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I. INTRODUCTION

History is replete with examples of discrimination against people based on race and gender, both during their lives and after their deaths.[1] Perhaps then it is unsurprising that unequal treatment has impacted people's ability to control and financially benefit from their own identity, as well as their ancestors' identities, in the United States.[2] This essay focuses on one such scenario—Mark Twain's use of a formerly enslaved woman's private life experiences—where discrimination likely contributed to a misappropriation of identity and a resulting inequitable transfer of wealth. In discussing that scenario, this essay encourages policymakers and private institutions to consider how inequalities have impacted, and may continue to impact, the control of identity and inheritance of wealth, via the right of publicity.

In 1874, Twain published "A True Story, Repeated Word for Word as I Heard It" in the *Atlantic Monthly*.[3] Although he called the storyteller "Aunt Rachel," it was told to him by Mary Ann Cord—who worked as a cook in the home of Twain's sister-in-law—based on her

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1 *See* Fred O. Smith, Jr., *On Time, (In)equality, and Death*, 120 MICH. L. REV. 195, 195 (2021).

2 *See* Danielle M. Conway, *Intellectual Property: Implicit Racial and Gender Bias in Right of Publicity Cases and Intellectual Property Law Generally*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 179, 182 (Justin D. Levinson & Robert J. Smith eds., 2012). Control over one's identity has both economic and emotional dimensions. *See* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 110-12 (2018).

3 Mark Twain, *A True Story, Repeated Word for Word As I Heard It*, ATLANTIC, Nov. 1874, at 591, 591-94, https://cdn.theatlantic.com/media/archives/1874/11/34-205/131954894.pdf.

own life.[4] Cord was enslaved from birth, then torn from her husband and children at an auction block.[5] Years later, she miraculously reunited with her youngest son, Henry, when, as a solider in the Union army, he liberated her from slavery.[6] Twain proceeded to write this story down from memory, organizing the events chronologically, editing it, and describing how she told it.[7] Twain published it, for money, under his name alone.[8] It has captivated readers ever since.[9]

Cord does not appear to have consented to Twain's use of her story, nor did she benefit from it economically.[10] But Twain and the *Atlantic* certainly did.[11] And they have passed down that wealth through Twain's estate and the continued value of the *Atlantic*'s corporate enterprise.[12]

Twain did not use Cord's real name, but it connects to her identity given that the story came from her own life. Because stories such as hers, often referred to as "slave narratives," were regularly published, there was a realistic commercial market for Cord to have profited from her story herself.[13] Arguably, then, this situation falls within the law's recognition of the right to control commercial uses of one's identity, typically called the right of publicity, as detailed below.[14]

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4 *See* Timothy J. McFarlin, *A Copyright Ignored: Mark Twain, Mary Ann Cord, and the Meaning of Authorship*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022-23) (manuscript at 1) (on file with author).

5 *See id.* at 1, 16-17.

6 *Id.* at 17.

7 *Id.* at 1.

8 *Id.*

9 *Id.* at 7.

10 *See id.* at 1, 5-7.

11 *See id.* at 1, 7.

12 *See id.* at 1, 21.

13 *See id.* at 9, 39-40.

14 *See infra* Part II. Though cases have generally found that life stories are not protected by the right of publicity and that their use is protected by the freedom of speech, *see, e.g.*, 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 8:64 (2d ed. 2022), Cord's case is arguably distinguishable given that she was a private figure, her experiences were not previously made public, and Twain financially benefited from them in a way that likely precluded Cord's ability to do the same. *See* McFarlin, *supra* note 4, at 1, 5, 24. Now, there has been some suggestion that what Cord told Twain was not fully true—specifically, according to an interview of her great-grandson Leon Condol, Henry was kept by Cord's enslaver and was thus not torn from her at the auction block. PETER MESSENT, THE SHORT WORKS OF MARK TWAIN: A CRITICAL STUDY 62, 231 (2001). But her descendants' oral history supports the overall truth of the story in a way that implicates the right of publicity. *See id.*; Herbert A. Wisbey, Jr., *The True Story of Auntie Cord, in* MARK TWAIN IN ELMIRA 277 (Robert D. Jerome & Herbert A. Wisbey, Jr. eds., 2013) ("Incredible as are the events that Mark Twain recorded, the story is indeed a true one and it still exists in the oral tradition handed down from generation to generation in the family of Mary Cord.").

We suggest that circumstances like these are not isolated, but rather are indicative of patterns of identity appropriation connected to issues of race and gender. Another example is a post-mortem publicity claim brought in 2019 by Tamara Lanier against Harvard University.[15] Lanier has asserted that she is a descendant of Renty and Delia, enslaved people whose daguerreotypes (an early type of photograph) were commissioned by Harvard's Louis Agassiz for research into since-discredited racial hierarchies.[16] Lanier sued Harvard for continuing to profit from their images via its control of the daguerreotypes.[17] Among other theories, Lanier asserted a claim under Massachusetts' publicity statute and she requested, among other relief, disgorgement of the wealth generated from her ancestors' images.[18]

We believe that cases like Lanier's and Cord's shine a striking, historically significant light on concerns of distributive justice and systemic inequality in this area of the law.[19] We suggest that policymakers and private institutions take these concerns into account as such cases gain increased awareness in our society.

II. CONTROLLING IDENTITY: PRIVACY AND PUBLICITY

Case law and scholarship in the fields of tort and property have often differentiated between privacy and publicity: the former is generally described as a right to be left alone, the latter as a right to control the commercial use of one's identity.[20] But as Professor Jennifer Rothman has explained, these are usually just two sides of the same coin.[21] Whether a person does not want certain aspects of her identity (such as name, image, or likeness) used in public, or rather is fine with it as long

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15 *See* Smith Jr., *supra* note 1, at 258-61; Lanier v. President & Fellows of Harvard Coll., 191 N.E.3d 1063 (Mass. 2022).

16 *Lanier*, 191 N.E.3d at 1069.

17 *Id.*

18 *See id.* at 1072. The trial court dismissed Lanier's publicity claim on the ground that the statute provides no post-mortem right. *Id.* at 1072 n.8. In June 2022, the Massachusetts Supreme Judicial Court affirmed dismissal of every claim except for the infliction of emotional distress caused by how Harvard has treated Lanier. *Id.* at 1069, 1072-74, 1083. In a concurring opinion, however, Justice Cypher wrote that she would have also recognized a common law right for Lanier to possess the daguerreotypes. *Id.* at 1093-98 (Cypher, J., concurring). Though not couched in terms of publicity, Justice Cypher's proposed right aligns generally with our suggestion that state common law may help remedy such situations. *See infra* Part III.

19 *See generally Lanier*, 191 N.E.3d at 1069. The right of publicity is certainly not the only aspect of the law that can apply in such circumstances. *See* McFarlin, *supra* note 4, at 56 (focusing on the implications of Cord's case for the law of copyright).

20 *See* ROTHMAN, *supra* note 2, at 30.

21 *See id.* at 11.

as she reaps the benefit, both concern the right to control one's own identity.[22]

The most famous early formulation of this right in the U.S. came in 1890 from the seminal article "The Right to Privacy," which argued for the recognition, beyond the law of copyright, of "the more general right to the immunity of the person – the right to one's personality."[23] Since then, a majority of states have expressly recognized, either through the common law or by statute, some form of a right to control certain uses of one's identity.[24] One major aspect of the right is that it generally allows a person to stop someone else from using her identity in a purely or predominantly commercial manner.[25] This is what is most commonly referred to today as the right of publicity.[26]

Currently no state has refused to recognize at least some form of this right, though some have yet to address it.[27] While some states limit the right to a person's name, image, likeness, or voice, others have expanded protection to, as Professor Rothman has put it, "any use that conjures up a person's identity."[28] To date, no federal right of publicity has been adopted, though proposals have been offered.[29]

Among the states that have recognized this right, there is presently little if any disagreement that it is transferable during a person's lifetime and inheritable at death.[30] Many scholars have argued, however, that the right should be largely if not totally inalienable and uninheritable.[31]

Though the brief nature of this essay does not permit a discussion of the policy arguments for and against a post-mortem right of publicity generally, nor a full analysis of (1) whether Cord's private life experiences, as used by Twain, should fall within the ambit of publicity law or

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22 *See id.* at 30.

23 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 207 (1890).

24 *See* ROTHMAN, *supra* note 2, at 3.

25 *See id.* at 147-53.

26 *See id.* at 7, 143. Though, as many have recognized, summarizing a coherent theory of the right is challenging at best. *Id.* at 143; *see also* Eric E. Johnson, *Disentangling the Right of Publicity*, 111 Nw. U. L. REV. 891, 893-95 (2017).

27 *See* 1 MCCARTHY & SCHECHTER, *supra* note 14, § 6:2; Jennifer E. Rothman, *Rothman's Roadmap to the Right of Publicity*, UNIV. PA. CAREY L. SCH., https://rightofpublicityroadmap.com [https://perma.cc/QV9P-M9QK].

28 ROTHMAN, *supra* note 2, at 3.

29 *See* 1 MCCARTHY & SCHECHTER, *supra* note 14, § 6:2.

30 *See id.* § 9:17; *see also* David Horton, *Indescendibility,* 102 CALIF. L. REV. 543, 562 (2014) (discussing post-mortem recognition); Joshua Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1, 15 (2009) (summarizing the history of post-mortem recognition).

31 *See, e.g.*, 1 MCCARTHY & SCHECHTER, *supra* note 14, §§ 9:2-9:10; ROTHMAN, *supra* note 2, at 115-37; Horton, *supra* note 30, at 577-78.

(2) whether Twain's use should be protected by the constitutional freedom of speech,[32] we think Cord's case is still instructive.

Specifically, the historical record suggests both that Twain and the *Atlantic* failed to consider even the possibility that Cord had a right in her private life experiences and that this failure was likely due, at least in part, to Cord's race and gender.[33] Further, the law of publicity, as it presently stands, would not provide her descendants any avenue to seek a remedy for that failure. Because Cord died there, New York law would likely apply to any publicity claim.[34] New York has not (at least *yet*) recognized a common-law publicity right, and though the state legislature recently added a post-mortem right to its statute—originally enacted in 1903, fifteen years after Cord's death—the right does not apply to those who died prior to 2021.[35]

So, if Cord never had any right to control her identity, and her descendants have no possible right, what does this tell us about the past and present state of the law? And how might policymakers and private institutions address the situation?

III. Addressing Inequalities in Identity and Wealth Transfer

In one sense, it is entirely unremarkable that the law of wealth transfers advantages those, like Twain and the *Atlantic*, who historically have wealth to transfer. After all, the gratuitous transfer of property "also transmits privilege and maintenance of the status quo,"[36] and (absent active intervention) these patterns are likely to persist. But sometimes, windows open to guide the evolution of wealth transfer law toward a system that is more inclusive and fair. When assessing whether, and how, the law *should* allow the transfer of publicity rights at death, one consideration ought to be *who benefits* from such a rule?

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32 For a summary of how Cord's case arguably falls within the right of publicity and beyond the freedom of speech, see *supra* note 14 ("Cord's case is arguably distinguishable given that she was a private figure, her experiences were not previously made public, and Twain financially benefited from them in a way that likely precluded Cord's ability to do the same.").

33 *See* McFarlin, *supra* note 4, at 6.

34 *See* Mary LaFrance, *Choice of Law and the Right of Publicity: Rethinking the Domicile Rule*, 37 Cardozo Arts & Ent. L.J. 1, 16 (2019).

35 *See* 1 McCarthy & Schechter, *supra* note 14, §§ 6:78-6:86, 6:101.

36 Naomi Cahn, *Dismantling the Trusts and Estates Canon*, 2019 Wis. L. Rev. 165, 167 (2019).

Trusts and estates scholarship in recent years has integrated a critical lens: considering the perspectives of critical race theory[37] and feminist legal theory.[38] Scholars have noted the disadvantages experienced within our system of probate law by those who are not white,[39] or cisgender,[40] or male.[41] Without intervention, the laws of trusts and estates can serve to exacerbate inequality and inequities.[42] The challenge, though, is what to do about it.

One potential approach, advanced by Professor Boni-Saenz, is to integrate notions of distributive justice into trusts and estates legal reform. Though focusing primarily on the role of formalism, Boni-Saenz argues compellingly that probate law can be improved when it is guided by "a distributive analysis, or a normative evaluation of how the relevant legal arrangements 'distribut[e] perceived goods and ills over persons.'"[43] Similar approaches have been proposed within the publicity sphere as well.[44]

What insights does this offer to the debate over the post-mortem right of publicity? As an initial matter, we ought to consider the distributive impact of crafting the rule.[45] A basic distributive justice analysis would first identify the good (or burden) distributed if publicity rights are recognized post-mortem.[46] It would next determine the population

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37 For a description of the development of critical race theory, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé W. Crenshaw et al. eds., 1995).

38 On feminist legal theory generally, see NGAIRE NAFFINE, LAW AND THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE 1 (1990).

39 *See, e.g.*, M. Akram Faizer, *Bridging the Divide: A Proposal to Bring Testamentary Freedom to Low-Income and Racial Minority Communities*, 99 TEX. L. REV. ONLINE 20, 21-22 (2020); Terrence M. Franklin, *Black Deaths Should Matter, Too!: Estate Planning as a Tool for Antiracists*, 47 ACTEC L.J. 39, 40 (2021); Reetu Pepoff, *The Intersection of Racial Inequities and Estate Planning*, 47 ACTEC L.J. 87, 87 (2021).

40 *See, e.g.*, Carla Spivack, *The Dilemma of the Transgender Heir*, 33 QUINNIPIAC PROB. L.J. 147, 147 (2020).

41 *See, e.g.*, Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1535, 1545, 1580 (2015).

42 *See* Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 90-91 (2018).

43 Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 342 n.90 (2018) (citing Robert Hockett, *Putting Distribution First*, 18 THEORETICAL INQUIRIES L. 157, 165 (2017)).

44 *See, e.g.*, Lateef Mtima, *What's Mine is Mine but What's Yours is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age*, 15 SMU SCI. & TECH. L. REV. 323, 348-49 (2012).

45 *See* Thomas Wright, *Reformation of the Right of Publicity*, 9 BELMONT L. REV. 37, 44 (2021).

46 *See id.* at 41-42, 44-45.

subject to the benefits or burdens inherent in such recognition.[47] Finally, it would determine the ideal rules of distribution.[48]

This analysis should be integrated into any consideration of whether and how best to recognize a post-mortem right of publicity. If it fails to do so, it risks entrenching a system that often ignored the rights of people due to their race, gender, or other characteristics. Policymakers ought to consider how the design of the rule will impact those descended from people whose rights were ignored.

As applied to Cord's case, a few ideas come to mind. First, the New York legislature could consider amending the statute to recognize post-mortem claims where identity misappropriation was caused, at least in part, by discrimination based on characteristics like race and gender. Akin to existing statutes that are specifically tailored to control certain uses of a deceased soldier's identity,[49] a statute could specifically address deceased victims of discriminatory identity-appropriation.

The New York Court of Appeals could also consider revisiting its interpretation of New York common law. Instead of treating the New York statute as the only font of a right of privacy or publicity, as it currently does, the court could recognize a right to control one's identity in New York common law. And because the statute does not expressly preempt the common law—indeed it states that "the provisions of this section are in addition to, but shall not supersede, any other rights or remedies available in law or equity"—the court could further decide that a situation like Cord's is redressable under that law.[50] In other words, under this revised interpretation a court could hold that it was a violation of Cord's common-law rights for Twain and the *Atlantic* to have used her identity without consent and that some remedy should now be available to her descendants.[51]

Perhaps, given the passage of time, a remedy in a case like Cord's cannot be effectively implemented by a legislature or court. But this does not mean it must go unheeded. Private institutions have recently shown interest in acknowledging their past through words and action.[52]

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47 *See id.* at 45-49.

48 *See id.* at 59-60.

49 1 MCCARTHY & SCHECHTER, *supra* note 14, § 4:21.

50 N.Y. CIV. RIGHTS L. § 50-f(10) (McKinney 2022); *see also supra* note 23 and accompanying text; 1 MCCARTHY & SCHECHTER, *supra* note 14, § 6:51 (explaining how California interprets similar statutory language to not preempt a common-law right of publicity).

51 *Cf.* Lanier v. President & Fellows of Harvard Coll., 191 N.E.3d 1063, 1093-96 (Mass. 2022) (Cypher, J., concurring) (proposing a previously unrecognized common-law property right of a descendant in daguerreotypes of her enslaved ancestors' images).

52 *See, e.g.*, Anne E. Bromley, *New Law, Signed at UVA, Focuses on Reparations for Descendants of Enslaved Workers*, UVA TODAY (May 5, 2021), https://news.virginia.edu/

Here, that could include the Twain Foundation and the *Atlantic* officially and more effectively acknowledging Cord's role in "A True Story." It could also include searching for surviving descendants of Cord and seeking a dialogue over what might be done to help rectify the situation.

IV. Conclusion

The ongoing debate over whether, and how, to recognize post-mortem publicity rights has often overlooked important notions of distributive justice and systemic inequalities. The argument here is not that recognizing publicity rights after death is, on balance, the best rule for society in every respect. Instead, this essay makes the modest suggestion that the conversation should incorporate a key insight: there are deep and thorny issues like race and gender percolating beneath the surface. When thinking about post-mortem publicity rights we should consider how discriminatory, nonconsensual uses of identity can impact the intergenerational transfer of wealth.

content/new-law-signed-uva-focuses-reparations-descendants-enslaved-workers [https://perma.cc/2CDK-YVA4].