

## SUPPORT OUR [DEAD] TROOPS: SACRIFICING POLITICAL EXPRESSION RIGHTS FOR FAMILIAL CONTROL OVER NAMES AND LIKENESSES

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### INTRODUCTION

It just doesn't seem right to profit on the death of a soldier who put his life on the line for us and our freedom.<sup>1</sup>

That was the sentiment of Linda Harper-Brown,<sup>2</sup> a state representative in the Texas legislature, after she learned from one of her Irving constituents, whose son died while fighting in Baghdad in 2004, that an Arizona man named Dan Frazier was selling T-shirts online with the words "BUSH LIED" and "THEY DIED" superimposed in capital letters on the names of nearly 3000 U.S. service members killed in Iraq.<sup>3</sup> As Robert Vandertulip, the father who approached Harper-Brown, put it in expressing his emotional pain and anguish over what he perceived as a slight to his son's life, "From the time that they're born, your main concern is trying to make sure they're protected . . . . It does not end when they have died."<sup>4</sup>

That certainly may well reflect an understandable and appropriate *emotional* yearning for posthumous protection, but should the *legal* right to protect and control the use of the names and likenesses of soldiers end when they have died, or conversely, should it be passed along like a property right to grieving relatives, spouses, and parents like Robert Vandertulip? This question is far from idle or hypothetical.

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<sup>1</sup> Aman Batheja, *A Father's Fight: Slain Son's Name on Anti-War T-Shirt Prompts Irving Man to Seek State Law to Stop Sales*, FORT WORTH STAR-TELEGRAM, Jan. 4, 2007, at A1 (quoting Linda Harper-Brown, a Republican member of the Texas legislature).

<sup>2</sup> See Rep. Linda Harper-Brown, Texas House of Representatives, <http://www.house.state.tx.us/members/dist105/harper-brown.htm> (last visited Dec. 4, 2007) (providing brief biographical information about Harper-Brown and identifying her as representing District 105).

<sup>3</sup> Batheja, *supra* note 1, at A1.

<sup>4</sup> Nicholas Riccardi, *The Sting Is in the Small Type; Antiwar T-Shirts that List the Names of Troops Killed in Iraq Have Angered Relatives of the Dead While Fueling a Debate over Free Speech*, L.A. TIMES, Sept. 24, 2007, at A1 (quoting Robert Vandertulip).

Although Dan Frazier's shirts were still for sale on his website<sup>5</sup> in February 2008, that soon will not be the case if a growing number of states and lawmakers like Linda Harper-Brown have their way.

In May 2007, when Texas Governor Rick Perry signed into law Senate Bill 277,<sup>6</sup> the Lone Star State joined four others—Arizona,<sup>7</sup> Florida,<sup>8</sup> Louisiana,<sup>9</sup> and Oklahoma<sup>10</sup>—that have recently enacted legislation affecting and limiting, to various

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<sup>5</sup> CarryaBigSticker, <http://www.carryabigsticker.com> (last visited February 20, 2008).

<sup>6</sup> S. 277, 80th Leg., Reg. Sess. (Tex. 2007) (creating a class A misdemeanor for the use, "in an advertisement for a commercial purpose," of either the name of a member or former member of the United States armed forces or "a picture of the individual in uniform in which the individual is clearly identifiable," without first obtaining the consent of either the soldier (if living) or "the individual's surviving spouse or personal representative or a majority of the individual's adult heirs, if the individual is deceased"). The law took effect in September 2007. TEX. BUS. & COM. CODE ANN. § 35.64 (Vernon 2007).

This Senate bill is the nearly identical companion to the House Bill that Linda Harper-Brown first filed in November 2006. *See* H.R. 331, 80th Leg., Reg. Sess. (Tex. 2007). In her official press release announcing the bill, Harper-Brown is quoted for the proposition that "[t]he families of fallen soldiers have gone through enough, and House Bill 331 will help protect them from additional grief." Press Release, Rep. Linda Harper-Brown, Harper-Brown Files Bill to Protect the Images of United States Soldiers (Nov. 29, 2006), *available at* <http://www.house.state.tx.us/news/release.php?id=1738>.

<sup>7</sup> Arizona provides for *both* criminal penalties and civil remedies. ARIZ. REV. STAT. § 13-3726 (LexisNexis 2007) (creating a class 1 misdemeanor for knowingly using "the name, portrait or picture of a deceased soldier for the purpose of advertising for the sale of any goods, wares or merchandise or for the solicitation of patronage for any business without having obtained prior consent to the use" from "the soldier's spouse, immediate family member, trustee if the soldier is a minor or legally designated representative"); ARIZ. REV. STAT. § 12-761 (creating a "soldier's right of publicity" that is "a property right *that survives a soldier's death*," and providing a civil remedy for the unauthorized use of "the name, portrait or picture of any soldier" if the defendant is, among other things, advertising for or receiving consideration for "the sale of any goods, wares or merchandise" that include the name, portrait or picture of the soldier (emphasis added)).

<sup>8</sup> FLA. STAT. ANN. § 540.08(3) (West 2007) (providing for criminal penalties of up to \$1000 per violation, in addition to civil remedies, for the trade use or any commercial or advertising purpose of the "name, portrait, photograph, or other likeness of a member of the armed forces without obtaining . . . consent," with the term "member of the armed forces" including "any officer or enlisted member who died as a result of injuries sustained in the line of duty" (emphasis added)).

<sup>9</sup> LA. REV. STAT. ANN. § 14:102.21 (2007) (providing that "[i]t shall be unlawful for any person to use for the purpose of advertising for the sale of any goods, wares, or merchandise, or for the solicitation of patronage by any business the name, portrait, or picture of *any deceased soldier*, without having obtained prior consent" from "the closest living relative, by blood or marriage, of the deceased" (emphasis added)).

<sup>10</sup> OKLA. STAT. ANN. tit. 21, § 839.1A (West 2007) (making it a misdemeanor offense, punishable by up to a \$1000 fine and one year in jail, for a "person, firm, or corporation" to use "the name, portrait, or picture of any service member of the United States Armed Forces"

degrees, the use of the names and images of United States soldiers killed in Iraq. What is more, even Congress was considering a similar bill in 2007 that would prohibit the unauthorized use of the name or image of a deceased member of the armed forces “in connection with any merchandise, retail product, impersonation, solicitation, or commercial activity in a manner reasonably calculated to connect the protected individual with that individual’s service in the armed forces.”<sup>11</sup>

The legal battles already are starting to play out, pitting the First Amendment<sup>12</sup> right to engage in what might be considered “core political speech”<sup>13</sup> that objects to and dissents from government orthodoxy or policies<sup>14</sup> (in this case, U.S. involvement in the ongoing war in Iraq) against both familial emotional tranquility and familial proprietary and commercial control over the names of deceased love ones.<sup>15</sup> This control is closely akin to the sometimes descendible<sup>16</sup> interests protected by the

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for “the purpose of advertising for the sale of any goods, wares, or merchandise, or for the solicitation of patronage by any business enterprise,” unless the person, firm, or corporation has “obtained, prior or subsequent to such use, the consent of the person, or, if the person is deceased, without the consent of the surviving spouse, personal representatives, or that of a majority of the adult heirs of the deceased”).

<sup>11</sup> H.R. 269, 110th Cong. (2007).

<sup>12</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”). The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>13</sup> *See, e.g.,* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (observing that “core political speech” can extend beyond speech for particular candidates to sweep up “issue-based elections” and describing “the advocacy of a politically controversial viewpoint” as “the essence of First Amendment expression”).

<sup>14</sup> *See, e.g.,* *Cohen v. California*, 403 U.S. 15 (1971) (protecting the right to passively wear a jacket emblazoned with the message “Fuck the Draft” in a public courthouse).

<sup>15</sup> *See* Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford, A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 248 (2007) (discussing both the “personal and emotional interests,” as well as the “economic” and “proprietary interest[s],” that underlie, respectively, the torts of appropriation and right of publicity); *see also* KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 212 (7th ed. 2008) (writing that “[t]he injury suffered by an appropriation plaintiff may take two forms,” including “shame and humiliation” and “loss of a commercial property”).

<sup>16</sup> The phrase “sometimes descendible” is appropriate here because there is a definite lack of uniformity among state laws and court opinions on the inheritability of the right of publicity. Ezra D. Landes, Comment, *I Am the Walrus.—No. I Am!: Can Paul McCartney Transpose the Ubiquitous “Lennon/McCartney” Songwriting Credit to Read “McCartney/Lennon?” An Exploration of the Surviving Beatle’s Attempt to Re-Write Music Lore, as It Pertains to the Bundle of Intellectual Property Rights*, 34 PEPP. L. REV. 185, 216–17 (2006). In some states, “rights of publicity die with the person.” MIDDLETON & LEE, *supra* note 15, at 214. However, “a growing number of states have determined that a person’s post-mortem right of publicity can be assigned while the person is living and is inheritable after death.” Lapter, *supra* note 15, at 272.

common law (and in some instances state statutory) torts of appropriation<sup>17</sup> and right of publicity.<sup>18</sup>

In September 2007, in the first judicial rebuke of such legislation, U.S. District Court Judge Neil V. Wake issued a preliminary injunction in the case of *Frazier v. Boomsma*<sup>19</sup> that prohibits Arizona from enforcing a criminal statute that makes it, unless one of several specified exceptions applies, a class 1 misdemeanor to

knowingly use the name, portrait or picture of a deceased soldier for the purpose of advertising for the sale of any goods, wares or merchandise or for the solicitation of patronage for any business without having obtained prior consent to the use by the soldier or by the soldier's spouse, immediate family member, trustee if the soldier is a minor or legally designated representative.<sup>20</sup>

The suit in *Frazier* was brought by T-shirt seller Dan Frazier over the same shirt that angered Robert Vandertulip in Texas,<sup>21</sup> as well as two other anti-war T-shirts carrying

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<sup>17</sup> See, e.g., *Whisper Wear, Inc. v. Morgan*, 627 S.E.2d 178, 180 (Ga. Ct. App. 2006) (“This Court has recognized that the appropriation of another’s identity, picture, papers, name or signature without consent and for financial gain is a tort for which an action lies on the theory that it constitutes an invasion of a property right, or an invasion of privacy.”).

<sup>18</sup> There is a lack of uniformity among the states when it comes to the nuances of the law in the area of the right of publicity. As University of Oregon Law School Professor Dominick Vetri and his co-authors succinctly summarized the state of the common and statutory law:

The right of publicity is the right to control the commercial use of one’s identity. All but a few courts recognize that the right is available to everyone and not limited to celebrities. The right of publicity of living persons is recognized in 25 states, 14 by statute and 11 by common law. The right of publicity of deceased persons has been recognized in 13 states either by common law or statute.

DOMINICK VETRI ET AL., *TORT LAW AND PRACTICE* 1274–75 (2d rev. ed. 2003).

California, for instance, has both a statutory and common law right of publicity. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799, 802 (Cal. 2001), *cert. denied*, 534 U.S. 1078 (2002) (writing that “[i]n this state the right of publicity is both a statutory and a common law right” and noting that “the right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product”). Similarly, Illinois recognizes both a statutory and common law right of publicity. See *Brown v. ACMI Pop Div.*, 873 N.E.2d 954, 959 (Ill. App. Ct. 2007) (discussing both the common law and statutory right of publicity recognized in Illinois and observing that the right of publicity tort is “designed to protect a person from having his name or image used for commercial purposes without consent”).

<sup>19</sup> No. CV-07-08040-PHS-NVW, 2007 U.S. Dist. LEXIS 72427 (D. Ariz. Sept. 27, 2007).

<sup>20</sup> ARIZ. REV. STAT. § 13-3726 (LexisNexis 2007).

<sup>21</sup> See *supra* notes 2–4 and accompanying text.

messages (“Support Our Remaining Troops—Bring the Rest Home Alive” and “If Any Question Why We Died, Tell Them, Because Our Fathers Lied”) that were similarly “printed in large, capital, bold-faced type over the names of the deceased soldiers.”<sup>22</sup> In ruling for Frazier, Judge Wake found that:

- “Frazier’s activities are political speech protected by the *First Amendment*”<sup>23</sup> and, indeed, “constitute core political speech”<sup>24</sup> that critiques “the most salient and hotly debated issue in current American politics.”<sup>25</sup>
- Although the shirts are sold for a profit and the online advertising of them uses the names of some of the deceased soldiers,<sup>26</sup> the commercial elements are so “inextricably intertwined with political speech”<sup>27</sup> that the speech cannot be treated as commercial but instead must be considered political.<sup>28</sup>
- The applicable standard of judicial review for the statute was the rigorous strict scrutiny<sup>29</sup> test traditionally reserved for content-based laws<sup>30</sup> rather than, as Arizona had argued for, the more relaxed scrutiny imbued in the commercial speech doctrine.<sup>31</sup>

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<sup>22</sup> *Frazier*, 2007 U.S. Dist. LEXIS 72427, at \*\*2–3.

<sup>23</sup> *Id.* at \*20 (emphasis added).

<sup>24</sup> *Id.* at \*33.

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

<sup>26</sup> *Id.* at \*12 (noting that Frazier’s website does advertise the T-shirts with legible names of some soldiers).

<sup>27</sup> *Id.* at \*33.

<sup>28</sup> *Id.* at \*34.

<sup>29</sup> *Id.* at \*\*30–33; see *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (writing that a “content-based speech restriction” is permissible “only if it satisfies strict scrutiny,” which requires that the law in question “be narrowly tailored to promote a compelling Government interest”); *Sable Comm. of Cal, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (writing that the government may “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 903 (2d ed. 2002) (writing that “content-based discrimination must meet strict scrutiny”).

<sup>30</sup> See generally Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 *IND. L.J.* 801 (2004) (providing an excellent analysis of the differences between content-based laws and content-neutral laws).

<sup>31</sup> See *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (setting forth what the nation’s high court called “a four-part analysis” under which courts must first decide if “the expression is protected by the First Amendment,” meaning that “it at least must concern lawful activity and not be misleading,” and after which courts must decide

- “[P]rotection of the right of publicity, whatever the scope of the right under state law, *cannot* be a compelling state interest that overrides Frazier’s fundamental right to political speech on the facts of this case” because, in part, “the individual identities of the deceased American soldiers are not only reasonably related to his message, but integral to it. The t-shirts, like the Vietnam War Memorial, derive some of their communicative force from their ability to personalize human loss on a great scale.”<sup>32</sup>

While Judge Wake’s ruling was a preliminary blow to Arizona’s *criminal* statute, it did not affect the *civil* remedy still in place because Frazier failed to serve a complaint against any person likely to file a civil lawsuit against him (i.e., the parents and spouses of deceased soldiers).<sup>33</sup> According to Frazier’s ACLU attorney, Dan Pochoda, his client “has been reluctant to bring a case against the families of dead soldiers out of sensitivity to their suffering.”<sup>34</sup> And the criminal statute may yet survive a full review on its merits. Jim Waring,<sup>35</sup> the Arizona state senator who sponsored the legislation, publicly remarked both that “[t]his is a preliminary hearing, so it’s not etched on stone yet,”<sup>36</sup> and that “I’m not going to give up. On behalf of these parents, I am not going to give up.”<sup>37</sup> Furthermore, the laws in the four other states that have adopted criminal and/or civil statutes affecting the use of the names and images of deceased service members have yet to be litigated and undergo judicial review.<sup>38</sup> In brief, then, this emerging area of law is ripe for analysis.

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“whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest”); *see also* RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 77–84 (2003) (providing an overview of the commercial speech doctrine as it has evolved since *Central Hudson*).

<sup>32</sup> *Frazier*, 2007 U.S. Dist. LEXIS 72427, at \*43 (emphasis added).

<sup>33</sup> *Id.* at \*\*14–15 (writing that the plaintiff “must serve process on at least one individual who is likely to file a civil action against him,” adding that “[s]uch joinder is feasible. Frazier is aware of approximately a dozen people who lost loved ones to the Iraq war and threatened to sue him because of the t-shirts,” and noting that litigation over the constitutionality of this civil statute “cannot be adjudicated unless Frazier properly joins at least one individual who might file a civil action against him”).

<sup>34</sup> Luige del Puerto, *U.S. District Court: Is Using Dead Soldiers’ Names on T-Shirts a Dead Issue?*, ARIZ. CAPITOL TIMES, Oct. 5, 2007.

<sup>35</sup> Jim Waring, Arizona State Legislature, [http://www.azleg.gov/MembersPage.asp?Member\\_ID=90&Legislature=48](http://www.azleg.gov/MembersPage.asp?Member_ID=90&Legislature=48) (last visited Dec. 4, 2007) (providing brief biographical information about Waring and identifying him as a Republican representing Arizona District 7).

<sup>36</sup> Del Puerto, *supra* note 34.

<sup>37</sup> *Id.*

<sup>38</sup> *See supra* notes 6–10 (identifying all five states that, as of the submission of this Article, have passed such legislation).

Importantly, this Article is devoted to the larger policy issues raised by these laws, and thus, conversely, the Article is *not* exclusively an analysis or critique of Judge Wake's ruling in *Frazier* but instead uses that case merely as a springboard or starting point for addressing and illustrating the big picture issues in this sector of the law. In addition, although the statutes passed to date also allow for either control over or criminal prosecution of the unauthorized use of soldiers' names and images while they are still alive, this Article concentrates its analysis on the post-life property rights these laws create for the heirs and immediate relatives, since that is the hot-button area of controversy as witnessed in *Frazier*.

In particular, Part I of the Article briefly contextualizes laws like that now enjoined in Arizona within the broader framework of several other recent cases, controversies, and legislative initiatives affecting the privacy rights of relatives of the deceased and, more specifically, deceased service members. Next, Part II elaborates on the tension between the First Amendment right to engage in political speech, on the one hand, and the privacy and pecuniary interests at stake when laws restricting and limiting the use of the names and images of dead soldiers are adopted, on the other hand.

Among other points, Part II notes that civil statutes that allow immediate relatives and designated heirs to control the use of the names and likenesses of deceased soldiers represent a very substantial expansion of the traditional right of publicity, which typically is designed as "a right to prevent others from misappropriating the economic value generated by the *celebrity's* fame."<sup>39</sup> In brief, dead soldiers under these recent laws are now being treated akin to dead celebrities—at least in those states where the property right to control names and images is descendible to heirs. This is, at first blush, a rather perverse outcome and notion, considering the selfless, altruistic anonymity and the out-of-the-limelight manner in which many rank-and-file soldiers spend their working lives, seeking neither fame nor fortune. But equating celebrities, who often intentionally cultivate a commercial value in use of their names and images (think serial-endorsers like Tiger Woods<sup>40</sup> or Peyton Manning<sup>41</sup>), with dead soldiers who do not do so, is precisely the argument of Arizona state Senator Jim Waring, who has publicly stated: "You should have some rights to your own name and your own legacy, particularly if you're a deceased veteran . . . . Celebrities have that. Why shouldn't our soldiers have that?"<sup>42</sup>

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<sup>39</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001), *cert. denied*, 534 U.S. 1078 (2002) (emphasis added).

<sup>40</sup> Among golfer Tiger Woods's current endorsements are Nike, Buick, Tag Heuer, Accenture, Gillette and Electronic Arts. Associated Press, *Tiger, Gatorade Close to Deal*, MOBILE REG., Sept. 8, 2007, at C6.

<sup>41</sup> Manning, the quarterback for the National Football League's Indianapolis Colts, "does spots for MasterCard, Gatorade, Reebok, DirecTV and Sprint" and is "TV's most prominent NFL pitchman." Kostya Kennedy et al., *Who's Hot/Who's Not*, SPORTS ILLUSTRATED, Nov. 19, 2007, at 23.

<sup>42</sup> Paul Davenport, *Anti-War T-Shirts Face a Battle of Their Own*, VIRGINIAN-PILOT

Given this legislative maneuver to treat them as alike, however, Part III then argues that courts in the future should simply borrow from and employ the California Supreme Court's "significant transformative elements" test, adopted in the 2001 right of publicity case of *Comedy III Productions, Inc. v. Gary Saderup, Inc.*<sup>43</sup> and later refined in *Winter v. DC Comics*,<sup>44</sup> to analyze whether the use of a dead soldier's name or image, in fact, should be protected.<sup>45</sup> Importantly, this Article analyzes Dan Frazier's T-shirt controversy (as well as a hypothetical scenario that is a variation of the Frazier "BUSH LIED" and "THEY DIED" shirt) through the prism of this test to illustrate both its appropriateness and its effectiveness in safeguarding the free expression interests at stake when states adopt statutes providing civil redress to relatives of deceased soldiers. The application of this test also illustrates how any allegedly compelling interest that would underlie a criminal statute in these circumstances is constitutionally suspect. Although the *Saderup* test certainly is not without its problems, it could provide an equitable solution for helping to resolve disputes in this area. Interestingly, Judge Wake in *Frazier v. Boomsma* did not reference or even cite to either the *Saderup* or *DC Comics* decisions, despite citing two other California state court decisions involving the right of publicity.<sup>46</sup>

Finally, the Article concludes in Part IV by calling for legislators and legislative bodies that might consider drafting laws similar to those adopted in Arizona, Florida, Louisiana, Oklahoma, and Texas to refrain from doing so. Although such measures may have both sentimental appeal and endearing emotion on their side and, concomitantly, represent politically expedient bills for lawmakers with their constituents, they likely will be struck down, just as Judge Wake enjoined Arizona's criminal statute in *Frazier*, and thus end up costing taxpayers significant dollars in litigation costs in the long run.

### I. DEATH, DIGNITY, AND PRIVACY

Back in 2005, before the controversy over Dan Frazier's anti-war T-shirts erupted, the author of this Article contended that, in recent years, "a nascent, inchoate, and sometimes politically-charged jurisprudence has emerged: *the privacy of death*."<sup>47</sup> Today, some two-plus years later, perhaps nothing else sparks and arouses public

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(Norfolk), May 18, 2007, at A7.

<sup>43</sup> *Saderup*, 21 P.3d at 808.

<sup>44</sup> 69 P.3d 473, 477 (Cal. 2003).

<sup>45</sup> See *infra* Part III.

<sup>46</sup> See *Frazier v. Boomsma*, No. CV-07-08040-PHS-NVW, 2007 U.S. Dist. LEXIS 72427, at \*\*42-46 (D. Ariz. 2007) (citing the California state court cases of *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 462 (Cal. 1979), and *Lugosi v. Universal Pictures*, 603 P.2d 425, 438-39 (Cal. 1979)).

<sup>47</sup> Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133, 133-34 (2005).

passion quite like the combustible combination of grieving family members, dead soldiers, and either political protests or media cameras that allegedly intrude on familial privacy interests. It is an explosive formula of ingredients that, since the start of the current war in Iraq, has spawned both litigation and legislation in areas *other than* anti-war T-shirts.

In late October 2007, for instance, a federal jury in Baltimore, Maryland, awarded Albert Snyder a whopping 10.9 million dollars in damages, based on causes of action for invasion of privacy via intrusion into seclusion<sup>48</sup> and intentional infliction of emotional distress,<sup>49</sup> against three leaders of the Kansas-based Westboro Baptist Church<sup>50</sup> for staging a picket and protest outside the funeral of Snyder's son, Lance Corporal Matthew A. Snyder, who was killed while fighting in Iraq in 2006.<sup>51</sup> The members of the church, as *The New York Times* observed, "frequently picket the funerals of military officials and soldiers killed in Iraq and Afghanistan because church leaders assert that God is killing soldiers to punish America for condoning

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<sup>48</sup> See *Snyder v. Phelps*, No. RDB-06-1389, 2006 U.S. Dist. LEXIS 79020, at \*30 (D. Md. Oct. 30, 2006) ("In Maryland, '[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.'" (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977))).

On October 16, 2007, just two weeks before the trial, U.S. District Court Judge Richard D. Bennett dismissed Albert Snyder's causes of action for defamation and invasion of privacy by public disclosure of private facts against each of the three individual defendants. Order at 1–2, *Snyder v. Phelps*, Civil Action No. RDB-06-1389 (D. Md. Oct. 16, 2007). Conversely, the judge allowed the jury to consider three causes of action: 1) invasion of privacy via intrusion upon seclusion; 2) intentional infliction of emotional distress; and 3) civil conspiracy. *Id.*

<sup>49</sup> Under the laws of Maryland, which govern the substantive claims in the lawsuit filed in federal court in Maryland by Albert Snyder, a plaintiff suing for intentional infliction of emotional distress "must establish: 1) defendants' conduct was intentional or reckless, 2) the conduct was extreme and outrageous, 3) the conduct caused emotional distress, and 4) the emotional distress was severe." *Cole v. Anne Arundel County Bd. of Educ.*, No. CCB-05-1579, 2006 U.S. Dist. LEXIS 89426, at \*\*31–32 (D. Md. Nov. 30, 2006) (citing *Harris v. Jones*, 380 A.2d 611 (1977)).

<sup>50</sup> On the opening page of its website, the Westboro Baptist Church claims that since 1991, it has been "conducting over 34,000 peaceful demonstrations (to date) opposing the fag lifestyle of soul-damning, nation-destroying filth" and that "[n]ow, God is america's [sic] enemy, dashing your soldiers to pieces. 3,927 dead. 28,770 wounded." Westboro Baptist Church, <http://www.westborobaptistchurch.com> (last visited Jan. 15, 2008).

<sup>51</sup> See Ruben Castaneda, *\$11 Million Awarded in Funeral Protest Suit*, WASH. POST, Nov. 1, 2007, at B1 (reporting on the jury verdict and identifying the three individual defendants as Fred Phelps, pastor of the Topeka-based Westboro Baptist Church, and his two daughters, Shirley L. Phelps-Roper and Rebekah L. Phelps-Davis); Melody Simmons, *To Marine's Father, Suit Is More Than Money*, N.Y. TIMES, Nov. 2, 2007, at A23 (discussing the case and the jury verdict). In February 2008, U.S. District Court Judge Richard D. Bennett affirmed the jury's verdict but reduced the total amount of damages to five million dollars. Matthew Dolan, *Judge Cuts Court Award*, BALT. SUN, Feb. 5, 2008, at 1B.

homosexuality.”<sup>52</sup> In the instance of the funeral of Matthew A. Snyder, they hoisted signs emblazoned with messages such as “God Hates You” and “Thank God for Dead Soldiers.”<sup>53</sup> Another sign was far more blatant in conveying the church’s profoundly homophobic beliefs; it read “Semper Fi, Semper Fags.”<sup>54</sup> Although several media law experts agreed the jury verdict would likely be overturned on appeal<sup>55</sup> and some newspapers similarly opined that the First Amendment should protect the protestors’ disquieting speech,<sup>56</sup> the jury obviously was emotionally stirred enough to mete out eight million dollars in punitive damages.<sup>57</sup> As an editorial for the *Baltimore Sun* put it, the “jury struck a blow for human decency” by rendering a verdict the paper called “heartwarming.”<sup>58</sup>

But it is more than just jurors who are outraged by such protests at the funerals of dead military service members. The actions of groups like the Westboro Baptist Church have spawned legislation across the nation designed to push back the

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<sup>52</sup> Melody Simmons, *Marine’s Father Sues Church for Cheering Son’s Death*, N.Y. TIMES, Oct. 26, 2007, at A18.

<sup>53</sup> *Id.*

<sup>54</sup> Editorial, *Crossing the Line*, INTELLIGENCER J. (Lancaster, Pa.), Nov. 5, 2007, at A10.

<sup>55</sup> See, e.g., Matthew Dolan, *Award Over Military Funeral Protest May Not Stand, Experts Say*, L.A. TIMES, Nov. 2, 2007, at A15 (writing that “[l]eading constitutional scholars say the multimillion-dollar award this week to the father of a Marine killed in Iraq is likely to be overturned because the church members who protested his son’s funeral enjoy broad protection under the 1st Amendment,” and quoting Ronald K.L. Collins, a scholar at the First Amendment Center, for the proposition that “I have spoken to a number of 1st Amendment attorneys today, and every one of them believe the case will be reversed and should be reversed”); Robert D. Richards, *Phelps’ Hateful Words Deserve Protection*, BALTIMORE SUN, Nov. 13, 2007, at 11A (contending, from the author’s perspective as founding co-director of the Pennsylvania Center for the First Amendment, that two reasons suggest the decision will be reversed on appeal, including the fact that “the speech occurred in a public space, and traditionally streets, sidewalks, parks and other open areas are considered First Amendment-protected sites,” and that the protestors’ “message is inherently political, and this country has a long legal tradition of affording political speech the highest level of protection regardless of how unpopular the message may be”).

<sup>56</sup> See, e.g., Editorial, *The Right to Hate; A Kansas Church’s Message Is Ugly and Despicable—And It Merits 1st Amendment Protection*, L.A. TIMES, Nov. 12, 2007, at A18 (asserting that while “[t]he rants of the Westboro Baptist Church are loathsome,” they are nonetheless “constitutional”); Editorial, *Repugnant, But Legal*, MIAMI HERALD, Nov. 5, 2007 (writing that although the jury verdict is “worth cheering” and the views and behavior of the Westboro Baptist Church members “are vile, to say the least,” they are also “constitutional”); Editorial, *The 1st Amendment Rights of a Hateful Church*, NEWS TRIB. (Tacoma, Wash.), Nov. 4, 2007, at 2 (“[T]he Westboro Baptists are exercising three bedrock constitutional rights: Freedom of religion, speech and assembly. Americans own those rights even if they are shocking, extreme and outrageous.”).

<sup>57</sup> Editorial, *Crossing the Line*, *supra* note 54, at A10 (specifying that the award covered “\$2.9 million in compensatory damages and \$8 million in punitive damages”).

<sup>58</sup> Editorial, *A Victory for the Heart*, BALTIMORE SUN, Nov. 2, 2007, at 16A.

demonstrators from the sites of funerals.<sup>59</sup> For instance, less than two weeks after the jury handed down its super-sized verdict in the *Snyder* case, the attorney for Sarpy County, Nebraska, was planning to draft an ordinance to supplement a Nebraska law that “prohibits funeral picketing within 300 feet of a cemetery or church from one hour prior to two hours after the ceremony starts.”<sup>60</sup> Legal scholarship previously has addressed and analyzed the First Amendment issues involving laws that restrict and limit pickets and protests near funerals held for American soldiers killed in Iraq.<sup>61</sup>

It is not just protests that spark trouble when the privacy interests of families allegedly hang in the balance and are compromised at funerals taking place on behalf of their deceased, service-member relatives. The supposedly prying eyes of media cameras can cause funeral-centric controversy too. For example, in October 2007, the United States Supreme Court denied a petition for a writ of certiorari in *Showler v. Harper’s Magazine Foundation*<sup>62</sup> appealing the dismissal of a lawsuit brought by the biological father and maternal grandfather of a deceased member of the Oklahoma National Guard, Kyle Brinlee, who was killed in action while serving in Iraq in 2004. The suit centered on a photograph of the deceased in an open casket taken at his public funeral, which was held in a high school gymnasium with a press-reserved section and attended by 1200 people, by a reporter for *Harper’s Magazine* and later published in that periodical.<sup>63</sup> The allegedly offensive photograph is available on the

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<sup>59</sup> Immediately after the jury verdict in favor of Albert Snyder, *USA Today* reported that “[f]orty states have passed laws in the past two years to keep protesters a certain distance from a funeral, according to the National Conference of State Legislatures.” Alan Gomez, *Church Liable for Protest at Funeral*, USA TODAY, Nov. 1, 2007, at 3A. According to David Hudson, an attorney for the First Amendment Center, citing data from the National Conference of State Legislatures, twenty-seven states have passed funeral protest laws, including: Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. David C. Hudson, Jr., Assembly Topic: Funeral Protests, [http://www.firstamendmentcenter.org/Assembly/topic.aspx?topic=funeral\\_protests](http://www.firstamendmentcenter.org/Assembly/topic.aspx?topic=funeral_protests) (last visited Jan. 21, 2008); see also Matthew Dolan & Julie Bykowicz, *Huge Award in Funeral Lawsuit; \$10.9 Million Damages for Kin of Marine Killed in Iraq*, BALTIMORE SUN, Nov. 1, 2007, at 1A (“[A]larmed by Westboro protests, at least 22 states have proposed or enacted laws to limit the rights of protesters at funerals.”).

<sup>60</sup> Joe DeJka, *Sarpy Eyes Funeral Picket Limits*, OMAHA WORLD-HERALD, Nov. 7, 2007, at 1B.

<sup>61</sup> See, e.g., Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575 (2007); Rebecca Bland, Note, *The Respect for America’s Fallen Heroes Act: Conflicting Interests Raise Hell with the First Amendment*, 75 UMKC L. REV. 523 (2006); Andrea Cornwell, Comment, *A Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals*, 56 AM. U. L. REV. 1329 (2007); Megan Dunn, Note, *The Right to Rest in Peace: Missouri Prohibits Protesting at Funerals*, 71 MO. L. REV. 1117 (2006).

<sup>62</sup> No. 06-7001, 2007 U.S. App. LEXIS 7025 (10th Cir. Mar. 23, 2007), cert. denied, 128 S. Ct. 196 (2007).

<sup>63</sup> *Id.* at \*\*2–6.

*Harper's Magazine* website.<sup>64</sup> Invasion of privacy causes of action based on the multiple theories of misappropriation, public disclosure of private facts, and intrusion into seclusion ultimately were dismissed, as were all other causes of action, including one for intentional infliction of emotional distress.<sup>65</sup> The case, unlike that in the *Snyder* funeral protest, never reached a jury.

Of particular importance in *Showler* was the rejection by the Tenth Circuit in May 2007 of the plaintiffs' reliance on the Supreme Court's 2004 decision in *National Archives & Records Administration v. Favish*.<sup>66</sup> In *Favish*, which centered on whether Exemption 7(C)<sup>67</sup> of the Freedom of Information Act (FOIA) protected the privacy interests of immediate relatives of the deceased to control graphic death-scene photographs,<sup>68</sup> the Court specifically found "in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes."<sup>69</sup> Reasoning that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own,"<sup>70</sup> the Supreme Court concluded that "the personal privacy protected by Exemption 7(C) extends to family

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<sup>64</sup> See Commentary, *Supreme Court Upholds Appeals Court Decision in Favor of Harper's Magazine*, HARPER'S MAG., Oct. 1, 2007, available at <http://www.harpers.org/archive/2007/10/hbc-90001320>.

<sup>65</sup> *Showler*, 2007 U.S. App. LEXIS 7025, at \*\*28–29 (affirming the judgment of the district court for the defendants, concluding "that summary judgment was appropriate on each of the Oklahoma state tort claims asserted by Plaintiffs in this action," but not addressing the merits of the First Amendment-based defense made by the defendants).

<sup>66</sup> 541 U.S. 157 (2004). See generally Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 546–52 (2006) (analyzing the Supreme Court's *Favish* opinion).

<sup>67</sup> This exemption provides, in relevant part, that "records or information compiled for law enforcement purposes" need not be disclosed by a government agency under FOIA if those records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(7)(C) (West 2007).

<sup>68</sup> The photographs in question were of Vincent Foster, Jr., an attorney for former President Bill Clinton. *Favish*, 541 U.S. at 160–63. Government investigations had ruled Foster's death a suicide, but attorney Allan Favish was skeptical of that conclusion and he requested, under FOIA, certain death-scene photographs to review the evidence for himself. *Id.* Foster's relatives objected to Favish's request, and they asserted that "their own right and interest to personal privacy" would be violated by the government by turning over the photographs to Favish and thus making them public. *Id.* at 166. As the Supreme Court put it, the relatives sought "to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased." *Id.*

<sup>69</sup> *Id.* at 167.

<sup>70</sup> *Id.* at 168.

members who object to the disclosure of graphic details surrounding their relative's death."<sup>71</sup> The *Favish* opinion thus was a victory for what University of Miami legal scholars Samuel A. Terilli and Sigman L. Splichal call "relational or derivative privacy rights."<sup>72</sup> Terilli and Splichal astutely predicted in their 2005 analysis of the case that "[t]he implications of this decision will take some time to play out, but there is no question that *Favish* will be significant and will affect the concerns raised by various parties and judges in a number of cases."<sup>73</sup>

Unfortunately for the plaintiffs in *Showler*, however, the implications of *Favish* proved insignificant in supporting their case. In particular, the Tenth Circuit readily distinguished the legal theories at play in *Showler* and *Favish*, writing that *Favish* "is inapplicable to this analysis because it relies on a statutory privacy right under the FOIA, not a cause of action for invasion of privacy."<sup>74</sup> But the Tenth Circuit then went much further and not only distinguished the causes of action, but also separated and contrasted the underlying facts of the two cases.

In particular, the appellate court observed that "all of the cases cited by the Court [in *Favish*] in support of its acknowledgment that the common law has recognized a family's right to control the death images of the deceased, involve *death images that are gruesome* and none involve images displayed at a public funeral."<sup>75</sup> With that pronouncement, the court appeared to be trying to create a dichotomy, albeit a somewhat shaky one, between photographs of the dead that are gruesome (death-scene photos and autopsy images) and photographs of the dead that are dignified. The *Showler* Court bolstered this point by noting that the Supreme Court in *Favish* seemed to focus on gruesome examples of photos of the dead in order to help justify its ruling in favor of the relatives of deceased. For example, the *Showler* court notes the Supreme Court "references 'outrage at seeing the bodies of American soldiers *mutilated and dragged through the streets*,' as a modern example of 'the interests decent people have for those whom they have lost.'"<sup>76</sup> In addition, the Tenth Circuit wrote:

Courts that have found an invasion of privacy have done so when the case involves death-scene images such as crime scene or autopsy photographs. The photographs here are not death-scene photographs, but images of Sgt.

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<sup>71</sup> *Id.* at 171.

<sup>72</sup> Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL'Y 313, 323 (2005).

<sup>73</sup> *Id.* at 325.

<sup>74</sup> *Showler v. Harper's Mag. Found.*, No. 06-7001, 2007 U.S. App. LEXIS 7025, at \*13 (10th Cir. Mar. 23, 2007), *cert. denied*, 128 S. Ct. 196 (2007).

<sup>75</sup> *Id.* at \*15 (emphasis added).

<sup>76</sup> *Id.* at \*\*14–15 (quoting *Favish*, 541 U.S. at 168).

Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral to pay their respects. Coupled with the public nature of this funeral, the photographs are distinguishable from those at issue in *Favish*.<sup>77</sup>

Although the appellate court's seeming effort to draw a distinction between the specific types of content and context included in photographs of the dead that are at issue in privacy disputes is tenuous at this point, it could well prove to be important in the long run in other cases, including those like *Frazier v. Boomsma*,<sup>78</sup> that involve challenges to laws that restrict the use of the names and images of dead soldiers for commercial benefit. It should be noted, initially, that Oklahoma is one of the five states that so far have adopted such a law<sup>79</sup> and that Oklahoma is one of the six states comprising the Tenth Circuit, where *Showler* arose.<sup>80</sup> The logic and reasoning in *Showler* thus could be relevant in a challenge brought against Oklahoma's dead-soldiers statute, and federal district courts within other federal appellate courts have the discretion, of course, to borrow from it as well.

The key from *Showler* is that the May 2007 decision by the Tenth Circuit appears to be intimating that how *tasteful*, for lack of a better word, a photograph of the deceased is may be weighed or considered as one factor (not, of course, the exclusive or only one) in the judicial privacy calculus for determining the rights of relatives. Taken to its logical conclusion, the reasoning in *Showler* seems to be that the more tasteful the photograph (a shot of Kyle Brinlee lying in uniform, face cleaned up and nary a drop of blood in sight, in a clean casket, the upper half of which is open and the lower half of which is neatly draped in an American flag<sup>81</sup>), the less likely the privacy concerns of relatives are to prevail. Conversely, the more gruesome the photograph (a death-scene image of Vincent Foster in *Favish* that reveals his "hand showing [the] gun & thumb"<sup>82</sup> or one in which there is "focus on top of [the] head"<sup>83</sup> of Foster), the more likely the privacy concerns of the relatives will prevail.

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<sup>77</sup> *Id.* at \*15.

<sup>78</sup> No. CV-07-08040-PHX-NVW, 2007 U.S. Dist. LEXIS 72427 (D. Ariz. Sept. 27, 2007).

<sup>79</sup> See *supra* note 10 (setting forth the relevant provisions of Oklahoma's statute).

<sup>80</sup> See The United States Tenth Circuit Court of Appeals, <http://www.ca10.uscourts.gov/generalinfo.php> (last visited Jan. 28, 2008) (providing that "[t]he territorial jurisdiction of the Tenth Circuit includes the six states of *Oklahoma*, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the Yellowstone National Park extending into Montana and Idaho" (emphasis added)).

<sup>81</sup> See *supra* note 64 and accompanying text.

<sup>82</sup> *Favish*, 541 U.S. at 163 (using the district court's description of this particular photograph out of the four photographs that ended up being at issue before the Supreme Court).

<sup>83</sup> *Id.* at 164.

Employing a factor like tastefulness—a term that, if used in a statute, would likely lead to it being declared unconstitutional under the void-for-vagueness doctrine<sup>84</sup>—seems to fly in the face of the Supreme Court’s aging dicta in *Cohen v. California* that “the Constitution leaves matters of taste and style so largely to the individual” precisely because “governmental officials cannot make principled distinctions in this area.”<sup>85</sup> But in the realm of privacy torts (one of which is appropriation,<sup>86</sup> which ties into the interests allegedly at stake under laws like that in *Frazier*<sup>87</sup>), however, such consideration may actually make some sense. Why? Because in both the privacy torts of public disclosure of private facts and intrusion into seclusion, jurors are required to consider an equally subjective concept that is very similar, in terms of meaning, to tastefulness—namely, *offensiveness*.<sup>88</sup> Stretching such a consideration of the tastefulness or offensiveness of images from the relational privacy context of

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<sup>84</sup> Under the void-for-vagueness doctrine, “[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted.” CHEMERINSKY, *supra* note 29, at 910.

<sup>85</sup> 403 U.S. 15, 25 (1971).

<sup>86</sup> As one federal district court recently observed:

The four distinct torts grouped under the privacy rubric are: (1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

*Bonner v. Fuji Photo Film*, No. C-06-04374-CRB, 2007 U.S. Dist. LEXIS 79623, at \*17 (N.D. Cal. Oct. 26, 2007).

<sup>87</sup> *See supra* notes 15–18 (discussing the interests protected by the related torts of appropriation and right of publicity).

<sup>88</sup> *See Four Navy Seals v. Assoc. Press*, 413 F. Supp. 2d 1136, 1144 (S.D. Cal. 2005) (providing that, in order to win a cause of action for public disclosure of private facts, “a plaintiff must establish the following elements: (1) public disclosure; (2) of a private fact; (3) *offensive to a reasonable person*; and (4) not a legitimate public concern” (emphasis added)); RESTATEMENT (SECOND) OF TORTS § 652B (1977) (providing that the tort of intrusion occurs when a person “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, *if the intrusion would be highly offensive to a reasonable person*” (emphasis added)).

The privacy tort of false light also includes consideration of offensiveness, but it is less relevant here as *Showler* did not involve a false light claim and, more importantly, because “[c]ourts have continuously narrowed the protection provided by the false light invasion of privacy, to the point of non-existence.” Matthew Stohl, *False Light Invasion of Privacy in Docudramas: The Oxymoron Which Must Be Solved*, 35 AKRON L. REV. 251, 254 (2002). In Arizona, where *Frazier* originates, false light is a recognized cause of action, and “Arizona law allows false light plaintiffs to recover damages for injuries that are distinct from the injuries necessary to sustain a parallel defamation claim.” *Ultimate Creations, Inc. v. McMahon*, 515 F. Supp. 2d 1060, 1067 (D. Ariz. 2007).

*Showler* to a similar application in the emerging relational privacy context of the statute at issue in *Frazier* would allow courts to evaluate and weigh items such as how either the images or the names of dead soldiers are displayed or used on a T-shirt or any other object.

The T-shirts at issue in *Frazier*, for example, do not have “gruesome,” to borrow the word chosen by the Tenth Circuit in *Showler*,<sup>89</sup> images of any of the deceased soldiers. There are no images of, as the Supreme Court wrote in *Favish*, “American soldiers mutilated.”<sup>90</sup> In fact, there are no photographs or drawings on the T-shirts whatsoever; there are only names and words.

In particular, the names of the dead soldiers on Dan Frazier’s T-shirts “are printed in a small font approximating the size of newsprint,”<sup>91</sup> in white ink pressed onto black fabric, with the words “BUSH LIED” and “THEY DIED” being “printed respectively on the front and back of one shirt in large, capital, bold-faced type over a background consisting of the names of 3,461 deceased soldiers.”<sup>92</sup> The individual names are so small, in fact, that six rows of names stacked on top of each other measure the height of a single penny, as an image on Frazier’s website clearly illustrates.<sup>93</sup> Anyone standing more than a couple of feet away from the shirt most likely would not be able to read or to make out any of the individual names but rather would see an illegible mass of white text.

There is, then, nothing distasteful or offensive about how the names themselves are actually printed. They are displayed in a format that is very much like the mass of more than 58,000 names now etched onto polished black granite at the Vietnam Veterans Memorial in Washington, D.C.<sup>94</sup> In stark contrast, and by way of comparison with a very different and far more well-known federal court dispute involving the names of deceased individuals, each of the names of the abortion doctors who were killed that were displayed on the so-called Nuremberg Files website was, as the Ninth Circuit put it, “struck through,”<sup>95</sup> with a legend on the site indicating that a strikethrough means a “fatality.”<sup>96</sup> In other words, the names themselves were written in a manner that is distasteful. The distastefulness conveyed in the case of

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<sup>89</sup> *Showler v. Harper’s Mag. Found.*, No. 06-7001, 2007 U.S. App. LEXIS 7025, at \*15 (10th Cir. Mar. 23, 2007), *cert. denied*, 128 S. Ct. 196 (2007).

<sup>90</sup> *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 168 (2004).

<sup>91</sup> *Frazier v. Boomsma*, No. CV-07-08040-PHX-NVW, 2007 U.S. Dist. LEXIS 72427, at \*2 (D. Ariz. Sept. 27, 2007).

<sup>92</sup> *Id.*

<sup>93</sup> See *CarryaBigSticker*, [http://www.carryabigsticker.com/images/bush\\_lied\\_front\\_nov06\\_big.gif](http://www.carryabigsticker.com/images/bush_lied_front_nov06_big.gif) (last visited Feb. 20, 2008).

<sup>94</sup> See generally Michael E. Ruane, *Vietnam Memorial Turns 25*, WASH. POST, Nov. 11, 2007, at C1 (describing the memorial, noting the number of names now etched on it, and reporting on its twenty-fifth anniversary).

<sup>95</sup> *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1065 (9th Cir. 2002).

<sup>96</sup> *Id.*

Frazier's T-shirts, in contrast, arises from an individual's interpretation of the meaning of the words "BUSH LIED" and "THEY DIED," which are superimposed directly on top of more than 3000 names. And it really is an individual's interpretation of meaning; as Dan Frazier told a reporter for the *Los Angeles Times*, "The shirt doesn't say these people opposed the war. Just that they died."<sup>97</sup> In brief, it is the added textual words, not the manner in which the names themselves are written (i.e., there are no lines through the names, there is no blood dripping from them, etc.) that some parents like Robert Vandertulip find distasteful.<sup>98</sup> There clearly are no bright lines to make such distinctions readily transparent, but at this point in time it is important to be cognizant of the Tenth Circuit's apparent acknowledgment that how tasteful or gruesome the image of the deceased is may be weighed into relational privacy disputes.

Such a consideration might well be a factor in cases like *Frazier* in determining how tasteful the use of the name or image of a dead soldier is when it appears on an object like a T-shirt. In particular, this factor, when coupled with *Showler*'s overall reluctance to extend *Favish*'s statutory conference of relational privacy rights of relatives in the FOIA context to privacy-based tort situations, could suggest to a court that the new dead soldiers statutes creating civil tort remedies for the relatives of dead soldiers are not warranted, especially when the images and names of the deceased are not gruesome but are more akin to the photo at the heart of the dispute in *Showler*.

With this background and context in mind in consideration of other current freedom of expression controversies that affect the alleged privacy rights of the parents of dead soldiers—individual lawsuits like the one in *Snyder v. Phelps*<sup>99</sup> targeting funeral protestors, state legislation adopted across the nation that is aimed at pushing back such protestors fixed distances from funerals, and the lawsuit in *Showler* over the published open-casket photograph of soldier Kyle Brinlee—this Article now turns to an overview of the competing interests at stake under laws like the one at issue in *Frazier*.

## II. THE RIGHT OF POLITICAL PROTEST VERSUS THE RIGHT OF PUBLICITY: WEIGHING THE INTERESTS IN FASHIONING A DEAD SOLDIER'S RIGHT OF PUBLICITY

"A lot of those soldiers died thinking they were fighting for American values like freedom of speech, and now their loved ones want to take that right away."<sup>100</sup>

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<sup>97</sup> Riccardi, *supra* note 4, at A1.

<sup>98</sup> *See id.* at A8.

<sup>99</sup> No. RDB-06-1389, 2006 U.S. Dist. LEXIS 79020 (D. Md. Oct. 30, 2006).

<sup>100</sup> Riccardi, *supra* note 4, at A8 (quoting Dan Frazier).

That is how Dan Frazier, the man currently caught in the crosshairs of one of the recently adopted state laws limiting the use of the names and images of dead soldiers, views the actions of relatives of soldiers killed in Iraq who would sue to stop sale of his anti-war T-shirts on which those soldiers' names appear in miniscule white letters. For Frazier, it is, as he puts it, a fight for "American values like freedom of speech"<sup>101</sup> when he challenges laws like those in Arizona.

George Washington University Professor Jonathan Turley contends that, by using the names of real people killed in an unpopular war, Frazier's speech is made all that more powerful because he is "personalizing the true costs of the war."<sup>102</sup> Frazier later acknowledged this point in a letter published in *USA Today*, in which he argued that "[i]t is important to keep the names and faces of the fallen at the forefront of our discussions about the war."<sup>103</sup>

Frazier, of course, is not the first person to utilize, in controversial fashion, the names of American service members killed in Iraq in order to make political statements about the war or, as some might see it, to pay tribute to the dead. For instance, Sinclair Broadcasting Company engaged in self-censorship when it refused to allow its television stations to air a *Nightline* episode in 2004 called "The Fallen" in which "Ted Koppel read the names of approximately 700 U.S. servicemen and -women who have been killed in Iraq."<sup>104</sup> In a commentary published in the *San Antonio Express-News*, Dan Frazier himself pointed out that *Atlanta Journal-Constitution* cartoonist Mike Luckovich "created the word 'WHY?' out of the names of 2,000 fallen soldiers who died in Iraq. He won a Pulitzer Prize for doing so. The *Constitution* sells reprints for up to \$290."<sup>105</sup> In addition to such mass media uses of the names of dead soldiers, Vincent Green, an artist from Austin, Texas, sells anti-war art consisting of "a mosaic of names over a portrait of President Bush."<sup>106</sup>

The importance of protecting political speech that dissents from government policies applies not only to *what* is being said—the cognitive message transmitted—but also to *how* it is being said. As the Supreme Court opined in protecting Paul Robert Cohen's provocative, jacket-conveyed message, "Fuck the Draft," in a Los Angeles courthouse during another controversial war, Vietnam:

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<sup>101</sup> *Id.*

<sup>102</sup> Jonathan Turley, *A War with Flags but No Faces*, USA TODAY, Aug. 17, 2006, at 11A.

<sup>103</sup> Dan Frazier, Letter to the Editor, *Anti-War Protesters' Sales Aren't Un-American*, USA TODAY, Sept. 5, 2006, at 10A.

<sup>104</sup> Lisa de Moraes, *'Nightline' Ratings Rise for Roll Call of Iraq Dead*, WASH. POST, May 4, 2004, at C1.

<sup>105</sup> Dan Frazier, Commentary, *Soldiers' Names on Stickers, Shirts Personify Tragedy*, SAN ANTONIO EXPRESS-NEWS (Tex.), Aug. 6, 2006, at 4H.

<sup>106</sup> Mark Lisher, *Anti-War Artists Say Free Speech Trumps All*, AUSTIN AMERICAN-STATESMAN (Tex.), July 20, 2007, at A1.

[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, *words are often chosen as much for their emotive as their cognitive force.* We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.<sup>107</sup>

Just as Cohen's anti-draft message would have lost its emotive impact were he to have changed it to something like "I object to the Draft" or "End the Draft" in order to, as the Supreme Court wrote, make it "palatable to the most squeamish among us,"<sup>108</sup> so too would the anti-war message of Dan Frazier lose its impact and poignant force were the shirts to be stripped of the names of the more than 3000 men and women killed in Iraq and replaced with "More Than 3000 Have Died Because Bush Lied."

Although U.S. District Court Judge Neil V. Wake somewhat surprisingly failed to cite or even mention the *Cohen* case at all in his September 2007 opinion in *Frazier*, there is additional language in the majority's opinion in *Cohen* that seems particularly relevant, by analogy, to the controversy now facing those individuals like Dan Frazier who want to use the names and images of dead soldiers to convey anti-war messages. In particular, Justice John Harlan wrote, toward the close of the *Cohen* opinion, that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."<sup>109</sup> Similarly, by attempting to forbid the use of particular words—in the current battle, the words being the names of dead soldiers—the states of Arizona, Florida, Louisiana, Oklahoma, and Texas could be viewed, albeit cynically, as trying to suppress the much larger anti-war messages that may be "unpopular views" among some people.

But *Cohen*, of course, is not the only case that easily lends itself to supporting Frazier's T-shirts that Judge Wake neither quoted nor cited. In *Texas v. Johnson*,<sup>110</sup>

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<sup>107</sup> *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (emphasis added).

<sup>108</sup> *Id.* at 25. Even in the parlance of today, the message "The Draft Sucks" would seem to convey far less force than "Fuck the Draft."

<sup>109</sup> *Id.* at 26.

<sup>110</sup> 491 U.S. 397 (1989).

protecting the right of Gregory Lee Johnson to burn the American flag in symbolic political protest, Justice William Brennan wrote for the majority of the Court that the decision in favor of Johnson was a reaffirmation “of the conviction that our toleration of criticism such as Johnson’s is a sign and source of our strength.”<sup>111</sup> Similarly, tolerance of Frazier’s use of the names of the real people killed in action as a form of criticism of the government’s policy in Iraq should be seen as a sign of strength. As First Amendment scholar and Columbia University President Lee Bollinger wrote in *The Tolerant Society*, “free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.”<sup>112</sup>

Justice Brennan also wrote in *Johnson*, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>113</sup> Under this logic, Frazier’s shirts may well be offensive and disagreeable to some of the parents of the deceased soldiers, but the government should not attempt to criminalize such sentiments or to provide civil remedies for their redress. As University of Alabama Professor Matthew Bunker observes, “the protection of dissent for its own sake” is one of many theories that justify expansive protection of expression under the First Amendment.<sup>114</sup>

Although the civil statute at issue in Arizona is more akin to the right of publicity than to defamation,<sup>115</sup> some might say that the implication from Frazier’s T-shirt is that one defames the honor of the American men and women who died in Iraq by associating them with an anti-war message. Initially, of course, this defamation-of-the-dead notion conflicts with “the centuries-old rule against liability for defamation of dead people.”<sup>116</sup> What’s more, although the men and women who died in Iraq

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<sup>111</sup> *Id.* at 419.

<sup>112</sup> LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 10 (1986).

<sup>113</sup> *Johnson*, 491 U.S. at 414.

<sup>114</sup> MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 14 (2001).

<sup>115</sup> Under defamation law in Arizona, which tracks the *Restatement (Second) of Torts* definition, a plaintiff must prove four elements:

- (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

*Athans v. Starbucks Coffee Co.*, No. CV-06-1841-PHX-DGC, 2007 U.S. Dist. LEXIS 21412, at \*4 (D. Ariz. Mar. 23, 2007) (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

<sup>116</sup> Lisa Brown, Note, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1525 (1989).

may not be public figures, they arguably are caught up voluntarily—they chose to join the military as there is no forced conscription today in the United States—in a very public debate about a most controversial government policy, and the Supreme Court has recognized “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>117</sup> Importantly, Judge Wake in *Frazier* quoted this exact language from *New York Times Co. v. Sullivan* in support of his decision enjoining Arizona’s criminal statute,<sup>118</sup> so its relevance to the current dispute is judicially recognized. As Judge Wake wrote, Frazier’s T-shirts “critique the initiation and administration of the war in Iraq, perhaps the most salient and hotly debated issue in current American politics.”<sup>119</sup>

But if courts and legal scholars, armed with freedom of expression principles and precedent at the ready, stand on one end of the rope in the legal tug-of-war over the use of the names and images of dead soldiers, then the outraged family members, upset by the supposedly exploitive use of their relatives’ names, stand alongside lawmakers in, so far, five states, pulling hard in the other direction. They are attempting to control the commercial use of the names and likenesses of their deceased loved ones, either because of the emotional pain they themselves experience at seeing the names used as part of an anti-war message or simply because they do not want to see other people profit—what they would see as unjust enrichment—from the sale of objects carrying the names of their deceased relatives.

Consider, for example, the sentiment of Judy Vincent, whose son was killed in Iraq in 2004: “I do believe the First Amendment stops when you use a person’s name or likeness to make a profit. I don’t care what he [Frazier] thinks about the war. I do care that he’s making money off my son’s death.”<sup>120</sup> Her view clearly taps into the unjust enrichment position. Or reflect on the views of Margy Bons, whose son was killed by a suicide bomber in Iraq in 2005, who said “the shirt’s existence increased the pain she felt every day.”<sup>121</sup> Bons was also quoted as saying, “This is using your political stance and hurting me.”<sup>122</sup> This clearly taps into not the unjust enrichment, property-right argument but, instead, into the personal, emotional turmoil experienced by some of the grieving relatives.

Tort law provides a legal springboard for allowing an individual (and in some states, his or her relatives or designees after the individual’s death) to control the commercial use of his or her name and likeness via the theories of appropriation and right

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<sup>117</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>118</sup> *Frazier v. Boomsma*, No. CV-07-08040-PHX-NVW, 2007 U.S. Dist. LEXIS 72427, at \*29 (D. Ariz. Sept. 27, 2007) (quoting *Sullivan*, 376 U.S. at 270).

<sup>119</sup> *Id.* at \*33.

<sup>120</sup> *Woman Wants Son’s Name Off T-Shirts*, ASSOC. PRESS ONLINE, July 21, 2006, available at <http://www.lexisnexis.com/us/Inacademic/>.

<sup>121</sup> Riccardi, *supra* note 4, at A1.

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

of publicity described in this Article.<sup>123</sup> One appellate court recently observed that “[t]he common law right of publicity derives from the fourth category of invasion of privacy identified by Dean Prosser, described as ‘appropriation’ of a plaintiff’s name or likeness for the defendant’s advantage.”<sup>124</sup> This reference, of course, is to the 1960 law journal article by William L. Prosser that classified four privacy torts, including appropriation.<sup>125</sup> As Professor Oliver R. Goodenough of Vermont Law School wrote in a 1996 article that succinctly captures the history and evolution of the right of publicity tort, Prosser contended “that the law of privacy could be most sensibly summarized as a loosely unified, common-law tort with four distinct branches.”<sup>126</sup> The right of publicity, as Saint Louis University School of Law Professor Mark P. McKenna writes, thus often is “described as a descendant of the right of privacy”<sup>127</sup> that has evolved over the last four decades in “protecting the economic associative value of identity.”<sup>128</sup> Put differently, the right of publicity often is thought of as protecting a property or economic right in one’s name or likeness, while appropriation is seen as protecting emotional tranquility.

Although the nuances of the appropriation and right of publicity causes of action vary in those states that recognize them, and a complete review of the history of these causes of action is beyond the scope of this Article,<sup>129</sup> the Ninth Circuit, which includes Arizona—where *Frazier* is taking place—has observed that “[a] common law cause of action for appropriation of name or likeness may be pleaded by alleging 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>130</sup> The court added:

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<sup>123</sup> See *supra* notes 16–18 and accompanying text (providing background information on the survivability of the right to control one’s name or likeness after death in some states); see also RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 660 (2d ed. 2002) (“The vast majority of courts that have considered the right to publicity view it as a property-based right. Most of these courts find this property-based publicity right freely assignable by its owner during his lifetime and fully descendible to his heirs after his death regardless of whether he used his right during his lifetime.”).

<sup>124</sup> *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Ct. App. 2001).

<sup>125</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

<sup>126</sup> Oliver R. Goodenough, *Go Fish: Evaluating the Restatement’s Formulation of the Law of Publicity*, 47 S.C. L. REV. 709, 734 (1996).

<sup>127</sup> Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 227 (2005).

<sup>128</sup> *Id.* at 230.

<sup>129</sup> For a recent review of the history of the right of the publicity, see Andrew Koo, *Right of Publicity: The Right of Publicity Fair Use Doctrine—Adopting a Better Standard*, 4 BUFF. INTELL. PROP. L.J. 1 (2006). For a more critical review of the evolution of the right of publicity, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993).

<sup>130</sup> *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997).

The so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed and planned, endows the name and likeness of the person involved with commercially exploitable opportunities. The protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy.<sup>131</sup>

Interestingly, prior to 2000 Arizona had “not recognized a claim for the right of publicity in common law or by statute.”<sup>132</sup> But that changed when a federal district court judge opined that he “[saw] no reason why a claim for invasion of the right of publicity should not be recognized in Arizona.”<sup>133</sup> In *Frazier*, Judge Wake quoted the *Restatement (Third) of Unfair Competition* to define the common law right of publicity as providing that “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability.”<sup>134</sup>

Although an application of each of the basic elements of appropriation and right of publicity to the facts of *Frazier* is beyond the scope of this Article (it is important to remember that these torts only provide possible support for the public policy interests that underlie the *separate* and *stand-alone new statutes*, both civil and criminal, that states are creating to safeguard the names and images of dead soldiers), it certainly seems clear, based on Judge Wake’s reasoning, that the use of the names of dead soldiers for *Frazier*’s work would be protected under either appropriation or right of publicity theories because the names are inextricably intertwined on the T-shirts with a newsworthy issue—the war in Iraq. As a New York court observed four decades ago in ruling against comedian and satirical-presidential aspirant Pat Paulsen, who sued a company that produced and sold posters that used his image without his consent:

The “right of publicity” . . . like that of “privacy” is at best a limited one, within the context of an advertising use, and would be held to have no application where the use of name or picture, as is here the case, *as in connection with a matter of public interest*.<sup>135</sup>

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<sup>131</sup> *Id.* (citing *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (1979)).

<sup>132</sup> *Pooley v. Nat’l Hole-In-One Assoc.*, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000).

<sup>133</sup> *Id.* at 1112.

<sup>134</sup> *Frazier v. Boomsma*, No. CV-07-08040-PHX-NVW, 2007 U.S. Dist. LEXIS 72427, at \*40 (D. Ariz. Sept. 27, 2007) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)).

<sup>135</sup> *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 508 (Spec. Term 1968) (emphasis added).

Specifically citing the *Paulsen* case, Judge Wake in *Frazier* wrote that “the right of publicity cannot justify content-based restrictions on political or artistic expression where the identity of the holder of the right bears a reasonable relationship to the message.”<sup>136</sup> In this case, he found more than simply a reasonable relationship:

Because a focal point of Frazier’s critique of the Iraq war is the magnitude of the personal loss that it has produced, the individual identities of the deceased American soldiers are not only reasonably related to his message, but *integral to it*. The t-shirts, like the Vietnam War Memorial, derive some of their communicative force from their ability to personalize human loss on a great scale. Without the large number of real names of fallen soldiers, the effect of Frazier’s political message would be diminished.<sup>137</sup>

Perhaps the most interesting and intriguing public policy question here, however, is whether average American service members should be treated akin to modern-day celebrities and sports stars who often profit from the commercial value in the use of their names and likenesses by endorsing particular products and then, upon death, pass that value along to their estate and designated heirs.<sup>138</sup> After all, as Judge Wake wrote in *Frazier*, Arizona was creating what he termed a “*soldiers’ right of publicity*” statute, as the state “apparently aims to prevent the unauthorized use of a soldier’s identity principally because it unjustly deprives him or her of potential financial gain.”<sup>139</sup> The subsidiary issue is whether such a soldier’s right of publicity should be passed along to heirs given that “the question of the descendibility of publicity rights is essentially settled. Either by common law or statute, the vast majority of states that have recognized publicity rights allow them to be asserted after the death of the celebrity.”<sup>140</sup>

At first glance, there is some obvious sympathetic merit to bolstering the publicity rights of soldiers and service members in order to treat them akin to sports stars and famous movie actors. Clearly, the dangerous and deadly work of United States troops and soldiers on battlefields in Iraq far outstrips in magnitude the importance and real-world relevance of any action American athletes could ever possibly take on football fields or any acting turn Hollywood performers could take on the

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<sup>136</sup> *Frazier*, 2007 U.S. Dist. LEXIS 72427, at \*42.

<sup>137</sup> *Id.* at \*43 (emphasis added).

<sup>138</sup> See *supra* notes 40–41 and accompanying text (illustrating this point with the examples of Tiger Woods and Peyton Manning).

<sup>139</sup> *Frazier*, 2007 U.S. Dist. LEXIS 72427, at \*44 (emphasis added).

<sup>140</sup> David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 83 (2005).

silver screen. But neither importance nor dangerousness, however, are the legal criteria that underlie or justify the recognition of a property right in one's name or likeness that is bestowed under the right of publicity. Similarly, heroism is *not* a legal criterion; were it to be one, the selfless heroism of putting one's life on the line in the face of bombs, bullets, and bloodshed in Iraq would clearly outweigh the heroism of hitting a ninth-inning, walk-off home run to end a baseball game. Simply put, the former person's life is at risk, the latter person's is not.

Judge Wake did not bother to address or mention such possible sympathetic arguments for treating soldiers akin to celebrities but instead cut directly to the legal chase when he wrote in *Frazier*:

Unlike athletes, movie stars, and other celebrities to whom the right of publicity is most frequently applied and for whom income is often substantially reliant on the commercial value of an identity, the soldiers did not earn their living from their names. They did not invest time and effort cultivating an identity that was itself a source of financial reward. The right of publicity loses much of its economic justification where the business affairs of the individuals asserting the right are wholly unrelated to the maintenance of a public persona and wholly unaffected by another's use of that persona.<sup>141</sup>

The bottom line is simple: the average soldier has not cultivated or built up any commercial value in his name during his life, and thus there is no economic value in the name to be passed along after the soldier dies. Put more bluntly, average soldiers simply have no commercial value in their names at the time of their death, so why should the parents expect any posthumous value?

The sad irony, from the relatives' perspective, also is clear: selfless, underpaid heroism in Iraq does not merit being treated, at least for purposes of the right of publicity, like a selfish, overpaid athlete playing a game in a ball park. Judge Wake was quick to note, however, that "a soldier whose identity carried some commercial value could be protected against commercial exploitation by this statute or by the common law."<sup>142</sup> Although the judge again failed to provide any examples here, one might readily imagine a soldier like General H. Norman Schwarzkopf, who gained fame during the Gulf War and Operation Desert Storm and then later penned a top-selling autobiography,<sup>143</sup> falling into this category.

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<sup>141</sup> *Frazier*, 2007 U.S. Dist. LEXIS 72427, at \*\*45–46.

<sup>142</sup> *Id.* at \*46.

<sup>143</sup> See Herbert Mitgang, *Books of The Times; It's Not the Last Word, But It's Firsthand and Fast*, N.Y. TIMES, Sept. 30, 1992, at C19 (calling Schwarzkopf's autobiography, *It Doesn't Take a Hero*, "a first draft of history, a serviceable but incomplete story of a complex coalition

In summary, the tension between the rights of the relatives of deceased soldiers and those of Dan Frazier that now are at stake in five states track what Professor F. Jay Dougherty of Loyola Law School in Los Angeles calls “the very difficult problem of the conflict between property rights in persona and the free speech rights of visual artists who depict real people.”<sup>144</sup> The next part of this Article argues that, in order to resolve this thorny issue on an equitable, case-by-case basis in situations like that in *Frazier* and others that are sure to transpire in other contexts in the other four states that recently have adopted such laws, courts should embrace and apply a test created by the California Supreme Court in, appropriately enough, another T-shirt-based case. Although the test described in the next Part may be an imperfect solution to a very intricate and emotionally charged issue, it nonetheless provides a legal mechanism that can be employed in a manner flexible enough to take into account the many diverse ways in which the names and/or likenesses of dead soldiers might be used by the likes of Dan Frazier and others for purposes of political commentary.

### III. FROM THE THREE STOOGES TO 3000 DEAD SOLDIERS: MAKING USE OF CALIFORNIA’S TRANSFORMATIVE USE TEST TO RESOLVE FACT-SPECIFIC CONTROVERSIES IN *FRAZIER*-LIKE CASES

Professor Lior Jacob Strahilevitz of the University of Chicago Law School recently observed that “[p]rivacy law is better developed in California than in any other U.S. jurisdiction.”<sup>145</sup> One particular area in which it has evolved in recent years is the right of publicity. In 2001, in the case of *Comedy III Productions v. Gary Saderup, Inc.*,<sup>146</sup> the California Supreme Court created what it called “essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”<sup>147</sup> As Professor F. Jay Dougherty wrote, the California Supreme Court in *Saderup* “proposed a new categorical test under which a work of visual art will be considered speech protected from right of publicity claims only if it is transformative.”<sup>148</sup>

If legislators in states like Arizona and Texas truly want to treat soldiers like celebrities—recall the words of Arizona state Senator Jim Waring, who proclaimed,

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war. In his book, General Schwarzkopf comes across as a strong professional soldier, a Patton with a conscience”).

<sup>144</sup> F. Jay Dougherty, *All the World’s Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 78 (2003).

<sup>145</sup> Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 939 (2005).

<sup>146</sup> 21 P.3d 797 (Cal. 2001), cert. denied, 534 U.S. 1078 (2002).

<sup>147</sup> *Id.* at 799.

<sup>148</sup> Dougherty, *supra* note 144, at 7.

“You should have some rights to your own name and your own legacy, particularly if you’re a deceased veteran. . . . Celebrities have that. Why shouldn’t our soldiers have that?”<sup>149</sup>—and assuming, arguendo, that they should indeed be treated as such, then adopting a test that was designed in the celebrity-centric case of *Saderup* makes sense. In any case, the right of publicity does not necessarily only protect celebrities; as intellectual property attorney Russell S. Jones, Jr. wrote, “The right of publicity is generally defined as the right of a person—usually but *not necessarily a famous person or celebrity*—to control the commercial use of his name, likeness or other personal identifying characteristics.”<sup>150</sup> Indeed, as attorney Ann Margaret Eames wrote, even the *Restatement (Third) of Unfair Competition* “states that the right of publicity exists in us all, both celebrities and non-celebrities.”<sup>151</sup>

With this in mind, and along with all of the understandable passion about dead soldiers illustrated in Part I (such as the funeral-protest jury verdict in *Snyder v. Phelps*<sup>152</sup>) as well as the author’s illustration in Part II about the unmatched importance of the work and heroism of United States soldiers relative to that of Hollywood movie stars and professional athletes, let us generously assume two things, each of which clearly errs on the side of protecting both the emotional and financial interests of the relatives of deceased soldiers in cases like *Frazier*:

1. Dead soldiers *do* have a right of publicity enforceable by their immediate relatives or designated heirs; and
2. Dead soldiers *do* have “fame” akin to that of celebrities upon their deaths.

Even with these two assumptions that are vastly deferential to the rights of relatives to control the names of their deceased, service-member relatives, the remainder of this part of the Article argues that application of the California Supreme Court’s rule and related factors from *Saderup* would almost certainly protect Dan Frazier’s T-shirt with the words “BUSH LIED” and “THEY DIED” emblazoned on top of the tiny names of more than 3000 U.S. soldiers killed in Iraq. To begin to understand this rule and how it most likely would protect Frazier’s T-shirt, a brief overview of the facts and holding in *Saderup* is essential.

In *Saderup*, the California Supreme Court ruled in favor of Comedy III Productions, the registered owner of all rights to the former comedy act known as The Three Stooges, and against artist Gary Saderup, who “sold lithographs and T-shirts bearing a likeness of The Three Stooges reproduced from a charcoal drawing he had

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<sup>149</sup> Davenport, *supra* note 42, at A7.

<sup>150</sup> Russell S. Jones, Jr., *The Flip Side of Privacy: The Right of Publicity, the First Amendment, and Constitutional Line Drawing—A Presumptive Approach*, 39 CREIGHTON L. REV. 939, 941 (2006) (emphasis added).

<sup>151</sup> Ann Margaret Eames, *Caught on Tape: Exposing the Unsettled and Unpredictable State of the Right of Publicity*, 3 J. HIGH TECH. L. 41, 47 (2004) (emphasis added) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)).

<sup>152</sup> No. RDB-06-1389, 2006 U.S. Dist. LEXIS 79020 (D. Md. Oct. 30, 2006).

made.”<sup>153</sup> Saderup, who never obtained permission from Comedy III Productions to use the likeness of The Three Stooges, netted \$75,000 in profits from the sale of the unlicensed lithographs and T-shirts bearing the likenesses of Moe Howard, Jerome (Curly) Howard, and Larry Fein.<sup>154</sup> When Comedy III Productions sued Saderup, the California Supreme Court was forced to address what it termed the “difficult issue”<sup>155</sup> of whether enforcement of the lower court’s judgment against Saderup awarding damages of \$75,000 and attorney fees of \$150,000, plus costs, to Comedy III Productions for the unauthorized use of the artistic likeness of the images “violates his right of free speech and expression under the First Amendment.”<sup>156</sup>

Before going further, several factual similarities between *Saderup* and *Frazier* are worth noting. First, both cases involved visual works displayed on the medium of T-shirts, with the court in *Saderup* observing that speech does *not* receive reduced First Amendment protection simply because it is conveyed “on a less conventional avenue of communications, T-shirts.”<sup>157</sup> Second, both works involved either the likeness (*Saderup*) or names (*Frazier*) of deceased individuals, with likenesses and names constituting traditional aspects of a person’s identity protected in appropriation and right of publicity cases. Third, the speech in question of both Gary Saderup and Dan Frazier can be considered art. In Saderup’s situation, he created “charcoal drawings of celebrities” that he then “used to create lithographic and silkscreen masters, which in turn [were] used to produce multiple reproductions in the form, respectively, of lithographic prints and silkscreened images on T-shirts.”<sup>158</sup> In Frazier’s case, he looks up the names of deceased service members, then assembles and arranges their names in tiny white font on a black T-shirt, and, finally, adds artistic and political commentary by placing, in much larger, all-capital letters, words such as “BUSH LIED” and “THEY DIED” on top of them. Frazier’s work certainly may not be “high” art, but as the California Supreme Court wrote in *Saderup*, “courts are not to be concerned with the quality of the artistic contribution.”<sup>159</sup>

What courts *are* to be concerned with, the California Supreme Court determined, is whether the work in question is “transformative.”<sup>160</sup> In borrowing this consideration from copyright law—it tracks one of the four statutorily defined fair-use factors<sup>161</sup>—to apply to the right of publicity tort, the court wrote that “inquiry into whether a work is ‘transformative’ appears to us to be necessarily at the heart of *any*

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<sup>153</sup> Comedy III Prod. v. Gary Saderup, Inc., 21 P.3d 797, 800–01 (Cal. 2001), *cert. denied*, 534 U.S. 1078 (2002).

<sup>154</sup> *Id.* at 801.

<sup>155</sup> *Id.* at 802.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 804.

<sup>158</sup> *Id.* at 800.

<sup>159</sup> *Id.* at 809.

<sup>160</sup> *Id.* at 808.

<sup>161</sup> See 17 U.S.C. § 107 (2000) (providing that “the purpose and character of the use” shall be a factor “[i]n determining whether the use made of a work in any particular case is a fair use”).

judicial attempt to square the right of publicity with the First Amendment.”<sup>162</sup> The question thus became whether Gary Saderup’s rendering of The Three Stooges on the T-shirts he sold was sufficiently transformative to warrant First Amendment protection. To resolve this issue, the California Supreme Court articulated two key principles and factors:

1. Whether the work in question contains “significant transformative elements,” an inquiry that focuses on the “creative contributions” of the artist and, in particular, that “is in a sense more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work.”<sup>163</sup>
2. Whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted” or, in contrast, whether “the value of the work comes principally from some source other than the fame of the celebrity.”<sup>164</sup> If the value comes primarily or principally from a source *other than* the celebrity’s fame, then “it may be presumed that sufficient transformative elements are present to warrant First Amendment protection.”<sup>165</sup>

Summarizing these two principals, the California Supreme Court concluded that

when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains *significant transformative elements* or that the *value of the work does not derive primarily from the celebrity’s fame*.<sup>166</sup>

It is important to notice that this is *not* a conjunctive test, as the California Supreme Court will rule in favor of the artist if he or she can prove that the work either “contains significant transformative elements *or* that the value of the work does not derive primarily from the celebrity’s fame.”<sup>167</sup> It is similar, for purposes of ready comparison, to the Supreme Court’s phrasing of actual malice as the publication of a defamatory statement either “with knowledge that it was false *or* with reckless disregard of whether it was false or not.”<sup>168</sup> The use of the word “or” thus

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<sup>162</sup> *Saderup*, 21 P.3d at 808 (emphasis added).

<sup>163</sup> *Id.* at 808, 809.

<sup>164</sup> *Id.* at 810.

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

<sup>166</sup> *Id.* (emphasis added).

<sup>167</sup> *Id.* (emphasis added).

<sup>168</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (emphasis added).

means that the individual being sued only needs to successfully assert one of the two factors to win First Amendment speech protection.

Applying this rule to The Three Stooges T-shirts, the California Supreme Court ruled against Gary Saderup, reasoning that, in accord with the second factor noted above, “the marketability and economic value of Saderup’s work derives primarily from the fame of the celebrities depicted.”<sup>169</sup> The court, in fact, found absolutely “no significant transformative or creative contribution”<sup>170</sup> but instead determined that Saderup’s “undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame.”<sup>171</sup>

The gist of the *Saderup* rule is, as George Washington University Law School Professor Jonathan Siegel recently distilled it, that “a simple exploitation of a celebrity’s likeness is not protected by the First Amendment, but a ‘transformative’ use of the likeness, in which the artist adds creative elements that transform the likeness into the artist’s own expression, is protected.”<sup>172</sup> UCLA Law School Professor Eugene Volokh has criticized the *Saderup* test, pointing out issues of vagueness in its application.<sup>173</sup>

But as applied to the Dan Frazier T-shirt scenario, an outcome in favor of protection of his “BUSH LIED” and “THEY DIED” T-shirts would seem to be anything but vague. Critical here is the fact that the value of the work is in no way derived from the use of the name of any particular or individual soldier identified on the T-shirts. As Judge Wake wrote in *Frazier*, “the names of the individual soldiers are printed on the t-shirts in a font that cannot be read beyond arm’s length. The *identity of any particular soldier is not the point of the t-shirts*; it is the combined effect of all the names of the 3,461 deceased soldiers.”<sup>174</sup> Parsed differently, the Frazier T-shirt does not exploit or profit from the fame of any given soldier; rather, Frazier has, as the California Supreme Court might put it, significantly transformed the name of any given soldier by clustering it within a mass of other names, such that the totality of the names facilitates and enhances conveyance of a powerful political commentary on the war in Iraq when Frazier adds the much larger words “THEY DIED” and “BUSH LIED” to the shirts. If the test is, as the California Supreme Court stated, more “quantitative than qualitative,”<sup>175</sup> then Frazier’s addition of more than 3000 other elements—the more than 3000 other names—to surround and subsume any other given name evidences the magnitude of the quantitative changes wrought by an artist.

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<sup>169</sup> *Saderup*, 21 P.3d at 811.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Jonathan R. Siegel, Ex Post, *Bobblehead Justice*, 10 GREEN BAG 2d 405, 409 (2007).

<sup>173</sup> See Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 913–25 (2003).

<sup>174</sup> *Frazier v. Boomsma*, No. CV-07-08040-PHX-NVW, 2007 U.S. Dist. LEXIS 72427, at \*46 (D. Ariz. Sept. 27, 2007) (emphasis added).

<sup>175</sup> *Saderup*, 21 P.3d at 809.

What is more, if a critical question under *Saderup* is whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted,”<sup>176</sup> then here the answer is no, when one substitutes in the word “soldier” for the word “celebrity.” First, even if an individual soldier has “fame” (as this Article assumed earlier in this Part for the sake of argument), the name of that soldier is so small in print that his or her fame is consumed by a mass of other names. Second, assuming all of the soldiers named on the T-shirt also possess “fame,” the economic value of the fame of any particular soldier is significantly diluted by being engulfed in a veritable sea of names. Third, the marketability and economic value of the shirt comes from its political message, not the fame of anyone killed. Consider it this way: would the purchaser of a Dan Frazier “BUSH LIED” T-shirt be buying it to make a statement about any specific soldier identified on it? The answer certainly is no. The purchaser presumably wants to wear the T-shirt to make a statement about the war, not about any individual soldier who died.

In contrast, consider a hypothetical scenario. If a person wanted to convey a statement via a T-shirt about a specific soldier who died in Iraq, then he or she might purchase a T-shirt with a large, eight-by-ten inch photograph of that same individual soldier (no other photos on the shirt), with added text such as “BUSH LIED” and “HE DIED” underneath the photo. Were Frazier to create such a T-shirt and, assuming (as was stipulated to earlier, for the sake of argument, in order to show the applicability of *Saderup* to allow for potentially equitable resolutions of controversies) that the soldier pictured is famous, this would be a much closer call under the *Saderup* rule than the actual case in *Frazier*. Although a political commentary about the war and the Bush administration is being made by such an article of clothing, the shirt features what the *Saderup* court dubbed a “literal depiction”<sup>177</sup> of the soldier in question, and it is the power of the particular individual’s identity (not the volume of names) that packs the emotional wallop for anyone who would recognize the person. For instance, if one did not recognize the person in the photograph (even though he or she might be famous, clearly not everyone would know the person), then the text carries very little power or meaning, probably leaving people to ask, instead, “Who is he?” Thus, the power of the printed words against the war that are set forth underneath the eight-by-ten inch photo of a solitary soldier is conveyed through the viewer’s recognition of that person. In addition, unlike the tiny names printed on the shirt at issue in *Frazier*, the image of the individual in the eight-by-ten inch photograph is clear and visually legible to all who view the shirt, even if they are standing more than five or seven yards away from it.

Each such *Saderup* determination, of course, requires a highly fact-specific inquiry, as is the case in *any* area of the law related to privacy torts, such as whether a person possesses a reasonable expectation of privacy in a particular location.<sup>178</sup>

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<sup>176</sup> *Id.* at 810.

<sup>177</sup> *Id.* at 809.

<sup>178</sup> *See, e.g., Sanders v. Am. Broad. Co.*, 978 P.2d 67, 72 (Cal. 1999) (“[P]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees

Indeed, as the California Supreme Court readily acknowledged in *Saderup*, “[a]lthough the distinction between protected and unprotected expression will sometimes be subtle, it is no more so than other distinctions triers of fact are called on to make in First Amendment jurisprudence.”<sup>179</sup> To help make such subtle and fact-specific determinations, a jury or judge applying the *Saderup* test to a situation involving the use of the names or images of dead soldiers would want to take into account, in a totality-of-the-circumstances like fashion, items including but not limited to:

1. The number of names or images used in a single work;
2. The prominence or conspicuousness of those names or images in relation to any additional textual or written component to the message; and
3. Whether the names or images are in some significant way altered or contorted to convey a meaning beyond simply the identity of the individual or individuals named or pictured.

No one factor is necessarily determinative of whether a work is protected. In regard to the third and very important consideration listed above, the California Supreme Court in *Saderup* observed:

The silkscreens of Andy Warhol . . . have as their subjects the images of such celebrities as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself. Such expression may well be entitled to First Amendment protection.<sup>180</sup>

In this light, then, consider a hypothetical T-shirt that contains an original black-and-white photograph of three U.S. soldiers lying dead in a desert in Iraq. But now imagine, however, that the photograph has been altered in such a way as to color each of their three black-and-white likenesses in vibrant versions and shades of the American colors of red, white, and blue, while an oil well is sketched into the photograph that rains down black oil upon each of their lifeless corpses. To this altered photograph are added the captioned words, “For the Love of Oil, They Died.” In this scenario, although only three individual soldiers have their likenesses used, there clearly are significant transformative elements and creative components that have

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and nuances to societal recognition of our expectations of privacy: the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.”).

<sup>179</sup> *Saderup*, 21 P.3d at 811.

<sup>180</sup> *Id.* (citation omitted).

altered the photograph to add social and political commentary about not only the war in Iraq, but American values and the country's seemingly unquenchable thirst for oil, apparently at (if one subscribes to a potential meaning of the altered photograph) any cost. This is, then, no longer a literal depiction of the dead soldiers. If Andy Warhol's images of celebrities are protected, as the California Supreme Court intimated in *Saderup*, then surely the artistic rendering of dead soldiers described here would be so too, given that its meaning (most likely clear via the imagery but rendered even more so via the text) is much less obtuse to the average person than is the meaning of a Warhol work.

In summary, although the *Saderup* test does not provide bright lines and is subject to criticism, its application to artistic works of political commentary, including the T-shirts of Dan Frazier, makes it a useful legal tool when evaluating the constitutionality of claims of civil protection or criminal prosecution under recently adopted state statutes that restrict and limit the use of the names and images of soldiers killed in Iraq. Notably, as this Article explained above, protection likely exists for Dan Frazier's work under the *Saderup* test, even if one assumes that dead soldiers are to be treated akin to dead celebrities and even if each of those dead soldiers is assumed to have fame in his or her own right.

#### CONCLUSION

It probably is not surprising that a controversial war, fought thousands of miles away from the United States, now is leaving a lasting legacy of litigation and legislation on the homefront as fallen soldiers return from Iraq for proper burials. Although funeral protests and privacy cases like *Showler v. Harper's Magazine Foundation*<sup>181</sup> have garnered significant media attention, this Article has focused on the new effort, in an increasing number of states, to craft statutes that limit and restrict the commercial use of the names and likenesses, post-mortem, of soldiers killed in the ongoing war in Iraq. Using the September 2007 decision in *Frazier v. Boomsma*<sup>182</sup> as a starting point, the Article has explored both the First Amendment interests that are jeopardized by such laws and the oddity of treating dead soldiers akin to celebrities when it comes to bestowing publicity rights. It also has suggested that application of the California Supreme Court's test in the right of publicity case of *Comedy III Productions v. Gary Saderup, Inc.*<sup>183</sup> provides a workable, albeit imperfect, solution for helping to resolve disputes in this area on a case-by-case basis.

It remains to be seen whether Judge Wake ultimately will grant a permanent injunction—not simply the preliminary one now in place—in *Frazier*. As this Article

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<sup>181</sup> No. 06-7001, 2007 U.S. App. LEXIS 7025 (10th Cir. Mar. 23, 2007), *cert. denied*, 128 S. Ct. 196 (2007).

<sup>182</sup> No. CV-07-08040-PHX-NVW, 2007 U.S. Dist. LEXIS 72427 (D. Ariz. Sept. 27, 2007).

<sup>183</sup> 21 P.3d 797 (Cal. 2001).

has argued, there certainly are strong public policy considerations related to freedom of expression and rooted in cases like *Cohen v. California*, *Texas v. Johnson*, and *New York Times v. Sullivan*<sup>184</sup> for granting such permanent relief. In addition, the Article explored how the Tenth Circuit's holding in *Showler* suggests that the tastefulness of an image of a dead soldier (whether it is gruesome, as the appellate court put it)<sup>185</sup> could well be considered by courts as a relevant factor when analyzing laws like that at issue in *Frazier* to determine whether the interests of relatives of dead soldiers should prevail when their images are used for commercial purposes. In addition, the overall outcome in *Showler*, rejecting each and every tort cause of action, suggests a judicial reluctance to extend relational privacy rights of the relatives of the dead beyond the narrow FOIA-based context of *National Archives & Records Administration v. Favish*.<sup>186</sup> This too militates against the validity of laws like the one at issue in *Frazier*.

Ultimately, rather than face potentially protracted and expensive taxpayer-funded legal battles defending these statutes against constitutional freedom of expression concerns in courts, lawmakers in other states now considering such legislation would be better off simply not proposing them in the first place. Not only does the September 2007 outcome in *Frazier* suggest the unconstitutionality of such laws, but a general tolerance of dissenting political expression during wartime situations comports with the recognition that such speech is a natural—even inevitable—part of the give-and-take and “uninhibited, robust and wide-open”<sup>187</sup> debate in a democratic society about government policies affecting life and death. Although that would not be an easy position to explain to an upset and angry constituent like Robert Vandertulip who has lost a son in the war,<sup>188</sup> it ultimately is the right thing to do. To paraphrase Justice Brennan's language from the flag-burning case of *Johnson*,<sup>189</sup> it is a reaffirmation of our nation's strength that we tolerate the speech of others with which we disagree, even when that speech dares to disturb the legacy of those who gave their lives for the nation.

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<sup>184</sup> See *supra* notes 107–19 and accompanying text (discussing these cases as they are relevant to the soldiers' right of publicity statutes).

<sup>185</sup> See *supra* text accompanying note 75.

<sup>186</sup> 541 U.S. 157 (2004).

<sup>187</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>188</sup> See *supra* note 4 and accompanying text.

<sup>189</sup> 491 U.S. 397, 419 (1989); see *supra* note 111 and accompanying text.