Within the Labyrinth of the Law

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Date : May 1, 2020

Robert C. Post and Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 **Yale L. J.** __ (forthcoming, 2020), available at SSRN.

"*It only takes two facing mirrors to build a labyrinth.*" – J.L.Borges

A labyrinth has no easily discernible path. It leads to frustration and wasted time on the part of the uninitiated, who find themselves foiled by twists, turns, and blocked escapes. We easily imagine the bellowing roars of frustration of the mythological beast, the Minotaur, trapped in his unlighted labyrinth on the Isle of Crete. When we encounter a labyrinth, what we need is a guide to lead us from frustration with the task to a possible solution. An image comes to mind of Ariadne, daughter of the King of Minos, who provided the knowledge and the tools to allow the (admittedly ungrateful) Theseus to escape the maze.

Professors Robert C. Post and Jennifer E. Rothman provide both guidance and solution to a labyrinthine problem in their forthcoming article, *The First Amendment and the Right(s) of Publicity*. That problem, as suggested by the article's title, is accommodating the interests protected by the right of publicity with those protected by the First Amendment. Post and Rothman traverse the labyrinth created by existing doctrine from two directions. First, they clarify the varied and distinct interests that the right of publicity protects, or ideally should protect. If this were the article's only contribution, it would be a tremendously valuable one, and judges and lawyers willing to accept their guidance could begin to construct coherent doctrine. But their second contribution is to point away from the "sea of inconsistent, vague, and unhelpful First Amendment tests" cluttering current doctrine toward more stable yet nuanced analysis. (P. 29.) Along the way, they even propose four new torts, and what's not to love about new torts?

As Post and Rothman persuasively demonstrate, much of the problem with the right of publicity is that the doctrine has focused on defendants' conduct (namely, the appropriation or use of a name or likeness) rather than the harm or harms the tort is meant to remedy. (P. 2.) They seek to solve this problem by teasing from the caselaw the numerous distinct interests the right is designed to protect.

Post and Rothman show that that there is not one right of publicity but four. (P. 5.) The first right the tort attempts to vindicate is the right of performance. The right of performance is violated "when a defendant uses the performance of another without consent." (P. 8.) This right was at issue in the Supreme Court's only right of publicity decision, *Zacchini v. Scripps-Howard Broadcasting*, which involved the broadcast of the entire act of a human cannonball. What the Court's decision in *Zacchini* protected, at least according to Post and Rothman, was not Mr. Zacchini's identity but his performance—"a discrete set of acts in space and time." (P. 12.) Protecting performances protects an interest akin to copyright and "encourage[s] the creation of unfixed performances that may not be copyrightable." (P. 12.)

The second interest the right of publicity vindicates is the right of commercial value. This right allows individuals to reap commercial or market value from their identity. (P. 17.) In describing this right, Post and Rothman are careful to disclaim the proposition that the interest protected is "a generalized property right in the commercial value of one's identity." (P. 18.) Instead, they identify three concerns underpinning cases involving rights of commercial value. One concern, which they denominate "confusion," arises when the use of a plaintiff's name or likeness creates confusion about his participation with or sponsorship of the defendant or the defendant's products or services. (P. 19.) A second concern is diminishment, namely that the defendant's use of plaintiff's likeness or identity in a commercial context will lessen its market value. (P. 20.) The final concern is unjust enrichment, which occurs when a defendant uses the

plaintiff's identity for advertising or marketing goods and services without compensation or consent.

The third interest the right of publicity tort advances is the right of control, which gives people "a general right to control how others use their identity." (P. 22.) This right is "oriented toward the protection of personality rather than market damages." (P. 22.) It encompasses a "right of informational self-determination," a right especially likely to conflict with First Amendment interests in the free flow of information. (Pp. 21-22.)

The fourth interest implicated by the right of publicity is the right of dignity. (P. 22.) Portrayal of individuals in ways that cause them shame and humiliation threatens the integrity of their identities as persons worthy of respect within their communities, at least when these portrayals are highly offensive to reasonable people. A musician who has a song used for a political campaign without consent may experience this as a dignitary harm, as may the people whose arrest photos are posted on mugshots.com. Again, this dignitary interest is especially likely to collide with First Amendment interests, which is why Post and Rothman insist that the specification of interests involved in a particular tort action must come before decisionmakers begin the process of weighing that interest against any asserted First Amendment interest.

In fact, in a bold nod to legendary legal scholar William Prosser's four-fold division of the right to privacy into distinct torts, they convincingly argue that the right of publicity—one of Prosser's original four—should itself be divided into four distinct torts. (P. 4.) Recognition of these four torts would help diminish doctrinal inconsistencies and add precision to First Amendment analysis, thereby reducing the chill that current doctrine imposes on free expression.

Even so, this step is insufficient, standing alone, to properly resolve conflicts between the *rights* of publicity they propose and the First Amendment, because it ignores the First Amendment side of the balance. On that side, Post and Rothman contend that proper analysis requires consideration of the contexts in which appropriations of identity occur. First Amendment interests are at their zenith when appropriation occurs in public discourse, at their midpoint when they occur in commercial speech, and at their nadir when a plaintiff's name or likeness is used in or on commodities. (P. 32.) Although the determination of the context in which a defendant is using a plaintiff's name or likeness is sometimes difficult, this determination must be the starting point of accurate First Amendment analysis.

Although these categories of contexts seem to suggest an ad-hoc balancing of tort and First Amendment interests, Post and Rothman map the broad outlines of what the balance would look like with regard to each of the four torts they propose, leaving the details to future scholarship. For example, Post and Rothman contend that the similarity of the right of performance to copyright suggests the proper shape of its constitutional analysis and that copyright's protections for free expression, such as the doctrine of fair use, should be imported into the right of performance.

The balance tilts quite differently in the case of the publicity rights more oriented toward redressing emotional harms—namely, the rights of control and dignity. For these torts, pinpointing the context of the appropriation is especially crucial. If the appropriation occurs within the sphere of public discourse, the scope of the rights of control and dignity is narrow because the First Amendment demands that the public remain free "to form its own judgments based on publicly available information." (P. 63.) In addition, the First Amendment typically does not allow plaintiffs to recover for dignitary harms based on the publication of truthful information in public discourse unless they can prove fault of the defendant. Analogizing to existing First Amendment precedents, Post and Rothman suggest that the First Amendment should permit redress of harms flowing from use of one's name or likeness in public discourse only when the defendant knowingly or recklessly disregarded that such use would mislead the public about the plaintiff's participation in or endorsement of the use. Presumably, the authors would apply this standard regardless of the plaintiff's status as a public or private figure, because to do otherwise would import into this troubled tort all the complications of another troubled tort, namely, defamation law.

A brief review, such as this one, can only hint at the many fruitful journeys scholars can take along the path marked by Post and Rothman. I look forward to the flowering of the new torts they have outlined, complete with elements fleshed out to protect the interests they have identified without comprising free expression.

Cite as: Lyrissa B. Lidsky, *Within the Labyrinth of the Law*, JOTWELL (May 1, 2020) (reviewing Robert C. Post and Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 **Yale L. J.** __ (forthcoming, 2020), available at SSRN), https://conlaw.jotwell.com/within-the-labyrinth-of-the-law/.