
SYMPOSIA

A CELEBRATION OF THE WORK OF WENDY GORDON

RESTITUTION, PROPERTY, AND THE RIGHT OF PUBLICITY: A TRIBUTE TO PROFESSOR WENDY GORDON

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ABSTRACT

In this brief Essay, I celebrate the legendary (yet still ongoing) career of Professor Wendy Gordon in the way I think she would appreciate best: by using some of her pioneering ideas to theorize about intellectual property (“IP”) rights.

My topic is the development of IP rights over time. I am interested not only in the conceptual roots of IP law but also in that moment when the roots push through the crust of soil to form trunk and branch—the moment of emergence: When does a normative legal intuition bloom into a full-fledged property right? How do fundamental common-law principles come to be expressed in complex statutory property grants? Starting from Gordon’s marvelous 1992 article on the “restitutionary impulse” behind IP law, I explore these aspects of IP’s origin story.

The right of publicity is a typical instance of the birth of a property right from common-law origins. I revisit the famous Haelan Labs case, which was central to the development of the publicity right. This case pushed forward the legal recognition of exclusive rights in celebrity images and serves (for many) as the generative source of publicity rights as a form of property. In keeping with some of Gordon’s observations in her article On Owning Information: Intellectual Property and the Restitutionary Impulse, I explain why the holding in Haelan Labs responded both to fairness concerns and to some felt necessities of the era.

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Among those necessities was the growth of postwar advertising and celebrity culture. This in no small part explains the impulse to compensate the ballplayers in the Haelan Labs case and to do so in particular by conferring on them a full-fledged (and fully alienable) property right. I then carry this an extra measure by arguing that Gordon's observation about judicial intuition and common-law extension is related to Harold Demsetz's well-known theory of property. From this point of view, Gordon has described one specimen in a larger set: those legal adjustments that take place when the value of an asset has increased. Though Gordon herself might well object to some features of this simple functionalist account, I for one see her as having contributed to it in an important way.

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I. GORDON'S INSIGHTS ON RESTITUTION

In 1992, Gordon wrote a now-classic article describing the “common law trend toward granting new intellectual property rights.”¹ Citing examples such as misappropriation and trademark dilution, Gordon described the new rights as a response to two distinct forces. One was ethical or moral: the “restitutionary impulse” judges feel when confronted with a defendant who has “[reaped] where another has sown.”² The other force was a more consequentialist or functional concern: that changed economic conditions called for stronger property rights.³

Reading Gordon's skillful account of restitution is like walking into a library chock-full of new and inviting books—so much to think about! Even if I had more space to work with, I could not get very far with a full treatment of all her ideas. But the truth is that I have agreed to keep these comments within reasonable bounds. I can sample only a small subset of dishes at the Gordonian feast.

And so, my choice: I want to take off from Gordon's description of the IP right “creation story.” Gordon's account of when and why IP rights are created is nuanced and complex, as seen from this passage:

I suspect that this common law trend toward granting new intellectual property rights has been fueled largely by two forces. On the one hand is an intuition of fairness—a norm often linked to natural rights—that one should not “reap where another has sown.” On the other hand is a set of empirical developments: the gradual decline in our nation's industrial/manufacturing sectors, the dramatic growth of high-tech information industries, and the perception that our nation's wealth is declining relative to that of other nations. As the economic hopes of a less confident, service-oriented economy have become increasingly dependent on the nation's intangible assets, legislatures and courts seem willing to extend intellectual property protections on the questionable, and surely often unconscious, assumption that protection means prosperity.⁴

Gordon describes with great skill how new IP rights come about through a combination of fairness concerns and empirical developments. She does not force a decision about which cause dominates, a perennial debate in the IP field; she instead treats the causes as coequal and gets on with it.⁵ Gordon's comments

¹ Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 156 (1992) (footnote omitted).

² *Id.* at 166-67.

³ *See id.* at 156-57.

⁴ *Id.* (footnotes omitted). On the generality of common-law adaptation to changing conditions, see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (“Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”).

⁵ Gordon, *supra* note 1, at 219-20 (“Restitution cases apparently grant recompense where party-oriented fairness concerns conjoin with societal concerns, notably with economics. This

about each of these causative forces have proven to be very prescient. It is one thing to be first with a claim; it is another thing to be both first and mostly right. On this issue Gordon was both.

Gordon's insight about a judge's sense of fairness is backed up by experimental psychology studies exploring the development and application of the "reap/sow" intuition. The "restitutionary impulse" in IP law, which Gordon first identified, appears to be rooted in verifiable and near-universal moral intuitions.⁶ In the sections that follow, however, I am more interested in Gordon's description of how judges create IP rights in light of the felt economic necessities of their times. I want to explore this more functionalist account of the origin of IP rights. I will place this idea in the context of the progression from tort-based restitution to full-blown, state-backed property rights.⁷ As you will see, I try to relate Gordon's insight about the birth of IP protection to the economic theory of property rights associated with Harold Demsetz. The impulse to grant restitution is a case study in the operational details of the Demsetz story. Whereas Demsetz generalized about the evolution of property rights in response to changing economic conditions, Gordon isolated specific instances in which judges employed common-law tools to extend IP protections in novel directions.

I study the birth of a new IP right—the right to publicity—as an instance of the restitutionary impulse at work. The extension of the right to publicity from a relational tort based in privacy to an alienable right, good against the world (i.e., property) is a perfect example of how the Gordonian mechanism works in service of the Demsetzian theory. The impulse to compensate creators of increasingly valuable information assets finds expression in the restitutionary impulse. And it reaches full fruition in the recognition of a full-blown, state-backed property right.

sort of redundancy is common in the law but is particularly noteworthy here. Restitution seems to be denied where it would impose unfairness, either by threatening an innocent defendant's autonomy or by imposing a net harm on him, or where a restitutionary right would impose high systemic costs by undermining the market and burdening the courts. But no precise dividing line can be drawn between economic issues and fairness issues because one of the key economic concerns—preservation of markets—arguably is also an autonomy concern.”).

⁶ See generally, e.g., Kristina R. Olson & Alex Shaw, *'No Fair, Copycat!': What Children's Response to Plagiarism Tells Us About Their Understanding of Ideas*, 14 DEVELOPMENTAL SCI. 431 (2011) (reporting studies showing that children have strong moral objection to plagiarism); Alex Shaw, Vivian Li & Kristina R. Olson, *Children Apply Principles of Physical Ownership to Ideas*, 36 COGNITIVE SCI. 1383, 1384 (2012) (describing children's employment of simple ownership principles, such as first possession and need for permission, to both physical objects and ideas).

⁷ On the property status of the right of publicity, see David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 99 (2005) (describing “remarkable continuing power of the property syllogism” with regard to publicity rights).

A. *Restitution for Unsought Intangible Benefits*

In the beginning is restitution; property comes later. What is the basis for a restitution claim in the IP context? What is the common-law background out of which property emerges?

To see the significance of this transformation, one must first understand how restitution differs from property. The key is this: restitution is *relational*, doing justice as between two individual parties in light of their specific relative situation, while property provides a more standardized and, as it were, impersonal set of rights. There are limits to this rigid distinction, but it also holds a good bit of truth.

What does it mean that restitution is “relational”? It means that courts inquire closely into the interaction between the party that supplies a benefit and the one that receives it. The legal system in general resists awarding compensation when the recipient of a benefit has not bargained or asked for it.⁸ The classic cases speak of an “officious intermeddler,”⁹ and the unofficial phrase might be, “Who asked you for your help?” In the canonical case, Party *A*, a homeowner, returns from vacation to find that her house has been freshly painted by Party *B*. *A* owes no compensation to *B* despite the fact that *B* may well have conferred a benefit on *A* (measured, perhaps, by the increase in appraised value of *A*’s house after *B*’s paint job).¹⁰ *B* has enriched *A*, but it is not “unjust enrichment” (to use the restitution paraphrase)—*A* never asked for this benefit. As Gordon herself pointed out, the chief concern in a case like this is protecting the autonomy of one who, like *A*, receives an unsought benefit.¹¹ It might be nice to receive something of value, but the law finds that liability for an unsought benefit is too intrusive and too presumptuous.

There are exceptions to this principle, and it is these exceptions that make up the body of successful restitution claims. One who bestows a benefit during an emergency might recover on the theory that it is the rare recipient who would feel imposed upon by being helped. One who encourages the benefactor to

⁸ See, e.g., *Teton Peaks Inv. Co. v. Ohme*, 195 P.3d 1207, 1211 (Idaho 2008) (“This rule exists to protect persons who have had unsolicited ‘benefits’ thrust upon them.” (quoting *Curtis v. Becker*, 941 P.2d 350, 354 (Idaho Ct. App. 1997))).

⁹ See, e.g., *id.* at 1212.

¹⁰ See John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1409 (1974). Note that a housepainter who made an honest mistake (such as getting the address wrong for a painting job) might have a valid restitution claim. See, e.g., *Roesch v. Wachter*, 618 P.2d 448, 451 (Or. Ct. App. 1980) (allowing defendant to set off value of improvements against rent owed when honest mistake as to title ownership occurred). Restitution is denied to the housepainter who says, “*A* is away; I’ll do her a favor and paint her house. She will be happy with the result, and so she will pay me.” See Dawson, *supra* at 1410.

¹¹ Gordon, *supra* note 1, at 202.

bestow a benefit might be liable when that benefit is conferred¹² on the theory that he or she has sent a signal regarding preferences; there is less risk that legal compulsion to pay for the benefit will undermine his or her autonomy. A typical encouragement case involves benefits bestowed in the lead-up to a contract that is never consummated.¹³ One who bestows a benefit after making an honest mistake might also recover in restitution.¹⁴

In *Restitutionary Impulse*, Gordon builds on these principles to construct a carefully limited set of rules for when intangible information goods ought to be subject to a claim for restitution.¹⁵ The result is a *tour de force*—a sophisticated melding of transaction-cost economics, guiding principles as extracted from case law, and straightforward good sense. An especially insightful point springs from the conventional concern that courts must be careful not to award restitution so often that parties eschew market bargains in favor of litigation over restitution claims.¹⁶ Gordon extends this traditional “transactional” consideration to make a novel point: if a future plaintiff/benefactor cannot identify potential recipients of a benefit, then in some cases the law ought to put the burden on future *defendants* to initiate a bargain. This leads to a discussion of the limits of this idea—in particular, the need to avoid compensation when the recipient of a benefit uses it to sell a product in a market unforeseen or unforeseeable to the party that bestowed the benefit. This limits compensation when the recipient adds value by exploiting an intangible asset in a way that does not directly compete with the primary (foreseeable) market of the benefactor.¹⁷

¹² See DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.9 (1973) (discussing defenses to restitutionary claims); John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183, 1198 (1966) (“On the other hand, if the plaintiff, before bestowing the benefit on the defendant, notifies him and thus gives an opportunity to decline, the defendant, if he accepts the benefit, will be held liable.”).

¹³ Note that in these cases, IP rights serve the valuable purpose of protecting the disclosing party and therefore encouraging disclosure in the precontractual period. See Robert P. Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH. L.J. 1477, 1503 (2005) (describing patent protection as “important weapon when precontractual negotiations break down). And absolute liability in patent law may indirectly encourage information disclosure; it removes the incentive to shut oneself off from the information created by others in order to limit liability. See Robert P. Merges, *A Few Kind Words for Absolute Infringement Liability in Patent Law*, 31 BERKELEY TECH. L.J. 1, 7 (2016).

¹⁴ See *supra* note 10.

¹⁵ Gordon, *supra* note 1, at 229-48.

¹⁶ *Id.* at 202 (“Most fundamentally, allowing frequent restitution suits when contracts could have been obtained would undermine the market system and overload the judiciary for no good reason. Consensual transfers are preferable to judicially imposed transfers on virtually all grounds—efficiency, fairness, and autonomy.” (footnotes omitted)).

¹⁷ For an application of this idea in the right-to-publicity context, see Vincent M. de Grandpré, *Understanding the Market for Celebrity: An Economic Analysis of the Right of*

This is excellent analysis. It is of a piece with Gordon's earlier work on copyright fair use as market failure¹⁸: subtle and strikingly perceptive as regards transaction costs in the IP context. Because the focus is on restitution, the analysis is necessarily "relational": a creator and a user are the only parties in the frame. This keeps the problem manageable and allows Gordon to focus on the ways in which intangible production and use do and do not fit the principles of restitution. Much of the essence of her article revolves around IP rights and transaction costs.

In her article, Gordon discusses courts' traditional concern about replacing voluntary markets with court-imposed restitution—a concern that is traditionally listed as the primary reason to avoid restitutionary liability. But Gordon also notes that consistent restitution awards by courts will drive parties to negotiate privately in the shadow of expected restitution awards, at least when those rewards are predictable.¹⁹ Together these are important insights. The concern with restitution as a market substitute prevents the extension of this cause of action, but Gordon rightly points out that the conditions present in many traditional cases are absent in some situations involving IP rights.²⁰ In other words, restitution might make more sense more often in IP law. The second point, that an extended restitution principle in IP law might lead to *market making* rather than market substitution, is even more important. To my knowledge, this was one of the earliest treatments of the relationship between IP rights, bargaining, and market formation. The literature on these topics was a growth industry in the 1990s and beyond, and Gordon got there first.

Despite all the innovations in Gordon's article, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* ("*Haelan Labs*")²¹ highlights transactional issues that go beyond Gordon's concerns.²² While restitution solves the problem of deciding on proper compensation as between two discrete parties (creator and

Publicity, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 79 (2001) (stating that from transaction-cost perspective, "the law should grant every person a property right in her identity; but if she is a celebrity and her persona has acquired secondary meaning, she should only recover if the unauthorized use of her identity is deceptive or directly competes with her own use, without being transformative. In addition, the law should consider whether the plaintiff and defendant could have agreed to the allegedly infringing use if the defendant had sought authorization or whether transaction or coordination costs would have prevented that transaction").

¹⁸ See generally Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

¹⁹ Gordon, *supra* note 1, at 235-38; *id.* at 235 ("A court may have difficulty policing whether a benefit-generator has made a good faith effort to proceed through the market. Keeping this judicial door open may erode the much-preferred voluntary system.")

²⁰ *Id.*

²¹ 202 F.2d 866 (2d Cir. 1953).

²² Even the greats can't cover *everything* at once.

user), it cannot address the additional issues revealed by the facts in *Haelan Labs*. These issues centered on the connection between the nature of rights (restitution versus property) and the way the relevant business was structured. The case revealed that specialized companies had emerged in the baseball card industry.²³ These companies had an advantage over individual players; the companies could aggregate the image rights to many players. Acting alone, the ballplayers were limited in their ability to exploit the intangible asset they had created (their persona or image).²⁴ The right of publicity emerged as a needed innovation due to the deficiencies of the common-law tools then available (primarily tort and contract). While Gordon's variety of restitution explains the impulse to compensate in *Haelan Labs*, in the end it is still primarily a party-to-party legal tool. It is much more efficient to have an intermediary between individual ballplayers and individual consumers. The card companies served that function. But to enable the companies to do this, they needed to be able to aggregate player image rights, produce a high volume of player cards, distribute them to the public, and (if needed) enforce their acquired image rights against copyists. The available legal tools by themselves—contract; tort; and their cousin, restitution—were inadequate to the tasks at hand. And that is why the solution reached in *Haelan Labs* was to create a form of *property*—the right tool for the job.

B. *Working with Common-Law Tools: Tort and Contract*

Haelan Labs shows more than the importance of the restitutionary impulse. It also shows the limits of that impulse when it is expressed through the common-law tools of tort duties and contract law. Even a novel restitution cause of action like the one Gordon advocated for would not have met all the needs of the parties involved. As a consequence, the case shows the importance of full-blown property rights in protecting the interests of the celebrity ballplayers at the heart of the dispute.

Before *Haelan Labs*, ballplayers' rights to their images were grounded in tort law. Invasion of privacy, one tort in the cluster of privacy torts, protected against unauthorized uses of player images.²⁵ The playing card companies would violate

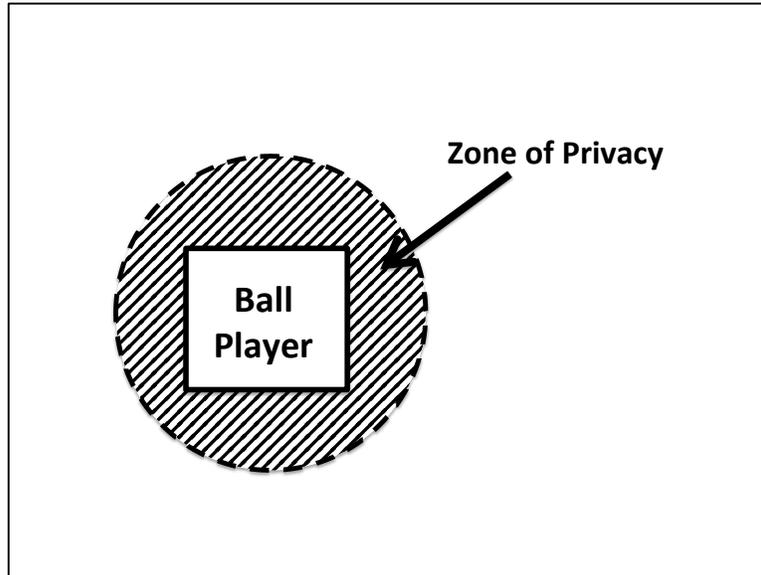
²³ See *id.* at 867.

²⁴ See *id.* at 868.

²⁵ Warren & Brandeis, *supra* note 4, at 205 (“[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term.”)

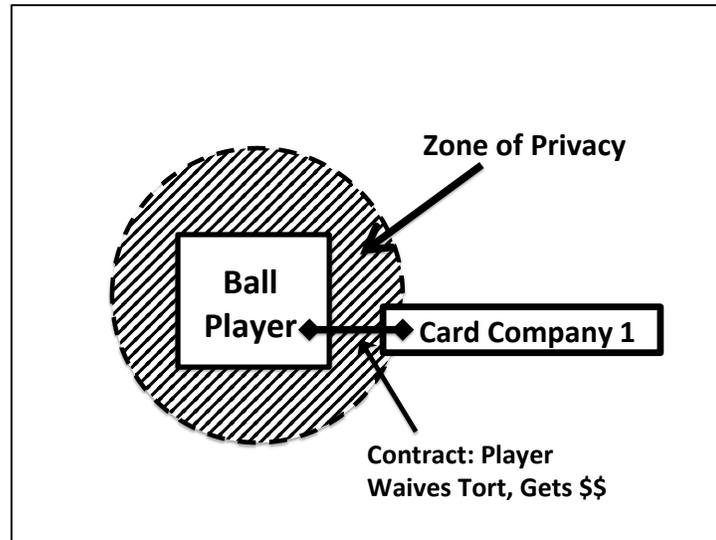
this right when player cards were issued. We can think of the players' rights as constituting a zone of privacy:

Figure 1.



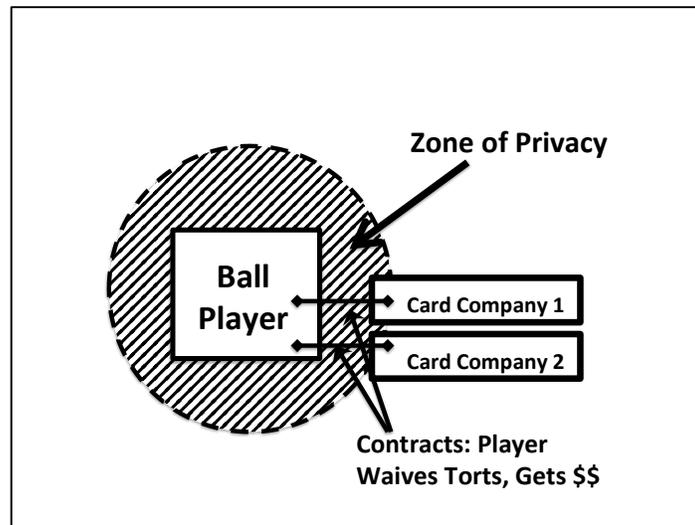
The commercial deal between a card company and a ballplayer amounted to a waiver (in advance) of any tort action the player had a right to bring after his image was published on a baseball card:

The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.”).

Figure 2.

As Professor Jennifer Rothman and others have pointed out, *Haelan Labs* had its genesis in a series of conflicting contracts of this very nature.²⁶ Whether or not intentionally, the ballplayers involved had given their image rights to multiple sellers of chewing gum in this fashion:

²⁶ JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 50 (2018).

Figure 3.

The *Haelan Labs* lawsuit was filed by one playing card company (Haelan) against another (Topps).²⁷ A player first promised to permit Haelan to use his image. The player later signed a conflicting contract with Topps. Looking at the essence of the case—Haelan wanted to enforce the player’s promise to permit only Haelan to use the player’s image—clarifies the limitations of the privacy tort.²⁸ The duty arising from the tort was owed to the ballplayer. Haelan’s rights

²⁷ The player cards began as adjuncts to the sale of chewing gum, but over time—and perhaps by the time of *Haelan Labs*—the gum became an adjunct of the cards. By the mid-1960s, when I (Merges, the author of this Essay, me) began collecting baseball cards, my friends and I saw the gum as a nice throw-in to the player cards. To this day, the smell of bubble gum brings me back, Proust-like, to the feeling of opening a new pack of baseball cards, hoping for a Yastrzemski triple crown or Willie Mays card. Reveries aside, the reversal of player cards and gum as the primary product sought by consumers recapitulates the progression in value of celebrity images from the 1950s to the 1960s and beyond.

²⁸ The limitations are apparent from *Hanna Manufacturing Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763 (5th Cir. 1935), which held that baseball player contracts granting the exclusive right to use player signatures on baseball bats did not constitute assignment of a property right but that the contracts were rather more in the nature of a waiver of the right to sue for unauthorized use of the signature. *Id.* at 766-67; see also *Haelan Labs*, 202 F.2d at 869 (expressing disagreement with *Hanna Manufacturing Co.*). The *Hanna* court said:

[A] famous batsman, aside from questions of trade-mark and unfair competition or libel, might have difficulty in keeping his name and likeness from respectful use by others. But if they be his property in a sense, they are not vendible in gross so as to pass from purchaser to purchaser unconnected with any trade or business. Fame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to

arose from a contract waiving the player's right to recover for invasion of privacy. But this was a personal, relational right; the player could waive his right vis-à-vis Haelan, but after the waiver Haelan had only a contractual promise from the player. When the player violated a term of the waiver contract—the exclusivity term—Haelan's only legal action was against the player. The recipient of the second, conflicting waiver was a legal stranger to Haelan.

Put another way, because Haelan had no contractual privity with Topps, enforcement would have been difficult. Nor was either card company a third-party beneficiary of the ballplayers' contracts with the other company. The only tort cause of action Haelan might have had against Topps was inducement to breach a contract. But there was a problem with this: the ballplayers had contracted directly with Haelan, but Topps had acquired player image rights from players' agents.²⁹ Thus, if anyone had induced breach of the Haelan contracts, it was the agents—not Topps. Topps surely gave the agents a cut in the deal, and this cut might have encouraged the agents to induce the players to breach their contracts with Haelan. But in the end it was the agents—not Topps—that had induced these breaches. Haelan no doubt had a viable cause of action against the agents (and the players) for inducement to breach, but Topps was insulated from this claim.

An additional reason contract was inadequate was that there is no reliable contractual remedy that would make a card seller whole. The standard remedy is monetary damages. So in a suit by a card company against a ballplayer, the company would probably receive only monetary damages: the value of the exclusivity promised, but not delivered, by the ballplayer. It is possible to estimate losses from a broken promise of monopoly in cases where breach leads to a duopoly instead. But, baseball salaries being what they were,³⁰ it is unlikely

the highest bidder as property. Moreover, appellee is not by its contracts the assignee as of property of the name and likeness of these players. The usual form of the contract grants 'the sole and exclusive right for twenty years of the use of my name, autograph, portrait, photograph, initials or nickname for trade-mark or advertising purposes in connection with the manufacture or sale of baseball bats.' The signer does not divest himself of his name and likeness, but gives a permission or license to use them for a stated purpose and for a limited time. Since the players were not makers or sellers of bats and sold no business together with its marks and good will to appellee, *the contracts in our opinion in and of themselves operate only to prevent the signers from objecting to appellee's use of their names and likeness.*

Hanna Mfg. Co., 78 F.2d at 766-67 (emphasis added).

²⁹ See Stacey L. Dogan, Haelan Laboratories v. Topps Chewing Gum: *Publicity as a Legal Right*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* 17, 21 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014) ("Topps itself had not dealt directly with some of the players, but had acquired the license from third parties.").

³⁰ See Michael Hauptert, *MLB's Annual Salary Leaders Since 1874*, SOC'Y FOR AM. BASEBALL RES. (Dec. 1, 2016), <https://sabr.org/research/mlbs-annual-salary-leaders-1874-2012> [<https://perma.cc/DS6Q-887P>] (reporting top MLB salary in 1953—the year *Haelan Labs* was decided—to be \$85,000, or about \$800,000 in 2019 dollars).

the player would have been able to pay full damages for this breach. This is likely true of their agents as well.

Even if the player/agent pair was not judgment-proof, it may have been very difficult to fully measure Haelan's loss in this case. This is because the card companies did not issue individual cards but card *sets*. A card company seeking to build customer loyalty by offering an exclusive set of player cards for all players on a team or league, thwarted by one or more ballplayer breaches, has lost an opportunity that is difficult to value. The classic doctrinal solution is, of course, an injunction. But the injunction Haelan really wanted—to get Topps to stop issuing all ballplayer cards—was not possible. Topps was not a party to the breached contract. That contract was between the ballplayer and Haelan. The best Haelan might hope for is an injunction against its contractual partner (the individual player), ordering the ballplayer not to sign any more contracts with future card companies. And to maintain the sole right to produce a full set of player cards for an entire league, Haelan would have to bring a contract case and obtain an injunction against every single ballplayer in the league.

No matter the viewpoint, the Haelan/ballplayer contract action gave Haelan only second-best avenues of recourse. It might have been possible to persuade a court to order the player to rescind his second contract. Rescission, however, is an equitable remedy. And the ballplayer/agent team (at least when it knowingly pledged exclusivity in two conflicting agreements) surely had unclean hands. Other remedial solutions—such as a liquidated damages clause in the first ballplayer/gum-seller contract—also come with problems. Even if ballplayers are not judgment-proof, they may not be capable of paying damages adequate to compensate Haelan for its loss of full exclusivity for all player cards in a league. The simple fact is that no combination of tort waiver or contract remedy gave Haelan adequate rights to do what it wanted: stop Topps by using a single enforcement action. Additionally, no plausible contractual remedy protected Haelan's desire for exclusivity. The *Haelan Labs* court recognized these precise deficiencies in the privacy right:

[W]e must consider defendant[] [Topps's] contention that none of plaintiff's contracts created more than a release of liability, because a man has no legal interest in the publication of his picture other than his right of privacy, *i.e.*, a personal and non-assignable right not to have his feelings hurt by such a publication.

A majority of this court rejects this contention.³¹

To summarize: the combination of a personal, tort-based right and the limits on contractual remedies under the facts of the case created a bit of a mess. The situation was rife with problems of privity, judgment-proof parties, and inadequate remedies. What was needed, as the court recognized, was a legal right that did three things the tort/contract structure could not: (1) permit the full alienation of a distinct legal right over the ballplayer's image so that the player

³¹ *Haelan Labs*, 202 F.2d at 868.

had nothing left to give other card sellers after an exclusive first contract; (2) eliminate the need for privity between the source/creator of the asset in question (i.e., the ballplayer, source of the player image) and those whose actions might harm the use-value of the asset (a rival card company); and, in general, (3) concentrate enforcement power over the image right in a single, well-motivated entity capable of deploying the right directly against commercial rivals.

In short: property. This was exactly what the *Haelan Labs* court supplied. Faced with the defendant's argument that ballplayers possessed only privacy rights whose invasion (through unauthorized use of player images) was a tort, the court said:

A majority of this court rejects this contention. We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," *i.e.*, without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.³²

The significance of this passage is obvious. As Professor Stacey Dogan has written:

[B]efore *Haelan*, [celebrity] legal rights focused largely on avoiding harm to the celebrity; no court had recognized celebrity images as legal rights that could be sold to the highest bidder. Since *Haelan*, this sale of celebrity has become ubiquitous. Although publicity interests had long floated around the edges of intellectual property, *Haelan* marked their debut as full-fledged intellectual property rights.³³

Although there are some limits on the alienability of publicity rights, there is no question that they can be sold in the context of the baseball card deals at issue in *Haelan Labs*. They are fully alienable in a functional sense.³⁴

³² *Id.*

³³ Dogan, *supra* note 29, at 17.

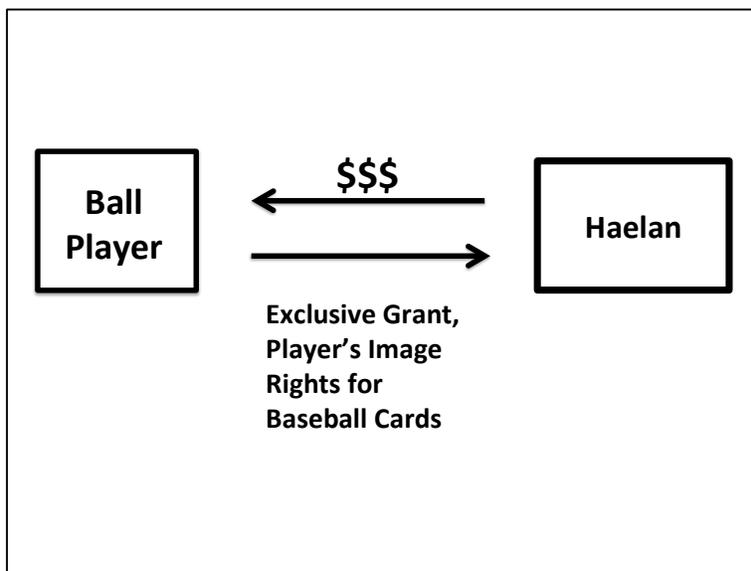
³⁴ *See, e.g.*, *Timed Out, LLC v. Youabian, Inc.*, 177 Cal. Rptr. 3d 773, 781 (Ct. App. 2014) ("[T]hrough the right of publicity is described as 'personal' in nature, this simply means that the owner of the right has exclusive authority to assign it during his or her lifetime." (citing *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) (in bank))). *See generally* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1413-19 (2009) (describing various intellectual property rights as "anxiously alienable": though "not always translat[ing] into restrictions on alienability," some concern is ignited "due to feared ex ante incentive effects or use" when certain IP rights are transferred).

II. WHY PROPERTY?

After the initial “propertization” event or moment, the resultant property right often begins to receive judicial and practical recognition. Then, an entire series of second-order efficiencies is often revealed. These are not conscious objects of the judges who first see the need to propertize the common-law duty. The efficiencies are emergent characteristics that show up only over time, after the initial moment when property is formed. Though not intentional, they are still important and worth mentioning.

The conversion of multiple, potential causes of action into a single, generalized duty creates a legal right that maps closely to an asset. At first, the value lies mainly in the fact that the duty can be enforced against “all comers”—enforcement is generalized. The second step, then, is to recognize that this generalized bundle of duties can be treated as something that can be detached in various ways from the holder of the bundle (i.e., the beneficiary of the propertization moment). Once the legal system conceptually aggregates the duties of all potential infringers of a right, the next step is to see that this bundle can also be separated or detached from the *holder* of the right. By concentrating the duties of all potential violators of rights over an asset into a single legal instrument, it becomes easier to contemplate alienating that instrument from its owner as well. Propertization, in other words, supports alienation:

Figure 4.



The understanding that the concentrated form of all these duties might be a separate legal instrument also takes some time to develop. It is a halting and sporadic thing—like a baby learning to walk. Taking little steps, retrenching,

moving forward, and then tripping and stumbling. Yet slowly, over time, the distinctiveness of the emergent property right becomes more and more evident. Vestiges and remnants of its origins will remain, but eventually the solidity of the legal property right becomes inarguable. One force pushing all this forward is the force of business or economic imperatives.

Aggregation of multiple duties into a single right is born from efficiency, at least under the functional account associated with Demsetz and others.³⁵ But it also creates further efficiencies. Once the aggregated duties are conceived of as a right, businesspeople start to see this right as an economic asset. The generalized duties are concentrated and centralized, as it were, into a distinct legal right. It is a short step, then, to see this right as a valuable and distinct focal point representing the inherent value of the underlying intangible asset(s) that the right protects. A single legal right stands in for all the possible common-law remedies that might flow from wrongful acts affecting the intangible asset (trademark, famous persona, etc.). Then this right comes to be seen as tightly bound with the asset itself. The heart of it is the legal right to fair compensation from wrongful acts directed at the intangible. This right can itself come to be seen as an asset. The right stands in for the value of the underlying intangible asset.

A. *Why 1953?*

From a present perspective, the logic of property in this situation is perhaps straightforward. Nevertheless, discussing property's benefits sidesteps the question of why the *Haelan Labs* court chose that case to recognize the new

³⁵ There are other plausible explanations that I do not explore here. See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 421-24 (1999) (“[I]mage can be viewed as unique, a product of the peculiar mix of mental, psychological, and physical attributes that make the progenitor the individual she is. . . . The objectification of one’s self may be viewed not as a purely external, objective thing, but as something more. . . . Most people—and, many will agree, celebrities in particular—experience a special, even unique, attachment to their own images or other objectified attributes, and feel that those things are inextricably associated with their identities.”); see also Barton Beebe, *What Trademark Law Is Learning from the Right of Publicity*, 42 COLUM. J.L. & ARTS 389, 391 (2019) (“[A] variety of . . . justifications have been adduced over the years for right of publicity protection: It incentivizes the creation of celebrity personas; it prevents the overgrazing or tarnishment of those personas and protects the public’s interest in stable celebrity identities; it provides an appropriate reward for the labor that goes in to the development of a valuable personal identity; and it prevents misappropriation or unjust enrichment of that value. And finally, a rationale that emerges in part from the earliest origins of right of publicity law is that the law protects the individual liberty and dignitary interests of identity holders. It enables identity holders to engage in what Mark McKenna calls ‘autonomous self-definition’ and protects them from certain forms of emotional harm, a rationale which [Professor Jennifer] Rothman also endorses [in her 2018 book].” (footnotes omitted)).

right. Our only hint comes in a passage in which the court named the right it was recognizing (or creating):

This right might be called a “right of publicity.” For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.³⁶

Notice three things: First, the court wrote that “it is common knowledge that many prominent persons” have been in the habit of “receiv[ing] money for authorizing advertisements . . . in newspapers, magazines, busses, trains and subways.”³⁷ The reference to “common knowledge” meant that authorizing the use of one’s likeness had become a frequent occurrence. In other words, the *volume* of use of celebrity images was substantial. Second, the court wrote, “[F]ar from having their feelings bruised through public exposure of their likenesses,” celebrities had become accustomed to making substantial money from licensing the use of their images.³⁸ Bruised feelings are the sign of a tort—and, as the court noted, image licensing had grown beyond the tort framework. Third, the court identified “actors and ball-players” as the most frequent image licensors at the time.³⁹ This constituted judicial recognition of a distinct class of “prominent persons”—those who made their living in the public eye. The recognition of a distinct group of identifiable celebrities reinforces the notion that the situation before the court was fundamentally different from the traditional privacy setup. It no longer made sense to use the “right to privacy” as the mechanism by which to structure monetary rewards for celebrities. This was in fact background. Celebrities wanted exposure and recognition, and their identifiable images were valued by advertisers. Continuing to structure rewards under a privacy rubric defied logic and common sense. What celebrities sought and what advertisers leveraged were publicity and exposure—not privacy. Thus, a more honest nomenclature backed by a more robust legal right emerges: the right of publicity.

The *Haelan Labs* court made its observations in the context of rapid growth in advertising and in the use of celebrity images in particular. The postwar years unleashed a torrent of new consumer spending, stimulated in part by the meteoric rise of television. As David Halberstam wrote in his book *The Fifties*:

³⁶ *Haelan Labs.*, 202 F.2d at 868.

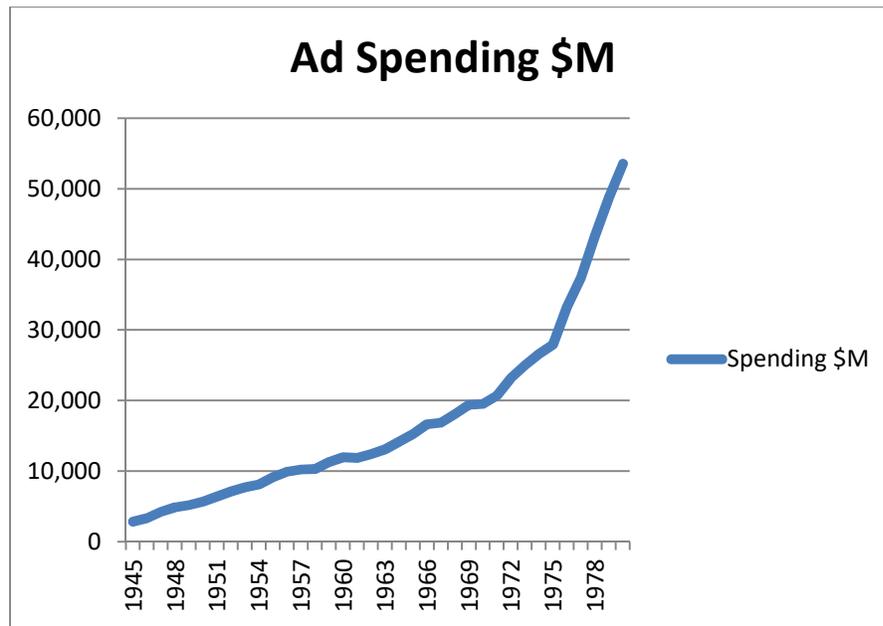
³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

“In 1949, Madison Avenue’s total television billings were \$12.3 million; the next year, it jumped to \$40.8 million; and the year after that, it jumped to \$128 million.”⁴⁰ The Second Circuit was right in the middle of this trend; the ad industry, centered on Madison Avenue in New York City, was the foremost high-growth, high-profile field in the city at that time, as popularized by the television series *Mad Men*. The graph below captures this high-growth era in the history of advertising:

Figure 5.



Source: Douglas Galbi, *U.S. Advertising Expenditure Data*, PURPLE MOTES (Sept. 14, 2008), <https://www.purplemotes.net/2008/09/14/us-advertising-expenditure-data/> [<https://perma.cc/WR8H-JWYS>].

To summarize, advertising expenditures totaled \$7.7 million in 1953 (equivalent to \$74 million in 2019 dollars). By 1980, expenditures had risen to well over \$50 million per year. More recently, expenditures totalled \$151 billion in 2018. In real (constant) dollars, 2018 expenditures were two thousand times the value of 1953 expenditures.

⁴⁰ DAVID HALBERSTAM, *THE FIFTIES 501* (1993). Halberstam also noted that one large advertising firm—Batten, Barton, Durstine & Osborn—specialized in television ads and saw its TV billings grow from \$40 million in 1945 to \$235 million in 1960. *Id.*

Advertisers realized early on that celebrity endorsements were becoming more important as the volume of advertising took off. Baseball players were in the middle of this trend—in the 1950s, baseball was without doubt the preeminent professional sport in the United States. The popularity of football, basketball, and hockey at the time paled in comparison. As legendary ad executive David Ogilvy (of the ad firm Ogilvy & Mather) wrote:

Testimonials from celebrities get remarkably high readership, and if they are honestly written they still do not seem to provoke incredulity. The better known the celebrity, the more readers you will attract. . . . When we advertised charge accounts for Sears, Roebuck, we reproduced the credit card of [famous baseball player] Ted Williams, “recently traded by Boston to Sears” [i.e., recently retired].⁴¹

Once again, the Second Circuit was at the epicenter. Baseball fans widely acknowledge that New York City held dominion over the sport in the 1950s.⁴² The city had three professional teams, each of which had rabid followings, big stars, and championship rings in the 1950s: the Brooklyn Dodgers, the New York Giants, and the New York Yankees. In fact, from 1950-1960, only three *non*-New York City teams won the World Series, one of which—the 1959 Los Angeles Dodgers—won two years after moving west (the Giants also moved to the West Coast after the 1957 season).⁴³

And so the *Haelan Labs* court was simply responding to readily observable facts. Advertising was taking off, celebrities were being used more and more in ads, and baseball players were some of the best-known celebrities of the day—especially in New York City. This is precisely the sort of dynamic Demsetz described in his famous article, *Toward a Theory of Property Rights*.⁴⁴ As Demsetz put it, “[T]he emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities.”⁴⁵

Revenue from baseball card sales supports the general point. Research shows that total revenue earned by the top two baseball card companies increased from

⁴¹ DAVID OGILVY, *CONFESSIONS OF AN ADVERTISING MAN* 110-11 (1964).

⁴² See Perry Arnold, *New York City in the Golden Age of Baseball*, BLEACHER REP. (Feb. 27, 2010), <https://bleacherreport.com/articles/353586-new-york-city-in-the-golden-age-of-baseball> [<https://perma.cc/YTX6-KBTF>] (“From 1947 through 1957, New York City was the most exciting city in the World. The United States had come home from war and it was a boom time for the country. It was also the Golden Age of Baseball, and without question, New York City was the capital.”).

⁴³ *Id.*

⁴⁴ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350-53 (1967) (describing relationship between development of private rights in land among indigenous Americans and development of commercial fur trade).

⁴⁵ *Id.* at 350.

\$973,000 in 1951 to over \$1.6 million in 1954—an increase of 64%.⁴⁶ By 1959, the figure was \$3.8 million,⁴⁷ up almost 300%. And the market grew very significantly for years thereafter.⁴⁸ These numbers show that the baseball card market tracked overall trends in advertising spending in the 1950s.⁴⁹ This represents the kind of economic shift that gives rise to the need for more finely specified property rights. The functional case for the birth of the right of publicity is strong.

B. *Back to Haelan Labs: The Value of Celebrity Images and the Propertization Moment*

Gordon's famous article steers clear of the long-running debate over the nature of property—the famous (and well-flogged) formalist-realist debate. This is understandable; she was talking about restitution, not property. But my main point is that in cases like *Haelan Labs*, the effective solution the court hit upon was to create a property right in player images. This solution supports the formalist (or at least nonrealist) side of the age-old property debate. The realists said—and their inheritors still say—that property is merely a set of legal relations between legal actors. The emphasis is on property as a way to structure rights and relations between people. This minimizes the older emphasis on property as a body of law about things—about assets independent from people. To reify the thing is to miss the point, the realists said: property simply governs relations between people with respect to things.

As mentioned earlier, restitution is like tort law in the sense that it is relational. It deals with the relationship between one who confers a benefit and one who uses or enjoys the benefit. This is the classic domain of corrective justice, of course; its protagonists are the ever-handy Party *A* and Party *B*. Restitution goes beyond tort law in being a law of benefits and their compensation. Tort law is about harms and duties. But like tort law, restitution sets out to determine if and when compensation is due in some interaction between *A* and *B*. It is a paradigmatic “realist” doctrine, centering on the rights and duties of *A* and *B*. This is the sense in which restitution is said to be relational.

Property is very different, particularly when looked at in a highly practical way. I have already remarked at some length about the advantages of property with respect to alienability. I emphasized the advantages of alienability under

⁴⁶ J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum*, 12 MARQ. SPORTS L. REV. 273, 281, 291 (2001).

⁴⁷ *Id.* at 292.

⁴⁸ John Tamny, *Baseball Cards and the Current Economy*, FORBES (Aug. 31, 2009, 12:01 AM), <https://www.forbes.com/2009/08/28/baseball-cards-economy-inflation-opinions-columnists-john-tamny.html> [<https://perma.cc/KG2Q-ZXN7>] (noting that baseball card sales peaked at \$1.2 billion in 1991 before declining to \$200 million by 2008).

⁴⁹ *See supra* fig.5.

the specific facts in *Haelan Labs*: difficulties of contractual privity, the need for a single entity to enforce the player image rights, etc.⁵⁰ But this is only the beginning. Once player images are covered by a recognized property right, the door opens to a host of sophisticated arrangements and transactions. To take one example, in the aftermath of *Haelan Labs* Topps acquired Haelan, which had decided it could not compete with Topps's aggressive market tactics.⁵¹ The fact that player image rights were recognized as a discrete asset class surely helped facilitate this transaction. Through recognition of a property right, celebrity (player) images became a valuable corporate asset. Individual image rights could be aggregated into a single valuable bundle that could be bought and sold (a practice Topps later perfected).⁵² For the same reason, these assets could have been used as collateral for a loan or mortgage, as security for credit advanced by a supplier or partner, or in any of the myriad ways corporations deploy the assets they own to achieve strategic goals or simply serve ongoing operations.

As noted earlier, a specialized company such as Haelan or Topps has advantages in aggregating and enforcing publicity rights. These advantages lead to others: the owner of bundles of rights can more easily raise capital, arrange distribution, market the cards, and so on. For all these reasons, it is desirable to move player image rights from the players themselves to an independent entity. Once there, the assets covered by the rights can be deployed in a variety of ways. If bargains were limited to the two immediate parties, there would be high or intractable transaction costs when parties try to aggregate player images, arrange financing for card distribution and marketing, and so on. And so, for efficient exploitation, rights to the valuable public images of players must be alienable—not only from creator to user in a restitutionary or Coasean sense but also from creators to third parties, such as specialized card companies. Once in the hands of those companies and after the rights have been delineated and assembled the underlying assets can be cultivated and deployed in ways that add value and build wealth. For all of that, we need property.

These observations bear on the scholarly discussion of property as a set of relations versus property as a set of rights that attach to assets. Restitution is relational—which is to say, situational—as mentioned. A proper assessment of whether restitution will lie and, if so, how much compensation should be paid, requires a good deal of information about the parties and their situations: For example, who provided what kind of benefit under what surrounding facts? How much is that benefit worth to the recipient? The rights-attached-to-assets view of property, by contrast, leads to determinations of rights and duties that require less information. Property gives its owner near-plenary rights over the future uses of an asset and in general permits the owner to set her, his, or its own price. As Gordon wrote:

⁵⁰ See discussion *supra* Section I.B.

⁵¹ Hylton, *supra* note 46, at 291.

⁵² *Id.* at 292-93 (describing Topps's near monopoly in card market in later years and baseball players' union's successful efforts to break the monopoly).

Property law, by contrast [to restitution], is much less willing to weigh the interests of strangers against those of the property owner, particularly where intentional actions are concerned. Property rights give owners *prima facie* claims that are presumptively “good against the world” rather than against particular parties. An innocent trespasser is as liable as a knowing one. By contrast, the benefit-creating labor that suffices to justify a plaintiff’s restitutionary award against a defendant who knowingly avails himself of the plaintiff’s labor might not justify that same plaintiff’s prevailing in a context where the defendant innocently receives the putative benefit.⁵³

More simply, property provides an “off-the-rack” (or “baseline”) collection of rights that apply to discrete assets. In many ways, property rights over assets determine relations between people—property is not a product of those relationships. Because the assets are severable from the people involved and are in general equally enforceable against anyone (“good against the world”), they can be traded, assembled, borrowed against, etc. In this sense, property is more anonymous and less relational than torts, contracts, and restitution. Enforcement of a restitution claim, for instance, depends on relational facts: what the benefactor knew, what the recipient knew, whether there were alternatives to the restitution action (especially voluntary market exchange), whether there were other reasons to decline a restitution award, etc. Property requires less: Who was the owner? What were the limits or boundaries of the right? Did a second party interfere with a protected right? Because of its generality and the (related) relatively low information costs, property forms the foundation on which a myriad of transactions can be built. In describing the generative place of property in private law, property theorist Henry Smith wrote:

Private law deals with the interactions of persons in society. If we think about all the effects produced by the relation between each pair of persons and then unlimited chains of such interactions—*A* sells Blackacre to *B*, who sells to *C*, who mortgages to *D* and rents to *E*, and so on—then prescribing results for such interactions is a potentially intractable problem. Private law would be an impossible enterprise. This is where property comes in.

Property is a platform for the rest of private law. . . . [T]he baselines that property furnishes, as well as their refinements and equitable safety valves, are shaped by information costs. For information-cost reasons, property is, after all, a law of things.

. . . An “in rem” right originally meant a right “in a thing,” and I argue that it is the mediation of a thing that helps give property its in rem character — availing against persons generally.⁵⁴

⁵³ Gordon, *supra* note 1, at 214 (footnotes omitted) (citing William C. Powers, Jr., *A Methodological Perspective on the Duty to Act*, 57 TEX. L. REV. 523, 526-28 (1979) (book review)).

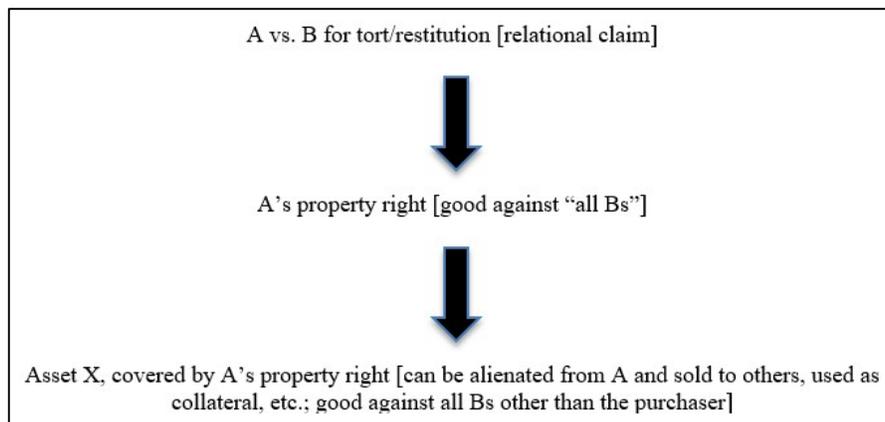
⁵⁴ Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012).

The only “relationship” required to enforce a property right is that the rightholder and putative infringer must be citizens or citizen-equivalents of the same legal jurisdiction—the jurisdiction that grants and enforces the property right. In this sense, property rights are rarely actually “good against the world”; they are good against that portion of the world subject to the jurisdiction of the right-granting state. But aside from this constraint, property requires less information about parties and events.

To summarize: The dispersed duties toward an intangible asset are aggregated into a right. Then the right is melded closely with the intangible asset, helping the asset to be treated as a separate thing for economic purposes. In this way, dispersed duties of individual people are concentrated into a distinct (property) right, which is then made alienable. Alienability allows the asset to be treated as a legal *res*, a locus of economic value removed from specific people and less dependent for legal enforcement on the details of relationships. The *res* can then be deployed in a wide variety of economic transactions: combined with other assets, split up, moved around, or used as collateral.

The progression this takes in the case of the right of publicity is:

Figure 6.



C. *Gordon to Demsetz; Restitution to Property*

To recognize a property right, in Smith’s apt metaphor, is to construct a platform upon which economic transactions can be built.⁵⁵ But when is it time to construct this platform? How do judges know when it is time to make new property?

⁵⁵ *See id.*

Gordon, as mentioned, said that one cause of new IP rights was the response of judges and legislatures to new economic conditions.⁵⁶ In her account, perceptions about the decline of manufacturing led judges to expand IP doctrines.⁵⁷ This diverges somewhat from the classic economic account of new property, which emphasizes increasing asset values rather than the substitution of new legal rights to replace declining activity in other sectors of the economy. But this is a minor difference. The main point is that Gordon posited that legal actors—judges and legislatures—create and shape property rights in response to the felt economic necessities of the era. This is essentially a functionalist argument: the legal system acts in response to changing economic conditions. This explanation for the “propertization moment” is the insight I want to explore.

In this functionalist vein, it makes sense to start with the well-worn but still serviceable frame of Demsetz’s property theory. I have used the theory already, but now I want to foreground it. Demsetz provides a simple, functionalist account of the economic forces that shape the emergence, refinement, and (sometimes) responsive relaxation of property rights.⁵⁸ The simple version of this simple theory might be stated this way: when the economic value of an asset increases, we expect the emergence of stronger property rights over that asset.⁵⁹ In the IP context, we might say: as the value of information assets increases, the reach and scope of legal IP rights over those assets increase as well. Remedies for violating IP rights also become more robust.

⁵⁶ See *supra* Part I.

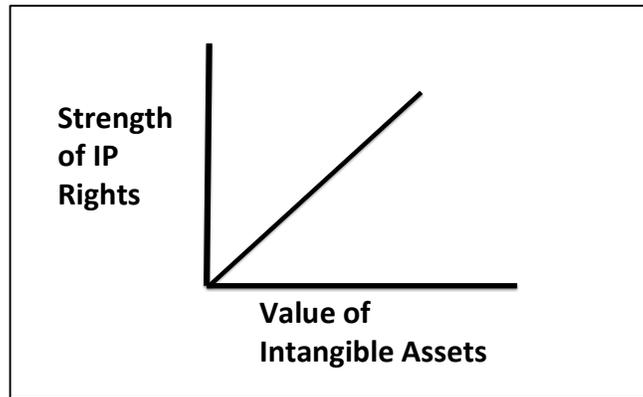
⁵⁷ Gordon, *supra* note 1, at 156-57 (“As the economic hopes of a less confident, service-oriented economy have become increasingly dependent on the nation’s intangible assets, legislatures and courts seem willing to extend intellectual property protections on the questionable, and surely often unconscious, assumption that protection means prosperity.” (footnote omitted)).

⁵⁸ See generally Demsetz, *supra* note 4444.

⁵⁹ See generally Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975) (testing Demsetz’s theory on resource and water rights in American West); Thomas W. Merrill, *The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331 (2002) (testing, refining, and reworking Demsetz thesis).

A primitive expression of the Demsetzian scheme might look like this:

Figure 7.



The original Demsetz paper described this process for property in general, but it has been readily adapted to the case of IP rights.⁶⁰ A major corrective was added later with the observation that property is generally granted by organs of the state—courts (as in Gordon’s examples) or a legislature. The *political* nature of property (which Demsetz “abstracted away from”—that is, bracketed or glided over) is crucial. It interjects “political economy” into the naïve, simplistic Demsetzian theory.⁶¹

The fact that governments mediate between underlying economic forces and the specification of property may cause major inefficiencies compared to the original version of the theory, which implicitly assumed a sort of automatic transmission of information from the marketplace to the situs where norms are shaped or laws are passed.⁶² In any event, the advent of “political economy” as

⁶⁰ See, e.g., Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649, 654-61 (2007).

⁶¹ See THRÁINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS 249 (1990) (discussing “naïve theory” of emergence of property rights, so named because it proceeds “without reference to political factors and considerations of wealth redistribution”).

⁶² See, e.g., DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 13-44 (1981) (noting that while property-rights regimes will have some tendency to push toward efficiency, politics can and often does warp this process); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. S421, S443-47 (2002) (arguing that against backdrop of optimistic, efficiency-based story of property-rights evolution, one must also be aware that property rights often result from inefficient capture by interest groups); Robert H. Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, 1986 U. ILL. L. REV. 361, 363-64 (arguing that first steps toward institutionalizing new forms of property are often taken by judges for reasons of efficiency but that as legislature

an important strand in passing legislation has now thoroughly modified the original “naïve view.”⁶³

My topic takes us back to a moment that usually occurs prior to the drafting of legislation. This is the moment when individual legal disputes reveal the need for the blossoming or bursting forth I described earlier: the moment when individual-to-individual disputes first give rise to the impetus to form a property right. Gordon’s foundational work on the restitutionary impulse in IP law is an excellent example of the kind of common-law concepts at work in this moment. By 1953, the time of the *Haelan Labs* opinion, advertising was a large and fast-growing industry.⁶⁴ The images and endorsements of ballplayers and other celebrities had been identified as powerful symbols, capable of cutting through the growing clutter; the images had become more valuable. Specialized firms—player card companies—sprang up to capitalize on these assets. The old privacy tort was modified and extended, and the right of publicity—a property right—was born.

D. *Demsetzian Dynamics: The Legal System Continues to Respond to Increasing Asset Value*

What happens after a new property right is born? There is perhaps no single progression or fixed timeline along which the new right is developed. There are a few patterns common enough, however, to make them worth discussing.

In many cases, such as the right of publicity, the recognition of property coincides with a continuing increase in the value of the underlying asset. Recognition of property may even contribute to an increase in value, though one must be very careful when ascribing causative power to changes in the law.

Whatever the contribution from the legal system, celebrity image rights have continued to increase in value since the 1950s. Advertising expenditures totaled \$7.7 million in 1953 (equivalent to \$74 million in 2019 dollars).⁶⁵ Advertising was a \$1.7 trillion global industry in 2019.⁶⁶ Just from 2004-2017, advertising

gets involved in later stages, political pressures become paramount and inefficiency often results).

⁶³ On the right-of-publicity context, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 177 (1993) (“[A]s the ‘celebrity industry’ has grown in power, organization, and sophistication, and as the costs involved in celebrity production have soared, the pressure for legal commodification of personas has intensified. This is pressure that would-be appropriators (and consumers who might share their interests in free use) have had neither the cohesion, lawyering skill, nor lobbying muscle to counter this pressure [sic] effectively.” (footnoted omitted)).

⁶⁴ See *supra* fig.5.

⁶⁵ See *supra* fig.5.

⁶⁶ Press Release, Redburn Ltd. & PricewaterhouseCoopers LLP, Redburn and PwC Study Finds Global Marketing Industry Larger than Current Estimates (Jan. 29, 2019), <https://www.redburn.com/wp-content/uploads/2019/01/190129-BTL-Press-Release.pdf> [<https://perma.cc/6X9S-KPKU>].

firm revenues grew from \$66 billion to \$104 billion.⁶⁷ And celebrity images are an increasingly important part of the business.⁶⁸ Indeed, some companies build entire ad campaigns or even corporate images around prominent celebrities. One consequence is that when a celebrity endorser creates a scandal, the corporate sponsor can suffer significant economic loss.⁶⁹

1. Legislation and Changing Property Specifications

If a novel property right is recognized at common law, if the underlying assets continue to increase in value, there is often a call to codify the right in legislation. This has been true of trademark law and trade-secret law, although in both cases it took a long time for Congress to pass unified *federal* legislation.⁷⁰ Although the right of publicity is still state law in the United States, the right has moved from pure common law into the statute books in states such as California, Indiana, and New York.⁷¹ There comes a time when the case-by-case, common-

⁶⁷ A. Guttman, *Revenue of the U.S. Advertising Industry 2004-2017*, STATISTA (Aug. 9, 2019), <https://www.statista.com/statistics/183932/estimated-revenue-in-advertising-and-related-services-since-2000> [<https://perma.cc/TW2X-TVYU>].

⁶⁸ See, e.g., Anita Elberse & Jeroen Verleun, *The Economic Value of Celebrity Endorsements*, 52 J. ADVERT. RES. 149, 163 (2012) (“Signing the kinds of endorsers that featured in this study on average generates a 4% increase in sales . . . and nearly a 0.25% increase in stock returns.”); B. Zafer Erdogan, Review, *Celebrity Endorsement: A Literature Review*, 15 J. MARKETING MGMT. 291, 308 (1999); cf. George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 457-61 (1991) (explaining that growth of advertising helped increase value of celebrity images over time).

⁶⁹ E.g., Christopher R. Knittel & Victor Stango, *Celebrity Endorsements, Firm Value, and Reputation Risk: Evidence from the Tiger Woods Scandal*, 60 MGMT. SCI. 21, 21 (2014) (finding that Tiger Woods’ sponsor’s overall market value dropped more than 2% in ten trading days after scandal broke).

⁷⁰ Caitlin Kearney, *Learning the Lingo of Patents and Trademarks*, NAT’L MUSEUM AM. HIST.: O SAY CAN YOU SEE? (Sept. 23, 2015), <https://americanhistory.si.edu/blog/learning-lingo-patents-and-trademarks> [<https://perma.cc/R5E9-HH44>] (“In the United States, trademarks did not become a federally governed intellectual property right until 1870, though every state had, since colonial times, some form of law or common law to protect genuine brands from imposters.”).

⁷¹ Despite recognition in legislation, the law has not yet settled into a unified national form. See, e.g., *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585-86 (2d Cir. 1990) (discussing view that there are no rights of publicity or privacy in New York outside of state statute). *But see* Se. Bank, N.A. v. Lawrence, 483 N.Y.S.2d 218, 219 (App. Div. 1984) (“[O]ur analysis of the legal authorities convinces us that there is a common law right of publicity in New York”), *rev’d on other grounds*, 489 N.E.2d 744, 745 (N.Y. 1985). While California and New York are logical states for a strong right of publicity, Indiana is a bit of an outlier. The explanation is that an important right of publicity pioneer, Mark Roesler, began his career in Indianapolis where he represented celebrities and bought up merchandising rights in the 1970s. Roesler founded the now-worldwide celebrity representation and licensing firm CMG.

law method appears inadequate to the job of properly specifying a property right. So legislatures step in to codify details and enact defenses and limitations to the novel rights.⁷² This follows a more general pattern in IP law. Courts create ad hoc doctrinal innovations and legislatures ratify, solidify, and limit them. Courts and legislatures thus interact and cooperate in what might be thought of as a Demsetzian dialectic: a back-and-forth conversation, unrolling sometimes over many years, elaborating and more carefully specifying IP rights in response to changing conditions.⁷³

The right of publicity is a property right with uneven contours. It is still state law: twenty-four states have codified the right in their statute books, fourteen other states recognize the right at common law, and the remaining twelve states give the right an uncertain status.⁷⁴ Posthumous publicity rights provide a good example of the lack of uniformity. Twenty-five states recognize such rights. Given that the vast majority of states recognize publicity rights generally, this means there is a significant split on the issue of posthumous publicity rights.⁷⁵

See Matthew Savare, Comment, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 164 n.241 (2004).

⁷² It also may be partly due to the fact that legal actors feel uncomfortable with common-law innovations in the realm of property, which has been described as an unalterable set of rights of predictable shape, in which settled expectations are particularly important. Cf. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 20 (2000).

⁷³ On the prevalence of this pattern of adapting to newly emerging technologies, see generally Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CALIF. L. REV. 2187, 2189 (2000) (drawing on “selected [technological innovation] episodes from the past 100 years to illustrate the three typical stages by which the legal system accommodates new technologies: (1) disequilibrium; (2) adaptation and adjustment; and (3) legislative consolidation”). On Demsetzian adaptation in IP law generally, see Yun-chien Chang & Henry E. Smith, Essay, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275, 2299 (2015) (“The more important the problem the custom solves, the more likely it is worth incurring the information cost of in rem enforcement. In a sense this is an application of the Demsetz Thesis: as a potential externality becomes more important, the tendency will be for property to catch up with it. Of course, we must ask how that will happen and at what cost—including but not limited to information cost.” (footnote omitted)).

⁷⁴ See Jonathan Faber, *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <https://rightofpublicity.com/statutes> (last visited Nov. 27, 2019) (click states on interactive map to review statutes state by state). Faber states, “[T]he majority view appears to be that the right exists in every state that has not explicitly rejected such interests.” Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <https://rightofpublicity.com/brief-history-of-rop> [<https://perma.cc/8YFJ-8PLL>] (last visited Nov. 27, 2019).

⁷⁵ Christian B. Ronald, Note, *Burdens of the Dead: Postmortem Right of Publicity Statutes and the Dormant Commerce Clause*, 42 COLUM. J.L. & ARTS 123, 124-25 (2018) (“The right of publicity, a person’s right to control the commercial use of his or her likeness, is recognized in some form in thirty-eight states. Approximately twenty-five of those states have laws

Even so, in states with major entertainment and advertising industries—California, New York, Tennessee (Nashville), etc.—state publicity-rights statutes are often amended or are at least the subject of legislative hearings regarding problems and proposed amendments.⁷⁶ And, as with trademarks and trade-secret law, proposals to pass a federal right of publicity have been discussed occasionally.⁷⁷ *Haelan Labs*, then, was just the beginning. The Demsetzian dynamic continues to unfold.

CONCLUSION

I can conclude with two quick lists. The first summarizes the right of publicity's progression from common-law duty to property right. The second sets out some observations on why property might be superior—a set of reasons why the particular progression we observe here might be a result of functional considerations.

The progression I mentioned looks roughly like this:

Step 1: *A* has a cause of action against *B* when *B* violates a duty toward *A*'s intangible asset.

protecting a person's right of publicity after death, known as the postmortem right of publicity. When Prince died in 2016, however, Minnesota did not have a postmortem right of publicity statute. In response to his death, state lawmakers rushed to pass the Personal Rights in Names Can Endure ("PRINCE") Act, which would have expanded Minnesota's right of publicity laws and created a retroactive postmortem provision applicable to deceased celebrities like Prince. Although the PRINCE Act was abandoned after backlash from professional sports and other entertainment groups, the very introduction of the bill shows the enduring power of celebrity and the desire to change the law to protect artists' legacies." (footnotes omitted).

⁷⁶ See, e.g., Bela G. Lugosi, *California Expands the Statutory Right of Publicity for Deceased Celebrities While Its Courts Are Examining the First Amendment Limitations of That Statute*, 10 DEPAUL-LCA J. ART & ENT. L. 259, 262-67 (2000) (discussing legislative expansion of publicity rights for deceased celebrities in 1999); Jennifer E. Rothman, *In Final Hours, New York Makes Last Minute Changes to Right of Publicity Bill*, ROTHMAN'S ROADMAP RIGHT OF PUBLICITY (June 18, 2019, 10:30 AM), <https://www.rightofpublicityroadmap.com/news-commentary/final-hours-new-york-makes-last-minute-changes-right-publicity-bill> [<https://perma.cc/2D9V-64XU>] (summarizing proposed amendments to New York statute in 2019).

⁷⁷ See generally, e.g., de Grandpré, *supra* note 17, at 75-76 ("The multiplicity of rights of publicity has led trademark practitioners to propose federal legislation on the subject matter. It is feared that a lack of uniformity in state laws chills commercial uses of celebrity identity and favors forum shopping. These concerns are understandable: the general principles of fairness and equity that fostered the emergence of the right of publicity must give way, in their maturity, to more certain legal rules. The right of publicity is in need of a theoretical model, and assessing right of publicity infringements on criteria of unjust enrichment or fair rewards is unlikely to yield consistent case law." (footnotes omitted)); Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209 (1998).

Step 2: Courts generalize the duties of all *Bs* into a single right; this right, “good against the world” of all *Bs*, is a property right.

Step 3: Businesspeople come to see that this right is valuable insofar as it represents the aggregated legal claims of *A* versus all who would infringe on *A*’s rights over *A*’s intangible asset.

Step 4: Economic logic then generalizes *A*’s prospective benefit as the recipient of the duties held by all *Bs*. *A*’s potential profit flow from exploiting the duties of all *Bs* is (conceptually) separated from *A* herself. From a business point of view, this profit flow is an asset. The profit stream becomes (conceptually) alienated from *A*. It becomes a new thing entirely—call it Asset *X*.

Step 5: Asset *X*, being a separate thing, can be sold to others. As lawyers say, it can be alienated in whole or in part (i.e., licensed or assigned, in the lexicon of IP law). Asset *X* can be pledged as collateral for a loan. It can form part of the bundle of assets owned by a corporation. It can be sliced, diced, and meted out in all the complex ways businesspeople can think of to work with property.

On the differences between restitution and property, I summarize with these aphorisms:

The grant of a property right creates rather than supplants a market; the property grant, a government action, creates the conditions for exchange—it does not substitute for exchange.

Restitution reflects relations; property creates relations. Relational issues are secondary in property. In general, property creates relations between citizens of the same jurisdiction who otherwise have no preexisting relationship or interaction.

Restitution is like a cousin of contract; property rights are more like the parents of contract. Restitution emulates contract; property creates or clarifies the grounds or subject matter for contract. Restitution is a market substitute; property is a market stimulant.

Restitution is a cause of action. Property is tied up with economic assets and might be said to help clarify or define assets. Awarding restitution corrects an injustice. Granting property rights solidifies and enhances the value of underlying assets.

Restitution is reactive; property is generative. Corrective justice seeks to restore a status quo. New property rights deviate from the status quo.

Gordon, in the timeless article I celebrate here, laid bare the logic of the restitutionary impulse that sometimes leads judges to create a new IP right. I have added a modest, if not trivial, point: the progression of the right of publicity fits well inside a Demsetzian frame. The movement Gordon traced, from vague fairness intuition to analytically sound restitutionary principle, has an additional

stage in some cases: the emergence of a full-blown property right. In terms of both legal analytics and transaction-cost considerations, this final stage represents the extension (or reextension in some cases) of the restitutionary impulse so skillfully laid out by Gordon. In this as with her other contributions, we are the fortunate recipients of rich intellectual benefits willingly and generously bestowed.