

# THE DYSTOPIAN RIGHT OF PUBLICITY

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## ABSTRACT

Our society frequently describes privacy problems with the dystopian metaphor of George Orwell's *1984*. Understood through the Orwellian metaphor—and particularly the “Big Brother is watching you” maxim—privacy rights are forcefully invaded by the government's constant surveillance and disclosures of personal information. Yet our other personality right—the right of publicity, “the right of every human being to control the commercial use of his or her identity”—still lacks an appropriate metaphor, making it difficult to conceptualize and thus to regulate effectively.

This Article suggests that the problems with a commercially transferable right of publicity can be usefully analogized to another chilling dystopia: Aldous Huxley's *Brave New World*. Huxley wrote *Brave New World* as an expression of the anxiety of losing one's individual identity in a technology-driven future. The novel envisioned a utilitarian society controlled through technological manipulation, conspicuous consumption, social conditioning, and entertainment addiction. In contrast to Orwell's Big Brother's forceful coercion, pacified citizens in Huxley's “World State” society willingly participate in their own servitude.

Commentators often focus on the fact that litigated publicity cases tend to overprotect celebrities' fame to the detriment of creators' First Amendment rights. The vast majority of publicity rights, however, actually belong to ordinary citizens. The Huxleyan metaphor's depiction of technological manipulation, social conditioning, and identity loss thus reveals the constant but overlooked publicity problem that this Article labels the “pleasurable servitude.” In effect, by consenting to terms of service on social media, ordinary citizens voluntarily license rights in their identities to internet platforms in exchange for access to the pleasures of digital realities. Through this unregulated mass transfer of publicity rights, social networks strip away their users' identities and sell them to advertisers as commodities. This Article claims that pleasurable servitude is a form of surveillance capitalism deserving of regulation by means of “publicity policies” that would function analogously to privacy policies.

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### I. INTRODUCTION

There are two ways by which the spirit of a culture may be shriveled. In the first—the Orwellian—culture becomes a prison. In the second—the Huxleyan—culture becomes a burlesque.

Neil Postman<sup>1</sup>

Our society often describes *privacy* problems using the dystopian metaphor of “Big Brother”—the figurehead of the totalitarian government in George Orwell’s classic novel *Nineteen Eighty-Four* (1984).<sup>2</sup> Understood through the

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1. NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 155 (1985).

2. See, e.g., DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 31 (2006) (“Big Brother dominates the discourse of information privacy”) [hereinafter SOLOVE, THE DIGITAL PERSON]; Neil Richards, *The Danger of Surveillance*, 126 HARV. L. REV. 1934, 1948 (2013) (“Of course, the most famous cultural exploration of the conforming effects of surveillance is Orwell’s harrowing depiction in *Nineteen Eighty-Four* of the totalitarian state personified by Big Brother.”); Lora Kelley, *When “Big Brother” Isn’t Scary Enough*, N.Y. TIMES (Dec. 2019), <https://www.nytimes.com/2019/11/>

Orwellian metaphor—and particularly the “Big Brother is Watching You” maxim—privacy rights are forcefully invaded by the government’s constant use of surveillance and the unauthorized disclosures of personal information. Big Brother reflects the unease, inhibition, and self-censorship individuals feel in their private lives when at the mercy of a malevolent watcher.<sup>3</sup> In this way, Big Brother serves as a helpful conceptual warning about the consequences of government abuse of power, privacy, and surveillance made possible through sinister implementation of high technology coupled with nefarious intent.<sup>4</sup>

Yet, our other personality right,<sup>5</sup> the right of *publicity*, still lacks an appropriate metaphor, making it difficult to conceptualize, and thus to regulate effectively.<sup>6</sup> The right of publicity is “the inherent right of every human being to control the commercial use of his or her identity.”<sup>7</sup> This Article suggests that the problems with a commercially transferable right of publicity can be usefully analogized not to *1984* but rather to another chilling and well-known dystopia: Aldous Huxley’s *Brave New World*.<sup>8</sup>

04/opinion/surveillance-big-brother.html (“In terms of usage, ‘1984’ and Big Brother stomp other surveillance metaphors”); Carl S. Kaplan, *Kafkaesque? Big Brother? Finding the Right Literary Metaphor for Net Privacy*, N.Y. TIMES (Feb. 2001), <https://www.nytimes.com/2001/02/02/technology/kafkaesque-big-brother-finding-the-right-literary-metaphor-for.html> (“It’s customary these days for many legal thinkers, journalists and just plain civilians to use the phrase ‘Big Brother’ when bemoaning the loss of privacy . . .”).

3. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1398 (2001) [hereinafter Solove, *Privacy and Power*].

4. See generally GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

5. See, e.g., Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L. J. 213, 214 (1999) (referring to privacy and publicity as “the conjoined twins of our modern media-saturated society.”).

6. See, e.g., Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 158 (2015) (referring to the right of publicity as “conceptually unbounded”); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 893 (2017) (noting that “courts have yet to clearly articulate what the right of publicity is”); Thomas E. Simmons, *An Estate Plan for Kanye West*, 39 CARDOZO ARTS & ENT. L. J. 1, 4 (2021) (explaining that the right of publicity “is usually defined in the negative sense—that is, not in terms of the use one may make of it, but in terms of the right to prohibit others from using it.”).

7. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2019). The right of publicity is a state law right, having never been codified federally. In litigation, its elements generally include some version of: (1) standing to sue, meaning that plaintiff is the owner or licensee of the identity in question; (2) defendant has made a commercial use of one or more aspects of that identity; (3) plaintiff did not consent to the appropriation; and (4) the appropriation of identity resulted in harm—typically of an economic nature—to the plaintiff. *Id.*

8. See generally ALDOUS HUXLEY, BRAVE NEW WORLD (Harper Crest Library 1946) (1937).

Huxley wrote *Brave New World* as an expression of the anxiety of losing one's individual identity in a technology-driven future.<sup>9</sup> In the novel, Huxley envisioned a utilitarian society gone awry, controlled through technological manipulation, conspicuous consumption, social conditioning, drug use, and entertainment addiction. In contrast to Orwell's Big Brother's forceful coercion, pacified citizens in Huxley's "World State" society willingly participate in their own servitude.<sup>10</sup> Their lack of freedom and identity is reflected in the World State's hypnopædic proverb: "Every one belongs to every one else."<sup>11</sup>

Commentators often consider the major problem with publicity rights to be the protection of rich and famous celebrities at the expense of the free expression of others who seek to exploit their personas as a matter of public discourse.<sup>12</sup> In celebrity-focused publicity cases, courts haphazardly prioritize celebrities' publicity rights over creators' First Amendment rights to free expression in exploiting celebrity personas for use in creative or newsworthy endeavors.<sup>13</sup> As two leading commentators put it, the right of publicity's

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9. See Bob Barr, *Aldous Huxley's Brave New World—Still a Chilling Vision After All These Years*, 108 MICH. L. REV. 847, 849 (2010).

10. See Daphne Jong, *Civilization and its (Dys)contents: Savagery, Technological Progress and Capitalism in Industrial and Information Dystopias*, INTERSECT Vol. 12 No. 3 (2019); Solove, *Privacy and Power*, *supra* note 3, at 1422.

11. HUXLEY, *supra* note 8, at 46, 50, 55, 142, 151, 245.

12. See, e.g., DAVID L. HUDSON, JR., PROTECTING IDEAS 88 (2006) ("The right of publicity threatens First Amendment values by punishing individuals for the content of their creations. Celebrities have used the right of publicity as a cudgel, hammering expression from the public domain."); Tushnet, *A Mask That Eats*, *supra* note 6, at 157 ("[C]ourts have allowed the right of publicity to etch into the First Amendment in their eagerness to reward celebrities for the power of their 'images' and to prevent other people from exploiting those images."); Thomas E. Kadri, *Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse*, 79 MD. L. REV. 899, 958 (2019) ("The time has come to curb the right of publicity and reframe the First Amendment justifications that face off against it . . . the tort censors—or at least ransoms—the portrayal of real people and threatens public discourse."); Stephen McKelvey et al., *The Air Jordan Rules: Image Advertising Adds New Dimension to Right of Publicity-First Amendment Tension*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 945, 954 (2016) (examining the right of publicity's expansion as contributing to its increasing tension with the First Amendment).

13. Tushnet, *A Mask that Eats*, *supra* note 6, at 158–59; see also Kadri, *Drawing Trump Naked*, *supra* note 12, at 909; cf. STACEY DOGAN, HAELAN LABORATORIES V. TOPPS CHEWING GUM: PUBLICITY AS A LEGAL RIGHT, INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP 17, 20 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg, eds., 2014) ("[W]hile courts often rule in favor of defendant on First Amendment grounds, they do so by applying murky legal standards that offer little certainty or comfort to parties thinking about selling a product that draws upon a celebrity's identity."). But see Reid K. Weisbrod, *A Copyright Right of Publicity*, 84 FORDHAM L. REV. 2803, 2812 (2016) (noting that courts often side with free expression over publicity rights, particularly as compared to copyright).

“jagged and unpredictable reach chills speech in extensive and immeasurable ways.”<sup>14</sup>

However, as some, such as publicity luminary Jennifer Rothman, have recently pointed out, the right of publicity can and should function as a vehicle for protecting the identity of everyday citizens in our digital age.<sup>15</sup> Indeed, the high-profile lawsuits launched by celebrities to protect the unauthorized uses of their personas, while visible because they get litigated, are not commonplace.<sup>16</sup> There are roughly eighteen of these “privileged” publicity decisions published per year in the United States, and a halo of filings and informal disputes surely extending far beyond that.<sup>17</sup> Far more common, though, is the right of publicity’s “dark matter,”<sup>18</sup> which is not litigated but refers to the constant contractual loss of identity (i.e., publicity) rights for

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14. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L. J. 86, 91 (2020).

15. See JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 183 (2018) (“Distinctions between public and private figures make little sense today as so-called private figures increasingly live public or quasi-public lives on . . . online fora.”) [hereinafter ROTHMAN, *RIGHT OF PUBLICITY*]. See also Dustin Marlan, *Unmasking the Right of Publicity*, 71 HASTINGS L. J. 419, 473 (2020) (“[R]ecasting the right of publicity through an intersubjective lens might allow the right to contribute to the development of not just the self, but of digital relationships and community—a far cry from publicity’s commonly held stereotype as a hedonic vehicle bolstering the rights of already wealthy celebrities and trampling on the First Amendment.”); Note, Noa Dreymann, *John Doe’s Right of Publicity*, 32 BERKELEY TECH. L.J. 673, 709 (2017) (“Seeing as eighty-one percent of Americans in the United States have a social media profile, non-celebrities are now more vulnerable than ever to having their identities appropriated.”); Note, Barbara Bruni, *The Right of Publicity as Market Regulator in the Age of Social Media*, 41 CARDOZO L. REV. 2203, 2207 (2020) (suggesting “that the right of publicity can be a useful tool for ordinary people to gain more control and bargaining power over their online personas”).

16. See *Right of Publicity*, FINDLAW (May 26, 2016) <https://corporate.findlaw.com/litigation-disputes/right-of-publicity.html> (“It should not be surprising that most cases involving right of publicity claims involve celebrities or public personalities; however, this is probably more a condition of the economics of litigation than the legal rights involved.”); see also Rebecca J. Rosen, *Something Like 0.0086 the World is Famous*, THE ATLANTIC, <https://www.theatlantic.com/technology/archive/2013/01/something-like-00086-of-the-world-is-famous/267397/>.

17. Dustin Marlan, “Published Decisions Based on Westlaw Key Number Searches in Right of Publicity, Trademark, Copyright, and Patent 2010-2021” (2022), available at [https://scholarship.law.umassd.edu/fac\\_pubs/238/](https://scholarship.law.umassd.edu/fac_pubs/238/) (comparing results of Westlaw key number searches in Right of Publicity (379 K383-409), Trademark (382 K1000-1800), Copyright (99 K220-1202), and Patent (291 K401-2094) for the years 2010 to 2021)).

18. See Brian L. Frye, *Literary Landlords in Plaguetime*, 10 NYU J. IP & ENT. L. 225, 232 (2021) (referring to non-litigated occurrences of copyright appropriation as copyright’s “dark matter”). Frye might have preferred, though, that his work was not cited in this regard. See Brian L. Frye, *Plagiarize this Paper*, 60 IDEA 294 (2020) (advocating for the benefits of plagiarism in certain academic contexts).

hundreds of millions of individuals in the United States, and billions worldwide,<sup>19</sup> on the internet and social media.<sup>20</sup>

The Huxleyan metaphor—particularly through the “[e]very one belongs to every one else” proverb—captures the right of publicity’s application beyond celebrity, in this regard. As one court remarked, “[i]n a society dominated by reality television shows, YouTube, Twitter, and online social networking sites, the distinction between a ‘celebrity’ and a ‘non-celebrity’ seems to be an increasingly arbitrary one.”<sup>21</sup> In capturing a society subjugated by social conditioning and technological manipulation, the Huxleyan metaphor reflects the (allegedly) consensual sacrifice of publicity rights our own citizens regularly encounter.

This transfer of identity occurs through the unregulated licensing of publicity rights on the internet and social media. Social media users<sup>22</sup>—often by way of clickwrap or browsewrap terms of service agreements—voluntarily or unknowingly relinquish rights in their identities to social networks in exchange for the pleasures and comforts of digital worlds.<sup>23</sup> The emblematic social media cases involving the right of publicity thus far include *Cohen v. Facebook*, *Fralely v. Facebook*, *Perkins v. LinkedIn*, *Parker v. Hey, Inc.*, and *Groupon v. Dancel*, where internet platforms harvested social media users’ names and

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19. The Article does not make any claims as to the applicability of publicity licenses outside of the United States and U.S. law.

20. According to a recent study from Statista, Facebook has approximately three billion active users worldwide. *Number of monthly active Facebook users worldwide as of 4<sup>th</sup> quarter 2021*, STATISTA <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (last visited Apr. 4, 2022). This includes roughly 300 million social media users in the United States, or roughly two-thirds of the U.S. population. *Number of Facebook users in the United States from 2017 to 2026*, STATISTA <https://www.statista.com/statistics/408971/number-of-us-facebook-users/> (last visited Apr. 4, 2022).

21. *Fralely v. Facebook, Inc.*, 830 F. Supp. 2d 785, 808 (N.D. Cal 2011); see ROTHMAN, RIGHT OF PUBLICITY, *supra* note 15, at 183 (2018) (“Distinctions between public and private figures make little sense today as so-called private figures increasingly live public or quasi-public lives on . . . online fora.”).

22. While I will grudgingly use the term “user” in the social media context, it appears disparaging and objectifying in a similar manner as “consumer” does in trademark law. See generally Dustin Marlan, *Is the Word “Consumer” Biasing Trademark Law?*, 8 TEX. A&M L. REV. 367 (2021); Dustin Marlan, *Rethinking Trademark Law’s “Consumer” Label*, 55 GONZ. L. REV. 422 (2020).

23. See *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1092 (N.D. Cal. 2011) (“As a ‘social networking’ internet site, Facebook exists because its users *want* to share information.”). More broadly, this lack of consent issue is well documented in the context of the internet and social media terms of service and privacy policies. See, e.g., MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 12 (2014); Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880 (2013) [hereinafter Solove, *Consent Dilemma*]; *infra* Section III.D.

images and used them in connection with targeted advertisements and endorsements.<sup>24</sup>

In response to these lawsuits, several prominent social networks have added or modified exculpatory provisions to their terms of service agreements. These publicity-related provisions take a broad license of users' rights of publicity, for purposes of endorsement-related advertising, in exchange for use of their platforms. Thus, because consent functions as a complete defense to a right of publicity claim, social networks must be strategic in crafting their terms of service to obtain the express consent of their users.<sup>25</sup> This Article labels this online "stripping away" of individuals' publicity rights through online contracts as the "pleasurable servitude," and explores it as a problem of online manipulation deserving of regulatory reform.<sup>26</sup> More broadly, the pleasurable servitude is emblematic of what Shoshana Zuboff labels surveillance capitalism.<sup>27</sup>

The pleasurable servitude can be defined as the mandatory release of some control by social media users over their publicity rights, in return for the benefits of accessing digital worlds. As an example of the phenomenon, consider that, as a prerequisite for using the popular messaging app, all Snapchat users must "consent" to Snap Inc.'s terms of service, which grants

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24. Cohen, 798 F. Supp. 2d 1090 (N.D. Cal. 2011) (concerning endorsements regarding the "Friend Finder" service); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011) (concerning targeted endorsements regarding "Sponsored Stories"); *Perkins v. LinkedIn*, 53 F. Supp. 3d 1222 (N.D. Cal. 2014) (regarding marketing with "Add Connections" tool); *Parker v. Hey, Inc.*, Case No. CGC-17-556257, 2017 Cal. Super. LEXIS 609 (Super. Ct. Cal. Apr. 14, 2017) (concerning name's used in connection with Twitter's text invitations sent to contacts); *Dancel v. Groupon, Inc.*, No. 18 C 2027, 2019 U.S. Dist. LEXIS 33698 (N.D. Ill. Mar. 4, 2019) (regarding Groupon's collection of public Instagram data to collect photos and use them in connection with targeted advertisements); *cf. Dobrowolski v. Intelius, Inc.*, No. 17 CV 1406, 2017 U.S. Dist. LEXIS 138587 (N.D. Ill. Aug. 29, 2017) (regarding Intelius and Instant Checkmate's use of plaintiff's name in search engine advertisements).

25. See, e.g., Cydney Tune & Lori Levine, *The Right of Publicity and Social Media: A Challenging Collision*, LICENSING J., at 16 (June/July 2015).

26. Online manipulation can be defined as "the ability of data collectors to use information about individuals to manipulate them." Daniel Susser, Beate Roessler & Helen Nissenbaum, *Technology, Autonomy, and Manipulation*, 8 INTERNET POL'Y REV. 1 (2019); see also Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 995 (2014) (explaining that technology companies purposely exploit the cognitive limitations of consumers in the digital context); Shaun B. Spencer, *The Problem of Online Manipulation*, 2020 U. ILL. L. REV. 959, 969 (2020) (explaining that "terms of service can also exploit consumer biases and vulnerabilities.").

27. SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 8 (2019) (arguing that we have entered a new era of "surveillance capitalism" that operates by "unilaterally claim[ing] human experience as free raw material for translation into behavioral data," and then processing the data to "anticipate what [individuals] will do now, soon, and later.").

Snap an unrestricted, worldwide, royalty-free, irrevocable, and perpetual right and license to use the name, likeness, and voice, of anyone featured in [uploaded] Public Content for commercial and non-commercial purposes.”<sup>28</sup> Similar broad publicity license or waiver provisions exist on internet platforms including Facebook, TikTok, YouTube, Instagram, and Groupon.<sup>29</sup> On these and other platforms, users of social media “voluntarily relinquish some control over their personal information, in return for the benefits these websites provide, often free of charge.”<sup>30</sup>

In *Brave New World*, terror is no longer necessary because people have become so deeply conditioned to love their servitude. As media theorist Neil Postman writes in the seminal *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*, “in Huxley’s vision, no Big Brother is required to deprive people of their autonomy . . . people will come to love their oppression, to adore the technologies that undo their capacities to think.”<sup>31</sup> Today, with the gravitating power of digital media, technology corporations are able to gain control of the identities of millions or billions of people. These social media users, willingly or perhaps because they are too distracted to notice, license their publicity rights to internet platforms, who, in turn, sell their users’ identities to advertisers as commodities.<sup>32</sup> Such publicity transfer gone awry is not a dreary Orwellian totalitarianism but rather like a Huxleyan world of pleasure-seeking, technological manipulation, and socially conditioned alienation of identity.<sup>33</sup>

The *Brave New World* analogy is not purely academic or literary. It is intended to be a useful rhetorical device in highlighting the right of publicity as a right belonging to everyone, not just celebrities, and the injustice of publicity rights’ forced transfer from individuals to internet platforms. According to George Lakoff and Mark Johnson’s conceptual metaphor theory, a metaphor is a way of “understanding and experiencing one kind of thing in

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28. *Terms of Service*, SNAP INC., <https://snap.com/en-US/terms> (last visited April 15, 2022).

29. See *infra* notes 260-277 and accompanying discussion.

30. Daniel B. Garric, *CyberLife: Social Media, Right-of-Publicity and Consenting to Terms of Service*, Thomson Reuters (July 19, 2017), *CyberLife: Social Media, Right-of-Publicity and Consenting to Terms of Service* (legalexecutiveinstitute.com).

31. POSTMAN, *supra* note 1, at iii.

32. Melody Nouri, *The Power of Influence: Traditional Celebrity vs Social Media Influencer*, ADVANCED WRITING: POP CULTURE INTERSECTIONS 1 (2018) (“The use of social media platforms has grown exponentially in the last decade. From 2008 to 2018, the percentage of the U.S. population with a social media profile has grown from 10% to a whopping 77%.”).

33. See *infra* Section III.D.



terms of another.”<sup>34</sup> Daniel Solove, in proposing a Kafkaesque metaphor for information privacy, notes that “metaphors are tools of shared cultural understanding. Privacy involves the type of society we are creating, and we often use metaphors to envision different possible worlds, ones that we want to live in and ones that we don’t.”<sup>35</sup> Jurists, legislators, politicians, and academics often use conceptual metaphors to understand new surveillance technologies and their application to privacy laws.<sup>36</sup>

Similarly, conceptual metaphors can be applied to online manipulation, surveillance capitalism, and the right of publicity. To this end, this Article proposes regulation regarding “publicity policies”—akin to privacy policies—that emphasize, rather than bury, mandated disclosures of appropriation of users’ commercial identities—name, image, and likeness—on websites across the internet and social media.<sup>37</sup> Inherent in these publicity policies should be publicity settings, including options to opt-out of, or customize, the internet platform’s use of one’s identity for advertising, marketing, and endorsements.<sup>38</sup> This sort of “publicity self-management” will not alone solve the problem<sup>39</sup> but is intended to serve as a realistic first step in drawing attention to the issue and therefore toward preventing this sort of mass identity alienation.

The Article proceeds as follows. In setting the stage for a Huxleyan right of publicity discussion, Part II gives an overview of the Orwellian metaphor for privacy problems. Section II.A provides background regarding privacy’s evolution from Warren and Brandeis’s historical “right to be left alone” to our current “age of surveillance.” Section II.B examines the Orwellian conception

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34. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5 (1980); *see also* Dustin Marlan, *Visual Metaphor and Trademark Distinctiveness*, 93 WASH. L. REV. 767, 778 (2018) (applying conceptual metaphor theory in the trademark and advertising context and noting that “the focus of metaphor . . . is on understanding how one idea or concept can be understood in terms of another one, i.e., ‘A is B.’”).

35. SOLOVE, *THE DIGITAL PERSON*, *supra* note 2, at 28; *see also* J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 247 (1998) (explaining that “metaphoric models selectively describe a situation, and in doing so help to suppress alternative conceptions.”); Lauren Henry Scholz, *Big Data is Not Big Oil: The Role of Analogy in the Law of New Technologies*, 86 TENN. L. REV. 863, 871 (2018) (“Lawyers use applied analogies to understand and address specific problems in the law.”).

36. *Id.*; *see infra* Sections II.B and II.C.

37. *See infra* Section IV.A.

38. *Id.*

39. Solove, *Consent Dilemma*, *supra* note 23, at 1880 (acknowledging that “privacy self-management is certainly a laudable and necessary component of any regulatory regime” but is also “being tasked with doing work beyond its capabilities”); *see also* WOODROW HARTZOG, *PRIVACY’S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES* 21 (2018) (explaining that “all the focus on [user] control distracts you from what really affects your privacy in the modern age.”).

of privacy breach as one involving Big Brother, the malevolent watcher, reflective of power and control by overreaching government actors.

Part III provides an analogous Huxleyan conceptualization of the right of publicity. Section III.A offers background on the right of publicity and its modern function as a transferable (i.e., licensable) intellectual property right. Section III.B provides an overview of *Brave New World* and its potential as a metaphor for publicity problems. Section III.C applies the Huxleyan metaphor to the celebrity-oriented aspect of the right of publicity, and Section III.D extends the metaphor to the online publicity licensing phenomenon—what this Article labels the “pleasurable servitude.”

Part IV charts a “brave new world” for the right of publicity. Section IV.A discusses the pleasurable servitude as a form of online manipulation—and, more broadly, of surveillance capitalism—and hence an autonomy, dignity, social, and political problem. Section IV.B proposes regulation in the form of “publicity policies.” Section IV.C contrasts First Amendment balancing considerations in the context of celebrity publicity—where noncommercial speech is often at stake—and the pleasurable servitude—which this Article argues should be seen purely as a matter of commercial speech, and thus outside the ambit of core historic First Amendment protection.

In conclusion, the Article reiterates its central thesis: if privacy law must be regulated, beyond the common law privacy torts, to respond to an Orwellian “Age of Surveillance,”<sup>40</sup> then publicity law, beyond the common law right of publicity, should be regulated to respond to a Huxleyan “Age of Instagram Face.”<sup>41</sup>

## II. ORWELLIAN PRIVACY

*[The poster] depicted simply an enormous face, more than a meter wide: the face of a man about forty-five, with a heavy black mustache and ruggedly handsome features . . . BIG BROTHER IS WATCHING YOU, the caption beneath it ran.*<sup>42</sup>

To set the stage for a parallel discussion of the Huxleyan right of publicity, this Part offers an overview of the Orwellian conception of privacy. The right to privacy is “[t]he principal historical antecedent of the right of publicity.”<sup>43</sup> This Part provides a brief historic overview of privacy and then discusses the

40. Richards, *The Dangers of Surveillance*, *supra* note 2, at 1936.

41. Jia Tolentino, *The Age of Instagram Face*, THE NEW YORKER (Dec. 12, 2019), <https://www.newyorker.com/culture/decade-in-review/the-age-of-instagram-face> (“How had I been changed by an era in which ordinary humans receive daily metrics that appear to quantify how our personalities and our physical selves are performing on the market?”).

42. ORWELL, *supra* note 4, at 2.

43. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (2008).

1984 metaphor and particularly the “Big Brother is watching you” motif as a central, if imperfect, framing for modern surveillance concerns, particularly in a post-9/11 era.<sup>44</sup>

The sinister Big Brother metaphor captures the unease, inhibition, and self-censorship one feels in an era of total surveillance.<sup>45</sup> The Big Brother metaphor’s depiction of harm resulting from undue power and control at the hands of a malevolent watcher helps to justify an expansive notion of privacy—an ethereal personality right that is difficult to conceptualize in literal fashion.<sup>46</sup> Thus, finding the right metaphor is important in deciding how to regulate the area.<sup>47</sup> As demonstrated in later Parts, the use of conceptual metaphors is needed in the right of publicity context too.

#### A. BRIEF PRIVACY OVERVIEW

Samuel Warren and Louis Brandeis popularized the modern right of privacy in their 1890 Harvard Law Review article, *The Right to Privacy*.<sup>48</sup> In it, Warren and Brandeis advocate for a “right to be let alone,” and for the ability of every individual to determine “to what extent [their] thoughts, sentiments, and emotions shall be communicated to others.”<sup>49</sup> In echoing modern publicity concerns, Warren-Brandeis privacy was conceptualized, at least in part, to ward off unwarranted *publicity* stemming from the advent of new inventions and

44. See Deji Bryce Olukotun, *Sweep, Harvest, Gather: Mapping Metaphors to Fight Surveillance*, THE MILLIONS (Apr. 10, 2014), <https://themillions.com/2014/04/sweep-harvest-gather-mapping-metaphors-to-fight-surveillance.html> (“George Orwell’s novel 1984 continues to dominate literary metaphors with respect to surveillance.”); *supra* notes 2-4 and accompanying discussion.

45. See SOLOVE: THE DIGITAL PERSON, *supra* note 2, at 29.

46. See, e.g., WOODROW HARTZOG, PRIVACY’S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES 10 (2019) (“Privacy is an amorphous and elusive concept.”); Calo, *Digital Market Manipulation*, *supra* note 26, at 1028 (“Distilling privacy harm is famously difficult.”).

47. See Kaplan, *supra* note 2. Information privacy is not the only legal subject area, though, where scholars have invoked dystopian literary metaphors. See, e.g., I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 9 (2019) (employing Octavia Butler’s science fiction to imagine what policing might look like in the year 2044); Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 482 (2012) (arguing “that modern alternative processes are just as susceptible to the dystopian inclinations that afflict the legal system, if not more so,” in providing a *The Hunger Games* metaphor for alternative dispute resolution).

48. See generally Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

49. *Id.* at 198.

technologies, such as the portable camera.<sup>50</sup> Although quaint by today's standards, such technology enabled new opportunities for commercial exploitation.<sup>51</sup> In fashioning a "right to be let alone," Warren and Brandeis wrote that "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life."<sup>52</sup>

Warren-Brandeis' "right to be let alone" understands "privacy as a type of immunity or seclusion."<sup>53</sup> In this sense, privacy is a personal and nonassignable right protecting against psychic harm to thoughts, feelings, or emotions.<sup>54</sup> In distilling decades of privacy case law, prominent torts scholar William Prosser, in 1960, famously articulated the four "privacy torts"—(1) public disclosure of private facts; (2) intrusion on seclusion; (3) depiction of another in a false light; and (4) appropriation of another's image—the dignitary, privacy-rooted precursor to the commercial right of publicity.<sup>55</sup> Prosser's privacy torts have been accepted by nearly all U.S. courts, and were adopted in the Second Restatement of Torts.<sup>56</sup>

50. Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 5-6 (1979) (noting that Warren, in particular, may have been especially concerned with unwanted publicity given that he was a member of high society frequently targeted by journalists).

51. Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1119, 1120 (2013).

52. Warren & Brandeis, *supra* note 48, at 195.

53. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1808 (2010) (citing Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1101 (2002)).

54. Notable early privacy cases, which might be considered prototypical of modern publicity cases, minus the right of publicity's transferability, include *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) (involving plaintiff's unauthorized endorsement for insurance); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 442 (N.Y. 1902) (involving plaintiff finding her picture on an ad for Franklin Mills flour without permission); and *Edison v. Edison Polyform & Mfg., Co.*, 67 A. 392, 392 (N.J. Ch. 1907 (involving appropriation of Thomas A. Edison's name and likeness for use in labeling of pharmaceuticals); *O'Brien v. Pabst Sales Co.*, 124 F.2d. 167, 168 (5th Cir. 1942) (involving use of famous football player's photograph on beer ad).

55. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 388-89 (1960).

56. Most relevant to the right of publicity, the Restatement definition of the tort of "Appropriation of Name and Likeness" is: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy." For a thorough comparison between the tort of appropriation and the right of publicity, see generally Kahn, *Bringing Dignity Back to Light*, *supra* note 5. Courts and commentators often sketch out a difference between the dignitary interests protected under the tort of appropriation and the commercial interests protected by the right of publicity. 1 J THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:60 (1987) ("[I]nfringement of the right of publicity focuses upon injury to the pocketbook while an invasion of 'appropriation privacy' focuses upon injury to the psyche."); *People for the Ethical Treatment of Animals v. Berosini*, 895 P.2d 1269, 1283 (Nev. 1995) ("The appropriation tort seeks to protect an individual's personal interest in privacy . . . measured in terms of the mental anguish that

Yet, Warren-Brandeis privacy, as distilled into the four privacy torts, has proven inadequate to address the scope of modern privacy harms.<sup>57</sup> As Danielle Keats Citron writes, “[a]lthough twenty-first century technologies can similarly interfere with individual privacy, they magnify the harm suffered.”<sup>58</sup> Indeed, Warren and Brandeis could not have foreseen the exponential acceleration of technology which has led to the modern surveillance society. And Prosser’s four torts model has proved rigid and limiting.<sup>59</sup> Thus, in justifying enhanced regulations beyond the privacy torts, modern critiques of privacy rights in the information age frequently use the literary metaphor of George Orwell’s *1984* and its Big Brother motif to describe the evils of all-encompassing surveillance made possible by “an explosion of computers, cameras, sensors, wireless communications, GPS, biometrics, and other technologies.”<sup>60</sup>

## B. THE ORWELLIAN METAPHOR

What makes something “Orwellian”?<sup>61</sup> George Orwell’s magnum opus, *1984*, provides a vocabulary to discuss surveillance, the police state, and authoritarianism, which includes terms like “thought police,” “telescreen,” “doublethink,” and, most famously, “Big Brother.”<sup>62</sup> Big Brother, in particular,

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results from the appropriation of an ordinary individual’s identity. The right to [sic] publicity seeks to protect the property interest that a celebrity has in his or her name.”) However, some states treat the two rights—appropriation and the right of publicity—interchangeably or recognize one or the other. For a comprehensive resource on state publicity laws, see Jennifer E. Rothman, *Rothman’s Roadmap to the Right of Publicity*, <https://www.rightofpublicityroadmap.com/>.

57. Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1889 (2010) (“Prosser bears at least some responsibility for the failure of the privacy torts to evolve in response to the technological and cultural developments of the last fifty years”).

58. Citron, *Mainstreaming*, *supra* note 53, at 1808.

59. Richards & Solove, *supra* note 57, at 1890.

60. “*Big Brother*” is no Longer a Fiction, *ACLU Warns in New Report*, ACLU (Jan. 15, 2003), <https://www.aclu.org/press-releases/big-brother-no-longer-fiction-aclu-warns-new-report>.

61. George Orwell, a pen name, was born Eric Arthur Blair (1903–1950). His other, numerous, politically-themed works include his first published book-length piece, *DOWN AND OUT IN PARIS AND LONDON* (1933) (depicting the theme of European poverty), *THE ROAD TO WIGAN PIER* (1937) (depicting 1930s depression-era London poverty), *THE LION AND THE UNICORN: SOCIALISM AND THE ENGLISH GENIUS* (1941) (critiquing Britain’s role in the Second World War), *POLITICS AND THE ENGLISH LANGUAGE* (1946) (essay criticizing the degradation of the English language, echoing his concept of Newspeak in 1984) and Orwell’s most famous work behind 1984, *ANIMAL FARM* (1945) (providing an allegory for Stalin’s Communist Russia).

62. Matthew Feeney, *Seventy Years Later, It’s Still “1984”* (June 5, 2019), <https://www.cato.org/commentary/seventy-years-later-its-still-1984> (claiming that “‘1984’ is at its

now serves as a “familiar metaphor that conjures up visions of political surveillance, political control of dissidents, totalitarian rule, and loss of individual liberty.”<sup>63</sup>

Written in the late 1940s, *1984* describes a tyrannical state, Oceania, ruled by Big Brother—the figurehead of the totalitarian government.<sup>64</sup> As Orwell writes, “Big Brother is infallible and all-powerful . . . the guise in which the Party chooses to exhibit itself to the world.”<sup>65</sup> The Oceania government’s goal is “dreary conformity.”<sup>66</sup> To achieve this goal, Big Brother uses surveillance techniques resulting in fear and self-censorship: uniformed guards patrolling street corners, roving helicopters peer in from above, and a telescreen in every home “watches people as they watch it.”<sup>67</sup>

Big Brother banned information to keep the public powerless, monitored its citizens every move, and enforced its brutal regime through the Gestapo-like Thought Police.<sup>68</sup> With Big Brother, “[t]here was of course no way of knowing whether you were being watched at any given moment.”<sup>69</sup> Orwell explains:

A Party member lives from birth to death under the eye of the Thought Police. Even when he is alone he can never be sure that he is alone. Whatever he may be, asleep or awake, working or resting, in his bath or in bed, he can be inspected without warning and without knowing that he is being inspected. Nothing that he does is indifferent. His friendships, his relaxations, his behavior toward his wife and children, the expression of his face when he is alone, the words he mutters in sleep, even the characteristic movements of his body, are all zealously scrutinized.<sup>70</sup>

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core a novel about language; how it can be used by governments to subjugate and obfuscate, and by citizens that resist oppression”).

63. Daniel J. Power, *“Big Brother” can watch us*, 25 J. DECISION SYS., 578, 578 (2016).

64. ORWELL, *supra* note 4, at 2.

65. ORWELL, *supra* note 4, at 2.

66. *See* Kaplan, *supra* note 2.

67. *See* Kaplan, *supra* note 2.

68. ORWELL, *supra* note 4, at 9 (“People simply disappeared, always during the night. Your name was removed from the registers, every record of everything you had ever done was wiped out, your one-time existence was denied and then forgotten.”). Not all citizens are heavily scrutinized, though, in *1984*. While the upper and middle classes (labeled “Party” members) are monitored intensely through telescreens and microphones, the lower classes (referred to as “Proles”) are presumed to be politically harmless and thus left to their own devices. ORWELL, *supra* note 4, at 24.

69. ORWELL, *supra* note 4, at 2.

70. ORWELL, *supra* note 4, at 99.

As a surveillance metaphor, Big Brother is one of power and control, which is achieved through the domination of one's inner, private life.<sup>71</sup> For sociologist Dennis Wrong, “[t]he ultimate horror in Orwell’s imagined anti-utopia is that men are deprived of the very capacity for cherishing private thoughts and feelings opposed to the regime, let alone acting on them.”<sup>72</sup>

Big Brother is an imperfect, but nonetheless effective, metaphor for our surveillance age. The metaphor concentrates our attention on local issues like police forces with traffic cameras to nationwide issues such as National Security Agency surveillance using massive databases.<sup>73</sup> As Daniel Power notes, a chief concern regarding government data collection “is its misuse to extend political ‘thought’ control.”<sup>74</sup> It is true that Orwell’s depiction of a conformist, totalitarian regime does not mirror our own private sector dominated “informational capitalism,”<sup>75</sup> as Julie Cohen refers to it. Yet, “Orwell’s insights about the effects of surveillance on thought and behavior remains valid—the fear of being watched causes people to act and think differently from the way they might otherwise.”<sup>76</sup> In this way, Big Brother serves as a conceptual warning for the dangers of government and private sector intrusion into one’s personal life and helps fashion privacy laws designed to combat these practices.<sup>77</sup>

Of course, Big Brother is not the only effective metaphor for articulating privacy problems. Some view Big Brother as inadequate, including its failure to distinguish government surveillance from private sector surveillance. Several other metaphors have been conceptualized, though none have gained

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71. See SOLOVE, THE DIGITAL PERSON, *supra* note 2, at 31 (“The metaphor of Big Brother understands privacy in terms of power, and it views privacy as an essential dimension of the political structure of society. Big Brother attempts to dominate the private life because it is the key to controlling an individual’s entire existence: her thoughts, ideas, and actions.”).

72. DENNIS WRONG, POWER: ITS FORMS, BASES AND USES 98 (1988).

73. See, e.g., *United States v. Howard*, 426 F. Supp. 3d 1247, 1249 (M.D. Ala. 2019) (referring to “twentieth century fears that Big Brother is watching” in the context of unreasonable search and seizure); Samuel D. Hodge, Jr., *Big Brother is Watching: Law Enforcement’s Use of Digital Technology in the Twenty-First Century*, 89 U. CIN. L. REV. 30 (2020); Note, Robert Fairbanks, *Masterpiece or Mess: The Mosaic Theory of the Fourth Amendment Post-Carpenter*, 26 BERKELEY J. CRIM. L. 71, 72-73 (2021).

74. See Power, *supra* note 63, at 579 (2016).

75. See generally JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019); see also Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460 (2019) (offering a comparison between Zuboff’s *The Age of Surveillance Capitalism* and Cohen’s *Between Truth and Power*).

76. Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1948 (2013).

77. See, e.g., California Consumer Privacy Act (CCPA), CA.GOV, <https://oag.ca.gov/privacy/ccpa>.

the platform of Orwell's Big Brother. And some are modifications of the Big Brother motif itself.<sup>78</sup>

Shoshana Zuboff proposes the metaphor of “Big Other” to signify that a threat to our data privacy stems not only from a centralized government (i.e., Big Brother) but also a decentralized private sphere, which she labels “surveillance capitalism.”<sup>79</sup> William Staples uses the metaphor of “Tiny Brothers” to refer to “the quiet seemingly innocuous [surveillance] techniques that appear in the workplace, the school, the community and the home.”<sup>80</sup> Michel Foucault popularized Jeremy Bentham's panopticon as a metaphor for digital sensing and control, reminding us that everyone—not just the party members, as in 1984—is a potential surveillance target.<sup>81</sup> Kevin Haggerty and Richard Ericson liken “the convergence of once discrete surveillance systems” to a “surveillant assemblage” in drawing from the post-structuralist landscape of Deleuze and Guattari's assemblage theory.<sup>82</sup> Daniel Solove persuasively argues that the “helplessness, frustration, and vulnerability one experiences

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78. See, e.g., Lora Kelley, *When 'Big Brother' Isn't Scary Enough*, N.Y. TIMES, (Nov. 4., 2019), <https://www.nytimes.com/2019/11/04/opinion/surveillance-big-brother.html>.

79. Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, *Journal of Information Technology*, 30 J. INFO. TECH. 75, 75-76, 82 (Mar. 2015) (“Unlike the centralized power of mass society, there is escape from Big Other. There is no place where Big Other is not.”).

80. William G. Staples, *How our culture of surveillance dictates our lives*, USA TODAY, <https://www.usatoday.com/story/cybertruth/2014/01/24/how-pervasive-surveillance-influences-how-we-live/4808699/> (discussing WILLIAM G. STAPLES, EVERYDAY SURVEILLANCE: VIGILANCE AND VISIBILITY IN POSTMODERN LIFE (2000)) (listing examples of “Tiny Brothers,” which contribute to a “culture of surveillance,” including employers' use of electronic monitoring of employee emails and internet usage, use of data mining techniques to pitch ads to consumers, and police scans and storage of license plate numbers).

81. See JEREMY BENTHAM, DEONTOLOGY; OR, THE SCIENCE OF MORALITY 100 (1834) (envisioning a circular wall of cells surrounded by a single guard tower—due to the building's unique design, the occupants cannot tell whether guards are occupying the tower or not, leading them to believe they are always under surveillance); MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT 201 (1977) (popularizing the panopticon metaphor for digital sending and control); Mason Marks, *Biosupremacy: Big Data, Antitrust, and Monopolistic Power*, 55 U.C. DAVIS L. REV. 513, 524 (2021) (describing the “digital panopticon [a]n engine for generating and exerting biopower because it enables platforms to monitor billions of people, calculate statistics on their physical and psychological traits, and nudge them to conform their behavior to norms established by the platforms.”).

82. Kevin D. Haggerty & Richard V. Ericson, *The Surveillant Assemblage*, 51 BRIT. J. SOC. 605, 606 (2000) (“This assemblage operates by abstracting human bodies from their territorial settings and separating them into a series of discrete flows. These flows are then reassembled into distinct “data doubles” which can be scrutinized and targeted for intervention. In the process, we are witnessing a rhizomatic leveling of the hierarchy of surveillance, such that groups which were previously exempt from routine surveillance are now increasingly being monitored.”).



when a large bureaucratic organization has control over a vast dossier of details about one's life" is more Kafkaesque than Orwellian.<sup>83</sup> And Noah Berlatsky finds that Philip K. Dick's science-fiction work provides a better comparison than Orwell to the reality of surveillance in our systemically racist society.<sup>84</sup> Berlatsky writes regarding the Phildickian metaphor:

Police profiling programs like stop and frisk are designed to give the authorities the power to regulate young Black and Hispanic men, while leaving others largely unmolested. Big Brother is watching you—but only if “you” fit certain criteria. Orwell doesn't capture that reality—but there are books that do. Philip K. Dick's 1968 *Do Androids Dream of Electric Sheep?*, for one, is set in a run-down future dystopia that is dilapidated rather than authoritarian. The protagonist, Rick Deckard, is a policeman, but he doesn't spy on his neighbors or terrorize the general populace. Instead, he is focused on identifying, tracking down, and destroying androids. The surveillance apparatus and the murderous force of the state are targeted, specifically, towards those defined as different.<sup>85</sup>

In sum, Big Brother, as well as a host of other surveillance metaphors, are useful for depicting *privacy* problems. By contrast, our other personality right, the commercially oriented right of *publicity*, still lacks a suitable conceptual metaphor.<sup>86</sup> As one commentator puts it, “courts have yet to articulate what the right of publicity is.”<sup>87</sup> Moreover, the term “publicity,” like “privacy,” is itself a metaphor that—in connoting fame, celebrity, and stardom—may be obscuring our views about what a “right to identity” should consist of.

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83. Solove, *Privacy and Power*, *supra* note 3, at 1421; see SOLOVE, THE DIGITAL PERSON, *supra* note 2, at 27-56 (providing a thorough literary analysis of the conceptual distinctions between Orwell's *1984* and Franz Kafka's *The Trial* as privacy metaphors). Moreover, Neil Richards explains that the term “privacy” is itself a metaphor. Richards notes that “the existing metaphors and conceptions—Big Brother, ‘invasion of privacy,’ the secrecy paradigm, and the public/private distinction—have become so engrained into our collective understanding that they dominate any discussion of something as ‘privacy.’” Therefore, using literal terminology like “data protection” or “confidentiality” has certain advantages when proposing new frontiers in this metaphor saturated area of the law. Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1135 (2006).

84. Noah Berlatsky, *Stop Comparing the NSA to 1984 (and Start Comparing It to Philip K. Dick)*, THE ATLANTIC (Apr. 9, 2014), <https://www.theatlantic.com/entertainment/archive/2014/04/stop-comparing-the-nsa-to-em-1984-em-and-start-comparing-it-to-philip-k-dick/360353/>.

85. *Id.*

86. See Marlan, *supra* note 15, at 448.

87. Johnson, *supra* note 6, at 891.

### III. HUXLEYAN PUBLICITY

*Everybody belongs to every one else—don't they, don't they*<sup>88</sup>

This Part theorizes a Huxleyan conceptualization of the right of publicity. It first provides background on publicity rights. This Part then discusses *Brave New World* and its potential as a metaphor for modern publicity problems. It next applies the *Brave New World* metaphor, particularly through the work of McLuhanesque media theorist Neil Postman, to the traditional notion of a celebrity-focused right of publicity. This Part lastly applies the Huxleyan metaphor to the modern online publicity licensing phenomenon. In analogizing to *Brave New World*, the Article labels the publicity license provisions in internet platforms' terms of service agreements the "pleasurable servitude."

#### A. BRIEF PUBLICITY OVERVIEW

The right of publicity "is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity."<sup>89</sup> Depending on the state law at issue, "identity" may include name, image, likeness, voice, signature, or other personally identifying traits.<sup>90</sup>

Though the idea of a legal notion of publicity was not new (the right of publicity is similar doctrinally to the privacy tort of appropriation),<sup>91</sup> the term "right of publicity" was ostensibly coined by Judge Jerome Frank in the seminal 1953 case *Haelan Laboratories v. Topps Chewing Gum*.<sup>92</sup> In that controversial decision, Judge Frank stated:

88. HUXLEY, *supra* note 8, at 142.

89. *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) (citing MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3) (2d ed. 2000)).

90. *See e.g.*, Alabama Code 1975 § 6-5-771(1), where Alabama's Right of Publicity Act defines "Indicia of Identity" broadly to "[i]nclude those attributes of a Person that serve to identify that Person to an ordinary, reasonable viewer or listener, including but not limited to, name, signature, photograph, image, likeness, voice, or a substantially similar imitation of one or more of those attributes." By contrast, Virginia's statute recognizes a narrower right to prevent the unauthorized use of one's "name, portrait, or picture . . . for advertising purposes or for the purposes of trade." Virginia Code § 8.01-40.

91. *See* ROTHMAN, RIGHT OF PUBLICITY, *supra* note 15, at 11-29 ("Concerns over the misappropriation of identity and unwanted publicity were not novel when the right of publicity purportedly emerged in the 1950s. To the contrary, they were long-standing and in large part the inciting incident for the development of the right of privacy itself.").

92. 1 MCCARTHY & SCHECHTER, *supra* note 7, § 1:26 ("Judge Jerome Frank was apparently the first to coin the term 'right of publicity.'"); *see also* Joseph R. Grodin, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1124, 1126 (1953) ("[T]he Court of Appeals for the Second Circuit, speaking through Judge Frank, recently held that an individual has, independent of the right of privacy, rights in his name or picture which can be granted to

We think that in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a right may validly be made “in gross,” i.e., without an accompanying grant of a business or of anything else . . . . This right might be called a “right of publicity.”<sup>93</sup>

In distinguishing publicity from privacy, Judge Frank noted that the right of publicity is both a right to prevent the commercial use of one’s identity as well as a *license* to grant use of that identity to a third party.<sup>94</sup>

Judge Frank took the opportunity to fashion such a transferable right based on the unique facts of the *Haelan* case. The plaintiff, Haelan, a chewing gum manufacturer, obtained contracts with professional baseball players for the exclusive right to use their names and images in connection with baseball trading cards to be sold along with packs of chewing gum.<sup>95</sup> Defendant Topps, a rival chewing gum manufacturer, then used the same players’ names and images in connection with trading cards to be sold with their own gum.<sup>96</sup> Haelan sued to enjoin Topps’s use of the baseball players’ names and images on the trading cards.<sup>97</sup> In response, Topps argued that the baseball players had no legal right in their images (i.e., photos) other than the right of privacy, and one’s privacy right is strictly personal and thus cannot be assigned to others, such as Haelan.<sup>98</sup>

In styling a remedy, Judge Frank, perhaps influenced by the psychoanalytic theories of his day—which bifurcated the public and private aspects of the personality—described a right distinct from privacy.<sup>99</sup> Although privacy rights

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an exclusive licensee.... This new right of publicity allows a licensee of a famous person adequate protection against third parties.”); *cf.* Post & Rothman, *supra* note 14, at 93 n.22 (“What Frank and Nimmer added to the picture was the possibility that rights over one’s own identity could be transferable.”).

93. *Haelan Lab’s, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

94. *Id.* (explaining that one’s right of publicity is the “right to grant the exclusive privilege of publishing [his picture], and that such a grant may validly be made ‘in gross’”); *see also* § 10:53. 2 MCCARTHY & SCHECHTER, *supra* note 7, § 10:53 (“the holding in *Haelan* that an exclusive licensee has standing to sue has never been seriously questioned.”); Andrew Beckerman-Rodau, *Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition and Trademark Law*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 132, 147-48 (2012) (explaining that the right of publicity is currently a property right that allows one to possess, use, exclude, and transfer their identity to others).

95. *Haelan*, 202 F.2d at 867.

96. *Haelan*, 202 F.2d at 867.

97. *Haelan*, 202 F.2d at 867.

98. *Haelan*, 202 F.2d at 867.

99. *See* Marlan, *Unmasking*, *supra* note 15, at 443–48.

are “rooted in the individual,” the right of publicity, governing the commercial identity and persona, is often alienable and descendible.<sup>100</sup> Far from a “right to be let alone,” the right of publicity is “anchored in commercial possibility.”<sup>101</sup>

In recognizing a transferable personality right, Judge Frank, in writing for the Second Circuit, ruled that the baseball players licensed Haelan a valid publicity right to their names and images.<sup>102</sup> Thus, Haelan could recover against Topps in damages and receive injunctive relief for violation of its publicity right. As Jennifer Rothman puts it, the ball players are the “identity holders” who effectively transferred their publicity rights to Haelan as the “publicity holder.”<sup>103</sup> As a justification for such a right, Judge Frank claimed, quite thinly, that “it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money from authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains, and subways.”<sup>104</sup>

Seizing on Judge Frank’s description of this new transferable identity right, Melville B. Nimmer, soon after *Haelan*, wrote a law review article called *The Right of Publicity*.<sup>105</sup> In it, Nimmer identified two rationales for the right of publicity: “First, the economic realities of pecuniary values inherent in publicity, and second, the inadequacy of traditional legal theories protecting such publicity values.”<sup>106</sup> To these ends, Nimmer argued that the “right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee.”<sup>107</sup>

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100. See, e.g., *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 22213 (C.D. Cal. Jan. 7, 2008); *Lugosi v. Universal Pictures*, 603 P.2d 425 (1979); cf. Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. REV. 185 (2012) (exploring instances in which the right of publicity is not freely alienable and situating such alienability on a spectrum) [hereinafter Rothman, *Inalienable Right of Publicity*].

101. Mark Bartholomew, *A Right Is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 310 (2011).

102. *Haelan*, 202 F.2d at 868-69.

103. See Rothman, *Inalienable Right of Publicity*, *supra* note 100 at 187 (“The identity-holder is the person whose name, likeness, or other indicia of identity and, when used without permission, forms the basis of a right of publicity violation. The publicity holder, by contrast, is the person who owns the property interest in (commercial) uses of that identity.”).

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

105. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954).

106. *Id.* at 215.

107. *Id.* at 216.

In the decades since, most states now recognize the right of publicity. About half of the states that recognize it have enacted statutory versions of the right of publicity, while the others continue to recognize the right at common law.<sup>108</sup> In 1976, the Supreme Court acknowledged a right of publicity in *Zacchini v. Scripps-Howard Broad. Co.*, where, despite the First Amendment, the Court recognized plaintiff Hugo Zacchini's right not to have his entire (fifteen second) "human cannonball" act broadcast on an Ohio local news channel (thus impacting the demand for ticket sales for the live act). From there, the right of publicity has continued to expand in scope.<sup>109</sup>

In litigation, the right of publicity's elements typically require: (1) standing to sue (meaning that plaintiff is the owner or licensee of the identity in question); (2) defendant has made a commercial use of one or more aspects of that identity; (3) plaintiff did not consent to that appropriation; and (4) the appropriation of identity resulted in harm—usually of an economic nature—to plaintiff.<sup>110</sup> From a transactional perspective, identity-holders, often celebrities, enter agreements to transfer their publicity rights to others, sometimes in exchange for vast compensation.<sup>111</sup> In transactional law, the right of publicity functions as a business asset.

Like Prosser did with the privacy torts, scholars have recently attempted to "disentangle" the various types of right of publicity cases into discrete categories. Eric Johnson proposes that the right of publicity consists of three dimensions: "(1) an endorsement right; (2) a merchandizing entitlement; and (3) a right against virtual impressment."<sup>112</sup> Robert Post and Jennifer Rothman offer four distinct publicity torts: "(1) the right of performance; (2) the right of commercial value; (3) the right of control; and (4) the right of dignity."<sup>113</sup>

Despite these efforts, courts and commentators continue to have difficulty conceptualizing right of publicity theory, policy, and doctrine. Eric Johnson likens the right of publicity's blackletter doctrine to "a large, shapeless block

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108. See, e.g., CAL CIV. CODE § 3344.1; Illinois Right of Publicity Act (IRPA).

109. See, e.g., *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984) (explaining that the right of publicity has morphed into a free-standing, alienable property right protecting "the essence of the person, his or her identity or persona.").

110. 1 MCCARTHY & SCHECHTER, *supra* note 7, § 1:3.

111. See, e.g., Steve Olenski, "How Brands Should Use Celebrities For Endorsements," FORBES (July 20, 2016, 2:43 PM), <https://www.forbes.com/sites/steveolenski/2016/07/20/how-brands-should-usecelebrities-for-endorsements/#48a123e95593>. For example, LeBron James extended his original 9-year endorsement contract with Nike indefinitely, worth over a billion dollars over the course of James' lifetime. Cork Gaines, "Why LeBron James' record-breaking deal with Nike is a game-changer," BUS. INSIDER (Dec. 8, 2015, 9:41 PM), <https://www.businessinsider.com/lebron-james-nike-lifetimecontract-game-changer-2015-12>.

112. Johnson, *supra* note 6, at 891.

113. Post & Rothman, *supra* note 14, at 93-125.

of material.”<sup>114</sup> Similarly, Thomas Simmons remarks that the right of publicity is “usually defined in the negative sense—that is, not in terms of the use one may make of it, but in terms of the right to prohibit others from using it.”<sup>115</sup> Indeed, the right of publicity, as conceived of by Judge Frank, is notoriously elusive as a legal doctrine governing the ethereal identity, or persona.<sup>116</sup> As with privacy, though, the right metaphor might shine a spotlight on previously hidden aspects of publicity and the harms associated with its transferability.

## B. THE HUXLEYAN METAPHOR

What makes something “Huxleyan”?<sup>117</sup> Aldous Huxley published *Brave New World* in 1932.<sup>118</sup> The novel is, along with Orwell’s *1984*, “one of the two most widely discussed fantasies of this century.”<sup>119</sup> *Brave New World* is a satire that depicts a utilitarian, scientifically perfected society premised on a caste system. Humans are operantly conditioned to occupy a place on the social hierarchy.<sup>120</sup>

Huxley understood the power of technology not only to allow the government to control the population, like Big Brother, but also to manipulate through “artificial pleasures which dim the mind.”<sup>121</sup> In differentiating the two novels, Huxley explained that “[i]n *1984*, the lust for power is satisfied by inflicting pain; in *Brave New World*, by inflicting a hardly less humiliating

114. Johnson, *supra* note 6, at 907.

115. Simmons, *supra* note 6, at 4.

116. See Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 829–35 (1997) (discussing the ambiguous nature of the term *persona* under right of publicity law); Marlan, *supra* note 15, at 426–429.

117. Aldous Huxley (1894–1963) is a well-known English writer and philosopher. Beyond *Brave New World*, Huxley wrote numerous novels and non-fiction works, including the utopian *Island* (1962), *Brave New World Revisited* (1958). Huxley is also well known for his work in mysticism including *The Perennial Philosophy* (1945) (illustrating commonalities between Western and Eastern mystical practices) and *The Doors of Perception* (1954) (interpreting his psychedelic experience with mescaline). For a legal perspective on psychedelic substances, see Dustin Marlan, *Beyond Cannabis: Psychedelic Decriminalization and Social Justice*, 23 LEWIS & CLARK L. REV. 851 (2019).

118. See generally HUXLEY, *supra* note 8. Both Huxley’s *Brave New World* and Orwell’s *1984* drew inspiration from the influential dystopia, Yvgeny Zamyatin, *We* (1924). See Paul Owen, *1984 Thoughtcrime? Does it Matter that George Orwell pinched the plot?*, THE GUARDIAN (2009), <https://www.theguardian.com/books/booksblog/2009/jun/08/george-orwell-1984-zamyatin-we>.

119. Rudolf B. Schmerl, *The Two Future Worlds of Aldous Huxley*, 77 PMLA 328, 328 (1962).

120. See 5 ALDOUS HUXLEY, COLLECTED ESSAYS 313 (1958).

121. Mario Varricchio, *Power of Images/Images of Power in Brave New World and Nineteen Eighty-Four*, 10 UTOPIAN STUDIES 98, 98 (1999).

pleasure.”<sup>122</sup> Citizens are too distracted by “vapid pleasure, of mindlessness and numbness” to notice the chains that bind them.<sup>123</sup>

*Brave New World* takes place hundreds of years in the future, in the year 632 AF (“After Ford”).<sup>124</sup> The settings are the “world zone” of “Central London,” representing the material world, and “The Reservation,” representing the primitive world.<sup>125</sup> The population, including protagonists Bernard Marx and Lenina Crowne, are kept docile through social conditioning, technological manipulation, and a narcotic called *soma*, which the government uses to sedate its people through an opiate-like euphoria.<sup>126</sup>

The World State government is led by the benevolent dictator, Mustapha Mond, one of several “World Controllers,” who serves in mild-mannered contrast to the malevolent Big Brother.<sup>127</sup> Citizens in *Brave New World* are encouraged to take soma pills frequently, engage in promiscuous sex and conspicuous consumption, and use entertaining technologies such as television and virtual reality.<sup>128</sup> Such amusing distractions render the citizenry mindlessly content, politically passive, and culturally and intellectually vacuous.<sup>129</sup>

Through these methods, the government keeps the population distracted enough not to realize that their personal freedoms are limited by a small elite who “combine complete control over social, political, and economic life with the achievement of material abundance.”<sup>130</sup> As Huxley describes in his later essay *Brave New World Revisited*, “non-stop distractions of the most fascinating nature . . . are deliberately used as instruments of policy, for the purpose of preventing people from paying too much attention to the realities of the social and political situation.”<sup>131</sup>

122. HUXLEY, *Brave New World Revisited* 27 (1958) [hereinafter HUXLEY, *REVISITED*].

123. Solove, *Privacy and Power*, *supra* note 3, at 1423.

124. HUXLEY, *supra* note 8, at 2.

125. Ahmed Ahmed Abdelaziz Farag, *Enslavement and Freedom in Aldous Huxley's Brave New World*, 7 *INT. J. ENG. & LIT.* 57, 59 (2015).

126. HUXLEY, *supra* note 8, at 52 (“The warm, the richly coloured, the infinitely friendly world of soma-holiday. How kind, how good-looking, how delightfully amusing every one was!”).

127. HUXLEY, *supra* note 8, at 52.

128. The one exception is John “the Savage,” who chooses to live on the Reservation.

129. Solove, *Privacy and Power*, *supra* note 3, at 1422.

130. Richard A. Posner, *Orwell versus Huxley: Economics, Technology, Privacy and Satire*, 24 *PHIL. & LIT.* 1, 14 (2000).

131. HUXLEY, *REVISITED*, *supra* note 122, at 43.

In blurring the lines between dystopia and utopia, the World State operates as a form of “pleasurable servitude.”<sup>132</sup> As Judge Richard Posner writes, “[t]echnology has enabled the creation of the utilitarian paradise, in which happiness is maximized, albeit at the cost of everything that makes human beings interesting.”<sup>133</sup> Indeed, “the world of *Brave New World* enhances the role of technology and neglects the value of individuality.”<sup>134</sup>

To deprive its citizens of identity and autonomy without the use of force, the World State government uses hypnopedia (i.e., sleep learning) techniques to brainwash its population. The hypnopædic mantra, “Every one belongs to every one else” is drilled into the minds of citizens from a young age.<sup>135</sup> As Mustapha Mond recites in the novel:

“But every one belongs to every one else,” [Mond] concluded, citing the hypnopædic proverb.

The students nodded, emphatically agreeing with a statement which upwards of sixty-two thousand repetitions in the dark had made them accept, not merely as true, but as axiomatic, self-evident, utterly indisputable.<sup>136</sup>

When read literally, the “Every one belongs to every one else” slogan refers to the fact that monogamy and family rearing are not accepted in the World State—and promiscuity results in yet another pleasurable distraction from servitude.<sup>137</sup> More figuratively, the slogan perhaps symbolizes that no one is free, because everyone is subject to everyone else and, in effect, the property of everyone else. The World State’s inhabitants “are imprisoned in a predefined government mold, guided through carefully crafted and persistently enforced incentives.”<sup>138</sup> They “have no options, no free will, no chance to make a difference; only the opportunity to be another happy cog in a vast machine designed and run by the government.”<sup>139</sup>

Through this pleasurable servitude, citizens in *Brave New World* sacrifice their identities, willingly or because they are too distracted to realize that they

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132. *Aldous Huxley and Brave New World: The Dark Side of Pleasure*, ACAD. IDEAS (Jun. 21, 2018), <https://academyofideas.com/2018/06/aldous-huxley-brave-new-world-dark-side-of-pleasure/>.

133. Posner, *supra* note 130, at 13-14.

134. Farag, *supra* note 125, at 60.

135. HUXLEY, *supra* note 8, at 29, 31, 34, 81, 139.

136. HUXLEY, *supra* note 8, at 29.

137. HUXLEY, *supra* note 8, at 31.

138. Barr, *supra* note 9, at 856.

139. *Id.* at 856.



might have another option.<sup>140</sup> Huxley warns that this type of social conditioning becomes more effective as technology advances and there are greater insights as to the prediction and control of human behaviors.<sup>141</sup> Huxley feared that a technology revolution would “bring each individual’s body, his mind, his whole private life directly under the control of the ruling oligarchy.”<sup>142</sup> Such a “love of servitude cannot be established except as a result of a deep, personal revolution in human minds and bodies.”<sup>143</sup> In sum, “Orwell feared that what we hate will ruin us. Huxley feared that what we love will ruin us.”<sup>144</sup>

There are at least two ways in which the right of publicity echoes *Brave New World*. In depicting a culture oppressed by an addiction to amusement and which uses entertainment as a form of control, the Huxleyan metaphor can be seen to reflect the overprotection of celebrities’ publicity rights at the expense of the First Amendment freedom of speech and expression of creators who seek to use these celebrity personas as part of their (otherwise) original works.<sup>145</sup> This encroachment on public discourse has negative ramifications for our democracy. As Neil Postman writes regarding the Huxleyan metaphor in *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*:

When a population becomes distracted by trivia, when cultural life is redefined as a perpetual round of entertainments, when serious public conversation becomes a form of baby-talk, when, in short, a people become an audience and their public business a vaudeville act, then a nation finds itself at risk; culture-death is a clear possibility.<sup>146</sup>

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140. See HUXLEY, REVISITED, *supra* note 122, at 36 (noting that some who have advocated for a free society “failed to take into account man’s almost infinite appetite for distractions.”).

141. See HUXLEY, REVISITED, *supra* note 122, at 35.

142. GREGORY CLAEYS, *DYSTOPIA: A NATURAL HISTORY* 380 (2016).

143. HUXLEY, REVISITED, *supra* note 122, at xix (1958).

144. POSTMAN, *supra* note 1, at xx.

145. Compare POSTMAN, *supra* note 1, at 92 (“It is in the nature of the medium [television] that it must suppress the content of ideas in order to accommodate the requirements of visual interest; that is to say, to accommodate the values of show business.”), with Roberta Rosenthal Kwall, *Fame*, 73 IND. L. J. 1, 2 (1997) (“[O]ur obsession with fame and our reverence for celebrities have given rise to a unique [publicity] doctrine designed to protect against unauthorized attempts to utilize famous personas. Still, the doctrine presents something of an irony in that it provides increased economic protection for those who already are at this country’s top income level.”), and Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 148 (1993) (noting that the influence of the cultural shift from a word-based to an image-based culture created a new form of celebrity eminence).

146. POSTMAN, *supra* note 1, at 155-56.

Perhaps, though, we might be too distracted by the rare celebrity publicity cases to realize that our own identities are constantly being appropriated.<sup>147</sup> Beyond celebrity, the Huxleyan metaphor—and especially the “[e]very one belongs to every one else” proverb—also captures the now widespread, but still overlooked, publicity problem the Article labels the “pleasurable servitude.” In effect, by consenting to clickwrap and browserwrap publicity licenses on the internet and social media, ordinary citizens literally transfer their identities in the form of broad publicity licenses to internet platforms. Thus, insights into the dystopian nature of an uncontrolled, transferable right of publicity, as applicable to ordinary citizens in our society, can be found in Huxley’s dark vision.

Under this analogy, social networking companies, like Facebook and Twitter, operate as “systems of governance”—or as Kate Klonick dubs them, our “New Governors.”<sup>148</sup> And social media platforms function as technological narcotics, a form of Brave New World’s soma.<sup>149</sup> In exchange for use of the platforms, internet users—like citizens of the World State—are conditioned through technology to forfeit legal rights to their identities.<sup>150</sup> And the mass scale of this identity transfer phenomenon echoes the “every one

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147. See Noa Dreyman, *John Doe’s Right of Publicity*, 32 BERKELEY TECH. L.J. 673, 674 (2017) (suggesting that the right of publicity is meant not just for celebrities but for “every human being” and criticizing the Ninth Circuit for giving short shrift to a non-celebrity’s right to publicity in *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016)).

148. Klonick, *The New Governors*, 131 HARV. L. R. 1598, 1663 (2018) (“[t]he idea of governance captures the scope these private platforms wield through their moderation systems and lends gravitas to their role in democratic culture.”); see also Marks, *supra* note 81, at 516 (noting that social media platforms have “grown so powerful that their influence over human affairs equals that of many governments.”); Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325, 325 (2014) (explaining that, through its terms of service, Facebook wields more power, in terms of freedom of speech, than either monarchs or presidents).

149. See Chris Taylor, *Facebook Just Became the Ultimate Dystopia*, MASHABLE, (Jan. 12, 2018), <https://mashable.com/article/facebook-dystopia> (“[R]eplace ‘soma-holiday’ with ‘social media,’ and you can see why Huxley was even more prophetic than we’ve given him credit for.”).

150. See Rebecca MacKinnon, *If Not Orwell, Then Huxley: The Battle for Control of the Internet*, THE ATLANTIC (Feb. 9, 2012), <https://www.theatlantic.com/technology/archive/2012/02/if-not-orwell-then-huxley-the-battle-for-control-of-the-internet/252792/> (“In the Internet age, the greatest long-term threat to a genuinely citizen-centric society—a world in which technology and government serve instead of the other way around—looks less like Orwell’s *1984*, and more like Aldous Huxley’s *Brave New World*: a world in which our desire for security, entertainment, and material comfort is manipulated to the point that we all voluntarily and eagerly submit to subjugation.”).

belongs to every one else” proverb.<sup>151</sup> Like in Huxley’s dystopia, individuals are conditioned to assign their identities to seemingly benevolent systems of governance. What do these digital governments do with the rights to its users’ (i.e., citizens’) identities? They sell them to advertisers as commodities for use in personalized, targeted advertisements.<sup>152</sup>

The Huxleyan metaphor thus captures the right of publicity in its two-tiered nature—an extravagant, powerful celebrity right that has the potential to chill public discourse, but also one of servitude and dominion for the ordinary citizen who must voluntarily license their identity to maintain a normal relational or professional life or to feed their addiction to technology. Like *1984*, *Brave New World* is also an imperfect metaphor—it serves as a cartoonish exaggeration, rather than a realistic depiction, of surveillance capitalism. It is nonetheless helpful in showcasing the current and eventual harms of a commodified, licensable right in the identity. The next two Sections will apply the Huxleyan metaphor in greater detail to publicity’s two dimensions: (1) celebrity publicity and (2) the pleasurable servitude.

### C. CELEBRITY PUBLICITY

This Section will apply the Huxleyan metaphor to the traditional, celebrity-focused right of publicity. The case law surrounding the right of publicity is overwhelmingly celebrity-centered. That is, famous people tend to be the ones who bring claims under the right of publicity. This is largely because of the economics of litigation—celebrities often can afford to do so, and their identities have market-based value, thereby making it easier to show the requisite commercial harm.<sup>153</sup> Though in many jurisdictions anyone can theoretically bring a right of publicity claim, many commentators frame the right of publicity as one “valuable mainly to celebrities.”<sup>154</sup> As Rebecca Rosenthal Kwall puts it in her article *Fame*, “our obsession with fame and our reverence for celebrities have given rise to a unique [publicity] doctrine designed to protect against the unauthorized attempts to utilize famous personas.”<sup>155</sup> Indeed, numerous celebrities have succeeded in using the right of publicity to stop others from appropriating their personas.

Paradigmatic examples include actress and singer Bette Midler succeeding in recovering damages from Ford Motor Company when a sound-alike of her

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151. See generally *Right of Publicity*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/issues/right-publicity> (last visited Apr. 18, 2022).

152. *Meta for Business*, META, (last visited Nov. 15, 2022) <https://www.facebook.com/business/tools/ads-manager>.

153. 1 MCCARTHY & SCHECHTER, *supra* note 7, § 1:3.

154. Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 634 (2003).

155. Kwall, *supra* note 145.

voice—singing her iconic single “Do You Want to Dance?”—was used on a Ford television commercial.<sup>156</sup> Johnny Carson was likewise able to recover against the defendant, Here’s Johnny Portable Toilets, Inc., when the company used his famous “Here’s Johnny” slogan along with the phrase “The World’s Foremost Comedian” in connection with its portable toilet products.<sup>157</sup> The musician, Don Henley, prevailed against department store Dillard’s, Inc. for appropriation of his name and likeness in connection with their advertisements for “henley” (three button) t-shirts (“Don loves his henley; you will too.”)<sup>158</sup> More recently, pop star Ariana Grande sued slumping fashion retailer Forever 21 for “publishing at least 30 unauthorized images and videos misappropriating [her] name, image, likeness, and music” in connection with an advertising campaign.<sup>159</sup>

A dominant theoretical issue inherent in the celebrity publicity context is the right of publicity’s difficult balance with the First Amendment and, relatedly, the seeming lack of a sound justification for its existence.<sup>160</sup> As the late John Perry Barlow’s digital privacy and free expression-focused nonprofit organization, the Electronic Frontier Foundation, explains: “[r]ight of publicity cases raise important freedom of expression issues. When celebrities claim that a TV show or some other work violates their right of publicity, the cases effectively ask whether celebrities should have a veto right over creative works

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156. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

157. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 832–33 (6th Cir. 1983).

158. *Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 589 (N.D. Tex. 1999)

159. *See Ariana Grande’s 10 Million Suit Against Forever 21 Has Been Set Aside, But the Fight is Far From Over*, THE FASHION L., (Nov. 12, 2019), <https://www.thefashionlaw.com/ariana-grandes-10-million-suit-against-forever-21-set-aside-but-the-fight-is-far-from-over/> (explaining that, given Forever 21’s bankruptcy status, the future of the right of publicity litigation is uncertain).

160. *See, e.g., Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d, 757, 774 (D.N.J. 2011), rev’d 717 F.3d 141 (3d. Cir. 2013) (noting that “no judicial consensus has been reached on the contours of the First Amendment vis-à-vis the right of publicity”); Mark Lemley and Stacy Dogan, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1162-63 (2006) (“[B]ecause the right of publicity rests upon a slew of sometimes sloppy rationalizations, courts have little way of determining whether a particular speech limitation is necessary or even appropriate in order to serve the law’s normative goals.”). Another related right of publicity issue is federal preemption, especially regarding the Copyright Act. *See, e.g., Jennifer E. Rothman, Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 204 (2002) (“The right of publicity conflicts not only with explicit provisions of the Copyright Act, but also with the implicit grant of affirmative rights to copyright holders and the public, as well as with the purposes behind copyright protection.”); Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 153, 159 (2017) (“[C]omparing how preemption and First Amendment law have used purposive approaches to limit the right of publicity” and noting that “without a coherent justification for the right of publicity, there are no obvious stopping points for its scope.”)

that depict them.”<sup>161</sup> In this regard, courts have struggled to develop a coherent test in balancing the right of publicity and the First Amendment.

Scholars have written at length about this frustrating balance and the negative implications of the right of publicity’s expansion at the expense of free expression.<sup>162</sup> As Thomas Kadri writes regarding this perceived censorship in *Drawing Trump Naked*, “[i]n recent years, creators of expressive works have faced legal challenges from a bizarre cast of characters, including Panamanian dictator Manuel Noriega, Mexican drug lord ‘El Chapo’ Guzman, wayward actress Lindsey Lohan, and Hollywood dame Olivia de Havilland.”<sup>163</sup> Such creators provoked litigation by portraying real people.<sup>164</sup>

The prevailing scholarly viewpoint is that the First Amendment serves as a virtuous limit on an out-of-control right of publicity.<sup>165</sup> This narrative ostensibly makes sense when the cases involve newsworthy public discourse, perhaps from the press or political speakers or artists.<sup>166</sup> But many publicity cases involve comparatively trivial subject matters, often a famous persona versus a corporate advertiser, where the First Amendment stakes are significantly lower given the commercial speech (i.e., advertising) at issue.<sup>167</sup> And the blanket emphasis on free speech over publicity rights does not take distributive justice concerns into account enough. As Steven Jamar and Lateef Mtima write, “[b]ecause of institutionalized barriers to information, financial capital, and legal support, many members of marginalized communities have been unable to commercially develop and exploit their publicity rights, while majority enterprises have proven quite adept at exploiting these properties.”<sup>168</sup>

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161. ELEC. FRONTIER FOUND., *supra* note 151.

162. *See* Kadri, *supra* note 13.

163. *See* Kadri, *supra* note 13, at 901.

164. *See* Kadri, *supra* note 13, at 901.

165. *See, e.g.*, Kadri, *supra* note 13, at 901; Post & Rothman, *supra* note 14; Tushnet, *supra* note 12; Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003) (claiming that the right of publicity is “unconstitutional as to all noncommercial speech, and perhaps even as to commercial advertising as well”).

166. *See, e.g.*, Parks v. LaFace Recs., 329 F.3d 437 (6th Cir. 2003) (regarding legality of using civil rights icon Rosa Parks’ name without permission in hip-hop band Outkast’s song “Rosa Parks”); Winter v. DC Comics, 69 P.3d 473 (Cal. 2003) (involving comic book containing significant creative elements that transformed the celebrity identities depicted and were thus deserving of First Amendment protection).

167. *See infra* Section IV.C.

168. Steven D. Jamar and Lateef Mtima, *A Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship*, Ch. 6 in MEGAN CARPENTER, ED., ENTREPRENEURSHIP AND INNOVATION IN EVOLVING ECONOMIES: THE ROLE OF LAW (ELGAR LAW AND ENTREPRENEURSHIP SERIES) 13 (2012).

The quintessential 1992 case *White v. Samsung Electronics America Inc.* epitomizes the “image as spectacle”<sup>169</sup> that is celebrity publicity. *White* involved a dispute between “Wheel of Fortune” host Vanna White who objected to an advertisement by Samsung for video cassette recorders. The ad depicting a robot dressed in a gown, wig, and jewelry, created to resemble White’s persona.<sup>170</sup> The caption for the ad read: “Longest-running game show. 2012 A.D.”<sup>171</sup>

White sued Samsung for depicting this roboticized version of her likeness without consent. The Ninth Circuit majority held in White’s favor on the right of publicity claim, finding that Samsung used White’s identity to its commercial advantage, without consent, resulting in economic injury to White.<sup>172</sup> According to the Ninth Circuit:

The robot is standing on what looks to be the Wheel of Fortune game show set. Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one. Indeed, defendant’s themselves referred to their ad as the “Vanna White” ad. We are not surprised. Television and other media create marketable celebrity identity value.<sup>173</sup>

As a justification for protecting White’s right of publicity, the Ninth Circuit noted that “considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit for profit.”<sup>174</sup> Publicity “law protects the celebrity’s sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck or a combination thereof.”<sup>175</sup>

In a scathing dissent, then Chief Judge Alex Kozinski<sup>176</sup> famously wrote that overprotecting intellectual property is as dangerous as underprotecting

169. GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* 144 (1967) (“The spectacle is capital accumulated to the point where it becomes image.”).

170. *White v. Samsung Elecs. Am. Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

171. *Id.*

172. *Id.* at 1399 (“The law protects the celebrity’s sole right to exploit [celebrity] value.”).

173. *Id.*

174. *Id.*

175. *Id.*

176. Kozinski retired in 2017 amid allegations of sexual harassment. Matt Zaposky, *Judge Who Quit Over Harassment Allegations Reemerges, Dismaying Those Who Accused Him*, WASHINGTON POST (Jul. 24, 2018), [https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375\\_story.html](https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375_story.html); see Ixta Maya Murray, *Draft of a Letter of Recommendation to the Honorable Alex Kozinski, Which I Guess I’m Not Going to Send Now*, 25 MICH. J. GENDER & L. 59 (2018) (utilizing a legal-literary style to engage the jurisprudential moment of Kozinski’s resignation amidst the #MeToo movement).

it: “Parody, humor, irreverence are all vital components of the marketplace of ideas.”<sup>177</sup> Kozinski argues:

The panel’s opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority’s opinion, it’s now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity’s name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity’s image in the public’s mind. This *Orwellian* notion withdraws far more from the public’s domain than prudence and common sense allow.<sup>178</sup>

Judge Kozinski’s framing of the issue as “Orwellian” is notable. Vanna White is certainly a remarkable person.<sup>179</sup> But from a democratic perspective, *White v. Samsung* involves the balance between what amounts to a battle of distractions—a wealthy Hollywood star’s depiction as a robot by billionaire mega-corporation Samsung. In this way, the dilemma is fundamentally Huxleyan in nature, echoing the warnings of *Brave New World* more so than *1984*. Orwell’s *1984* warned about a tyrannical state that would ban information to keep the public powerless. By contrast, *Brave New World* depicted a culture too amused by distractions—entertainment, pleasure, and laughter—to realize that it had been made powerless by its ruling classes. In *Brave New World*, entertainment serves as a form of control, just as it does in our media-saturated society.

In 1985, media theorist Neil Postman warned that television posed a threat to liberal democracy given that corporations would be able to control the flow of public discourse and freedom of information through technology, and thus of cultural expression.<sup>180</sup> In channeling Marshall McLuhan’s concept of “the medium is the message,”<sup>181</sup> Postman warned that “[t]elevision . . . is

177. *White*, 989 F.2d at 1514.

178. *White*, 989 F.2d at 1514 (emphasis added).

179. See, e.g., Aude Soichet and Alexa Valiente, *6,500 dresses later: ‘Wheel of Fortune’ host Vanna White on 35 years with Pat Sajak, why she loves her job*, ABC NEWS, (Oct. 30, 2017), <https://abcnews.go.com/Entertainment/6500-dresses-wheel-fortune-host-vanna-white-35/story?id=50819154>. For feminist jurisprudential critiques on *White v. Samsung*, see Emily Donohue, *White v. Samsung – Feminist Rewrite*, YOUTUBE (Apr. 22, 2020), [https://www.youtube.com/watch?v=06\\_KIw1u4f8](https://www.youtube.com/watch?v=06_KIw1u4f8); Brian L. Frye, *Commentary on White v. Samsung*, in FEMINIST JUDGMENTS: REWRITTEN PROPERTY OPINIONS 149 (Eloisa C. Rodriguez Dod & Elena Maria Marty-Nelson eds., 2021), .

180. POSTMAN, *supra* note 1.

181. See generally Marshal McLuhan, *The Medium is the Massage*, in UNDERSTANDING MEDIA: THE EXTENSION OF MAN (1964). The spelling of “massage,” rather than message, is intentional, or at least purposely uncorrected in referring to a linguistic amalgamation of

transforming our culture into one vast arena for show business.”<sup>182</sup> Postman writes:

What Huxley feared was that there would no reason to ban a book, for there would be no one who wanted to read one. Orwell feared those who would deprive us of information. Huxley feared those who would give us so much that we would be reduced to passivity and egoism. Orwell feared that the truth would be concealed from us. Huxley feared the truth would be drowned in a sea of irrelevance. Orwell feared we would become a captive culture. Huxley feared we would become a trivial culture, preoccupied with some equivalent of the feelies, the orgy porgy, and the centrifugal bumblepuppy.<sup>183</sup>

As such, Postman suggests that we “look to Huxley, not Orwell, to understand the threat that television and other forms of imagery pose to the foundation of liberal democracy namely, to freedom of information.”<sup>184</sup> Indeed, “[i]n the Huxleyan prophecy, Big Brother does not watch us, by his choice. We watch him, by ours. There is no need for wardens or gates or Ministries of Truth.”<sup>185</sup>

Disallowing Samsung Corporation the unlicensed right to use the persona of celebrity Vanna White on a television advertisement is not reminiscent of an Orwellian prison. Rather, it is more akin to a Huxleyan burlesque.<sup>186</sup> An ad featuring a robotic version of a game show host—by a court Judge Kozinski refers to as the “Hollywood Circuit”—echoes the Huxleyan triviality of culture rather than an Orwellian surveillance state where one’s private knowledge and expression is heavily restricted and controlled.

More specifically, the privileging of the Hollywood persona over the First Amendment is Huxleyan in the sense that our preoccupation with celebrity

“message,” “massage,” “mess age,” and “mass age.” See Dr. Eric McLuhan, *Commonly Asked Questions (and Answers)*, <https://www.marshallmcluhan.com/common-questions/>. Marshall McLuhan and Neil Postman, a McLuhan acolyte, were both influential in establishing the field now referred to as media ecology, “the study of media as environments.” See LANCE STRATE, *AMAZING OURSELVES TO DEATH: NEIL POSTMAN’S BRAVE NEW WORLD REVISITED* 24-30 (2014).

182. POSTMAN, *supra* note 1, at 80. According to Postman, Huxley “believed that it is far more likely that the Western democracies will dance and dream themselves into oblivion than march into it, single file and manacled.” Indeed, “Huxley grasped, as Orwell did not, that it is not necessary to conceal anything from a public sensible to contradiction, narcotized by technological diversions.” Thus, “spiritual devastation is more likely to come from an enemy with a smiling face than from one whose countenances exudes suspicion and hate.” POSTMAN, *supra* note 1, at 111.

183. POSTMAN, *supra* note 1, at vii-viii.

184. POSTMAN, *supra* note 1, at 155.

185. POSTMAN, *supra* note 1, at 156.

186. See POSTMAN, *supra* note 1, at 155.



persona—a television idol’s right of publicity—takes precedence over the “marketplace of ideas”—the free evocation of White’s image by others. In this way, the preference for protecting the value of amusement, entertainment, and celebrity, through a persona-focused right of publicity, chills the ability to engage in public discourse and the free exchange of ideas in a serious, civil, and respectful way.<sup>187</sup>

This legal focus on protecting the value of entertainment via celebrity identity ostensibly leaves individuals ill-equipped to fulfill their obligations as citizens in a democracy. According to Alexander Meiklejohn’s influential justification of the First Amendment, the key purpose of free speech and expression is in preserving the open debate essential to democracy.<sup>188</sup> A celebrity-focused right of publicity has the potential to shut down this formation of public opinion.<sup>189</sup> Society prioritizes the exchange of images (i.e., personas) rather than the exchange of ideas (i.e., works of free expression based on those personas).<sup>190</sup> This legal emphasis reflects the passivity of culture depicted by Huxley in *Brave New World*.

As technology has evolved in recent decades, the subject matter of right of publicity cases has shifted to digital mediums beyond the playing cards of *Haelan*, and further still beyond *White’s* realm of game show television. Indeed, the scope of the right of publicity cases now encompasses synthetic recreations of personas.<sup>191</sup> For Postman, when he wrote *Amusing Ourselves to Death* in the 1980s, television appeared as the all-encompassing form of media. A generation later, the internet has a far more pervasive influence than television, and Postman’s arguments appear a bit outdated in their focus on major

187. Yet the preference, at least as to these facts, does assist in preserving White’s subjective autonomy.

188. See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1965) (claiming that the First Amendment’s “purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 373 (2010) (stating that a “vibrant public discourse . . . is at the foundation of our democracy.”) (Roberts, J.).

189. See Tushnet, *supra* note 6, at 205–06 (“Celebrities, by concentrating our attention and interest, are good to think with . . . [C]elebrities offer important reference points enabling broader discussion.”).

190. See Tushnet, *supra* note 6, at 206 (“More serious attention to the communicative nature of images, as opposed to continued equation of an image with the person it represents, would lead to a substantial contraction of the right of publicity.”).

191. See, e.g., *Noriega v. Activision/Blizzard, Inc.*, BC 551747, 2014 WL 5930149, (Cal. Super. Ct., L.A. Cnty. Oct. 27, 2014) (involving former Panamanian dictator’s right of publicity claim based on depiction of his likeness in the *Call of Duty* videogame); *Kirby v. Sega of Am.*, 144 Cal. App. 4th 47, 51 (Cal. Ct. App. 2006) (involving singer Keirin Kirby’s right of publicity claim based on depiction of her likeness in the *Space Channel 5* videogame).

network television. But as media scholar Lance Strate—who wrote a follow-up to Postman’s book called *Amazing Ourselves to Death: Neil Postman’s Brave New World Revisited*—explains, “Huxley’s dystopia is also a society that worships technology in all of its forms.”<sup>192</sup>

In cases involving digital recreations of personas, courts continue to struggle to balance the right of publicity with the First Amendment.<sup>193</sup> There is no uniform test for achieving this balance. However, the copyright fair use-derived transformative use test from *Comedy III Prod. Inc. v. Gary Saderup Inc.*<sup>194</sup> has come to prominence as the doctrinal mechanism for doing so in certain key jurisdictions, supplanting the trademark-like *Rogers v. Grimaldi* test.<sup>195</sup> Under the transformative use test, unauthorized use of an identity is permissible if the use adds significant creative elements and sufficiently transforms the identity into original expression.

In *No Doubt v. Activision Publishing*, for instance, members of the rock band No Doubt successfully sued video game publisher Activision, alleging that Activision’s recreations of band member likenesses exceeded the parties’ licensing agreement, violating their rights of publicity in the video game *Band Hero*.<sup>196</sup> Although No Doubt had agreed that Activision could develop digital avatars based on their personas, it had not agreed that the No Doubt avatars could play songs by other musical acts or alter Stefani’s vocals, as the game allowed.<sup>197</sup> Because the video game simulated what No Doubt did in real life—performing music concerts—the court held that Activision did not make a “transformative use” of No Doubt’s identities, and thus the right of publicity prevailed over the First Amendment.<sup>198</sup>

Similarly, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, student-athletes prevailed in class action lawsuits based on use of their identities in Electronic Arts’ NCAA Football video game series, which featured the graphical representations of real-life college football players.<sup>199</sup>

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192. LANCE STRATE, *AMAZING OURSELVES TO DEATH: NEIL POSTMAN’S BRAVE NEW WORLD REVISITED* 12 (2014).

193. For a thorough recent commentary on calibrating the balance between the First Amendment and right of publicity, see generally Post & Rothman, *supra* note 14.

194. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (establishing the transformative use test in the right of publicity context).

195. *See Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) (establishing the “Rogers test”).

196. *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 401-03 (2011).

197. *Id.*

198. *Id.* at 411.

199. *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1289 (9th Cir. 2013). A similar case, also involving the NCAA football video game series, is *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145-46 (3d Cir. 2013). For an analysis of the *Hart* and *Keller* cases, see James Kyper & Dustin

Because of NCAA restrictions, Electronic Arts did not license or compensate the players for use of their likenesses, nor did it ask for their consent prior to incorporating them into the video game.<sup>200</sup>

Similar to *No Doubt*, the court was persuaded that because the video game simulated college football, the players' likenesses were not sufficiently transformed to constitute highly original expression, and the players' rights of publicity thus trumped Electronic Arts' First Amendment rights. However, unlike other right of publicity cases, *In re NCAA Student Athlete* involved thousands of virtual actors, many of which were not famous in the conventional sense.<sup>201</sup> The lawsuit in this regard represents a departure from celebrity right of publicity cases. While a minority of the athletes represented might be considered major or minor celebrities, such as lead plaintiff Samuel Keller (then quarterback of Arizona State), the majority of college football players are not famous.

The right of publicity and its reconciliation with the First Amendment is thus an area that would benefit from much needed clarity. The Huxleyan metaphor reflects this Hollywood stifling of free expression given its focus on amusement and entertainment as a form of control. Yet there is a prevalent, but often overlooked, aspect to the right of publicity beyond celebrity: its application to ordinary citizens, particularly in the digital context. The Electronic Frontier Foundation (EFF) vows that it “will continue to work in this area to ensure that right of publicity claims are limited by robust free expression.”<sup>202</sup> But EFF also notes that “a limited version of this right [of publicity] makes sense” as “you should be able to prevent a company from running an advertisement that falsely claims that you endorse its products.”<sup>203</sup> This two-tiered policy stance alludes to a dystopian world this Article calls the “pleasurable servitude.”

#### D. THE PLEASURABLE SERVITUDE

We might be too distracted by the celebrity publicity simulacrum<sup>204</sup> to notice that our own identities are constantly being licensed to technology

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Marlan, *When Does the Right of Publicity Trump a Video Game Maker's First Amendment Rights?*, 18 CYBERSPACE LAW. 11 (2013), <https://www.jdsupra.com/legalnews/when-does-the-right-of-publicity-trump-a-69233/>.

200. Keller, 724 F.3d at 1289.

201. Keller, 724 F.3d at 1289.

202. ELEC. FRONTIER FOUND., *supra* note 151.

203. ELEC. FRONTIER FOUND., *supra* note 151.

204. See generally JEAN BAUDRILLARD, SIMULACRA AND SIMULATION (1981) (referring to “simulation,” “simulacra,” and “hyperreality” as relating to manufactured representations of the world that appear more real than actual events because they are created for the media, made accessible through the media, and work within the biases established by the media).

corporations. In fact, celebrity publicity cases are not altogether common. There are very few celebrities in society relative to ordinary people.<sup>205</sup> One estimate puts the figure at about 0.0265 percent of the U.S. population; another at 1 in 2,000 people.<sup>206</sup> In terms of the whole world, the number of celebrities is far lower at 0.0086 percent.<sup>207</sup>

From 2015 to 2021, there were an average of roughly eighteen published right of publicity cases decided per year.<sup>208</sup> Beyond these recorded cases, there are many more court filings and undoubtedly numerous informal disputes that are never litigated.<sup>209</sup> Indeed, the inconsistency inherent in this legal area has the potential to chill free speech *ex ante*. But there is another, far more widespread aspect to the right of publicity that is also captured by the Huxleyan metaphor: publicity's application to ordinary citizens through the internet and social media.<sup>210</sup> By contrast to celebrity publicity, as of 2020, Facebook has over 2.85 billion users worldwide and over 231 million users just in the United

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205. Though that number has likely grown as of late given the influencer phenomenon. For a legal perspective, *see generally* Alexandra J. Roberts, *False Influencing*, 109 GEO. L. J. 81 (2020).

206. Samuel Arbesman, *The Fraction of Famous People in the World*, WIRED (Jan. 1, 2013), <https://www.wired.com/2013/01/the-fraction-of-famous-people-in-the-world/>.

207. Rosen, *supra* note 17 (“Which is to say, almost no one is famous, so don’t get too down on yourself.”).

208. Marlan, *supra* note 17. Other estimates are lower. 15.7 cases per year, based on computing the averages of the years 2015-2021 (based on 110 right of publicity cases during that period). (C) *Use of Name, Voice or Likeness; Right to Publicity*, k383-k409, WESTLAW, [https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?guid=Id0977963a8dc151aca8634aa547dafb5&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?guid=Id0977963a8dc151aca8634aa547dafb5&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)) (last visited on Nov. 15, 2022). By comparison during this time period, there were on average 55.8 trademark cases (383 K1000-1800), 53.5 copyright cases (99 K220-1202), and 93.1 patent cases (291 K401-2094). *West Key Number System*, WESTLAW, [https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?transitionType=Default&contextData=(sc.Default)) (last visited on Nov. 15, 2022). The number of right of publicity cases has been trending slowly upwards, though, throughout the decades since the right’s ostensible birth in *Haelan*. Kwall, *supra* note 145, at n.5 (conducting a similar search using Westlaw on Oct. 21, 1997 and noting that “[b]etween 1953 and 1974, there was an average of between four and five right-of-publicity cases decided each year. Between 1975 and 1996, the average was about 14 cases per year.”).

209. Post & Rothman, *supra* note 14, at 130 n.6 (noting that the “uptick in right of publicity filings has been far greater” than the number of published decisions).

210. *Fralely v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190 (N.D. Cal. 2014); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140 (2017); *cf. Hepp v. Facebook, Inc.*, 465 F. Supp. 3d 491 (2020) (suing platform for appropriation of identity by other social media users rather than platform’s own appropriation for purposes of advertising and endorsements, thus potentially triggering § 230 analysis, subject to intellectual property exception); *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190 (2017) (same). For a helpful overview of social media and its intersection with the right of publicity, see Tune & Levine, *supra* note 25.

States.<sup>211</sup> Over 70 percent of U.S. citizens are social media users.<sup>212</sup> The non-celebrity aspect of publicity law, which this Article refers to as the pleasurable servitude, by sheer numbers affected deserves far greater recognition in legal and academic discourse.<sup>213</sup>

The pleasurable servitude may be thought of as part of the “dark matter” of publicity law—that which is constantly occurring but only rarely litigated.<sup>214</sup> Through broad publicity licenses, the pleasurable servitude strips away the identities of the hundreds of millions of social media users in the United States alone and perhaps billions worldwide.<sup>215</sup> The phenomenon does not just affect those who are influential and famous but all users who sign up for internet platforms. The pleasurable servitude is also desired (Huxleyan) rather than coerced (Orwellian), as identity-holders willingly (or unwittingly) cede their publicity rights in exchange for use of social media.

As background on the pleasurable servitude, consider that internet platforms like to conduct psychological experiments on their users. A famous example of this is Facebook’s “emotional contagion” study, which occurred in January 2012.<sup>216</sup> In the experiment, Facebook altered the News Feeds of nearly 700,000 of its users, dividing them into one of two randomly selected groups.<sup>217</sup> Over the course of one week, one group received content with enhanced positive emotional content and reduced emotional content, and vice versa for

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211. STATISTA, *supra* note 20.

212. STATISTA, *supra* note 20.

213. The suggestion is not that the pleasurable servitude is the only non-celebrity right of publicity issue worthy of note. *See, e.g.*, Adam Candeb, *Nakedness and Publicity*, 104 IOWA L. REV. 1747 (2019) (explaining that the right of publicity could provide a cause of action against revenge pornography); Lisa Raimondi, *Biometric Data Regulation and the Right of Publicity: A Path to Regaining Autonomy of Our Commodified Identity*, 16 MASS. L. REV. 198 (2021) (exploring how the right of publicity might be used to address concerns about biometric data ownership rights in situations, such as on social media, where a person’s likeness, as raw data, is essentially bought and sold); Jesse Lempel, *Combating Deepfakes through the Right of Publicity*, LAWFARE (Mar. 30, 2018), <https://www.lawfareblog.com/combating-deepfakes-through-right-publicity> (exploring whether “a victim of a deepfake posted on Facebook or Twitter [could] bring a successful right-of-publicity claim against the platform for misappropriating ‘the commercial use of his or her identity,’” § 230 notwithstanding); Carrie Brown, *Influencing IP: How the Right of Publicity Should Adapt to the Influencer Age*, JIPEL BLOG (Dec. 2020), <https://blog.jipel.law.nyu.edu/2020/12/influencing-ip-how-the-right-of-publicity-should-adapt-to-the-influencer-age/> (exploring the right of publicity’s application to social media influencers).

214. *See* Frye, *supra* note 18.

215. *See infra* notes 260-277 and accompanying discussion.

216. *See* James Grimmelman, *The Facebook Emotional Manipulation Study Sources*, THE LABORATORIUM, BLOG (June 30, 2014, 5:05 PM), [http://laboratorium.net/archive/2014/06/30/the\\_facebook\\_emotional\\_manipulation\\_study\\_source\\_](http://laboratorium.net/archive/2014/06/30/the_facebook_emotional_manipulation_study_source_).

217. Ralph Schroeder, *Big Data and the brave new world of social media research*, BIG DATA AND SOCIETY 1 (2014).

the other group.<sup>218</sup> Afterwards, Facebook analyzed the positive and negative words produced by the users on the site to see whether the previous exposure to the positive or negative stimuli impacted the later expressed content.<sup>219</sup> As anticipated, it certainly did. The experiment showed that the group who was shown more positive words tended to post more positive words, while the group who was shown more negative words tended to post more negative words.<sup>220</sup> Facebook later apologized to an outraged user base.<sup>221</sup>

The emotional contagion study is probably the most famous experiment to be conducted on social media users. More directly relevant here, though, are Facebook's advertising-based experiments. Advertisers pay social networks to display ads to their billions of users. It is commonly stated that "[w]e are the product; our attention is the product sold to the advertisers."<sup>222</sup> More precisely, according to Jared Lanier, the product is the modification of our behavior.<sup>223</sup>

In September 2006, Facebook created the concept called the "News Feed," a version of which still exists today as a centerpiece of Facebook's platform.<sup>224</sup> Prior to the News Feed, "Facebook was essentially a collection of disconnected user profiles."<sup>225</sup> With the News Feed, Facebook began to broadcast updates of personal details of its users—including relationship status changes—without their knowledge or consent.<sup>226</sup> Many users complained about broadcasting the updates on the News Feeds, and Facebook publicly apologized.<sup>227</sup> A year later, in 2007, Facebook launched a two-part advertising system, called "Social Ads" and "Beacon."

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218. *Id.*

219. *Id.*

220. *Id.*

221. Dominic Rushe, *Facebook sorry—almost—for secret psychological experiment on users*, THE GUARDIAN (Oct. 2, 2014), <https://www.theguardian.com/technology/2014/oct/02/facebook-sorry-secret-psychological-experiment-users>.

222. Julien Dimastromatteo, *Social Media are Manipulating your Free Will*, MEDIUM, <https://medium.com/swlh/social-media-are-manipulating-our-free-will-46e4a737e901>.

223. See JARED LANIER, TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW 10 (2018) ("The core process that allows social media to make money and that also does damage to society is *behavior modification*... techniques that change behavioral patterns in... people.") (emphasis in original).

224. See, e.g., Jillian D'Onfro, *Facebook's News Feed is 10 years old now. This is how the site has changed*, WORLD ECONOMIC FORUM (Sept. 9, 2016), <https://www.weforum.org/agenda/2016/09/facebook-news-feed-is-10-years-old-this-is-how-the-site-has-changed>.

225. *Id.*

226. Natasha Lomas, *A brief history of Facebook's privacy hostility ahead of Zuckerberg's testimony*, TECHCRUNCH (Apr. 10, 2018), <https://techcrunch.com/2018/04/10/a-brief-history-of-facebooks-privacy-hostility-ahead-of-zuckerbergs-testimony/>.

227. Louise Story & Brad Stone, *Facebook Retreats on Online Tracking*, N.Y. TIMES (Nov. 30, 2007), <https://www.nytimes.com/2007/11/30/technology/30face.html>

With Social Ads, when users would write something positive about a product or service, Facebook would use their names, images, and reviews in connection with ads on the News Feed. The goal was to entice users to also purchase the products or services by seeing their Friends' endorsements.<sup>228</sup> With Beacon, the concept was similar but directed externally to other commercial websites on the internet. For example, when a Facebook user purchased a product from Amazon or elsewhere, that information would pop up in that user's public profile.<sup>229</sup> Facebook did not adequately inform its users of these advertising mechanisms, and its users were then outraged as they "unwittingly found themselves shilling products on their friends' websites."<sup>230</sup>

In 2011, *Cohen v. Facebook, Inc.* was one of the initial class action lawsuits brought against a social network alleging violations of the right of publicity.<sup>231</sup> It concerned Facebook's "Friend Finder" service, which generated a list of contacts of people who had not yet signed up for Facebook by searching current users' email accounts.<sup>232</sup> Although this service was not itself necessarily problematic, Facebook also broadcast on the News Feed that the plaintiffs, who were identified by name and profile picture, had tried Friend Finder, in effect serving as endorsements for the service.<sup>233</sup> The court held that Facebook's terms of service, which, at the time contained broad and ambiguous representations for disclosure of name and profile picture, did not establish consent for this particular use.<sup>234</sup> However, the court dismissed the case for what it viewed as a lack of cognizable injury.<sup>235</sup>

Also in 2011, Facebook began running its now infamous "Sponsored Stories" advertisements on the News Feed.<sup>236</sup> Sponsored Stories allowed Facebook to monetize its users' identities—through tracking "likes," "posts," and "check-ins"—and then selling these updates as ads on their friends' News Feeds.<sup>237</sup> Very roughly, Sponsored Stories functioned as follows: (1) users interacted with a company or brand on the site, such as by "liking" their Facebook page; (2) organic News Feed stories were generated regarding those

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228. Daniel J. Solove, *Speech, Privacy, and Reputation on the Internet*, in *THE OFFENSIVE INTERNET* 21-22 (2011).

229. *Id.*

230. *Id.* at 21.

231. *See* *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090 (N.D. Cal. 2011).

232. *Id.* at 1091.

233. *Id.*

234. *Id.* at 1097.

235. *Id.*

236. Nathan Ingraham, *Facebook Sponsored Stories will be removed from the site on April 9<sup>th</sup>*, *THE VERGE* (Jan. 9, 2014, 5:39 PM), <https://www.theverge.com/2014/1/9/5293166/facebook-sponsored-stories-will-be-removed-from-the-site-on-april-9th>.

237. *Id.*

interactions; and (3) advertisers could pay to feature the stories prominently on the News Feeds of users' friends.<sup>238</sup> The endorsement-based ads, viewable in the News Feed, were auto-generated from "actions" taken by users, and featured stories about Pages that users already "Liked."<sup>239</sup> Notably, users were unable to opt-out of seeing Sponsored Stories in the News Feed, or of having their identities used in connection with them.<sup>240</sup>

According to one description of the value of Sponsored Stories as an advertising mechanism, "[t]he ability to display promoted content alongside organic social content in the popular and highly addictive [N]ews [F]eed is essentially the holy grail for advertisers."<sup>241</sup> This is because when "users are attentively browsing photos and updates from friends, they'll end up consuming ads as well."<sup>242</sup> Indeed, Sponsored Stories are "so similar to organic news feed stories [that] users probably won't notice the difference until they've already internalized an ad's message."<sup>243</sup>

Sponsored Stories was the subject of the right of publicity class action lawsuit *Fraley v. Facebook*.<sup>244</sup> In *Fraley*, the lead plaintiff in the case, Angel Fraley, had "Liked" the Rosetta Stone company page. This action was then broadcast to her social network on the News Feed.<sup>245</sup> In this regard, Fraley represented a class of social media users who alleged right of publicity violations when Facebook did not inform them that their names and images (i.e., profile pictures) would be used to advertise products when they clicked the "Like" button on a brand's Facebook page or engaged in similar activities.<sup>246</sup> Notably, Facebook did not allow users to opt-out (i.e., limit or block) of their names and images appearing in connection with Sponsored Stories.<sup>247</sup> Nor did Facebook compensate users for their unintended endorsement of the advertised products or services.<sup>248</sup>

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238. Josh Constine, *Facebook Sponsored Story Ads To Appear In The Web News Feed In 2012*, TECHCRUNCH (Dec. 20, 2011), <https://techcrunch.com/2011/12/20/sponsored-stories-news-feed/>.

239. For an illustration of Facebook's Sponsored Stories, see, for example, Laurie Segall, *Facebook's 'sponsored stories' turns your posts into ads*, CNN (Jan. 26, 2011), [https://money.cnn.com/2011/01/26/technology/facebook\\_sponsored\\_stories/index.htm](https://money.cnn.com/2011/01/26/technology/facebook_sponsored_stories/index.htm).

240. Constine, *supra* note 238.

241. Constine, *supra* note 238.

242. Constine, *supra* note 238.

243. Constine, *supra* note 238.

244. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

245. *Id.* at 791.

246. *Id.* at 792.

247. *Id.* at 805.

248. *Id.* at 806.



One of Facebook's main defenses was consent. Facebook claimed that by agreeing to its terms of service, users provided the social network with permission to use their names and pictures in connection with commercial, sponsored, or related content.<sup>249</sup> Yet, plaintiffs had all registered for Facebook prior to the rollout of Sponsored Stories and were not asked to consent again to a modified terms of service before the launch of the program.<sup>250</sup> Plaintiffs thus alleged that they did not know that their use of the "Like" button would be "interpreted and publicized by Facebook as an endorsement of those advertisers, products, services, or brands."<sup>251</sup>

The plaintiffs in *Fralely* encountered difficulties in their right of publicity claim partly because they had assigned their publicity rights to Facebook for advertising and endorsement purposes per the terms of service.<sup>252</sup> According to the California District Court in *Fralely*, plaintiffs "faced a substantial hurdle in proving a lack of consent, either express or implied. While those issues could not be decided in Facebook's favor at the pleading stage, there was a significant risk that, if the litigation was to proceed to trial, plaintiffs would be found to have consented."<sup>253</sup> Ultimately, the lawsuit settled for a modest \$10 per claimant.<sup>254</sup>

In 2014, another right of publicity class action, *Perkins v. LinkedIn*, involved a challenge to professional networking platform LinkedIn's use of a service called "Add Connections."<sup>255</sup> Add Connections allowed LinkedIn users to import contacts from their email accounts and then email connection invites to their contacts, inviting them to connect on LinkedIn, using plaintiffs' names and likenesses in the endorsement emails. For example, an email recipient may receive an email from LinkedIn stating, "I'd like to add you to my professional network—Paul Perkins."<sup>256</sup> Then, on receiving a member's authorization, LinkedIn would send an email to the member's email contacts who were not already members of LinkedIn. If that connection invite was not accepted within a certain amount of time, up to two further emails were sent reminding

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249. *Id.* at 805–06.

250. *Id.*

251. *Id.* at 792.

252. Another major issue was that, as private figures, their personas had little financial value for assessing injury. For an analysis of this issue specifically, see Marlan, *supra* note 15, at 468–70.

253. *Fralely v. Facebook, Inc.*, 966 F. Supp. 2d. 939, 942 (N.D. Cal. 2013).

254. Settlement Notice [*Fralely v. Facebook*], SANTA CLARA L. DIGIT. COMMONS (Jan. 2, 2013) <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1272&context=historical>.

255. *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1225 (N.D. Cal. 2014).

256. *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1200 (N.D. Cal. 2014).

the recipient that the connection invite was pending.<sup>257</sup> Ultimately, the class action settled for \$13 million.<sup>258</sup>

In response to lawsuits such as *Coben*, *Fralely*, and *Perkins*, internet platforms have enacted (or tightened) the “pleasurable servitude”—the mandatory license of social media users’ rights of publicity in exchange for use of the service. Importantly, consent functions as a complete defense to right of publicity claims. Thus, conduct that would otherwise infringe the right of publicity is not actionable if the holder of the right consents to the use.<sup>259</sup> However, a user who has not consented or consented only to a limited use of their identity may still prevail on a right of publicity claim that is outside the scope of the terms.<sup>260</sup> Social networks must thus be strategic in crafting their terms of service to obtain the express consent of their users’ identities for commercial purposes. For example, Facebook’s terms of service now reads, in the relevant part:

Permission to use your name, profile picture, and information about your actions with ads and sponsored content: You give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you. For example, we may show your friends that you are interested in an advertised event or have liked a Page created by a brand that has paid us to display its ads on Facebook.<sup>261</sup>

The pleasurable servitude is an example of what Margaret Jane Radin describes as the “unwitting contract.” Most websites have a terms of service, which most users do not actually read. When a user does click on it, “pages of boilerplate open out, telling the user that she is bound to these terms, that she has ‘agreed’ to them simply by the act of looking at the site, and, moreover, that the owner may change the terms from time to time and that the user will be bound by the new terms as well.”<sup>262</sup> This type of contract is called

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257. *Id.*

258. *See, e.g.*, Eric Goldman, *The Perkins v. LinkedIn Class Action Was Badly Bungled*, FORBES (Oct. 3, 2015, 10:38 AM), <https://www.forbes.com/sites/ericgoldman/2015/10/03/the-perkins-v-linkedin-class-actionsettlement-notification-was-badly-bungled/#5190d7844e0c>.

259. Tune & Levine, *supra* note 25, at 16.

260. Tune & Levine, *supra* note 25, at 17.

261. Facebook, *Terms of Service*, <https://www.facebook.com/terms.php> (last visited July 24, 2021).

262. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 12* (2012).

“browsewrap.”<sup>263</sup> Where users affirmatively declare acceptance by clicking “I agree,” the agreement is instead referred to as a “clickwrap” agreement. Generally, courts enforce clickwrap agreements, so social networks are incentivized to use clickwrap. In contrast, browsewrap agreements are often, but not always, declared unenforceable.<sup>264</sup>

Through browsewrap or clickwrap contracts, social media users’ publicity rights are constantly being transferred to social networks. This specious form of consent occurs either willingly (because users realize they have no other option) or unwittingly (because they are too distracted or disinterested to read the terms of service). For instance, Instagram, owned by Meta Platforms, Inc. (formerly Facebook, Inc.), contains a substantially similar clause to Facebook’s above clause.<sup>265</sup> The multimedia messaging app Snapchat’s terms of service demands an even broader right of publicity license in exchange for use of the platform:

When you appear in, create, upload, post, or send Public Content (including your Bitmoji), you also grant Snap, our affiliates, other users of the Services, and our business partners an unrestricted, worldwide, royalty-free, irrevocable, and perpetual right and license to use the name, likeness, and voice, of anyone featured in your Public Content for commercial and non-commercial purposes. This means, among other things, that you will not be entitled to any compensation if your content, videos, photos, sound recordings, musical compositions, name, likeness, or voice are used by us, our affiliates, users of the Services, or our business partners.<sup>266</sup>

Other platforms have similar pleasurable servitudes. LinkedIn’s terms of service state that “we have the right, without payment to you or others, to serve ads near your content and information, and your social actions may be visible and included with ads, as noted in the Privacy Policy.”<sup>267</sup> YouTube frames the issue as a “right to monetize”—“You grant to YouTube the right to monetize your Content on the Service (and such monetization may include displaying ads on or within Content or charging users a fee for access). This

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263. *Id.*

264. *Id.*

265. Instagram, *Terms of Use*, (2021) (last visited Aug. 2, 2021), <https://help.instagram.com/581066165581870>.

266. *Supra* note 28. *Terms of Service*, SNAP INC., (2021) (last visited Nov. 2, 2022), <https://snap.com/en-US/terms>.

267. *User Agreement*, LINKEDIN, <https://www.linkedin.com/legal/user-agreement> (last visited Aug. 2, 2021).

Agreement does not entitle you to any payments.”<sup>268</sup> TikTok’s terms of service state:

By posting User Content to or through the Services, you waive any rights to prior inspection or approval of any marketing or promotional materials related to such User Content. You also waive any and all rights of privacy, publicity, or any other rights of a similar nature in connection with your User Content, or any portion thereof.<sup>269</sup>

Here, rather than licensing their users’ rights of publicity, as do Facebook and Snapchat, TikTok includes a broad publicity (and privacy) waiver, accomplishing much the same consent scheme, assuming courts would hold such a waiver valid.<sup>270</sup> As Radin argues persuasively, courts should not enforce such waiver provisions, because valid consent is a major requirement for an enforceable contract.<sup>271</sup> Rather than valid consent, terms of service like the ones discussed above are adhesion contracts based often on “sheer ignorance.”<sup>272</sup>

The pleasurable servitude is not limited to the major social networks. For instance, in the 2019 case of *Dancel v. Groupon*, a class of plaintiffs alleged that Groupon, Inc. violated the Illinois Right of Publicity Act (IRPA) by harvesting plaintiffs’ photos and usernames from Instagram, and then using them to advertise vouchers for Illinois businesses on the Groupon platform without consent.<sup>273</sup> To use Instagram, as is typical with other social networks, individuals must create a username, and can then begin posting photos on the platform. The photos can then be viewed by others who visit the platform. Instagram users can also “tag” their photos with information, such as the location where a given photo was taken and the usernames of others who appear in the photo.<sup>274</sup>

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268. *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?template=terms> (last visited Aug. 2, 2021).

269. *Terms of Service*, TIKTOK, <https://www.tiktok.com/legal/terms-of-service?lang=en> (last visited Aug. 2, 2021).

270. See Anthony M. Ramirez & Katherine DeVries, *Just Browsing: District Court Finds Browsewrap Agreement Enforceable*, SOCIALLY AWARE BLOG (Nov. 14, 2019), <https://www.sociallyawareblog.com/2019/11/04/just-browsing-district-court-finds-browsewrap-agreement-enforceable/>.

271. Radin, *supra* note 23, at 19.

272. Radin, *supra* note 23, at 21.

273. *Dancel v. Groupon, Inc.*, 949 F.3d 999, 1002 (2019).

274. See *Tagging and Mentions*, INSTAGRAM, <https://help.instagram.com/627963287377328> (last visited Nov. 8, 2022) (providing instructions on how to tag photos on Instagram).

Groupon is a platform that sells discount vouchers for goods and services at local businesses, often restaurants. Here, Groupon, in “scraping” Instagram accounts, found a photo that plaintiff Christine Dancel had posted on Instagram that depicted a restaurant in Mt. Vernon, Illinois.<sup>275</sup> Without Dancel’s knowledge, Groupon used her photo and username (“meowchristine”) in connection with selling vouchers to that restaurant.<sup>276</sup> Groupon also did this to other Instagram users on a mass scale, harvesting usernames and photos to advertise its vouchers for other businesses.<sup>277</sup> Ultimately, the lawsuit was dismissed, because the Seventh Circuit held that Instagram usernames do not constitute an aspect of identity common to the entire class. Groupon’s terms of service now reads:

You grant Groupon a royalty-free, perpetual, irrevocable, sublicensable, fully paid-up, non-exclusive, transferrable, worldwide license and right to use, commercial use, display and distribute any Personal Information in connection with your User Content in accordance with these Terms of Use, including, without limitation, a right to offer for sale and to sell such rights in Personal Information, whether the User Content appears alone or as part of other works, and in any form, media or technology, whether now known or hereinafter developed, and to sublicense such rights through multiple tiers of sublicensees, all without compensation to you.<sup>278</sup>

Terms of service agreement consent provisions, such as the examples above, constitute exculpatory provisions for the use of user identities for advertising and endorsement purposes. Thus, by demanding broad publicity licenses or waivers, as it stands now, internet platforms have likely drafted their way out of liability for appropriation of their users’ publicity rights. Again, if a user does not consent to the applicable terms of service (and privacy policy), they cannot use the social network. In effect, by consenting to terms of service on social media, ordinary citizens license rights in their identities to internet platforms in exchange for access to the pleasures and comforts of digital worlds. Through the pleasurable servitude, internet platforms become the publicity rights holders of the identities of their hundreds of millions of users in the United States. The pleasurable servitude thus results in widespread identity alienation and identity commodification, which can be viewed as harmful when seen through the lens of a Huxleyan dystopia.

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275. *Dancel*, 949 F.3d at 1002.

276. *Dancel*, 949 F.3d at 1002.

277. *See Dancel*, 949 F.3d at 1002.

278. Groupon, Inc., *Terms of Use*, (2019) (last visited Aug. 2, 2021), <https://www.groupon.com/legal/termservice>.

#### IV. PUBLICITY'S BRAVE NEW WORLD

*We are not our own any more than what we possess is our own.*<sup>279</sup>

This Part proposes a regulatory path forward for the right of publicity in responding to the online publicity licensing phenomenon. This Part first discusses the pleasurable servitude as a matter of social and economic injustice—an instance of online manipulation and emblematic of surveillance capitalism.<sup>280</sup> It next proposes regulation in the form of “publicity policies”—analogous to privacy policies—with the goal of increasing awareness among users of social networks and other internet websites regarding identity appropriation. Through publicity policies, social media users could customize their publicity settings through an opt-out regime. This Part lastly discusses the First Amendment balance in the context of the pleasurable servitude. To the extent that social networks claim a free speech defense in cases like *Fraley* and *Perkins*, or to evade regulation of the issue more broadly, the defense should be denied as commercial speech outside the scope of core First Amendment protection.

##### A. MANIPULATIVE PUBLICITY

Locating the relationship between internet platforms and their users within a Huxleyan dystopia highlights the harms to users’ publicity rights in ways that appropriately characterizes the manipulative dynamics of that relationship. In particular, the pleasurable servitude involves aspects of (1) online manipulation, (2) dark patterns, and (3) surveillance capitalism. These three subjects will be discussed in turn.

Susser, Roesler, and Nissenbaum define online manipulation as “the ability of data collectors to use information about individuals to manipulate them.”<sup>281</sup> Such manipulation “disrupts our capacity for self-authorship—it presumes to decide for us how and why we ought to live.”<sup>282</sup> In considering that identities are transferred online, through targeted advertisements, as a form of data, the pleasurable servitude can be seen as an aspect of online manipulation.<sup>283</sup> And the targeted advertisements and endorsements that are “consented to” through these terms of service have long been a quintessential form of online manipulation discussed among privacy scholars.

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279. HUXLEY, *supra* note 8, at 278.

280. See Zuboff, *supra* note 27.

281. Susser, et al., *supra* note 26, at 1.

282. Susser, et al., *supra* note 26, at 4.

283. See Spencer, *supra* note 26, at 980 (noting that “marketers have already proven with online behavioral advertising that they can target different advertisements, offers, and terms of service in real time.”).

Along these lines, the pleasurable servitude is characteristic of what Ryan Calo refers to as “digital market manipulation,” or “nudging for profit.”<sup>284</sup> Digital market manipulation refers to the ability of advertisers to collect data about consumers and then use that data to personalize their users’ experience by taking advantage of their cognitive limitations.<sup>285</sup> This involves “uncover[ing] and trigger[ing] consumer frailty at an individual level” in an attempt to “set prices, draft contracts, minimize perceptions of danger or risk, and otherwise attempt to extract as much rent as possible from consumers.”<sup>286</sup> Here, publicity appropriation—enabling consent for targeted, endorsement-based advertising—is a form of means-based targeting. In essence, this means “matching the right advertising *pitch* with the right person, based on the premise that people vary in their susceptibility to various forms of persuasion.”<sup>287</sup>

The pleasurable servitude may similarly be thought of as a “dark pattern”—a design that functions to trick users into doing what they ordinarily would not do, such as handing over their personal data, in this case transferring their publicity rights through online terms of service.<sup>288</sup> According to Senator Mark R. Warner (D-VA), former technology executive and Chairman of the Senate Select Committee on Intelligence: “For years, social media platforms have been relying on all sorts of tricks and tools to convince users to hand over their personal data without really understanding what they are consenting to.”<sup>289</sup> Warner notes that one of the most manipulative strategies is reliance on dark patterns—“deceptive interfaces and default settings, drawing on tricks of behavior psychology, designed to undermine user autonomy and push consumers into doing things they wouldn’t otherwise do, like hand over all of their personal data to be exploited for commercial purposes.”<sup>290</sup>

More broadly, the pleasurable servitude is a form of “behavior modification” emblematic of what Shoshana Zuboff labels “surveillance capitalism”—“declaring private human experience as free raw material for

284. Calo, *supra* note 26, at 1001.

285. See Calo, *supra* note 26, at 999.

286. Calo, *supra* note 26, at 995, 1001.

287. Renee Boucher Ferguson, *Is Digital Advertising a New Form of Market Manipulation?*, MIT SLOAN MGMT. REV. (Sept. 24, 2013), <https://sloanreview.mit.edu/article/is-digital-advertising-a-new-form-of-market-manipulation/>.

288. Arunesh Mathur, Jonathan Mayur & Mihir Kshirsagar, *What Makes a Dark Pattern . . . Dark?*, CHI '21: PROCEEDINGS OF THE 2021 CHI CONFERENCE ON HUM. FACTORS IN COMPUT. SYS. 3 (2021).

289. Mark R. Warner, U.S. Senator from the Commonwealth of Virginia, Press Release (Apr. 9, 2019), <https://www.warner.senate.gov/public/index.cfm/2019/4/senators-introduce-bipartisan-legislation-to-ban-manipulative-dark-patterns>.

290. *Id.*

translation into production and sales. Once private human experience is claimed for the market, it is translated into behavioral data for computational production.<sup>291</sup> Here, the claimed private human experience is user identity—name, image, or likeness.

This manipulation through terms of service and its resulting enablement of targeted advertising experiments is Huxleyan, differing from an Orwellian world of top-down surveillance. The social network experiments involve playing with their users' minds in such a way that they accept, or even delight in it.<sup>292</sup> A form of social conditioning, the purported goal of manipulating social media users is to improve the user experience (i.e., pleasure) on the platforms.<sup>293</sup> Of course, improving experience is synonymous with selling targeted advertisements and thus increasing revenue. Such aims are also consistent with the conspicuous consumption depicted in *Brave New World*.<sup>294</sup>

The pleasurable servitude results in social and economic injustice. Some would argue that social networks are delivering a valuable service to users and therefore should be able to appropriate publicity rights for purposes of identity-based advertising, sponsorship, and endorsements when and how they want.<sup>295</sup> Consider, though, that it is increasingly difficult to live an internet and social media free life. Indeed, new technologies are “a pervasive and insistent part of everyday life” and “it is becoming increasingly hard to forgo using these technologies, especially when they are very useful and beneficial.”<sup>296</sup> And “individuals are compelled to engage with social media to maintain their “social circles, professional presence, or romantic relationships.”<sup>297</sup>

291. SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 270 (2019) (explaining that through technological behavior modification, we “sacrifice our right to the future tense, which comprises our will to will, our autonomy, our decision rights, our privacy, and, indeed, our human rights”).

292. Ralph Schroeder, *Big Data and the Brave New World of social media research*, *BIG DATA AND SOCIETY* 3-4 (2014) (explaining “that it is more relevant to invoke Huxley’s *Brave New World* [than 1984], where companies and governments are able to play with people’s minds, and do so in a way such that users, knowingly or unknowingly (and it may not be easy to tell the difference), come to accept and embrace this”).

293. *Id.* at 4.

294. *See id.* (“[I]mproving experience and services could also just mean selling more products, or manipulating people’s political behavior.”).

295. *See* Garrie, *supra* note 30 (discussing the mutual convenience of the technological relationship to both the social networks and its users).

296. Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 *Geo. Wash. L. Rev.* 1, 37 (2021) [hereinafter Solove, *Myth of Privacy Paradox*]; *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (noting that “cell phones and the services they provide are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable to participation in modern society”).

297. Raimondi, *supra* note 213, at 200.



Therefore, forgoing use of internet platforms might mean, particularly in a pandemic era, living “an isolated and hermetic existence.”<sup>298</sup> Moreover, social media is designed to be as addictive as possible. Many simply do not have the will to resist it.<sup>299</sup> As former president of Facebook Sean Parker confessed, the site is designed to exploit our “vulnerability” and to “consume as much of [our time and conscious attention as possible].”<sup>300</sup>

For those who use social media, the licensing of one’s identity and for commodification by the platforms is done willingly (or at least without obvious coercion). But such consent is also a mandatory condition to use the platforms. As the Huxleyan metaphor demonstrates, the fact that individuals *voluntarily* trade their publicity for use of platforms does not demonstrate that such contractual transactions are valuable or conscionable.<sup>301</sup> Rather, the licensing of publicity rights is normatively undesirable based on (1) individual autonomy and dignity-related concerns, as well as (2) broader social and political reasons. Given such normative and democratic concerns elaborated below, courts should hold pleasurable servitude contracts—whether clickwrap or browsewrap—unenforceable. Moreover, as will be discussed in Part IV.B, this is an area that should be the subject of legislative action.

298. Solove, *Myth of Privacy Paradox*, *supra* note 296, at 30.

299. See Yubo Hou, *Social media addiction: Its impact, mediation, and intervention*, 13 CYBERPSYCHOLOGY: J. PSYCHOSOCIAL RSCH. ON CYBERSPACE 1, 1 (2019) (“Individuals with social media addiction are often overly concerned about social media and are driven by an uncontrollable urge to log on and use social media.”); Stephanie Plamondon Baer, *Innovations Hidden Externalities*, 47 BYU L. REV. 1385, 1411 (2022) (“Interactions with media innovations, like the texting and social networking applications found on smartphones, provide emotional gratification.”); see also Shiri Melumed and Michel Tuan Pham, *The Smartphone as a Pacifying Technology*, 47 J. CONSUMER RSCH. 237 (2019) (explaining that the smartphone itself, beyond its applications like social media, is an addictive technology). The addictive and exploitive nature of social media was popularized in Tristan Harris’s documentary *The Social Dilemma*, NETFLIX (2020).

300. Olivia Solon, *Ex-Facebook president Sean Parker: site made to exploit human ‘vulnerability*, THE GUARDIAN (Nov. 9, 2017), <https://www.theguardian.com/technology/2017/nov/09/facebook-sean-parker-vulnerability-brain-psychology>. More recently, Facebook whistleblower Frances Haugen revealed that Facebook “failed to address negative effects of its social media products,” realizing “that if they change the algorithm to be safer, people will spend less time on the site, they’ll click on less ads, they’ll make less money.” Chad De Guzman, *The Facebook Whistleblower Revealed Herself on 60 Minutes. Here’s What You Need to Know*, TIME (Oct. 4, 2021) <https://time.com/6103645/facebook-whistleblower-frances-haugen/>.

301. See Solove, *Myth of Privacy Paradox*, *supra* note 296, at 29 (“The fact that people trade their privacy for products or services does not mean that these transactions are desirable in their current form.”).

### 1. *Autonomy and Dignity Concerns*

The pleasurable servitude threatens autonomy and dignity in much the same way as data privacy breaches do.<sup>302</sup> The concept of autonomy is essential to a liberal democratic society.<sup>303</sup> Autonomy refers to an individual's capacity to make "meaningfully independent decisions."<sup>304</sup> Online manipulation threatens the autonomy of social media users by leading them to act in ways they have not chosen and for inauthentic reasons.<sup>305</sup>

The problem is particularly glaring in the right of publicity context given that "human identity is a self-evident property right."<sup>306</sup> Identity is an aspect of personhood.<sup>307</sup> The distinction, though, is that although personhood carries an "intrinsic worth" belonging equally to all human beings, identities are not shared equally but rather constitute the aspects of the self that are unique from others.<sup>308</sup> As such, the forced commodification of identity on social media can be seen as an assault on dignity that denies "the conditions of individuation necessary to the proper respect for and development of one's personhood."<sup>309</sup> It does this by "treating people as experimental subjects and mere means to an end."<sup>310</sup>

From a reputational standpoint too, individuals should be respected in how they want to be portrayed, such as having the ability to opt-out of having their identities used in connection with targeted advertisements or otherwise commodified. Although complete control of our reputations is not a reality, either in the physical or digital world, citizens should have some ability to protect their reputations from unfair harm on the internet and social media.<sup>311</sup>

As an example of autonomy, dignity, and reputational harm, consider the 2016 right of publicity class action lawsuit *Parker v. Hey, Inc.*, where Twitter users' profiles were turned into trading cards without their consent.<sup>312</sup> *Parker* involved an App called "Stolen," which allowed players to collect the Twitter

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302. For literature on the connection between privacy breaches and autonomy, see generally Susser et al., *supra* note 26; Luciano Floridi, *On Human Dignity: a Foundation for the Right to Privacy*, 29 *Philosophy & Technology* 307-312 (2016);

303. Susser et al., *supra* note 26, at 8.

304. Susser et al., *supra* note 26, at 8.

305. Susser et al., *supra* note 26, at 8.

306. Daniel Gervais & Martin L. Holmes, *Fame, Property & Identity: The Purpose and Scope of the Right of Publicity*, 25 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 181, 194 (2014).

307. Kahn, *supra* note 5, at 218.

308. Kahn, *supra* note 5, at 218.

309. Kahn, *supra* note 5, at 219.

310. Spencer, *supra* note 5, at 991.

311. Solove, *Myth of Privacy Paradox*, *supra* note 296, at 38.

312. *Parker v. Hey, Inc.*, Case No. CGC-17-556257, 2017 Cal. Super LEXIS 609, \*1-2 (Super. Ct. Cal. Apr. 14, 2017).

profiles of real-life people as if they were baseball cards.<sup>313</sup> Although not created by Twitter, the App was endorsed by Twitter, at least initially, and relied exclusively on data from Twitter. Hey, Inc., the App's maker, accessed the data by partnering with Twitter, an arrangement that allowed it to access the Twitter API through which Twitter disclosed individuals' names and images.<sup>314</sup>

According to journalist Lauren Hockenson's description of Stolen's features, the game "essentially sucks in all of the available public data from Twitter and assigns value to user names."<sup>315</sup> Players are then "encouraged to buy these users with currency . . . . You buy people, and then other people pay more than you to take that person away."<sup>316</sup> For Hockenson, "it felt particularly weird going on an app I only knew about a few days ago to find people who follow me on Twitter have driven up my value. That people are sparring back and forth to take ownership of my account."<sup>317</sup>

Hockenson notes that the App "commoditize[s] users without their knowledge" and, in doing so, "crafts a potential opening for harassment" considering people who "own" others' profiles can rename them.<sup>318</sup> As such, [i]t's not too much of a mental stretch to see how this can be used to harm someone personally," given that "you can't opt out of the game."<sup>319</sup>

## 2. *Political and Democratic Concerns*

In addition to being problematic from the perspective of individual autonomy, mass identity transfer furthers technology companies' monopoly on collective human capital.<sup>320</sup> In this sense, the pleasurable servitude can be seen as a collective harm from a broader social, political, and democratic perspective. As New York Attorney General Letitia James puts it, "[n]o

313. *Id.* As such, the facts evoke an eerie consent-free subversion of Judge Frank's *Haelan* opinion. See *Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953) and accompanying discussion.

314. *Parker*, 2017 Cal. Super LEXIS 609, at \*2-3.

315. Lauren Hockenson, *Here's the 411 on Stolen—the app that turns your Twitter account into a commodity*, THE NEXT WEB (Jan. 13, 2016), <https://thenextweb.com/news/what-the-hell-is-stolen>.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. See, e.g., RADIN, *supra* note 23, at 35 ("Widespread boilerplate undermines the rationale that justifies the state's power to organize the polity; and it converts rights enacted and guaranteed by the state into rights that can be 'condemned' by private firms."). Marks, *supra* note 81, at 589 ("By deploying dark patterns and other coercive design features, tech companies . . . [gain] monopolistic power over human behavior, which threatens democracy and human autonomy.").

company should have this much unchecked power over our personal information and our social interactions.”<sup>321</sup> And as Radin argues in *Boilerplate*, contracts of adhesion such as terms of service displaces legal regimes created by the state with governance regimes more favorable to corporations—in effect “transporting recipients to a firm’s own preferred legal universe” and thus causing “democratic degradation” that undermines public ordering.<sup>322</sup>

Along these lines, Michel Foucault labeled the ability to manipulate human capital “biopower”—literally, having power over bodies, or “an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations.”<sup>323</sup> In distinguishing biopower from an Orwellian subjugation, Foucault used the term to describe “a power bent on generating forces making them grow, and ordering them, rather than one dedicated to impeding them, making them submit, or destroying them.”<sup>324</sup> Like the Huxleyan warning of a utilitarian society gone awry, Foucault envisions modern humans as “an animal whose politics places his existence as a living being in question.”<sup>325</sup> Both “the disciplinary power mechanisms of the body and the regulatory mechanisms of the population, constitute the modern incarnation of power relations, labeled as *biopower*.”<sup>326</sup>

In preventing what Mason Marks labels “biosupremacy” by internet platforms—a monopoly on biopower—reasonable limits on the transferability of identity-based rights—name, image, likeness—could serve as a limit on the immense power that internet platforms currently possess over their users.<sup>327</sup> In the pleasurable servitude cases, identity is transferred as a form of data. As Daniel Solove puts it, “[p]ersonal data can be used to affect our reputations; and it can be used to influence our decisions and shape our behavior. And it

321. *N.Y. Attorney General Asks Courts to Take Action Against Facebook*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/video/us/politics/10000007495190/new-york-attorney-general-facebook-antitrust.html>.

322. See RADIN, *supra* note 23, at 35 (“[Boilerplate] threatens the distinction between public and private ordering, and indeed the ideal of private ordering itself. In addition to undermining or bypassing the system of rights structures enacted and guaranteed by the state, the degradation of our commitment to democratic political ordering includes several other interlocked deficiencies.”).

323. MICHEL FOUCAULT, *HISTORY OF SEXUALITY (THE WILL TO KNOWLEDGE: HISTORY OF SEXUALITY)* Vol. 1, 140 (1976).

324. *Id.* at 136.

325. *Id.* at 146.

326. Vernon W. Cisney and Nicolae Morar, *Why Biopower? Why Now?*, 5 in *BIOPOWER: FOUCAULT AND BEYOND* (2015).

327. See Marks, *supra* note 81, at 519 (“When firms acquire a dominant share of biopower, influencing enough traits in sufficiently large populations, they achieve *biosupremacy* . . . monopolistic power over human behavior.”).

can be used as a tool to exercise control over us.”<sup>328</sup> In other words, if we have no control over our data (no less our very identity)—how it is being used, and what it is being used for—we remain at the mercy of large technology companies and their market power.

For instance, currently, online publicity licenses are non-exclusive.<sup>329</sup> But if the terms of service were to change to claim exclusive publicity license in users’ identities, internet platforms may singularly possess property rights in them.<sup>330</sup> In such a dystopian vision, to use social networks, one would have to agree to an exclusive, perpetual license to their name, image, or likeness. In essence, the individual will have signed away their right of publicity.<sup>331</sup> The internet platform could then impose limits on its users’ ability to market themselves or use their likenesses in future advertisements without their consent. As scholars have previously noted, such a licensing regime would be profoundly undemocratic and freedom limiting.<sup>332</sup>

Would internet platforms venture to take such an exclusive right in user identities, or would they be constrained by ethics or by market principles? The answer is not totally clear, and it may be pessimistic to predict that a technology corporation would claim exclusivity in the legal identity of its millions or billions of users. Yet, short of citizen activism or legal regulation, the power is in the hands of social networks. As one commentator remarked regarding Facebook CEO Mark Zuckerberg: “There is nothing that constrains what [Zuckerberg] can do ... This is a level of concentrated power in the hands of one person that I’m not sure we’ve ever seen anywhere in history. And whatever his intentions are, whatever kind of person he is, we should never have allowed this to happen.”<sup>333</sup>

## B. PUBLICITY POLICIES

To the extent that the right of publicity remains a transferable, commercial right, individuals should be educated in this regard. As a mechanism for doing so, this section analogizes to privacy policies. For example, California’s privacy law requires “operators of commercial web sites or online services that collect

328. Daniel Solove, *10 Reasons Why Privacy Matters*, TEACH PRIVACY (Jan. 20, 2014), <https://teachprivacy.com/10-reasons-privacy-matters/>.

329. See ROTHMAN, RIGHT OF PUBLICITY, *supra* note 15, at 128.

330. See ROTHMAN, RIGHT OF PUBLICITY, *supra* note 15, at 128.

331. Solove, *Consent Dilemma*, *supra* note 23, at 1880 (“Consent legitimizes nearly any form of collection, use, or disclosure of personal data.”).

332. ROTHMAN, RIGHT OF PUBLICITY, *supra* note 15, at 128; Raimondi, *supra* note 213, at 216.

333. NYU Law School, *Monopolization and Abuse: Application to Platforms and Digital Markets*, YOUTUBE, (May 12, 2020), <https://www.youtube.com/watch?v=XSSGaQ9xwd8>.

personal information on California residents through a website to conspicuously post a privacy policy on the site and to comply with its policy.”<sup>334</sup> Those who fail to do so risk civil litigation under unfair competition laws.<sup>335</sup>

For example, New York passed a comprehensive right of publicity law that became effective on May 29, 2021. The law created a transferable and descendible right of publicity, and also touched upon the online publicity phenomenon by making illegal sexually explicit deepfakes and protecting digital avatars and digital voices as aspects of the commercial identity.<sup>336</sup> But it did not address the pleasurable servitude.<sup>337</sup> Ideally, the law would have regulated social networks so that they are not able to claim the publicity rights of users for purposes of advertising, sponsorships, and endorsements.<sup>338</sup> At least though, it should have included a provision requiring “publicity policies” to promote awareness among social media users of the mass transfer of publicity rights required to use the services, and subsequent commodification of their identities.

The inclusion of publicity policies could function as a sort of media literacy regarding the right of publicity. In invoking Marshall McLuhan’s philosophy of media ecology, Strate explains that our technology and media function as “environments” which can “fad[e] into the background as they become routine, thereby becoming invisible to us.”<sup>339</sup> Along these lines, Postman remarked that “technopoly eliminates alternatives to itself precisely the way Aldous Huxley outlined in *Brave New World*. It does not make them illegal. It

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334. *Cal. Bus. & Prof. Code* §§ 22575-22579; California Online Privacy Protection Act (CalOPPA) (2013), <https://consumercial.org/about-cfc/cfc-education-foundation/california-online-privacy-protection-act-caloppa-3/>

335. *Id.*

336. For a sampling of the literature on the deep fake issue, see generally Danielle K. Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753 (2019); Matthew B. Kugler and Carly Pace, *Deepfake Privacy: Attitudes and Regulations*, 116 NW. U. L. REV. 611 (2021); Douglas Harris, *Deepfakes: False Pornography Is Here and the Law Cannot Protect You*, 17 DUKE L. & TECH. REV. 99 (2019); Rebecca A. Delfino, *Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn’s Next Tragic Act*, 88 FORDHAM L. REV. 887 (2019); Anne Pechenik Gieseke, “*The New Weapon of Choice*”: *Law’s Current Inability to Properly Address Deepfake Pornography*, 73 VAND. L. REV. 1479 (2020).

337. See Judith Bass, *New York’s New Right of Publicity Law: Protecting Performers and Producers*, NEW YORK STATE BAR ASSOCIATION (Mar. 17, 2021), <https://nysba.org/new-yorks-new-right-of-publicity-law-protecting-performers-and-producers>.

338. I discuss this point further in a previous work. See Marlan, *supra* note 15, at 463.

339. Strate, *supra* note 192, at 143 (citing MARSHAL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964)).

does not make them immoral. It does not even make them unpopular. It makes them invisible and therefore irrelevant.”<sup>340</sup>

To counteract such technological fatalism, Postman suggested that education should serve a cybernetic function. To this end, “education [should be] based on literacy and typography, on the spoken and written word, and on reason and rationality, against the extremes of idolatry and efficiency, image culture and technopoly.”<sup>341</sup> Postman writes regarding the importance of media literacy: “[Aldous Huxley] believed . . . that we are in a race between education and disaster, and he wrote continuously about the necessity of our understanding the politics and epistemology of media.”<sup>342</sup> Indeed, “what afflicted the people in *Brave New World* was not that they were laughing instead of thinking, but that they did not know what they were laughing about and why they had stopped thinking.”<sup>343</sup>

In applying media literacy to publicity law, privacy policies educate the public about the contractual relationship between users and social media platforms. Among other disclosures, privacy policies typically define the extent to which social media platforms or other websites can use user data to generate revenue through targeted advertising. Prior to regulatory intervention, privacy policies were often embedded within a website’s terms of service. However, several laws now require distinctive and easily found privacy policies. For example, under California’s privacy law:

The privacy policy must, among other things, identify the categories of personally identifiable information collected about site visitors and the categories of third parties with whom the operator may share the information. The privacy policy must also provide information on the operator’s online tracking practices. An operator is in violation for failure to post a policy within 30 days of being notified of noncompliance, or if the operator either knowingly and willfully or negligently and materially fails to comply with the provisions of its policy.<sup>344</sup>

Analogously, legislation mandating publicity policies could serve an important disclosure function as to the appropriation of social media users’ commercial identities (e.g., name, image, and likeness) across social media and

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340. NEIL POSTMAN, *TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY* 71-2 (1992) (defining a “technopoly” as a society in which technology is deified; where “the culture seeks its authorization in technology, finds its satisfactions in technology, and takes its orders from technology”).

341. Strate, *supra* note 192, at 143.

342. POSTMAN, *supra* note 1, at 163.

343. POSTMAN, *supra* note 1, at 163.

344. CalOPPA, *Cal. Bus. & Prof. Code* § 22575.

on the internet. Like California's privacy policy regulations, social media platforms should not be allowed to bury publicity-related disclosures in the terms of service. Instead, they should be made to conspicuously post a publicity policy on their sites and comply with it. The publicity policy should identify the aspects of the identity—name, image, or likeness—that the platform will collect, and to what ends the platform will use the information. Having social media users consent by way of clickthrough publicity policies would be a heightened form of consent, at least as compared to provisions within the browsewrap terms of service.

Inherent within the publicity policy should also be users' ability to opt-out of platforms' use of identity in connection with commercial and sponsored conduct.<sup>345</sup> Users should be able to customize their settings regarding the scope of their publicity license, as well as permissions regarding the types of identity-based endorsements and sponsorships their publicity rights will be used in connection with. An opt-out regime granted through a publicity policy, while not ideal, is a sensible, middle of the road approach to consent. It would shift some of the power and control back to social media users while still allowing platforms the economic power to fuel their platform through (targeted) advertisements. This sort of publicity "self-management" will not alone solve the issue.<sup>346</sup> But legislation mandating the use by internet platforms of publicity policies would be a realistic start to regulating the area in drawing attention to the issue on a macro level.

Some will object to the publicity policy proposal based on the failure of analogous privacy policies—"privacy self-management" or user "control"—as an all-encompassing solution to privacy concerns. As Woodrow Hartzog argues, "the focus on control distracts you from what really affects your privacy in the modern age . . . It is all in the design."<sup>347</sup> But this control-oriented proposal is not meant as a complete solution to the pleasurable servitude. As Solove notes in *Privacy Self-Management and the Consent Dilemma*, "privacy self-management is certainly a laudable and necessary component of any regulatory regime."<sup>348</sup> And while flawed, privacy self-management is a widely accepted

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345. An opt-in regime would seem preferable to an opt-out regime in preventing the commoditizing of identity but is less likely from a political perspective. It is unlikely a significant number of social media users would opt-in to such a regime to allow this form of identity-based advertising to remain profitable for advertisers and the social media platform. On the other hand, a significant percentage of social media users would likely not bother to opt-out.

346. Solove, *Consent Dilemma*, *supra* note 23, at 1883.

347. Hartzog, *supra* note 39, at 21.

348. Solove, *Consent Dilemma*, *supra* note 23, at 1880; *see also* Tuukka Lehtiniemi and Yki Korttesniemi, *Can the obstacles to privacy self-management be overcome? Exploring the consent intermediary*



aspect of privacy regulation.<sup>349</sup> Through privacy self-management regimes, the law seeks to give people control over their data by focusing on acquiring their consent.<sup>350</sup> Indeed, privacy policies have certain advantages over more “paternalistic regulation.”<sup>351</sup>

Nonetheless, privacy self-management is a flawed and incomplete solution as it is tasked with “doing work beyond its capabilities” and “does not provide people with meaningful control over their data.”<sup>352</sup> Solove highlights a few reasons why. First, humans have cognitive limitations which impair their ability to “make informed, rational choices about the costs and benefits of consenting to the collection, use, and disclosure of their personal data.”<sup>353</sup> Second, privacy self-management does not scale well—“[t]here are too many entities collecting and using personal data to make it feasible for people to manage their privacy separately with each entity.”<sup>354</sup> And third, privacy self-management “addresses privacy in a series of isolated transactions guided by particular individuals. Privacy costs and benefits, however, are more appropriately assessed cumulatively and holistically—not merely at the individual level.”<sup>355</sup>

Are these shortcomings applicable to publicity self-management via publicity policies? Yes and no. The first point, regarding cognitive limitations, certainly is applicable. The second and third points, however, are perhaps less of an issue as to publicity. Consider that there are far fewer entities (i.e., primarily social media platforms) who seek publicity licenses or waivers than collect other aspects of personal data. Thus, although with respect to privacy, “[i]t is virtually impossible for people to weigh the costs and benefits of revealing information or permitting its use or transfer without an understanding of the potential downstream uses,”<sup>356</sup> publicity licenses are less ubiquitous on the internet, and uses of user publicity are more narrowly

*approach*, *Big Data & Society*, July–December 2017 at 10 (concluding “that it is indeed possible to make privacy self-management work better, and some of its obstacles seem to be even solvable with new tools”); Mario Pascalev, *Privacy exchanges: restoring consent in privacy self-management*, 19 *Ethics and Information Technology* 39, 39 (2017) (arguing that a streamlined, automated, and standardized form of privacy self-management could be workable).

349. Solove, *Consent Dilemma*, *supra* note 23, at 1883.

350. Solove, *Consent Dilemma*, *supra* note 23, at 1880 (explaining that under a privacy self-management regime, “[c]onsent legitimatizes nearly any form of collection, use, or disclosure of personal data”).

351. Solove, *Consent Dilemma*, *supra* note 23, at 1903 (“Privacy self-management cannot achieve the goals demanded of it, and it has been pushed beyond its limits. But privacy self-management should not be abandoned, and alternatives risk becoming too paternalistic.”).

352. Solove, *Consent Dilemma*, *supra* note 23, at 1880-81.

353. Solove, *Consent Dilemma*, *supra* note 23, at 1880-81.

354. Solove, *Consent Dilemma*, *supra* note 23, at 1881.

355. Solove, *Consent Dilemma*, *supra* note 23, at 1881.

356. Solove, *Consent Dilemma*, *supra* note 23, at 1881.

tailored to advertising, marketing, and endorsements. Because publicity licenses are less common and thus publicity management less of a complexity for users, publicity policies coupled with an opt-out regime may be more effective than privacy self-management has been.

Like with privacy, though, the law may ultimately need to venture into substantive publicity rules beyond self-management to combat the pleasurable servitude. Such laws could consist of “hard boundaries,” affirmatively restricting publicity rights transfer (at least absent a heightened form of consent), in addition to “softer default rules” that could be bargained around, such as an opt-in (rather than opt-out) regime where users would need to toggle the default settings to allow for publicity licensure.<sup>357</sup> Notably, prohibiting outright the transfer of publicity rights—in effect holding the right of publicity to be inalienable—risks stifling internet entrepreneurs (i.e., influencers) who seek to profit financially in part through publicity rights licensure.<sup>358</sup> Ironically, hindering such entrepreneurial efforts may negatively impact autonomy while attempting to protect it.<sup>359</sup> Regardless of how this balance is grappled with down the line, however, publicity policies, in drawing attention and education to the pleasurable servitude, provide a sound introductory step to a publicity regulatory regime.

### C. FIRST AMENDMENT BALANCE

Laws regulating the pleasurable servitude should not necessarily implicate the First Amendment because identity-based sponsorship and endorsements are purely commercial activity. As discussed earlier in Section III.C, the right of publicity can clearly encroach on the First Amendment rights of creators. Thus, the First Amendment can, at least in cases of noncommercial speech, serve as a complete defense to publicity infringement.<sup>360</sup> In the celebrity context, the First Amendment is often considered a public interest-oriented limit on an ever-expanding right of publicity.<sup>361</sup> As Post and Rothman put it, “[t]hose who wish to create expressive works that incorporate the identities of actual people, or who wish to post images and comments about actual people

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357. Solove, *Consent Dilemma*, *supra* note 23, at 1903 (“[S]ubstantive rules about data collection, use, and disclosure could consist of hard boundaries that block particularly troublesome practices as well as softer default rules that can be bargained around.”).

358. Solove, *Consent Dilemma*, *supra* note 23, at 1881 (remarking that “although extensive self-exposure can have disastrous consequences, many people use social media successfully and productively.”); <https://www.traverselegal.com/blog/influencer-brand-and-agency/> (explaining that “[l]icensing of copyrights and publicity rights are the foundation of [the influencer] business”).

359. Solove, *Consent Dilemma*, *supra* note 23, at 1894.

360. *See, e.g.*, Tune & Levine, *supra* note 25, at 17-18.

361. *See supra* note 165 and accompanying discussion.

online, are bereft of reliable and foreseeable protection for the exercise of essential First Amendment rights.”<sup>362</sup>

Thus, where the appropriation of an individual’s identity relates to expressive works or has a social purpose other than purely commercial benefit (i.e., newsworthiness, parody, etc.), the First Amendment should serve as a complete defense to a right of publicity challenge.<sup>363</sup> Yet, to the extent that a right of publicity challenge amounts to no more than the appropriation of one’s economic value, such purely commercial speech need not be protected expression under the First Amendment.<sup>364</sup> Courts never (or almost never) conduct a four-part *Central Hudson* commercial speech inquiry where the right of publicity is at issue, instead preferencing the right of publicity over commercial speech as essentially a per se rule.<sup>365</sup>

In considering these guidelines, unlike with expressive works in the celebrity publicity context where it is strong, the First Amendment should serve as a weak defense in the pleasurable servitude cases. Because the use of identities for advertising and endorsement purposes in the social media marketing cases fits quite easily in the category of commercial speech, such use is thus outside the realm of historic core First Amendment protection, particularly as applied to the right of publicity.<sup>366</sup> However, that is not a given considering the trend toward First Amendment expansionism in the last half century.<sup>367</sup> As Tim Wu puts it, “[o]nce the patron saint of protesters and the disenfranchised, the First Amendment has become the darling” of economic

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362. Post & Rothman, *supra* note 14, at 90-91.

363. Tune & Levine, *supra* note 25, at 17-18.

364. Tune & Levine, *supra* note 25, at 17-18; cf. Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VIRGINIA L. REV. 1929, 2008 (2015) (arguing that the commercial versus non-commercial distinction is an insufficient binary from which to decide the availability of a First Amendment defense in intellectual property matters).

365. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (describing a four-part analysis for evaluating restrictions on commercial speech); Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1478-79 (2015) (“[T]he paucity of judicial decisions applying the Supreme Court’s famed four-part *Central Hudson* test to determine the appropriate protection for speech relative to publicity rights claims is astounding.”).

366. *But see Sorrell v. IMS Health Inc.*, 546 U.S. 552 (2011) (striking down on First Amendment grounds a commercial speech regulation involving a Vermont law that prevented pharmacies from selling data that would show the prescription patterns of doctors).

367. Redish & Shust, *supra* note 365, at 1450 (arguing that “commercially motivated expression is appropriately extended the same level of First Amendment protection against right of publicity claims as traditionally protected expression receives.”).

libertarians and corporate lawyers who have recognized its power to immunize private enterprise from legal restraint.”<sup>368</sup>

As an example, consider Facebook’s specious argument in *Fralely* that “[b]ecause the expressive modes of sharing that can lead to a Sponsored Story are ‘inextricably intertwined’ with the ‘commercial aspects’ of a Sponsored Story, any constraint on Facebook’s rebroadcast of these stories would likely run afoul of the First Amendment.”<sup>369</sup> Under Facebook’s argument, Sponsored Stories are newsworthy matters of public interest because they are “expressions of commercial opinion.”<sup>370</sup> Facebook’s rhetoric is a stretch, though, because the social network’s real motivation is strictly commercial gain.<sup>371</sup> That is, Facebook’s speech is “related solely to the economic interests of the speaker and its audience”<sup>372</sup> and “does no more than propose a commercial transaction.”<sup>373</sup>

In fact, First Amendment protections, particularly in the realm of commercial speech, are a relatively recent advent. For much of American history, the First Amendment “sat dormant.”<sup>374</sup> In the 1920s, it began protecting “political speech” in earnest due to the federal government’s speech control programs and extensive propaganda during the First World War.<sup>375</sup> Beginning in the 1950s, the First Amendment began to be used to protect speech that is less overtly political, such as indecency and cultural expression.<sup>376</sup> In 1976, with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>377</sup> it was extended to cover commercial advertising, far beyond “the kind

368. Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (June 3, 2013) (discussing the phenomenon of “[h]ow corporations hijacked the First Amendment”), <https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation>.

369. Def. Facebook, Inc.’s Brief in Supp. Of Pls.’ Mot. For Prelim. Approval of Settlement, Case No. 11-CV-01726 LHK (PSG), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1131&context=historical> (citing *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001)).

370. *Id.*

371. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002 (9th Cir. 2001) (holding that noncelebrity plaintiff’s surfing photo being used in a clothing catalog was not a matter of public interest given the strictly commercial interests at stake).

372. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

373. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

374. Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 551 (2018) (noting that the First Amendment “is an American tradition in the sense that the Super Bowl is an American tradition—one that is relatively new, even if it has come to be defining.”).

375. *Id.*

376. *See Roth v. United States*, 354 U.S. 476 (1957).

377. *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772-73 (1976).

of political and press activity that was the original concern of those who brought the First Amendment to life.”<sup>378</sup> And in 2011, in *Sorrell v. IMS Health, Inc.*, commercial speech protection under the First Amendment was further extended to the creation and dissemination of data.<sup>379</sup>

To the extent internet platforms use the First Amendment as a defense in right of publicity cases like *Fraleigh*, *Perkins*, and *Dancel*, or to challenge prospective endorsement-based regulations on the pleasurable servitude, such tactics are instances of what Charlotte Garden calls the “deregulatory First Amendment.”<sup>380</sup> This refers to the Supreme Court’s now decades-long expansion of First Amendment protection of commercial speech and of limiting economic regulations.<sup>381</sup> Jurists and scholars have compared this deregulatory agenda—the “hijacking” of the First Amendment by corporations—to the judicial excesses of the *Lochner* era.<sup>382</sup> In this sense, some have challenged the claim that data privacy laws and other regulations on information are necessarily speech that restrict the dissemination of truthful information and thus violative of the First Amendment.<sup>383</sup> As applied to the online publicity licensing phenomenon, the First Amendment defense becomes a tool for internet platforms to evade liability rather than a serious

378. Wu, *supra* note 374, at 553.

379. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011)

380. See generally Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016) (coining the term “deregulatory First Amendment” to describe the phenomenon of its expansionism into protecting commercial speech” and applying it in the context of labor and employment law, hence the article title’s double entendre).

381. *Sorrell*, 546 U.S. at 587 (Breyer, J., dissenting) (noting that regulatory actions of the kind present here [concerning information disclosures] have not previously been thought to raise serious additional constitutional concerns under the First Amendment.”); Shaun Spencer, *Two First Amendment Futures: Consumer Privacy Law and the Deregulatory First Amendment*, 2020 MICH. ST. L. REV. 897, 900 (2021) (explaining that in the consumer privacy context, there is greater deregulatory potential because data flows “bear[] a superficial resemblance to speech”).

382. *Sorrell*, 564 U.S. at 591 (arguing that expansive free speech jurisprudence “return[s] constitutional law] to the bygone [Lochner] era”) (Breyer, J., dissenting); Wu, *supra* note 368; cf. Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1342 (2020) (“There are significant and important similarities between Lochner-era due process jurisprudence and contemporary free speech law—albeit, not the similarities that most contemporary critics point to.”). *Lochner* is in reference to the infamous *Lochner v. New York*, 198 U.S. 405 (1905), which enforced an unconscionable freedom to contract despite situations of vastly unequal bargaining power, and heralded what many consider to be the dystopian “Lochner era” of the U.S. Supreme Court.

383. See, e.g., Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1151 (2005) (challenging “the conventional wisdom that regulating databases regulates speech, that the First Amendment is thus in conflict with the right of data privacy, and that the Constitution thereby imposes an insuperable barrier to basic efforts to tackle the database problem.”).

defender of free speech. Courts are not forced through binding precedent to give credence to such a corrupting deregulatory First Amendment agenda and should not do so.

Scholars often believe that curbing the excesses of the “extravagant,”<sup>384</sup> “bloated monster”<sup>385</sup> that is the right of publicity in exchange for free speech is an obvious choice. And perhaps it is in the celebrity publicity context. But in drawing attention to the pleasurable servitude, which affects mostly everyday citizens, jurists and commentators should think twice about trading citizens’ identity-based protections in exchange for a romanticized notion of the First Amendment.<sup>386</sup> In the context of the pleasurable servitude, the First Amendment defense is the constitutional extravagance, rather than the ordinary citizen’s right of publicity.<sup>387</sup> This weakened First Amendment defense, though, makes the consent defense even more important for internet platforms, hence their compulsory licensing of users’ publicity rights via the pleasurable servitude.

## V. CONCLUSION

*After all, every one belongs to every one else.*<sup>388</sup>

The concept of “identity” is a largely metaphysical subject. But for purposes of the right of publicity—“the right of every human being to control the commercial use of his or her identity”<sup>389</sup>—the law must grapple with the question of what constitutes identity and the harms flowing from its transfer. Literary metaphors help conceptualize ethereal subject matter such as the

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384. Stacey Dogan, *Stirring the Pot: A Response to Rothman’s Right of Publicity*, 42 Colum. J.L. & Arts 321, 329 (2019).

385. ROTHMAN, RIGHT OF PUBLICITY, *supra* note 15 at 7 (2018).

386. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing majority of “weaponizing the First Amendment” in overturning long-standing precedent requiring public-sector employees to pay union fees).

387. Marlan, *supra* note 15, at 463–68. Here, invocation of the First Amendment appears to be standing in for a broader public domain claim for the free use of human identity—name, image, and likeness. But the romance of the public domain “obscures the distributional consequences of [that commons].” See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1334 (2004). In a similar vein as other intellectual property rights, this romance of the First Amendment obscures the distributional inequities inherent in the right of publicity context too. See Jamar & Mtima, *supra* note 168, at 13 ([b]ecause of institutionalized barriers to information, financial capital, and legal support, many members of marginalized communities have been unable to commercially develop and exploit their publicity rights, while majority enterprises have proven quite adept at exploiting these properties.”).

388. HUXLEY, *supra* note 8, at 50.

389. MCCARTHY & SCHECHTER, *supra* note 7.

subjective harms inflicted by a lack of privacy in our surveillance age. To this end, dystopian metaphors like Orwell's Big Brother, in focusing on power and control, and other surveillance metaphors, like Kafka's *The Trial*, in focusing on a shadowy bureaucracy, are useful where a literal analysis falls short.<sup>390</sup> Finding appropriate metaphors is thus essential to framing *privacy* problems and for the development of sound legislation.<sup>391</sup>

The right of *publicity*, though, has no such prevailing conceptual metaphor (aside from the term "publicity" itself, which connotes fame and celebrity). Therefore, many remain in the dark about this personality right and the extent of the harms flowing from its manipulation. Yet the right of publicity has the potential both to be exploited, as well as to act as a safeguard in our data-driven age. The *Brave New World* metaphor—in depicting a society built around both (1) entertainment as a form of control and (2) socially conditioned technological manipulation—gets at the fact that the right of publicity is a two-tiered right.

On one hand, the right of publicity is an extravagant right focused on protecting celebrities—the rich and famous "stars" of our society. This conventional notion of the right of publicity, was formulated at a time (the 1950s) when there existed a strict bifurcation between famous people and non-famous people. This celebrity-focused right has the potential to chill the First Amendment rights of creators who portray real famous people, including for purposes of public discourse. On the other hand, the right of publicity is a *right to identity* that many regular citizens have stripped away by agreeing to technology corporations' draconian terms of service required to use social media and other online services. In the pleasurable servitude context, the First Amendment presents less of a conflict, because social networks use of identities is for advertising, sponsorships, and endorsements—what should be a clear-cut form of commercial speech, the likes of which are routinely trumped by the right of publicity.

The need to curtail the celebrity-focused right to ensure First Amendment protections is a well-documented publicity problem. But the pleasurable servitude—the voluntary licensing of social media users' rights of publicity as a prerequisite for use of the platforms—should drive regulation in this area

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390. See Solove, *Privacy and Power*, *supra* note 3, at 1398 (arguing that problems with mass data collection are best captured by "Franz Kafka's depiction of bureaucracy in *The Trial*—a more thoughtless [than Big Brother] process of bureaucratic indifference, arbitrary errors, and dehumanization, a world where people feel powerless and vulnerable...").

391. Kaplan, *supra* note 2 ("The battle of the metaphors is much more than a literary parlor game . . . . The way a problem is framed determines its solution . . . . The right metaphor is a necessary ingredient to good legislation.").

given the overwhelming frequency with which it occurs on the internet and social media. The right of publicity's transferability is a problem in this regard, as is the questionable level of consent needed for its alienation from identity holders. Hence this Article's proposal of publicity policies analogous to privacy policies.

The conceptualization of online publicity licenses as a "pleasurable servitude" underscores the perniciousness of such agreements on an individual's right to publicity. Seen through the lens of *Brave New World*, the right of publicity is not only a First Amendment problem as in the case of celebrity publicity but also a consent dilemma for ordinary citizens in the social media context. The pleasurable servitude involves technological manipulation, social conditioning, human commodification, and ultimately the loss of identity rights at the hands of online social media platforms, who operate as powerful quasi-governments. Increasingly, though, we find such servitude delightful, which is just the sort of dystopian nightmare Huxley warned against in *Brave New World*.