THE APPROPRIATION OF BLACK POSTMORTEM RIGHTS OF PUBLICITY IN THE AGE OF POLICE BRUTALITY

Dane D. Norvell II[*]

[*] Recipient of the 2023-2024 Outstanding Comment Award. Staff Editor (Vol. 93) *Mississippi Law Journal*; J.D. Candidate, 2025, University of Mississippi School of Law; M.B.A., 2022, University of Memphis; B.A. in Political Science, 2020, University of Memphis. A special thank you to my family for encouraging me to latch on to my love for writing. Thank you to the *Mississippi Law Journal* for your work in preparing this publication and for taking on the mission of advancing legal scholarship. Finally, thank you to those whose voices can no longer be heard but whose impact will forever remain. Your sacrifice is the reason for this work, and it is my hope that it serves as a piece to move the puzzle of equality one step further to being complete.

INTRODUCTION

It was after 8:00 p.m. when he gasped for air under the knee of a Minneapolis police officer. Nine and a half minutes later, George Floyd died.[1] Seven hundred miles away on a Louisville night, she was at home when the battering ram shattered her apartment door and the suspected intruders open-fired, lynching Breonna Taylor.[2] Public disdain for these murders took the form of protests that spread across the country—unrest the country hadn't been seen since the 1992 riots in Los Angeles, California.[3] In a show of support for the victims, celebrities and common folk alike purchased everything from apparel to household accessories sporting the image of the victims whose lives that were cut short. What many purchasers didn't know was that they were engaging in the "e-commerce ecosystem" monetizing the deaths of Black Americans effectively made famous because of their death.[4] Though some vendors appear to use profits earned from the merchandise to aid social justice groups, the widespread commodification of the victims' image, or items directly connected to their deaths, is a real issue.[5]

A remedy to discourage this appropriation exists in the right of publicity. However, the right of publicity is solely a "creature of

---

[1] *See generally How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), https://www.nytimes.com/article/george-floyd.html [https://perma.cc/68M9-EK9Y] [hereinafter *How George Floyd Died*].

[2] Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Dec. 13, 2023), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/F7VL-99N7].

[3] *How George Floyd Died, supra* note 1.

[4] Justin Ray, *Commentary: We Need to Talk About Those Breonna Taylor T-shirts*, L.A. TIMES (Sept. 28, 2020, 11:51 AM), https://www.latimes.com/entertainment-arts/story/2020-09-28/black-lives-matter-problem-with-breonna-taylor-t-shirts [https://perma.cc/E829-3267].

[5] *Id.* ("Recently, a Charleston, S.C.-area couple came under fire for a jewelry line that featured shards of glass from store windows broken during May 30 riots in the city. The line, called 'Wear Their Names,' included pieces such as the Trayvon (Martin), $45, the Breonna (Taylor), $240, and the Elijah (McClain), $480. Last month, 'BreonnaCon' was held in Louisville to commemorate the death of the 26-year-old emergency room technician. The event, which included a 'Bre-B-Q,' also drew criticism, with the Louisville chapter of Black Lives Matter tweeting at the time that 'commodifying her entire being as a 'con' is completely disrespectful.'"). *See also* Michael Pina, *Is It OK to Sell Breonna Taylor T-Shirts?*, GQ SPORTS (Aug. 28, 2020), https://www.gq.com/story/breonna-taylor-tshirt-ethics [https://perma.cc/U38M-L3TK].

state law."[6] In general, the right of publicity grants "exclusive dominion and control over a person's name, likeness, image, or any attribute indicative of that person's identity."[7] With each jurisdiction defining the right's scope differently, coupled with the lack of a federal statute on the matter, the protection of this right seems illusive and the extent of its shield unclear.[8] Arguments for uniformity have latched themselves to a need for federal guidance in the form of potential statutes, but have neglected to offer solutions that would institute actual change for the everyday individual.

Instead, these arguments focus on remedies for individuals fighting the commercial exploitation of their likeness during their lifetime, thereby limiting protection to those who have accrued fame and earned the title "celebrity."[9] But what about the unfortunate soul murdered by law enforcement whose name is used commercially because of their death? The extension of this right postmortem is even more rife with differences in state legislation and judicial opinions.[10] The unfortunate consequence of this is that the name, image, and likeness of the common person (i.e., the non-

---

[6] Kristin Bria Hopkins, *When I Die Put My Money in the Grave: Creating a Federally Protected Post-Mortem Right of Publicity*, AM. BAR ASS'N (Apr. 28, 2023), https://www.americanbar.org/groups/entertainment_sports/publications/entertainment-sports-lawyer/esl-39-01-spring-23/when-i-die-put-my-money-the-grave-creating-federally-protected-postmortem-right-publicity/ [https://perma.cc/4Q2A-GUMN].

[7] David C. Bodette, Note, *Use It (Every Two Years), or Lose It (Forever)—Tennessee's Personal Rights Protection Act and the Post-Mortem Right of Publicity*, 33 U. MEM. L. REV. 83, 84 (2002).

[8] *See* Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1200 n.3 (1986) (quoting Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1589-90 (1979)) ("The right of publicity has been defined with surprising consistency by courts and commentators; it is generally conceived as comprising a person's right in the use of his name, likeness, activities, or personal characteristics. This amicable unanimity in defining the right is somewhat illusory, however, for there is considerable disagreement about what the definition means. To begin with, there is no consistent test for determining how far the right of publicity extends. The language of some courts would suggest that virtually any recognizable attribute would be protected. But a number of other decisions have refused to extend the right of publicity nearly as far. As a result, the extent to which a person's attributes are protected by the right of publicity remains unclear.").

[9] *See* Jennifer E. Rothman, *Right of Publicity State-by-state*, Rothman's Roadmap to the Right of Publicity, https://rightofpublicityroadmap.com/ [https://perma.cc/Q4AB-LY54] (last visited May 9, 2024).

[10] *Id.*

celebrity) is left to be exploited in many jurisdictions in life and death. An emphasis seems to be added to the fame and notoriety that celebrities have gathered rather than the impact of the commercial exploitation.

Though this Comment recognizes the need for federal intervention, it does not intend to offer what a model statute looks like. Rather, it argues the need for a federal standard with an emphasis on the decidability of publicity rights through postmortem rights of publicity. Additionally, it offers the Postmortem Lynching Doctrine as a piece of the puzzle to ensure the protection of those made famous because of events that caused their death.

II. THE RIGHT OF PUBLICITY

The argument that a person should be able to protect their image from unauthorized publication was grounded in the rise of appropriation which accompanied America's acknowledgement of the celebrity figure. As stardom captivated families across the country, a push for recognition of the economic value this attention brought ensued.

A. From Private to Economic: The Development of a Right of Publicity

The right of publicity is deeply rooted in the fundamental right of privacy.[11] Samuel Warren and Louis Brandeis coined the term in their Harvard Law Review article, *The Right to Privacy*, due to concerns of the press overstepping "obvious bounds of propriety and of decency."[12] The two recognized that gossip was no longer a tool for everyday conversation, but an intrusive resource used in

[11] Christian B. Ronald, *Burdens of the Dead: Postmortem Right of Publicity Statutes and the Dormant Commerce Clause*, 42 COLUM. J. L. & ARTS 123, 127 (2018). *See* Martin Luther King Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 702-03 (Ga. 1982) ("Dean Prosser . . . suggests that the invasion of privacy is in reality a complex of four loosely related torts" which include "(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.").

[12] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

trade.[13] In 1902, the New York Court of Appeals became the first court to consider a right to privacy in *Roberson v. Rochester Folding Box Co.*[14] This court entertained the idea of a privacy right, recognizing that it was founded upon the idea that people should be able to "pass through this world" without their name, image or likeness being used "for the benefit of others."[15] However, the court ultimately held that a right to privacy could not disturb already settled law.[16] The New York legislature responded to *Roberson* swiftly, codifying the right to protect a person's likeness from unauthorized use in trade.[17]

Many states took note of the New York legislature's actions, and over the several decades that followed, enacted similar privacy laws to combat the "unjust commercial exploitation" of celebrities.[18] Though this state action sought to provide a remedy to identity appropriation, it still had "several implications" for those it sought to protect.[19] Specifically, courts refused to label the "mere publication" of a celebrity's photograph as an invasion of privacy under the rationale that these individuals sought fame and "could not be offended by its furtherance."[20] Additionally, arguments that relied on the false endorsement of a celebrity often failed if they were only supported by the fact that a celebrity's image was used, and even when they prevailed in such cases, damages would then be limited to the personal injuries suffered rather than the actual value the advertiser received.[21]

---

[13] *Id. See* Restatement (First) of Torts § 867 (1939). *See also,* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1169 (2006) (discussing how Warren and Brandeis' proposal for a right of privacy should only apply to "matter[s] which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his public position" (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890)).

[14] Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).

[15] *Id.* at 443.

[16] *Id.* at 447 ("[T]he so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.").

[17] N.Y. CIV. RIGHTS LAW § 50-51 (McKinney 1903).

[18] *See* Ronald, *supra* note 11, at 127-28

[19] *See* Dogan & Lemley, *supra* note 13, at 1171.

[20] *Id.*

[21] *Id.*

The public push for a more economically centered approach found merit in the Second Circuit case, *Haelan v. Topps Chewing Gum*.[22] In *Haelan*, competing manufacturers in the chewing gum industry argued over the right to use a baseball player's image on trading cards.[23] The plaintiff took the position that they originally contracted the right from the player and argued that the defendant's action of convincing the player to also work with them amounted to the inducement of a breach of contract.[24] The defendant contended that the plaintiff's contract with the player acted only as a "release of liability," because a person had "no legal interest in the publication" of their picture other than what the right of privacy offered.[25] The court rejected this argument stating:

> 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.[26]

The introduction of a right of publicity recognized an "independent property right" separate from a right of privacy.[27] In other words, a third party would now be able to acquire a person's publicity rights and be able to sue for the unauthorized use of that right.[28] This decision propelled state legislatures to act, and in the early 1970s, California became the first state to enact a right of publicity statute.[29] The United States Supreme Court officially recognized the right of publicity in the 1977 opinion *Zacchini v. Scripps-Howard*.[30]

---

[22] Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

[23] *Id.* at 867.

[24] *Id.* at 868.

[25] *Id.*

[26] *Id.*

[27] *See* Ronald, *supra* note 11, at 128; *see also*, Dogan & Lemley, *supra* note 13, at 1172 (stating that "[t]he court gave no doctrinal or policy justification for its decision, offering instead a conclusory statement that 'New York decisions recognize such a right' and citing three cases that did no such thing.").

[28] Dogan & Lemley, *supra* note 13, at 1173.

[29] CAL. CIV. CODE § 3344; *See also* Ronald, *supra* note 11, at 128 n.30 (citing THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:23 (2d ed. 2018)).

[30] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

In *Zacchini*, a freelance reporter for Scripps-Howard Broadcasting Co. attended a fair in which Hugo Zacchini performed a human cannonball act.[31] Zacchini asked the reporter not to film his act, but the reporter ignored him.[32] The broadcasting company later showed the entire act on their news program.[33] Zacchini brought an action for damages, but the trial court granted Scripps-Howard's summary judgment motion.[34] The Court of Appeals of Ohio reversed, finding merit in the complaint and agreeing that the press' First Amendment shield did not allow them to show Zacchini's entire performance without compensation.[35] The Ohio Supreme Court disagreed, stating that Scripps-Howard had the privilege of reporting on "matters of legitimate public interest which would otherwise be protected by an individual's right of publicity" unless the intended purpose "was to appropriate the benefit of the publicity for some non-privileged private use, or . . . to injure the individual."[36]

The United States Supreme Court granted certiorari to answer the question of whether the First and Fourteenth Amendments granted Scripps-Howard immunity from infringing on Zacchini's state law right of publicity.[37] The Court recognized that a substantial portion of the economic value Zacchini received from his performances lay in the "right of exclusive control" over his own publicity.[38] Ultimately, the opinion established that "[n]o social purpose is served" when a defendant gets something for free from the plaintiff "that would have market value and for which he would normally pay."[39]

---

[31] *Id.* at 563.

[32] *Id.* at 564.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 565 (quoting Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454, 455 (1976).

[37] *Id.*

[38] *Id.* at 575.

[39] Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 331 (1966) (stating that the rationale for the right of publicity is the prevention of "unjust enrichment by the theft of good will").

B. In Death It Shall Not Part: The Postmortem Extension of Publicity Rights

State legislatures answered the call for economic protections of likeness in varying forms.[40] As more jurisdictions opened to the idea of codifying a right of publicity statute, an extension of this protection was sought to cover their right after death. This postmortem right of publicity allows an estate's executor or heir to protect their likeness.[41] In response to the passing of major celebrities around the country, many courts considered whether this new property right was descendible like other property interests.[42]

In *Lugosi v. Universal Pictures*, the widow and surviving son of Bela Lugosi brought an action to recover profits made by Universal in its licensing of Bela Lugosi's role as Count Dracula and to enjoin them from licensing the role further without their consent.[43] The Supreme Court of California noted that the trial court found "that 'the essence of the thing licensed by Universal' . . . was the 'uniquely individual likeness and appearance of Bela Lugosi in the role of Count Dracula" and thus held that the property right "was of such character and substance" that it descended to Lugosi's heirs and did not terminate with his death.[44] The Supreme Court of California disagreed,[45] holding that the right to exploit an artist's name and likeness must be exercised during their lifetime.[46] The court rationalized this stance stating:

> The so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities. The protection of name and likeness

---

[40] *See* Rothman, *supra* note 9.

[41] Sharon L. Klein & Jenna M. Cohn, *The Post-Mortem Right of Publicity: Defining It, Valuing It, Defending It and Planning for It*, 48 ACTEC L.J. 63, 63 (2022).

[42] *See e.g.,* Pirone v. MacMillan, Inc., 894 F.2d 579, 585-86 (2d Cir. 1990); Ronald, *supra* note 11, at 128.

[43] Lugosi v. Universal Pictures, 603 P.2d 425, 427 (Cal. 1979).

[44] *Id.*

[45] The Court's main concern centered around the durational limit of an inheritable right of publicity and stated that the question was "beyond the scope of judicial authority." *Id.* at 430.

[46] *Id.* at 431.

> from unwarranted intrusion or exploitation is the heart of the law of privacy.
>
> If rights to the exploitation of artistic or intellectual property never exercised during the lifetime of their creators were to survive their death, neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served.[47]

Like the Supreme Court of California, the United States Court of Appeals for the Sixth Circuit contemplated the idea of a descendible right of publicity in *Memphis Development Foundation v. Factors Etc., Inc.*[48] Here, Elvis Presley conveyed a right of commercial exploitation of his name and likeness to Boxcar Enterprises who, two days after Presley's death, licensed its rights to Factors.[49] In honor of Presley, the Memphis Development Foundation ("Foundation") planned to erect a statue of him, soliciting contributions for its creation, and distributing mini replications of the statue to those who contributed.[50] The Foundation sought a declaratory judgment that the license which Factors' purchased did not preclude their distribution of the statue replicas.[51]

Factors responded with a counterclaim for damages and an injunction against the distribution of Foundation's replicas under the argument that it appropriated Factors' "exclusive right to reap commercial value from the name and likeness of Elvis Presley."[52] The District Court agreed, issuing an injunction which allowed the building of a memorial but prohibited the manufacture, distribution, or selling of the statute replicas.[53] The Sixth Circuit recognized that adopting a post-mortem right of publicity would encourage creativity and vindicate the interests of a contract between a decedent and a third party's goal of creating a "valuable capital asset."[54] However, the Court scrutinized the issues that an inheritable right of publicity created, asking:

---

[47] *Id.*
[48] Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980).
[49] *Id.* at 957.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 958.

> How long would the "property" interest last? In perpetuity? For a term of years? Is the right of publicity taxable? At what point does the right collide with the right of free expression guaranteed by the first amendment? Does the right apply to elected officials and military heroes whose fame was gained on the public payroll, as well as to movie stars, singers and athletes? Does the right cover posters or engraved likenesses of, for example, Farah Fawcett Majors or Mahatma Gandhi, kitchen utensils ("Revere Ware"), insurance ("John Hancock"), electric utilities ("Edison"), a football stadium ("RFK"), a pastry ("Napoleon"), or the innumerable urban subdivisions and apartment complexes named after famous people?[55]

The court's contemplation compartmentalized fame under the same umbrella as reputation, finding it an attribute that third parties may benefit from but not own.[56] To the court, there was no indication that a shift from the common law rule denying an heir exclusive commercial control of an ancestor's name would "increase the efficiency or productivity" of the economy.[57] Ultimately, the Sixth Circuit reversed the district court's judgment denying the extension of a post-mortem right of publicity.[58]

The political sway of celebrities showed itself again as the Tennessee Legislature addressed the descendibility of a right of publicity to a celebrity's heirs in their enactment of The Personal Rights Protection Act of 1984 ("PRPA").[59] The PRPA contradicted the Court in *Memphis Dev. Found,* codifying that "[e]very individual has a property right in the use of that person's name, photograph, or likeness in any medium in any manner,"[60] that is "freely assignable and licensable" and does not "expire upon the death of the individual."[61] The California legislature followed suit,

---

[55] *Id.* at 959.

[56] *Id.* ("The law of defamation, designed to protect against the destruction of reputation including the loss of earning capacity associated with it, provides an analogy. There is no right of action for defamation after death."). *See* Restatement (Second) of Torts § 560 (rev. ed. 1977).

[57] *Memphis Dev. Found.*, 616 F.2d at 959.

[58] *Id.* at 960. *See e.g.,* Bodette, *supra* note 7.

[59] *See* TENN. CODE ANN. § 47-25-1103 (2023).

[60] *Id.*

[61] *Id. See also* Bodette, *supra* note 7, at 84 ("This enactment codified the Tennessee judiciary's view that the right to publicity is a property right, and not a privacy right." (footnote omitted) (citing TENN. CODE ANN. §§ 47-25-1101 to 1108 (2001)).

declining to stick to the *Lugosi* court's narrative in their enactment of the Celebrities Rights Act of 1985.[62] This statute made any person who appropriated a deceased person's image without the consent of the person who owned the right of publicity liable for damages sustained.[63] Though government action like the Tennessee and California legislatures' suggests a move toward a unified view on the scope of protection offered by a right of publicity, there is actually a scramble of state stances.[64]

C. Jurisdictional Free for All

The right of publicity has significant variances amongst jurisdictions that chose to recognize it.[65] For some jurisdictions, the right of publicity is a "privacy right meant to protect individuals" from noneconomic damages caused by the "unauthorized commercial uses" of their likeness.[66] In others, the right is considered a "property right" over a person's own identity.[67] The primary distinction between the two stances is whether the right is descendible upon death.[68] The lack of uniformity amongst states,

---

[62] CAL. CIV. CODE § 990 (1985), *revised at* CAL. CIV. CODE § 3344.1 (1999).

[63] *Id.* ("Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages.").

[64] *See* Rothman, *supra* note 9.

[65] Robert Rossi, *Jurisdictional Haze: Indiana and Washington's Unconstitutional Extensions of the Postmortem Right of Publicity*, 57 B.C. L. REV. 297, 302 (2016) (citing David S. Welkowitz & Tyler T. Ochoa, *Teaching Rights of Publicity: Blending Copyright and Trademark, Common Law and Statutes, and Domestic and Foreign Law*, 52 ST. LOUIS U. L.J. 905, 906-07 (2008)).

[66] *Id.* at 302-03. *(*"Under the 'privacy right' view, the right of publicity is inherently tied to the individual and therefore cannot be passed to the estate any more than an individual's right of privacy could be left to his or her heirs.").

[67] *Id.* ("Under the 'property right' view, the right of publicity is intellectual property with commercial value that passes into the estate along with the individual's other tangible and intangible possessions.").

[68] *Id.*

along with the absence of federal guidance on the matter, creates a spectrum of rights that do not fully protect the general population.[69] The research of renowned and leading scholars in the field of publicity, such as Jennifer Rothman, has helped demonstrate the jumble of stances available in all fifty states and the District of Colombia [70]

The following states recognize, by either statute or common law, a postmortem right of publicity: Alabama,[71] Arizona,[72] Arkansas,[73] California,[74] Connecticut,[75] Florida,[76] Georgia,[77] Hawaii,[78] Illinois,[79] Indiana,[80] Kentucky,[81] Louisiana,[82]

---

[69] *See e.g.*, Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM. LAW. 14, 15 (2011).

[70] Rothman, *supra* note 9.

[71] ALA. CODE §§ 6-5-770-74 (2023).

[72] ARIZ. REV. STAT. § 12-761 (2023); ARIZ. REV. STAT. § 13-3726 (2023). *See also* In re Estate of Reynolds, 327 P.3d 213 (Ariz. Ct. App. 2014).

[73] The Frank Broyles Publicity Rights Protection Act of 2016, ARK. CODE ANN. § 4-75-1101 (2016).

[74] *See e.g.,* Comedy III Prods., Inc. v. Gady Saderup, Inc., 21 P.3d 797 (2001); Eastwood v. Super. Ct., 149 Cal.App.3d 409 (1983); White v. Samsung, 971 F.2d 1395 (9th Cir. 1992); Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983 (9th Cir. 2012).

[75] *See e.g.,* Jackson v. Roberts, 972 F.3d 25 (2d Cir. 2020); Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc., 867 F. Supp. 175 (S.D.N.Y. 1994).

[76] FLA. STAT. § 540.08 (2022). *See also* Weaver v. Myers, 229 So. 3d 1118 (Fla. 2017); Loft v. Fuller, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981).

[77] *See e.g.,* Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982); Bell v. Foster, 2013 WL 6229174 (N.D. Ga. Dec. 2, 2013); Toffoloni v. LFP Pub. Grp., LLC, 572 F.3d 1201 (11th Cir. 2009).

[78] *See e.g.,* HAW. REV. STAT. § 482P-1 (2009).

[79] *See e.g.,* 765 ILL. COMP. STAT. ANN.1075/1 (West 1999).

[80] *See e.g.,* IND. CODE. § 32-36-1-0.2 (2011). *See also* Felsher v. Univ. of Evansville, 755 N.E.2d 589, 594 (Ind. 2001).

[81] *See e.g.,* KY. REV. STAT. ANN. § 391.170 (West 2022).

[82] *See* LA. STAT. ANN. 14:102.21 (2006).

Michigan,[83] Nebraska,[84] Nevada,[85] New Jersey,[86] New York,[87] Ohio,[88] Oklahoma,[89] Pennsylvania,[90] South Carolina,[91] South Dakota,[92] Tennessee,[93] Texas,[94] Virginia,[95] and Washington.[96] Amongst these are drastic variances in the scope of protection. For example, Indiana grants postmortem protection for 100 years after the person's death, whereas Tennessee limits the period to ten years initially.[97] Further distinctions arise between states in the scope of protection. For example, Arizona and Louisiana limit rights of publicity solely for those who have served in the armed forces,[98] whereas Hawaii takes a broad approach, allowing even nonresidents to bring an action to protect postmortem rights.[99] In addition to these stances, there are still several states that refuse to recognize a right of publicity separate from a right of privacy.[100]

For those that do recognize the rights of publicity, courts have interpreted the right in ways that expand its scope. In *Midler v.*

---

[83] *See* Arnold v. Treadwell, 2009 WL 2136909 (Mich. Ct. App. July 16, 2009) (describing the right of publicity as separate from the right of privacy). *See also* Rosa and Raymond Parks Inst. for Self Dev. v. Target Corp., 812 F.3d 824 (11th Cir. 2016); Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc., 270 F.3d 298 (6th Cir. 2001).

[84] *See e.g.,* NEB. REV. STAT. § 20-205 (2023); NEB. REV. STAT. § 20-208 (2023).

[85] NEV. REV. STAT. ANN. § 597.800 (West 2023). *See also* People for Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269 (Nev. 1995).

[86] *See e.g.,* McFarland v. Miller, 14 F.3d 912 (3d Cir. 1994); Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Monk v. North Coast Brewing Co., 2018 WL 646679 (N.D.Cal. Jan. 31, 2018).

[87] N.Y. CIV. RIGHTS LAW § 50-f (McKinney 2022).

[88] *See e.g.,* OHIO REV. CODE ANN. § 2741.02 (West 2009). *See also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

[89] OKLA. STAT. tit. 12, § 1448 (2024).

[90] 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2003).

[91] *See e.g.,* Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 684 S.E.2d 756 (S.C. 2009).

[92] *See e.g.,* S.D. CODIFIED LAWS § 21-64-2 (2024).

[93] *See e.g*, TENN. CODE ANN. § 47-25-1103 to -04 (West 2023).

[94] TEX. PROP. CODE. ANN. § 26.001 (West 2023).

[95] VA. CODE ANN. § 8.01-40 (West 2015).

[96] WASH. REV. CODE ANN. § 63.60.010 (West 2008).

[97] *Compare* TENN. CODE ANN. § 47-25-1104 (West 2023), *with* IND. CODE. § 32-36-1-8 (West 2019) (formerly § 32-36-1-0.2).

[98] ARIZ. REV. STAT. ANN. § 12-761 (2007); LA. STAT. ANN. 14:102.21 (2006).

[99] HAW. REV. STAT § 482P-1 (West 2009).

[100] Author's Note: Alaska, Colorado, Delaware, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Vermont, West Virginia, Wisconsin, Wyoming, Rhode Island, Utah, and the District of Colombia do not recognize a postmortem right of publicity.

Ford Motor Co, a nationally known, grammy award winning actress and singer's voice became a topic for publicity protection.[101] Here, Ford's advertising agency, Young & Rubicam, Inc., advertised the Ford Lincoln Mercury in the "Yuppie Campaign" in a series of short television commercials.[102] Midler, was approached by the advertising agency to use an edited version of her singing in one of these commercials, but her manager declined.[103] In response, the agency reached out to one of Midler's long-term backup singers and had her record the commercial while sounding "as much as possible like the Bette Midler record."[104] Midler sued, and although the agency had a license to use the song from the copyright holder and neither Midler's name nor picture was used in the commercial, the District court recognized that the defendant's actions amounted to a taking.[105]

On appeal, the court stated that the California statute protecting the use of a decedent's voice recognized voice protection as an expansion of the right of publicity.[106] As such, appropriation of Midler's voice was a tort.[107] The court asked several questions in their analysis:

> Why did the defendants ask Midler to sing if her voice was not of value to them? Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them? What they sought was an attribute of Midler's identity. Its value was what the market would have paid for Midler to have sung the commercial in person.[108]

---

[101] Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988).

[102] *Id.* (noting that "[t]he aim was to make an emotional connection with Yuppies, bringing back memories of when they were in college" and that Young & Rubicam Inc., wanted "to get 'the original people'" who sang popular songs to star in these commercials).

[103] *Id.*

[104] *Id.*

[105] *Id.* at 462. (awarding summary judgement to defendants because there was "no legal principle" which prevented the imitation of Midler's voice).

[106] *Id.* at 463.

[107] *Id.*

[108] *Id.*

The court landed on the conclusion that a person's voice is synonymous with their identity, further expanding the scope of publicity in a way that other states had not.[109]

Another interesting view of the scope of protection offered by a right of publicity was analyzed in *White v. Samsung Elec. Am., Inc.*[110] In *White*, Samsung ran a series of advertisements prepared by Deutsch which depicted a robot dressed in a wig, gown, and jewelry made to resemble Vanna White, although done without her permission.[111] In the advertisement, the robot was posed beside a game board similar to the Wheel of Fortune game show set.[112] The Ninth Circuit stated that these elements show a clear depiction of whom the robot was meant to represent when viewed together.[113] The court concluded by highlighting that the right of publicity protects the right of sole exploitation of a person's value.[114]

III. THE NEED FOR EXPANSION

Statistics show a rise in police-involved wrongful death cases with clear racial disparities.[115] Several high-profile cases of police violence have sparked widespread social movements, leading to

---

[109] *Id.* ("A voice is more distinctive and more personal than the automobile accouterments protected in *Motschenbacher*. A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone. At a philosophical level it has been observed that with the sound of a voice, 'the other stands before me.' D. Ihde, Listening and Voice 77 (1976). A fortiori, these observations hold true of singing, especially singing by a singer of renown. The singer manifests herself in the song. To impersonate her voice is to pirate her identity.").

[110] White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).

[111] *Id.* at 1396.

[112] *Id.*

[113] *Id.* at 1399.

[114] *Id.* at 1408.

[115] *See Race and Policing*, NACDL (Nov. 29, 2022), https://www.nacdl.org/Content/Race-and-Policing [https://perma.cc/YRZ2-EPCV]; see also Stephan A. Schwartz, Police Brutality and Racism in America, ELSEVIER (Jul. 2, 2020),https://ncbi.nlm.nih.gov/pmc/articles/PMC7331505/ [https://perma.cc/TU26-HX8J];*Elevating Economic Research on Racist Violence and Exclusion in the United States*, WASH CTR. EQUITABLE GROWTH (Jun. 5, 2020), https://equitablegrowth.org/elevating-economic-research-on-racist-violence-and-exclusion-in-the-united-states/ [https://perma.cc/R9RP-T533]; *see also* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (May, 4, 2020), https://www.nature.com/articles/s41562-020-0858-1 [https://perma.cc/A64S-2L8L].

increased public awareness of systemic issues such as the abuse of law enforcement authority.[116] Companies, marketers, and general opportunists have capitalized on the emotive power of these incidents by incorporating the images of brutality victims into consumer products.[117] The practice of doing so risks diluting the gravity of social justice movements to mere marketing strategies.[118] Without a federal uniform standard protecting the publicity rights of brutality victims, their likeness is subject to appropriation after death.

For this reason, the descendibility of publicity rights through postmortem rights of publicity is vital. Estates are the best option for protecting brutality victims and the federal government should work to codify a right for them to do so postmortem.[119] However, the enactment of federal standards is likely to focus on the commercial value of a decedent's name and likeness during life. An established standard would exclude brutality victims who, in effect, became celebrities at the time of their death. Therefore, the term "commercial exploitation" needs to be expanded to encompass individuals whose death effectively makes them a celebrity. This expansion would include brutality victims, protecting the financial interest of their estate under the shield of the postmortem right of publicity.

A. A Lack of State Uniformity Necessitates Federal Intervention

Before diving further into what the expansion of a postmortem right of publicity looks like on a general scale, it is important to know there is a crucial need for federal intervention to prevent postmortem appropriation of an individual's publicity rights. One such reason is that the absence of a federal uniform postmortem

---

[116] *See generally How George Floyd Died*, *supra* note 1.

[117] *See* Ray, *supra* note 4.

[118] *See White v. Samsung Elecs. Am., Inc.,* 971 F.2d at 1399 ("Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice.").

[119] *See* Meaghan Fontein, *Digital Resurrections Necessitate Federal Post-Mortem Publicity Rights*, 99 J. PAT. & TRADMARK OFF. SOC'Y 481, 492 (2017).

right of publicity statute significantly complicates interstate commerce. The United States Constitution gives Congress the power to regulate Commerce "among the several States,"[120] and current state statutes violate the dormant Commerce Clause because they are regulating interstate commerce.[121] Indiana and Washington are two examples of state statutes which overstep congressional authority.[122] Both state statutes allow any individual, regardless of where they lived at the time of their death, to bring postmortem claims.[123] These statutes exemplify states effectively regulating economic activity across state lines.[124] Though these statutes overstep federal authority, it is important for estates to be able to protect the image of victims wherever appropriation may happen.

Jurisdictional variations on how a deceased individual's likeness can be used across state lines not only affects the financial interests of brutality victims' families but also invites appropriation. Although some marketers may genuinely aim to raise awareness or express their solidarity with social movements, the appropriation of victim images for profit is inherently exploitative. A uniform statute enabling a victim's estate to pursue postmortem publicity violations would settle publicity disputes between a decedent's estate and third parties, making interstate commerce more efficient while protecting the decedent's legacy. Furthermore, the right of publicity is categorized under the umbrella of intellectual property and the federal government has already recognized a federal interest in providing uniform guidance for intellectual property disputes in its enactment of the Defend Trade Secrets Act of 2016.[125] A majority of states have subscribed to this act, which suggests that federal guidance for trade secret

---

[120] U.S. CONST. art. I, § 8, cl. 3 (stating that "Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[121] *See* IND. CODE. ANN. §§ 32-36-1-1(a) to -8(a) (West 2012).

[122] *See* WASH. REV. CODE ANN. § 63.60.010 (West 2008); IND. CODE. § 32-36-1-8 (West 2019) (formerly § 32-36-1-0.2); *see also* Rossi, *supra* note 65, at 328.

[123] *See* WASH. REV. CODE ANN. § 63.60.010 (West 2008); IND. CODE. § 32-36-1-8 (West 2019) (formerly § 32-36-1-0.2).

[124] *Id.*

[125] *See* Defend Trade Secrets Act of 2016, S. 1890, 114th Cong. § 2 (2016). *See also* Fontein, *supra* note 119, at 493-94 (stating that the Defend Trade Secrets Act "parallels the Uniform Trade Secrets Act").

misappropriation has led to a more uniform application of the law.[126]

The creation of a federal statute for postmortem publicity claims will give states something to mirror so that estates can protect the rights of brutality victims nationally. Many states fail to capture the full extent of the right of publicity, refusing to make the right of publicity descendible or to extend it to estates whose decedent failed to commercially exploit their likeness during their lifetime. This problem arises, in part, because no guiding statute exists for states to look toward when drafting their own legislation.[127] The Supreme Court of Georgia supports the need for decidability and general estate exploitation in *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*[128]

In *King*, the defendant developed a concept for marketing a plastic bust of Dr. Martin Luther King, Jr., and formed a company to sell the busts.[129] The Martin Luther King, Jr. Center for Social Change, Inc. refused to endorse the marketing of the bust, but the defendant pursued the idea anyway.[130] The defendant advertised to purchasers that a percentage of the order went to the King Center for Social Change and that each bust would be given along with a Certificate of Appreciation.[131] On suit, the District Court concluded that the right of publicity was not devisable in Georgia because Dr. King had not commercially exploited the right during his lifetime.[132] On appeal, the Supreme Court of Georgia stated that Georgia's courts recognized the rights of private citizens to not have their likeness used for the "financial gain" of others without their express approval where the use is not otherwise an authorized

---

126 Fontein, *supra* note 119, at 494.

127 Matt Whibley, *Celebrity and Trademarks: Why Courts Should Recognize a Celebrity-Likeness-Mark*, 43 SW. L. REV. 121, 122 (2013) ("Unauthorized uses of the celebrities' image or likeness usually must be argued under the state action, right of publicity.").

128 Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc. 296 S.E.2d 697 (Ga. 1982).

129 *Id.* at 698.

130 *Id.*

131 *Id.*

132 *Id.* at 699.

exercise of the First Amendment.[133] The court focused on the issues of descendibility and commercial exploitation, stating:

> If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use. Conversely, those who would profit from the fame of a celebrity after his or her death for their own benefit and without authorization have failed to establish their claim that they should be the beneficiaries of the celebrity's death. Finally, the trend since the early common law has been to recognize survivability . . . [134]

The Court also pointed to Justice Bird's dissent in *Lugosi*, where he argued that "advertisers" should not be able to use the "name and likeness" of a deceased person with "impunity" and that the "financial benefits" of a person should go to their heirs.[135] Though the focus of the issue was the right of privacy, the *Pavesich* court also pointed to a person's likeness being something that is descendible.[136]

---

[133] *Id.* at 703.

[134] *Id.* at 705. *See also*, Pavesich v. New England Life Ins. Co., 50 S.E. 68, 79-80 (Ga. 1905) ("the mere fact that a man has become what is called a public character . . . or by exercising a profession which places him before the public, or by engaging in a business which has necessarily a public nature" does not give "every one the right to print and circulate his picture").

[135] *See King* at 705 ("If the right is descendible, the individual is able to transfer the benefits of his labor to his immediate successors and is assured that control over the exercise of the right can be vested in a suitable beneficiary. 'There is no reason why, upon a celebrity's death, advertisers should receive a windfall in the form of freedom to use with impunity the name or likeness of the deceased celebrity who may have worked his or her entire life to attain celebrity status. The financial benefits of that labor should go to the celebrity's heirs. . . .'" (quoting Estate of Presley v. Russen, 513 F.Supp. 1339, 1355 (N.J. D.C. 1981))).

[136] *See King* at 700-01 ("While the right of privacy is personal, and may die with the person, we do not desire to be understood as assenting to the proposition that the relatives of the deceased can not, in a proper case, protect the memory of their kinsman, not only from defamation, but also from an invasion into the affairs of his private life after his death. This question is not now involved, but we do not wish anything said to be understood as committing us in any way to the doctrine that against the consent of relatives the private affairs of a deceased person may be published and his picture or statue exhibited." (quoting *Pavesich v. New Englad Life Ins. Co.*, 50 S.E. at 76)).

Uniformity is necessary to protect the estate of brutality victims but to also encourage free enterprise. "The social policy underlying the right of publicity is encouragement of individual enterprise and creativity by allowing people to profit from their own efforts."[137] Therefore, the federal government must come up with a form of guidance for the right of publicity.

B. A Postmortem Lynching Doctrine: Help To Protect Brutality Victims Regardless of The Scope of Protection Provided by Federal Law

The biggest hurdle that a future federal authority would have to overcome to create a unified statute would be the scope of protection of postmortem rights of publicity and the duration that the protection would last. To prevent the vesting of interest in distant heirs who would not have the estate's best interest in mind, the authority would likely stick to a short duration.[138] What is harder to project is the scope of protection. Though current approaches like Tennessee's Protection of Personal Rights Act protect the exploitation of an individual's name and likeness regardless of whether they commercially exploited their likeness during their life, several states remain unclear on the matter or divert addressing it by focusing only on a common law right of privacy.[139] The federal interest in regulating interstate commerce is likely to play a huge role in this decision and is likely to limit the scope of protection to individuals who commercially exploited their name, image, or likeness during their lifetime. Thus, future legislation would either not protect individuals who failed to exploit

---

[137] Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1128 (1980) (citing Sacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573, 576 (1977); *see also* Erik W. Kahn & Pou-I "Bonnie" Lee, *"Delebs" and Postmortem Right of Publicity*, 8 LANDSLIDE 11 (2016).

[138] *See, e.g.*, Vick & Jassy, *supra* note 69, at 18 ("The shortest possible duration . . . would be preferable because it would free uses as soon as possible. Longer durations would be more likely to vest rights in distant heirs or corporate assignees, serving no discernible public purpose and running contrary to basic notions that the right is at least somewhat personal and its postmortem aspect is meant to protect the financial interests of immediate family."); Timothy C. Williams, *The Right of Publicity: "You Can't Take It with You"*, 12 PEPP. L. REV. 999, 1012-23 (1984).

[139] TENN. CODE ANN. § 47-25-1103 (West 2023); *see* also Rothman, *supra* note 9.

their likeness during their lifetime, or limit the duration of their protection shorter than those who did. Therein lies the dilemma. Those who are killed in a circumstance that raises societal concern or ignites public displays of disdain are also left in a world that capitalizes off the moment and may have their image exploited and sold to add fuel to the concern and thus to the opportunist's wallet. Because of this, courts need some form of guidance that they can refer to in order to adequately protect the estates of brutality victims in the event that a federal statute requires commercial exploitation or limits the scope or duration of the average person.

The proposed solution lies in the establishment of a Postmortem Lynching Doctrine, a legal framework which courts could apply to broaden the understanding of "commercial exploitation," particularly in cases where individuals become famous posthumously due to events leading to their death, such as in the case of George Floyd.

The essence of this doctrine lies in considering a person's name and likeness as commercially exploited during their lifetime if the circumstances surrounding their death propelled them to fame. This extension of the concept aims to empower the decedent's estate to bring misappropriation claims, safeguarding the interests of heirs and assignees especially in jurisdictions that adopt commercial exploitation as the criterion for descendibility. Expanding the scope of "commercial exploitation" in this manner is crucial in providing a legal avenue for the protection of the legacies of victims of brutality.

By deeming the name and likeness of individuals as commercially exploited when their death triggers fame, the Postmortem Lynching Doctrine responds to the unique circumstances surrounding posthumous recognition. It acknowledges that certain individuals attain public prominence specifically due to the circumstances surrounding their demise, necessitating a broader interpretation of the term. Moreover, the Postmortem Lynching Doctrine serves as a strategic tool for navigating potential gaps in current or future legislation. In instances where federal or state statutes may offer protections for both individuals who capitalized on their likeness during their lifetime and those who did not, this doctrine steps in to extend the duration and scope of protection, ensuring that the heirs and

assigns of victims receive the maximum safeguard available under the prevailing legal framework.

In evaluating the applicability of the Postmortem Lynching Doctrine, courts should consider several factors. Firstly, they should consider the reputation the individual attained during their lifetime. This involves an assessment of their standing in society, the positive or negative associations linked to their name, and the extent to which their identity was known or recognized. Secondly, they should consider the impact of the person's death on their public recognition. Understanding how the circumstances surrounding their demise catapulted them to public awareness is essential in gauging the potential commercial exploitation of their name and likeness.

The third factor involves the duration of the fame or public interest that persists postmortem. This includes an examination of the enduring societal interest in the individual, especially if their legacy extends beyond the immediate aftermath of their death. The societal impact of the person's death, the fourth factor, necessitates an evaluation of how their demise influenced broader societal norms, discourse, or movements. This includes considering whether their death became a catalyst for change or heightened awareness of significant social issues. Fifthly, the coverage and public response to the death play a crucial role. The extent of media coverage, public reactions, and the public's collective memory are integral elements in determining the potential for commercial exploitation. Lastly, the cultural, artistic, or humanitarian contributions arising from the individual's death form the sixth factor. This involves understanding whether their demise inspired positive societal changes, creative endeavors, or humanitarian initiatives that could contribute to the public interest.

Following a comprehensive assessment of these factors, if a court concludes that a person's death had a substantial economic impact, served a social purpose, and would likely have been commercialized had the individual been alive, then their name, image, and likeness should be deemed as commercially exploited during their lifetime.

Regarding the first factor, a person's reputation is often intricately tied to their identity, influencing how they are remembered after death. Extending postmortem rights ensures

that the individual's legacy is protected from unauthorized commercial exploitation, preserving the integrity of the reputation they worked to establish. For those who, during their lifetime, contributed positively to society, posthumous misrepresentation could tarnish not only their personal reputation but also their broader impact. This becomes particularly important for individuals like brutality victims who are made famous because of their death because the societal impact is intertwined with their death. Those who recognize this have an opportunity to exploit the victim's likeness at the expense of society. The *Haelan* court understood the importance of a person's reputation, stating, "a man has a right in the publicity value of his photograph . . . the right to grant the exclusive privilege of publishing his picture."[140]

Turning to the second and third factors, sudden or dramatic deaths can significantly influence how the person is remembered, affecting the way their image is utilized in the public domain. The duration of this influence is particularly pertinent to consider for figures whose impact transcends generations, as their images may continue to hold cultural or historical significance. In cases where the death receives extensive media attention and evokes strong public reactions, there is a heightened risk of exploitation. This concern lends merit to the fourth and fifth factors. Extending postmortem rights is key to controlling the narrative surrounding the individual, preventing unauthorized use of their image in a manner that may not align with the estate's or the family's wishes. This ensures that the public's collective memory is shaped in a way that respects the individual's legacy.

For individuals whose deaths led to cultural, artistic, or humanitarian contributions, postmortem rights become a tool for preserving and honoring their legacy. When an individual's demise inspires positive societal changes or sparks creative endeavors, the postmortem right of publicity enables the guardians of the estate to control how the individual is depicted. This ensures that any artistic or cultural contributions arising from their death align with the values and intentions of the deceased, fostering a meaningful and respectful continuation of their impact beyond the grave. In

---

[140] Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

this way, postmortem rights become a tool for upholding the integrity of the individual's posthumous contributions.

Even if federal guidance never arises, courts can use the Postmortem Lynching Doctrine to expand the scope of what their jurisdiction's statute considers to be commercial exploitation. While celebrities undoubtedly contribute to shaping society as a whole, the interest in a postmortem right of publicity is not exclusive to the famous. As stated in *King*, there is a right of private citizens to not have their likeness used for the "financial gain" of others without their express approval.[141] At the bare minimum, there is a societal interest in this approval. In recognizing this right for everyday individuals, society acknowledges the intrinsic value of every person's narrative, emphasizing the importance of preserving dignity and autonomy beyond celebrity status.

IV. CRITIQUES

The creation of a federal postmortem standard or the application of a Postmortem Lynching Doctrine raises some potential concerns. First Amendment considerations would play a huge role when limiting the use of information and expression.[142] The First Amendment protects the fundamental right to freedom of expression, speech, and the press.[143] Being a cornerstone of American democracy, the exchange of ideas and the support of a diverse marketplace of ideas is a right which can not be abridged.

---

[141] *See* Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 703 (Ga. 1982).

[142] *See, e.g.*, Rossi, *supra* note 65; Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 170 (2010). *See also* Vick & Jassy, *supra* note 69, at 18-19 (arguing that fair use defenses should apply to a federal statute creating a right of publicity and stating, "fair use serves important free speech interests that should be vindicated regardless of whether a plaintiff's claim is based on copyright, the Lanham Act, or the right of publicity"). *But see King*, 296 S.E.2d at 700 ("There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject." (quoting Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80 (Ga. 1905))).

[143] U.S. CONST. amend I. ("Congress shall make no law respecting an establishment of religon, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grivances.").

As such, the right of publicity – an individual's right to control the commercial use of their likeness – naturally clashes in some aspects with the First Amendment.

The Supreme Court has consistently interpreted this amendment broadly, recognizing the importance of the flow of information and ideas.[144] The Court held that public figures must meet the high standard of proving actual malice to succeed in defamation claims.[145] On the other hand, as stated previously, the right of publicity is a concept deeply rooted in the right of privacy, allowing individuals to control the commerciality of themselves. The California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* speaks to this clash and provides an answer.[146]

In *Comedy III Productions, Inc.*, the plaintiff, Comedy III Productions, Inc. ("Comedy III"), "brought [an] action against defendants Gary Saderup and Gary Saderup, Inc. (hereafter collectively "Saderup") seeking damages and injunctive relief" for violating a California right of publicity statute.[147] The publicity statute granted the right to "successors in interest of deceased celebrities, prohibiting any other person from using a celebrity's name, voice, signature, photograph, or likeness for commercial purposes without the consent of such successors."[148] Comedy III was the registered owner of all rights to the comedy act known formerly as The Three Stooges, all of whom were deceased at the time of the action.[149] Saderup, an artist specializing in charcoal drawings of celebrities used in turn to produce silkscreened images for T-Shirts, sold clothing bearing a likeness of the Three Stooges

---

144 *See generally* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

145 *Id.* at 279-80.

146 *See generally* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001). *See also Publicity Rights vs. the First Amendment,* FENWICK (Feb 19, 2014). https://www.fenwick.com/insights/publications/publicity-rights-vs-the-first-amendment#:~:text=There%20is%20an%20obvious%20tension,to%20balance%20these%20competing%20interests [https://perma.cc/3ETX-MEBZ]. ("There is an obvious tension between the right of publicity, which allows a person to control the commercial use of their name or likeness, and the First Amendment, which guarantees the right of free expression. Courts have developed various tests to balance these competing interests."); *cf.* Hart v. Elec. Arts, Inc., 717 F.3d 141 (3rd Cir. 2013).

147 *Comedy III Prods*., 21 P.3d at 799.

148 *Id.*

149 *Id.* at 800.

without the consent of Comedy III.[150] The California Supreme Court noted that the appropriation of celebrity likeness can at times be an important avenue for individual expression because individuals can conjure "personal meaning" from celebrities impacting society.[151] Furthermore the court stated,

> When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist. . . .
>
> On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity. As has been observed, works of parody or other distortions of the celebrity figure are not, from the celebrity fan's viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect.[152]

This transformative use test should be utilized when balancing First Amendment concerns with the Postmortem Lynching Doctrine, and for any future federal statute.

Another area of concern, the Communications Decency Act ("CDA"), protects internet service providers from state law claims

---

[150] *Id.* at 800-01.

[151] *Id.* at 803 ("The tension between the right of publicity and the First Amendment is highlighted by recalling the two distinct, commonly acknowledged purposes . . . . First, 'to preserve an uninhibited marketplace of ideas and to repel efforts to limit the uninhibited, robust and wide-open debate on public issues.' Second, to foster a 'fundamental respect for individual development and self-realization. The right to self-expression is inherent in any political system which respects individual dignity. Each speaker must be free of government restraint regardless of the nature or manner of the views expressed unless there is a compelling reason to the contrary.'" (quoting Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 866 (1979)))

[152] *Id.* at 808 (footnote omitted); *see also id.* at 802 ("[An expressive activity] does not lose its constitutional protection because it is undertaken for profit." (alteration in original)).

based on the content of third-party users.[153] The CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[154] Congress created this immunity to preserve the competitive free market of the internet and to promote its future development.[155] This is very important, as entities like Amazon and Facebook often have third parties advertise their own content for sale. Consequently, they may host some form of publicity misappropriation that would leave these corporations open to liability without the protection offered by the CDA.

However, an internet service provider is not considered to have developed third-party content unless that service provider "directly and 'materially' contributed to what made the content itself 'unlawful.'"[156] The expansion of protection which the Postmortem Lynching Doctrine offers to brutality victims would not destroy the immunity enjoyed by internet service providers; however, a federal statute may.[157] Therefore, the Postmortem Lynching Doctrine should not be utilized to find an internet service provider liable for the misappropriation of a postmortem right of publicity by a third party unless the service provider themselves directly or materially contributed to the appropriation. This allows internet service providers to enjoy the immunity provided by the CDA while remaining accountable for their own actions.

---

153 47 U.S.C. § 230(c).

154 47 U.S.C. § 230(c)(1).

155 47 U.S.C. § 230(b)(1)-(3).

156 Force v. Facebook, Inc., 934 F.3d 53, 68 (2d Cir. 2019) (quoting FTC v. LeadClick Media, LLC, 838 F.3d 158, 174 (2d Cir. 2016)); *see also* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008); Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093 (9th Cir. 2019); Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021).

157 Vick & Jassy, *supra* note 68, at 18. ("[T]he Communications Decency Act, 47 U.S.C. § 230(c), immunizes Internet service providers (ISPs) from state law claims based on content posted by third parties. If the right of publicity is elevated from a patchwork of state law claims to one federal claim, ISPs arguably would lose that immunity for right of publicity claims simply because they are no longer founded in state law.").

CONCLUSION

There is a strong need for a uniform statute recognizing a postmortem right of publicity. While some states have codified the right through statutes, others rely on common law principles. Beyond legal considerations, the right of publicity raises questions about societal values and ethical norms. As forums navigate this landscape, the boundaries between public and private life become increasingly blurred. Public perception plays a crucial role in shaping the discourse around the protection of identity, and ethical considerations must be integrated into legal frameworks to ensure a holistic approach that respects both individual rights and societal interests.

The most effective way to achieve this is through the creation of a federal statute. However, with the current array of state statutes available, uniformity, as well as constitutional implications have left brutality victims at risk of having their name, image, and likeness commercially exploited. Though this Comment recognizes the need for a unified standard, it does not attempt to solve the puzzle and dictate what a model statute should look like. Rather, it suggests a necessary component to this future authority that focuses on the postmortem right of publicity.

This component lies in the Postmortem Lynching Doctrine. By analyzing (1) the reputation the person attained during their lifetime, (2) the impact their death had on their public recognition, (3) the duration of the fame or public interest that persisted postmortem, (4) the societal impact of their death, (5) the coverage and public response to the death, and (6) the cultural, artistic, or humanitarian contributions that arose from the individual's death, courts can expand the scope of protection for the postmortem right of publicity and help a decedent's estate adequately protect their interests.