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## Shockingly Evil: The Cruel Invasive Appropriation and Exploitation of Victims' Rights of Publicity in the True Crime Genre

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## Shockingly Evil: The Cruel Invasive Appropriation and Exploitation of Victims' Rights of Publicity in the True Crime Genre

### Cover Page Footnote

J.D. Candidate, 2021, University of Georgia School of Law.

**SHOCKINGLY EVIL: THE CRUEL INVASIVE  
APPROPRIATION AND EXPLOITATION OF  
VICTIMS' RIGHTS OF PUBLICITY IN THE TRUE  
CRIME GENRE**

*Ashton Williams\**

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\*J.D. Candidate, 2021, University of Georgia School of Law.

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## I. INTRODUCTION

“We serial killers are your sons, we are your husbands, we are everywhere.”<sup>1</sup> Ted Bundy’s haunting words are more accurate than he could have known. Jeffrey Dahmer, Charles Manson, Dennis Radar (aka “BTK”), and John Wayne Gacy are a few of the many names that elicit nightmares and horror to essentially every American with access to media. Famous for their ghastly crimes, serial killers captivate the country with their terrible acts. What is more troubling, however, is that it seems as if, today, serial killers are everywhere in a way that Ted Bundy could not have anticipated. Not only are their crimes broadcast over the news throughout their violent killing sprees, the vicious murders are now often memorialized in the form of dramatic reenactments in the popular genre of “true crime”.

The “true crime” genre has expanded to virtually every medium; podcasts, television shows, movies, and more captivate audiences with scarily realistic representations of crimes. Directors and screenwriters often utilize the real names, images, and likeness of the killers, victims, investigators, lawyers, and family members involved without so much as a consultation to any of the individuals whose identities are being recreated. Thus, in most cases, true crime capitalizes on the exploitation of individuals’ personhood. This leads to the question of whether individuals portrayed or discussed in these reenactments should have their identity protected through right of publicity laws.

## II. BACKGROUND

## A. EXPLOSION OF THE TRUE CRIME GENRE

Americans have seemingly become obsessed with the infamous dramatizations of the country’s most notorious killers.<sup>2</sup> The growing popularity of the true crime genre has led to the creation of shows and movies such as *Mindhunter*,<sup>3</sup> *Extremely Wicked, Shockingly Evil and Vile*,<sup>4</sup> *The People v. O.J.*,<sup>5</sup> and *Making a*

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<sup>1</sup> Audrey Webster, *8 Twisted Confessions from Ted Bundy That Will Make Your Skin Crawl*, THE LINEUP (Jan. 30, 2019), <https://the-line-up.com/ted-bundy-twisted-confessions>.

<sup>2</sup> Kelly-Leigh Cooper, *Is our growing obsession with true crime a problem?* BBC NEWS (Apr. 1, 2019), <https://www.bbc.com/news/world-us-canada-47474996>.

<sup>3</sup> See *Mindhunter*, (Netflix broadcast Oct. 13, 2017), available at <https://www.netflix.com/watch/80226463?trackId=14277281&tctx=0%2C0%2C55d249c9-c9f9-4c5f-833a-3b7a829c45d3-103875782%2C%2C>.

<sup>4</sup> See *Extremely Wicked, Shockingly Evil and Vile*, (Netflix broadcast July 24, 2019), available at <https://www.netflix.com/watch/81028570?trackId=13752289&tctx=0%2C0%2C00db c4b-8af8-478e-8868-c10484878889-17021293%2C%2C&ad=true>.

<sup>5</sup> See *The People v. O.J. Simpson*, (Netflix broadcast 2016), <https://www.netflix.com/watch/80127673?trackId=13752289&tctx=0%2C0%2C752e03d7-0f42-4223-9db0-b8b30e6e96f7-319298354%2C%2C>.

*Murderer*.<sup>6</sup> Additionally, podcasts like *Serial*<sup>7</sup> and *Dr. Death*<sup>8</sup> capitalize on discussing the crimes and allegations against convicted killers. While many directors take creative liberties, it is quite common for shows to feature the real identities of not only the criminals, but also the victims, victims' family members, police officers, FBI agents, and lawyers associated with the crimes. Just as captivating as the gruesome deaths and killers are the law enforcement personnel tracking them down and the family members of victims grappling with the loss of loved ones.

The show *Mindhunter* follows the early stages of a team of FBI psychological profilers' investigation into what motivates a serial killer to commit his crimes.<sup>9</sup> The series is a dramatization of the real-life crimes that the behavioral analysis unit of the FBI worked to solve.<sup>10</sup> All characters are played by actors and the episodes are scripted, yet the victims' and killers' real names are used along with real-life events and details.<sup>11</sup> The actors and actresses also closely resemble their real-life counterparts.<sup>12</sup> Season two features the infamous Atlanta child murders from the late 1970's. Viewers sympathize with Camille Bell and Venus Taylor in their attempts to bring attention to the loss of their sons and other young murder victims plaguing Atlanta.<sup>13</sup> Both brave mothers are prominent characters in season two, yet neither of these real-life women were ever contacted by anyone connected with production of the show.<sup>14</sup> The two women's valiant efforts to find justice for their sons are utilized without ever giving consent to the show's use of their likeness.<sup>15</sup>

Audiences of *Extremely Wicked, Shockingly Evil and Vile* share in the torment of Ted Bundy's girlfriend, Elizabeth Kloepfer, as she discovers and grapples with

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<sup>6</sup> See *Making a Murderer*, (Netflix broadcast Dec. 18, 2015), <https://www.netflix.com/watch/80115431?trackId=13752289&tctx=0%2C0%2C94f5e0a0d8a497a4917095e3fac4fd9227c78fda%3Aabc231ced4ea9a532a9a303b321a99e62e8a93026%2C%2C>.

<sup>7</sup> See *Serial*, (Oct. 3, 2014), <https://serialpodcast.org/season-one>.

<sup>8</sup> See *Dr. Death*, WONDERY (Sep. 4, 2018), <https://wonderly.com/shows/dr-death/>.

<sup>9</sup> See Netflix, *Mindhunter*, NETFLIX (2019), <https://www.netflix.com/watch/80226463?trackId=14277281&tctx=0%2C0%2C55d249c9-c9f9-4c5f-833a-3b7a829c45d3-103875782%2C%2C>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Chloe Foussianes, *How the Mindhunter Cast Compares to the Real-Life People They're Based on*, Town & Country (Aug. 24, 2019), <https://www.townandcountrymag.com/leisure/arts-and-culture/g28751923/mindhunter-cast-real-life-comparison/>.

<sup>13</sup> See Matt Brennan, *With Atlanta child murders, 'Mindhunter' delves into its thorniest case yet*, LOS ANGELES TIMES (Aug. 16, 2016), [https://www.latimes.com/entertainment-arts/tv/story/2019-08-16/netflix-mindhunter-season-2-atlanta-child-murders?fbclid=IwAR3Ygk5RWy-vDiYwgegL6dBN1eh7y\\_AffDcpCLgqrLccpqOGgqO5\\_AnyYIg8](https://www.latimes.com/entertainment-arts/tv/story/2019-08-16/netflix-mindhunter-season-2-atlanta-child-murders?fbclid=IwAR3Ygk5RWy-vDiYwgegL6dBN1eh7y_AffDcpCLgqrLccpqOGgqO5_AnyYIg8).

<sup>14</sup> *Id.* ("Netflix confirmed to the [Los Angeles] Times that the victims' families were not contacted about the Atlanta killings' prominent role in Season 2 of 'Mindhunter,' including two of the stricken women Ford meets during his introduction of the case: Camille Bell, mother of 9-year-old Yusuf Bell, found dead in 1979; and Venus Taylor, mother of 12-year-old Angel Lenair, found dead in 1980.")

<sup>15</sup> *Id.*

the double life he leads.<sup>16</sup> Kloepfer wrote about her time with Bundy under the pseudonym “Elizabeth Kendall.”<sup>17</sup> The tale of Bundy’s crimes through Kloepfer’s point of view is a rare instance in which the story is based off of Kloepfer’s memoir: *The Phantom Prince: My Life with Ted Bundy*.<sup>18</sup> Kloepfer was consulted and included throughout the production of the film.<sup>19</sup> At first, however, Kloepfer wasn’t going to be included with production.<sup>20</sup> It was only after her lawyers got involved that she was given the opportunity to tell her story for the first time on film.<sup>21</sup> In an interview, Kloepfer recalled:

“They were telling my story about Ted Bundy, and they had never contacted me,” Kendall told *Vanity Fair* on Thursday morning in a rare interview. Kendall turned the matter over to her attorneys, then tried to steel herself—as she had multiple times before, whenever pop culture turned its obsessive eye back to Bundy. She thought, Oh, no, here we go again, and returned to counseling. “I knew it was going to be hard,” she said. “I was just appalled that this was going to start up again.”<sup>22</sup>

The film captures the real events surrounding Bundy’s arrest and trials complete with actors portraying his wife, lawyers, and victims.<sup>23</sup> Zac Efron and Lily Collins, playing Bundy and Kloepfer respectively, bring the terrifying tale to life. But it is important to note that while Kendall was consulted about the film’s use of her life story and likeness, there is no indication that any of the victims’ family members were consulted about the film’s use of their loved ones’ names and likenesses. Moreover, Judge Cowart, who sentenced Ted Bundy, is also portrayed in the film by John Malkovich despite the fact that he died in 1987 and therefore could not consent to the use of his likeness. In fact, the inspiration for the movie title comes from his admonition of Bundy at the end of his trial.<sup>24</sup> In his closing

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<sup>16</sup> See *Extremely Wicked*, *supra* note 4.

<sup>17</sup> Marco Margaritoff, *Elizabeth Kloepfer Was Ted Bundy’s Girlfriend – While His Murder Spree Was Unfolding*, ATI (May 6, 2019), <https://allthatsinteresting.com/elizabeth-kloepfer-kendall-ted-bundy-girlfriend>.

<sup>18</sup> *Id.*

<sup>19</sup> Julie Miller, *Inside Ted Bundy’s Real-Life Relationship with Elizabeth Kloepfer*, VANITY FAIR (May 3, 2019), <https://www.vanityfair.com/hollywood/2019/05/ted-bundy-movie-girlfriend-elizabeth-kloepfer-confession>.

<sup>20</sup> Julie Miller, *Ted Bundy’s Longtime Girlfriend Finally Speaks, and Finds (Some) Relief*, VANITY FAIR (Jan. 31, 2020), <https://www.vanityfair.com/hollywood/2020/01/ted-bundy-girlfriend-elizabeth-kendall-interview>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Margaritoff, *supra* note 17.

<sup>24</sup> Nicole Pomarico, *Extremely Wicked, Shockingly Evil & Vile’s Cast vs. Their Real Life Counterparts*, REFINERY 29 (2019), <https://www.refinery29.com/en-us/2019/05/231359/netflix-ted-bundy-biopic-cast-vs-real-people>.

statement, he said, “[t]he court finds that both of these killings were indeed heinous, atrocious and cruel and that they were *extremely wicked, shockingly evil, [vile]* and the product of design to inflict a high degree of pain and utter indifference to human life.”<sup>25</sup>

Other series, such as *The People v. O.J. Simpson*, memorialize the crimes of celebrities.<sup>26</sup> *The People v. O.J.* is one season of the franchise *American Crime Story*.<sup>27</sup> The season covers when Simpson was charged and tried for the murders of Nicole Brown and Ron Goldman. Both the Brown and Goldman families were altered forever by the loss of their loved ones. Viewers are not only captivated by Simpson but also by the dynamic prosecution and defense teams.<sup>28</sup> The victims’ families, the lawyers, the jurors, and Judge Ito also take prominent roles throughout. The reenactments of the real events are complete with the names and personal characteristics that captivated the nation during the actual trial. In the series, you can see actors portray both Brown and Goldman’s families as they endure the traumatizing events and lengthy trial. This is not the only time that directors have used the likeness of those involved with the murders. Victim Ron Goldman has his own Wikipedia page, complete with a separate tab titled “Portrayals”, where you can find a brief history of all the different films and reenactments of his death that have been created beyond just *The People v. O.J. Simpson*.<sup>29</sup>

Shows such as *Making a Murderer* and podcasts such as *Serial* and *Dr. Death* take a more direct approach to retelling crimes. Combining news footage with interviews of individuals involved, these series provide a critique of the crimes, sometimes even attempting to throw doubt onto convictions. While some who were directly involved in the horrific events are interviewed, the shows widely discuss all parties to the case, including anyone who refused to participate. The identities and actions of all involved are scrutinized for public entertainment, regardless of whether they consented to use of their identity.

There is a wide spectrum of appropriation of victims’ and third parties’ identity used in commercial recreations for entertainment. From dramatic portrayals by actors based upon the real-life killer crimes to docu-series evaluations and critiques of investigations, popular culture and media depict the crimes in a variety of ways. Regardless of the particular format a true crime series may take, many of these series often use names and identities without so much as a consultation or warning to those whose likeness and image they are appropriating.

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<sup>25</sup> *Id.*

<sup>26</sup> See *The People v. O.J. Simpson*, *supra* note 5.

<sup>27</sup> Ashley Ross, *Everything You Need to Know Before Watching The People v. O.J. Simpson*, TIME (Feb. 2, 2016), <https://time.com/4202124/oj-simpson-fox-people-v-oj-simpson/>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

## B. BEGINNINGS OF THE RIGHT OF PUBLICITY

In 1890, Samuel Warren and Louis Brandeis conceptualized the right to privacy in their famous law review article.<sup>30</sup> They recognized that the growth of society required a “protection of the person,” which should be found through “the right ‘to be let alone.’”<sup>31</sup> The right of privacy originated as an independent right designed to protect against theft of an individual’s personality.<sup>32</sup> Out of this initial right of privacy, courts went on to distinguish a related right of publicity. For example, in 1905, the Supreme Court of Georgia relied upon the right of privacy in *Pavesich v. New England Life Ins. Co.*<sup>33</sup> There, a private citizen brought suit against an insurance company for the unauthorized use of his image in one of their advertisements.<sup>34</sup> The court found in favor of Pavesich, the man whose likeness had been used, and held that there are inherent liberties to personhood and that he is entitled to choose the life and reputation he has.<sup>35</sup> The court further held that an individual retains a right “to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty.”<sup>36</sup> The recognition of inherent rights and liberties to personhood by courts eventually led to greater protections.

Over sixty years after the right to privacy was first recognized, the United States Court of Appeals for the Second Circuit was the first court to officially recognize the related “right of publicity.”<sup>37</sup> The court reasoned that there was inherent value derived from the identity of “prominent persons.”<sup>38</sup> They held that this value and personhood was legally protected in prior decisions under New York law.<sup>39</sup> The court found that the value in “exclusive privilege of publishing” and commercializing off an image needed to be protected by law.<sup>40</sup> The Supreme Court recognized the existence of the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>41</sup> The Court explained the rationale behind their decision by stating that “[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which

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<sup>30</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890) (“It is our purpose to consider whether the existing law affords a principle which can be invoked to protect the privacy of the individual.”).

<sup>31</sup> *Id.* at 195.

<sup>32</sup> *Id.* at 207.

<sup>33</sup> *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (1905).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 70.

<sup>36</sup> *Id.*

<sup>37</sup> *Haelen Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 869 (2d Cir. 1953) (recognizing that Baseball players had a “right of publicity” for use of their image in advertising).

<sup>38</sup> *Id.* at 868.

<sup>39</sup> *Id.* at 869.

<sup>40</sup> *Id.* at 868.

<sup>41</sup> *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

he would normally pay.”<sup>42</sup> The Court left the ability to protect the right of publicity to the states.<sup>43</sup>

### C. EVOLUTION OF THE RIGHT OF PUBLICITY

The right of publicity is now recognized in the Restatement 3d of Unfair Competition as the “[a]ppropriation of the Commercial Value of a Person’s Identity.”<sup>44</sup> Today, the right is conceptualized as “the value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade,” and the infringement on such a right can trigger liability.<sup>45</sup> The right is a property right that is freely assignable.<sup>46</sup> Early courts debated its transferability, but most courts today hold that the right to commercially exploit a person’s value is assignable.<sup>47</sup> This is different than the right of privacy which is a personal right.<sup>48</sup> The right of publicity is a state right, so it is not universally recognized. Thirteen states have adopted the right of publicity by statute, and many more recognize it by common law.<sup>49</sup> It is typically considered a tort right and relief can be found when there is “commercial exploitation of a person’s identity.”<sup>50</sup>

Courts give many rationales for protecting the right. Some courts want to incentivize individuals to invest time and labor into the creation of value of their image.<sup>51</sup> The Supreme Court of California, for example, has conceptualized the right as one that:

protects a form of intellectual property that society deems to have some social utility. Often considerable money, time and energy are needed to develop one’s prominence in a particular field. Years of labor may be required before one’s skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return.<sup>52</sup>

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<sup>42</sup> *Id.* at 576.

<sup>43</sup> *Id.* at 578.

<sup>44</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW. INST. 1995).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at cmt. g.

<sup>47</sup> *Id.*

<sup>48</sup> Stephen R. Fowler, *Taking a Bite Out of Michael Vick’s Publicity Rights: An Analysis of How the Right of Publicity Should be Treated after a Celebrity is Convicted of a Crime*, 16 J. INTELL. PROP. L. 109, 114 (2008).

<sup>49</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. i (AM. LAW. INST. 1995).

<sup>50</sup> *Id.* at cmt. a.

<sup>51</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

<sup>52</sup> *Id.* (internal quotations omitted).

Others believe in a more philosophical approach that “[f]reedom is an innate right” in and of itself as a human being.<sup>53</sup>

The right greatly varies from state to state. Not only have the number of states which recognize the right of publicity expanded, the right itself has also expanded.<sup>54</sup> For example, the right to publicity has been found to be descendible in many states, including Tennessee.<sup>55</sup> The Court of Appeals in Tennessee found that a celebrity’s right to control their name and image is descendible because of a recognition that “as an intangible property right in life, it is no less a property right at death.”<sup>56</sup> The court found that the value of the right, the ability to control it to the exclusion of others, and the fact that the right can be the subject of a contract were compelling evidence to protect it.<sup>57</sup> While not all the states or circuits agree, Tennessee courts defined the right to be able to pass on at death.

#### D. FIRST AMENDMENT AND THE RIGHT OF PUBLICITY

The First Amendment of the U.S. Constitution guarantees freedom of speech and the press to all citizens.<sup>58</sup> This is at tension with the protections that come from recognizing a property right in name and personhood. The First Amendment does not give complete protection to all speech though.<sup>59</sup> The right of publicity is interpreted differently in each state, but there are some common distinctions between types of public information which are commonly not covered by First Amendment protection.<sup>60</sup> For example, noncommercial speech is often protected and thus may be used without restriction.<sup>61</sup> Examples of noncommercial speech would be news stories.<sup>62</sup> News stories that report on local crimes and murders are of public concern and have very few limitations.<sup>63</sup> Yet, even news stories may be subject to lawsuits in some circumstances. This limitation on news stories is applicable only when the story is covering some type of creative work. For example, if a news station attempts to show an entire unedited performance

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<sup>53</sup> Alice Haemmerli, *Whose who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 414 (1999).

<sup>54</sup> *See* State ex rel. Elvis Presley Int’l Mem’l Found. v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

<sup>55</sup> *See id.* at 97-98 (“If a celebrity’s right of publicity is treated as an intangible property right in life, it is no less a property right at death.”).

<sup>56</sup> *Id.* at 98.

<sup>57</sup> *Id.* at 97.

<sup>58</sup> U.S. CONST. amend. I.

<sup>59</sup> Tara E. Langvardt, *Reinforcing the Commercial-Noncommercial Distinction: A Framework for Accommodating First Amendment Interests in the Right of Publicity*, 13 VA. SPORTS & ENT. L.J. 167, 174 (2014).

<sup>60</sup> *Id.* (“[T]he three types of speech are noncommercial, nonmisleading commercial and misleading commercial speech.”).

<sup>61</sup> *Id.* at 168.

<sup>62</sup> *Id.* at 177.

<sup>63</sup> Langvardt, *supra* note 59, at 175.

of a human cannonball act, this would likely be unprotected under the First Amendment despite being noncommercial speech.<sup>64</sup>

Similarly, if a person's identity has been creatively adapted in some way, then some courts will allow it to be utilized without violating their right to publicity.<sup>65</sup> In *ETW Corp. v. Jireh Publishing*, the U.S. District Court for the Northern District of Ohio granted summary judgment to an artist for his painting of Tiger Woods.<sup>66</sup> The court held that due to the creative interpretation given to Tiger by the artist in the painting, there was no violation of Tiger's right of publicity.<sup>67</sup>

#### E. SON OF SAM LAWS

"Son of Sam" laws are state laws which generally prohibit criminals from profiting from their crimes.<sup>68</sup> The name "Son of Sam" comes from David Berkowitz, a serial killer in New York City during the late 1970s.<sup>69</sup> He murdered six people within the span of a year and terrorized the city.<sup>70</sup> During this time, Berkowitz sent several notes to law enforcement, teasing them about not being able to catch him.<sup>71</sup> In his letters, he would refer to himself as the "Son of Sam".<sup>72</sup> His impact and widespread news coverage led "[t]he New York legislature [to] preemptively [push] for a law that prevented criminals from monetizing their crimes by selling their stories – the country's first so-called Son of Sam law."<sup>73</sup> Other states have also followed suit by enacting their own versions.<sup>74</sup>

The "Son of Sam" laws passed in several state legislatures created First Amendment controversies since they were taking away criminals' constitutional free speech rights.<sup>75</sup> The laws were enacted so that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found

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<sup>64</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

<sup>65</sup> *ETW Corp. v. Jireh Publ'g, Inc.*, 99 F.Supp. 2d 829, 836 (N.D. Ohio 2000) (holding that "an artistic creation seeking to express a message" is not subject to right of publicity claims from the subject of the artwork).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Orly Nosrati, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?*, 20 WHITTIER L. REV. 949, 950 (1999).

<sup>69</sup> Cady Drell, *How Son of Sam Changed America*, ROLLING STONE (July 29, 2016), <https://www.rollingstone.com/culture/culture-features/how-son-of-sam-changed-america-118562/>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> DAVID BERKOWITZ | SON OF SAM KILLER, CRIME MUSEUM, <https://www.crimemuseum.org/crime-library/serial-killers/david-berkowitz/> (last visited Apr. 7, 2020).

<sup>73</sup> Drell, *supra* note 69.

<sup>74</sup> Toni Messina, *Crime That Might Pay*, ABOVE THE LAW (July 10, 2017), <https://abovethelaw.com/2017/07/crime-that-might-pay/>.

<sup>75</sup> *Id.*

any claim upon his own iniquity, or to acquire property by his own crime".<sup>76</sup> In 1991, the Supreme Court addressed the constitutionality of the laws in *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*<sup>77</sup> This case involved the specific New York law that had been enacted after Berkowitz tried to profit off the rights to his story.<sup>78</sup> The New York law required that any individual who was either convicted or accused of a crime to submit contracts to the special Victim Board, as well as turn over all profits the criminals made from the crime.<sup>79</sup> Justice O'Connor's majority opinion found the law unconstitutional, and held that in order to comply with the First Amendment, if a state plans to take away anyone's freedom of speech, there must be a compelling state interest and the law must be narrowly tailored to advance that interest.<sup>80</sup> For the law at issue in the case, the interest was compelling but the law was not narrow enough.<sup>81</sup> The Court found the law overinclusive because "the statute applies to work on *any* subject. . . however tangentially or incidentally."<sup>82</sup> They also noted that the definition of those who the law applied to was able to include those not actually convicted of crimes.<sup>83</sup> At the end of *Simon*, the Court noted that other similar state laws may in fact be constitutional if not as broad as the New York law.<sup>84</sup>

The Supreme Court's decision in *Simon* guided states in the adoption, or later modification, of their laws.<sup>85</sup> Even though the New York law was struck down, many other states have held their versions of laws upheld. In fact, several states currently have similar laws which prevent criminals from being able to profit off their crimes.<sup>86</sup> Criminals are therefore unable to use their image and story in order to benefit themselves in most states. This is an ever-changing area of law where the laws' constitutionality is continually questioned.<sup>87</sup>

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<sup>76</sup> *Riggs v. Palmer*, 22 N.E. 188, 193 (N.Y. 1889).

<sup>77</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991).

<sup>78</sup> *Id.* at 109.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 123.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 121.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 123.

<sup>85</sup> Orly Nosrati, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?* 20 WHITTIER L. REV. 949, 962 (1999) ("New York's Son of Sam law served as the model for many other states. Thus, the Supreme Court's ruling in *Simon & Schuster* significantly impacted nationwide legislation.").

<sup>86</sup> *Id.*

<sup>87</sup> Messina, *supra* note 74 ("Some 40 states and the federal government have similar or more severe restrictions.").

## F. CELEBRITY CRIMINALS

There is an important distinction to make between normal criminals and celebrity criminals. Some criminals are famous because of their crimes (i.e. Ted Bundy) while other criminals, or alleged criminals, were celebrities before they committed crimes (i.e. O.J. Simpson). The right of publicity was designed to protect celebrities such as Simpson. Simpson was not a normal citizen, but had previously acquired fame and notoriety in his image, which is what right of publicity laws seek to protect. The status of his rights becomes complicated by the alleged commission of a crime. His trial was nationally publicized, and in the wake of his acquittal, he attempted to obtain book and television deals.<sup>88</sup> The father of one of Simpson's victims brought suit to obtain Simpson's right of publicity in order to pay Simpson's wrongful death judgment at the close of his civil trial.<sup>89</sup> There is something inherently unique to each person, and, in this context, Simpson had worked to achieve fame in his life prior to the alleged crimes. This is in contrast to serial killers, such as Ted Bundy, who are only known because of the heinous nature of their crimes. There is undoubtedly value in the identities of both Simpson and Bundy, but courts looking to how laws will incentivize conduct could rule very differently on their respective rights based on the way the two types of criminals or alleged criminals achieved their initial fame.

## G. ACCIDENTAL CELEBRITIES

Originally, the cases surrounding the right of publicity originated from celebrities attempting to protect their image.<sup>90</sup> Some courts have previously insinuated that the right is exclusive to individuals who have attained celebrity status in protecting their image.<sup>91</sup> However, many courts now recognize that the appropriation of anyone's image for commercial use can violate the right of publicity.<sup>92</sup> For example, the Superior Court of New Jersey, Law Division, held that all people, regardless of celebrity status, inherently have a property right protected by right of publicity.<sup>93</sup> The court found that "plaintiffs' names and likenesses belong to them. As such they are property. They are things of value."<sup>94</sup> The right does

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<sup>88</sup> Laura Hock, *What's in a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities*, 35 PEPP. L. REV. 347, 348 (2008).

<sup>89</sup> *Id.* at 353.

<sup>90</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b,d (AM. LAW. INST. 1995).

<sup>91</sup> *See* *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978) (holding that the "right of publicity is usually asserted only if the plaintiff has 'achieved in some degree a celebrated status'"(quoting *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 847 (S.D.N.Y. 1975)).

<sup>92</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d. (AM. LAW INST. 1995).

<sup>93</sup> *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 75 (N.J. Super. Ct. Law. Div. 1967) ("[I]t seems to us that however little or much plaintiff's likeness and name may be worth, defendant, who has appropriated them for his commercial benefit, should be made to pay for what he has taken. . .").

<sup>94</sup> *Id.* at 76.

not, in the court's opinion, rely upon any fame of the person.<sup>95</sup> The only time where the relative fame would be considered would be in the calculation of damages.<sup>96</sup> The Restatement 3d of Unfair Competition states that “[n]on-celebrities should be permitted to recover upon proof that the appropriated identity possessed commercial value.”<sup>97</sup> Many courts utilize this approach. They follow the Kantian perspective of the right of publicity that it is an “autonomy-based property right.”<sup>98</sup> As such, some courts and the Restatement consider that any and all citizens have ownership over their image rights and retain the rights to commercially exploit it.<sup>99</sup>

Many household names today are not celebrities in the traditional sense. With the widespread use of modern technology and media, it is even easier for news of individuals to spread. Sometimes, people are not at all attempting to achieve notoriety and yet they do anyways. For example, most Americans could tell you who Monica Lewinsky is despite the fact that she was not a celebrity in the traditional sense. Lewinsky did not seek the spotlight at all. In fact, she likely would have preferred to keep her identity unknown. Regardless, the newsworthiness of her affair with former President Bill Clinton has made her a household name.<sup>100</sup> While the initial public interest surrounding her affair sufficiently allowed news reports to use her name and image, she has lived on in infamy as an “accidental celebrity”. Accidental celebrities are individuals who have not sought out or worked for fame but for some reason have achieved notoriety anyway. Even though criminals and their victims were never celebrities in the traditional sense, they have nevertheless achieved notoriety. As individual citizens, they should have an inherent right of personhood under this perspective.

#### H. LIBEL VS DEFAMATION VS RIGHT OF PUBLICITY

It is important to note that there are different remedies available to individuals who have had their identity used commercially without consent. Scholars Warren and Brandeis distinguish a cause of action for defamation or libel as something inherently different from the rights of privacy and publicity.<sup>101</sup> The

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 350 (holding that the distinction between public figures and private individuals is only relevant to the question of damages in determining a right of publicity).

<sup>97</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d. (AM. LAW INST. 1995).

<sup>98</sup> Alice Haemmerli, *Whose who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 386 (1999).

<sup>99</sup> Yvette Joy Liebesman, *When Selling Your Personal Name Mark Extends to Selling your Soul*, 83 TEMP. L. REV. 1, 14. (2010) (“Today, under section 46 of the Restatement, there are no boundaries or requirements as to the famousness or lack thereof of the person who wishes to exercise their right to exploit the commercial value of their identity.”).

<sup>100</sup> *Monica Lewinsky*, BIOGRAPHY, <https://www.biography.com/personality/monica-lewinsky> (last visited April 7, 2020).

<sup>101</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).

former are characterized as “injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows.”<sup>102</sup> Rights of privacy and publicity are alternatively concerned with personhood or to phrase it another way, the “unwarranted violation of the ‘honor’ of another.”<sup>103</sup> Defamation is meant to protect against attacks to reputation.<sup>104</sup> It protects against false statements being made about a person’s reputation.<sup>105</sup> Libel is a similar protection from defamatory statements.<sup>106</sup> Violations of the right of publicity do not rely upon any false or negative statements. Rather, any depiction, positive or negative, without consent of the individual whose likeness is being used constitutes a violation.

### III. ANALYSIS

All states should recognize a uniform right of publicity which protects victims’ and victims’ family members’ rights in true crime media. The creation of such a universal right will help to prevent further suffering upon those who have already experienced unbelievable trauma. The huge rise in popularity of the true crime genre has left many individuals who suffered at the hands of killers and criminals without any sort of remedy to prevent the commercialization of the tales of the fates of themselves or their loved ones. Despite protestations and outcries from family members grieving their loss and requesting privacy, television series, movies, and podcasts realistically recreate the horrors of the crimes unabashed. While the directors, producers, and actors reap profits, the real victims are left reliving their most painful moments and watching their stories publicized and retold for the world to watch.

The right of publicity is a relatively new right to compensate for the ever-challenging technological innovations which create new avenues for violation of individuals’ rights which simply could not have previously been conceived of. For example, the ability of true crime to create more accurate representations of real events is more advanced than ever. Additionally, the popularity of the genre has sky-rocketed and led to a development of the variety within the genre.<sup>107</sup> There should be a universally recognized right of publicity in place to protect victims’ rights regarding their depiction in true crime portrayals.

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 198.

<sup>104</sup> RESTATEMENT (SECOND) OF TORTS § 580B (AM. LAW INST. 1977).

<sup>105</sup> *Id.*

<sup>106</sup> RESTATEMENT (SECOND) OF TORTS § 568 (AM. LAW INST. 1977).

<sup>107</sup> Eddie Mullan, *How we got hooked on grisly true crime*, BBC CULTURE (Dec. 6, 2018), <http://www.bbc.com/culture/story/20181205-how-we-got-hooked-on-grisly-true-crime>.

## A. CALIFORNIA'S RIGHT OF PUBLICITY LAWS

California is unsurprisingly one of the few states which has a history of recognizing the right of publicity. Since state law defines the right of publicity, California law guides the creation of true crime productions in Hollywood. It has protections for the right of publicity under both statute and common law.<sup>108</sup> Common law requires that a plaintiff show: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”<sup>109</sup> Additionally, California Civil Code Section 3344 provides for remedies when “[a]ny person . . . knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, goods, . . . without such person’s prior consent”<sup>110</sup> and makes the perpetrator “liable for any damages sustained by the person or persons injured.” The statute requires that the use be for a commercial purpose, in contrast to the common law.<sup>111</sup>

There are special protections in place for “expressive works.”<sup>112</sup> The First Amendment protects expressive works where the work has transformative elements or “the value of the work does not derive primarily from the celebrity’s fame.”<sup>113</sup> Under this standard, the first portion of the test requires that in order for a work to be permissible, it must be valuable due to significant creative transformation of a person’s identity within the work.<sup>114</sup> Otherwise, under the second portion of the test, if there is no significant change in the expression of a person’s identity, then the value of the work cannot be derived from the use of the person’s identity.<sup>115</sup> If the work fails to meet either of these categories, then this is an impermissible violation of a person’s right to publicity.<sup>116</sup>

In a recent California Court of Appeals decision, the court held that the right of publicity of a secondary character (Olivia de Havilland) in a docudrama was not violated.<sup>117</sup> The court discussed the First Amendment protections which generally allow filmmakers a lot of latitude in their works so long as they are transformative.<sup>118</sup> Although the court noted that there was “nothing transformative about the docudrama. . . even if [FX] imagined conversations for the sake

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<sup>108</sup> *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001).

<sup>109</sup> *Id.* at 1001 (quoting *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 415, 198 Cal. Rptr. 342 (Ct. App. 1983)).

<sup>110</sup> CAL. CIV. CODE § 3344(a) (West 2019).

<sup>111</sup> *Id.*

<sup>112</sup> *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010).

<sup>113</sup> *Id.* at 909 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018).

<sup>118</sup> *Id.* at 862.

of being creative,<sup>119</sup> that was not enough for de Havilland to prevail. The court held that de Havilland's right of publicity was not violated by the docudrama since her personhood constituted only a minor role, which meant viewers didn't tune in to see her.<sup>120</sup>

This leads one to wonder: what if the character who viewers tuned in to see claimed a violation? Yes, many true crime series are appealing due to the eccentric killers they depict. These killers, under many Son of Sam laws, indisputably do not have rights to their image. But these killers would not be anything without their victims. The victims are truly indispensable to these stories. Without the horrible acts and sufferers of the crimes, the killers would not have the notoriety that they do and no one would "tune in." Realistic depictions of these crimes, including the stories of the victims, are a large part of why anyone chooses to watch. There should be a viable claim of violation of any victims' rights of publicity when their image is appropriated for true crime stories.

In addition to creating an "expressive works" exception to the right of publicity, California has also given "news" First Amendment protection.<sup>121</sup> In a case filed in the U.S. District Court for the Central District of California, the court, applying California law, had to decide if a popular financial analyst's right of publicity was violated.<sup>122</sup> The author of a book had featured a profile of the analyst in a chapter of the novel.<sup>123</sup> California established that "a public figure who is the target of 'news' or material of public concern may state a claim under California's right of publicity statute only if he or she alleges that the defendant published the news with knowledge of its falsity or in reckless disregard of the truth."<sup>124</sup> The law and rationale assume that the protections will apply to "public figures" only. The laws were neither enacted nor have they been litigated for the rights of "accidental celebrities", whose likeness is utilized for profit.

Crime victims are often forcibly thrust into the spotlight. These are not individuals who want attention and to profit off of their likeness. They want the privacy protection of the right of publicity inherent in their personhood. There is a lack of protection covering victims' rights of publicity in California. As a leading state for media production, California needs to adopt a more effective and enforceable right of publicity. The new evolution of technology and true crime necessitates an expansion of the recognized rights.

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<sup>119</sup> *Id.* at 863.

<sup>120</sup> *Id.* at 864. ("While viewers may have 'tuned in' to see these actors and watch this Hollywood tale, there is no evidence that de Havilland as a character was a significant draw.")

<sup>121</sup> *William O'Neil & Co. v. Validea.com, Inc.*, 202 F. Supp. 2d 1113, 1118 (C.D. Cal. 2002).

<sup>122</sup> *Id.* at 1115.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1118.

## B. NEW JERSEY'S PROGRESSIVE APPROACH

The state with perhaps the most robust right of publicity is New Jersey. New Jersey's common law right of publicity allows "an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for commercial benefit."<sup>125</sup> The state has broadly recognized the right of publicity and permitted the right of publicity to protect against "unauthorized use of the name or likeness of a famous entertainer, who is deceased, in connection with an imitation for commercial benefit of a performance of that famous entertainer."<sup>126</sup> Courts permit widows and beneficiaries to prohibit publication of television series that use their loved ones' identities.<sup>127</sup> The families are therefore able to enforce the deceased's rights of publicity.<sup>128</sup> New Jersey defines the right to include protection against theatrical performances that profit primarily based off of the fame or notoriety of the real-life individuals who are depicted in the dramatizations.<sup>129</sup> This greater protection is important to protect the inherent personhood value, which many directors and producers seek to exploit. By broadening the scope of the works protected under right of publicity laws, the state of New Jersey is also increasing protections afforded to those whose identity is being appropriated.

The United States District Court for the District of New Jersey grappled with the balancing of First Amendment rights in the context of the right of publicity in *Estate of Elvis Presley*.<sup>130</sup> Elvis Presley's estate brought suit to claim their right to commercially exploit the image of Elvis against a theatrical performance which featured a performance that intentionally greatly mimicked the iconic singer.<sup>131</sup> The court adopted the following test:

If the portrayal mainly serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing the free expression of creative talent which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability. If,

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<sup>125</sup> *McFarland v. Miller*, 14 F.3d 912, 918 (3d Cir. 1994).

<sup>126</sup> *Estate of Elvis Presley v. Russen*, 513 F.Supp. 1339, 1360 (D.N.J. 1981).

<sup>127</sup> *Id.* (refencing *Price v. Worldvision Enterprises, Inc.*, 455 F.Supp. 252 (S.D.N.Y. 1978), *aff'd without opinion*, 603 F.2d 214 (2nd Cir. 1979)).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1356.

<sup>131</sup> *Id.* at 1348 ("THE BIG EL SHOW is a stage production patterned after an actual Elvis Presley stage show, albeit on a lesser scale, and featuring an individual who impersonates the late Elvis Presley by performing in the style of Presley.").

however, the portrayal functions primarily as a means of commercial exploitation, such immunity will not be granted.<sup>132</sup>

When deciding where dramatizations of famous individuals in theatrical performances fall on this spectrum, the court focused on whether the performance was “primarily as a commercial appropriation . . . of the famous entertainer’s likeness or as a valuable contribution of information or culture.”<sup>133</sup> The court found that the use of Elvis’s image in this manner violated the right of publicity.<sup>134</sup> The court found there was limited informational value, but rather, the purpose of the production was to make money from appropriating Elvis’s likeness.<sup>135</sup>

True crime reenactments function similarly to the Elvis impersonations. There is no additional information or news information being disseminated. Rather, directors and producers in the true crime genre hope to attract attention to their series based on the notoriety and accuracy of recreating the recognized names of killers and their victims. In essence, they are hoping to exploit the identities to generate commercial benefit. The Elvis protection rationale is similar to the school of thought behind the right of publicity that states protection should be afforded to an identity based upon the labor of building monetary value in a person. Protection of likeness should apply regardless of the rationale behind the right of publicity.

The Chancery Division of the New Jersey Superior Court has held that the validity of right of publicity claims does not rest upon whether an individual is currently hoping to commercialize their image.<sup>136</sup> Similarly, the right does not turn about competing commercialization. The right exists regardless. The court held that “[i]t is unfair that one should be permitted to commercialize or exploit or capitalize upon another’s name, reputation or accomplishments merely because the owner’s accomplishments [or name] have been highly publicized.”<sup>137</sup> The court recognized and emphasized the unfairness of permitting individuals to capitalize off the names of another.

While the factors motivating protection of Elvis center around his contributions to society, there are equally powerful rationales for protection of accidentally famous individuals as well. The law is largely constructed to advance societal interests and protect against individual injuries and harms. When murder victims and their families are dramatized without permission, movies, shows, and podcasts are profiting off of the suffering of others. Not only are they literally

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<sup>132</sup> *Id.* at 1356.

<sup>133</sup> *Id.* at 1359.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967). (“[Individuals] may not all desire to capitalize upon their names in the commercial field, beyond or apart from that in which they have reached their known excellence. However, because they presently do not should not be justification for others to do so because of the void.”).

<sup>137</sup> *Id.*

profiting off of re-creations of actual suffering, but they are profiting from incurring further emotional injury to families. By not providing any remedies to the injured parties, the laws allow directors to take advantage of the free use of private citizens' image. New Jersey's progressive interpretation of the right of publicity should be even further expanded and implemented by all states in order to provide a much-needed remedy for crime victims who are left suffering.

### C. SOCIETAL INCENTIVES AND MORALITY

Son of Sam laws have been instated in large part to prevent criminals from profiting off of their crimes. The laws are enacted in order to combat any "gains" that criminals have from their crimes. As narcissists, some of these killers thrive off of attention and fame being brought to them.<sup>138</sup> Ted Bundy famously stated, in regard to the thrill of killing, that "[y]ou feel the last bit of breath leaving their body. You're looking into their eyes. A person in that situation is God."<sup>139</sup> It is reasonable that society would not want to further incentivize criminals that already think so highly of themselves from being able to further profit off of their fame and horrific crimes.

Directors and producers seize this opportunity to captivate the country with the tales of these crimes because the criminals themselves are incapable of profiting. Since criminals lose the rights to their image, there is no need for filmmakers or other content creators to get these criminals' permission. Unfortunately, under most of the current state laws, these content creators also do not necessarily need to get permission from the criminals' victims. This gap in protections is harmful. The murders and crimes depicted within the true crime genre are some of the most horrific events any person could ever experience. For a victim, or a victim's loved ones, to have to reexperience that trauma is unimaginable. What is worse, is that the appropriation and use of a deceased loved one's likeness to make profit is done without permission. The laws are constantly evolving in order to protect rights in contexts that could never have previously been perceived; this should happen here. It would have been near impossible for Samuel Warren and Louis Brandeis to construct privacy rights in the 19<sup>th</sup> Century as needing to protect against televised recreations of crimes.<sup>140</sup> As more avenues of media arise, there is a need for expansions of essential rights to cover new injuries.

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<sup>138</sup> Sam Vaknin, *The Psychology of Serial and Mass Killers*, Healthy Place, <https://www.healthy-place.com/personality-disorders/malignant-self-love/psychology-of-serial-and-mass-killers> (last visited Apr. 7, 2020).

<sup>139</sup> Richard Williams, *Becoming Ted Bundy: An Introspective Analysis*, MEDIUM (Jan. 17, 2017), <https://medium.com/@initforthechase81/becoming-ted-bundy-an-introspective-analysis-6e71b4a096be>.

<sup>140</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).

There is undoubtedly a spectrum of appropriation of individuals' personhood rights. For example, on one end of the spectrum are television dramas that use real-life events to serve as basic loose inspiration; these *do not* infringe on one's right to publicity. On the other end of the spectrum, however, is the use of a real-life person's name and recreation of their image for realistic likeness; this *does* infringe upon the rights of an individual's personhood. The appropriation of anyone's identity for money in dramatic works should therefore be protected.

*Making a Murderer's* star is undoubtedly the convicted killer, Steven Avery.<sup>141</sup> The Netflix series evokes sympathy for the mistreatment he has experienced in the justice system.<sup>142</sup> The victim of the murder, who is integral to telling the story of Steven, is Teresa Halbach. Halbach's death is the center of the Steven Avery Netflix series.<sup>143</sup> Halbach's family not only refused to participate in the show but also asked that their daughter's tragic story be left alone. Prior to the series being released, her family issued the following statement:

Having just passed the 10-year anniversary of the death of our daughter and sister, Teresa, we are saddened to learn that individuals and corporations continue to create entertainment and to seek profit from our loss. We continue to hope that the story of Teresa's life brings goodness to the world.<sup>144</sup>

Instead of privately mourning the untimely passing of Halbach, her family has instead been bombarded with questioning of reporters and fictionalizations of the conspiracies behind her death. In fact, Halbach's death is used as a tool to create sympathy for the imprisonment of her convicted killer, Steven Avery.<sup>145</sup> Regardless of his guilt or lack thereof, Halbach's story is retold complete with her full name and pictures throughout the series without her family's consent.<sup>146</sup>

*Making a Murderer* is not about an open investigation; it is also not about a serial killer currently on the loose; rather, it is an appropriation of Halbach's story, name, voice and image to make money on a Netflix series, which was expressly against the family's wishes.<sup>147</sup> There is currently no legal remedy available to the grieving family, making their ability to move on privately difficult. By permitting directors, producers, and other content creators to utilize the inherent personhood of victims without any permission, our society is allowing further injury to victims.

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<sup>141</sup> See *Making a Murderer*, supra note 6.

<sup>142</sup> *Id.*

<sup>143</sup> See *Making a Murderer*, supra note 6.

<sup>144</sup> Becca Van Sambeck, *What Does Teresa Halbach's Family think about 'Making a Murderer Part 2?'*, TRUE CRIME BUZZ (Nov. 2, 2018), <https://www.oxygen.com/martinis-murder/what-does-teresa-halbach-family-think-about-making-a-murderer-part-2>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

Another popular series, *Mindhunter*, dramatizes the real-life events of the FBI profilers who tracked famous serial killers such as BTK, Charles Manson, and others.<sup>148</sup> The series is based off of FBI profilers John E. Douglas and Robert Ressler.<sup>149</sup> Interestingly, neither of the main characters in the show retain the names of their real-life counterparts.<sup>150</sup> The actual high-profile individuals who worked to develop the FBI techniques are given different names and the show's creators have many creative liberties in how the profilers are portrayed.<sup>151</sup> The same cannot be said of the victims depicted on the show.

The second season of *Mindhunter* features the Atlanta child murders from the late 70s.<sup>152</sup> Unlike the fake names and identities given to the profilers, the real names, identities, and events of the murders are utilized. Parents and family members of the murdered children still live with the grief of their lost ones. None of the families, including those whose full names appear in the series, were ever consulted regarding their representation.<sup>153</sup> Without so much as a warning, the parents and family members of the victims are forced to be subjected to media representations of their loved ones' deaths. Sheila Balthazar was the stepmother to victim Patrick Balthazar.<sup>154</sup> In response to the series, she commented that she:

wishes the filmmakers of *Mindhunter* – as well as writers of other recent articles and podcasts about the tragedy – would think critically about the victims' families. It would be nice for a producer to reach out and talk to her before she sees her story played out on the television."<sup>155</sup>

These families are forced to relive their worst nightmares through these recollections of the events. They are left to repeatedly suffer psychological trauma without judicial remedy.<sup>156</sup> *Mindhunter* is interesting in the fact that it not only

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<sup>148</sup> See *Mindhunter*, *supra* note 3.

<sup>149</sup> Mehera Bonner, *See the 'Mindhunter' Cast Next to Their Real-Life Counterparts*, COSMOPOLITAN, (Aug. 17, 2019), <https://www.cosmopolitan.com/entertainment/tv/g28675539/mindhunter-netflix-cast-vs-real-life-counterparts/>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Ryan Lattanzio, *'Mindhunter' Season 2 Didn't Consult Families of Atlanta Child Murder Victims*, INDIEWIRE (Aug. 17, 2019), <https://www.indiewire.com/2019/08/mindhunter-season-2-atlanta-child-murders-1202166661/>.

<sup>153</sup> *Id.* (“Netflix has confirmed that the “Mindhunter” team did not consult the families of the victims in the killings, two of whom feature prominently in the season – Camille Bell, the mother of nine-year-old, Yusuf Bell, who was found dead in 1979, and Venus Taylor, the mother of 12-year-old, Angel Lenair, who was found dead in 1980.”).

<sup>154</sup> Jacqueline Tempera, *A Mother of An Atlanta Child Murders Victim Responds to Netflix's 'Mindhunter'*, WOMENS HEALTH (Aug. 30, 2019), <https://www.womenshealthmag.com/life/a28833877/mindhunter-atlanta-child-murders-mother-response/>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (“The families should also be compensated by Netflix. . .”).

features what happened to the victims , but it also heavily features the family members of the victims.<sup>157</sup> The show uses the mothers' real names and depicts events in their lives following the death of their children.<sup>158</sup> These are people who did not choose fame. For whatever reason, the directors and producers attempt to feign protection in the privacy of the profilers by changing their names and stories, yet no such consideration is given to the victims and their families.

#### D. GIVING VICTIMS THEIR VOICES BACK

Giving individuals enforceable remedies for violations of their right of publicity in the context of true crime is not to say the true crime genre should not exist. If a show intends to utilize the real name, image, or intentional likeness of a crime victim or family member, then they should seek out the appropriate individuals for permission. For example, the *American Crime Story* franchise, which coincidentally features *The People v. O.J.* in its first season, is set to feature a dramatization of the Monica Lewinsky scandal in their newest season.<sup>159</sup> The creator, Ryan Murphy, stated that the series would not go forward without having Lewinsky be involved.<sup>160</sup> As such, Lewinsky has signed on as a producer who will be able to oversee and help define the depiction of her story.<sup>161</sup> She finally wanted to be able to have some control over how her life is depicted stating, “[p]eople have been co-opting and telling my part in this story for decades. In fact, it wasn’t until the past few years that I’ve been able to fully reclaim my narrative; almost 20 years later.”<sup>162</sup> Just as Ryan Murphy has done, producers and directors should seek out those whose images and stories they hope to utilize. While not everyone will likely agree to join on as producer, by asking and receiving permission, directors and other content creators will be respecting the inherent personhood that citizen’s retain regarding commercialization.

Alternatively, within *The People v. O.J.* season of *American Crime Story*, viewers are able to watch an actress portray victim Ron Goldman’s sister, Kim Goldman,

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<sup>157</sup> See *Mindhunter*, *supra* note 3.

<sup>158</sup> Julia Emmanuele, *Is Camille Bell From ‘Mindhunter’ A Real Person? The Activist Raised Awareness For The Atlanta Child Murders*, BUSTLE (Aug. 17, 2019), <https://www.bustle.com/p/is-camille-bell-from-mindhunter-a-real-person-the-activist-raised-awareness-for-the-atlanta-child-murders-18665182> (“Played by June Carryl in *Mindhunter*, the grieving mother is the main advocate for the victims, just like the real Camille Bell did during the Murders.”).

<sup>159</sup> Joanna Robinson, *Exclusive: Monica Lewinsky on Producing FX’s New Impeachment: American Crime Story*, VANITY FAIR (Aug. 6, 2019), <https://www.vanityfair.com/hollywood/2019/08/american-crime-story-impeachment-bill-clinton-monica-lewinsky-producing-statement-beanie-feldstein>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (“Murphy recalled running into Lewinsky at a Hollywood party and telling her: ‘Nobody should tell your story but you, and it’s kind of gross if they do. If you want to produce it with me, I would love that; but you should be the producer, and you should make all the goddamn money.’”).

<sup>162</sup> *Id.*

grieve and publicly mourn her brother throughout Simpson's criminal trial.<sup>163</sup> She has decided to reclaim her narrative and identity through a podcast discussing the infamous crime that so many others have attempted to recreate.<sup>164</sup> Throughout the series, Goldman meets with jury members, family members, and the original prosecutors to get actual insight into their perspectives of the crime.<sup>165</sup> She provides her audience with one of the most real and raw retellings of the events that captured America's interest.<sup>166</sup> So many people have stolen her and her families' images to retell the crimes that it is a way for her to reclaim the image and identity the media and true crime has given her. Throughout her podcast, Kim shares the pain and overwhelming emotions she feels whenever she is confronted with commercialization of her brother's murder. She tells her listeners in episode three entitled "Brentwood" that "[y]ou never want to think that people are profiting from a crime against your family, but people keep coming up with new and creative ways to monetize Ron and Nicole's murders."<sup>167</sup> Twenty five years after the murders, she provides a unique perspective on the pain her family has felt beyond the widespread news coverage at the time but also with the continuous dramatic adaptations of the murder.<sup>168</sup> Monica Lewinsky and Kim Goldman are rare examples of accidental celebrities who are reclaiming their image and narrative. Other victims who have not come forward, or who prefer to retain their privacy, should have the right to prevent widespread exploitation of their image.

Of course, victims and family members can consent to use of their image and thus alleviate any right of publicity claims that could arise. In fact, the directors and producers who meet with either the victims or their families will receive the added benefit of having better details and firsthand accounts for their recreations of the crimes. The inclusion of family members not only respects their wishes, but adds to the credibility of the stories.

If directors and producers neglect to seek permission from the victims or their families, there should be some redress available. Those whose image is appropriated and exploited should have the ability to seek injunctive and compensatory remedies through the court systems. If the harmed party is able to discover the misappropriation of their image prior to release, then injunctive relief would be appropriate. In all reality, however, it is unlikely that most individuals will be aware of the use of their image until after a series has been released. At this stage,

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<sup>163</sup> Ian Spiegelman, *25 Years After Her Brother's Murder, Kim Goldman Still Wants to Take Down O.J. Simpson*, Los Angeles Magazine (June 12, 2019), <https://www.lamag.com/culturefiles/oj-simpson-podcast/>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Kim Goldman, *Confronting O.J. Simpson*, APPLE PODCASTS PREVIEW (2019), <https://podcasts.apple.com/us/podcast/confronting-o-j-simpson-with-kim-goldman/id1467123067>.

<sup>168</sup> *Id.*

lawsuits could provide compensatory damages for the profits from use of the individuals' identity.

It is foreseeable that some victims and family members will be cooperative and have no issue with use of their image. Some families will likely not care to take the issue to court; others, however, will desperately seek a remedy to prevent the continued exploitation of their loved ones. In order to account for these different possible reactions, ideally, directors and producers working within the true crime genre should seek permission to use the image or likeness of the victim and the victim's family prior to creating anything; if permission is granted, then they should feel free to move forward with their project; if permission is not granted, however, then they should face liability if they continue.

In order to avoid incurring any liability, producers and directors could loosely base their series on true events and make the story "transformative" in order to receive protections under the First Amendment. A variety of adjustments to true crime series can greatly preserve citizens' constitutional rights while providing relief to those who have suffered. While some could fear a 'chilling' effect on the genre, this would not be the result. By getting permission from family members, creatively transforming stories, or risking liability, directors and producers will still be able to create true crime series. True crime series are in high demand and will still be able to be created; directors will just be accountable for unauthorized use of individuals' likeness.

Implicit in the rights guaranteed to us as citizens, there is a sacrifice of certain actions. If the remedies provided by right of publicity statutes are expanded, then directors and producers will be subject to more restrictions, but it will be worth it due to the value we have as a society in personhood. Seeking permission for use of individual's name and image in creation of shows is hardly an extraordinary measure. This is done commonly with musical soundtracks used in shows. Why should FBI profilers John Douglas and Robert Ressler's identities be protected in *Mindhunter* while mothers of victims, like Camille Bell, are not given the same respect?<sup>169</sup>

More than anything, a legal remedy is needed to send a message to what we value as a society. Injuring and taking advantage of victims should not be what the country allows or incentivizes. There is such power in a name, and it is unjust to allow appropriation of victims' identities. Case law in many jurisdictions has established that the right of publicity is descendible with death to that person's estate.<sup>170</sup> Even after the tragic deaths of victims, their right of publicity should pass to their loved ones to determine how and who can portray them.

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<sup>169</sup> See *Mindhunter*, *supra* note 3.

<sup>170</sup> See *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

American serial killer Dennis Rader, commonly known as “BTK” which stands for “Bind, Torture, Kill”, terrorized Kansas before his arrest in 2005.<sup>171</sup> In a letter regarding why he killed, Rader said, “[w]hen this monster entered my brain, I will never know, but it is here to stay. How does one cure himself? I can’t stop it, the monster goes on, and hurts me as well as society. Maybe you can stop him. I can’t.”<sup>172</sup> Perhaps no one can predict and stop all these monsters, but the law can prevent inflicting further harm to society and these traumatized victims.

#### IV. CONCLUSION

The states, particularly California and New York, need to adopt a protection of victims’ right of publicity. The right of publicity is intended to protect citizens’ inherent personhood. The victims and their family members have already suffered immensely and the current legal landscape is allowing content creators in the true crime genre to deepen their wounds. Some individuals will want to keep their stories private and not commercialize off of it. They should be able to prevent others from using their loved one’s likeness or their own likeness, regardless of whether they plan to commercialize off it themselves or not. Family members should not turn on TV to unexpectedly see dramatic portrayals of their loved one’s final moments, particularly if they were never asked for their consent. Every person has an inherent right to their identity and image via the right of publicity. Crime victims should not have any lessened right than anyone else. The right of publicity should be a vehicle through which injured victims can receive injunctive or compensatory relief for the harm they suffer at the hands of others. Needless to say, the current treatment of these victims and families is extremely wicked, shockingly evil, and vile.

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<sup>171</sup> Cathy Henkel, *Killer’s letter still haunting 30 years later*, THE SEATTLE TIMES (Feb. 25, 2005), <https://www.seattletimes.com/nation-world/killers-letter-still-haunting-30-years-later/>.

<sup>172</sup> *Id.*