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Rhetorically Re-visioning the Right of Political Expression: A Critical Analysis of *Frazier v. Boomsma*

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Abstract

In May 2007 the Arizona Legislature passed, and the Governor signed, Senate Bill 1014, extending the common-law right of publicity to include civil and criminal penalties for specific unauthorized uses of the identities of American soldiers. Five other states and the U.S. House of Representatives have passed similar legislation. The Arizona Legislature specifically intended to prohibit Flagstaff activist Dan Frazier from advertising and selling t-shirts on the Internet which contain antiwar messages and which list the names of American service personnel who died in the Iraq war. In September 2007, in *Frazier v. Boomsma*, Judge Neil Wake of the United States District Court for the District of Arizona granted Frazier's motion for a preliminary injunction against enforcement of the bill, and expedited hearing on the constitutional issues raised by the Arizona law. In August 2008, Judge Wake declared the injunction permanent and enjoined enforcement of the criminal law as applied to Frazier's communications.

Frazier raises unique and enduring questions regarding the limits of free expression. First, this essay reviews the rhetorical/legal foundations for the *Frazier* court's conclusion that "the right of publicity cannot justify content-based restrictions on political or artistic expression" when the communicator's use of personal names "bears a reasonable relationship to the message." Second, this essay analyzes the *Frazier* opinion and offers applicable insights from rhetorical and communication theory when the free exercise of the right of political expression arguably compromises individuals' publicity and privacy rights.

Introduction

Courts in the U.S. have long recognized that persons possess a basic right to privacy and, attendant to this legal protection, a right of publicity: the "inherent right of every human being to control the commercial use of his or her identity" (McCarthy, 2006, p. vii). The focus of the law of publicity is upon preventing, or providing legal remedies for, *commercial mis/appropriation* of the identity of another; it is recognized as "the right to prevent others from using one's name or picture for commercial purposes without consent" (*Douglass v. Hustler Magazine, Inc.*, 1985, p. 1138). The right is developed in state rather than in federal law[2] where, in Arizona as in many other states, the definition of the claim is taken from the *Restatement of the Law, Unfair Competition* (§46, 1995): "One 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 for the relief appropriate under the rules stated in §§ 48 and 49 [injunctive and damage relief, respectively.]" *Pooley v. National Hole-in-One Association* (2000, p. 1111).

Whenever the right of publicity of person A is granted privilege against the claim of another person B who seeks to exercise the unfettered right to use A's identity (name or likeness), the right of publicity abridges the right of free expression. Thus, for example, if B attempts to sell memorabilia featuring the identity of Elvis Presley, or to claim that Presley endorsed B's product or service, those who are legally authorized to exercise Presley's right of publicity may seek legal action enjoining

B from using Presley's identity and/or may sue B for damages attendant to B's unauthorized use of Presley's identity (see, for example, *Estate of Presley v. Russen*, 1981).

But what happens when B appropriates A's name or likeness in the context of political communication? In *Frazier v. Boomsma* (2008, 2007), Judge Neil Wake of the United States District Court for the District of Arizona concluded that "the right of publicity cannot justify content-based restrictions on political or artistic expression" when the communicator's use of another's name or likeness "bears a reasonable relationship to the message" (2007, pp. 21-22). Thus a communicator may use the identity of another in political messaging so long as that use satisfies an expectation of "reasonableness" from the perspective of the communicator. One may also conclude that, after *Frazier*, laws designed to prevent the reasonable use of the name of another in political messaging are more likely than not to be held unconstitutional when they are challenged in the courts.

Judge Wake provides an insightful and precedent-setting discussion of the non/applicability of the right of publicity to controversial instances of political or artistic expression. Nevertheless, his analysis invites analysis and criticism from an alternative perspective that is scarcely represented in the court's opinion. This essay argues that a reconstruction of the Court's opinion as a rhetorical artifact intended to explore the legal consequences of restraints upon communication highlights valuable aspects of the controversy left un- or under-explored in *Frazier v. Boomsma* (2008, 2007).

The project proceeds as follows. First, it re-presents the controversy that led to the attempt of the Arizona Legislature to expand the right of publicity to the detriment of Dan Frazier's political communication. Second, it presents a summary of those components of Judge Wake's decision and opinion relevant to the competing rights of publicity and free political expression. Third, it offers a rhetorical reconstruction of the evolution of the right of publicity, for the purposes of reanalyzing what this right is intended to accomplish and how this right is ir/relevant to the current controversy. Fourth, it employs an analytical and critical lens to reconstruct Frazier's communicative act from three perspectives: the communicator as rhetor in a public controversy, the apparent effects of the message upon audiences, and the symbolic power of the rhetor's use of personal names in a political message. Finally, it addresses two anticipated objections to these reconstructions.

The project continues a line of scholarly research (see, for example, essays in Parker, 2003) that focuses upon the utility of insights from rhetorical and communication theory (RCT) in illuminating issues and questions of law, especially those relevant to America's commitment to freedom of expression. This research is premised upon the assumption that legal communications (especially judicial opinions) constitute "activity that invites, lures, or guides us on to action within and in response to the environment"—in this case, the legal environment—and may be described aptly as "symbolic inducement" (Gregg, 1984, p. 134). Furthermore, this research illustrates how communication scholars are especially qualified to illuminate both the communicative processes that are regulated in First Amendment law and the communicative practices predominant in judicial and jurisprudential analyses of First Amendment law. These examples emphasize that communication scholars should demonstrate to researchers outside the discipline that RCT merits a central role in scholarly analyses of legal cases and opinions. Additionally, at least some of these scholars should illustrate "the utility of moving rhetorical criticism … from 'great cases' to less well known cases" (Mallin, 2005, p. 17), especially where the legal focus invites us to examine burgeoning controversies.

When scholars of RCT advance these claims, we ask no more of scholars outside the communication disciplines than of communication scholars investigating interdisciplinary issues and questions. When communication scholars write about, say, jurisprudence, we do not write oblivious to the accumulations of insights and understandings generated by scholars in law, philosophy, political science, etc., who have previously addressed the issues they investigate. Rather, we consult these

sources and, where appropriate, reference them. Obviously, we may not be as accomplished at this as we might like to believe that we are, or as others might wish that we were. But only when we read each other's work and engage in vigorous, cross-disciplinary analysis and criticism will we transcend the limitations of disciplinary boundaries. Only when we realize that we share common interests and theoretical frameworks will we surmount the "intellectual trade deficit" that characterizes communication's interrelations with jurisprudence.[3]

Factual Background

Dan Frazier, an Internet entrepreneur, communicates political messages and sells political paraphernalia, including bumper stickers and t-shirts, on his website (www.carryabigsticker.com). His sales at the website constitute Frazier's primary source of income (*Frazier*, 2007, p. 2). However, he also employs the website "as a vehicle to advance his political views in a variety of ways unrelated to the sale of merchandise" (*Frazier*, 2008, p. 2), including postings regarding efforts to organize an antiwar movement in his hometown of Flagstaff, AZ, and his goal of changing the policies of the Bush administration regarding the Iraq war (*Frazier*, 2007, pp. 2-3). For example, in an "Open Letter to the Families of the Fallen" in Iraq, posted on his website in 2007, Frazier disclosed how his personal views in opposition to the war motivated him to sell antiwar t-shirts (pp. 3-4). Additionally, Frazier donates $1 from the sale of each shirt to a charity that provides support for the families of fallen soldiers (Denogean, 7/10/07).

In June 2005 Frazier printed 100 t-shirts with the messages, "Bush lied; they died," or "Support our remaining troops—bring the rest home alive," and the names of 1,693 service personnel who had died in Iraq up to that time. He advertised the t-shirts on his website. The shirts sold so poorly that, by the end of the year, Frazier had discounted the $20 price by 50% and planned to close out the line. Then, in 2006, legislatures in both Louisiana (La. Rev. Stat. Ann. § 14:102.21, 2007) and Oklahoma (Okla. Stat. Ann. Tit. 21, § 839.1A, 2007) banned sales of the t-shirts in their jurisdictions. CNN and Fox News covered the legislation, and t-shirt sales increased dramatically (Montini, 2007). By June 2007, when the Arizona legislature passed Arizona Senate Bill S.B. 1014 (Ariz. Rev. Stat.s §§ 12-761 & 13-3726, 2007) banning sales in Frazier's home state, he claimed to have sold 2,200 t-shirts. Legislatures in Texas (Tex. Bus. & Comm. Code Ann. § 35.64), Florida (Fla. Stat. § 540.08(3), 2007), and Washington (Wa. Substitute House Bill 2727, 2008) and the U.S. House of Representatives (Soldiers Targeted by Offensive Profiteering Act of 2007; "STOP Act"; H.R. 269, 110th Cong. 2007) passed similar laws.

The Arizona law was passed specifically to mollify family members of soldiers who had died in Iraq and whose names appeared on the "Bush lied; they died" and other t-shirts and merchandise offered for sale at Frazier's website (*Frazier*, 2007, p. 5). The family members complained that these soldiers' names were used in conjunction with a message that the soldiers would not have endorsed or supported, had they lived, and that the use of these names in conjunction with the message/s was profoundly distressing to the family members. Both houses of the Arizona legislature unanimously supported the bill, and Governor Janet Napolitano signed the bill into law on May 24, 2007.

The law provides both criminal and civil penalties for unauthorized uses of the names of American service personnel. The criminal law, codified at A.R.S. § 13-3726 (2007), provides for punishment upon conviction for those who "knowingly use the name, portrait or picture of a deceased soldier for the purpose of advertising for the sale of … merchandise or for the solicitation of patronage for any business without having obtained prior consent" from a legally designated representative, such as a family member. Violation of the criminal provision constitutes a Class 1 misdemeanor, punishable by a year of imprisonment.

The law also provides for civil liability for unauthorized uses of soldiers' names (A.R.S. § 12-761, 2007). The law recognizes "[t]he right to control and to choose whether and how to use a soldier's" identity "for commercial purposes … as each soldier's right of publicity." This section of the law identifies liability for use of a soldier's identity without prior consent for "advertising for the sale of … merchandise", "soliciting patronage for any business", or "receiving consideration for the sale of any merchandise." Violators are subject to injunctive relief, treble damage awards, punitive or exemplary damages, and attorney's fees and costs. The criminal and civil statutes contain an identical list of exceptions (discussed below).

This transparent attempt of the Arizona legislature to enact a law aimed at one person's exercise of free expression attracted the attention of the American Civil Liberties Union (ACLU). The ACLU agreed to provide legal representation to advance Dan Frazier's claim that the legislation violates the First Amendment to the U.S. Constitution as made applicable to the states by the Fourteenth Amendment. The ACLU's involvement was important for at least two reasons. First, the plaintiff's arguments were complex, involving issues of legal standing and a motion for a temporary injunction against enforcement of the law, in addition to intricate constitutional claims involving freedom of political expression, commercial speech, and the criminal and civil law of the right of publicity. The ACLU's attorneys are qualified and experienced in arguing technical legal issues. Second, the ACLU's role as symbolic protector of civil liberties highlighted the case as raising contemporary and enduring issues relevant to free expression. During hearings on the bill, these issues had been subordinated to the interests of the families of deceased military personnel in extending the right of publicity to soldiers. The ACLU's entry re-framed the conflict as a matter of constitutional dimensions.

The case was assigned to Judge Neil V. Wake of the United States District Court of Arizona. Judge Wake heard arguments on the case on August 23, 2007, issued his preliminary decision on September 27, 2007 (*Frazier*, 2007), and finalized that decision by imposing a permanent injunction against enforcement of the criminal penalties of the law as applied to Frazier specifically on August 20, 2008 (*Frazier*, 2008).

The U.S. District Court's Decision

In his initial decision for the Court, Judge Wake granted the plaintiff's motion for a preliminary injunction against enforcement of those components of the law imposing *criminal* penalties for violation of the right of publicity (A.R.S. § 13-3726, assessed in *Frazier v. Boomsma*, 2007). However, Judge Wake declined to rule regarding the constitutionality of those components of the law authorizing *civil* actions (A.R.S. § 12-761, assessed in *Frazier v. Boomsma*, 2007) on the ground that Frazier had failed to serve process on any individual "who is likely to file a civil action against him" (pp. 8-9).[4] Nevertheless, virtually all of the arguments and conclusions in Judge Wake's opinion regarding the unconstitutionality of the law apply equally to its civil and criminal dimensions, because constitutional protection for speech arguably provides a shield against civil action as well as criminal prosecution (*Hustler Magazine, Inc. v. Falwell*, 1988, pp. 52-53). Anyone filing a civil suit against Frazier would be obligated to present a convincing case that these arguments and conclusions were defective.

Judge Wake based his decisions upon conclusions of fact and of law. In addition to the facts previously noted, Judge Wake reported that the names of some soldiers who died in Iraq are visible in the advertising of the t-shirts on Frazier's website—a fact which makes the criminal provisions of the law applicable to the plaintiff (*Frazier*, 2007, p. 3). The jurist also noted other examples of prior usages of the names of the fallen soldiers in public communications: a Pulitzer-prize-winning cartoon in 2006, a Doonsbury cartoon in 2004, and news reports at websites CNN.com and WashingtonPost.com (pp. 4-5). The court opinion also reported that "a dozen" family members of deceased soldiers had threatened to sue Frazier if he persisted in using the names on his t-shirts (p. 5), and that police officers had contacted Frazier to advise him that an inquiry

into his activities might "result in criminal charges" (p. 11)—a notification which triggered plaintiff Frazier's plea for a preliminary injunction prohibiting enforcement of the laws.

With regard to the enforcement of criminal laws against Frazier, Judge Wake ruled that Frazier satisfied the legal prerequisites to establish that he had standing to challenge the statute (pp. 15-24), and that the case presented "a controversy ripe for review" (p. 27). Judge Wake based his determination that the requirements for issuance of a preliminary injunction were satisfied upon an analysis of the constitutional issues raised by application of the law to Frazier's conduct (pp. 27-29). Thus Judge Wake turned to the seminal legal question posited in this case: Would criminal prosecution of Dan Frazier for advertising and selling his t-shirts violate the plaintiff's right to freedom of expression? Judge Wake answered this question in the affirmative, on the following grounds:

First, Judge Wake concluded that Frazier's advertising and selling of t-shirts containing the names of fallen soldiers in Iraq constituted political expression, despite their obvious commercial component (pp. 29-36; see also *Frazier*, 2008, pp. 4-7). Second, Judge Wake held that the criminal provisions of the Arizona law are content-based rather than content-neutral time, place, or manner restrictions (*Frazier*, 2007, pp. 36-39). The combinations of these findings led Judge Wake to conclude that the appropriate standard to be applied to the statute in question is that it must satisfy the *strict scrutiny* standard: the enforcement of the law would "have to be 'necessary to serve a compelling state interest and … narrowly drawn to achieve that end'" (p. 39, citing *Foti v. City of Menlo Park*, 1998, p. 635).[5] Third, Judge Wake reviewed each of the purposes of the government in enacting the legislation—(A) enforcement of the right of publicity in order to protect the use of a soldier's identity in political expression, (B) enforcement of the criminal statute in order to serve the state's interest in preventing misleading advertising, and (C) enforcement of the statute in order to promote the state's interest in protecting mourning military families—and concluded that none of these purposes satisfied the requirement of strict scrutiny established in case law in order to justify abridging Frazier's constitutional guarantee of freedom of expression. (pp. 44-52). Finally, Judge Wake concluded that Frazier had demonstrated sufficient harm to his First Amendment rights to satisfy the legal requirements for issuance of a temporary injunction against enforcement of the criminal provisions of the law (pp. 52-54). Therefore, Judge Wake granted the plaintiff's request for this injunction. He made the injunction permanent in his subsequent ruling in August 2008 (*Frazier*, 2008).

This essay is not intended to be a comprehensive analysis of the reasons for decision and justifications for each argument in the *Frazier* case. Accessible legal scholarship relevant to both the criminal (Calvert, "Support," 2008) and civil (Calvert, "War and," 2008; Calvert, "War, Death," 2008) aspects of the case addresses these issues.[6] Rather, this essay provides rhetorical analyses of the intersection of the right of publicity with the right of free political expression, for several reasons.

First, use of another's identity in political messaging is a burgeoning area of constitutional law. The potential for future conflicts is great, and an understanding of the issues at stake and the relevant precedent cases is invaluable for resolving these conflicts. For example, subsequent to Judge Wake's decision, the State of Washington adopted a similar statute, and two states—Michigan (D. Frazier, personal communication, January 29, 2008) and Maryland (Schwartzman, 2008)—are debating the passage of similar legislation. Additionally, regulation of some recent attempts to suppress political and artistic expression incorporating the identities of others into the message (see examples in Calvert, 2008, pp. 1176-85) suggest that a discussion of the limits of the right of publicity is timely and valuable. Finally, the threat of civil suits grounded in constitutionally-questionable statutes constitutes an immediate and enduring First Amendment concern. For example, Dan Frazier is facing a $40 billion civil lawsuit in Tennessee directly related to his t-shirts (*Read v. Lifeweaver, LLC*, 2008).

Second, arguably the most important element of Judge Wake's decision in *Frazier v. Boomsma* (2007) is his identification of a specific category of protected speech within the penumbra of the common law right of publicity: "political or artistic expression where the identity of the holder of the right [of publicity] bears a reasonable relationship to the message" (p. 42). The invocation of a reasonableness standard to determine when speech identifying others is un/protected by constitutional right merits careful consideration.

Third, the inclusion of insights from rhetorical theory and criticism possess the potential to illuminate important components of the law. Among these are the rhetorical purposes of the development of a right of publicity, evolving perspectives upon political expression in media, and the rhetorical functions of the use of personal names in political expression.

A historical perspective upon the right of publicity provides an apt foundation for exploring many of the issues raised in the conflict between publicity rights and First Amendment protections for free expression. Therefore, our odyssey begins with a brief critical analysis of the foundations of publicity law.

A Rhetorical Reconstruction of the Right of Publicity

The right of publicity evolved from two distinct social influences. The first, a limited governmental concern for protecting citizens' identities from commercial exploitation, was born in jurisprudential construction of a right to privacy beginning in 1890 (Warren & Brandeis). It evolved from a series of cases in which unscrupulous advertisers appropriated the identities of unknown persons for financial gain. In 1902, the legislature of the State of New York enacted a limited statutory restraint upon unauthorized uses of individual identities after the highest court of the State declined to protect commercial exploitation of the likeness of a child.[7] Three years later the Georgia Supreme Court was the first judicial body in the nation to recognize a common law of privacy (*Pavesich v. New England Life Insurance Co.*, 1905), when a corporation's use in advertising of an unauthorized photograph of the plaintiff, "an artist of no great renown" (Madow, 1993, n. 204), motivated legal remediation. Throughout the early history of the development of the tort of privacy, the judiciary emphasized the importance of protecting ordinary people from the nonconsensual use of their identities, even as they denied the right to celebrities (*O'Brien v. Pabst Sales,* 1941*)*. When judges granted "redress for the unauthorized use of a person's name or picture in advertising," they

> did so based on traditional tort law concepts such as personal injury to dignity or state of mind. In such cases, damages were typically measured by amount of mental distress. Recovery in these cases was based on the concept that when a person's [name or] photograph is used for selling a product against his consent, it affronts his humanity, and damages his dignity (Stapleton & McMurphy, 1999, pp. 26-27).

This right to privacy from commercial expropriation by others was classified as personal, and therefore held to expire upon the death of the injured party.

The second influence was born of a concern that those who have invested substantial effort into creating a financially-viable persona should be permitted to capitalize (literally) upon its commercial value, rather than allowing others to exploit identities for personal financial gain. The initial case recognizing a right of publicity involved the right of a corporation to obtain exclusive rights to the use of the image of a popular athlete on baseball cards (*Haelan Lab. v. Topps Chewing Gum*, 1953). Ultimately, courts recognized that this right of publicity was descendible—that families and assigned agents of deceased celebrities deserved compensation for the unauthorized use of the identities of these celebrities. In the original case establishing descendibility, *Lugosi v. Universal Pictures Co.* (1972, p. 1979), Judge Jefferson of the Superior Court in Los Angeles ruled that "Bela Lugosi's identity in the persona of Count Dracula was a property right which did not terminate

at death, but descended to his heirs—his surviving widow and son." Judge Jefferson reached this conclusion only "after extensively reviewing the differences between the personal rights of privacy and the property interest inherent in the right of publicity…." (McCarthy, 2006, § 9:5, p. 391). The identities of celebrities have commercial value, the courts reasoned, because of the investment involved in cultivating a socially-recognized persona.

Subsequent to *Lugosi* the courts, especially those in California, have developed extensively the descendibility of the property right of publicity. Nevertheless, these developments are clearly distinguishable from cases dealing with personal injury rights for emotional distress to non-celebrities caused by unauthorized uses of one's identity. McCarthy (1996, § 9:1, p. 381) clarified the distinction:

> There is no dispute as to the postmortem rule for traditional 'privacy' rights which protect human dignitary values, damage to which is measured by mental and physical suffering and damage to reputation. Such classic 'privacy' rights die with the person whose privacy was allegedly invaded. Both the commentators and the cases unanimously support this rule.

Thus the concept of descendibility of one's property right of publicity is a clearly-established consuetude, restricted to those who can claim celebrity legal status and distinguishable from those who have suffered emotional distress as a consequence of misappropriation of their identities.

Nevertheless, some legal scholars (for example, Calvert, "Support," 2008; Lapter, 2007) and legislators have overlooked or obscured this distinction. In 2007, when the Arizona legislature authorized the compensation of families of deceased service personnel for losses suffered as a consequence of Dan Frazier's unauthorized use of the soldiers' names, the authors of this legislation (for whatever reason) muddled the distinction between these two rights. Under the title "Right of *publicity*; unauthorized use of the name, portrait or picture of a soldier" (emphasis supplied), the legislators created a descendible right of *privacy*, assigning authority to family members and/or legally-designated representatives to sue for use of a soldier's identity without authorization. The law specifically states, "The right of publicity is a property right that survives a soldier's death." The civil penalties involved include injunctive relief, damages, and attorney's fees. This property right is clearly distinguished from "any other rights and remedies provided by law, including the common law right of privacy" (Ariz. Rev. Stat. § 12-761). Yet what this amendment to civil law performs is designation of a property right to descendants, a right historically and unequivocally reserved to those individuals (legally referred to as celebrities) whose identities retain a distinct economic value. Because few if any soldiers' identities possess endorsement value, the value assigned to unauthorized use of these identities is a legislative creation, non-economic in nature.[8]

In 2007 the Arizona legislature assumed the unprecedented posture of assigning to a descendant the legal authority to obtain costs of attorneys' fees and other legal services in order to win "damages" that have no economic value per se in the marketplace of endorsements. This commingling of discrete rights of privacy and publicity creates at least three problems.

First, because the legislature failed to specify an alternative test for determining economic value in this special class of cases, fact-finders (especially juries) may be prone to award damages to plaintiffs on the ground of distaste for the idea expressed. For example, a Tennessee couple filed a civil suit against Frazier requesting $40 billion in compensation for emotional harms suffered as a consequence of his use of their son's name on his t-shirts (*Read v. Lifeweaver*, 2008). Lawsuits of this type are not only likely to chill communicators' presumptively-protected First Amendment rights; they appear to be designed to produce this result.

Second, the distinction between a property right of publicity and an emotional-distress right to privacy is further compromised when the legislature categorizes unauthorized use of a soldier's identity as a *crime* under Arizona law: "A person who violates this section [see endnote 1, § 13-3726] is guilty of a class 1 misdemeanor." This legislative effort transforms an

issue historically resident within the domain of civil law into a matter for state enforcement. Yet that transformation is constructed absent any grounding in legal precedent. The State of Arizona is rhetorically and legally obligated to explain why the use of names of fallen soldiers without consent of their families constitutes a crime against the State.

Third, if (as the State of Arizona asserts) the right to privacy is compromised by the publicity attendant to using a soldier's name or likeness in public messaging, the appropriate approach would be to enact broad bans on such uses. In fact, the State does precisely the opposite by providing a catalogue of exceptions to restricting the public communication of the identities of deceased service personnel (Ariz. Rev Stat. § 13-3726 and & 12-761, providing criminal and civil penalties, respectively). Oddly, these exceptions are nowhere justified, either in the legislation itself or in briefs for the government offered in its support. Yet these exceptions tacitly compromise the government's justifications for initiating limitations on the right of publicity. Therefore, the scope of Senate Bill 1014 seems arbitrary, capricious, and specifically designed to prevent Frazier's participation in the marketplace of ideas. Two examples of these exceptions should clarify and justify these conclusions.

Any portrayal of a soldier in a live performance, book, play, article, film, etc., as well as any news, public affairs, or sports broadcast or account, constitutes an exception to both the criminal and civil restrictions on First Amendment rights. Once one tallies the exceptions, it seems that few portrayals save those on clothing violate the law. Likewise, any "photograph of a monument or memorial that is placed on any goods, wares, or merchandise" is likewise protected as an exception to the law, even when the names of deceased soldiers appear on the products. Note that, in the act of constructing these exceptions, the State fundamentally compromises its interests in protecting the use of a soldier's identity in political expression. Moreover, any of the exceptions might harm mourning military families. Finally, the law permits advertising for all of these exceptions, ensuring that some soldiers could be identified with political positions with which they might have disagreed—the third justification offered by the State of Arizona.

Courts take a dim view of transparent attempts by governments to advance an interest only when it suits them. The U.S. Supreme Court has ruled that, when the government proposes the regulation of expression in order to advance an important State interest, a regulation fails to fulfill that interest when it is "pierced by exemptions and inconsistencies" (*Greater New Orleans Broadcasting Association v. United States*, 1999, p. 190) that "directly undermine and counteract its effects" (*Rubin v. Coors Brewing Co.*, 1995, p. 489). The exceptions listed in the Arizona law appear to provide a textbook example of the Court's concern.

On the Arizona legislature's expansive interpretation of the right of publicity Judge Wake is virtually silent. Yet to comment on the uniqueness of these constructions, their self-evident rhetorical purposes, and the absence of relevant precedent supporting these extensions would appear to be vital to assessing these new state laws. Herein reside important contributions that rhetorical analysis of the development of the law of publicity can provide for students, scholars, and jurists in cases addressing the nature and scope of the First Amendment.

Re-visioning Frazier's Political Expression

How Judge Wake constructs Dan Frazier as a rhetor is integral to his conclusion that Frazier's communication should be protected. Judge Wake re-presents Frazier as a "peace activist … who owns and operates … a website devoted in part to selling t-shirts," etc., "expressing views on a variety of political topics" (*Frazier*, 2007, pp. 1-2). Judge Wake observed that he has "sold these items online for several years … to promote his political views and to 'change the policies of the Bush Administration relating to the war in Iraq'" (p. 2). With regard to the t-shirts bearing anti-war messages such as "Bush lied;

they died," Judge Wake asserted that "Frazier created the t-shirts to 'underscore and symbolize the significant loss of life and the harm done by the Iraq war'" (p. 3), and that Frazier donates some of the proceeds from selling the shirts to charities that help families of soldiers killed in Iraq. Finally, Judge Wake also noted that Frazier employs his website "as a vehicle to advance his political views in a variety of ways unrelated to the sale of his merchandise," such as his "effort to organize and document a local antiwar movement," his negative criticisms of the Iraq war and President Bush, and his promotion of "original political satire" (p. 4).

On the basis of this biographical sketch, Judge Wake concluded that Frazier's t-shirts "constitute core political speech," both because of the message/s they convey and because "Frazier is at least substantially motivated by political considerations in creating and selling the t-shirts. He is a long-time peace activist and opponent of the current war" (p. 33). Thus Judge Wake rejects the suggestion that the online advertising constitutes commercial speech:

> Frazier advertises his t-shirts not only to earn a living through sales, but also to promote the messages that the t-shirts bear. Taken as a whole and in context, the t-shirt advertisements do more than simply "propose a commercial transaction" (p. 34; internal citations omitted).

Judge Wake concluded, "Frazier's product is his medium and his customers.' The political and commercial dimensions of the speech cannot be separated because the mode of expression has a cost" (p. 36). In other words, the mere fact that the t-shirts are sold does not legally constitute a sufficient condition for classifying the products or advertisements as pure commercial speech.

Judge Wake conducts this analysis of the rhetor, his motives, and his message primarily to justify his conclusion that the communications are political rather than commercial in nature. Under the law, political expression receives the highest constitutional protection and can only be regulated via judicial application of a stringent standard—the strict scrutiny test. The test specifies that restrictions on political speech are permissible only when "necessary to serve a compelling state interest" (*Perry Education Association v. Perry Local Educators Association*, 1983, p. 45), must use the "least restrictive means to further the articulated interest" (*Foti v. City of Menlo Park*, 1998, p. 365), and must actually advance that interest (*Arizona Right to Life Political Action Committee v. Bayless*, 2003, 1011-1012). Commercial speech, on the other hand, is subject to regulation under a more relaxed series of requirements (*Central Hudson Gas & Electric v. Public Service Commission*, 1980, pp. 564-566).

Judge Wake's analysis is concise and focused. Nevertheless, his re-presentation of Frazier is ambiguous in a sense similar to that which has been identified in other appellate court decisions on publicity rights as a ground for reversal and rehearing by a trier of fact: to determine the true motives of the communicator in using another's name (see, for example, *Parks v. LaFace Records*, 2003; reversing in part *Parks v. LaFace Records*, 1999).[9] Complicating matters is that the money derived from the sale of products available at his website is Frazier's primary source of income (*Frazier*, 2007, p. 2). On these and additional grounds, an appellate court might well hold that Frazier's communications constitute commercial speech, or (alternatively) that fact-finders should be allowed to determine fault based on the communicator's motives for using the names of dead soldiers. A contextual analysis of Frazier's method and a rhetorical inquiry into his message hold potential for expanding our understanding of arguments for the claim that the t-shirts, and advertising for these artifacts, merit constitutional protection.

Dan Frazier: Rhetor in an Image Event

The apparent simplicity of Frazier's communication belies its underlying complexity. In his opinion granting constitutional immunity to Frazier's expression, Judge Wake attempts to convey some of the message's rich texture in the

straightforward assertion: "Frazier's product is his medium, and his customers'" (*Frazier*, 2007, p. 36). Nevertheless, the expression arguably deserves constitutional immunity because its operations are more interrelated and more sophisticated than this simplistic re-presentation in Judge Wake's opinion. Understanding how Frazier's communication operates rhetorically and symbolically may enrich our construction of his activist role in contemporary society and heighten our awareness of an ongoing r/evolution in political advocacy.

Historically, the activity of joining in deliberation of important sociopolitical issues has been viewed through the lens of the *public sphere*. As Kevin Michael DeLuca and Jennifer Peeples (2002, p. 128) note,

> Ideally the public sphere denotes a social space wherein private citizens gather as a public body with the rights of assembly, association, and expression in order to form public opinion. The public sphere mediates between civil society and the state, with the expression of public opinion working to both legitimate and check the power of the state.

The hallmark of forming public opinion within this sphere is its emphasis upon rational deliberation and uninhibited conversation. The enduring appeal of this view of a marketplace of ideas, DeLuca and Peeples contend, is that "it is endemic to our vision … of democracy, of even communication itself" (p. 129). Yet, today, that vision confronts the reality of an alternative locus of political and cultural evolution: the *public screen*.

The development of television and computer-mediated communication (CMC)—especially the Internet—reconfigure the image as the new format for political influence. Hartley (1992, p. 84) contends that images "are the place where collective social action, individual identity and symbolic imagination meet—the nexus between culture and politics." The images, symbols (including words), and sounds appear as "a constant current" on the public screen, "a ceaseless circulation abetted by the technologies of television, film, photography, and the Internet" with "global reach" (DeLuca and Peeples, 2002, p. 135). These "new technologies introduce new forms of social organization and new modes of perception", (Ibid., p. 131), and invite new forms of communication, such as the *image event*. Image events are "crystallized philosophical fragments, mind bombs that work to expand the universe of thinkable thoughts" (DeLuca, 1999, p. 6).

The image event supplements, and in many cases eclipses, traditional means of messaging that the courts have protected via the First Amendment. Yet the law ought to recognize that image events are essentially communicative, and merit protection on the same grounds as speeches, printed messages, and expressive conduct. As Julie Kalil Schutten (2006, p. 332) notes:

> Today, individuals can participate in movements through a variety of ways other than public gatherings or protests, including . . . purchasing products (e.g., symbolic jewelry and knick-knacks, or organic products), and by publicly displaying symbols (e.g., via bumper stickers and t-shirts).

Thus, in the case at hand both Frazier's t-shirts and the ads that appear on the Internet are vital components of the public screen.

In at least five ways, Dan Frazier is the architect of an image event. First, he is the producer of a t-shirt that constitutes participation in a vibrant antiwar movement and that invites the co-participation of others—those who buy and wear his shirts—in this movement. Second, he is the designer of a website that simultaneously advertises his t-shirts for sale and advances his political message. Third, he places ads on his website that solicit visitors to buy his products, including those which list the names of the war dead; some of these names are themselves visible on the ads at the website. Fourth, his activities galvanize the attention of numerous parties—families and friends of service personnel who died in the Iraq war, politicians with authority to enact legislation designed to criminalize and create financial penalties for sales of these t-shirts, a public outraged by his use of the names, a cadre of sympathetic followers, those with a vested interest in protecting freedom of

expression, etc.—who transform his website and the images found thereon into a site for contention. Fifth, the legislation aimed at interfering with his sale of t-shirts itself generates a legal and social controversy of significant proportions—a communicative event in its own right. Although Frazier might be characterized most accurately as an accidental catalyst of this event, he has not shied away from controversy and, indeed, has contributed to it.

Revisioning Dan Frazier as architect illustrates how new media (the Internet) combine with traditional means of political communication (t-shirts, editorial commentaries) in the development of an image event. Frazier's visible use of the names of Iraq war dead in Internet ads for t-shirts illustrate how the product is the medium. His use of the names on t-shirts that assert "Bush lied; they died" for sale to those who wish to convey this message by wearing them in public illustrate how (in Judge Wake's terms) the product is the customers' medium. In fact, all mass media, including t-shirts, "carry messages that serve the interests of" specific political, social, and/or cultural groups (Lull, 2000, p. 16). This symbiotic relationship between source and audience, product and medium, information about and inducement to join the antiwar movement, at once reveals the complexity of one communicative process. This richly textured cacophony of social interaction arguably merits First Amendment protection.

Judicial embrace of the unprecedented development of the public screen entails implications both evolutionary and revolutionary. At a minimum, Judge Wake's failure to focus upon the complexities of communication in the public screen is evident in his omission of any consideration of the *right to receive* (Bezanson, 2003)—specifically with regard to the rights of receivers to obtain information from sources other than those officially sanctioned by the State. The Arizona law assigns to the families of deceased service personnel the authority to interrupt the communication process by invoking a veto power—a prior restraint, in the legal vernacular—upon those who would use these names for political purposes.[10] Receivers could not view or buy t-shirts that exhibit the names. Yet the right to receive information is firmly established in First Amendment law (*Red Lion Broadcasting Co. v. FCC,* 1969, pp. 389-390). This right should be highlighted, rather than ignored, in Judge Wake's opinion because it restores the vital role of receivers in the communication process.

Moreover, Judge Wake might employ public screen analysis to re-vision the scope of First Amendment protections by transcending the troublesome distinction between political and commercial speech. Since 1980, the courts have labored to maintain artificial distinctions between high-value political expression and low-value commercial speech (see, for example, *Board of Trustees of State University of New York v. Fox*, 1989, p. 477) in the face of a plethora of criticisms (see, for example, Kozinski and Banner, 1990). Nevertheless, once the courts admit that money is speech (*Buckley v. Valeo*, 1976), these distinctions are unmasked as little more than an expedient façade to protect the rich and powerful at the expense of commoners. Prosperous publishers buy media outlets, charge subscription fees for access, and operate under the sanction of courts who assign their communications the highest level of First Amendment protection. Meanwhile, the Dan Fraziers of America set up a website, charge $20 for a t-shirt to earn $1 profit, and struggle to defend their First Amendment rights to advertise and sell their messages on the Internet. The public screen provides a potent juridical metaphor for erasing arbitrary distinctions between rich and poor, powerful and powerless in 21st century communications.

Message Effects

The effects of Frazier's message upon various audiences are immediate, dramatic and enduring. For example, the list of names of the Iraq war dead combined with the message, "Bush lied; they died," produced a response of shock, offensiveness and outrage from the surviving family members. These negative responses motivated the family members to petition the Arizona legislature to adopt legislation outlawing Frazier's use of the names of deceased service personnel. In

turn, the predominantly-Republican Arizona Congress unanimously supported the legislation, and the Democratic Governor signed it into law—clear evidence that the negative reaction to the message was bipartisan.

Meanwhile, states' and the U.S. House of Representatives' adoption of legislation outlawing the sale and/or advertising of the t-shirts produced unintended effects: Commentators in the media and on the Internet offered competing views on the legality and appropriateness of Frazier's method of expressing his antiwar views, which sparked further interest in the controversy of U.S. involvement in Iraq. The number of shirts sold increased dramatically.

Surely these facts speak to the impact of Frazier's message upon his audience. Understanding how the message operates rhetorically to produce such strong reactions in receivers is instrumental in appreciating speech efficacy.

The State of Arizona actually argued in *Frazier* that the effects of the message upon family members of deceased service personnel constituted a ground for its regulation. Specifically, Judge Wake noted that, among the three justifications for adopting and enforcing the new law against Frazier, the State argued that it "is necessary 'to protect military families in mourning for their sons and daughters killed in the war.'" However, Judge Wake quickly dispensed with this justification on the ground that "it is 'firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'" (pp. 49-50, citing *Street v. New York*, 1969, p. 592). Subsequently in his opinion, Judge Wake recognized that the juxtaposition of the names of the war dead with Frazier's antiwar dead pains some families, and that "such pain is real." However, he rejected the notion that these emotional effects of the message sufficed to justify its regulation, asserting that one's convictions regarding "the worth of our values" and of "the service we choose to give" are "not diminished by the disagreement of others" (p. 51).

Judge Wake did not attempt to re-present this image event by explaining how it might function to influence others, choosing instead to ground the communication in a framework of tolerance for offensiveness. Nevertheless, to see Frazier's message from an alternative perspective, instead of viewing his artifact as *a t-shirt that offends*, is vital to appreciating its communicative role in a national debate about the wisdom of American involvement in Iraq.

Rhetorical theory offers an alternative explanation for the impact of juxtaposing the names of the deceased soldiers in the Iraq war with the message, "Bush lied; they died."[11] Rhetors employ *perspective by incongruity* when they pair two items in a way unanticipated by receivers (Burke, 1964, pp. 94-99). The pairing redirects receivers toward unconventional thinking in order to gain a new perspective on a topic.

Frazier's t-shirt initially strikes the eye as incongruous because of the sheer volume of information. The number of names far exceeds many receivers' expectations. The realization that the names confirm Frazier's assertion, "They died," produces an "Oh, no!" response similar to the "aha!" effect identified in the literature of interpersonal communication (Tannen, 1984, p. 38). This unique response to self-discovery of the insight that "each one of its inscriptions is one too many" (Harrison, 1997, p. 188) is producible only via the rhetorical strategy of naming or depicting the war dead.

Perspective by incongruity may also operate in Frazier's rhetoric in a second way: One would anticipate seeing the names of the war dead associated with a message about honoring our fallen comrades or remembering the sacrifice they made. Frazier pairs these names with an indictment of the Commander-in-Chief for misrepresenting the reasons for America to send U.S. troops into Iraq. This rhetorical ploy invites those who assume that the sacrifice of soldiers is necessary to preserve American values to question the motives of those who made the decision to invade Iraq. If, indeed, those committed to the propriety of sacrifice withdrew their support, the result would be a sea change in American attitudes toward military solutions to international problems.

So what? The District Court's perspective on the question of constitutional protection for Frazier's rhetoric is to rule that, even though it offends, offensiveness is not a criterion for regulating political speech under the aegis of the First Amendment. A strength of this approach is to say that Frazier's speech is protected, even if it offers no constructive contribution to a discussion of political and social matters. Nevertheless, an alternative vision of the reasons for protecting Frazier's communication is to say that, even when we grant to detractors their claims of offensiveness, Frazier's rhetoric possesses redemptive qualities that elevate its candidacy for legal protection. Here the approach is less to disqualify the feelings of the offended as unimportant to the law, and more to recognize those feelings but to weigh them against the constructive values of the offending message in contributing to a vital debate about a national issue. Enumerating and exploring these values can tell us much about the power and purpose of speech in a democratic society—the reasons why anyone might want to protect communications when drafting and implementing a constitution.

The Symbolic Power of Personal Names

Dan Frazier intentionally uses the names of the war dead to invoke a particular, desired response. "Language as a system encourages certain responses and understandings, and not others" (Lull, 2000, p. 18). Though Frazier insists that he never anticipated the reaction of offense reported by surviving family members (www.carryabigsticker.com), he continues to market the t-shirts despite evidence of their extreme emotional distress, in the face of threats of litigation and even physical harm (Affidavit of plaintiff Dan Frazier, July 2007, pp. 3-4).

The authority to use—or to regulate the use of—the names of the war dead is a clear illustration of what Thompson (1995, p. 17) calls *symbolic power*: The "capacity to use symbolic forms to intervene in the course of events, to influence the actions of others and indeed to create events, by means of the production and transmission of symbolic forms." Frazier's use of the names of the war dead is both polysemic—because, to different people, the names signify differing meanings—and multisemic—because the names "can mean different things to the same person at different times, places, and situations, and in different moods" (Lull, 2000, p. 162). Frazier is interested in raising the consciousness of those who conceptualize the war in Iraq—from re-presentation in abstract (statistical) form, to reconceptualizing that war more concretely in terms of the human cost of American involvement. Thus Frazier is an architect of contemporary popular culture; he empowers those who challenge the Iraq war with a means of expressing their opposition (Fiske, 1989), and re-focuses discourse about the war upon the loss of life it generates.

The families of the war dead object to Frazier's construction because it challenges the "collective identities" (Lull, 2000, p. 173) of those who sacrificed their lives in the Iraq war. These families oppose the association of their loved ones' names with the assertion that their Commander-in-Chief misled the public regarding the reasons for sending their sons and daughters to fight in Iraq. Judge Wake rejected the inference that this pairing justifies regulation of the speech: "Messages such as 'Bush Lied—They Died" cannot reasonably be read to suggest any criticism of the soldiers themselves" (*Frazier*, 2007, p. 25). An alternative reading suggests that the pairing of these identities with the claim, "They died," provides evidence for a factual assertion that Judge Wake endorses: The ads "inform consumers about the identity and number of soldiers who have died in Iraq…. (*Frazier*, 2007, p. 34). Moreover, Judge Wake asserts (p. 43)

> 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.

This analysis provides the framework for Judge Wake's conclusion (p. 48):

> The State cannot give anyone a right of commercial exaction for the exercise of someone else's First Amendment rights. The Nation's debt to its fallen soldiers may not be paid by giving their families a toll on free speech. The debt must be paid, but in other ways.

Judge Wake's unsupported assertion that restrictions upon the use of the names would dilute Frazier's message would benefit from reference to the literature in communication studies. For example, interpreting the names of fallen soldiers as "Information used as proof by a source" (Reinard, 1988, p. 5) or as "factual statements originating from a source other than the speaker" (McCroskey, 1969, p. 170)—that is, as authoritative, nominal, non-statistical evidence—provides windows to understanding its persuasive appeal.

One perspective examines the message as designed to appeal to a variety of receivers. First, the names constitute "strong, specific, and … high-quality" evidence aimed at highly-involved receivers, or designed to produce high involvement in low- or moderately-involved receivers (Perloff, 1993, p. 158). Second, differing presentations employ either one-sided ("Bush lied; they died") or two sided ("Support our remaining troops—bring the rest home alive") appeals. While one-sided messages are more likely to persuade those who initially agree with the position advocated in the message (Hovland, Lumsdaine, & Sheffield, 1949), two-sided messages are more effective with receivers who initially disagree with the message or with those who are aware of opposing arguments (Burgoon, 1989).

Another perspective identifies the characteristics that render a message persuasive to audiences. First, many of those who view the t-shirt impulsively desire to read at least some of the names, or to look for familiar names, on the t-shirt. Persuasion theory explains why *vivid* information is persuasive: It is "likely to attract and hold our attention and to excite the imagination" (Nisbett & Ross, 1980, p. 45) according to those who view the t-shirt.[12] Vividity produces strong affective response because the names are "emotionally interesting, concrete, and proximate in a … temporal … way" (Nisbett & Ross, 1980, p. 45). Second, Frazier's t-shirt is noteworthy because it offers case-history (nominal) rather than statistically-based information. In contrast to governmental and media releases of statistical summaries, case-history (including nominal) information is more concrete. The *reality* and *immediacy* of information renders a message more believable (Perloff, 1993, p. 159). because it captures receivers' attention more readily (Bell & Loftus, 1985). Additionally, subjective message construct theory identifies three "underlying constructs"—importance, plausibility, and novelty—"that receivers apply to persuasive messages before belief change occurs" (Morley, 1987, 200). Moreover, all three are "necessary conditions for belief change" (Morley & Walker, 1987, 439).[13] Most receivers would find statistical and nominal reports of the war dead to be equally important[14] and plausible[15]. However, receivers are likely to find Frazier's list of names *novel* when contrasted with standard statistical representations of the war dead: the substitution of statistical for nominal information in most media reports means that these receivers have not encountered—and therefore not "previously integrated" (Morley, 1987, p. 186)—the names of all of the war dead in a single exposure, as Frazier's t-shirt provides. Testimony from those who are exposed to the t-shirt for the first time confirms the novelty of Frazier's means of conveying the datum.[16] Thus Frazier's t-shirt merits protection as a rhetorical artifact because of its *vividity*, *reality*, *immediacy*, and *novelty*.

Additionally, Frazier confronts a challenge: "Contemporary anti-war rhetoric must generate and utilize new images" that compete with extant forms of contemporary political messaging. Specifically, Foss (1986, p. 338) notes,

> What are needed … are unconventional, unusual images or symbols that attract attention because of their freshness and unpredictability. These images thus will stand out from those to which we are exposed daily and cause us to stop, inquire into, and examine the issue of war.

The previously-documented realization that the list of names of the war dead far exceeds expectations frames receivers' visual encounters with the t-shirt. Textual-analysis research on the appearance of proper names in artifacts

demonstrates that observers both focus their attention upon appearances of names and assign greater importance to named than to unnamed persons (Sanford, 1988). Several rhetorical critics have addressed the persuasive significance of names of deceased soldiers engraved on the Vietnam Veterans Memorial in Washington, D.C. Harrison (1997, p. 188) commented that to "allow their names to occupy space," as Frazier's t-shirt does, provides "a measure for their immoderate excess:" We see the war's cost in human terms. Moreover, the list galvanizes us. We inspect the list for names familiar to us, and each name—recognized or not—contributes to the "sheer profusion" that triggers moral doubt regarding the decision to invade Iraq (p. 188). Thus it is "the lyric singularity of each and every name" (p. 189) that haunts us. Like a monument yet to be built, the t-shirt provides "a location of memorializing by offering the names of the dead to our reading" (Feldman, 2003, p. 304).[17] In our co-participation performed in the act of reading, we consecrate those who sacrificed their lives, even as we entertain Frazier's shockingly-documented assertion that Executive deceit is the proximate cause of the body count.

Frazier's t-shirt performs a unique and vital rhetorical function: It exposes the commonplace strategy of substituting a statistic for the names of real people who have lost their lives in the war. While the names are a matter of public record, media coverage traditionally identifies by name only those who have died very recently, and substitutes a statistic for a listing of the cumulative war dead. To see the statistical representation of war dead—4,266 as of April 9, 2009 ("U.S. military deaths," 4/10/09, p. A10)—is one thing; to see each individual name is another. Students who inspect the shirt in a class often comment on the emotional impact and personal effect of seeing all the names individually, as opposed to viewing the statistic that represents the undeniable human cost of war. What they are saying is that the names are not redundant, but new information, in a media environment that consistently re-presents the war dead as a statistic rather than as individual human beings—an information-processing perspective on how the media report war news. In a very real sense, Frazier's shirt supplants a summary number with individual names, implicitly unmasks media complicity in the Bush administration's strategy of depersonalizing the war, shocks the minds of receivers numbed by media convention, and thereby deconstructs the Bush administration's de-personalization of the Iraq war generally and its statistical re-presentation of the war to the nation specifically.[18]

Re-visioning Freedom of Expression

Neither Arizona Senate Bill S.B. 1014 nor Judge Wake's opinion in *Frazier* enshrines a constructive capacity for the families of deceased service personnel in a national debate on the Iraq war. Encouraging participation in public discussion should be an integral component rather than a default consequence of the Court's decision. Judge Wake should have articulated an affirmative commitment to "a cornerstone of First Amendment doctrine" (Dee, 2003, p. 36): That "more speech, not imposed silence" is the preferred alternative in a democracy (*Whitney v. California*, 1927, p. 377; Brandeis, J., conc. op.). This preference for *more speech* is firmly fixed in the constellation of values that support a system of freedom of expression (Emerson, 1970). It holds presumptive status in the arena of political expression, and it has been invoked in both criminal (*Texas v. Johnson*, 1989, pp. 419-420) and civil (*Fortune v. Molpus*, 1970, p. 805) cases.

Note that the Arizona law at issue on this case prohibits *anyone* from using the names or likenesses of deceased soldiers without permission: Those who endorse as well as those who oppose the Iraq war are legally prevented from invoking the names of deceased soldiers in support of their respective positions. This statutory neutrality is required to avoid viewpoint discrimination—governmental activity that identifies "a particular opinion or perspective" on a topic "for treatment unlike that given to other viewpoints" (O'Neill, 2009, p. 1130). Nevertheless, by requiring permission to use the identities of deceased soldiers, provisions of the Arizona law assign to family members the role of censors and throw a blanket of imposed

silence over the rhetorical strategy of identifying American service personnel who have given their lives in the line of duty. Moreover, these provisions grant to the families of deceased service personnel the license to control "a decision about which language will be used in a particular context" (Lull, 2000, p. 175)—literally, the power to define how the consequences of the Iraq war legally can be re-presented to audiences in political messaging.

Explicit judicial repudiation of prior restraints upon the use of identities of deceased military personnel, combined with subscription to the commitment to more speech as an alternative to regulation—"one of the most elegant of all First Amendment doctrines" (Dee, 2003, p. 48)—finesses these problematic consequences. The Court missed an invaluable opportunity to recast the role of family members by highlighting the importance of their participation in public debates regarding the Iraq war.

Objections

This paper illustrates how employing RCT may provide new insights into First Amendment controversies. Nevertheless, critics might offer at least two interrelated objections to this approach. Both of these objections are premised upon the assumption that classifying speech as political communication constitutes a necessary and sufficient condition for according First Amendment protection to that speech.

First, critics may object that the inclusion of rhetorical analysis extends the process of judicial decision-making to include irrelevant information. When Judge Wake justifies the categorization of Dan Frazier's t-shirt as political expression in *Frazier*, he satisfies the jurist's legal obligation. Therefore, including additional insights from RCT would be superfluous and alien to juridical decision-rendering.

Second, critics may assert that inclusion of rhetorical analysis contaminates the judicial decision-making process. To include insights from RCT entails that jurists make decisions regarding the political value of the speech. However, even worthless, false, and/or inflammatory political expression should be protected (*New York Times v. Sullivan*, 1964, pp. 271-283). Therefore, critics would argue that political expression should be protected regardless of intersubjective estimates of its worth. Jurists should never consider the value of the expression because to do so sets a dangerous precedent. By potentially exposing arguably-valueless expression to consideration on its merits, critics might claim that including insights from RCT potentially compromises the constitutional guarantee of free political expression.

Whatever the merits of these objections generally, they fail to account for the specific requirements of Judge Wake's test in *Frazier* (2007). That test specifically grounds constitutional protection in the character of the speech: 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" (p. 42). In order to establish if and when the identity of the person in whose name the right is asserted is reasonably related to the message, jurists cannot analyze that communication in vacuo; rather, they are required to examine it in the larger context of the political discussion of the role of the U.S. in the war in Iraq. This is why Judge Wake addresses that role elsewhere in his opinion (see, for example, p. 43), and why an expansive view of the functions of expression is instrumental to ensuring constitutional protection for political speech generally.

Moreover, the judicial act of categorizing speech as political rather than commercial does not ensure blanket immunity for that speech. By enacting Senate Bill 1014, the Arizona legislature created a new *categorical exception* to the First Amendment for speech, including but not limited to political speech, that contains the identities of soldiers killed in Iraq (with specific exceptions). The question presented to the courts, therefore, is "Should the judiciary uphold State creation of this new categorical exception, despite its intrusion upon the right of political expression?" In *New York Times v. Sullivan* (1964, pp. 279-

283), for example, the U.S. Supreme Court created a similar exception for *seditious libels published with actual malice*; the majority expressly repudiated the notion of blanket immunity for all political expression critical of government officials. The U.S. Supreme Court likewise has upheld exceptions to the First Amendment's guarantee of free political expression for *fighting words* (*Chaplinsky v. New Hampshire*, 1942), *incitement to imminent lawless action* (*Brandenburg v. Ohio*, 1969), and *true threats* (*Watts v. United States*, 1969; *Virginia v. Black*, 2003). In *Frazier*, Judge Wake was compelled to decide whether the interest in protecting families of deceased soldiers outweighed the interest in immunizing political expression containing the identities of the deceased. Therefore, explaining the functions that invocation of these names performs in the panorama of contemporary political communication is essential to answering the question before the U.S. District Court.

Finally, even in cases (such as *Frazier* 2007, 2008) where strict scrutiny is required, laws that restrict political speech based on content are nevertheless permissible when they are "necessary to serve a compelling state interest and . . . [are] narrowly drawn to achieve that end" (2007, p. 30). One can establish a compelling state interest fairly only by weighing the interests of the state in regulating expression against the free-speech right of the individual. Providing the rich background of the rhetorical process is essential to the jurist who seeks to weigh appropriately the rights of the individual against the interests of the state.

Conclusions and Supplementary Observations

In his second opinion in *Frazier v. Boomsma* (2008), Judge Neil Wake was careful to distinguish his conclusion that A.R.S. 13-3726 is unconstitutional as applied to Dan Frazier's communications from a ruling that the law is unconstitutional on its face. This distinction is important because it suggests that the protections the court provides for political messages invoking the names of deceased service personnel is not intended to apply when the message employs purely commercial uses of those names.

If Judge Wake's ruling is sustained, it provides protections for controversial political expression in yet another arena: the law of publicity. The law has long reserved its most stringent protections for free speech relevant to political, social, and cultural issues. These are domains rich with insights from critics and theorists in communication and allied disciplines. Explorations of the contributions that R&CT scholars may make to the development of the law possess limitless potential. If these scholars illustrate the utility of their analyses and critiques, free-speech jurisprudence will gain in sophistication and relevance.

Looking at *Frazier v. Boomsma* through the lenses of rhetorical theory and criticism reveals much about the promise of communication studies for decision-makers and theorists in jurisprudence. It also reveals when rhetorical analysis is useful in situations where classification of conduct (for example, as political or artistic or commercial) is per se inadequate to provide the necessary and sufficient conditions for judicial determinations—say, of constitutional protection for speech. It also explores some assumptions and values common to both rhetorical and jurisprudential analysis, such as the proposition that more speech is presumptively preferable to legally-imposed silence. This proposition appears intimately tied to John Fiske's (1987, pp. 236 & 239) conception of a "semiotic democracy" where access to the sociocultural interplay of values and ideas is guaranteed to all those who desire to participate. Inquiry into the motives of rhetors offers potential for illumination of legal doctrine in evolving areas of the law, such as the right of publicity.

In all of these arenas of inquiry we are wise to remember that the power to regulate or prohibit speech constitutes the power to suppress ideas, creativity, and self-fulfillment (Madow, 1993, pp. 145-146). This is not to say that regulation of political communication can never be justified. Rather, limits on free expression should only be authorized subsequent to a

thorough analysis of both legal and communicative components of the regulation, and communicative inquiry should represent and account for insights from RCT. For example, we should not decide whether Dan Frazier should be allow to sell his t-shirts without recognizing that Arizona's law constitutes a prior restraint upon the right to circulate specific meanings of the identities of the war dead. We cannot make effective decisions regarding the constitutionality of A.R.S. 13-3726 until we study how and why these meanings are presented to audiences, their symbolic power, and the controversies that these meanings inform.

Frazier v. Boomsma (2008, 2007) provides a paradigm exemplar for inquiry into the role of RCT in judicial decision-making. Nevertheless, exploring the insights into First Amendment law that a single case provides is only a tentative first step for communication scholars. In a 2007 essay in *Albany Law Review*, law professor Howard J. Vogel of Hamline University School of Law explored the ongoing dialogue among legal and literary scholars regarding the role of rhetoric in law. He concluded, "The time is long overdue for us to invite the academic rhetoricians who inhabit the speech departments of many colleges and universities, but whose work is rarely cited in the academic legal literature, to join us in this conversation" (p. 1561). Scholars in RCT should accept this invitation and embrace the challenge to contribute to legal interpretation, because our contributions possess limitless potential to enrich this interdisciplinary interchange.

Endnotes

[1] *Dr. Parker* (richard.parker@nau.edu) *is a* Professor of Speech Communication in the School of Communication at Northern Arizona University. Earlier versions of this essay were presented at the Western Social Science Association convention in Denver, CO, in April 2008 and the Western States Communication Association convention in Mesa, AZ, in February 2009. The author thanks Sammy Basu of Willamette University and Paul Siegel of the University of Hartford for their contributions to this essay.

[2] No federal right of publicity statute exists, and the sole U.S. Supreme Court decision regarding the right of publicity, *Zacchini v. Scripps-Howard Broadcasting Co.* (1977), is narrowly focused (Lapter, 2007, pp. 243, 251-252). Nevertheless, at least one critic (Samuelson, 1983) has proposed an expansion of First Amendment defenses in publicity actions grounded upon the Supreme Court's decision in that case.

[3] Charles Berger observed in 1991 that "the field of communication has been suffering and continues to suffer from an intellectual trade deficit with respect to related disciplines; the field imports much more than it exports" (p. 102). This essay is designed to illustrate how this deficit creates problems in jurisprudential scholarship.

[4] Judge Wake notified Frazier that he must identify "at least one individual who might file a civil action against him by October 26, 2007," or "his action will be dismissed with respect to all unserved Defendants after that date." (*Frazier v. Boomsma,* 2007, p. 9). Frazier declined to meet this legal requirement.

[5] The judge reasoned that, even though the state failed to argue that the statute meets the strict scrutiny standard, the court would determine independently whether any of the "purposes" of the statute identified by the state "would survive strict scrutiny" nonetheless (*Frazier v. Boomsma,* 2007, pp. 21-22).

[6] Nevertheless, this essay raises legal issues not discussed in Calvert's three (2008) essays on the *Frazier* decisions. Additional issues include critiques of the Arizona legislature's unwarranted extensions of the right of publicity, recognition that the civil and criminal statutes impose prior restraints upon communicators, and analysis of the relevance of the right to receive as a component of a First Amendment defense for Frazier.

[7] New York Civil Rights Law 50, 51 (1903), following *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

[8] This argument might seem particularly harsh in its extension of property rights to families of celebrities while denying them to the families of slain soldiers. In fact, some (for example, Madow, 1993) have argued that celebrities neither need nor deserve property rights to the use of their identities, while others (Kwall, 1994; Lapter, 2007, pp. 256-258) have defended the alliance of celebrity status with property rights. Examination of the contours of this debate exceeds the scope of this paper.

[9] The District Court ruled that the First Amendment, as a matter of law, was a defense against plaintiff's publicity claims (*Parks v. LaFace Records*, 1999, pp. 780-784). The Sixth Circuit Court of Appeals overturned this ruling on the ground that "a reasonable finder of fact" might disagree with the District Court's decision that the use of a person's name by a musical group constituted protected artistic expression. *Parks v. LaFace Records*, 2003, p.453). It is not unreasonable to argue that, in the circumstances of the *Frazier* case, an appellate court might decide analogously that Frazier's use of the names of the war dead on products for sale and advertising for these products could be construed by a finder of fact as commercially motivated. Therefore, the fact-finder/s at the trial court level should be allowed to determine whether Frazier's communications fall outside the scope of protections generally afforded political speech.

[10] The law allows communicators to use the names of deceased soldiers only with the consent of the families. Hence, refusal to grant consent to use operates as a de facto prior restraint upon the use of all of the names, because unanimous consent is practically impossible to obtain.

[11] Receivers will process the components of the message together: that is, they will perceive the names of the dead soldiers as linked to the entirely of the message, "Bush lied; they died." "Perception is never of an individual entity, but always of entities in relation to other entities so that it is the structure of the relationship that is abstracted for perception" (Gregg, 1984, p. 46).

[12] Students in the author's classes on mass communication law report that a close inspection of the t-shirt invokes central-route responses, such as thinking more deeply about the cost of the Iraq war in terms of human lives.

[13] Booth-Butterfield & Welbourne (2002, p. 168) claim that "argument strength is composed of Morley's three dimensions."

[14] "The first, construct, importance, refers to the perceived significance of a datum to a claim's probability relative to the claim and other beliefs about the claim." (Morley, 1987, p. 186). With regard to Frazier's claim, "They Died," both the number and personal names of war dead are likely to be perceived as significant means of establishing the claim's probability in the minds of receivers, because both means illustrate that thousands have died in the Iraq war, and almost anyone would believe that the loss of thousands of lives is significant.

[15] Plausibility refers to the receiver's "direct subjective estimate of the probability" that the datum is accurate (Morley, 1987, p. 187). Because the personal names of deceased soldiers are taken from public records accessible to anyone, receivers would find no ground for denying plausibility to Frazier's list of war dead while granting plausibility to a statistical representation of the war dead.

[16] Students in the author's classes on mass communication law report that the sheer number of names on the t-shirt strikes the eye as more formidable than a statistical representation of war dead.

[17] Foss (1986), Harrison (1997) and Feldman (2003) are rhetorical critics addressing the persuasive potency of individual names of deceased service personnel on the Vietnam Veterans Memorial in Washington, D.C. The claim here is that their use is analogous to Frazier's use of names of soldiers who have died in Iraq on his t-shirts. Only relevant aspects of the influence of the names themselves, in contrast to the appearance of these names as an integral component of the Memorial's structure, are employed in this analysis.

[18] Statistical manipulation is not the only means used by government to control information about the Iraq war. Another oft-criticized strategy was the American military's efforts to deny to reporters the right to record, and media outlets to publish, visual images of coffins of those who died in the war. In February 2009 the Obama administration reversed this policy (Barnes, 2009).

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