

# University of Missouri School of Law Scholarship Repository

---

Faculty Publications

Faculty Scholarship

---

2016

## You as a Brand: A Legal History

Lyrissa Lidsky

*University of Missouri School of Law*, lidskyl@missouri.edu

Follow this and additional works at: <https://scholarship.law.missouri.edu/facpubs>



Part of the [Consumer Protection Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Lyrissa B. Lidsky, *You as a Brand: A Legal History*, JOTWELL (July 20, 2016) (reviewing Samantha Barbas, *Laws of Image: Privacy and Publicity in America* (2015)), <https://torts.jotwell.com/you-as-a-brand-a-legal-history/>.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## You as a Brand: A Legal History

**Author** : Lyrissa B. Lidsky

**Date** : July 20, 2016

Samantha Barbas, [Laws of Image: Privacy and Publicity in America](#) (2015).

Dr. Samantha Barbas' book, [Laws of Image: Privacy and Publicity in America](#), makes an original, important, and engaging contribution to the history of the privacy law in the United States. In the process, the book illuminates how we became a culture obsessed with image management and how the law developed and continues to evolve to protect our rights to become our own personal brands.

In **Laws of Image**, Barbas analyzes a disparate body of law—mostly tort law—that protects individuals' rights to control how they are portrayed by others. Barbas dubs this body of law the “laws of public image.” Through careful historical analyses of social, cultural and legal developments, she explains the origins of our culture of personal branding and gracefully charts the transition from Victorian-era sensibilities that condemned those who made spectacles of themselves to modern sensibilities that reward such behavior.

Barbas' account of the development of the laws of image starts in the late nineteenth century. The book documents the growth of image-consciousness in the US and demonstrates that image-consciousness expands contemporaneously with industrialization, immigration, and urbanization. This occurs presumably because the more one interacts with strangers, the more one needs to manage first impressions to succeed. (P. 29.) The growth of mass media and photojournalism in the nineteenth century also contributed to a desire to control negative “presentations of self.” Meanwhile, the contemporaneous development of the contingency fee gave more people access to the means to repair damaged images through litigation, a factor that perhaps deserves even more prominence than Barbas gives it. (Pp. 18-19; 106.)

Overall, Barbas' account of the growth of image-consciousness in the nineteenth century is fascinating and highly persuasive. She deserves especially high praise for her treatment of the origins of the privacy torts. Frankly, it is so common for privacy scholars to begin with nods to Samuel Warren and Louis Brandeis' famous 1890 article, [The Right to Privacy](#), that I always dread reading yet another analysis. But Barbas brings something new to the table. Although Warren and Brandeis are commonly portrayed as creating a right to be let alone, Barbas describes them as creating a “legal right to control one's public image” (P. 26). This broader framing encompasses a right “to keep one's personal affairs out of the public eye, and more broadly, to determine one's own public image without undue interference from the media of mass communication.” (P. 38.) More succinctly, it is a “right to *selective* publicity” (P. 44) (emphasis added). I have always found *The Right to Privacy* to be elitist and self-serving, but Barbas convincingly argues that the article's sentiments would have been common across the social spectrum. Warren and Brandeis were reacting “to a new sensitivity to personal image” that afflicted both the prominent *and* the obscure. (P. 27.) This sensitivity, as Barbas recounts, “grew from the demands of social life in an increasingly urban, commercial, mass-mediated society, where appearances, first impressions, and superficial images were becoming important foundations of social evaluation and judgement.” (P. 27.) Her use of historical evidence to support this thesis is masterful, and I must admit that I had to reevaluate my reading of *The Right to Privacy* after almost a quarter of a century in the field.

Venturing into the early twentieth century, Barbas illustrates how image-consciousness intensified in response to the increased “urbanization, innovations in communication and transport, [and] social and geographic mobility.” (P. 81.) She identifies a number of threads in this complex story. She associates growing image-consciousness with a changed perception of identity as fluid and malleable rather than fixed, demonstrating the connection between the psychological conception of the self and the commodification of the self. She also shows how the advertising and film industries fuel

individuals' desires to sell their "selves" to others. In the early twentieth century, the growing advertising industry touted "personal fulfillment through the purchase and use of the right products." (P. 91.) Consumer choices at the time were not just about image management; rather, they created the potential for "inner transformation" based on then-current understandings of the self as capable of being "continuously rehabilitated, perfected, and worked pure over time." (P. 94.) Meanwhile, the growing film industry and the celebrities it spawned were, for audiences, paragons of image creation and management to emulate.

Many states responded to these changes by adopting tort causes of action designed to protect citizens from "unwarranted publicity." (P. 102.) In the 1930s and 1940s, more citizens pursued libel actions, and courts extended the parameters of libel to cover the emotional harms associated with interference with image. In addition, courts began to recognize claims such as intentional infliction of emotional distress, which further expanded legal protections for an individual's personal brand. (*Id.*)

Contemporaneously, however, courts began to expand the rights of the media to report on matters of public interest. Barbas documents this countertrend in a chapter about the famous case involving a former child prodigy profiled in the *New Yorker*. This chapter adds nuance to a well-known case, [Sidis v. F-R Publishing Corp.](#) (1940), and shows how it portended a legal shift away from privacy protection. Other competing trend lines were evident after World War II: As the culture became preoccupied with self-expression, attacks on one's "public image were being cast as serious assaults not only to dignity, but to the psyche itself." (P. 160.) In other words, an attack on one's public image by the media threatened the very foundation of one's self. Meanwhile, a more aggressive press, preoccupied with understanding the hidden sides of public personalities, increased these very attacks. By the 1970s, with the continued growth of libel and privacy litigation, "image law" had matured. Then, as now, it protects not only the individual's "ability to control his image" but also "his feelings about his image." (P. 199.)

Given that **Laws of Image** spans more than 100 years of legal and cultural developments, it is remarkable how readable this book is: It is well-written, and the flow and pacing are excellent. At its core the book is about the fact that "people want to expose themselves to the public—to create a public image, a visible public persona and presence—yet at the same time to manage and control those images." (P. 210.) As Barbas notes, we often call the desire to manage our image a desire for privacy, but it is not synonymous with the right to be let alone. What the two rights share, however, is a desire for control over what aspects of the self the individual reveals to the public or doesn't. **Laws of Image** sheds necessary light for anyone hoping to understand the law's conflicted embrace of these complex rights.

Cite as: Lyrissa B. Lidsky, *You as a Brand: A Legal History*, JOTWELL (July 20, 2016) (reviewing Samantha Barbas, **Laws of Image: Privacy and Publicity in America** (2015)), <http://torts.jotwell.com/you-as-a-brand-a-legal-history/>.