⁰⁰ This concern is triggered as much by a product that, by its design, name or nature, falsely implies a celebrity's endorsement as by an ad that falsely claims a celebrity's endorsement.²⁰¹ Further, any unauthorized endorsement, whether claimed in an advertisement or implied by the product, poses similar risks of injury to the person whose identity has been exploited. Critics of a no-endorsement standard for the right of publicity typically argue that it does not go far enough to reach the uses of celebrities in advertising, rightly noting that merely including a celebrity in an ad can gain attention and boost sales even if the ad disclaims any endorsement.²⁰² This criticism logically loses force, however, when a no-endorsement test only supplements a general no-advertising-use standard.

No standard defining the scope of the right of publicity is perfect, but a clear one is better than continuing the current legal

198. For a case of this type, see *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 207 (5th Cir. 1998) (enjoining a bar from using the name "Velvet Elvis").

199. Felcher & Rubin, *supra* note 97, at 1596 ("The primary principle, derived directly from First Amendment considerations, centers on the purpose of the portrayal: if it serves an informative or cultural function, it will be immune from liability; if it serves no such function but merely exploits the individual portrayed, immunity will not be granted.").

200. *Id.* at 1600; Dogan & Lemley, *supra* note 97, at 1164; Treece, *supra* note 187, at 647; Leaffer, *supra* note 127, at 1372-73; George P. Smith II, *The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right*, 54 S. CAR. L. REV. 1, 42 (2002). This justification has attracted criticism. See Madow, *supra* note 64, at 229-36; MCCARTHY, *supra* note 12, §§ 2:1-2:4; see also Nimmer, *supra* note 64, at 212. McCarthy's criticism loses force when an endorsement test simply supplements a no-advertising-use rule.

201. See Dogan & Lemley, *supra* note 97, at 1198-99.

202. MCCARTHY, *supra* note 12, §§ 8:67-8:69; see also Nimmer, *supra* note 64, at 212; Sheldon W. Halpern, *The Rights of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1245 (1986).

confusion with the attendant chill on the exercise of both property rights and free expression. An advertising and endorsement (or A&E) test completely covers the common cases of celebrity advertising and reasonably addresses the problematic issue of celebrity-linked merchandise and activities.²⁰³ Some merchandise, including some falling within such traditionally protected categories of expression as books, movies or songs, could draw on a celebrity's identity purely for advertising purposes or to convey endorsement.²⁰⁴ This might include particular T-shirts, art prints, or posters.²⁰⁵ There could still be hard cases but the standard applied to them should be clear and understandable by users, consumers, jurors and celebrities. Is a person's identity being used in advertising (except in ads about a permitted use) or primarily to convey a message of endorsement? If not, the use passes muster. *Compulsion* clearly passes this standard and the suit against it should have been quickly disposed of without chilling legitimate users of Leopold and Loeb's identity.

VI. CONCLUSION

Crimes, prosecutions and punishments fascinate Americans. They help us to understand ourselves, each other and our society. They have become part of our shared culture and folklore. This is clearly true for the 1924 murder of Bobby Franks and the subsequent prosecution and punishment of Nathan Leopold and Richard Loeb. These highly publicized episodes serve as a seemingly endless source

203. See Volokh, *supra* note 124, at 907-13, 929 (distinguishing between uses in advertising and in works other than advertising, and finding the legal treatment of the later more problematic than the former); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmts. a, b (1995) (distinguishing between uses in advertising and in merchandise).

204. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995) (“[I]f the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising.”). This comment should apply equally under the proposed standard. For example, for a decision holding a music group liable for appropriating the name of Rosa Parks by simply using it in the title for a song that did not otherwise deal with either her or her historic struggle for civil rights, see *Parks v. LaFace Records*, 329 F.3d 437, 452-53 (6th Cir. 2003).

205. For example, the question in the cases of the Three Stooges T-shirt or the Tiger Woods art print becomes whether a reasonable consumer would perceive the merchandise to be endorsed by the pictured celebrities rather than if the celebrity's image was so transformed as to become primarily the expression of the artist. See *Comedy III Products, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (Stooges); *ETW Corp. V. Jireh Publ'g, Inc.*, 332 F.3d 915, 934-36 (6th Cir. 2003) (Woods). Presumably in instances where fidelity to the original is a key element of the expression, an artist or writer could, with more integrity, disclaim endorsement in the final product than transform the image.

of material and inspiration for writers and commentators. With each retelling of their story, the leading characters in this American tragedy evolve in response to the changing hopes and fears of succeeding generations. They remain celebrities. Leopold's legal effort to control his public image against those who would develop its rich texture illustrates the danger of an overbroad or unclear test for the right of publicity and shows the social value of a simple, comprehensive standard for it. The focus should be on advertising and endorsement rather than on commercial use and the medium or transformative nature of the expression.